IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE COMPLETE GENOMICS, INC. : CONSOLIDATED
SHAREHOLDER LITIGATION : C.A. No. 7888-VCL

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Chambers
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Tuesday, November 27, 2012
9:15 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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TELEPHONIC ORAL ARGUMENT
AND THE COURT'S RULING

CHANCERY COURT REPORTERS
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THE COURT: Hello. This is Travis Laster joining. Is the conference there?

MR. LONG: Yes, Your Honor.

MR. ARONSTAM: Yes, Your Honor.

THE COURT: Great. For some reason, I couldn't hear anyone before, so I decided to try to dial in directly.

Do I have Mr. Enright and some other folks for the plaintiffs?

MR. LONG: Sure. Your Honor, Brian Long, Gina Serra and Donald Enright for the plaintiffs.

THE COURT: Great. Sounded like Mr. Aronstam was on.

MR. ARONSTAM: Yes. Good morning, Your Honor. Brad Aronstam here with Mike Sirkin. Also on the phone are our co-counsel from Latham in California, Patrick Gibbs and Andrew Farthing, on behalf of the Complete Genomics defendants.

THE COURT: All right.

MS. UHLENBROCK: And Your Honor, Patricia Uhlenbrock and Matthew Close are here as well.

THE COURT: Great. Thank you,

everyone, for getting on the line.

I wanted to get everyone together in light of Mr. Aronstam's letter clarifying that there is in fact a Don't Ask, Don't Waive provision in one of these standstill agreements, so I wanted to talk a little bit more about that. Before we do, are there any other transaction developments that I ought to know about before we go into a discussion of the Don't Ask, Don't Waive?

MR. ARONSTAM: Your Honor, Brad Aronstam. Other than what's evolving with Party H that has been publicly disclosed, there is nothing new to report. There was a board meeting yesterday by Complete Genomics. I believe it has already been publicly disclosed. If not, it will be shortly, and plaintiffs will be given prompt notice. This meeting was last night, by the way, considering Party H's -- another overture by Party H. And specifically, it is my understanding that the board concluded that that did not constitute a superior proposal.

THE COURT: Is there anything that anyone would like to talk about, about this Don't Ask, Don't Waive provision? I will tell you that it was certainly -- and this is an error on my part about

which I'm somewhat chagrined. It was not my understanding that there were any confidentiality agreements that had a Don't Ask, Don't Waive Standstill provision. So I want to now address that issue. So I'll go ahead and start with Mr. Aronstam.

Why is this an acceptable provision?

MR. ARONSTAM: Well, I think, first off, Your Honor, it only applies to one of the parties at present, for the reasons stated in my November 21st letter. Secondly, I think that, as we articulated in our papers in the briefing, it wasn't actually argued I guess at argument, that this is not a likely bidder. And as we said, context matters, as we talked about, given here, the question is whether or not this one counterparty to a standstill agreement is really being constrained or, stated differently, is likely to come in and offer a topping bid or potentially more consideration for the stockholders.

And as we talked about in our briefing, given Topps, and not talked about in our briefing but as Your Honor is well aware, in the Rehab Care case, the notion that stockholders or, I should say, sophisticated bidders like that of Party J would not have a road map for coming forward if they were

seriously interested in making an offer is just not the case, and it clearly isn't tethered to anything in the record. So for that reason --

THE COURT: I agree with you as far as that goes for the Don't Publicly Ask, and that's why I denied relief on those. But wouldn't -- for Party J to even express interest or attempt to follow some path, doesn't it have to breach its agreement?

MR. ARONSTAM: I understand where you're coming from, Your Honor. And I guess that the question is the questionable viability or enforceability of such agreement. Given the cases I referenced a couple of minutes ago, whether or not such language would significantly or at all deter Party J from going forward, I think, is questionable.

THE COURT: But then you have to wonder why anybody asked for it in the first place if they didn't think it was going to provide at least some type of legal impediment or, indeed, psychic impediment that someone would have to overcome. I mean, you guys --

MR. ARONSTAM: Exactly.

THE COURT: There are probably a lot of other facially invalid provisions that you all

could have thrown into an agreement on the assumption that somebody who actually researched the law or made a probabilistic determination as to the likelihood of enforcement might discount, but people generally don't do that. They generally put in provisions that they think have some value.

And so I have to assume that this provision would at least to some degree have inhibiting effect, particularly -- and who knows, perhaps -- I mean, I know who Party J is, and they're certainly a powerful capitalist with powerful capitalistic incentives. But some people might say, "Look, I promised not to do this. I'm not going to do it."

MR. ARONSTAM: Right. And I'd say the Court is well aware who Party J is: A pretty sophisticated party, no stranger to this Court. And I think that given that party and given the record here, I'm just skeptical as to whether or not -- and given, frankly, the reasons I've disclosed in the 14D-9 for Party J's having dropped out of the process very early on, given capital issues relating to Complete Genomics and the like, and that was quoted in our papers, I'm skeptical as to whether there is any kind of deterring

effect here. But I understand Your Honor's concerns and, clearly, I read those concerns in the Rehab case we referenced a few minutes ago.

THE COURT: Would anybody else like to add anything on this?

MR. ENRIGHT: Your Honor, this is Donald Enright. I think Your Honor is well aware of our concern in these types of agreements. Here, there is nothing abstract or questionable about this. There is nothing here in which there is somebody who could come forward and ask for it to be waived only to have the board constrained by the merger agreement and not be able to waive it. Here, this party is contractually bound not to seek a waiver.

It is our view that under Omnicare, that that is an improper impediment, an unreasonable impediment, on a potential bid for the company. Omnicare says that it is unreasonable if it presents anyone from making a bid for the company. And that's exactly what it does here.

THE COURT: All right. I don't want to cut anyone off.

Mr. Close, do you or Ms. Uhlenbrock or Mr. Aronstam on reply have anything you want to add on

this point?

MR. CLOSE: Your Honor, Matthew Close. I'll be brief. It's obviously not my provision, but I do think the point to be made is that this provision merely serves to force participation in the open and public auction process.

And I think we had some briefing and discussion when we were in Your Honor's courtroom about the legitimate benefit that many of these process-related provisions have in terms of the judgment of the board and the judgment of the target of wanting to maximize value for the shareholders by forcing participants, including this party, to come forward, participate in the process, and make their best bid as part of the process.

And I think this kind of provision, you know, should be seen in that light at that point in time, not merely sitting here today and just looking at its incremental hindsight effect, but rather, what is a very reasonable, we think, approach that is taken by the board and its advisor at the time they initiate a public auction process like occurred in this case.

MR. ENRIGHT: Your Honor, this is Don

Enright. I have been reviewing the agreements in question. There are four of them. Looking at them, it appears to me that there may actually be two that have this same problem. And that would be the agreement with -- I will reference it as Exhibit 22 from Mr. Reid's deposition and Exhibit 23 from Mr. Reid's deposition.

And both of them include a provision saying that the counterparty is forbidden to request or propose that the company amend, waive, or consider the amendment or waiver of any provision set forth in this paragraph. And both of those are in Subparagraph H on the third or fourth page, depending on which one we're talking about. So I don't think it's only one, actually, Your Honor. I think it's actually two.

THE COURT: Mr. Aronstam, this is your point about the tender and support agreement superseding the second one.

MR. ARONSTAM: Exactly right, Your Honor, as articulated in the letter we sent to the Court on Wednesday.

THE COURT: Great. Well look -- go ahead, sir. I didn't mean to cut you off.

MR. ARONSTAM: Not at all, Your Honor.

I simply was going to say for Mr. Enright's edification, that's Party I that has subsequently entered into the tender and support agreement and, therefore, as we articulated, it effectively superseded any of the standstill provisions that he just read into the record.

THE COURT: Great. I appreciate everybody getting on the phone this morning. I'm going to give you my ruling now.

In an oral ruling on November 9, 2012, I denied the plaintiffs' application for preliminary injunction that would have enjoined a pending two-step acquisition of Complete Genomics by BGI-Shenzhen and its wholly owned subsidiary Beta Acquisition Corporation. As part of their application, the plaintiffs sought preliminary relief barring Genomics from enforcing standstill agreements with four potentially interested parties. Based on the briefing and the argument, which I have gone back and looked at again, I understood that each standstill agreement prevented the counterparty from publicly requesting or proposing that the company or any of its representatives amend, waive, or consider amending or waiving any of its terms, but did not prevent the

counterparty from making a non-public request.

I denied the motion because the standstill agreements did not prevent a party, as I understood them, from making a non-public request, and the Genomics board of directors would then be able to take into account that request and any of its terms when evaluating its ongoing statutory and fiduciary obligations to determine whether to continue to recommend in favor of the merger.

The plaintiffs moved for reconsideration. Based on the briefing, I continued to understand that the standstill agreements prohibited public waiver requests but otherwise were not "Don't Ask, Don't Waive Standstills" of the type discussed in the Celera Corporation case that would purport to forbid a counterparty from ever asking for a waiver. As a result, on November 21st, I denied the motion for reconsideration without argument.

After the denial of the motion, the defendants submitted a letter advising that the standstill agreement that binds the counterparty referred to as Party J in fact does contain a Don't Ask, Don't Waive provision. I appreciate the defendants making this clarification of the record

because it is indeed true that I had misapprehended that fact. Because I misapprehended that fact, it is appropriate to reconsider this one aspect of my ruling under Rule 59. I am consequently enjoining Genomics pending trial from enforcing the standstill agreement with Party J.

I am not going to revisit the factual background that I reviewed on November 9th. The principal development since then is that another party has made a public bid for the company at $3.30 per share, 5 percent above the merger consideration. This development does not affect my rulings today, nor does it affect any of the rulings that I made on November 9, particularly my ruling as to the exclusivity of the merger agreement. The board's decision in that regard stands or falls based on the information that it knew at the time it entered into the merger agreement. This subsequently breaking development doesn't retroactively alter that state of information. So the new bid, while relevant to balancing of hardships, does not alter the underlying fiduciary analysis. And that was one of the bases, indeed the principal basis, on which I denied the motion for reconsideration. Nevertheless, I do have

to address the Don't Ask, Don't Waive provision because, as I say, I misapprehended before that there was this provision in one of the four agreements that were at issue.

In my view, a Don't Ask, Don't Waive Standstill resembles a bidder-specific no-talk clause. In Phelps Dodge Corporation v. Cyprus Amax, Chancellor Chandler considered whether a target board had breached its fiduciary duties by entering into a merger agreement containing a no-talk provision. Unlike a traditional no-shop clause, which permits a target board to communicate with acquirers under limited circumstances, a no-talk clause -- and here I'm quoting from the Chancellor -- "not only prevents a party from soliciting superior offers or providing information to third parties, but also from talking to or holding discussions with third parties." That's from Page 4 of the transcript.

The Chancellor concluded that there was a reasonable probability that for the target board to have agreed to such a provision violated its ongoing -- and again, I'm quoting -- "duty to take care to be informed of all material information reasonably available." That's from Page 2 of the

transcript. This was because the target board's agreement to disable itself from engaging in dialogue with a potential acquirer under any circumstances whatsoever was the legal equivalent of willful blindness.

Subsequent Delaware decisions have endorsed the Phelps Dodge analysis. Vice Chancellor Lamb, my predecessor, did so in the Cirrus Holdings case. Quoting from that decision, "directors cannot willfully blind themselves to opportunities that are presented to them, thus limiting the reach of 'no talk' provisions." Then-Vice Chancellor Strine likewise cited Phelps Dodge with approval in his ACE Ltd. v. Capital Re case.

In holding that the no-talk provision compromised the target board's ongoing obligation to remain informed, Chancellor Chandler in Phelps Dodge focused on the target's ability to decide whether to negotiate with third parties and whether the provision impermissibly prevented the board "from meeting its duty to make an informed judgment with respect to even considering whether to negotiate with a third party." That's from Page 1 of the transcript. As Chancellor Chandler noted, a board doesn't necessarily have an

obligation to negotiate. That, of course, has been confirmed by this Delaware Supreme Court in Gantler v. Stevens. It was also what Chancellor Allen held in the TW Services case.

Regardless, a board does have an ongoing statutory and fiduciary obligation to provide a current, candid and accurate merger recommendation. A board has an ongoing fiduciary obligation to review and update its recommendation. That's clear from the original Van Gorkom decision. It was the explicit holding of Vice Chancellor Noble in the Frontier Oil Corp. v. Holly Corp. decision -- I'm going to quote from that -- "Revisiting the commitment to recommend the Merger was not merely something that the Merger Agreement allowed the Board to do; it was the duty of the Board to review the transaction to confirm that a favorable recommendation would continue to be consistent with its fiduciary duties."

Maintaining a current and candid merger recommendation is part of the director's duty of disclosure. For that, you can see the Berkshire Realty Company case from 2002 in which the following was stated: "If the board, in the exercise of its business judgment, determined that liquidation" --

which was the decision at issue -- "was not in the best interests of . . . its stockholders, it could not have recommended a liquidation without violating its fiduciary duty to the stockholders." Put simply, Delaware law requires that a board of directors give a meaningful, current recommendation to stockholders regarding the advisability of a merger including, if necessary, recommending against the merger as a result of subsequent events. There, I'm paraphrasing from and would refer you to Frank Balotti and Gil Sparks' article titled *Deal-Protection Measures and the Merger Recommendation*, and particularly Page 476.

Chancellor Allen made the same comment in his 2000 Business Lawyer article where he pointed out, "A board may not suggest or imply that it is recommending the merger to the shareholders if in fact its members have concluded privately that the deal is not now in the best interest of the shareholders."

What these decisions and these authorities show is that the board has an ongoing statutory and fiduciary obligation with respect to the merger recommendation. So regardless of whether a no-talk provision, as in Phelps Dodge, or a Don't Ask, Don't Waive provision here, would create problems for

the decision to negotiate, and certainly Phelps Dodge holds that it would, those provisions interfere with the target's ability to determine whether to change its merger recommendation because they absolutely preclude the flow of incoming information to the board.

So in my view, by analogy to Phelps Dodge, a Don't Ask, Don't Waive Standstill is impermissible because it has the same disabling effect as the no-talk clause, although on a bidder-specific basis. By agreeing to this provision, the Genomics board impermissibly limited its ongoing statutory and fiduciary obligations to properly evaluate a competing offer, disclose material information, and make a meaningful merger recommendation to its stockholders. With respect to the Don't Ask, Don't Waive Standstill provision, therefore, the plaintiffs have established a reasonable probability of success on the merits that that provision represents a promise by a fiduciary to violate its fiduciary duty, or represents a promise that tends to induce such a violation. That's from Section 193 of the Restatement of Contracts.

I would note as an aside that to the extent that people focus on the fact that at the

tender offer stage of a two-step merger, the recommendation is really something that flows from federal law rather than Delaware law, I would refer you to the Matador Capital Management Corporation v. BRC Holdings case in which Vice Chancellor Lamb, my predecessor, held that in a two-step acquisition governed by a merger agreement, the same principals apply to the front-end recommendation as they do to the statutory merger recommendation.

More recently, in the Orchid Cellmark decision, Vice Chancellor Noble observed that in a two-step merger, "tendering, of course, is a substitute for the shareholder vote." That likewise indicates that the merger recommendation provisions and obligations flow through in this context.

And then there is a whole long line of decisions starting with the transcript ruling by Vice Chancellor Lamb in Peapod, rolling through Glassman and Andra v. Blount, and more recently, I have cited it in CNX and in the original -- I shouldn't say "original" because that harkens to 1986 -- but in the Revlon decision that I wrote a couple years ago, noting that when you have a two-step transaction, fiduciary obligations apply to a two-step that's

entered into by agreement to the same degree that they apply to the one-step. So the fact that we're now at a stage where the recommendation is a product of a 14D-9 rather than technically a product of 251 doesn't change the fiduciary analysis.

In terms of the issue of irreparable harm, I think for purposes of the Don't Ask, Don't Waive Standstill, it's met. We just don't know and we would never be able to know unless Party J decides to cavalierly breach its own promise whether Party J would ever want to make some type of bid or other acquisition proposal. Yes, it would be nice to say confidently, as Mr. Aronstam does, that this is a low likelihood event. Unfortunately, time-bound mortals aren't able to see the future. We can make probabilistic predictions but we can't know. This is a provision that flat-out prohibits, analogously to a bidder-specific no-talk clause, incoming information from that bidder under any circumstances. So just as that type of provision would create a situation that can't be remedied, likewise, here, I think that type of situation creates a situation that can't be remedied.

In terms of balancing, I don't see any

risk in terms of a narrow and limited injunction against the enforcements of the standstill agreement with Party J. I recognize that there is some authority standing for the proposition that because of the need to respect contract rights, this Court only should issue an injunction against the transaction as a whole and not against an individual transaction feature such as this standstill agreement. I think that that's a well-reasoned position. At the same time, though, this Court has a history of issuing more targeted injunctions. More importantly, the Supreme Court has a history of approving more targeted injunctions, including in the Mills Acquisition decision, the QVC decision, and the original Revlon decision. There was also a targeted injunction in the Holly Farms case. Most importantly for this decision, in Topps, this Court enjoined a standstill agreement without enjoining the transaction as a whole. So I feel quite comfortable that there is ample precedent for this type of narrow injunction.

I also don't believe based on my reading of Section 6.1(c) of the merger agreement that this type of limited injunction would cause the failure of a closing condition. The only closing

condition in 6.1(c) that relates to an injunction is an injunction barring consummation of the capital M Merger. I'm not enjoining that. Nor does it appear to me that this injunction under Section 7.1(d) would give BGI or Beta a termination right.

Finally, the merger agreement has a severability provision that indicates that the parties anticipated that this type of equitable relief would be available, as it is under default principles of contract law which recognize the severability of contract provisions. The severability provision speaks in terms of whether severing a provision would alter the economic rights of the bargain. I think only in the most tangential sense could this injunction be viewed as altering the economic rights of the parties. Yes, in some attenuated sense, any change in a state of the world alters the risk profile that someone anticipated when they were in a different state of the world, but I do not believe that that's what economic rights is getting at.

Moreover, what I haven't changed and what I've held did not state a reasonable probability of success on the merits was the effort by the plaintiffs to seek an injunction against the exclusive

aspect of the merger agreement. That's really what BGI bargained for. So in terms of addressing this Don't Ask, Don't Waive provision, I do not see material risk to the target, nor do I see an interference with BGI's contract rights that would require the balancing to come out differently.

Finally, in the current context, there actually is a topping bid out there. So even though my reasoning would stand even without the topping bid, here, there is a covering bid that in my view causes the balancing to weigh decidedly in favor of this type of limited injunction that I'm contemplating.

Now, the last thing that I'd like to do is to hopefully give you all a little bit of guidance in terms of what I meant by actually presenting a real dispute on some of these other things.

The motion for reargument seemed to suggest that because there was a topping bid, now all of a sudden, we had a live dispute on the recommendation provisions. That's not so. There are, as I indicated, potentially problematic aspects of this provision, but just because there is a topping bid out there doesn't mean that there is automatically

a problem with the recommendation.

To take the most obvious example, the recommendation provisions have a five-business-day negotiation period with infinite renewals. During a slow-moving phase of this process, it's hard to see a problem. But what if the board needed to change its recommendation three days before the date on which the offer was scheduled to close? It's things like that that create a potential issue. I would want to have briefing on that. I would want to think about that. The fact that a topping bid has emerged doesn't suddenly put that aspect of the merger agreement into play.

Likewise, there is a strong distinction drawn in the merger agreement between the defined term "Acquisition Proposal" and the defined term "Superior Proposal." Acquisition Proposal, as is customary, embodies a broad range of transactions, including things like recapitalizations. A recapitalization is actually what four of the interested parties were contemplating, including the party that was until this ruling subject to the Don't Ask, Don't Waive Standstill.

The definition of Superior Proposal is

limited to a bona fide written proposal for a merger, a consolidation, a tender offer or an exchange offer to acquire at least 85 percent of the outstanding shares of company common stock. There is a whole bunch of Acquisition Proposals that simply don't fall into that term. And under the terms of the recommendation provision, it's not clear how you would ever contractually be able to recommend something like a recap. I don't know if my reading of that is correct or not. I don't know if that's a problem or not. I would want to have briefing on that. But that's the type of thing that would create a real issue, not the sudden emergence of a topping bid.

So I would encourage the plaintiffs as this case goes forward to really think hard about when they need to trouble the defendants and the Court with a further application. Just because a topping bid is out there doesn't mean that there's a fiduciary problem. And it doesn't mean that we suddenly need to come to grips with and brief issues that may never arise, depending upon the type of bid, the timing of the bid, et cetera.

So that is more color on why I denied that aspect of your motion for reconsideration. And

as I said, I would encourage you all, to the extent you feel you need further relief, to really focus on the type of relief you're seeking and whether it's a real problem under the terms of the agreement rather than presenting something that's more abstract.

The Don't Ask, Don't Waive provision doesn't present something that's abstract, however, because as I discussed with Mr. Aronstam, there is literally no situation where -- unless the counterparty or, because of the terms of the merger agreement, Genomics itself, unless they decide to be contract breachers, there is literally no situation where one could ask for a standstill waiver or the board could obtain information that could be pertinent and indeed required in terms of its merger recommendation.

I'm going to ask for questions, but in terms of moving forward, I've now given you two transcript rulings. Rather than these simply bouncing around in the form of transcript rulings, I would like Mr. Enright to prepare a form of order, to circulate it to the defendants, and then submit it to me so that we can have something definitive on the docket that is clear in terms of what relief has been granted, the

limited relief that has been granted.

In that regard, I would be curious, because I frankly haven't looked, but I would be curious about the status of the supplemental disclosure issues, as to whether that has gone out -- I assume it was rolled into the 14D-9 supplements that were issued in connection with the topping bid, but I didn't focus on that.

So, Mr. Aronstam, why don't you tell me initially what the status is of those supplemental disclosures.

MR. ARONSTAM: Yes. And my colleagues at Latham will correct me if I'm mistaken, but I'm all but certain that the supplemental disclosures, both on the discussions with the CEO as to possible retention of employment and the correct version of the merger agreement, went out either later that day after your initial ruling or the day after.

THE COURT: Excellent.

Do you have any questions as to my ruling today?

MR. ARONSTAM: This is Brad Aronstam. I do not, Your Honor.

THE COURT: Okay. Mr. Enright, does

your team have any questions as to my ruling today?

MR. ENRIGHT: No, Your Honor. I understand. I have not had an opportunity to confer with my co-counsel, obviously, because we've been on the phone with you. I understand your ruling, and we'll obtain an expedited copy of the transcript to review as to any questions that may develop.

THE COURT: I'm confident Mr. Long and Ms. Serra understand it as well.

Ms. Uhlenbrock, Mr. Close, do you all have any questions for me?

MS. UHLENBROCK: I do not, Your Honor.

MR. CLOSE: No, Your Honor.

THE COURT: Great. Thank you, everyone, for getting on the phone. I appreciate it.

And let me thank again the defendants for clarifying the record on this point, because I was under a misapprehension about the nature of this one provision. And when I went back to the transcript, it was clear, I think, that I was under that misunderstanding. So I appreciate your candor in terms of bringing this issue to my attention, even recognizing it had potential risks for your client, as indeed came to pass. So let me close by complimenting

you on that again and expressing my appreciation.

Have a good day, everyone.

MR. ARONSTAM: Thank you, Your Honor.

(Conference adjourned at 9:55 a.m.)

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 29 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand this 27th day of November, 2012.

/s/ Jeanne Cahill

Official Court Reporter
of the Chancery Court
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