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Delaware Court of Chancery Holds that "Don't Ask, Don't Waive" Provisions Are Permissible Under Certain Circumstances

In *In re Ancestry.com Inc. S'holder Litig.*, a December 17, 2012, bench ruling, the Delaware Court of Chancery again addressed "Don't Ask, Don't Waive" standstill provisions, holding that there is no *per se* rule prohibiting such provisions.

On October 21, 2012, Ancestry.com Inc. ("Ancestry") entered into a $32 dollar per share all-cash merger with Permira Advisers LLC. At the start of the process leading to this transaction, Ancestry's financial advisor contacted parties it determined to be most likely to be interested in acquiring Ancestry and required such parties to sign non-disclosure agreements containing a standstill that included a prohibition on requesting a waiver from the standstill. When coupled with a typical no-shop covenant in a merger agreement that prohibits waiving standstill agreements, these provisions (together known as "Don't Ask, Don't Waive" provisions) impose a bilateral restriction (on the target and the losing bidder) on waiving, or requesting a waiver of, the standstill. The plaintiffs claimed that such provisions eliminated Ancestry's board of directors' ability to provide the stockholders with an informed recommendation on whether the proposed transaction represented the best value to the stockholders. At oral argument, the plaintiffs further noted that the proxy statement did not disclose that these provisions were in place.

At the preliminary injunction hearing, Chancellor Strine explained that there was no *per se* rule against "Don't Ask, Don't Waive" provisions, and that in certain circumstances a board of directors may be able to use such provisions to maximize stockholder value. As an example, he said, a company putting itself up for sale and which had surveyed the market and identified the most likely bidders could use the provision as a way to extract the highest price possible by designing an auction process in which all bidders would be forced to put forth a final and best offer since the winning bidder could prevent later topping bids from losing bidders by enforcing the "Don't Ask, Don't Waive" provisions.

The Chancellor, however, also cautioned that companies should not casually use "Don't Ask, Don't Waive" provisions. In the *Revlon* context, where the board of directors has a fiduciary duty to obtain the highest value reasonably available for the benefit of the stockholders, the Chancellor explained that to function as a value enhancer, a board of directors would have to use these provisions purposefully as a means of extracting the highest bids, rather than simply including the provision among a range of deal protections without thought.

In this case, Ancestry's board of directors did not appear to know how the provision operated or even that the provision was in place. The Chancellor noted that these facts may be evidence of a violation of the duty of care. Although the Chancellor declined to enjoin the merger, because no other bidder had come forward, the Chancellor ordered that the defendants disclose in the merger proxy that the "Don't Ask, Don't Waive" provision was in place before proceeding with the merger.

When viewed together with the Court of Chancery's November 2012 bench rulings in *In re Complete Genomics, Inc. S'holder Litig.*, this decision indicates that while "Don't Ask, Don't Waive" provisions are permissible under Delaware law, such provisions should be employed only in circumstances where a board of directors has affirmatively judged their use to be appropriate.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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