

Delaware Chancery Court: “Don’t Ask, Don’t Waive” Standstill Agreements can Breach Board’s Fiduciary Duties

We reported in the recent *Ropes Recap* quarterly M&A newsletter about a bench ruling by Delaware Vice Chancellor Laster calling into question the enforceability of M&A standstill agreements that prohibit bidders from requesting the target to waive the standstill restrictions in order to permit the bidder to submit a higher bid.¹ Such “Don’t Ask, Don’t Waive” provisions have been a common feature in standstill agreements that targets require bidders to sign before giving them access to confidential information and allowing them to participate in sales processes. V.C. Laster’s ruling in *In Re Complete Genomics* suggested that such agreements may be generally unenforceable and an earlier bench ruling in the same case raised the possibility that clauses in merger agreements that prohibit the board of the target from waiving existing standstill agreements might also be invalid.²

Following quickly on the heels of that eye-opener, Delaware Chancellor Strine declared December “the no-ask, no-waiver month” and weighed in with his own views of this previously long-dormant issue.³ In a case arising out of the sale of Ancestry.com, Chancellor Strine mandated that Ancestry disclose to its shareholders, before their vote on the company’s proposed merger, that the company signed interested parties to “Don’t Ask, Don’t Waive Standstills” during the sale process. However, Chancellor Strine declined to rule that Don’t Ask, Don’t Waive Standstills are impermissible under all circumstances. He clarified that these are not per se illegal, but are properly a subject for equitable consideration under traditional Delaware law principles. Chancellor Strine noted that these provisions, if used correctly, could have the legitimate effect of forcing interested parties to make their best offers at the beginning of the sale process and thus lead to a better price for shareholders. However, he found that the Ancestry board had used the Don’t Ask, Don’t Waive Standstills without fully appreciating their potency and had probably violated its fiduciary duties. Strine concluded that the Ancestry board was not adequately informed of the power of the provisions to shut down the bidding process, and that when Permira, the winning bidder, did not demand that the standstills be assigned to it, the Ancestry board should have waived the portion of the standstills preventing interested parties from asking for a waiver, in order to achieve the best price for shareholders.⁴ Chancellor Strine was not prepared to stand in the way of a shareholder vote over that lapse, but he did require Ancestry to first disclose to its shareholders that it had signed the potential bidders to the Don’t Ask, Don’t Waive Standstills.

Strine’s ruling offers a helpful refinement of the state of the law following the *In Re Complete Genomics* ruling. Strine read the *In Re Complete Genomics* ruling as fact-specific, and observed that “there is a role that bench opinions play, and I don’t think it’s to make per se rules.”⁵ In Strine’s view, Don’t Ask, Don’t Waive Standstills are potent enough in restricting the bidding process that they will often pose a danger of causing the board to violate its fiduciary duties, but whether the board actually violated its duties is a fact-specific inquiry. Strine seems to suggest that targets should be giving active consideration to waiving the “Don’t Ask” restrictions on the losing bidders at the end of an auction process. A more practical response might be to craft these agreements so that at least the “Don’t Ask” restrictions expire when a definitive agreement is signed with a third party.

¹ *In re Complete Genomics, Inc. Shareholder Litigation*, C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012).

² *In re Complete Genomics, Inc. Shareholder Litigation*, C.A. No. 7888-VCL (Del. Ch. Nov. 9, 2012).

³ *In Re Ancestry.com Inc. Shareholder Litigation*, C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012), at 222.

⁴ In the face of litigation, Ancestry did ultimately waive the “Don’t Ask” portion of the standstills as to all interested parties, meaning that the parties were still not permitted to make a bid for Ancestry but could now request that Ancestry waive the standstill and allow them to make a bid.

⁵ *Id.*, at 224.

The Court also required Ancestry to disclose to shareholders that its financial adviser had refused to issue a fairness opinion on Permira's offer based on Ancestry's initial financial projections. The financial adviser only delivered the fairness opinion on Permira's offer after Ancestry had given it a more pessimistic set of projections.