

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: ANCESTRY.COM INC. : CONSOLIDATED
SHAREHOLDER LITIGATION, : C.A. No. 7988-CS

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Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, December 17, 2012
2:00 p.m.

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BEFORE: HON. LEO E. STRINE, JR., Chancellor.

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THE COURT'S RULING ON
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

CHANCERY COURT REPORTERS
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1 APPEARANCES:

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-and-

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15 of the Pennsylvania Bar
16 Kessler Topaz Meltzer & Check, LLP

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20 for Plaintiffs

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22 for Defendants Ancestry.com Inc., Timothy
23 Sullivan, Charles M. Boesenberg, David
24 Goldberg, Thomas Layton, Elizabeth Nelson,
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1 APPEARANCES CONTINUED:

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3 -and-

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L.P., Spectrum Equity Investors V, L.P.,
7 Spectrum III Investment Managers' Fund,
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Global Generations International Inc., and
14 Global Generations Merger Sub Inc.

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1 THE COURT: I studied hard. I was
2 planning on taking 15 minutes and composing my
3 thoughts, and letting you know the answer. I'm going
4 to be a bit more spontaneous but not really
5 spontaneous at all. What I mean by that is, I told
6 you all, given the time of year and given when you
7 have the vote, I was likely to give you a very prompt
8 answer, in part because, honestly, having the vote
9 when you're going to have it is going to be a material
10 burden on some real people. And so they need -- in my
11 view, being a fan of Dickens, I think people ought to
12 know what's going on with the world right now rather
13 than the Friday before a major holiday. So I'm going
14 to give you my view of things, and you can deal with
15 them, and you'll like them or you won't, but they're
16 deeply studied. My law clerks and I spent the entire
17 weekend with you all in my head, basically, and
18 reading all these depositions.

19 Let me start with the plaintiffs'
20 basic theory is one that I came in today resistant to.
21 I still come out resistant of, which is -- this is not
22 a trial. It's very important for everybody to
23 understand it's not a trial. I don't get to see
24 everybody. I don't get to hear the plaintiffs

1 cross-examine everybody. I have to make a
2 probabilistic determination of how things might come
3 out at trial. I'm not averse to members of this
4 Court -- I am not averse to concluding
5 probabilistically that people's self-interest tainted
6 a process. I've done that more times than anyone
7 would want in a lifetime. You would like to think
8 everyone was pure of motive. And so I'm not
9 disinclined to do that. I read very carefully, as any
10 Delaware judge would, with our tradition of being
11 concerned about conflict of interest, I read very
12 carefully the allegations and the evidence regarding
13 that.

14 I took very seriously the case when it
15 came in at the motion to expedite stage, and I think
16 the defendants didn't impose expedition in part
17 because there was a very serious allegation lodged
18 about tipping towards a particular bidder.

19 As I said, I don't believe, in terms
20 of the motivational part of the plaintiffs' case --
21 they have not convinced me probabilistically that
22 they're likely to be right.

23 And in terms of Spectrum, I don't see
24 any evidence in this record that Spectrum wasn't a

1 highly motivated seller. I see abundant evidence to
2 the contrary. In fact, to the extent I see -- even
3 when we get into the projection thing in the spring, I
4 sense Spectrum wanting to police management a little
5 bit. That's not because it had any particular concern
6 about necessarily Mr. Sullivan or Mr. Hochhauser, but
7 realizing the dynamic it was in when they looked at
8 the market, it seemed to be a company where the
9 probable buyer, if you had to pick what type of buyer
10 it would be, was more likely to be a financial buyer
11 than it was likely to be a strategic buyer.

12 Knowing that, Spectrum is in that
13 game, knows that management is likely to be a
14 remaining investor, it's a very interesting situation
15 for management because it allows you to do a couple of
16 valuable things. You often get a nice hit to the
17 money machine, which is you get to harvest a certain
18 amount of net wealth that you've built up from your
19 investment in the firm, so that's cool. But you're
20 also asked to roll.

21 And you're asked to roll with sponsors
22 that hold your feet to the fire because you've been
23 part of a selling process, telling them how good the
24 company is going to be, and they say, Well, it's going

1 to be good, so a lot of what you're going to get with
2 us is you're going to roll a substantial amount of
3 equity, and if you create value, your equity will
4 become more valuable, and we all win-win.

5 Which puts management in a very
6 different situation in terms of optimal price as a
7 seller versus my circumstance as a part of the buyout
8 team and someone who is going to be held to the mark,
9 because my hurdle rate is if my buyer -- look, if they
10 buy at 40, as opposed to the 35, in order -- as a
11 person running the business and an owner, I've got to
12 get over the \$40 hurdle and 35.

13 So when I look at the situation, as
14 I'm saying, I've looked at all the plaintiffs' things,
15 I've read every line of depositions, I read all the
16 stuff about texts and stuff, even if I concede that
17 Spectrum had a very powerful influence over the board,
18 my sense of reading it is, if anything, Spectrum
19 wanted to be aggressive; that they recognized if they
20 were going to keep it as a portfolio company, then
21 they would be better off holding it. Because if
22 you're going to curl the monitoring costs and
23 everything, you might as well have the substantial
24 influence that the plaintiffs suggest that they have.

1 That actually selling a big block of your position but
2 leaving a non-de minimus chunk of equity in where you
3 have an obligation to your investors to protect that
4 equity, therefore, you still have to have somebody
5 monitor the investment, you don't have as much upside.
6 And here's another thing, you took all this thing to
7 bring this company public to get liquidity. You're
8 now back in the private situation, but you don't
9 control it. You're in somebody else's window. This
10 is not making sense to me. And in fact, that's not
11 how the process was run.

12 The process looked like they segmented
13 the market carefully, logical people were bought in, a
14 competent banker who appears at every turn to have
15 done sensible things, ran it.

16 The tipping, I don't see any -- I
17 don't get any hint of why Permira -- I hate to
18 criticize Permira when they're in the room and make
19 them feel like they're not at special as the
20 plaintiffs think they're special. I just don't get
21 that hint. Maybe I'm misreading the record, but I've
22 got to read the record, and I've got to draw
23 conclusions from it.

24 I don't get any sense from this that

1 Sullivan or Hochhauser should have had any reason to
2 believe they would be less beloved to any of the other
3 particular private equity buyers. All of the private
4 equity players sent all the usual love signals,
5 including Heller [sic]. The original Heller letter
6 was a love letter to management. It might not have
7 used -- because they might be more experienced.
8 Frankly, people are hesitant to put things like "roll"
9 and all that kind of stuff early on. They send the
10 right thing. But it was very clear, they said, We
11 don't run companies. We don't expect to run this
12 companies. We're excited about dealing with you. We
13 want to align your incentives. There is not one hint
14 in that that Mr. Sullivan or Mr. Hochhauser should
15 have believed that they were in danger or that there
16 was any sense in which they would have been otherwise
17 than been Heller's partner.

18 I have no reason to disbelieve --
19 there is nothing in this process to give me any sense
20 that when Qatalyst says that it went back to all the
21 bidders to try to juice them up, that it didn't do
22 that.

23 The fact that Permira talks
24 specifically about its call, that makes sense, because

1 they got deposed. And I don't fault the plaintiffs
2 like that. That's what a trial would be about, and
3 then the plaintiffs would have a chance to talk to the
4 other bidders.

5 I just probabilistically believe when
6 you talk to the other bidders, they're going to say,
7 Qatalyst tried to jack us up. That's what they were
8 trying to do. That's why they cut access off.

9 At every stage of it, I can see why
10 Qatalyst did what it did. I don't see any hint in the
11 process of Sullivan and Hochhauser getting out of
12 their lane. Do I think that they were shocked that
13 they were asked to roll their equity? No. I think
14 they would have been shocked if Heller had emerged or
15 TPG had emerged or KKR would have gotten back in the
16 process, I think they would have been shocked if they
17 had not been asked to do that, unless they were going
18 to be fired.

19 And see, here's another thing about
20 this process that just is sort of pretty clear to me.
21 There is nothing about the relationship between
22 Mr. Sullivan and Mr. Hochhauser and Spectrum that's
23 personal. I'm not saying they want harm to
24 Mr. Sullivan and Mr. Hochhauser, but Mr. Sullivan and

1 Mr. Hochhauser were found through a professional
2 search of this thing. I have no doubt that Spectrum,
3 if there had been 36, 35 bucks available, without
4 management, they would have said, This is why we've
5 been giving you equity grants. And we're going to
6 take the highest bid, and you'll be compensated richly
7 because we've been giving you equity grants. And the
8 \$36 is what you're going to take.

9 And therefore, with Spectrum being
10 motivated, every seller, every buyer, frankly, had --
11 this is not a situation where -- there are many -- and
12 I'm sensitive when the plaintiffs make these
13 arguments, because they're right to make it. When you
14 have a founder-dominated company where the block is
15 really those three top managers who own that
16 25 percent, who they're happy with is extremely
17 critical.

18 Here, you have Spectrum. Spectrum is
19 the big gorilla in terms of voting power. And there
20 is no sense in this record that Spectrum would have
21 ever traded out its own interest and that of its
22 investors in order to get a better deal for
23 Mr. Sullivan and Mr. Hochhauser. And as I'll repeat,
24 I have no sense in this that there was some reason,

1 rational reason, for Sullivan and Hochhauser to
2 believe that the Permira bid was especially
3 beneficiary to them. I don't believe they were
4 threatened by any of the private equity bids because
5 they believed that the MO of private equity is going
6 to be to retain management.

7 So the basic theory -- and even when
8 we get to the point of August, why -- I get exactly
9 why Qatalyst -- again, we can all make different
10 choices in this world. That's the point of the law, a
11 little bit, is we look at motivations; right? The
12 original *Revlon* was about Michel Bergerac not wanting
13 to sell to the upstart from Philly, and to doing
14 anything he could to avoid a level playing field.
15 When you see a motivation like that, you're more
16 skeptical of these choices. I don't see a
17 motivational factor.

18 And why you wouldn't -- nobody thought
19 H&F really needed Permira as a partner. H&F, you're
20 trying to get them to 35. You're going to partner
21 them up with somebody at 33 so you can be sure that
22 the only thing you have on the table is the
23 possibility of getting 33, or then when they go to
24 32.30 or 31 or 30? I don't believe there is any

1 indicia in this record of Heller being actually
2 unloved. They might have felt some frustration. They
3 might have felt some time pressure. That is all the
4 kind of thing that, frankly, a well-motivated seller
5 will make people feel at times. You're not supposed
6 to have the buyer fall in love with you. You're
7 supposed to get the buyer to make a real bid. There
8 is nothing here that kept Heller from topping. And
9 there is nothing in the record. What it suggests is
10 that Heller looked at this, and the more it looked at
11 it, the less confident it got that it wanted to pay
12 that price, and it ultimately went away with a
13 whimper.

14 In terms of the time of due diligence,
15 again, we're in a -- it's good that people diligence
16 deals better than they used to. That's good. But
17 this process started in the spring. This is not
18 Johnson & Johnson. This is not McDonald's. This
19 isn't an international petrochemical company with
20 vestigial environmentally sensitive operations. This
21 is a relatively small business in terms of diligencing
22 by the private equity industry. There was a data room
23 open with a lot of people that might have been closed
24 off but that was a lot of information they had for a

1 lot of time.

2 This is an industry in private equity
3 that claims they can diligence things quickly. I
4 think there was certainly time for the three who
5 prevailed. There was certainly time for Heller,
6 because Heller got back in and they were given a lot
7 of diligence. They were given an additional month of
8 diligence. They weren't told they had to make a firm
9 definitive bid with financing by X date or the world
10 would end. They dropped out of their own accord.
11 There was plenty of time for them to keep the process
12 open. And frankly, somebody like Providence, these
13 are all known names. People know how to make their
14 interests known.

15 So in terms of the basic story of
16 motivations, I'm not convinced. I may be wrong. I'm
17 going to emphasize, again, it's not trial. Now, that
18 does influence in terms of the kind of relief I'm
19 going to grant -- now, in terms of reasonable
20 probability of success on the merits on some
21 subsidiary issues, I am more troubled.

22 Let me talk first about the change in
23 the projections. I do think that this scenario is one
24 that's a bit vexing to deal with. I'm not sure what I

1 think is the reality. I think the defendants' story
2 that the original projections were bullish, plausible
3 but bullish, makes a lot of sense. It could have been
4 documented much better. And I think there are lessons
5 in this, again, for everybody writing these hygienic
6 depictions of the process where they take everything
7 that's actually told to the directors that might be
8 valuable out of it because the directors are actually
9 supposed to be entitled to rely upon that.

10 And when there is nothing
11 contemporaneously when you get to write the script,
12 and when the script in terms of the PowerPoint
13 presentations -- PowerPoint is ubiquitous. Doesn't
14 even have to be in the minutes. Could be a discussion
15 of the banker's process. There are all ways to do it.
16 But when none of it is in there, it makes you wonder.

17 But even if it's optimistically
18 plausible, you have a situation where the investment
19 banker says something that's more than a little bit in
20 tension with the idea that these things were never
21 going to be the basis for an actual valuation of the
22 deal. When the banker says, I can't render a fairness
23 opinion based on these numbers, well, if they were
24 just sell-side puffery to begin with, you would never

1 expect that that would have been the case. That might
2 have been your high side in your sensitivity case;
3 right? With a base case and a low case.

4 But you would never have the
5 discussion that where -- it's just odd to have a
6 discussion about these are the projections we've been
7 using. You've got to know that if we use these to
8 give our valuation opinion, we can't give one. Why
9 would it have ever been think that they would be the
10 basis for it? Which creates some cognitive dissonance
11 and adds color to the plaintiffs' claim.

12 I can't honestly in good conscience
13 premise an injunction on the idea that people are
14 lying. I don't have enough in this record to get
15 close to where I think people are behaving in bad
16 faith. I think it is very plausible that these were
17 optimistic, and if you are asking what the best
18 estimate was of the company's future cash flows, that
19 these were higher.

20 But I do think the process by which
21 the things were changed was a bit unusual. I tend to
22 lean a little bit more towards the plaintiffs, saying,
23 it doesn't look exactly like the original process. It
24 looked like the bank -- and I'm not faulting the bank.

1 I think the bank was trying to figure out what was
2 going on with the bidders, trying to figure out where
3 it is. Ultimately, says, We don't do projections.
4 You've got to do your own.

5 And I give credit to the proxy
6 statement in that it gives valuation ranges around
7 both sets. But does it tell the stockholders that
8 there was this powerful point where the advisor to the
9 board says, I can't give a fairness opinion based on
10 these? No.

11 Now, had the plaintiffs asked for an
12 injunction in those words? No, but Mr. Grant, it's
13 fair to say, reminded me, because I spent a whole lot
14 of time reading the opening brief and it was all about
15 these projections and about them being changed. And I
16 think to the extent that the Court is not willing to
17 grant, you know, a full-bodied, stop-the-deal-dead-in-
18 its-tracks injunction does not rule out an equity
19 taking note of a fairly important omission of actual
20 objective fact, which is I couldn't grant an
21 injunction -- I'm not going to grant a
22 self-flagellating injunction saying that the board has
23 to disclose that they actually believed the
24 sensitivity case.

1 But I do think that the failure to
2 disclose the objective fact about the inability to
3 give a fairness opinion is a -- reasonably likely
4 would be found to be a breach of fiduciary duty of
5 someone who is seeking the stockholders to vote. So
6 on that, I would give the plaintiffs their due.

7 I'm not going to -- on this hack sheet
8 thing, I will say that adds color to my finding there.
9 I don't know what this is. I heard the CEO -- I read
10 his testimony. I take serious people seriously. If
11 something is crazy, why is the CEO of a public company
12 musing on it? People involved in money, like CEOs,
13 worried about their equity, were they sticking in
14 numbers? Was it just something they saw on a
15 Powerball billboard chart? Is that what the Powerball
16 got up to where he was driving on the New Jersey
17 Turnpike? I don't know the roads out west. Maybe it
18 was Route 66. It is a number that looks a lot like
19 numbers that have been used in the sale process,
20 numbers that the CEO had come up with himself. And
21 he's doing it to value his own stake. That's a
22 little -- that is troubling.

23 And that's what trials are about,
24 ultimately. Because there is a lot of credibility put

1 in the process. And remember, when the selling
2 numbers are not the high side of what's used in the
3 sensitivities, right -- that's not the high case. The
4 sell-side case is not even in the sensitivities. But
5 something that looks a lot like the sell-side case is
6 the subject of a public company CEO sitting with an
7 Excel spread chart on the day that a deal is being
8 done for stockholders, and he's considering, What
9 happens if I hit these even higher numbers, which
10 we've now suggested to the stockholders to totally
11 disregard? What might happen to my personal wealth?
12 That adds color to it and I think at least supports
13 the idea that the fork in the road about the fairness
14 opinion needs to be disclosed before the stockholders
15 vote on this deal.

16 Now I'll get to the emerging issue of
17 December of 2012. Who would have think that this
18 would be the no-ask, no-waiver month. On that issue,
19 I think that the plaintiffs have a reasonable
20 probability of success around the disclosure point.
21 They would have if it had not been cured. I think if
22 there is going to be some disclosure around the other
23 issue, it should be disclosed.

24 I think the plaintiffs actually had a

1 reasonable probability of success until December 11th
2 on the substance of the thing. And let me be clear
3 about why I think that is and why I do not.

4 I'm giving you a bench ruling. Bench
5 rulings are limited rulings. They're time-pressured
6 ones. They're either time-pressured ones and because
7 they're time pressured, they shouldn't make broad law,
8 which is if you're too time pressured, and I do think
9 this is time pressured for some of the holiday reasons
10 I mentioned, because I do actually want the people
11 involved to know what's going on, and I'm also --
12 there is this tax issue. And I don't think telling
13 you Friday some of these things allows you maybe to
14 deal with it, whereas if I tell you right now, you can
15 deal with it.

16 So when you're time pressured, you
17 should be very careful about making broad
18 pronouncements of law for the obviously reason that
19 you've been time pressured, and the reflection of time
20 might allow you to make a more sensible ruling. And
21 so -- and then you give a bench ruling and you're
22 dealing with a particular situation.

23 Per se rulings where judges invalidate
24 contractual provisions across the bar are exceedingly

1 rare in Delaware, and they should be. It's
2 inconsistent with the model of our law. I always tell
3 my students, there are two kinds of corporate law
4 questions, essentially: The law question, and then
5 there is the equity question. And the law question is
6 what the board did. Did it comply with the law in the
7 sense of is it consistent with the statute? With
8 other elements of positive law? Some governing
9 contract? And then there is the equitable overlay,
10 which is even assuming it's lawful, is it equitable
11 under the circumstances?

12 This Court is a court of equity, and
13 usually we're dealing with the latter question. And
14 it's usually for the Legislature to determine when
15 something is per se unlawful. It's not for the Court.
16 Now, sometimes people do something that's totally
17 inconsistent with the statute. That's not the Court
18 making up a law. That's the Court saying, That
19 provision violates a statute.

20 I know of no statute, I know of
21 nothing, that says that these provisions are per se
22 invalid. And I don't think there has been a prior
23 ruling of the Court to that effect. I know people
24 have read a bench opinion that way. I think there was

1 a lot going on in that case. Again, there is a role
2 that bench opinions play, and I don't think it's to
3 make per se rules.

4 And the *Celera* case expressly went out
5 of its way to say it's not making a per se rule. I
6 think what *Genomics* and *Celera* both say, though, is
7 Woah, this is a pretty potent provision. And
8 precisely because of this *Schnell* overlay, the
9 equitable overlay of the law, directors need to use
10 these things consistently with their fiduciary duties,
11 and they better be darn careful about them. Because
12 they're often used in cases like this which are
13 governed by *Revlon* and the board's obligation to try
14 to get the highest value.

15 And that obligation comes from the
16 obvious reality that the board is saying to the
17 stockholders, You should give up your continuing
18 investment in the company right now for a sum certain.
19 Which means that the directors are supposed to make
20 sure that they've done everything reasonable to make
21 sure that that price is as high as possible, that they
22 give the stockholders full information about it, and
23 when the stockholders vote, they know the risks.

24 So here we get a provision, and I

1 get -- I'm not prepared to rule out that they can't be
2 used for value-maximizing purposes. But the
3 value-maximizing purpose has to be to allow the seller
4 as a well-motivated seller to use it as a gavel, to
5 impress upon the people that it has brought into the
6 process the fact that the process is meaningful; that
7 if you're creating an auction, there is really an end
8 to the auction for those who participate. And
9 therefore, you should bid your fullest because if you
10 win, you have the confidence of knowing you actually
11 won that auction at least against the other people in
12 the process.

13 That's what I understand the
14 additional part of this no-ask part of the waiver
15 provision is. Not talking about the standstill
16 itself, which gives the board the ability to control
17 what happens with an offer. We're talking about the
18 ability for someone to even ask for a waiver. And
19 it's on this idea of we've identified the most likely
20 potential bidders. In advance of any deal protections
21 inhibiting them from making a bid, we're bringing them
22 in. We think they're the most likely. We recognize
23 that other people may come forward, and they'll be
24 subject to different rules. But how do we, in a

1 public company context, get these most likely bidders
2 to actually put their full bid on the table rather
3 than hold something in reserve? We can use this tool
4 to gain credibility so that those final-round bidders
5 know the winner is the winner, at least as to them.

6 That's what I understand the argument
7 is around these things, in that you're running an
8 auction. I'm not prepared to rule that out. I don't
9 think the judges of this Court should be ruling that
10 out. That sounds like if you want to say per se
11 invalidity, that sounds like something for the
12 Legislature to decide. But we do have an inescapable
13 obligation to do what is the core job of this Court,
14 which is to do that equitable overlay. Which is if
15 you're going to use a powerful tool like that, are you
16 using it consistently with your fiduciary duties, not
17 just of loyalty, but of care?

18 And I think the plaintiffs here in
19 terms of -- I'll talk about the disclosure, but let's
20 talk about this as if December 11th hadn't happened,
21 because December 11th would have only happened because
22 of this litigation. I think the plaintiffs have
23 pretty obviously shown that this board was not
24 informed about the potency of this clause. The CEO

1 was not aware of it. It's not even clear the banker
2 was aware of it.

3 Now, you get the cognitive dissonance
4 because Hellman basically treated it as nothing. And
5 I think Hellman just kind of did things that were a
6 literal breach of the terms. But the terms of this
7 thing literally said, You cannot directly or
8 indirectly ask for a waiver of the standstill. That
9 means you could not ask, once you were siphoned out of
10 the process -- actually, Hellman was not supposed to
11 do what it did. It did it. Others might -- you have
12 to assume some of the others may have taken the words
13 more seriously and said, I can't do anything unless
14 I'm invited back in.

15 None of the board seems to be aware of
16 this. The only way it has value as an auction gavel
17 is if it has the meaning I've just described. It was
18 not used as an auction gavel. And when Permira was
19 signed up, Permira did not demand an assignment of it.
20 And the board and its advisors did not waive it in
21 order to facilitate those bidders which had signed up
22 the standstills being able to make a superior
23 proposal.

24 I think that probabilistically is a

1 violation of the duty of care. I think what's more
2 important is that I'm not prepared to allow this to go
3 to a vote without the stockholders being told about
4 that. I think if we're going to tell them about the
5 fairness opinion, which we should, they should know
6 about this.

7 I think, actually, what has happened
8 on December 11th, I think, would have been absolutely
9 essential to let them know. Why do I think that?
10 Because I think it would have created the false
11 impression that any of the folks who signed the
12 standstill could have made a superior proposal.
13 That's not true. They could only make it by breaching
14 the standstill. Because in order to make the superior
15 proposal, you would have to request for a waiver,
16 either directly or indirectly.

17 And again, I mentioned this silliness
18 before. These things either mean what they say and
19 are enforceable or they're silly. Treating people
20 with dignity and respect as adults requires that you
21 assume that they mean what they say, that they are
22 enforceable. I think treating people with dignity and
23 respect assumes there is a class of buyer out there
24 that actually takes legal obligations seriously, that

1 is not willing to play Chicago School efficient breach
2 theory games just for fun. Especially when it's not
3 about the company's situation. And I don't know that
4 for anyone in the world, buying Ancestry.com is about
5 the company's situation. The only company for which
6 it's about the company's situation is Ancestry.com
7 itself.

8 And even as to private equity players,
9 playing by the rules and having a reputation of
10 playing by the rules might actually be something
11 that's of value to them. So they made us sign this
12 up. They take it seriously. I'm not sure why they
13 haven't sent us the non-waiver letter, but they
14 haven't. Our MO is not to get edgy with people, not
15 to get confrontational. That's not how we get the
16 deal flow in the long run. They never asked us back
17 in the game. We're moving on.

18 Well, at least when the electorate
19 votes -- if these things are going to be used, and
20 they're used for a gavel, then the electorate should
21 know that with respect to the comfort they should take
22 in the ability to make a superior proposal, they
23 should understand that there is a segment of the
24 market where that segment cannot take advantage of

1 that; that the board made the cost/benefit trade-off
2 that the best way to get the value was to draw the
3 highest bid out from those people while they were in
4 the process; that in order to do that, it had to incur
5 the cost of giving to the winner the right to enforce
6 it. But what you as a stockholder know is, We invited
7 these people in on the front end. That's how we tried
8 to maximize value. You still have the ability of
9 somebody we didn't test the market with coming in, but
10 you shouldn't assume that these other people can come
11 in. That's if it's actually been assigned.

12 What's harder to explain is if the
13 winning bidder didn't ask for the assignment, how it
14 is that the seller -- I admit I wouldn't do it until I
15 signed the definitive acquisition agreement with
16 Permira. I don't want to tip Permira, but I would
17 have had you guys sign first. And then the nanosecond
18 after you didn't sign, I would have sent a letter to
19 all those people and said, We're waiving the sentence
20 in your standstill that says, Blank has hereby waived.
21 The remainder remains in force and effect. Which then
22 makes clear to all of them that if they wish to ask
23 for a waiver in order to make a superior proposal,
24 that they are legally allowed to do that. That makes

1 sense. That took this litigation for that to occur.

2 And so I think the plaintiffs have a
3 point that there was -- frankly, this was not used in
4 a probabilistic way, in my view, in keeping with the
5 duty of care that's required of directors during a
6 *Revlon* process. In terms of right now, I think it has
7 been waived on December 11th. I think it should be
8 explained, and on the condition that it be explained
9 that it was not waived until December 11th, and that
10 people were precluded until then to do it, and I think
11 that should be part of the mix of information, plus
12 the fairness opinion.

13 So in terms of my balance of the
14 equities, I may have jumped to it already, which is
15 I'm not prepared to give the plaintiffs a further
16 injunction than that, precisely because I think that
17 there was a -- and I want to be fair to the
18 defendants.

19 I think that this was a process that
20 had a lot of vibrancy and integrity to it,
21 probabilistically. I think they tried to kick the
22 tires. I think that even when I look at the
23 communications by Mr. Sullivan, I think they were
24 trying to get these buyers to pay as full a price as

1 possible. They were trying to create a competitive
2 dynamic.

3 Given that and given the ability of
4 stockholders to vote for themselves, I'm disinclined
5 to take it out of their hands. If someone has the
6 courage of his or her convictions and doesn't want to
7 accept it, then they should vote no. And a lot of
8 times, these deals -- I don't know whether there is an
9 appraisal cap. But even if people are going to tell
10 me that Spectrum has a lot of votes and Sullivan has a
11 lot of votes, if the bulk of the remaining electorate
12 says, We don't like this stinky deal; we believe
13 everybody in America wants another genealogy tree and
14 is going to want to know how Norwegian they are or how
15 Irish or how Belgian or how Kenyan they are, they can
16 protect themselves. I think given the market test
17 that was done here, I'm poorly positioned to take that
18 risk for them, and I'm not prepared to do so.

19 And I think that is what separates out
20 the absence of having a bidder on the table. That's a
21 very powerful dynamic, and it's one that this Court
22 has to consider for the best interests of
23 stockholders. That said, the stockholders should vote
24 knowing the material facts. And I've identified two

1 that the plaintiffs have convinced me -- and in
2 fairness to Mr. Savitt, they did not ask for a
3 disclosure preliminary injunction, but I am
4 considering this what I would call lesser-included,
5 because I believe that they fully briefed the merits
6 of these issues. They've convinced me that there were
7 flaws. And I believe that my balance of the harms
8 calculus only works if the electorate in fact has that
9 full information.

10 And so I want to give you that right
11 now so that you can do something about that. I would
12 think, given the alacrity with which lawyers can work,
13 it should allow you to get to your vote. But I want
14 it done, or I'm going to -- and I'm going to enjoin
15 the deal subject to those disclosures being promptly
16 made.

17 And if there is any absence of clarity
18 about them -- and I'm not asking -- I'm saying this to
19 plaintiffs. I'm not asking for adjectival
20 self-flagellation. I'm talking about the objective
21 fact about the fairness opinion, and that being told,
22 and when that came in the process.

23 And I'm also talking about the fact of
24 the December 11th waiver of the no-ask waiver, and

1 that before that time, the bidders had not been -- and
2 that the literal language of it -- I mean, I'm going
3 to ask you all to scriver that, but I think you wrote
4 language -- unless you can tell me otherwise, you
5 wrote language that, if you follow the literal
6 language for that, anyone who was a signatory to that
7 could not, before the waiver on December 11th,
8 approach the board in order to ask permission to make
9 a superior proposal. Because if you did that, that
10 would, in fact, be asking for a waiver of the
11 standstill. And it was only until December 11th that
12 you were able to do that. I think that the
13 stockholders should be aware of that, in the mix of
14 information, before they cast their vote.

15 And as I said, I'm going to get out of
16 here, but if there is some concern about how I just
17 put that -- but I think that was pretty
18 straightforward, and I think that's what the
19 electorate is focused on, because I think the proxy
20 statement does focus on Section 6.3. Does it not?
21 Right.

22 And the gateway for the electorate is
23 to think, Ha, I'm voting. I know that somebody, if
24 they had a second thought, could have come in, I

1 realize now, after December 11th, but what we've said
2 today is it's not even clear -- there wasn't even an
3 8-K about the December 11th, was there?

4 MR. SAVITT: There was not. No, Your
5 Honor.

6 THE COURT: So is that a clear enough
7 ruling? So it's essentially enjoined in those two
8 things. Can you all work together and then do that?

9 MR. GRANT: I have one other request,
10 and it's unrelated to the injunction. I'd like to ask
11 permission to send the plaintiffs' brief, all
12 defendants' briefs, the reply brief, and the
13 transcript from today to the Proxy Advisory Services
14 so that, really, this information can get out to all
15 folks. Is there any reason we can't do that? I know
16 the number of days hasn't expired for the 5(g), but
17 the problem is this is moving so quickly that I think
18 it's important for these folks to have this
19 information so they can deal with it as they wish.

20 THE COURT: I mean, I have no problem
21 with you sending the briefs. I have not sealed any
22 part of today's transcript. And I believe our good
23 reporting staffs is already feeling the time pressure
24 to get it to you. And the sooner I leave the room,

1 the sooner I will give her and her mighty team the
2 chance to get it to you. So we haven't sealed one bit
3 of today. And so our good friends in Rockville, I
4 don't know where Glass Lewes is, but --

5 MR. GRANT: I think they're in San
6 Francisco. I think so.

7 THE COURT: San Francisco.

8 I'm not going to accelerate any Rule
9 5(g) things for the Proxy Advisory Services. If they
10 wished to be here today, they could be here. And in
11 terms of the transcript, I mean we've had -- I believe
12 there are several good members of the press who are
13 here, and others, and the transcript will be available
14 whenever our good reporter makes it available. So I'm
15 going to limit it to that.

16 I think you all have enough going on,
17 and I'm not going to do persnickety things. I'm not
18 so sure that helps the plaintiffs' class either,
19 because to the extent that there are people among
20 those who have expressed interest, and we haven't
21 talked about them today, but they don't want to be
22 talked about anymore, I'm not sure it will warm the
23 cockles of their hearts to have all of the appendices
24 out there, if you get me. People have strange

1 sensitivities. I know part of your case that I only
2 partially embraced dealt with strange sensitivities.

3 MR. GRANT: I actually wasn't talking
4 about all the appendices. I was just talking about
5 the briefs. I hear Your Honor.

6 THE COURT: No, people are free to say
7 what -- your clients are stockholders and stuff.
8 They're free to do what they can without -- as long as
9 it's not on the basis of confidential information.

10 MR. RIEMER: Your Honor, could I just
11 inquire on one point? We want to be sure we
12 understand the process. We think it would be most
13 helpful if we can get Your Honor's proposed language
14 on an expedited basis.

15 THE COURT: Yes.

16 MR. RIEMER: And we just want to be
17 clear, that's the process we should follow --

18 THE COURT: What I'm saying is I don't
19 want to hold you all up. If the plaintiffs -- you
20 know the things. If the plaintiffs confirm -- I'm
21 sure Mr. Grant and Mr. Lebovitch and Mr. Wagner and
22 their team wish I had gone further. I'm asking them
23 to realize this is as far as I went. You can craft an
24 order that bases off of this transcript. If you all

1 reach agreement that the language does the trick, you
2 can go forward.

3 I was trying to give you an answer
4 today. As I said, I came in -- whether people believe
5 it or not, I didn't come in knowing exactly what I was
6 going to do. You prepare to be done in part because
7 if it's some resolution like this, I understand what
8 Mr. Grant is saying, not all taxpayers -- not all the
9 people on the Ancestry thing care about the tax rate.
10 But if there are people who do, it probably would be
11 better off, given the realities of the fiscal dynamics
12 to have the deal closed December 31st rather than
13 January 4th, if it's going to close.

14 MR. GRANT: Unless, of course, there
15 is another bid.

16 THE COURT: If there is another bid,
17 that's a whole different dynamic. And if there is a
18 materially higher expression of interest, then the
19 board, I believe, has the contractual flexibility, and
20 because it has the contractual flexibility, therefore,
21 has the fiduciary responsibility to consider that
22 development.

23 Absent something like that, then it's
24 probably in everybody's interest to keep things

1 moving. So I'm not expecting to hold off the process.
2 I'll be around tomorrow. And I issued my ruling so
3 that you could address it. And if nothing changes on
4 that -- at least what I would say is, what we're
5 saying, Mr. Grant, is once those two pieces of
6 disclosure are required, there is no judicial reason
7 at this point. If there are other emerging market
8 developments, that's a whole different factor. Make
9 sense?

10 MR. GRANT: Yes, Your Honor.

11 THE COURT: Anything else?

12 Thank you all for your patience, and
13 we'll see you soon.

14 (Court adjourned at 2:43 p.m.)

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CERTIFICATE

I, JEANNE CAHILL, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 37 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand this 17th day of December, 2012.

/s/ Jeanne Cahill

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 160-PS
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