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
9:00 a.m.

- - -

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

- - -

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

CHANCERY COURT REPORTERS
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THE COURT: Good morning, everyone.

ALL COUNSEL: Good morning, Your Honor.

MR. LESSNER: Good morning, Your Honor I rise briefly for introductions. Marty Lessner on behalf of the Ancestry defendants. With me at counsel table is Bill Savitt from Wachtell Lipton, Adam Gogolak, Kim Goldberg. And from Young Conaway, Katie McCormick. And I also have from Wachtell Lipton George Conway, Andy Nussbaum. And from Young Conaway, James Yoch and Ben Grossberg.

THE COURT: Good morning.

MR. LESSNER: Mr. Savitt will be presenting the argument.

THE COURT: Not Mr. Nussbaum?

MR. LESSNER: Not Mr. Nussbaum.

THE COURT: He'll just be in the earphone.

MR. WILLIAMS: Good morning, Your Honor. It's my privilege to introduce to the Court Yosef Riemer and Devora Allon from Kirkland & Ellis. Mr. Riemer will present on behalf of the defendants.

MR. NORMAN: Good morning, Your Honor.

Steve Norman on behalf of the Permira defendants. With me is David Hennes and Justin Santolli from the Fried Frank firm. And Mr. Hennes is going to present the argument this morning.

MR. HENNES: Good morning, Your Honor.

THE COURT: Good morning.

Good morning, Mr. Grant.

MR. GRANT: Good morning, Your Honor. I have a team of thousands also who I want to thank, because I think this was about as expedited a case in a court that handles lots of expedited cases. And I know you and your law clerks had to deal with this on a very expedited basis, not getting the last brief until Saturday late afternoon, early evening, so I want to thank the Court and your clerks and also our whole team. I'd also thank Katie for sending the brief over in large type so that I could actually read theirs.

Your Honor, there are a lot of things to talk about. There are some things I'd like to just put on the side that I don't think we need to talk about. Maybe it will cut out a couple of the defense side people speaking. I don't think we need to talk about the aiding and abetting today. Nobody really

moves for a preliminary injunction on the aiding and abetting claim. So I know that you've got a bunch of briefing there that said, wow, we didn't prove our case on that, but we weren't really trying. So I think we can put that to the side.

I would like to focus on, at least to begin with, on the fairness opinion. And one of the reasons I want to focus on that is I think there's pretty much agreement that if you lie or mislead the shareholders, lie to or mislead the shareholders, in the proxy statement, particularly on something as central as a fairness opinion, that an injunction follows. And that would be true whether there was another bidder or not. And so maybe we can eliminate a lot of that debate, although we can certainly get into it, just by focusing on that.

I think the case is pretty clear that the fairness opinion was a farce. That Qatalyst explains to management and the board that they're not going to be able to opine that 32 is fair, given the current projections. And then what happens, you know, if the facts don't fit the theory, change the facts. And so the projections were changed.

And I call Your Honor's attention,

although we certainly have discussion -- but I think if you look at the appendix we put into the reply brief, the sensitivity timeline, and just go through that, it's very obvious what happened.

THE COURT: They started working through this in August; right?

MR. GRANT: Well, they started working through it in August when they were getting a little uncomfortable about it. Certainly in September, starting September 20th, Qatalyst, you know, sent internal e-mails discussing some of this and saying, you know, we're going to need to play with these numbers because at this point, obviously, Qatalyst is trying to get ready to give the fairness opinion, and they see that they're not going to be able to. And so they start saying, well, how would these numbers have to change in order to get -- you know, be able to give a fairness opinion.

They then get, at the end of September into early October, Hochhauser involved in it. And one of the other very odd things is how they construct these projections. I've never seen projections structured where you say, okay, it's 2012. Let's guess 2016 and then we'll back in, I think what they

called backfill or something like that, the remainder of the years. Everyone I've ever heard of, every textbook I've ever looked at, every business school student I've ever spoken to, says you do current year projections, then the next year, then the following year, and the following year, and then you get to your terminal year when they decide to stop. They actually admit they figured out 2016, and then when asked, Why did you do 2016? Well, that's the one that's going to have the biggest effect on the discounted cash flow.

THE COURT: Right. And I don't know that -- you obviously take from that something sinister. There's another implication to it, is that is, in fact, the year to focus on; that this is not a company with a tradition, right, of doing five-year cash flows, is it?

MR. GRANT: No, it is not.

THE COURT: These were -- the original cash flow estimates were specifically deal-oriented cash flows. It was not something they did in the ordinary course of business; right?

MR. GRANT: I would say that they did this in order to get an understanding -- may -- get an understanding of value so that they could consider a

sales process, yes.

THE COURT: Isn't it true that if they got a $34 or even a $35 bid, that the original projections would have been problematic in terms of that price outcome?

MR. GRANT: Don't know.

THE COURT: I think we do know, don't we, from the proxy statement?

MR. GRANT: You're --

THE COURT: I mean, the proxy statement has the -- I believe the original says that the range, if you did the original projections, the range starts at $34.50; right?

MR. GRANT: Yes, I think I remember that; correct.

THE COURT: And goes to 49 bucks.

MR. GRANT: Yes. Which is consistent with our expert who says this is worth 38, and interestingly enough, consistent with the original I think indication of interest, which was, what was it, 34.50 to 37 or something like that.

THE COURT: Well, the high-end, somebody was at 37 on a high-end; right?

MR. GRANT: I mean, even the buyer

here when they came back after they had been tipped, they were told this is where they had to get into.

THE COURT: Oh, I understand --

MR. GRANT: There was a reason they were told, You have to start in the mid-30s and get to the high 30s.

THE COURT: I don't doubt that folks were trying to get the buyers into as high a range as they could. And I think there was even -- somebody even had a 38 handle on something, and then they backed away. Was that Providence or somebody? I mentioned a town in Rhode Island.

By the way, I'm not acting like anything I know is a state secret unless there's some state secret that I'm going to be told about, you know, especially given how leaky the market was about this stuff.

MR. GRANT: Your Honor, on that topic, I have already told defense counsel that I intend not to use Bidder A, Bidder B and Bidder C, and to use those names, and if they had an issue, they should raise it now.

THE COURT: Unless there is some issue, I'm not going to get into an awkward thing. I

don't think we're talking about state secrets here.

MR. GRANT: No.

So, Your Honor, the answer is those numbers may justify a higher price, but those numbers are their numbers.

THE COURT: No, but again, one of the things I'm trying to deal with is your spin on everything -- I mean by "you," your clients, obviously, not you personally, but your teams -- the spin on it is always sinister, when there's obviously a well-motivated reason to use optimistic bullish projections in a sales process. There is always the danger, then, when you do that, that later on, people, when you take into account the realities of the world, that you're going to be accused of just trying to justify the deal. That's especially so if there's conflicts of interest, and we'll get to those, in the deal.

But, for example, what I'm getting at is it's a little odd because these projections, even if the sales process had gone very well, right, the projections generate something pretty far down in the value range on a DCF basis. Like if they had gotten 35.50, which would have seemed to be a good result in

light of everybody's -- you know, they would have been at the very bottom of the DCF range.

MR. GRANT: Right, but they would have been within the range, and we could have fought about it, but at least somebody could have given a fairness opinion saying, You're within the range.

THE COURT: You could have.

MR. GRANT: Or you could have been honest and you actually could have said, You know what? We were completely full of it when we put our projections together. Then what we did was we got the deal price and we think it's the best deal price we could get. So what we really did was we went back and said, Could you please redo the projections in a way that would allow us to give a fairness opinion?

THE COURT: I guess some of us may live in a world where there is some distance between completely full of it and trying to put before buyers a very optimistic scenario, achievable but optimistic, in order to get the best price.

MR. GRANT: Let's talk about that.

THE COURT: That's what I'm saying. I'm more attracted to noun and verb than I am to adjectives on both sides.

MR. GRANT: I'm with you. So let's talk about -- I have to figure out whether it's a noun or verb, but let's talk about these projections. Projections, I guess that's a noun. So what happened in the first two quarters of these optimistic projections? Oh, they hit or exceeded them. Okay. So the idea that in May, they had for their Quarter 2 and Quarter 3, they hit or exceeded them. So we're already starting off with the facts that we do know is they're not so optimistic. And by the way, they hit or exceeded their projections since they've been in an IPO, every single one, never missed.

THE COURT: Their public projections.

MR. GRANT: And their internal ones.

THE COURT: I thought the testimony was a little bit different on the internal ones.

MR. GRANT: No. They hit every one of them.

THE COURT: I thought they said there were measures they had for internal stretching and that they had not met those, and that their internal ones are, frankly, different from the external ones precisely because they use the internal ones to create incentives for people to stive.

MR. GRANT: No. In fact, the board minutes go back and say, Well, the reason we want you to do this -- and hopefully, I can find those minutes for you -- they say, The reason we want you to do these projections and be a little more aggressive is because you keep exceeding, you keep exceeding the projections that you have. You are setting the bar too low because you keep jumping over it. And that's actually in the board minutes. And --

THE COURT: Is that earnings guidance or is that internal plans? Because those are different things. And I thought that there was testimony from both Hochhauser and Sullivan that those were different things, and that as to the internal ones, they don't always hit them because they're more ambitious.

MR. GRANT: What the board was talking about was whatever they're giving the board -- and they keep saying, Whatever you're giving us, which ultimately turns into these May projections, you have to raise them because, you know, you keep sailing over them and, you know, you're underselling yourself. So yes, that's what they gave the board and what the board responded to. They were all talking apples and

apples --

THE COURT: Again, I'm trying to piece together the motivational scheme. And I don't want to interrupt you, but as you go through it, that would also suggest that the Spectrum representatives on the board wanted to make sure that to the extent the company was going to go into sales mode, that it put its first -- its best foot forward and did not undersell.

MR. GRANT: There is a difference between saying, We want to put projections together that are realistic and that in the past, you have -- board talking to management now -- you have set the bar at an easily achievable rate, and you've gone over it, and whether you've done that just because you didn't want to disappoint us or so you could make your bonuses. It is what it is.

And in the board minutes from the May 15th board meeting --

THE COURT: What tab is this?

MR. GRANT: It's under Tab 29.

THE COURT: Okay.

MR. GRANT: And you can see no one gave the instructions to say, Go out there and goose

the numbers. On the very bottom of the first page, revised financial forecasts, "The board reviewed with senior management the revised financial forecasts for the corporation, which materials had previously been circulated to the board. These materials reflect recent developments of the business as well as management's view of the potential impact of the business of NBC's recent decision not to renew "Who Do You Think You Are?" for a fourth season.
Mr. Hochhauser led the board in the discussion relating to the financial forecasts. At the end of the discussion, senior management was requested to take into account the matters discussed."

I don't see where there's any evidence in the board minutes where it shows it was said, We want to have this aggressive projection. It's just not there.

THE COURT: Does that mean that it didn't happen?

MR. GRANT: I don't know. Does it mean that it certainly leaves someone the ability to tell the story after the fact? Sure does. Sure does.

But Your Honor, let's make it real easy. Let me have that exhibit. Let's take a look at

Exhibit 118. If I can hand a copy up, or does Your Honor have it?

THE COURT: You know, I'm not sure that the supplemental appendix somehow made it up here.

Thank you, Mr. Grant.

MR. GRANT: So if we take a look at -- and I'm going to get to Sullivan Exhibit 17, and I'll explain that in a moment. But if we take a look at the May management projections, they're at 372 million for EBITDA for 2016. If you look at the sensitivities, Case A is 230 million. Case B is 259 million.

In October, this is -- I think this came out October 19th, I believe. I'm pretty sure this was the 19th. Anyway, Mr. Sullivan is sitting there, now that the deal is all done and ready to go, and he is sitting there with his musings, and he wants to know what is he getting. What is it worth?

And you'll see at Tab 118, which is Sullivan Exhibit 17, company EBITDA, and we look under 2016, and what number does he use? This is after the sensitivity is already put together. What number does he use to value his own options? 337 million EBITDA,

which is a heck of a lot closer to those May projections, albeit a little bit lower, than it is to the sensitivities.

So what he's thinking -- and if Your Honor looks at this -- and we said, you know -- because we asked him at deposition, What is this? And he said, This is I was calculating what this deal is worth to me and what I'm going to get and all that.

THE COURT: I thought he said this was the screen shot, and that wasn't his estimate, and that it was one of the iterations he ran.

MR. GRANT: Yeah, well, here's the problem with the iteration. We said, Gee, could we have all the other iterations, please? Why would you only produce this one? And you know what turned up? Nothing. Zero.

THE COURT: There were no other iterations.

MR. GRANT: No other iterations.

THE COURT: But is this one you can play with on your screen?

MR. GRANT: Well, I don't know. This is how it was produced to us, but this is the only one that exists. This wasn't, you know, Let me see the

various sensitivities. In any event, why would it matter, because we already know, according to the defendants, what the truth is; right? It's somewhere between 230 and 259. Why on earth would you even use 337? Why? Because you knew, Sullivan knew, that those sensitivities were bogus. Those were just made up to be able to give a fairness opinion. Completely made up.

And then you go back and you look at Exhibit -- then you take a look at Goldman Sachs. Okay? So Goldman Sachs, they do a September 4th presentation to the board. And remember, this was the Plan B.

THE COURT: What exhibit are we at?

MR. GRANT: We're at Exhibit 117. And we look at Goldman Sachs' numbers as they go through. Their numbers are way more aggressive than -- their numbers are way more aggressive than the sensitivities. So you've got Sullivan more aggressive. You've got Goldman Sachs more aggressive.

THE COURT: Because they're at 314?

MR. GRANT: Yes. And you've got Sullivan saying that he would like to roll over as much as he possibly can because this whole process of

due diligence has made him even more bullish than he was on the company.

THE COURT: Where is that?

MR. GRANT: That is Exhibit 90, I believe.

THE COURT: Is that with his exculpation part about Ancestry is going to be huge?

MR. GRANT: That was certainly part of it.

THE COURT: Or is this a different one? Is this the string of texts?

MR. GRANT: I think that's right, Exhibit 90. So Exhibit 90.

THE COURT: Is this how texts print out?

MR. GRANT: Yes. I think the top says from Jonathan Turner to Tim Sullivan.

THE COURT: Right.

MR. GRANT: So that's where he says, "I also gave him my 'incrementally more bullish' statement about my personal investment/roll perspective. He said that they had penciled in a total management role of $40-$70, and I told him that, while I had zero conversations with the management

team about this, my own decisions were likely going to push this towards the high end of that range. My message was very much grounded in my statement that this process and associated diligence had only made me more bullish about our ability to execute and deliver a great financial outcome."

Again, this is him talking about his own dollars. This isn't him giving some kind of, you know, speech, sales speech, to those who are buyers.

THE COURT: Wait a minute. Ruder is a buyer; right?

MR. GRANT: Yes.

THE COURT: Isn't this as of September 9th, the deal terms haven't been struck; right? You're trying to get Permira up in the range; right?

MR. GRANT: Yes. Well, interestingly enough, they're at about thirty -- potentially 33 while that discussion is going on. They ultimately bid at 31.

THE COURT: Right. But you're trying -- I understand you've got a job to do, and I've got to put it together, and I understand they have a job to do. Part of the job of somebody like me

is to put it together, I have to filter out everybody doing their job and try to come up with what makes sense.

MR. GRANT: Mm-hmm.

THE COURT: There is a perfectly value-enhancing reason for him to have put it this way to the buyer; right? Which is, You are not buying our story. You should buy our story. I have confidence in our story, and I'll put my money where my mouth is by rolling as much as you asked me to do in order to show why you should pay at the higher end of the range we're asking for, for our stockholders.

MR. GRANT: One could try to put that spin on it, yes.

THE COURT: There is a problem in these situations any time where there's a conflict of interest; right? Is that for someone like Mr. Sullivan, if he's trying to actually help Qatalyst and the board sell the thing, part of what he wants to say is, to a private equity buyer, you know, I'll put my money where my mouth is in terms of telling you that this company is worth this. I'm bullish on this, so you should pay 33, and I think I'll beat that mark for you in the long term, and I'll beat it for me.

All I'm saying is that's -- this is a recounting that he's giving, I believe, of a call he had with Permira; right? At a time when they're trying to get the deal terms, get them to come to terms? Am I wrong on that?

MR. GRANT: He's recounting a conversation internally to someone recounting a conversation that he has with Ruder. But this e-mail is really an internal discussion. But he says, you know, I had this call with Ruder, and these are the kinds of things we talked about.

THE COURT: This is something he shared with Turner at Qatalyst? Isn't this his report to Turner?

MR. GRANT: This is Sullivan's report.

THE COURT: To Turner.

MR. GRANT: -- to Turner.

THE COURT: About his call with Permira; right?

MR. GRANT: Yes. Yes. So, I mean, my answer to your question was, yes, this is recounting a conversation with Ruder, but it's not -- but this e-mail is not a direct communication with Ruder.

THE COURT: No, no. I get that. But

what I'm saying is when I take this into account, I understand what you're saying, which you're saying this is his actual view of the probabilities of hitting things.

MR. GRANT: Right.

THE COURT: What I'm saying is it's also contextually clear that this was part of a sales conversation he had with the buyer; right?

MR. GRANT: Yes.

THE COURT: In which he was expressing confidence in his company's ability to deliver at a time when they're trying to convince the buyer to pay a higher price.

MR. GRANT: Well, then that begs the question about Exhibit 118, when the deal price is already set, everything is already done, the sensitivities are already done, and then on October 19th, he's still using the number that's substantially higher. And that has to color your view of everything he's saying in between. Like, you know, this is what he believes. Because when he's no longer in sales mode, he's still doing that.

THE COURT: So you believe he just flat-out lied in the deposition?

MR. GRANT: I think sometimes when there is a lot of money at stake and someone's reputation is at stake, the truth seems to perambulate. Yes, I do. And as I said, Goldman Sachs, interestingly enough, they're at a number well above this. But it's also --

THE COURT: Why would Spectrum -- if Goldman Sachs comes in with a plan, if this is just bankable, why doesn't Spectrum just call a halt?

MR. GRANT: Spectrum has its own reasons for wanting to do this transaction. So remember, Spectrum needs to get out of their investment for Fund III. The fund has already run its course in its life. It's got one investment left. This one. So it needs to get out.

THE COURT: So why do you need to get -- it sounds like it's been a successful fund. Why would you want to get out short of the mark if you can make more money?

MR. GRANT: Well, you can do it a couple ways. When you have just one piece left in a fund and it's a big fund, and this was a small investment for that big fund, the fund wants to close that out. Say, here, we gave everyone their money

back in this life. You put out your statistics, everything is great, and you've moved on to several funds already.

So the other fund that had an investment is Fund V. Now, that fund, the beauty is what you can do is, because it has been very successful for them also, is you can cash out a chunk of your investment in a way that gets you the two to five times return, which is their target, and then you can still keep some of it in there, and effectively play with the house's money. And the difference --

THE COURT: Again, I understand. I saw the snippet in the e-mail, and it's another lesson in the world, anytime you use a phrase, "play with the house's money" or whatever -- tell me why on this record I wouldn't believe Spectrum wouldn't have been ecstatic to get 35.50 for all its shares and be long gone come the crack of dawn.

MR. GRANT: They would have been.

THE COURT: And do they have any particular interest in rolling with -- the amount that they're rolling here, they've got monitoring and other kinds of costs. They've got the potential, they've got to make sure that they're not -- because the other

thing is if they roll into this deal, when will they be able to get out?

MR. GRANT: I assume the target is three years.

THE COURT: Right. So I mean, you've got --

MR. GRANT: You've got Fund V, who still has plenty of lifetime. Fund III is the one they've got to get out. Fund V, who has got the $100 million investment --

THE COURT: You're getting out of -- how much is left in the -- the one you say they have to terminate?

MR. GRANT: This is the last investment. There is nothing else there.

THE COURT: So I don't know why they have to terminate it at a lower price, but how much is left in it?

MR. GRANT: This investment.

THE COURT: No, no. How much? How much of their stake in Ancestry was that fund?

MR. GRANT: I don't know. And I don't know when you're measuring it. When they initially --

THE COURT: What I mean is the

companies do repurchase programs and things like that. And if Ancestry has these kinds of things, they could have that fund participate in the repurchase program and get out over time; right?

MR. GRANT: Well, that would be very awkward considering they were -- you know, what you're repurchasing is a stake from what we assert is a controlling shareholder at a price and not offering it to anyone else.

THE COURT: No, no. The company does -- I thought that they had sold down with some other stockholders who were offered the opportunity to do -- every stockholder was offered the opportunity to participate in a stock buyback program. The company was on the market, buying shares. And so it wasn't something exclusively made to Spectrum. And you could wind down that fund. And if this other one has this great opportunity because it's got a long lifetime, you might as well maintain a stronger hand and ability to monitor and to actually capitalize on these bullish --

MR. GRANT: Your Honor, we can speculate, but the truth is you and I are just speculating now.

THE COURT: I have to speculate because I'm doing probabilities. And what I'm trying -- I'll be candid with you. On the Spectrum side, it's not making sense to me that they did not wish to maximize the sale proceeds.

MR. GRANT: But that wasn't -- the question wasn't whether they maximized the sale proceeds. I think right now what we're talking about --

THE COURT: That is kind of an important question, which is that is what it's sort of all about. And *Revlon* was originally about the notion of a board resisting one buyer for all kinds of -- you know, you put aside the bondholder thing because that was really weird because they made the people, they made them bondholders four weeks before they were stockholders. But the real story is Bergerac didn't want to sell to Perelman, and he fended him off.

MR. GRANT: And I think that's what's going on here. And if you ask why, because it is better to take 32 and sell half your investment --

THE COURT: Who was he fending off, though?

MR. GRANT: Well, H&F was one of them.

THE COURT: But what did Spectrum -- what evidence at all is there that Spectrum was averse to doing a deal with Heller [sic] at a higher price and wouldn't have been absolutely glad to do that?

MR. GRANT: Well, I'm not sure there is a lot of evidence right now about Spectrum doing that. I think there is a lot of evidence about Sullivan and management doing that. And I could go through that if you want.

THE COURT: Well, I get that late in the process, Heller wasn't so taken with management, and wasn't as taken with their ability. The original overture was a standard private equity Valentine's Day card.

MR. GRANT: Right.

THE COURT: So there was no reason early in the process to think that they were going to -- that management wasn't going to be both asked and expected to roll equity, receive flowers every day throughout the process, all the kind of usual good stuff; right?

MR. GRANT: No. I think there is some doubt. Remember so Heller comes even before the IPO and says, Gee, I'd like to buy. And they were spurned

then, and they said, No, we'll do the IPO.

THE COURT: But that's being spurned by Spectrum.

MR. GRANT: No, but --

THE COURT: And then we're really reeling back through the years.

MR. GRANT: I'm sorry. So I'm moving forward.

THE COURT: We're in 2007.

MR. GRANT: I'm moving forward. I'm doing what you do. I'm starting a base and building chronologically. I'm not jumping to the end and then backfilling.

So then after they're already public, Heller makes an approach again. And then finally, they make another approach early this year. And that's when management says, Okay, I guess people are serious. We ought to go get an investment bank, and they do that.

So then at that point, they open it up and say, Who's interested? And it appears to me that for whatever reason, including their ability to roll over, as well as some recognition that they have that management will be central and important to Permira,

that seems to be the one that Sullivan likes. And for some odd reason, and this goes back to the tip -- and we've now shifted from the fairness opinion to kind of the uneven-handedness, and I just don't want to forget to get back to the rest of the fairness opinion.

So then at that point, you know, there are -- there is a category of one group of higher bidders and one group of lower bidders. And not surprising, you know, they go to the lower bidders and say, Gee, you're not going to make it to the second round. You've got to do this. But to Permira, they say, You need to get exactly to, and they tell them the number. So that's one thing where they favor them.

THE COURT: You say they favor them because -- did you take a deposition of Hellman.

MR. GRANT: Of?

THE COURT: Hellman?

MR. GRANT: No.

THE COURT: Or some of the others; right?

MR. GRANT: Your Honor, I'd love to, but in these expedited cases, I only get a limited amount.

THE COURT: I'm not faulting anyone. But again, I have to fill out the world; right? Mr. Turner said he told everybody the same essential message.

MR. GRANT: No. No. If we look at --

THE COURT: That is what Mr. Turner said. You may not agree with what Mr. Turner said, but what I'm saying about -- you have more evidence about what Permira was told because you took a deposition of Permira. It doesn't mean that other people, including Heller, weren't told that they were out of the thing and where they needed to get to if they really wanted to be in the game.

MR. GRANT: But there is no specific evidence, and they're the ones who have control of it, to say I told, you know, these bidders that they needed to get to 34.5, just like I told them.

THE COURT: Except --

MR. GRANT: I generally told them --

THE COURT: Mr. Turner said he called everybody up and goosed them, and he told them to get into the thing, and they were at risk if they didn't get their bid up. I thought he said he told Heller specifically, You're at risk in this process if you

don't move your bid, and that we are going to, you know, we're essentially going to focus on the three highest, and they told everybody that.

MR. GRANT: I still think there is a huge difference between being told that and being told, You need to get to a specific number.

THE COURT: Well, I'm going to say something, and I don't mean this to insult Permira, but I never heard of Permira before this case. And so the kind of frisson that must have gone up the spine of Mr. Sullivan with the thought of working for Permira is something that must be a unique thing, you know. Or a very select people who like read "Cigar Aficionado" magazine or something know that working for Permira is better than working for Bain or KKR.

MR. GRANT: I think it can be read a complete other way, to say you know what? I'd rather work for someone like that who doesn't necessarily have the management expertise and the breadth that a Bain or a TPG or some of the other super-sized ones would because they need me a lot more. They will do more for me. They can't replace me easily with the stable of management they have. I think there is a big advantage to Mr. Sullivan to do that.

THE COURT: That's what we have to think about here, because there's nothing -- I haven't been able to glean anything special about them. I mean, and I'm not saying they're not good at what they do, but anything different, any particular personal connection or anything -- I've read the initial bid letters. They as I said looked to me like the standard Valentine's Day letter, but that are careful, because you're more careful -- you don't tend -- and there is a protocol in these about why you talk in the ways you do about management's role. Because if you go over the line, you guys are going to be all over, rightly, if the bid letters are all over the line, in the sense of speaking too directly to management. But almost all of the bid letters refer to the importance of management, looking forward to running the management, including specifically the Heller letter.

MR. GRANT: The Heller letter says that, We will compensate -- you know, we've got to find a way to align our interests, I believe came from that letter.

THE COURT: "We are greatly impressed with Tim and Howard's capabilities and vision for the business."

MR. GRANT: Right.

THE COURT: "We believe that Hellman can be a compelling partner to management to help the business reach its full potential going forward."

MR. GRANT: Right.

THE COURT: "We are not business operators and do not aim to get involved in the day-to-day management of the business, but rather seek to play an active role at a board and strategic level."

And then they have a whole paragraph, senior management -- "our enthusiasm for this transaction is predicated upon the team continuing to lead the organization going forward," and blah, blah, blah.

MR. GRANT: But nowhere do they talk about rollover.

THE COURT: No, they don't, because again --

MR. GRANT: Whereas I believe Permira did.

THE COURT: "Alignment of incentives."

MR. GRANT: That's right. That's the phrase.

THE COURT: "Through appropriate compensation structures for senior" -- I mean, again, I don't know, maybe I've been around too long, but I kind of -- I mean, I know -- you know, that's like saying, Santa has your list.

MR. GRANT: I hear you. So let's jump ahead now to August 6th or to further in the process. Now we're going to Permira, TPG and Providence. Turner says, We're working with these three. We've got to give them a deadline of when they're going to do something. They set an August 6th deadline for a best and final proposal. And he said, I cleared this date with Permira. Not with Providence. Not with TPG. And Providence was the current high bidder at that time. So not I went to them and I cleared it and that's good, but I cleared it with Permira, and it fit their process. And what happens? Providence --

THE COURT: This is Turner or Sullivan?

MR. GRANT: Turner is telling this to Sullivan and Hochhauser.

And then Providence says on July 17th -- this is on July 11th when they do this. July 17th, Providence says, This timing doesn't work.

I can't get it done by then. They still hold to it. So Your Honor can say, Well, I don't know why Permira is --

THE COURT: And why do we? Because the thing is, again, and it's why motivations do matter in things. Providence is not in the process to be the buddy of Ancestry. Providence has its own interests.

MR. GRANT: Right.

THE COURT: There is a jockeying that's going on. Mr. Turner is going to try to digest this. Some people want time for conditionality for their own interests that aren't necessarily aligned with you as a seller. And so you're trying with all of these very aggressive folks to figure out what's real or not real.

And how long had Providence, for example, been doing due diligence by then?

MR. GRANT: I don't know the exact time, but I think Your Honor is maybe missing the question. You've got three bidders in the last round. Providence is the high indication of interest.

THE COURT: Right.

MR. GRANT: Why do you go to the

lowest one and say, Look, we're thinking of August 6th. Does that work with you? And they say, Okay. That's the deadline we're going to set. Seems to me that if you're only going to go to one -- either you do it unilaterally and say, August 6th is the day. You all come in by then. That's one way of doing it. The other way is I go to the high bidder and I say, You know what? Is August 6th going to work for you? Because right now you're in first place.

THE COURT: What date did Providence say would work for them?

MR. GRANT: I don't have that right now. All I have right now is to tell you that of those three, the only one August 6th was run by was Permira, and then Providence objected and said, We can't get it done by then. If they went to Providence, they might have had this discussion and negotiation with them and said, Okay, can you swing it by August 13th? Yeah, that works. Okay, August 13th is the date. And then made Permira go forth.

THE COURT: August 6th passed without a bid from any of them; right?

MR. GRANT: Yeah, because it was a ridiculous date, but it was the one that was run by --

THE COURT: I don't know whether things are ridiculous or not. It's interesting in all these things because the expressions that usually come in early on is that folks really can't wait to work with management and everybody else can do a speedy due diligence process, get to a final thing, and then of course once they get in, it tends to be a little bit different; right?

MR. GRANT: Right, which is why I say August 6th was silly.

THE COURT: I'm not saying -- the process, April -- I mean, when was the downing to three?

MR. GRANT: I believe early July.

THE COURT: Early July.

MR. GRANT: Yes. But again --

THE COURT: So they had had some due diligence before the shrinking to three.

MR. GRANT: Some.

THE COURT: Well, they had --

MR. GRANT: No. Some. They did. Absolutely. Not complete due diligence.

THE COURT: And then they had an additional month of due diligence before the

August 6th deadline.

MR. GRANT: Right. And just to bookmark this, the only reason I say "some" is because it's important to understand that, you know, in the end, only three had full due diligence.

THE COURT: Sure.

MR. GRANT: The other three bidders did not. And I say that because when we get to the standstills, heck, we can draw up a standstill and within two weeks, all these guys who have already had due diligence can run in and make a bid and close this whole deal. So I just want to bookmark there that, yes, there are three who continue on and get full due diligence, but only those three. And of those three, the key, to me, the key takeaway here is they go to Permira, the lowest bidder, and they run the dates by them. And they have this relationship that says, you know, What works for you? Let's make that. And the higher bidders, they don't do that with. And the question is why.

THE COURT: Okay. Why don't we ask them. August 6th passes and nothing happens; right?

MR. GRANT: Correct.

THE COURT: By Permira either.

MR. GRANT: Correct. And at some time over August, they start sort of getting bids, discussions, Well, I'm not sure I could do 35. I don't know if I can get to 33. Maybe I can. And then there is a question of, Can we partner up with someone.

THE COURT: Right.

MR. GRANT: And this other bizarre thing that, Okay, you guys are at 33. We'll let you partner up together, but not the guys at 35. Which I almost understand to say, Okay, now we have a 33 and 35, but the question is why aren't they coddling up to the 35 at that point?

THE COURT: Well, but I thought that there was every evidence that they were -- I don't know what you mean by coddling up. If you mean focusing attention upon and spending a lot of time and giving due diligence to the 35, there appears to be substantial evidence that they were. I think what they feared was that the people you think they so favored were on a continuing downward trajectory in a couple ways, not only in their nominal price but in the, Oh, gee, we can't get to the whole equity check, we can't do all that.

If we take our $35 bid from a very well-respected longstanding private equity firm who we don't really think needs this, probably, I think there might have been some sense on the part of Mr. Turner that Heller Freedman could figure out how to do a deal without Permira; that if you pair Heller Freedman with somebody who is already at 33, Heller Freedman is not dumb, and you go from having potentially two bidders you can play off against each other with one at 35 who provides you with stretch, with the lowest common denominator bid from one single source, no leverage at all, and you're playing hard ball in exactly the lower range that the buyers want you to.

MR. GRANT: No, and I hear you. And I don't really have a disagreement with that. Here's where I'm going with that. So you decide you're going to let the two 33s pair up together, figuring that you have a stronger 33 now. But you've got a 33 and a 35. And what does the 35 say? The 35 says, you know, I'm frustrated here. I'm very concerned about my chances of success in the process because you're not showing me the love. You seem to be favoring these other guys. And I think I'm just being used as a stalking horse.

THE COURT: But where -- I understand there is that. What I don't get to is when they say that the process goes on for several weeks beyond that, the company is clearly engaging with Heller, and I don't understand how, again, is this -- you know, I don't know if they needed to bring in Dr. Phil for Heller or, you know, the guy who used to be on M.A.S.H., who then had the show about the doctor, someone to kind of make them feel warm and welcome. I was looking for that rebuff. I just wasn't seeing it in there. Because the process from that point, I thought that that expression of something was in early August.

MR. GRANT: It is August I believe 9th.

THE COURT: And the process continues really through to the end of the month, trying to get Heller into the game, getting them additional due diligence. There appear to have been multiple meetings to address their concerns. And in the end, they punked out; right? At 28?

MR. GRANT: No. I don't think that's really where it went. I think what they really said was, You know what? We're not feeling the love.

We're just going to put this on hold.

THE COURT: What I'm trying to figure out, I think if they called up Mr. Parker, right, from Spectrum?

MR. GRANT: Mm-hmm, yes.

THE COURT: And said, If we say 35 and lock and load, will you tell us you love us? Everything about this has the feel of Mr. Parker saying, Where is the mistletoe I can kiss you under?

MR. GRANT: I don't know where Your Honor is getting that feeling because I haven't really seen the evidence. What I'm seeing is exactly what Your Honor foresaw in one of the earlier cases where you say, you know, there is a lot of body language, a lot of word choice, a lot of things that go around that can make people feel like they're it or they're on the outside.

THE COURT: But what I'm not getting --

MR. GRANT: And I see no evidence saying that Parker or Sullivan went to them and said, when they're putting together the 33s, to say, Look, you know what? These two guys are getting put together, but if you come to me and say 35 and we're

done, I'm signing. I don't see that anywhere.

THE COURT: But I see there is all kinds of indications of engagement with Heller asking them to come forward and Heller getting the diligence. I don't understand -- for example, I get the whole concern about -- one of the interesting things about here is there's no evidence here that Spectrum would have had any emotional or any financial reason to prefer the interest of Sullivan and Hochhauser over its own interests, at all. And so I don't really understand why they wouldn't want -- there is no indication in the record of why they wouldn't want the higher price, why the cleaner deal for them isn't the higher price. And I think you acknowledged before, 35, for them, they'd have been gone, entirely, and would have been happy to do it.

And so I'm not -- and I got to assume somebody like Heller, they're pretty experienced. They understand Spectrum is in a strategic process to sell. Spectrum has a lot of shares. If we win in price, we win in price. And they're being asked into the process. What more were they supposed to be --

MR. GRANT: No, they're not being asked into the process.

THE COURT: They asked back in and they got back in.

MR. GRANT: They fought their way back in; right.

THE COURT: But again, the assumption I take from your arguments is that if somebody on the sell side tells people that they need to meet marks in order to get into the process, that that is somehow always illegitimate --

MR. GRANT: No, that is clearly not what I'm saying. That is not what I'm saying. What I'm saying is if you have three or four bidders and you go to three of them and say, Look, I need a little more juice here or you're not going to make it to the second round, and you go to the fourth bidder and you say, Look, you've got to get to 34.50. I need the bid by this date, and if you put these little things in it, that's going to show favor and get you to the next round, yes, I think that's not fair.

THE COURT: You're saying that based on Permira telling you about the conversation.

MR. GRANT: Yes.

THE COURT: And then you draw from that inference that Mr. Turner's statement in his

deposition that he had substantively identical conversations with all the bidders, that that's just not --

MR. GRANT: I don't know if he said substantively identical, but what he could have put in an affidavit -- because we put that in our opening brief. They have access to Turner. He could have said, I told each of these people on a meeting on this date that they needed to get to 35 and preferably into the high 30s in order to move into the next round. They could have put that affidavit in. It wasn't.

THE COURT: Why don't you go back. I didn't want to interrupt your train about the projections and all, the projections, because I know we went back in time.

MR. GRANT: Okay. So again, we talk about these projections. Now, if the projections that were created in May were simply they changed the assumptions so that it could be more aggressive, so they changed the rate of what is the SAC, if they changed the rate at -- the customers that they lost versus customers that they gained, if they changed those two or three variables to say, You know what? Instead of 4 percent, we'll make it 5 percent, that

will goose it up, that should have been really easy. That when it came time to say, Okay, now we need more realistic, less stretchy projections, let's just back those assumptions down. Instead of saying that SAC was going to raise at 5 percent -- or I guess that's a cost, so instead of raising at 4 percent, we're going to say it will raise at 5 percent, you just change those three or four variables, someone in accounting should have been able to spit that out in about 15 minutes. But that's not what happened. That's not what happened.

They went back and forth with the idea of, you know, how are we going to get these projections to meet what we need? And in the reply brief, I think we focused on this discussion that was had between Mr. Hochhauser and his subordinate. And it goes back and forth in the e-mails about --

THE COURT: What exhibit are we at?

MR. GRANT: Let me see if I can grab it.

I'm going to skip to another subject because, I'm sorry, I just don't have that at my fingertips.

THE COURT: Sure.

MR. GRANT: But I do want to talk a little bit about the numbers. So interestingly enough, Permira, also based on their due diligence, looked at the numbers and, you know, applied their numbers. And Permira in their June estimate, when they got some information but hadn't taken full due diligence, estimated 2016 EBITDA at 290 million. After due diligence, I think in late July, they estimated at 321 million. This is Exhibit 119.

THE COURT: Okay.

MR. GRANT: Then on August 6th, they raised their estimate to 323 million. And my point there is that there is this alleged view that, Gee, when everyone got into the data room and started looking at stuff, everyone's view of the room was, Gee, this was overly optimistic and that's not what's happening. In fact, that's not true.

Permira itself, the EBITDA estimates for 2016 continued to go up. And at the time that they presented it to their own investment committee, they had 323 million as the 2016 EBITDA. So --

THE COURT: That's their own internal -- that was the Permira or that was --

MR. GRANT: Yes. That was their

internal from Permira, after they finished their due diligence. They had never changed after August 6th, 323.

THE COURT: But the -- and that's different from the management, or is that the management projections from the spring?

MR. GRANT: That is slightly lower than the management projections from the spring but substantially higher than the --

THE COURT: No, I understand that.

MR. GRANT: -- sensitivities.

THE COURT: What I'm wondering is, is this essentially the sell-side projections that were given to the bidders at that time and Permira was taking them to their investment committee with the hurdle tables?

MR. GRANT: My understanding is this is Permira's own work product that they put together after they had full due diligence.

THE COURT: Due diligence.

MR. GRANT: Then we look at Defendants' Exhibit 99. And this is Chris Tripoli, who worked for Howard Hochhauser. And what he's doing is he's the guy who is actually crunching the

different sensitivities at this point after he's gotten the information back from Qatalyst. And this is on October 10th that he's crunching these sensitivities, which of course is interesting because remember, they actually reached the deal on October 11th. So they're crutching these sensitivities.

And, you know, if you look at the e-mail at the bottom of the page, "With the assumptions we discussed, we land at 2016 Revenue of $717 million and EBITDA of $259 million. For perspective, to get to $285 million I would have to assume churn remains flat from 2014-2016 (not totally outrageous considering the natural maturing of the subscriber base, potential DNA impact on retention and historically higher churn during" -- I guess that's the TV show, all those letters down there.

He then goes on in later e-mails to say, you know, okay, basically, and now that you've given me the number, if I make these changes, I think I can get to, you know, where you need to be. I mean, this is after the fact. This is not based on someone saying, Well, we missed the first two quarters of projections or we think this changed or that changed.

The only things that changed was they dropped the WACC, the bottom of the WACC down to 9, for no apparent reason.

THE COURT: They testified that -- again, I know conspiracies are complex, and so dropping the bottom end of the WACC, how does that help except to expand the range? Because, frankly, the lower the cost of capital, the higher the value is going to be.

MR. GRANT: Right.

THE COURT: And so there was testimony about objective market factors that they used in their model that when they were doing the measuring rod for the fairness opinion, they had to take into account. And that had the effect of bringing down the WACC. They talked about using the Barra beta, and basically, when you took into account the market data from the last time they did it, it had the effect it had on the WACC.

MR. GRANT: No. They said part of it was the beta. They didn't tell you what the other part was. We still don't even know.

THE COURT: But why would they -- again, if the sinister --

MR. GRANT: I'll tell you why they did it. Because otherwise, when you came to those ranges, 32 wasn't in the range. It was above the range. In other words, it would show how ridiculous it was. Their range would be all of a sudden now 24 to 29.

THE COURT: So they had overshot their tubing of the projections?

MR. GRANT: To an extent, yes. It was one of those ways of just broadening the range so that at least this could be within the top end of the range.

THE COURT: For a simpleton, what is the EBITDA growth rate to 2016 under the revised projections?

MR. GRANT: I don't remember the number but I will tell you, it is a consistent growth rate throughout that time. No changes. No judgments. No anything. It's just a consistent growth rate.

THE COURT: But it is a growth rate; right?

MR. GRANT: It is a growth rate.

THE COURT: The other one was like a compounded annual growth rate of something like 18 percent?

MR. GRANT: It was impressive growth. I just don't have these numbers in my head, and I apologize.

THE COURT: The other one is based on five years of 18 percent growth?

MR. GRANT: I think it's based on historical, but I think it's also based on the company sitting down and saying, What do we think the next four years are going to look like? And there is actual, you know, judgments and assumptions put in there. It wasn't, What do we need 2016 to look like, and then let's just say it's all averaged there.

THE COURT: No. I mean, this isn't a company focused on the domestic United States population's interests in learning their own family trees; right? And then --

MR. GRANT: That's how they started, but they realized international expansion was a huge opportunity for them.

THE COURT: Sure. But in order to do international expansion beyond the DNA thing about knowing whether you're 7.7 percent Norwegian, in order to actually trace your family history, if you're going to start going back, you know, to County Cork or

something, you're going to have to get the County Cork probate files and all that kind of stuff; right?

MR. GRANT: Correct, assuming they have probate files.

THE COURT: So we're talking about filling out the domestic market, again, between now and 2016 in terms of people who want to do their family tree and all that kind of stuff.

MR. GRANT: Right, but there were also some very big opportunities. There was the opportunity to tap into the Mormon population, which they had just signed, because they had just signed something to get all their data and records. And there was this opportunity --

THE COURT: Tapping into the LDS population or is it using the records of the LDS church and making them available to others? I'm assuming if you're within the LDS community --

MR. GRANT: The answer is yes.

THE COURT: -- you can take advantage of that as a church member; right?

MR. GRANT: Right.

And the other thing, obviously, it looked like the TV show was going to be picked back

up. So there were a lot of positive things going on.

THE COURT: I'm just trying to get a sense of -- what was the compound annual growth rate in the revised one?

MR. GRANT: You know what? Your Honor, I have something in front of me that tells me, but --

THE COURT: I don't want to put you on the spot.

MR. GRANT: I don't have the level of confidence that what I have, that I'm going to give you a right answer. And you know that I will never give you an answer that I don't feel confident about.

THE COURT: Let me ask you a hard question about your case, which is this: If I don't come out of the evidence and the hearing today believing that anyone tried to do the wrong thing, why would I grant an injunction?

MR. GRANT: Because even if it was a duty of care violation, that the board wasn't trying to be evil, but they didn't quite realize what was going on, if they have put in false information, knowingly or accidentally or with the best of intentions, in the proxy statement, you cannot let

that go to a vote.

THE COURT: But I want to focus on this precise point, which is false information. The proxy has a range -- for example, the story you're telling, your clients could tell in the investment community.

MR. GRANT: Well, Your Honor, I'd like to be able, to except it's under seal.

THE COURT: Wait a minute. Your clients, other people could say, Look, from this proxy statement, it's pretty clear what they did. They ran out and they ran a sales process. They didn't get the bids that they wanted and they changed the projections, and the proxy statement shows you. And you ought to believe the value range based on the original projections they gave all the bidders, and this is a stinky deal.

So I have a situation where it's not like they hid the original projections or the value implications of them. They put them side by side with the new ones, which means, frankly, a skeptical investor applying a gumption factor could say, you know, this didn't yield what they wanted. But I'm at a preliminary injunction stage. You're asking me to

say not that they failed to disclose the original projections and the implications, the value implications of them, but they're lying in the proxy about the disclosure around the sensitivity case.

MR. GRANT: Correct. In other words, they told a story that said, We put these sensitivities out because we were getting negative feedback and we were doing all this, but if you look at that exhibit, at that Appendix 1, it doesn't match up with the facts and the timing, the story that they tell in the proxy. It doesn't match up with these, and they're just wrong.

THE COURT: Didn't they start doing -- didn't Qatalyst begin work in early August, trying to figure out why the bids were coming in different and why the bidders were coming in at different numbers? I thought there was evidence that Qatalyst itself and then later in the process, that Qatalyst said, in terms of giving our fairness opinion, Frankly, we're not going to do our own sensitivity case. That's not our job in this. That's not what we do, and we would violate every canon of investment banker fairness opinion letters to ever, you know, vouch for our own sensitivity cases.

But I thought there was evidence that Qatalyst and the board began considering in early August why it was that these bids were disappointing. They were hearing feedback from the bidders that they were skeptical around certain of the metrics, that they were skeptical, frankly -- I mean, this is a feel I get, and I'll put it in my own layperson's terms. That management had a good sense of the product, kind of creative into the product, but management's feel about the delivery and measurability of how it was going to translate in the real world over time was something that some of the bidders were a little more skeptical about.

MR. GRANT: Okay. We just need to stop for one second because what you've got to be very careful that you don't do is take the fact of when something happens and attribute the spin which the defendants are, because those don't match.

THE COURT: That's why I'm asking --

MR. GRANT: Right. So let me go back.

THE COURT: -- about your take on it.

MR. GRANT: It is true that by August 6th, Qatalyst is working on sensitivities. So they're working on, you know, Gee, what's going on?

Not even sure exactly why. But they're starting to work on sensitivities. And this is true during September.

Now, the interesting question is, you know, why are they doing this? Because the board doesn't ask them to do this exercise until the 16th of October. The board doesn't ask them to do this exercise until the 16th of October. So they're doing things and they're communicating with management and they're putting these things together, and I think it's because they see where this is going.

And they're -- you know, Quattrone is good, not necessarily honest, but good. And he says, you know -- so Qatalyst says that, you know, we're trying to work on this fairness opinion to get an idea that this may be coming in the low 30s and we're having trouble getting to it.

And then in late September, Hochhauser and Qatalyst are going back and forth saying, Look, we're going to have a problem here. I'm telling you, we can't give you a fairness opinion given these numbers. And you're going to have to change these numbers if we're going to be able to give a fairness opinion. And then Hochhauser steps in and starts

working on some of the numbers. And one of the interesting things here --

THE COURT: The fact that they told them they were unlikely to give a fairness opinion at those numbers, is that disclosed in the proxy?

MR. GRANT: I don't think so. I don't think so.

THE COURT: That's not disclosed?

MR. GRANT: I don't think so. You know, in the two weeks that we've been at this --

THE COURT: I get it.

MR. GRANT: -- there is a lot of information, and you've got to be careful where -- but I'm pretty sure they didn't do that.

The other interesting thing, you say to me, Gee, I think there is sinister reasons. Well, when management -- when Qatalyst is working on this, they want to change it to, you know, we got these projections based on our discussions with management and we put a lot together. And counsel to the bidder says, We really ought to be saying that these were just based on management discussions because we know that management isn't really the one who put these together. And Qatalyst says, Woah, no way. This can

not at all look like these are our numbers. We need to put on this "management's numbers."

THE COURT: No, I get that. You understand, too, that there's like three, you know, trained -- they might be the size of the pocket purse dogs that people have and put on tables. I was actually at a dinner recently where there was a dog at an adjacent table. Just a little disturbing.

MR. GRANT: Especially in a Vietnamese restaurant, Your Honor.

THE COURT: You know how there is always -- there's the reality, is that no -- the banker's barking dog lawyer is never going to let the bank -- you know, if you read a fairness opinion, if you read a fairness opinion literally, no one should ever rely on them because they're just entirely a disclaimer of anything. Which is I relied blindly, deafly, dumbly, on everything that was told to me. Anything in here cannot be regarded as my professional judgment.

But I mean, when I read that, it was just like, No way. That doesn't match our disclaimer. These have to be your projections.

MR. GRANT: Right. But we all know

that the projections in large part came from Qatalyst, which calls into question, let's see, will reaching of the numbers -- because if we use these numbers, we can give a fairness opinion.

THE COURT: Which is part of what I was getting at about this whole notion of people lying, which is I do think it's important for me to know. And actually, my crack team tells me that the high case sensitivity number is about 3.7 percent compound annual growth rate, and the low case is about 1.6 which is a fairly steep --

MR. GRANT: Compared to 18 percent.

THE COURT: It would be a fairly steep drop.

MR. GRANT: Yes.

THE COURT: But is, you know, what do you do about this if I don't believe it's a lie? That's part of why we have damages cases, which is one of the things I was going to say to you. Unlike your typical state-of-the-art now non-*Revlon Revlon* case, right, where you could actually say a damage claim isn't viable. I mean, a lot of times, there is nothing there. Here, you've got a couple things where you say our conflicts of interest have motivated

people.

In the context of this deal, I mean, Spectrum has -- there is no reason why Spectrum wouldn't be good for the money. And Sullivan is going to be stuck in. So if they actually, frankly, breached their duty of loyalty, then they would be outside their exculpation; right?

MR. GRANT: Yes. Yes.

THE COURT: And my concern about a disclosure violation is, typically, disclosure violations, in terms of sustaining an injunction, are based on omissions of material fact, not that what was -- not that somebody is lying about something; right?

Now, what you're telling me is that -- or we might be having is that one contextually important piece of information may be missing from the chronology in the proxy statement, which is whether or not the defendants would agree with you that these were just simply, you know, falsely designed to make the deal look fair. There is no doubt that part of the chain of chronology is they were prepared in substantial part because Qatalyst said, You're not going to get a fairness opinion based on these

original projections.

MR. GRANT: I'm pretty sure they didn't disclose that.

THE COURT: Okay.

MR. GRANT: But then let's get to the kind of second big issue why an injunction has to issue.

THE COURT: And what I'm going to say, in the interest of planning, Mr. Grant, is I don't know whether you can finish by 11:00 or like 11:05 or 11:15, but then we would take like a 15-minute break for humanity's sake and come back with the defendants, if that makes sense.

MR. GRANT: I'm also willing to break right now if that would be helpful to Your Honor.

THE COURT: I think we might want to finish if you're -- would you prefer to break now?

MR. GRANT: I'd prefer a break rather than a hard stop at 11:15.

THE COURT: No, no. What I'm saying is we're going to give much more time to this case than is typical of any court since the 19th century, but we're going to finish at some reasonable time today. And what I mean is, what I was saying is if I

give you until 11:15, that's almost another half hour. And we've been going since a little bit after 9:30. So we can take a break now and come back and go another 20 minutes, or we can just finish at 11:15. I promise you're going to get plenty of time in rebuttal.

MR. GRANT: I'll finish by 11:15 then. That makes sense.

So the second big area are these "Don't Ask, Don't Waive" standstills.

THE COURT: Right.

MR. GRANT: Now, I'll spend as much time as Your Honor thinks I need to on the fact that they have waived the don't-ask portion.

THE COURT: Did they -- and again, this is another question about the proxy statement. Did the proxy statement identify that the standstills contained the non-waiver?

MR. GRANT: No. And not only that, the board didn't know. To a person that we spoke to, the board didn't know. The banker I don't think understood. Nobody understood.

THE COURT: Well, what's interesting, and there is a cognitive dissonance about this, is

obviously, how do you deal with the fact that Hellman certainly didn't take the non-waiver provision as a bar to it basically calling up the banker continually and saying, you know, We're still interested in buying you guys?

MR. GRANT: Oh, no, Your Honor, that's not what the "Don't Ask, Don't Waive" is. What the "Don't Ask, Don't Waive" is, it stops you from putting in a bid.

THE COURT: No, no, no. I understand that. But there is a dance here. And the concern that's been raised about the no-waiver thing is that you can't request a waiver, is that everybody knows you can't make a bid, but the no request of waiver is I can't even communicate why I would like to do something. I can't actually call up because if, directly or indirectly, I'm asking for a waiver, I'm in literal contractual breach.

MR. GRANT: Right.

THE COURT: And I also understand there is an origin here, which is there is some sense in your brief that this is a new innovation. That's not actually my understanding.

MR. GRANT: It's about five years old,

and it's only been challenged or tested I think twice, both times rejected.

THE COURT: *Celera* was a settlement opinion. The other one was a bench decision.

MR. GRANT: Well, that's two. Better than what they got.

THE COURT: I understand the difficulties with these things. I also understand why they exist, which is -- and it's my understanding that they're, frankly, fairly common and have been since there was basically somebody who used a waiver request to try to jump a standstill. I know people have mused about public/private. There is no such thing as public/private because all I do is say, Mr. Grant, I'd like a waiver to make a bid at 47.50. It's totally private. You know, I'm private. Now, what you have to do under the securities laws might be public, but, you know, deal with that.

What I'm getting at, though, here is apparently there wasn't any disclosure of the existence of these things in the proxy statement; right?

MR. GRANT: I believe that to be true.

THE COURT: But Hellman apparently

never felt that it was an inhibition to expressing a continuing interest; right?

MR. GRANT: Yeah, but I just think you have a misunderstanding here. The way I understand these "Don't Ask, Don't Waive" is once a deal is signed, you can't ask or waive to come in and make a topping bid.

THE COURT: See, no --

MR. GRANT: It's not just part of the process.

THE COURT: No, no. I get that. I think you're limiting it though, in a way -- I think one of the problems with these -- these are very delicate instruments. And I think -- and I'll engage with your friends about it. I understand why a seller could use these in a very value-enhancing way.

MR. GRANT: I don't, and I'd like to discuss that with you.

THE COURT: Well, let me just say for the purpose of what I'm going to ask you next, I can actually see in an auction context where you actually have worked hard to identify the most serious bidders in the world, where a well-motivated seller could think that extracting the highest possible bid from

each of them was the most certain way to get the highest price. Because if you tested the market and you've got the most serious people, then the idea that somebody comes -- that instead of buying the next English Premier League team, some petrol oligarch decides to buy Ancestry.com for fun, that that might happen and God bless, but you know, what I really know is I've got three potentially big fish who are interested in my bait, and I want to have them pay the thing.

What we're getting at here is I thought -- you're saying that it was limited to a time when you signed a deal. I actually don't think it's written that way, is it? Isn't it written from basically the time you sign up the standstill?

MR. GRANT: From the time you sign up the standstill, you can't buy; correct.

THE COURT: See, the thing about the waiver request, and this is where the don't ask for the waiver comes in, everybody knows, right -- I don't think there is any controversy about what the standstill does in terms of, you know, an actual purchase. A typical standstill also extends to an offer to purchase.

MR. GRANT: Correct.

THE COURT: And the problem with the non-waiver request, right, that's been identified, is that I then can't call you up -- you're the issuer's counsel -- I can't call you up and say, I'm not going to make a public offer or anything like that until you let me. I would like you to waive the standstill so I can make the $47 bid.

The non-waiver request is written in there because of the very nature that I can essentially get around the purpose of the standstill by just making the waiver request.

MR. GRANT: Right.

THE COURT: And here's the thing, and you may not agree with it. Here's why people say from a well-motivated seller's perspective, this could be a value thing, is if you're the final three people in the auction, and the seller is trying to actually tell you all that it is an auction, you can assign that provision in favor of the winner in the auction, arguably; right? And you can say to each of you, You better pull out your highest price because you know you've signed this non-waiver, non-ask standstill. And as to the three of you, this is the time in the

world to put your best price on, and you better act like it's that now. Because later on, you're not going to do this. And in fact, the winner in the auction, we're going to give you, potentially -- we're going to give the winner in the auction -- all three of you are on a level playing field, but the winner in the auction is going to have this right assigned to them. Now, that may be problematic in terms of things, but frankly, you can also see how that could be a tool.

MR. GRANT: No. Can I take that issue on right now? Because --

THE COURT: Before you get on to the issue of why you don't see it as a tool, Hellman doesn't seem to have viewed the non-waiver thing as any bar to it from calling up during the process and saying, We still love you and want to buy you; right? And you didn't read it that way either?

MR. GRANT: I didn't read -- I'd like to split these things up and take on the Wachtell propaganda first and then come back to Hellman.

THE COURT: I don't know what Wachtell propaganda is.

MR. GRANT: Well, what you just

articulated is the sales piece that goes with the service of providing these "Don't Ask, Don't Waive" and I want to tell you why --

THE COURT: I think it's probably a quite broader group of propagandists than just Wachtell. I think quite a number of --

MR. GRANT: I like to give credit to the originators. Look, I marvel at it. It's interesting.

THE COURT: Well, it will be interesting to trace back. I'm not sure it was Wachtell who originated it.

MR. GRANT: I thought it was, but be that as it may, let's talk about it a little bit.

So you have three folks who are all bidders at the end, and you want to get their highest bid out. And so I'm sitting there as one of the bidders and I'm thinking, Okay, all I have to do is beat the other two guys. And as long as I beat them by a penny, I'm going to get it, and I am insulated now from anybody else, because you've already got all the likely potential bidders to sign this thing, from anyone else coming and topping me.

THE COURT: No.

MR. GRANT: So --

THE COURT: Huh-uh. That's what I mean about this in terms of creating an auction process. The people who you would be insulated -- you would be looking at your two fellow bidders.

MR. GRANT: Right.

THE COURT: And you would each be realizing, that if I win --

MR. GRANT: Everybody else is shut out, effectively.

THE COURT: Not everyone else. Those two. And the problem for the argument against it in terms of this per se thing is on your view of the world, right, remember, if everyone else -- no one who doesn't sign this is bound by it. Which means that if you assume that only three people have signed it, it's those three parties, and they're in a competitive process already, and they've been through this. And so they're each being told -- given the maximum incentive to put their highest bid on the table at the process.

MR. GRANT: No. No, that's not correct.

THE COURT: Wait a minute. The

hypothetical here would be that you've got these three folks. They're each told, The winner will get the assignment of this clause. That means they know if they're the winner, they get the high hand. If they're the loser, they're shut out.

MR. GRANT: Right.

THE COURT: Let's assume.

MR. GRANT: Correct.

THE COURT: That doesn't shut anyone else out of the process.

MR. GRANT: Well, that's a big assumption now.

THE COURT: No, no. It doesn't shut anyone else out of the process on the virtue of that provision because the only people bound by that provision are the people who signed it. Which means if there are people outside the process who -- a strategic or somebody else who wants to come in, they would be free, assuming compliance with the other provisions of the merger agreement, to express it. The two losers in the auction, I agree, in this scenario, would be shut out.

But if that's problematic, if what you're saying -- remember, if what you're saying in

your theory is that those are the most probable buyers, right, and they're the ones from whom you would think you would be in the best position to get the best price, that's exactly what people would argue is, that's what we're saying. We want to make it among them as much like an auction as possible so that they actually pull as deeply out of their pocket as they can.

MR. GRANT: But that makes no sense. Again, just let me run with this for a moment, Your Honor. First of all, you don't only go to three. You canvass the most likely ones, as in this case, and you have about a dozen of the most likely bidders who are now subject to this "Don't Ask, Don't Waive." So you've really gotten, as Your Honor said, basically everyone who makes logical sense except for the Russian oil oligarchs who, instead of buying the English football team, is going to decide to buy Ancestry. So but you've got 98 percent of the world who you think are the likely buyers.

Then you got down to three finalists. And when you're sitting there, the finalists all know that if I am the successful bidder here, not only are my two competitors here, but a lot of the others are

also out because they've all signed it.

THE COURT: Well, that depends again on how you do it.

MR. GRANT: But that's how it's done here, so let's make this as realistic as possible.

THE COURT: Actually, what they've done here was interesting, which is they did not assign it to Permira.

MR. GRANT: No, no, it's not assigned.

THE COURT: But they didn't release -- one of the things I actually understand and consistent with part of what you're arguing is there are many situations in which these things fall away. The issuer has that -- the non-waiver part falls away when the deal is signed, particularly if it's a no-shop deal that contemplates the possibility of a superior proposal.

MR. GRANT: Right.

THE COURT: So the issuer will actually do what was done -- and I concede with you, it could have been done earlier, and that shows the care with these things. But when the process is done, they signed the definitive acquisition agreement. They released the non-waiver portion of the

standstills as to everyone. You don't need to release the standstill part. And you would probably get in hot water with anyone with that.

MR. GRANT: Right.

THE COURT: But you release the non-waiver part, which then allows them --

MR. GRANT: You release the whole non-waiver and the non-ask. You release it all at once.

THE COURT: Well, I'm saying, you do that, and then if somebody wishes to come in -- if somebody has afterthoughts and regrets and wishes to make a superior proposal, they're freed up to do it.

MR. GRANT: And that would have been a different discussion, but let me get back to what was done here.

THE COURT: By the way, incoming new, my EBITDA calculation was updated, and it's amazing how one can do these things with staff, able staff. If the low case is 7-1/2 percent growth, then the high was 11 percent. Still much lower, but the other one was a different metric.

MR. GRANT: Okay. So again, going back now to the "Don't Ask, Don't Waive," so you have

the three together. You have 15 now who are precluded. So I am sitting there in this go-to game theory. I am sitting there and I say, All I really have to do is beat my two competitors by a penny and I get it and I'm safe.

And so if I knew that Mark was going to bid 42 and Cynthia was going to bid 43, the smart thing for me to do is bid 43.01. That's what game theory would tell me. I get it and now I'm protected from anyone else.

THE COURT: And --

MR. GRANT: Wait, Your Honor. Let me just --

THE COURT: Anyone else who signed that.

MR. GRANT: Right. Anyone else.

So now I'm only worried about the oligarch who doesn't want to buy the English football team. Now, contrast that with I got a bid against these guys and I'm worried that they're not out. So now Mark bids 42. Cynthia bids 43. And I say, Well, wait a minute. I want to be in the catbird seat. I want to be the one to sign the deal. I want the breakup and matching rights and all the rest of the

booty that comes with it. If I say 43.01, even though I'm willing to go to 45, I know there may be one of these folks come back or one of the other 12 or 15 who signed and they'll top me at 44. So what I say is, You know what? I think 45 is the most that anyone could possibly offer. Instead of just beating them at 43.01 and saying, Deal is over, locked up, I need to go to 44.50 because with that little booty that I get from being the winner, of the breakup fee and everything else, I know no one else can bid, and the oligarch will have to go to 46.

So in fact, not having that, the threat of a topping bid, is what actually forces me in the auction to pay more than just 1 cent over the high bidder. And that's why it makes no economic sense what they're saying. They cannot show in any scenario why having everyone shut out and there be no possibility of a topping bid could ever bring out the highest price.

THE COURT: Well, again, I think what you would be saying there -- and I mean, the thing about the difference between the roll of the cord and even the stockholders and people who have to make the decisions is if they're well motivated, they get to

make them. I think that there are probably economists and other business people who would say, Yeah. Actually, the finality of an auction is the best way to do it. And the more you can tell the folks that the end is here, and that if you are the winner, you are the winner, is what gets them to the highest price.

MR. GRANT: If you're the winner, then why don't we have a rule in Delaware that says if you're the winner, you could be completely locked up where nobody else could ever bring another topping offer. Let's have a don't talk, don't shop, don't whatever, go into a solitary room and lock the door so nobody can communicate whatsoever. But we don't.

THE COURT: We don't have a lot of rules in Delaware because we don't do a lot of per se rules. That's not what judges do in the common law. And because people -- you know, it's amazing how folks actually tend to do relatively sensible things, and it needs to be cuffed back once in a while, but you're positing extremes.

And, you know, if you actually think -- again, these are the three bidders. You've had them in a process for three months. You're trying

to actually get them -- if they believe that it is not the end, right -- what we all have to do, if you believe it's not the end, then you don't pull out your highest price, because you have no credible reason to believe it is the end.

MR. GRANT: Well, but, Your Honor --

THE COURT: And you might as well, because precisely for the reason -- it seems to me there is at least a plausible case for the one penny more scenario when you know it's not the end, because the reality is it's clearly not the end.

MR. GRANT: We're not talking about what's not the end. And first of all, one of the things in our law is until the deal closes, it's never the end. That board has to come up with a recommendation, and if circumstances change, they're required to change their recommendation.

THE COURT: And that's why some of the talk about these things and the reality is that there are a lot of people in the transactional community who are not sure what these things are worth because more edgier '80s style acquirers -- in fact, when you think about *Revlon*, I believe one of the more assiduous acquirers may have played a role in making this more a

market practice because of a standstill situation.

MR. GRANT: But, Your Honor, there are some tools that no matter how -- you know, what the good faith that they're used for, we just don't allow. So we don't allow dead hand poison pills. We don't allow lockups of 20 percent, breakup fees. We don't allow --

THE COURT: I don't know of any case that says that a 20 percent termination fee and some compelling circumstance is per se invalid. I just don't know where it is that any -- there is any case that says that or a judge got appointed to do it.

I think the dead hand poison pill, I mean, it's a pretty clear instance of how could that ever be equitable. That's probably the biggest example. I think there is a lot of debate about the -- within a lot of communities, about whether then-Vice Chancellor Jacobs' approach to *Quickturn* was more consistent with the traditions of Delaware law than the ultimate decision that was taken. Because there are an awful lot of things that boards of directors do that bind the company long-term. And the dead hand poison pill is sort of the easiest case in the world, because --

MR. GRANT: But we don't allow no-talk provisions.

THE COURT: I think that we do if they're used correctly. I don't think there is some bar, for example, of any no-talk at all, altogether.

MR. GRANT: I think anything that prevents a superior offer from coming, that just absolutely bars it, and that's what the "Don't Ask, Don't Waive" does -- it absolutely takes 99 percent of the likely bidders and it says, You can't bid now after we signed up the deal, that you cannot do that, and you cannot even inform us that you would do that, which might cause us to change our recommendation.

THE COURT: Again, the thing is maybe we just have a difference of view about the omniscience of people who wear robes and about our power. But I think that one of the things Courts have to be very careful of in terms of protecting the interests of people like you represent, stockholders, is this: A well-motivated board who has people in the process, up front during the process, and is trying to get them to get to their highest price -- what you're assuming is that the most likely thing that they ought to be thinking about is that most of the people

participating in the process actually don't want to buy through a process. They actually want to jump the process later on. And then what the board should do is to make it pretty much just an option for the first contract, have no advantages or incentives given to the winner in the fair process up front, so that you have the ultimate optionality for someone to then come in and make a superior proposal later on.

MR. GRANT: Why would anyone want to sandbag who wants the company and say, I don't want to be the winning bidder when I get all of the legs up of having access to all of management and having management on my side, to having a breakup fee, to having matchings rights, to having everything we give deals these days? Why would I not want that position and, instead, want to be the interloper? That's just not rational. Of course I wouldn't want that position. And so I always want to have that position, so no one is going to hold back and say, Gee, I don't want that position because how cool would it be after they announce that deal to come back a week later and say, no, I've got a higher deal?

THE COURT: Because, again, if the board is trying to get the maximum price that they

can, which is their charge, then if they can goose it up 50 cents --

MR. GRANT: That's the illusion. They can't. It doesn't make economic rational sense to preclude all the other bidders in this "Don't Ask, Don't Waive" --

THE COURT: It doesn't preclude, under this scenario. Using preclude, the term "preclude," as to a bidder who had every opportunity itself to get the same deal protections if it won, that's a very strange thing. Preclusion has got to be, we've got to be very careful about using it in terms of there is a very different purpose to deal protections that are used when you get people in a process in order to generate competition in a bid than slapping in your favorite bidder up front gets this full array. And you pointed that out in cases, and rightly so.

And a board who has gone through a rigorous process that's trying to pull that value out of the last people in an auction, frankly, is in a more plausible situation than if they go to their favorite bidder up front and say, You be the stalking horse. You'll get a 4-1/2 percent termination fee, full matching rights, the whole array.

MR. GRANT: Right, but here what they did was they got 14, 11, something like that, they got the most likely bidders and they got them all right at the beginning to sign this. So they knew that now, whoever they picked, that was going to be the likely bidder.

THE COURT: And they had -- one of the things they did, and you can fault it or not, but they were trying to be -- to encourage people to get to higher levels. That was part of syphoning down to the three; right? Which is --

MR. GRANT: Your Honor, the board didn't know about these.

THE COURT: No, I'm not talking about the --

MR. GRANT: The board didn't know about them, so how can you say the board is using them to get higher bidders?

THE COURT: I wasn't referring to this provision in that. I'm agreeing with you to this extent. And I'm going to ask the defendants why the board didn't release the non-waiver provision once the deal was struck. Because if there was no contractual promise to Permira -- right? I mean --

MR. GRANT: Can you ask them why the board didn't even know about it at any time? Until our brief came in?

THE COURT: You know me. I will likely ask several questions.

MR. GRANT: I have no doubt.

THE COURT: But I mean, at this point, I understand what you're saying about no one could get a deal done. People are free to make an expression of a superior proposal.

MR. GRANT: I'm sorry. Once more?

THE COURT: All of the folks who signed the non-waiver request, the non-waiver provision, have been free since December 11th to make an expression of a superior proposal.

MR. GRANT: No.

THE COURT: Why not?

MR. GRANT: They've only waived the don't-ask. So now, what happens --

THE COURT: No.

MR. GRANT: No. This is important because of the timing. So this deal is going to be voted on the 27th. So what you have to do now is you have to go, and you'd say, I would like the

opportunity to be able to propose a deal to you. Because you've waived the don't-ask, but you haven't waived the don't-waive. So the standstill is still there. I have to say, Would you please waive that so that I can actually make a proposal to you? And they say --

THE COURT: Someone could call up counsel and say, My client would like to make an expression of interest that could be reasonably likely to be considered a superior proposal under the thing. We would like a waiver to allow us to make such an overture consistent with the merger agreement.

MR. GRANT: And counsel says, I will have to ask the board, and we'll schedule a board meeting, and three days later, they schedule a board meeting.

THE COURT: Okay.

MR. GRANT: No, Your Honor, that's the way it works. It's not going to be, Okay, go do it. It's going to take a certain amount of time. And all we have is 16 days.

THE COURT: I will agree with you that a lawyer is going to call the client.

MR. GRANT: The client has to have a

board meeting.

THE COURT: I will not agree with you that it's going to happen in three days.

MR. GRANT: A day? Two days?

THE COURT: I don't even think it will take half a business day.

MR. GRANT: I don't know.

THE COURT: It's not even clear you need the entire board.

MR. GRANT: And then somehow --

THE COURT: I'm not sure your chairman and your CEO and your banker and lawyer together couldn't make that momentous decision under the "ask for forgiveness not for permission" rule.

MR. GRANT: You have more faith in the speed that they act than I do. But the problem is then why didn't they just say, You know what? We'll waive the whole thing. Why only waive half of it? Because that would allow just one step to say, okay, here it is. I can make --

THE COURT: You're not going to waive the standstill; right?

MR. GRANT: No, no. It says "Don't Ask, Don't Waive." What I am now waiving is I am

waiving -- not that you can buy, but you can come to us with an offer. Now you have to ask, May I please come to you with an offer? And then they say, Yes, and then you can come to them with an offer. Or they may say, You know what? I don't know. I have to check. Why do you want to come with an offer? Do you have a good reason why you didn't come with it before? We'll have to think about it.

THE COURT: I'm pretty sure they can only terminate the merger agreement, unless I miss my guess, unless there are certain hurdles that they go through. And so what you would be saying is -- I'm not sure they would actually be allowed to terminate -- I mean, you get a proposal -- I mean, it's just, typically, especially the types of buyers you're talking about here, the way they would get in the game would not be to just announce an offer.

MR. GRANT: My point is, Your Honor, they didn't waive the whole thing. They simply waived the don't-ask. So now you can ask and get permission from them.

THE COURT: And --

MR. GRANT: But in the end, you know, and this is the ultimate question, how can a board use

this "Don't Ask, Don't Waive" provision to get the highest possible offer when the board doesn't know that the "Don't Ask, Don't Waive" provision exists and they don't know how it operates?

It's kind of odd saying, You know what? I'm going to use this great tool to fulfill my fiduciary duties, and by the way, I don't know that the tool exists and I don't know how to use it.

THE COURT: No, no. I get it.

MR. GRANT: Which is kind of fascinating.

THE COURT: In an odd way, what you're saying is you may not like it, you may think it should be outlawed, but if it was actually going to be used for the purposes they say it actually has to be attended to and used for that purpose and communicated, and if nobody thinks it really means what they say or nobody even knows it exists, then it might be just impeding some people who take reading words literally, not impeding others, and not really doing anything, though, to jack up the auction price.

MR. GRANT: Right. The potential acquirers sure know it exists. It's just the board who is supposed to be using this tool --

THE COURT: I'm saying with respect to the Hellman thing, it's not even clear with respect to Hellman that they thought -- because there is no temporal -- I'll ask defendants this, and you guys can check on the break, which we're about to take or the reporter is likely to kill me if we don't. I don't believe there is any temporal thing. I think from the time they signed it up until the expiration, it applied, which means I believe what Hellman did, literally --

MR. GRANT: But if that's true, Your Honor, then no one could actually --

THE COURT: Hellman did literally breach the literal terms of it.

MR. GRANT: Then no one could actually ever make an offer, even within the auction process.

THE COURT: Unless invited.

MR. GRANT: Well, that's a very odd way of running an auction.

THE COURT: Again, it may be troublesome, and I have no doubt it's troublesome and has to be monitored, but it's actually not odd. It's saying, We're running a process, and there are bid rules, and there are times and windows when we invite

you to do certain things. Because I think it says without essentially our invitation. And so then it would be saying here's when you get your window. And frankly, when your window closed, when you were kicked out of the process, right, that would be the whole point of --

MR. GRANT: So, for instance, on August 6th, you were supposed to make your bid. When you didn't make your bid, you're not allowed to make your bid anymore unless they say, Okay, I want to hear it.

THE COURT: Pretty much.

MR. GRANT: And that's the way to maximize an offer, maximize price.

THE COURT: No. That's what I'm saying, I'm going to ask your friends, Mr. Grant, these things have to be used with care if you're going to put it in there. If it is your gavel, if this is your sort of rule enforcer, which is, Here's how you can participate, and essentially outside of our process, you can't, I do think it's designed when you cut the -- when they cut the data room, for example.

MR. GRANT: Mm-hmm.

THE COURT: It's a good analogy. We

cut off your data room. You're out of the process. Thank you. Actually, you're supposed to then sit and wait until the end of your standstill, until they call you back up.

Now, Hellman obviously took a flyer a couple times realizing, you know, well, if I call you up, I don't say "waiver," I don't say that, I just say, We still think you're really attractive; we kind of like you -- they did that, but I think, literally, the way that thing is written, it's not clear that wasn't a breach.

MR. GRANT: Then if that's written that way, to me, as a matter of law, it would have to be tossed out, because you just can't have that level of control and say, No one can ever say anything unless we say, you know, okay, you may speak now. But even if you want to, you can't even raise your hand. That cannot be a device in the abstract that would get the highest price and certainly not in this situation when you have people who actually are on both sides of the transaction. And let's not forget that.

Let's also not forget the court reporter.

THE COURT: Thank you, Mr. Grant.

Let's come back as close to 25 of as we can. Okay?

(A recess was taken.)

MR. GRANT: Your Honor, just a few relatively quick points. The first is in continuing with our discussion about the way the -- I was trying so hard to say "Don't Ask, Don't Tell" -- "Don't Ask, Don't Waive," one of the interesting things about the way that works is there were a bunch of bidders who gave indications of interest around the 33 level and they didn't get to move on to the final round.

THE COURT: Right.

MR. GRANT: So the problem is with these "Don't Ask, Don't Waive," if you get knocked out, you know, to the last round because you're only at 33, and then somehow the deal winds up being talked about or there is a serious bid at 31, and you were ready to bid 33 and are still ready to bid 33, how does that bid ever get on the table? Because there is no evidence whatsoever that these folks went back to those other bidders -- in fact, there is testimony that they did not -- and said, Well, you know, we were at 31, now we're at 32, but you guys were at 33. Do you want to come in again? But because they have

their Simon Says thing, if Simon doesn't say, Give me another bid, they never heard about it.

So you have three folks who gave indications of interest higher than the deal price who had been precluded from doing anything who they have never gone back to. I think that's terribly problematic. And again, without the board knowing.

The other thing that the board doesn't know is anything about the rollover until two weeks before. They learn about that in very late September, early October. And as soon as they learn about the rollover, they say, Okay, we're going to preclude management from the meetings and all that. But the rollover had already been discussed and was part of this deal in June, July, and August, and into September. And so, you know, this board, when they find out about it, says, We've got to cordon these folks off. Almost four months, they've been part of it. They've been leading the discussions, and they weren't cordoned off. Another problem.

Finally, I call Your Honor's attention to the expert report of Murray Beach. And I think that addresses one of the things that Your Honor asked, which was what was the cumulative average

growth rate. And the last few pages of the Exhibit 9, 10, 11, 12, 13 and 14 of that expert report, Exhibit 9 shows the May projections with the CAGR of 21.3. Then it shows Sullivan's roll-up projections in mid-October of that same CAGR as 18 percent; spectrum at 17.3 percent; Permira at 14.8 percent. And then as Your Honor correctly pointed out, the sensitivities are single-digit cumulative average growth rates.

THE COURT: Single as a high case single digit, or as a high case, like --

MR. GRANT: I'm sorry. I apologize. I was looking at the 7.4. So on Exhibit 13, it's 7.4. On Exhibit 14, it's 10.6. So as you can see, the outlier here is really the sensitivities. It's not like the sensitivities brought an outlier back down to the middle. The sensitivities are the outlier on the lower.

THE COURT: When you say Spectrum's, that's an internal analysis Spectrum did?

MR. GRANT: Yes, and their projections were 17.3 cumulative average growth rate.

THE COURT: Thank you.

MR. GRANT: Thank you, Your Honor.

MR. SAVITT: Good morning, Your Honor.

THE COURT: Good morning.

MR. SAVITT: Thank you for hearing us this morning. And let me add to Mr. Grant's notion that we very much appreciate the Court and the staff being available at this happy and stressful time of the year on such short notice. Thank you.

So what we have at issue is a request to enjoin the proposed transaction and the vote in advance of it that's scheduled to happen on the 27th and to close the day after, so that stockholders will receive their merger consideration in this tax year before there is an expectation that the tax rates will rise.

The injunction asks the Court to stop that. It wants a further market canvass. It wants to push the stockholder vote sometime into 2013 on the ground that there's been a breach of fiduciary duty that requires injunctive action.

There is a very substantial record here. Plaintiffs took all the depositions that they asked for. They asked all the questions they wished. Sometimes they didn't ask some of the questions they might have, but the record is here. There is no complaint on that. And one of the results of that is

that there are a lot of facts, notwithstanding the colloquy the Court had with my friend this morning, that are not in real dispute.

There is no dispute that as we speak this morning, Permira's $32 a share is the best available deal for the stockholders of Ancestry. There is no other bid. It's the only one. There is no dispute that that $32 price reflects a very substantial premium to the unaffected share price of Ancestry stock, nearly 10 bucks a share, 41 percent.

There is no question that Ancestry conducted a lengthy auction process. There is no question that the deal and the sales process were leaked over and over and over again in the press, so everybody knew that Ancestry was for sale. There was no claim until Saturday night's brief, no claim in the complaint, no claim in the moving papers, that the merger proxy or the 13e-3 disclosures published in connection with the transaction were in any way false or misleading. There is no real attack on the deal protection measures in the merger transaction either, which are comfortably within the ranges which have been uniformly held to be appropriate by this Court.

All that being said, as this morning

reveals, there are a few matters that remain in dispute, and they seemed to be ticking through them. First of all, whether an entire fairness standard can apply to the transaction on the ground plaintiffs say that Spectrum is a controlling stockholder.

THE COURT: I would just say in the interest of using time effectively, the standard review question might be a very important one at a different stage of the case, but it's not really something I would encourage you to spend a lot of time on today.

MR. SAVITT: I appreciate that, Your Honor, and raise it at the outset in the thought that perhaps the Court would give me guidance like that, because we don't want to spend more time on issues than are necessary.

THE COURT: Because the bigger issue is really what were Spectrum's motives than precisely whether it was a controller or not. There's no question it was influential.

MR. SAVITT: Agreed and understood, and I think that is exactly correct.

So that issue set to the side, there are plaintiffs' complaints with respect to the auction

process and certain conflicts that are said to have permeated it. There is this dispute with respect to the creation of the October sensitivities. And there is the matter of the standstill agreement that the Court and Mr. Grant were chatting about before the break. So those are the issues on which I was going to train my focus.

THE COURT: We can handle them in whatever order you choose.

MR. SAVITT: Thank you, Your Honor.

So a word about the auction process at the outset because plaintiffs' attempt to impugn it is really what the motion is about.

Ancestry conducted a broad auction. I think that's clear. Qatalyst engaged 17 potential merger partners, ultimately signed 12 non -- the company ultimately signed 12 non-disclosure agreements. The process was leaked over and over again. There is no higher bid. All that is common ground.

It is also common ground I think that in the final weeks before the auction, Permira tried to sell a $31 deal to Ancestry. No one on the board was prepared to accept that. There was a hard, hard

fight over that last dollar of terrain which ultimately wound up getting the price to $32, which was an amount that the Ancestry board was ultimately prepared to agree to as in the best interests of stockholders and the best value reasonably available.

There's lot of talk in the papers about the due diligence process. And I think the following is also pretty clear. What the bidders found in due diligence caused the initial indications of interest to come substantially down to what the final indications are. Let's leave Hellman & Friedman to the side for the moment because I know that red-headed stepchild has been singled out as potentially a different case. But what about TPG? There isn't a claim in the world that TPG was somehow discriminated against. They started in the high 30s and ended up at 30 bucks even and refused to go a penny higher. Providence Equity started in the high 30s. Ended up dropping out. Couldn't make a bid at all.

THE COURT: Mr. Grant, though, indicated his view is that there was a suggestion that Providence was rushed and fell out of the process because the process was unduly truncated.

MR. SAVITT: I heard that argument, and I believe that when the Court examines the one e-mail upon which the conclusion is reached, it will see that the real issue from Providence was that it was losing interest and expressing very negative sentiment as it went through the due diligence process; that Providence ultimately would have been permitted to make a bid whenever it wished. It was never denied access to due diligence, and it was never able to make a bid. And there is simply no evidence to support the suggestion --

THE COURT: What date did it definitively drop out? Was there a date, or after the August 6th thing, did it just never reemerge?

MR. SAVITT: My recollection, and I will check this when I sit down, is it was in late July when they signaled the negative sentiment and the concern they wouldn't make August 6th, but I believe it was before August 6th that they said they weren't going to be submitting a bid. August 1st or August 2nd I think are the dates there.

The proposition that the reason Providence didn't make a high bid is because they didn't have time is simply without support in the

record. And there is more than that. I mean, they were --

THE COURT: And the pre-narrowing data room was opened when?

MR. SAVITT: The pre --

THE COURT: What I mean by the narrowing was when the field was narrowed to I think it was -- was it Providence, TPG and Permira?

MR. SAVITT: Exactly.

THE COURT: And there had been a data room opened for the initial parties that signed the standstill things and who were in that initial round. And when was that opened up?

MR. SAVITT: I don't know when the initial round was opened up. I believe it was in the second half of May. The process launched May 15th. The initial contacts were made before the 24th, and the initial due diligence period ran from May 15th to June 22nd. There was a colloquy with Mr. Grant earlier about when the first --

THE COURT: So there was over a month of due diligence and then the narrowing occurred?

MR. SAVITT: On June 22nd.

And just to make clear a fact that was

discussed this morning, it was on June 22nd, not in July, when the narrowing happened. So the second-round bidders had from June 22nd to August 6th.

And I think this needs to be said. There isn't any evidence at all that anyone said, Hey, we need more stuff.

THE COURT: I also -- I'm assuming, I could be wrong about this but, for example, in terms of your due diligence team, you probably didn't -- people didn't need to bring in their surplus specialist.

MR. SAVITT: I think that's correct. I think it was a pretty targeted due diligence process that was substantially focused on some of the key metrics of the business.

THE COURT: Nor your FDA person, nor your Foreign Corrupt Practices Act partners. In terms of examining the business, it has its own unique dynamics. I mean, I get the question of how sticky your customer base is, which is if Strine gets curious about his ancestry and signs up for a while and does his research and he gets curious enough to find out how Norwegian he is because he liked John's Song, and once he does that, is he going to be a perpetual

customer or is he going to drop out? What is your revenue base? I get that. But it's not like this is a global far-flung thing that's in a highly regulatory intensive industry; right.

MR. SAVITT: I think that's completely right. The focus, there was some very deep due diligence done, we understand, but it was on a very narrow set of questions having to do with what are the reasonable assumptions that can be derived from historical experience and the present growth thesis that will drive, likely, performance in the out years having to do with the churn ratio, subscriber additional costs, and the ability to keep customers in the highest paying profiles. And it was the subject of some substantial diligence. Some of the bidders brought in experts, one of them hired McKinsey to actually do some analytics, but it's not far-flung in the manner the Court is describing. That's just right.

THE COURT: Was there any expense reimbursement ultimately offered to Heller?

MR. SAVITT: I believe the answer to that question is no.

THE COURT: But there was talk about

that for their end diligence, because they were talking about their expenses, I believe.

MR. SAVITT: I think that's correct. I think ultimately, Hellman & Friedman were treated like all the other bidders were, and there was never any suggestion that it was displeased in the way in which it was treated.

THE COURT: No, I didn't even ask you that question, but I understood you wished to address it. There was some hint of them in August, I believe, talking about the cost of further diligence and saying, Would you give us some reimbursement if we explore further?

MR. SAVITT: I think the answer to the Court's question is no.

THE COURT: Okay.

MR. SAVITT: And I want to make a point that I think is perfectly apparent to the Court, and that is that these folks we're dealing with here, not just the ones we've talked about, the Parties A through Z, inclusive, are not shrinking violets. They are private equity funds, some strategic businesses. They are folks who know how to buy a company when they think it's worthwhile. They aren't wallflowers. The

Court has made that point in a different context. If this was a business that was worth the money, these folks would have found it and they would have paid for it.

The process went on for eight months. I won't rehearse in detail. We've rehearsed it in detail in our papers. It's rehearsed in detail in the merger proxy, which is not the subject of disclosure claims. The bottom line is that there are no better bids out there. There is no one willing to pay more money for this company. There is no evidence that there is anyone out there willing to pay more money. There is not even really a claim. There is only the claim that in a hypothetical alternative universe were some legal rules were different, there might be someone. And I will talk about the standstill in a moment, but there is simply not even a claim that there is somebody out there ready to pay more.

I note, too, that the Proxy Advisory Services, including ISS, have recommended that the stockholders vote yes on the merger on the basis of their review of the facts and their independent valuation work.

And what we have when you step back

from this --

THE COURT: And for you, that -- I mean, that pretty much cinched it for you, personally; right?

MR. SAVITT: I understand where the Court is going. It is merely an observation. It's merely an observation.

But you step back and you say, What's the problem here? An eight-month auction. They talked to everyone in the world. It was competitive, round after round. Leaked. What's the problem here? And from defendants' perspective, that really is the issue. What is the problem?

THE COURT: And I get that. I think, to be candid with you, the thing that troubles me most at this stage, to be honest, is you heard my colloquy with Mr. Grant about the projections. Has or has not the fact been disclosed that Qatalyst told the board that it was not likely to be able to give a fairness opinion based on the projections that had been used during the sales process?

MR. SAVITT: Well, that is not in the proxy statement.

THE COURT: Why is that not in the

proxy statements? Because that is not a minor issue in the deal process. It's just not. And the weakness in the plaintiffs' case around the disclosure of these things is exactly, you know, what I got into with Mr. Grant, which is to premise some sort of injunction on the notion that somebody is lying about something about why they're disclosing something, that's a difficult thing to do. That's part of why you have damages cases later on, if you actually are going to get to whether people are lying about something that was disclosed. Because there is a disclosure of the sensitivities and there is a disclosure of the difference between them.

That's pretty contextually important, it seems to me, when you get to the why question. It doesn't even acknowledge that part of the why was you were going to get a deal without a fairness opinion, potentially.

MR. SAVITT: Let me say a few words in response to that of course very fair question. Here is the testimony that is at issue that supports plaintiffs' claim, is a question and answer in the deposition of Mr. Turner in which Mr. Turner said, We told the board that if they believed the company's

projections, the ones that were prepared in May, and that if they were what they thought the best estimates for the company were, that it would be difficult for us to provide an opinion. That's the testimony.

Now, no questions were asked of any members of the board as to how they remember that conversation, what was said and what its nuance was. What Mr. Turner's testimony says is if you think that those projections are correct, then it might be a difficult fairness opinion. That is the evidence available.

The disclosure in the marketplace is not just the very elaborate narrative description of all of this, not just the side-by-side projections that the Court alluded to earlier, but remember, this is a 13e-3 transaction. Every single bit of Qatalyst's analysis is 100 percent before the public. Not just the projections; the football fields that were shown to the board are before the public. The sequence of events is described in the proxy.

And ultimately, it is not clear precisely what disclosure would come out of this when this testimony was matched up with what was said, how the board understood what was being told to it, and --

THE COURT: It's really not a complicated issue. Disclosure doesn't come out of testimony in the first instance. The summary of the course of events leading to the deal comes out of the participants in the deal working with counsel and putting together the material events.

I think I'm pretty -- I'm a candid guy. I tell you on each side the things that are on my mind, and I try to give you an honest chance to react to what I think are the hardest parts of your case, because that's what excellent lawyers like you all specialize in doing. I could sit here and tell you that your case is wonderful, that all aspects of it are convincing, and you could have a good day. You wouldn't be able to serve your client because I wouldn't be telling you what you have to address to address what's on my mind.

Their motive case has some problems with me, but I also know people get into this deal dynamic, and people sanitize these processes too much. Part of what you're trying to tell me is from the beginning, right, these things were stretchy; that this was a sales case. Of course when you look at the minutes, it doesn't exactly say that; right?

It doesn't say anywhere in there that, frankly, management was charged with giving a set of projections for the sales process that should be achievable but aggressive, blah, blah, blah. It doesn't say any of that.

And I'm not saying it didn't happen the way you're saying it, but it's not documented in a way where you can find that, in those terms.

You get in this and you get, obviously, some greatly disparate ranges. And I commend the fact that the analysis, based on the original projections, is in there, and you can see that it's a much more bullish range. And you can see that the deal doesn't look so great. But it doesn't say in there that the board was told by the financial advisor that it probably wasn't getting there to give a fairness opinion on those original projections, and that after that fact, a process ensued to develop these things. It doesn't say that, does it?

MR. SAVITT: It doesn't say that, Your Honor.

THE COURT: And that's not a small problem in the deal terms; right?

MR. SAVITT: Well, on that, I mean,

let me push back just a little bit.

THE COURT: Especially because it is -- and again, I don't think your friends have convinced me that this was an evil conspiracy. But because of the way the deal came together at the end, with Spectrum having to roll some of its equity -- I mean put aside Sullivan. There is no buyer in here aside from the strategics who I would have expected anything -- I would have expected not a roll. Maybe that's me. But it sort of is standard private equity playbook, so I assumed that. Perhaps Spectrum is a little different.

But then because you have that conflict, the board is also going to be looking more and more toward getting that fairness opinion. Boards actually fetishize them more than the Court. So that's kind of an "Oh, heck" moment, right, when Qatalyst says that?

MR. SAVITT: You're asking a fair question, of course. Let me try and say a little bit around it and see if it's helpful.

I think this is the beginning of the story, so I want to make sure to respond to something that was said. It may be true that the minutes of

May 15th do not say that the board said, Go back and give us more aggressive and optimistic projections. The documentary record on this, the contemporaneous documentary record, is crystal clear, and it's set out in our papers.

The day before, Hochhauser sent the board the projections, they met and they discussed it. The day after, Hochhauser said, As we talked about, here are numbers that are more aggressive. There is nothing -- it was suggested this is not something that could be verified from the papers.

THE COURT: That's an interesting question. How close are the numbers that Hochhauser gave the day before to the sensitivity cases?

MR. SAVITT: We'll run that down, Your Honor.

THE COURT: I realize, for example, on the motive point, you heard me interact with Mr. Grant on this.

MR. SAVITT: Absolutely.

THE COURT: I think in terms of Spectrum, the incentive of Spectrum basically saying, Come on guys -- and maybe even knowing from -- not necessarily distrusting Sullivan and Hochhauser, but

understanding that the range of possible buyers are people with whom Spectrum competes, knowing that if Sullivan and Hochhauser didn't fall off the vegetable truck, they're likely to realize that they're going to be asked for a roll, which puts them in a little different place, Spectrum wanting to enforce, Gang, we want a bullish side to this.

But what we're getting at here is they did what they did, and they put these projections out there, and this was the basis on which they were operating until fairly late in the process, and they begin -- and they have some real world feedback.

But as I understand it, the sensitivity cases, for example, the high-end case is lower than the case that was being used for the process; right?

MR. SAVITT: I believe that is so, although I should say no one was operating on the basis of these, and these projections were never prepared except for use in the sales process.

THE COURT: I didn't mean operating the company. I meant operating the strategic process. This was, in fact, what was being given to bidders.

MR. SAVITT: They are what was being

given to bidders. And as early as late July, what the company is hearing is that Providence is very negative. Even before August 6th, it says, We're not going to make a bid.

TPG made a detailed presentation to Qatalyst in which it said, in sum and substance, You're going to have to rethink the way you're thinking about this if you're going to get a bid because it's not real. And that's in the record. That's late July.

Throughout the beginning part of August, there are a series, three, four board meetings, at which all of this is reviewed and discussed with the board. August 6th comes and goes. No bid. The board is presented with an LBO analysis by Qatalyst which is attempting to have the board perceive how the situation looks from the other side of the negotiation so it can take that into account.

Qatalyst begins to prepare illustrative sensitivities to give a sense of how other folks are looking at this process. And this is process that continues into September, when Qatalyst continues to work its numbers, and it becomes clear enough that when the board is called upon to make its

best decision as to whether to enter into a transaction or not, there was going to have to be some rethinking about the reliability of the May numbers in light of what had been learned as well as in light of certain internal bad news on some of the growth-oriented metrics coming out of the DNA and archives-related pieces of the business, which is all documented in the contemporaneous e-mails.

Now, I raise all of this as --

THE COURT: But there is also evidence in the record that's cited by your friends, for example, of Mr. Sullivan -- I take him at his word. It was just one iteration he was running. It happens to be the one you produced in discovery. It happens to deal with something that's kind of near and dear to most CEOs' hearts, which is what is the potential value of his equity. And it happens to look a lot more like his original projections than either of the sensitivity cases.

And he didn't -- when they got to the sensitivity cases, they didn't do what they did the first time. They actually never centered on -- they didn't even do, for example, a low case, base case, high case; right? They did this kind of odd thing.

And I don't mean to disparage the odd. Many of the most endearing and valuable things on earth are odd. That's precisely what makes them interesting and unique. But it wasn't exactly like they did the original. And the high end of it is substantially lower than his musings on the value of his own equity. What do I do with that?

MR. SAVITT: Well, two things. Before answering the question about Mr. Sullivan's musings, the plaintiffs have sponsored the view that the October sensitivities were prepared in a very substantially different manner and a less robust manner than the May sensitivities. We do not think that is so. And I think if the Court compares our Exhibits 45 and 99, we'll see that the back-up is more or less identical. The process is more or less identical. There is no testimony to the contrary. That's a fable.

That point to the side, the testimony relative to the Sullivan document that the Court is asking about is that this was a document that he had had on his system. It was in a live Excel spreadsheet. He was noodling with it after the price had been agreed. Maybe he had done it before as well.

It was a document that he did not frequently save. The numbers changed every time you typed a new number into one cell. And that it was in no measure his view of the likely future performance of the company.

He was asked that question point-blank at his deposition. He said it was absolutely not a projection. I believe plaintiff's own expert says that it was not a projection. It was a hack sheet. I think that's what the document was called. And it was saved at a point where it showed an 18 percent growth rate. Do I know every number that was ever on that document? I do not. What I think the evidence is clear on, though, is that it doesn't establish anyone's view, including Sullivan's, of the best view or a likely view of the company's future performance.

THE COURT: I'm going to push you on this one a little bit.

The high sensitivity case doesn't represent management's base case; right?

MR. SAVITT: That's right.

THE COURT: It supposedly represents management's high case; right?

MR. SAVITT: There were two scenarios to reflect the range of the most likely outcomes.

THE COURT: Those are the most likely outcomes.

MR. SAVITT: That is what the board asked management to provide, and it's what the board ultimately determined at its October 18th board meeting.

THE COURT: So even though the most likely high outcome is 7 percent compounded annual growth rate lower than what's on this hack chart, he's just musing on this, like, what if I make the original numbers, this is what it will be worth to me?

MR. SAVITT: His testimony isn't even that precise on the matter.

THE COURT: I've read his testimony. I read every deposition. It was fascinating. And I read the stuff about texts and about people's documents, having people's home e-mails and stuff, and I read all that stuff, so I know what he said.

MR. SAVITT: And what I would say to the Court, then, having read that, is you have a guy figuring what's the next few years going to look like, what are the range of options. He's noodling in a spreadsheet. He saves it at that point, and that's what it says.

THE COURT: It's interesting. All I'm saying is he's noodling stretchy while asking stockholders to accept non-stretchy.

MR. SAVITT: I think his testimony is that he noodled stretchy and non-stretchy, and he saved it at this point.

THE COURT: So we just don't know where the noodling was non-stretchy?

MR. SAVITT: Other than his testimony.

THE COURT: I realize it was expedited discovery, but were other iterations found?

MR. SAVITT: I believe one other iteration was found.

THE COURT: And produced.

MR. SAVITT: And produced. Certainly everything that was found was produced. I can assure the Court of that.

THE COURT: Did he use different numbers?

MR. SAVITT: I believe -- I think -- the thing is I don't want to outrun the Court on this. I think there was a different number in the other one and it was somewhat lower. But I'll also say --

THE COURT: Somewhat lower but higher

than the --

MR. SAVITT: I believe that's correct.

THE COURT: -- the high sensitivity case?

MR. SAVITT: I believe that's correct. And they were all done in the same timeframe and they were all done on an Excel spreadsheet that, of course, isn't going to save each key stroke, which I think was Mr. Sullivan's point in his testimony.

And the following is surely true. Nobody thought the numbers in Sullivan's spreadsheet were accurate, not even plaintiffs' expert. TPG didn't. Hellman & Friedman didn't. Nobody did. Nobody did. Nobody did. There is no basis to think that they were a reasonable estimation of the company's likely performance.

THE COURT: I was shown something by Mr. Grant, his Exhibit 119, that supposedly has Permira's numbers. What are those numbers, to your knowledge?

MR. SAVITT: I know them to be Permira internal documents.

THE COURT: Okay.

MR. SAVITT: They wouldn't have been

known to my client until the discovery in this lawsuit and probably --

THE COURT: Did they match, then, what the company was giving the bidder?

MR. SAVITT: No. They're substantially lower than the May projections. They're higher than the sensitivities, lower than the May projections. Permira was by far the most bullish of the PE bidders. And at the end, I don't think it's really consistent with the story that's being sponsored by the plaintiffs' side for that reason. They really show that everybody was given a very big haircut here, Permira perhaps a little bit less than the rest.

THE COURT: Okay.

MR. SAVITT: I don't want to leave -- there are some other points I did want to make, and I appreciate the Court's concern with respect to this disclosure point. And the reason I referred to the testimony, Your Honor, is these words on this transcript are not what one would put in a disclosure. It's a much more complicated story.

THE COURT: Because they would be told in the way a human would tell them. But you can

translate humanity into SEC speak, and it would simply go like this. On "blank" Qatalyst advised the board that if the "blank" projections were in fact management's best estimate of the future cash flows of the company, and Qatalyst were asked to deliver a fairness opinion on a deal at "blank" per share, Qatalyst would be unlikely to deliver such an opinion if you use -- if those were the best estimates of the company's future performance. Words to that effect can easily be crafted. It has nothing to do with whether Turner's deposition was taken.

MR. SAVITT: No. The point --

THE COURT: My point about that is people ask questions at depositions about what are in proxy statements and about the recitation of events in them. That was a portion of the events that transpired. Everybody on the deal side of it knows that that occurred, but the investors don't.

And when I'm getting into a situation about whether people are lying about what things are, that's when the Court has hewed to, Well, we don't ask you to -- what do you call it? It's some sort of, you have visions of medieval processions where people are hitting themselves. Self-flagellation; right? We

don't ask you to self-flagellate, but what we actually hew to, though, is a chronology of the material events.

And this isn't about self-flagellation, the issue about whether people are believing whether they have proved that -- what your friends are saying is that these things are in bad faith; that they're not in fact the best estimates; that they were just designed to make the deal look fair. Okay? That may be hard for them to get a disclosure on things that aren't disclosed fairly.

But here we have a point in the process where the why of why these things were prepared, the conditions under which they were prepared -- which is, frankly, they're being prepared in a situation where everybody realizes that the bank is unlikely to be able to deliver a fairness opinion using those projections, which creates a little bit of directional pressure -- that is an objective fact that the stockholders are unaware of when they go to the ballot box; right? On the day after Boxing Day.

MR. SAVITT: I hear you. And without doubt, there are some pieces of information that are in the proxy and some aren't, and there are fair

grounds to dispute their materiality. I will say this about process, because it's important to the question. It's what I'm inarticulately trying to express.

We're in a legal process here. There is a complaint. We asked for an amended complaint before we went into depositions so we could see what the actual issues were. We didn't get one. The operative complaint here doesn't say a word about disclosure documents. The moving brief didn't say a word about a disclosure issue. We only learned about this claim on Saturday night.

And the reason it's relevant here is, and what I'm trying to inarticulately say about this bit of testimony is, the plaintiffs didn't ask anyone else what happened. The evidentiary record, had anyone been aware that this was going to be raised, might have looked a little different. But we are left with this. And it is simply unfair surprise to raise an issue like this before anyone has had a chance to set out and make a proper evidentiary record.

THE COURT: I get some of that. I will say I'm not sure it required anybody to raise the issue about if a banker says to -- something in the process about the inability to deliver a fairness

opinion based on a set of projections, and that sets in place a process to develop ones for the purpose of a fairness opinion, you know, if that had to be said, right -- because there's an implication to it, Mr. Savitt, that you might be able to guess that I grasp.

MR. SAVITT: I'm sorry, Your Honor?

THE COURT: That had someone come in at 38.25, there would have never been a request for an additional set of projections, and that Qatalyst would have used the projections on the table potentially to render its fairness opinion. Right?

And see, the thing I think about in that context is, does that mean you're using -- you're not using the best estimate to give your fairness opinion because you knew from the beginning you were just using stretchy stuff? See, if it was so well understood -- you get my point about clarity?

And I think one of the problems that we get is people in good faith create problems for themselves by sanitizing the process, which is the objective addition of the process is often very hard for anybody to discern. And then at depositions, people testify about all the things they understood.

And they may be right, but when you look at things like the board presentations or the minutes, it won't be in there.

For example, we can't find anything -- your friends point out that they can't find anything about instructions to management and their interaction with particular bidders or about their arrangements. Now, that may well have been privileged advice, but there is probably a way to have that in a PowerPoint or in the board meetings that is not privileged, and say, This is the understood ground rule, and you can point to it. It's actually a good memory aid to people.

But all I'm saying is when you think about what I just said, if Qatalyst is telling folks that you can't give a fairness opinion based on those projections, one logical implication of that is that that is, in fact, the projections on which it was expected that they would actually deliver their fairness opinion, which means it wasn't the stretch case.

MR. SAVITT: Except that by the time that conversation had been had, there had been two full months when the board in Qatalyst and management

had been looking at alternative cases and were actually aware in their internal discussions that the numbers they had gone out to the equity sponsors with were not going to fly.

THE COURT: And I have no doubt that that there is more than something to that. What I'm saying is we create problems for stockholders in cases when that flow is not actually discernible from the process documents themselves. If it's very clear from the beginning that what you're going out with is not management's best estimate but management's most plausible home-run-swing estimate, and that's very clear from the beginning, that it was never going to be the basis on which the financial advisor would grant its fairness opinion, then there never actually is going to be a statement back that, We wouldn't be able to deliver a fairness opinion based on these numbers because we never expected to use them for that purpose. They were essentially the high end of our cases. That's what we're using them for. They're plausible. This is the story a bullish management tells and well-motivated seller tells.

But we're at a little bit of a different situation here because the financial advisor

specifically felt the need to say, By the way, Gang, we're not getting to a fairness opinion based on these numbers. And there is no doubt in my mind that part of the confluence of that is because the deal range now, right, that's set at a time where it's clear where the deal range will be, and it was a sort of disappointing range in view of some of the initial expressions of interests; right?

MR. SAVITT: The numbers came in far lower than the initial indications of interest.

THE COURT: Right.

MR. SAVITT: I should say that there is no suggestion in any of this record that the May projections were planned to be the basis for the Qatalyst opinion. What Qatalyst said in October is indeed the process leading to the sensitivities was a process of recognizing that you can't do a fairness opinion without sensitivities, trying to provide the best numbers on the basis of what was known at the time so that the fairness opinion could be done appropriately.

And all of the evidence in the record says that -- my friends on the other side suggest that everything has a nefarious tone to it. There is no

evidence of that. There is evidence that coming out of the period leading up to August 6th, the numbers were unbelievable, at least to everyone who was considering buying it. And not just for no reason. For good reason. For detailed analytics-driven reasons set forth on the documents.

And on that score, I should say the story about Hellman & Friedman ultimately making a protest bid at $28 is belied by the e-mail that we've highlighted that says "bad stuff," a laundry list of problems that these folks found after investing heavily and trying to buy a company.

The reason I'm focusing on this point here is what happened at the end of the process was the board had to give numbers to its advisors so it could get advice. It had to come up with projections at that time, and it did so. And the argument on the other side of the table seems to be that even though no one believed the May projections, not the company, not Permira, not the board, not management, not Hellman, no one, no one believed them -- and even though the board thought it was the --

THE COURT: Again, this is when people, smart people, people acting in good faith,

sometimes do silly things. What Mr. Grant is going to say is if no one believed them, why is the serious CEO of a public company, then, running numbers wildly higher than them in order to take a look at what his equity might be worth? If it's just clear that no one believed them, if it's clear that the high case is the high case, then why don't we see a number that's at least close to the high case in there as opposed to seeing a number that's -- is it pretty much dead on with the May?

MR. SAVITT: I'm sorry?

THE COURT: Isn't that number pretty much dead on with the May number?

MR. SAVITT: The --

THE COURT: The hack or whatever, isn't it pretty much the 18 percent?

MR. SAVITT: I actually think it's somewhere lower than that.

THE COURT: Somewhat lower, but materially higher than the high sensitivity case.

MR. SAVITT: It is higher than the high sensitivity case.

THE COURT: Materially higher.

MR. SAVITT: I agree. But that --

THE COURT: So again, is it just Fantasy Island? Is it just like, you know, that when I look at -- I did a retrospective of David Beckham's hairstyles over the last five years because I'm just musing on how I would want to part my bangs when I have really one choice: A center part? When at last you're going to bring back the "C-O," which I'm not a fan of, but to each his own. It was never my approach to dealing with the reality of my genetic heritage. I just kind of went like that.

But, you know, you see the problem that folks create for themselves?

MR. SAVITT: I see the issue, Your Honor, but respectfully, that document that plaintiffs now seek to emphasize so much, which, notably, didn't even make it into their opening brief and, notably, is not even given any credence by their expert, is not a view of future performance. Was it Fantasy Island? Maybe. If that is correct, then every single PE bidder who was in there kicking the tires all this time got it totally wrong. If that is correct, then Spectrum, who has real skin in the game, is just throwing money out the window. There is no reason to assume that those numbers aren't -- the

numbers in the sensitivities aren't realistic. There is no reason to assume that a hack sheet that was a working Excel document that could have had any number of cells filled in any number of times, by a man, who you saw in his deposition was drinking a glass of wine, is something that can reasonably be substituted for the lessons learned over the months and months and months leading to this period that was agreed to by a majority independent board and in a circumstance where all of the relevant information is disclosed --

THE COURT: So this is like a Barolo-fueled moment?

MR. SAVITT: I don't know what Mr. Sullivan was drinking. You saw the testimony, Your Honor.

THE COURT: I just assumed this was the stretchy end. It wasn't boxed wine.

Do you want to talk about the non-waiver thing?

MR. SAVITT: Of course.

THE COURT: Are we allowed to talk about it?

MR. SAVITT: We can talk about it. Your Honor, there are a couple of issues. There are

aspects of Permira being a favored bidder that I'm happy to talk about or not.

THE COURT: I want you to do -- unless you have something else to say about the projections, I thought we covered that fairly well.

MR. SAVITT: Fine.

THE COURT: Whatever you want to go to next, Mr. Savitt, in terms of topic.

MR. SAVITT: Fine.

Quickly, to try and rebut the suggestion, the illusion that was sought to be created, that management is conflicted here, everything that goes to this issue is fully disclosed. The evidence in the record actually shows that it is not -- that the board picked Qatalyst. The board told Qatalyst what to do. Management didn't do this. The board decided to have a first round and a broad first round and winnow the field, not management. We have cited chapter and verse of documents that say that in our papers. The story to the contrary is not so.

The board decided to retain Goldman Sachs to review stand-alone financing options. The board decided to turn to Spectrum as a potential funding option to increase the price. Management

didn't do any of those things. Same with the ultimate decision on the price. There is no evidence to support the conclusion that the board ran this process nor, frankly, is there any evidence to show that Ancestry manager acted otherwise than to get the highest possible bid. There isn't a document out there in which that is said or intimated or suggested.

Plaintiffs have identified some number of documents associated with Mr. Sullivan where he says things like Ancestry.com is going to be huge, but his testimony was clear on this, as the Court I'm sure appreciates, and it's supported by the documents, that these were all in the nature of his face to the other side --

THE COURT: No, I saw and read the huge thing and --

MR. SAVITT: And it's taken together with the rest of the document.

THE COURT: I also think, you know, if people read things in good faith, then, you know, the literal words can easily be misconstrued. So I get your point.

MR. SAVITT: Thank you, Your Honor.

And at a board level, there is some

criticism that there was a failure to properly manage these conflicts. I have to respectfully disagree with my friend on that. Everybody knew if there was going to be a private equity deal, there was going to be a rollover. And I think --

THE COURT: Again, one of the things I think -- I get that. I read all the original love letters, and I don't see much material distinction in them. But if you look at the board minutes or other things like that, a sophisticated reader supplies the context for herself about that, rather than the minutes or a document of the process indicating that. Which is there is nothing in the minutes that say, We're at a stage in the process where, even at the beginning of the process, we understand that to the extent that the universe of bidders is private equity bidders, they're almost certainly going to want to retain management. That's their modus operandi. They will often want to have an alignment package with management, and the subject of equity rolls, other sorts of things, are on the table. For that reason, we've asked management to refrain from that. Any discussions of those things should be deferred and should be reported to us, blah, blah, blah. It

doesn't say that; right?

MR. SAVITT: It doesn't say that, although I would respond by noting, without wanting to go anywhere near the possibility of a waiver of privilege, that these are matters that there was -- significant legal advice was sought early in the process and was given, and it shows as being redacted on the minutes going forward in the process.

THE COURT: I understand that, but we have -- no one chose to -- people make the choices they make. And I understand the difficult situation we have, which is people want to rely on things, but they have to show what they're relying on.

MR. SAVITT: Fair enough, Your Honor.

THE COURT: But what I would say about this is this is not the most exotic piece of -- it's not even clear it's legal advice. What I mean is it has elements of law to it but, frankly, the banker should be saying that too. The banker should be saying, We want to create a level playing field for everybody. We understand we're going to deal with management. We've got to create a level playing field. We've got to say the same thing to all the bidders. Everybody has got to be in. And this is the

way we're running this.

It relates to what we said before about the stretchiness. That's not legal advice; right? And the stretchiness and the stretch I story doesn't emerge from -- it emerges from people's testimony but it doesn't really -- I agree -- and I'm going to ask you, when you tell me the day before, whatever Hochhauser's projections were, it emerges out of the story, that may be true, but it doesn't emerge from the document of the process. Right?

MR. SAVITT: Well, on that point -- the minutes are what they are, and the Court has read them, and they have limited detail. As to the stretchiness of the projections, I can't emphasize this enough, it is contemporaneous documents that show the sequence of Hochhauser providing the projections and then providing, per the board's discussion the previous day, additional revised projections that were indeed stretchier.

And look, when the Court looks at the e-mails, the contemporaneous documents in the record, minutes of other documents, here's what it will not find. Here's what it will not find. It will not find documents or testimony that show that management was

out there working to get its own deal rather than working for the board and Qatalyst to get the best deal for shareholders. There isn't anything like that here. And this Court has seen enough cases to know and understand the way e-mail works sufficiently that if there isn't that in the record, there isn't going to be a likelihood of success on such a claim. There is just no evidence of it.

Spectrum, I'm not going to cover at great length. My colleague may have some words to say on behalf of Spectrum. The bottom line here is Spectrum has a huge amount of money at stake and the math is simple. It wants the highest deal possible. It is a sophisticated party. It understands Ancestry as well as anyone. It has been in it as long as anyone. The idea that it would burn money by taking a low-priced deal, a deal that is lower than it thought was obtainable, makes no sense.

I want to say a few words about the Permira favoritism issue. Mr. Grant made reference to the tipping that Qatalyst purportedly did of Permira to make a higher indication of interest in the first record. The idea was Permira for some reason was already the preferred bidder -- we don't know why --

and it was going to fall out of the first round. So Turner called and said, Hey, you guys better get to a price of X. Otherwise, you might not make it. This is the tip. Leave to the side that there is no explanation why Qatalyst would do such a thing. And leave to the side this important fact: On the original indications of interest, Permira was one of the top three.

THE COURT: They were bronze; right?

MR. SAVITT: They were bronze, but they were getting in anyway. They didn't need a tip.

THE COURT: Well, you know, bronze is edgy.

MR. SAVITT: Well, it was pretty clear.

THE COURT: The North Korean judge sees the finish a little bit differently, and no medal for you.

MR. SAVITT: Putting all that to the side, it's just false. There is no record in evidence for it. Qatalyst says it called all the first round bidders and said, Increase your bids. Is there something wrong with that? It is inexplicable that this is the basis of criticism under these

circumstances.

Then there is this partnering claim, and I think the papers are relatively clear on it. The short of the claim is that when it was working with Hellman & Friedman in August to get to a $35 bid, the board declined a request to have Hellman partner with Permira. But in September, when Permira was the only real bid on the table, it permitted Permira and TPG to bid together.

The record on the point is really clear. H&F was at 35. There was a real thought that if everyone worked extremely hard with H&F, they could get a $35 deal done. H&F is a well-known commodity. And the judgment of the board and Qatalyst was putting them together was going to lead to a $33 bid.

In September, the auction had degraded further. Permira was there saying, Maybe 33. It said its problem was it didn't have enough equity. You needed to find some source of equity. TPG was a likely one and it was the closest in price. And the alternative to that partnering request was probably a cratered auction. Not only that, TPG, unlike Hellman, had not been exposed to the due diligence, so there wasn't nearly as much likelihood that bringing them in

was going to drag the higher bidder's offer down.

So the short of it is the need to allow the partnering was more acute in September and the risk was considerably less. It was apples and oranges.

And a couple words on H&F. We read that it was not treated properly. It was not treated fairly. The fact is, it made a first-round bid. It was told to raise its first-round bid. It declined. It circled the process and said it wanted to get back in in the second round and it was let back in. It was treated as the preferred bidder through the entire month of August. Then it pulled back again referencing all the bad stuff that it had found in due diligence before concluding that the best it could possibly do is 28 bucks a share.

Now, the recitation of the earlier part of the argument was that no one showed them any love. There isn't any evidence of this. The evidence is that when they were trying to come back into the process, they wanted to be reassured that they would be given a fair chance. They were given that fair chance, and every single bit of diligence they wished, they were given. There isn't a shred of evidence

saying they didn't think they got the proper attention. There isn't a shred of evidence saying they didn't get the information they wanted.

What the evidence says is they came back at 28 bucks a share and they did so on the basis of very data-driven problems with the management forecasts. And the Hellman & Friedman story is, frankly, really without evidence.

And you know, why would Qatalyst have done that? Qatalyst had an incentive in trying to get the deal price up to 36 if it could, a big kicker in its contract. It had no incentive to sell low. It was going to make more money with each incremental dollar. Spectrum would have wanted Hellman & Friedman to make the highest bid.

THE COURT: Actually, they were indifferent as to a deal between 30 and 36; right? They're not indifferent as to no deal or a deal.

MR. SAVITT: No, because I think they get a percentage of the deal value at any rate.

THE COURT: Oh, they do.

MR. SAVITT: You're quite right, the kicker is at 36 --

THE COURT: They get a higher kicker

at 36, but they get more money at each increase.

MR. SAVITT: That's right.

THE COURT: You want to talk about waivers?

MR. SAVITT: I'll talk about waivers.

I can't help but to thank my friends for attributing this to Wachtell Lipton. I did not know this was our invention until I read it in the papers on Saturday night. That's very gracious. Thank you.

MR. GRANT: You're welcome.

MR. SAVITT: I did, however, want to say that the claim that these aren't --

THE COURT: I think it's maybe the passionate defenders.

MR. SAVITT: We'll take that mantle and I will say that I'm not quibbling with that, but I do quibble with the assertion that these aren't common features in M&A agreements. And to figure out whether we had invented this and whether they're common, I Googled "Don't Ask, Don't Waive" on Saturday night when I got the brief, and there was a long list of client memos. And they all say in the first sentence or two, all of them, Gibson Dunn, Hogan, they're

common features in M&A practice, particularly in structured auctions. They are highly common. And the reason they're highly common is the people who run auction appreciate that it is important to get bidders to commit to the auction and to use the tools at hand, at least the threat of the tools at hand, to require that participation. These contracts don't supply the basis for an injunction here, first of all.

THE COURT: If you're going to use them for that, don't people have to know that they have that effect, and don't they have to be attended to? And isn't what Hellman did a literal violation? I mean, we can go to the language. The language is extremely broad. And I believe that calling up somebody and saying "I wish to buy you" is a literal violation of this language.

MR. SAVITT: That may well be, and I'm not resisting the Court's suggestion this morning that what Hellman did was a literal violation of the language. I do think though that these are devices like other similar devices that have quite a lot of play in them --

THE COURT: As I understand it, the Permira deal contemplates that somebody who makes a

superior proposal, if they come and do everything and they're willing to, you know, accept the cost of the deal protections that the winner of the process got, that you can land the company. So understanding that one of the things that Permira did not get was any assignment of the benefits of the standstill.

Which is I could understand, for example, in the auction context, like I was going through with Mr. Grant, is what you're saying is -- I might be more open to the idea that if Warren Buffett is my negotiator and actually believes in good faith -- and he owns 50 percent of the equity, and he's going to share the thing ratably with me. If Warren Buffet -- and he picks Goldman Sachs or whoever he wants as his financial advisor. If they think that the way to pull the highest bid out of the final three bidders is to use this tool as one of the deal protections and say to the three bidders, We're assigning the "No Ask, No Waiver" standstill to the winner of the auction, I'm willing to indulge that that could be a way to make it as real an auction as you can as to those three people in the public company context.

If you don't do that, though, right,

which is you don't tell the bidders that that's why you're using it, you don't assign it to the winning bidder, they have no reason to give any bid-raising credit to it. And so once the bidder wins, there is no assignment. They haven't asked for it. You know, the only possibility for your stockholders to get a higher deal is that if somebody makes a superior proposal.

If you're attending to the process, don't you need to go out yourself and send out a thing saying, Without prejudice to the enforceability of the remainder of the standstill you sent us, the sentence at Paragraph "blank" that says "blank" is hereby waived?

MR. SAVITT: A couple of thoughts in response to that, Your Honor. The first is that while -- during the course of the pendency of the process, there was no certainty as to what the merger agreement would say and whether, in the Court's words, it would be assigned. So it has that disciplining effect during the course of the auction, which I'm sure the Court understands.

THE COURT: I get it, but what you're saying, then, if you haven't told anybody that it

would be assigned, and what the party -- if I'm then in the last round of the auction and you're bargaining for the issuer, and you're telling me, No way, Strine, we're not going to give you 3-1/2 percent of enterprise value plus a match right. That's above market. We're not going to do that. We're giving you no more than 2-1/2, blah, blah, blah, I've pushed back. You push for a go-shop. I've gotten you to a no-shop with the whatever. I think that you've bargained with me in good faith. I'm assuming everybody else thinks that too.

So I know I've signed this thing, but you haven't told me you would give me the assignment of everybody else's. I'm assuming you're bargaining in good faith. I'm assuming as to anybody else, you're going to go out and waive that sucker so that they can come in and be an interloper. And if you haven't told me otherwise, right, then it can't be what's pulling money out of my pocket.

Do you see my point? Which is it can only pull the money out if it in fact is part of gaveling down as to these people, the auction. Right? And saying to them, Put forth your bid now or be foreclosed.

And what happened here is nobody did it that way; right? Which is there's no reason absent this litigation -- the litigation wasn't the cause -- there was no reason why every one of the bidders in this process who signed those standstills couldn't have had the non-waiver -- the non-ask part of it waived by Ancestry a nanosecond after Permira was banned by the definitive merger acquisition agreement; right?

MR. SAVITT: I believe that's correct. I believe that's correct. They would have to -- care would have to be taken so as to not disrespect the no-shop provision.

THE COURT: I'm not talking about waiving the standstill. I'm not even going as far as Mr. Grant's point. I'm saying you waive the -- you can't ask for a waiver part precisely so that the party could then ask for a waiver in order to have the opportunity to make a potentially superior proposal that would meet the qualifying conditions of the definitive acquisition agreement with Permira. And if, therefore, it went through the process sufficiently, it would give Ancestry the ability to terminate in favor of that proposal.

What Ancestry did was leave these things in place without having used it in any way, shape, or form that would have led Permira to believe that it was paying for the assignment of that, and thus, should have, you know, pulled out its big bid; right?

You heard me with Mr. Grant. I'm not Mr. Per Se Invalidity Man, but when people use something that's potent and they say it's going to be a tool, you would actually like to see the tool employed in it in some way connected to the rhetoric.

MR. SAVITT: But I think there are two questions baked into the Court's question. And the first, I think it's important to recognize that at the beginning of this process, when these agreements were being signed, no one knew how it was going to end. And the ability of the company to use the gaveling process effectively was enormously compromised by the course that the auction took.

THE COURT: I understand that, but the process eventually does end.

MR. SAVITT: And I wanted to get to that point.

THE COURT: And it took the litigation

for the condition to be -- the non-ask waiver condition to be waived.

All I'm saying, Mr. Savitt, is it may have been a low probability bet; right? I understand from your perspective, and I'm not pushing on you this, that the board's belief was that all these other people had been pretty pleased. It's just there are people in the world who take words seriously. And when people are actually asked to sign up contracts by people, they take them seriously.

So to ask somebody to sign up something that says, literally, you can't do something directly or indirectly, and then just say, Everybody who signed this just assumes they can blow through it -- and I know the board is thinking, We already talked to these people, but it wasn't like the board seemed to have been counseled, even the top management, on the effect of these things; right?

MR. SAVITT: The board understood -- the board understood that it was signing standstills and that they were strict standstills. I doubt that they --

THE COURT: That's the difference, because -- and that's why the public/private, I get

why it doesn't work. People mused about, well, you can make a private waiver request. It's funny; right? It's great. I'll make my waiver request private. You'll be the one with the securities law obligation to make it public. People are going to ask why; right?

And look, there's been discussion out there, Oh, can't you do this? Which is you don't use the word "waiver." But I think when you put "directly or indirectly," if you've got counsel and people are asking you, What was the purpose of your call, Mr. Savitt? And then you're under oath and you have to say, Well, the purpose of my request was my client wanted to get a waiver of this thing. I didn't use the word "waiver," but the purpose of the call was to in fact request a waiver. Right? Yes. And your client understood it was not allowed to ask for a waiver? Yes. So you essentially used words other than "waiver." You got out your Roget's and you put together a script in order to request a waiver. That's where we are with these things; right?

MR. SAVITT: I mean, I do want to say, and I think it's important the Court have in mind, that the merger agreement at Section 6.3 says the

company may waive standstill agreements. The merger proxy says -- I know that's your point. I know that's your point, Your Honor. Just let me -- and the merger proxy says the company can waive standstills.

THE COURT: But, see, the problem with the thing is the merger proxy -- that's another thing. Does the proxy statement tell the voting electorate that as to the folks who signed the standstill, they cannot even ask for a waiver of the standstill in order to make a qualifying superior proposal?

MR. SAVITT: The proxy does not say that.

THE COURT: And see, that's a concern that I have about -- which is people use the "WB" term. I don't use the "WB" term. And I don't think that the "WB" term is apt if you have an open process and people have been invited to bid, and there are certain consequences, and then you tell folks that, frankly, these five folks are out of the process. There was an assignment to the winner of this. Everybody knew what it was. You know, voting, you know that those five are, in fact -- the winner of this has the contractual right to enforce these standstills. The standstills contain a non-waiver

clause, which, if enforced to the letter, prevent those four other people who are in the process from being one of the parties that could make a superior proposal.

So when you vote on this, you know that those four -- you know that this is how the process went down. You are risking that they were put on the inside in order to get the best deal out of the auction. You gave this concession to the winner in the auction. Therefore, when you vote on this, you know as to the protection of the superior proposal out, it's really a thing for someone outside the process who hasn't signed one of these to come forward. That you have to vote on the assumption that these other people have been foreclosed as a condition of process.

If you don't like that and want to reopen the process, you need to vote no and say, Board, reopen it. Don't do these rules again. But the proxy statement here doesn't even disclose that reality; right?

MR. SAVITT: The proxy statement does not disclose that reality.

THE COURT: Has it been disclosed that

there was the waiver of the non-waiver? Was that in an 8-K?

MR. SAVITT: That was not in an 8-K.

THE COURT: So nobody knows that.

MR. SAVITT: The people who received the waivers know that.

THE COURT: But the electorate does not know that.

MR. SAVITT: The electorate does not know that.

I appreciate the Court's view on this, but just to get the idea on the record, the proxy says that folks can waive -- anyone who was hanging around the net could have put themselves in a position to be invited to waive. They could have let Ancestry know that they were still around. They could have observed, I see you guys can waive. No one has said anything at all suggesting that there is any interest in doing this. None. None. And not only that --

THE COURT: Well, and here's the issue. I also think the problem with the non -- you can't even ask for the waiver. I actually am always skeptical. I mean, Mr. Grant, Mr. Lebovitch and Mr. Wagner and their friends know, the Court is always

more reluctant to grant an injunction when there is not a bidder on the scene who is actually bargaining and willing to put their money behind it. Because when you actually have somebody who has made an unconditional bid, the balance of the equities is easier to deal with because you're not talking about the stockholders coming up empty.

But one of the things is you actually take the bidder's ability to litigate away, in a weird way, because litigation itself over the standstill could arguably be a violation of the standstill; right.

MR. SAVITT: Right, although I should say that the Court's opinion in *Topps* takes care of that issue. What I'm trying to say is there is a lot of play in these things.

THE COURT: Whose opinion in *Topps*?

MR. SAVITT: Your decision in *Topps*. By which I mean folks can't use standstills unreasonably or they'll be sanctioned by this Court.

THE COURT: I understand, but what I'm asking about, Mr. Savitt, is here, unfortunately, there seems to be, frankly -- and I'm sure this is not the first situation of this, but this variation has

been -- I mean, I do think I have a different view of this than the plaintiffs. I think that this has become more market than not. But that doesn't mean it's been thoughtfully attended to.

And I think the situation here, unfortunately, illustrates it a little bit, which is I don't know any -- I can't conceive of, from Ancestry's purpose, why it was left in place once the acquisition agreement with Permira was signed up.

MR. SAVITT: And I think, candidly, the answer to that question is that from the company's perspective, the disclosures that were in the merger proxy were sufficient that anyone who was reasonably likely to want to express interest would have found a way to do so, and they did not.

THE COURT: Wait, wait, wait. But see, that's the problem. Again, when you make people sign something that prevents them from doing something, to then assume that they can do it, that creates the conundrum for a judge of saying, Why did you make them sign something that you believed to be worthless? And if you believe it not to be worthless, if you believe it to, in fact, be enforceable, then those parties, up until December 11th, those parties

could not actually make a superior proposal that the board could accept under the acquisition agreement with Permira. They could not. They could not communicate it; right?

MR. SAVITT: What they couldn't do is request a waiver.

THE COURT: Wait a minute. The standstill says that you cannot make an offer to do a bunch of things, the most central of which is an offer to purchase shares. The reason why you need the waiver is so -- and so, as I understand the superior proposal, right, there is a deal price at 32 bucks. We all got that straight. We haven't forgotten that; right?

MR. SAVITT: No.

THE COURT: I actually could forget it in some of the maze of the issues. I was reminding myself out loud. $32.

The way I would have to make a superior proposal, I believe, would be to come in and say, We can pay 33.50. That would be an offer to purchase shares. I believe I'm not allowed to do that under the standstill. I believe I need the waiver -- is I need the permission from Ancestry to allow me to

do that.

So when you're saying in the proxy statement -- what the proxy statement does not say is, In order to do all this value maximization up front with the people up front, we create an auction-like setting. We had them all sign contracts, and those contracts preclude them from asking for a waiver. We have, for whatever reason chosen, even despite the fact we're not contractually inhibited from doing it, we have chosen not to waive that non-waiver clause. So when we're disclosing to you that this deal can be the subject of a superior proposal, we mean from anyone other than someone who has signed one of these. That as to people who signed these, they literally prevent them from doing any of the things in the standstill or asking us for a waiver to do any of those things. Thus, they cannot make a superior proposal. Right?

MR. SAVITT: Yes. What the Court said is correct.

THE COURT: And the problem with that is then I have to say -- what you're saying to me is, No, don't really mean it. We really don't mean what we signed them up for. People know that you can blow

through it.

MR. SAVITT: Well, blow through it -- anyone who was interested in this, in this asset, could have said, We see you can waive. We're still around. They could have signaled interest.

THE COURT: Wait a minute. I don't know you personally, but whoever lawyered this for Ancestry, it says "directly or indirectly." That is a request for a waiver. That is why you have the "indirect" thing. That is a request for a waiver.

And that's the problem with these things, which is either it means something -- and once you get into this world of what I call the edgy people, the people at Hellman who looked at this and said, Oh, come on. What are they going to do to us? Are they going to sue us because we called them up and said we still love them?

But then there are people, especially some strategics, who face all kinds of pressures in the world about compliance and about other kinds of things. And if you go to the general counsel of some strategics and say, Will this literally be a breach of a contract? Yeah, it will. I'm sorry. We're not doing that. We signed this up. We're just not doing

that. It's not worth this enough for us to do that. We have other reputational issues at stake. And if we're ever going to test efficient breach, it's not going to be to buy Ancestry.com.

Do you see my point? It's either the gavel -- if it's the gavel, it has to mean something. And if it means something, therefore, it has implications. And if the implications are important and they're not described to the electorate, that's when the "WB" word comes into effect, not about the board but about people understanding the mature decision they're having to make. And the fact that the board made certain judgments about how to extract value from the market, you need to understand that there are costs that come with those. And when you vote, you can't expect that this segment will be among those who might make a superior proposal; right?

MR. SAVITT: I mean, Your Honor, of course I appreciate your train of reasoning and I don't disagree with it. Our view is that, look, as much as anyone, I appreciate that standstill agreements have to be respected. On the other hand, they are contracts that are negotiated and deployed and interpreted in a dynamic environment with some

degree of play in the joints, recognizing that they are governed at all events by fiduciary constraints. And it seems to us to be impossible to believe that anyone who was interested in signaling a further interest here would have been precluded from doing so.

THE COURT: Okay. Tell me -- isn't it true that the purpose of the conversation that you were having is to get a waiver? Right? What I'm saying is what you just said was right. What you're saying is the edgy person, someone at Hellman, some of you guys when you represent people on the bidder's side rather than the sell side who are more willing to be edgy than others and have certain clients, say, Fine. If they want to sue us for requesting a waiver, we won't use the "W" word, but we're willing to do it.

If the purpose of the call, though, is your client has told you that because your client wants to come in at 33.50 into this superior proposal, your client, in order to make the superior proposal, needs the waiver. The purpose of you making that call is to request a waiver; right? That is the purpose; right?

Let's talk about the instrument, which is the call. What the contract precludes is a certain

end. If you are pursuing a certain end, and the end is a waiver, you're not even allowed to pursue that end; right?

MR. SAVITT: I'm not sure I would go that far.

THE COURT: Wait a minute. You want to get your own language out? It also says "directly or indirectly," which means you cannot play word games. What you would be saying on the stand, if I were trying to do this clause, you would say, Mr. Strine, your client wanted to make a superior proposal at 33.50. I'd say -- I'm on the stand. I'd be like, Yes. Your client understood it could not ask for a waiver? Yes. Your client wished to make this proposal, and the only way it could make the proposal was to get a waiver. Yes. Why did you call them? Um, well, I wanted to initiate a conversation that would result in -- what? And then the judge leans over and says, Mr. Strine? Well, waiver, but I didn't use the word "waiver." Well, you understood it was indirect, and you can't do it indirectly, so you used words that had -- the purpose of it, though, of those words, although they may not use "waiver," was to in fact get them to waive it so your client could make

the bid. Yes, Your Honor. That would literally be a breach of the contract; right?

MR. SAVITT: If the testimony came in that way and I was the judge, assuming all the rest -- I do hear your point.

THE COURT: But the point I'm making is you just told me that if someone wished to make a superior proposal, they could have a conversation that would result in a waiver that would allow them to do it but that would put them at risk. They would have a conversation in which they would be in literal breach of an agreement that your clients asked them to sign, and they would have to hazard that breach and the consequences of it.

And maybe I'm sensitive because I did a little case called Martin Marietta Vulcan, which I thought might be a cool thing about defense fighters, and it turned out to be rock yards. It wasn't like cool things or Vulcans. It was like about big piles of rocks. But where I upheld a standstill and prevented somebody who was willing to pay a lot of money for a public company from going forward. Because we in Delaware take contracts seriously.

And so you get where I'm going?

Stockholders don't know this, do they?

MR. SAVITT: Your Honor, I do understand. I do understand where you're going. It's a difficult question. I mean, in a sense, the question for this motion is whether there is irreparable harm coming out of this. And in that, let me note that we did waive them on the 11th. There are more than two weeks between the time of those waivers and the stockholder vote. These are folks who have already looked at the company, some of which have received very substantial due diligence.

The plaintiffs rely on the *Celera* case and the *Complete Genomics* --

THE COURT: I think you've heard nothing to date?

MR. SAVITT: Haven't heard a peep. And even accepting and appreciating the Court's arguments with respect to the likelihood of having heard something earlier, the fact is we haven't heard a peep before or after from folks who we would have heard a peep from.

The likelihood of there being irreparable harm emanating from this is vanishingly, vanishingly low. It is a greater interval of time

than was found necessary in the settlement approved by the Court in the *Celera* case between the notification of the retrieval of the waiver and I think it was the closing of the tender offer but the relevant date. I think it was the same interval as in *Complete Genomics*, all Court's approved resolutions.

The idea, even recognizing the force of the Court's position on the point we were just debating, that this is one that is a fit subject for an injunction, respectfully, I think can't be really actionable.

THE COURT: But you do agree in this context, it also can't be something that's seen as having been much -- it has some effect in forcing the process. It certainly wasn't used in the auction context in the way that -- to drive some big bid.

MR. SAVITT: The facts on the record as they developed, I would have to say the answer is yes, Your Honor, I would concede that, but it is so critical to recognize that the auction didn't unfold as was hoped and planned at the outset.

THE COURT: No, I get it. As I said, I'm not Mr. Per Se Guy. It's actually a fine restaurant. It's a little precious. I prefer

"Daniel" if I'm going to go that price range. But I'm not a per se guy, but I also think there are a lot of dangers with this kind of tool, and it can't be just embedded in everything in the marketplace. If you're going to do something that's this potent, there is some responsibility to actually attend to it throughout the process and to recognize that it's there.

Because, frankly, if it's not recognized as it's there, it shouldn't be there. And what I mean by that is, if it's just there because it was in somebody's boilerplate, then it can't have the value that's advocated for it. So you shouldn't have a valueless thing, because then it's all cost and no benefit. Because there will be people who will take it seriously, because they take contracts seriously.

I actually tend to like to live in societies where people take their legal obligations seriously. Maybe that's an occupational hazard, but I kind of like the person whose inclination is, When I sign something up, I'm supposed to live up to it.

So you get all the costs and no benefits if you do that, and so that can't be good. And then if it is a potential thing that could have

benefits, if you don't look at every stage of the process about whether it has a benefit, where we're at in the process -- and again, if the winning bidder doesn't insist on you keeping it in place, and you're relying on the passive market check to be the final assurance that you got the best deal, why would you yourself leave it in place?

MR. SAVITT: I understand --

THE COURT: I assume you concede there is a fair criticism here that, frankly, the excellent people running this process, as good a process as they ran, may themselves not have focused on that provision and should have gotten rid of it before December 11th.

MR. SAVITT: I surely understand why the Court is asking the question. And most of the observations, I would entirely agree with. If August 6th had come around and, as had been hoped and planned, there had been three very live bidders, the device might have proved extremely useful in extracting a truly highest and best bid.

Have in mind that what the board sought to do from the outset was to run as broad a process as possible.

THE COURT: Isn't it the case --

again, this is the interesting thing about this, which is what I engaged with Mr. Grant. You can't take the view if it's a value enhancer that it's meaningless. You actually have to take the view that it's meaningful.

And when you get to that end-stage auction, it is in fact part of the deal protection arsenal that you're giving to people that basically said, You might fear every other interloper in the world, but as to each other, this is the only last day on which you need to fear each other. Because whichever one of you is the winner, the other one is going to stand down because the winner is actually going to have this assigned in favor of their benefit -- in favor of them in the acquisition agreement. Because if it doesn't have that effect, right, then the arguments about how it creates value are silly.

MR. SAVITT: Well --

THE COURT: They are. We have to be adults about this. You can't say to people that the reason why Strine -- when Strine, Savitt and Grant are in the auction, the reason why we each had the incentive to get the maximum bid on the table is we

know that it's our last opportunity to bid against each other. We know other people in the world might come out to the table, but this thing is in the process now that says none of us can ask for a waiver, and we -- we can't ask for a waiver, and that means the standstill -- we can't make a superior proposal. We will be out of the superior proposal game.

Therefore, we're all looking at each other and saying, I want to be the winner. I think that Mr. Savitt and Mr. Grant are the two most likely bidders in the world because they've invested all this time and it makes sense. They know I've invested all my time. And they're telling me if I win, I get to keep Mr. Savitt and Mr. Grant out. If that's the reason I pull my big value out, I get that.

Now, it has dangers. Mr. Grant has pointed them out. Other people have pointed them out. It has dangers, but I can see it.

If what you're telling me is, No, it's just a real joke because Mr. Savitt and Mr. Grant can just kind of leave notes under the door -- you know, it wouldn't even say anything. Every morning, there would be Godiva chocolates or something like that from Bill and Stuart, and that will be the waiver request.

If that's the case, then it's never going to have any effect on me pulling out the thing.

You see my point? It either has to be real or not. If it's real, then your arguments about the value of it are not silly. But there are dangers, then, because it's real. And that means it has to be used with great care.

And that means when you have a situation where the process isn't that way -- when Strine won, Strine wasn't smart enough to ask for any assignment to him of this thing. There are eight other people who signed up, including Mr. Savitt and Mr. Grant, for information. The issuer has the ability to waive the non-waiver and doesn't --

MR. SAVITT: Look, I think I agree with much of what the Court is saying. And I just want to -- I just want to narrow my response. If in the end stage, for the device to work, there has to at least be the threat that the right, as you put it, will be assigned, because if that doesn't exist then it won't have the incentive --

THE COURT: Not only that, but that what is being assigned is real.

MR. SAVITT: I agree, although to the

extent it is being -- the fact that it was not assigned in this case is one of the reasons that we believe it is not real, at least not to the same degree.

THE COURT: The problem, Mr. Savitt, is, again, you're in this situation where you're asking people to literally breach a contract in order to find out. What you're basically saying is, Breach it because no one cares that it's a breach. And you know, the thing about it is, adults shouldn't be asking other adults or other organizations to sign up something that says you can't do something and then say, you, in fact, can.

MR. SAVITT: But at the same time --

THE COURT: It won't bother us if you do it.

MR. SAVITT: Perhaps I'm looking at this -- the other point I want to make, not to belabor it, but I think the device has utility, not just at the end of the process but as you move through the process, informing the auction and getting better bids throughout the way.

THE COURT: I believe -- as I said, I'll pick my favorite team: Warren Buffett and Jimmy

Buffett. They're going to share it ratably with me. I can understand how at every level of the process, them having a real auction gavel, it tells people, If you want to go to the next round, you better be there. And when they don't make it to the next round, they're cut off and they can't go forward. I understand how that puts real hydraulic pressure to get the best price if you've got the right thing and you've got well-motivated people. I'm getting you.

Where you're not owning your own argument is where you're dealing with the pussy-footing around it, the subterfuge request for waiver that doesn't use the word "waiver." Because if that in fact is real, if it is in fact toothless, then it has none of the utility you're talking about. And you either have to be on one side of it or the other.

And I think there are people in the world -- I think it's a good thing. There are people in the world who take their promises seriously. And you probably have had some conversations with clients where you've told clients who are trying to encourage you -- Couldn't we do this thing? If we had a code word for "waiver" that we used, where if we said it enough, it became clear it was waiver, could we do

that, Mr. Savitt? And you're telling the client, No. No. That would be a breach. If you want to do it knowing you're going to commit a breach, know that you're going to commit a breach.

MR. SAVITT: And look, I hear Your Honor, everything you're saying. And it does seem to me that it's a very different circumstance if the winning bidder has bought the ability to preclude a waiver.

THE COURT: I understand that.

MR. SAVITT: Because it's in the nature of a deal protection.

THE COURT: But here's the problem for what your clients did and why I was asking about what the proxy statement said. Even if the winning bidder didn't get it, if the seller for some inattentive reason doesn't waive the non-waiver provision, and you don't tell the stockholders that, and you're also advertising that there is the ability for people to make a superior proposal, and then you're leading the stockholders to believe that the people who are legally precluded from even requesting a waiver are within the category of people who can make the offer, that strikes me as misleading, because it's not in

fact the case. Because there's ten parties in the world who would have to breach an obligation in order to even request the ability to put on the table a potentially superior proposal. And people are voting in ignorance to that. It's not just an ordinary standstill.

MR. SAVITT: I don't know what the Court --

THE COURT: We're going to end. I'll give you the last word.

MR. SAVITT: I think it's important, given our colloquy, now this afternoon, to end by talking about the last two pieces of the preliminary injunction, which I'll try to do quickly because I'm sure the arguments will be of no surprise to the Court.

But all of this to the side, there is an irreparable harm piece here. Say what you want about the standstills. They were waived as to these bidders on the 11th, two plus weeks, from very sophisticated parties, all of whom have looked at the company, all of whom received preliminary due diligence, all of whom were big boys and girls and would be prepared to act if they so wished. Not a

peep. There is no likelihood of irreparable harm flowing from this issue even if it were to be found to be legally problematic.

As to disclosures, as we've discussed, there was not a hint of a disclosure claim until the answering brief received on Saturday night, that is, arguments related to disclosures are waived. And there is black-letter law on that question. It's frankly not right. If there are disclosure issues, they should be ventilated earlier so everybody can have an opportunity to think about what to do about them.

And on the balancing of the equities, I don't need to remind the Court that going back a long time, when there is a premium offer and there is no competing bid, there won't be an injunction. And here, there's a premium offer and there is no competing bid.

Now, I know my friend is going to say, Well, how could there have been a competing bid? Because everyone's hands were tied. To that I have a couple of things to say. It's something we've been talking about for an hour now. First of all, they aren't tied anymore. Second of all, as a practical

matter, does anyone believe, given the terms of the merger agreement as set out at 6.3, given everyone's engagement here, is that a reasonable probability? The answer is an emphatic no. In circumstances like this, the Court has basically said it was basically a null set, the circumstances where there would be an injunction. That ought to remain so.

An injunction here would be a sharp departure from that, and it costs something. It's not just the time value of money, thought it would cost that. It's not just the Mac risk and the financing risk and the financing costs to other parties. It also is this issue of trying to get the benefit of this year's tax rates.

I apologize I was not able to be on the scheduling call at the beginning of the case. I know the Court expressed some wonderment that we had to have a hearing at this time, and it was inconvenient for everyone. But there really was a reason --

THE COURT: Everybody's fearful or, I mean, some of us might say optimistic, that there might be some -- that we might actually go back to Reagan-era capital gains. I'm actually on record, I

have the suggestion with Aspen Institute that you could actually, without raising the tax rate, just do a non-Orwellian definition of "long term," which is instead of -- in the United States, we think the one-year rate is a long-term rate. If we just change that to the accurate "short term," and then we have a long-term rate at five years at the Ronald Reagan rate, we can move on. But I get you. There is a tax reason to close the deal before the end of the year.

MR. SAVITT: Mr. Grant pointed out, and he's right, Ancestry.com is not a tax planner, but there is no reason to disregard this issue that is plain as day in front of everyone.

THE COURT: No, it's not a taxpayer, but the people who will receive the consideration --

MR. SAVITT: Absolutely. And we cannot understand, as fiduciaries for the same shareholders that Mr. Grant is a fiduciary for, how it is in their best interest not to get their cash this year rather than later. The incidence will fall exclusively --

THE COURT: What he's saying is they can vote no if they wish to vote no, too.

MR. SAVITT: They can vote no if they

wish to vote no. And if they vote yes, they will almost certainly be better off getting their premium money this year than next.

And for all of those reasons, the matters that we've debated to the side, we think this is clearly not an instance where an injunction should issue.

MR. GRANT: Before we break, I had asked you if you would ask them that question, and you kind of promised me that you would, how a board that doesn't know what these "Don't Ask, Don't Waive"s are, and that's at Footnote 28, Page 12 --

THE COURT: I think I asked it in every other more painful way --

MR. GRANT: I just don't want him to say he didn't have the opportunity to say that the board is completely unaware of it, and if he's taken that opportunity --

MR. SAVITT: I disagree.

MR. GRANT: I just want him to have the opportunity.

MR. SAVITT: Thank you Mr. Grant. Gracious as always.

MR. GRANT: We look out for each

other.

THE COURT: He has your back.

MR. SAVITT: I understand that. Believe me, it's a source of comfort.

Look, we just do not think the record supports the conclusion that the board was unaware of what was going on. Did they understand the details? No. The only evidence --

THE COURT: The board gave testimony that people -- not just the board. It was pretty clear that your gavel tool argument about these things was not understood.

MR. SAVITT: Yes, Your Honor. Only because this at the end, because of the way the auction dynamic developed, it was not an assigned point.

THE COURT: They understood, as I said, strong -- and look, I don't hang boards on what advisors or other people -- you know, there is level of artistry that actually requires -- that's why conflicts are difficult when management is disabled because you look to management on an ordinary business deal to do a lot of this, not necessarily the boards. There are tools that are used on behalf of boards by

folks. But it's pretty clear that, frankly, it wasn't even clear that Mr. Turner or Mr. Sullivan understood the non-ask part of the standstills.

MR. SAVITT: As the Court just articulated, I would agree. I do think that the reason they answered those questions the way they did is because they shared the intuition, as many business people do, that folks -- given that the waiver was permitted, I think that's why they answered --

THE COURT: No. They share the intuition that it's meaningless, that it says that but it's meaningless. And that's where the problem is, either -- if it's meaningful, it could potentially have the value that its proponents suggest, but if it's really meaningless, then it will just confuse the most law-abiding of bidders into being out of the game.

I mean, I suppose it means that for those of you who want to pretend to be hipsters, it can mean that we have the most edgy acquirers being successful, because the people who are the most law-abiding will be the ones in the herd, but the ones who are kind of the Avenue A, you know, alphabet avenue kind of folks, you know -- probably like

Brooklyn is passe. They're looking to open up new parts of the Bronx. You know, those will be your acquirers because they'll say, It's only in the contract. Who cares? It doesn't mean anything. Right?

MR. SAVITT: Yes, Your Honor.

THE COURT: But then if you get a couple Blue Chip strategics with real compliance departments where their general counsel just says, Literal Breach Land, we don't get into Literal Breach Land without going to the board and having a high-level discussion about whether it could ever be something that we want to -- if we have to honestly say we knew we were breaching a contract and there could be a potentially icky situation about it, it better be something that's really high stakes; and this is just not enough for us. Right?

MR. SAVITT: Right, although this is not this case. This case is one in which --

THE COURT: Which everybody is sort of Avenue A?

MR. SAVITT: All of the bidders, all of the -- 11 of the 12 NDAs were signed with private equity sponsors and, ultimately, the company was not

required to give over the --

THE COURT: Then -- and we will pause with this and we'll take as short a break to give the reporter a break, for humanity, as we can because what we're going to do is give Mr. Grant about 20 minutes, and I will probably take about 15 minutes and come back and tell you what I'm going to do about this, while I'm drinking it in.

All I'm saying is you're back to this point of it doesn't really mean anything. What you've just told me is there is a bunch of people who signed something that doesn't mean anything. That raises the question for adults, why are we asking people to sign things that don't mean anything?

MR. SAVITT: Had Permira bargained for the assignment right, it would have had all the meaning in the world.

THE COURT: Wait a minute. Then you are saying it means something, which means unless you're asking me to assume that all of the private equity -- that none of the private equity firms will respect it -- I'm not going to assume that. I'm not into labeling people as evil or not. I'm assuming there probably are some private equity firms who would

be relatively careful about following these things. And actually, some of them have reputational interests that are similar to strategics in the sense that they might want to have a reputation for playing these kinds of things straight, that even though they may not deal with this particular company again, they may be dealing with the sell-side advisors and others in the process, and they like to be known as somebody who plays by the process.

And I -- unless you're asking me to rule that out and assume the entire private equity world won't take seriously the contracts your client asks them to sign -- are you saying that?

MR. SAVITT: I'm not saying that, Your Honor.

THE COURT: Which means that for those 12 parties, they were bound; right?

MR. SAVITT: They were bound by the terms of the contract.

THE COURT: And they couldn't ask for a waiver in order to make a superior proposal until December 11th.

MR. SAVITT: They couldn't ask for a waiver until December 11th.

THE COURT: Thanks.

MR. SAVITT: They have been able to since then.

THE COURT: That was embedded in the question, since December 11th.

So our staff, seriously, as quick a turn-around as we can do, consistent with everybody being human.

MR. GRANT: What time is that, Your Honor?

THE COURT: What I'm saying is try to take care of what you need to to be ready in 5 minutes.

MR. GRANT: Okay.

THE COURT: We need to switch out reporters. We are humans; right? Like in the time we've been in here, any Philadelphia Phillies baseball fan would have departed and come back from the place seven times. And so, you know, that's just an observation, being in any Philadelphia sporting events. So go do what you need to do and come back, and then we'll try to finish it.

(A recess was taken.)

THE COURT: Thank you all for the

quick turn-around.

MR. GRANT: Given Philadelphia's performance, that was about half an inning.

So, Your Honor, we left with a few issues that I understand can really be, I think, challenging to the Court, and that is we have a situation where we have projections that the purpose of them was not really disclosed -- not "not really" -- was not disclosed to the shareholders.

We have these "Don't Ask, Don't Waive"s where they're not only not disclosed to the shareholders, but in fact there is an affirmative representation that others can come through and make a topping bid, and yet we know that that's not true.

We're also told that some of the numbers behind some of these projections, the sensitivities, that -- first we were told that the May projections were created the same way as the sensitivities. And if you look at -- he said compare Exhibit 45 with -- I forgot what exhibit I'm supposed to compare it to -- 99.

But Exhibit 45 says that in preparing the May exhibits, 2013 is a bottoms-up detailed model, while the out years -- I'm sorry, this is the new

ones -- while the out years are driven off a high-level metrics. So in fact, they really are, if you look at those documents, prepared very differently. And I think that actually there is some disclosure about that, that they're prepared differently, but let's not all of a sudden say that this was the same exercise.

The other thing that we're told is that Sullivan's numbers were just fantasy, just musings. But the interesting thing is, again, if you go to our expert report, they're not just musings. They're almost dead on with Spectrum's. So Spectrum's CAGR is 17.3 percent. Sullivan's is 18 percent. So really, is Sullivan that --

THE COURT: And 18 was essentially what he had done in the spring; right?

MR. GRANT: 18 -- well, what was done in the spring was 21. 18 was what Sullivan did in mid-October. Spectrum in October did 17.3. And Permira in September, late September, did 14.8. So, actually, Sullivan was right in the middle when he was doing those things. This wasn't Fantasy Island.

THE COURT: Your friends say that you didn't really focus on this aspect of the case until

your reply brief.

MR. GRANT: They do, and I don't think that's a fair criticism, because what we do in the opening brief is we challenge the sensitivities. We challenge the "Don't Ask, Don't Waive." We tell them everything that's wrong with it.

So, you know, whether we are trying to knock this out on the substance of what they are, which we clearly are trying to do, or the fact that the shareholders are completely unaware of what they do, I don't think left them at any disadvantage here. They understood that those were the two things that we were going after from the very beginning.

And in fact, if you look at our brief, our opening brief, beginning on Page 59 and continuing through Page 72, we discuss all the problems with the sensitivities. So that's 12 to 13 pages of sensitivity discussion. This can't be, Oh, I'm surprised that they think our -- I didn't realize sensitivities were an issue. They knew loud and clear.

They also knew what they disclosed and what they didn't disclose. And yes, we don't have it in our complaint. I know Your Honor is not a big fan

of disclosure issues.

THE COURT: You know, I reacted to that where I said the Court loathes -- I don't loath disclosure claims. I've issued many a disclosure injunction. The investment banking community thinks of me as the crazy guy who believes that management's best estimate of the future cash flows are material to someone's consideration of whether to take cash.

MR. GRANT: Well, let's not let those folks down today.

THE COURT: No, no. What I'm saying is I don't loath anything. I may be wrong about that. I thought that, actually, if you were going to take $35 today for stock, that you're taught by corporate finance that you should be considering what future cash flows you would get from the stock and making a judgment about whether 35 is good.

So I kind of thought that management's best estimates of those, that was not -- that did not find entire favor with the investment banking community. I think what this Court has been concerned about is it seems like the better disclosure that's given to stockholders, the more full it is and rich it is, instead of that coming with reduced disclosure

claims around minutia, there's just -- they identify ten comparables. There's a globe of companies. Identify -- or disclose why you didn't pick any of the other remaining companies.

MR. GRANT: And Your Honor knows we feel the same way on that, and we don't bring claims like that. But this is really to the heart of what shareholders have to decide. Because they say, Well, there is no topping bid. You them told them there could be a topping bid if there was merit to it, but in fact there is something that prevents them. You told them 32 is fair.

And you said, Well, there are a couple different sets of projections. What you didn't tell them was the second one was really devised after the deal was reached and devised in large part to justify that $32 number.

And you didn't tell them that, by the way, Sullivan -- and Mr. Savitt says that Sullivan doesn't claim that his numbers are accurate, but they're almost identical to what Spectrum -- thank you. I have trouble with that name.

THE COURT: Mr. Savitt said that you didn't even point to the document in your opening

brief. Is that true?

MR. GRANT: Which document?

THE COURT: I guess Mr. Savitt called it the hack sheet.

MR. GRANT: No. That's referred to --

THE COURT: What I would say is basically it's an Excel model to value his equity package, depending on the basis of different projections of Ancestry's performance.

MR. GRANT: Number one, it's in the expert report, so that shouldn't be that much of a surprise to him. And secondly, that's the one that's on Page 118. So I will tell you, though, though in the expert report, it was not in the appendix because it doesn't show up --

THE COURT: Right. So it wasn't in the opening brief.

MR. GRANT: That's true, it wasn't in the opening brief. It was in the expert report. And this is a time that I do ask -- and it was, I mean, focused in there in that that's what Exhibit 10 to the expert report relies on, is his little calculations there. So again, this wasn't a surprise to them. Now, did it make it in there, into the appendix? It

did not. You know, are there some casualties that occur when you are working as fast as you can?

THE COURT: No. Was this cast of characteristics a late-breaking thing that I got with the brief?

MR. GRANT: You got that with the opening brief.

THE COURT: Yeah.

MR. GRANT: And the fact is they did it first for me because I couldn't keep track of everyone. And I knew if I couldn't keep track of everyone, I knew the judge --

THE COURT: I knew you did it in haste because it didn't even identify who Sullivan and Spectrum were. So it was very helpful to get it but I know people are working against crunch time.

It is fair to say you didn't ask for a disclosure injunction in those words. What you're saying is you addressed 0I know you addressed at length the whole issue about the change in the projections because there was a very lengthy part of your brief about that.

MR. GRANT: Now, Mr. Savitt also said the board understood what it was signing when it

signed the standstills, and I just don't get that. And that's why I really wanted him to answer that question.

Because on Page 12, Footnote 28 in the reply brief, I mean, you have Mr. Sullivan being asked the question: "If any of Ancestry's suitors other than Permira now wanted to submit a topping bid for the company, they could, right?

"Answer: I believe so. My understanding is that we're a public company. We've announced, signed an agreement, and that anyone can come forward and submit a better bid."

Now, that's not even during the whole time that the bidding is going on. This is in deposition, after the fact, and he still believes that. But it's not just Mr. Sullivan.

So Mr. Parker is asked: "Would you agree that deal protections that would completely prevent a competing bid above $32 a share would be a breach of your duty as a director?

"I suppose it would be.

"Would you agree that a deal protection that completely prevents a competing bid above 32 from -- $32 per share from emerging would be

a breach of a fiduciary duty, in your businessperson's sense?" This is asking Mr. Shroepfer.

Answer: "If you're asking that would completely prevent the acceptance of any higher offer?

"Yes.

"I would think that would be inappropriate."

So these folks did not understand how this operated.

Now, we've been told the board drove this process. I've been saying it was Sullivan who was basically doing it with a bunch of help from Spectrum, but I'm told the board is driving it. Well, here it is, and the board has no idea what this powerful tool is doing.

And so I don't understand how -- in fact, I think if we want to talk about substance and disclosure, first of all, it's got to be disclosed that that tool is out there but we had no idea what we were doing with it, but I don't know how it can be anything other than a breach of the duty of care to have such a powerful tool and don't even know that you've used it. That's got to be a breach of the duty of care.

And if that was done by folks who did not have a personal interest in the transaction, it's going to be very, very hard to get damages.

So while I understand that Mr. Savitt says, Gee, no other bidder, you know, that really weighs one way, but there is a breach without a remedy. What we're basically going to say is, Boards, if you keep your eyes closed to this powerful tool and you let your lawyers and bankers deal with it and you don't even know about it, then don't worry about it because you're not going to get enjoined, because there can't be another bidder.

THE COURT: I get it. That's the issue. Like, the stockholders will also vote under the false impression that folks who signed those were able to make a superior proposal, and they'll vote on the impression that they had that chance, even they had that second look.

Like, I'm giving them credit that a reasonable stockholder would say, Look, these people were in on the front end. But the impression you can get from this is not only were they on the front end, but even after somebody, one of their colleagues, stepped up and signed a definitive agreement, and they

can free-ride reputationally and other things -- because people who fail are much more willing to fail in herds than on their own -- they have a second look, they all took a second look, and they didn't come in then, when the reality is there is no second look by those folks.

MR. GRANT: Because you know what this board could have done if they were doing the process right and knew that they had this tool? There could have said, We have three other likely bidders who are in this who didn't go into the final round even though they were at 32 and 33 and one might have been at 33.50, but we said we don't have the time for them. And since now we're discussing 31 to 32, let's go back to them and say, Hey, Simon Says --

THE COURT: I get that. I think there is even the technique of, without even going back to them, if all they receive is a waiver of the non-waiver -- if they receive a waiver of the non-ask, that is a soft overture as well.

MR. GRANT: Right.

THE COURT: Because it means they can ask for a waiver.

MR. GRANT: Right. Now, they say,

look, we waived on the 11th. First of all, they said they sent a letter. I don't know how that letter went. I don't know if it went by snail mail, Fed Ex, I don't know who it went to. And only one was produced. So I don't even know about the other nine. Secondly, remember that --

THE COURT: Are you impugning the integrity of the United States Postal Service?

MR. GRANT: I hope it's around. I hope it's around, but this time of year, it could easily take a week.

And remember, Your Honor, a number of those folks didn't get full due diligence because they were cut off from the data room. So there were only two of them who got full due diligence or close to full due diligence. So when they say, Well, the other nine could just step up and come running in at very short notice, that's not true. That's just not true. So the idea of --

THE COURT: I think, again, I think it becomes a question of what it is you have to do to come in. There are qualifying hurdles. This is not the world's most complex company. It may have its own things. You've got to look at the metrics of the

retaining of the subscriber base, what it's going to do. Diligencing -- doing the diligence on Ancestry.com -- we've become more careful in the world than we should, but private equity firms are also expected to and do compete on the basis that they're able to do due diligence in a good timeframe. It assumes, frankly, when people are shut out of the data room, that they never continue to analyze some of the stuff that 0their own metrics out of it.

MR. GRANT: No, I get that, but all I'm asking is don't buy into the, Hey, there's no problem. Everybody basically completed all their work and all they have to do is pull it off the shelf. I don't think that's fair.

THE COURT: No. Look, I don't believe that stuff at all, and I particularly don't believe it about strategic acquirers, because when a strategic is being asked to make, in a no-shop process, to make something that's reasonably likely to be a superior proposal, there is a real chance of them being revealed in public to have made that expression of interest. And if you don't actually get the thing, you can put yourself -- the market is going to say, Wow, you didn't make that big deal. Maybe somebody

should make a big deal for you. I get it.

MR. GRANT: Right. And the point I want to make, unless Your Honor has any questions, you said, I don't get Spectrum. Why would they take a cheap deal? And the interesting thing is on Exhibit 19 of our expert's report, it shows how -- the benefit they're really getting by rolling over at this cheap price and selling to someone at 32 is they're effectively getting out at $33.41. Are they in love with that? Probably not. They probably would have rather had 35. But the ability to roll over gives them a nice deal.

And then you say, Well, I could have the certainty. I could have it now. As Mr. Savitt likes to say, we don't know what's going to happen in the next tax year, although now I understand that Wachtell is giving tax advice for all of Ancestry's shareholders because for those --

THE COURT: No. That's not --

MR. GRANT: Because many of those may be nontaxable funds.

THE COURT: I think that's not fair. I think it's -- you know, there is a long American tradition of tax planning, tax avoidance. And many

investors are -- I just don't see how it's an illegitimate concern in and of itself.

MR. GRANT: It's a concern. I would be worried about Spectrum losing their -- what do they call it -- the carry, because they could get rid of that. So those are the people who could get hurt. But the other folks --

THE COURT: I think there is a chance, for example, that the SEC continues to worry about retail investors, and I guess that's okay. I hear your point on the ordinary retail investors, the 401(k) investor, because the limits for most of --

MR. GRANT: Or big pension funds? They're not taxable entities?

THE COURT: Things become taxable eventually. For example, there are many ordinary investors because of our retirement systems who, once they hit retirement age and things like that, these things, a lot of this stuff is deferred. It's not entirely eliminated. So it's not -- we haven't gotten to the point where capital gains is totally meaningless for anyone.

MR. GRANT: Fair enough. But in any event, as I said, I recommend Your Honor to Exhibit 19

to see how there is a benefit there.

I don't know if you have any other questions.

THE COURT: I do not.

MR. GRANT: Okay. Thank you very much.

MR. RIEMER: Your Honor, could I just be heard for one moment?

THE COURT: Sure.

MR. RIEMER: Regarding Spectrum, I took Your Honor's comment about what you were focusing on to heart and did not ask to be heard, but having just heard the comment about us, I might invite Your Honor's attention to Page 181 of plaintiffs' expert's deposition in which he said, under his analysis, there is no question in his mind that it would be beneficial to Spectrum to sell its shares at $38 a share rather than sell three-quarters of them at $32 a share, and then roll over a certain amount.

"Yes, that's true."

There is no math in the world where we are better off, given the fact that we were never willing to withhold from what would be sold, even a majority, we were never willing to go above what's

become 24 percent of our stock being rolled over, it doesn't matter if you say the stock is worth $38, 36, 34, 32.01, we are leaving way more money on the table if the stock is being sold for less than it's worth than we could possibly hope to get in the new capital structure. And that's the import of that.

And I take Your Honor's point about motivations. Ours was exactly the same as the other shareholders, because of simple math.

Thank you.

THE COURT: Thank you.

I studied hard. I was planning on taking 15 minutes and composing my thoughts, and letting you know the answer. I'm going to be a bit more spontaneous but not really spontaneous at all. What I mean by that is, I told you all, given the time of year and given when you have the vote, I was likely to give you a very prompt answer, in part because, honestly, having the vote when you're going to have it is going to be a material burden on some real people. And so they need -- in my view, being a fan of Dickens, I think people ought to know what's going on with the world right now rather than the Friday before a major holiday. So I'm going to give you my view of

things, and you can deal with them, and you'll like them or you won't, but they're deeply studied. My law clerks and I spent the entire weekend with you all in my head, basically, and reading all these depositions.

Let me start with the plaintiffs' basic theory is one that I came in today resistant to. I still come out resistant of, which is -- this is not a trial. It's very important for everybody to understand it's not a trial. I don't get to see everybody. I don't get to hear the plaintiffs cross-examine everybody. I have to make a probabilistic determination of how things might come out at trial. I'm not averse to members of this Court -- I am not averse to concluding probabilistically that people's self-interest tainted a process. I've done that more times than anyone would want in a lifetime. You would like to think everyone was pure of motive. And so I'm not disinclined to do that. I read very carefully, as any Delaware judge would, with our tradition of being concerned about conflict of interest, I read very carefully the allegations and the evidence regarding that.

I took very seriously the case when it

came in at the motion to expedite stage, and I think the defendants didn't impose expedition in part because there was a very serious allegation lodged about tipping towards a particular bidder.

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

And in terms of Spectrum, I don't see any evidence in this record that Spectrum wasn't a highly motivated seller. I see abundant evidence to the contrary. In fact, to the extent I see -- even when we get into the projection thing in the spring, I sense Spectrum wanting to police management a little bit. That's not because it had any particular concern about necessarily Mr. Sullivan or Mr. Hochhauser, but realizing the dynamic it was in when they looked at the market, it seemed to be a company where the probable buyer, if you had to pick what type of buyer it would be, was more likely to be a financial buyer than it was likely to be a strategic buyer.

Knowing that, Spectrum is in that game, knows that management is likely to be a remaining investor, it's a very interesting situation

for management because it allows you to do a couple of valuable things. You often get a nice hit to the money machine, which is you get to harvest a certain amount of net wealth that you've built up from your investment in the firm, so that's cool. But you're also asked to roll.

And you're asked to roll with sponsors that hold your feet to the fire because you've been part of a selling process, telling them how good the company is going to be, and they say, Well, it's going to be good, so a lot of what you're going to get with us is you're going to roll a substantial amount of equity, and if you create value, your equity will become more valuable, and we all win-win.

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

So when I look at the situation, as I'm saying, I've looked at all the plaintiffs' things,

I've read every line of depositions, I read all the stuff about texts and stuff, even if I concede that Spectrum had a very powerful influence over the board, my sense of reading it is, if anything, Spectrum wanted to be aggressive; that they recognized if they were going to keep it as a portfolio company, then they would be better off holding it. Because if you're going to curl the monitoring costs and everything, you might as well have the substantial influence that the plaintiffs suggest that they have. That actually selling a big block of your position but leaving a non-de minimus chunk of equity in where you have an obligation to your investors to protect that equity, therefore, you still have to have somebody monitor the investment, you don't have as much upside. And here's another thing, you took all this thing to bring this company public to get liquidity. You're now back in the private situation, but you don't control it. You're in somebody else's window. This is not making sense to me. And in fact, that's not how the process was run.

The process looked like they segmented the market carefully, logical people were bought in, a competent banker who appears at every turn to have

done sensible things, ran it.

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

I don't get any sense from this that Sullivan or Hochhauser should have had any reason to believe they would be less beloved to any of the other particular private equity buyers. All of the private equity players sent all the usual love signals, including Heller [sic]. The original Heller letter was a love letter to management. It might not have used -- because they might be more experienced. Frankly, people are hesitant to put things like "roll" and all that kind of stuff early on. They send the right thing. But it was very clear, they said, We don't run companies. We don't expect to run this companies. We're excited about dealing with you. We want to align your incentives. There is not one hint in that that Mr. Sullivan or Mr. Hochhauser should

have believed that they were in danger or that there was any sense in which they would have been otherwise than been Heller's partner.

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

The fact that Permira talks specifically about its call, that makes sense, because they got deposed. And I don't fault the plaintiffs like that. That's what a trial would be about, and then the plaintiffs would have a chance to talk to the other bidders.

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

At every stage of it, I can see why Qatalyst did what it did. I don't see any hint in the process of Sullivan and Hochhauser getting out of their lane. Do I think that they were shocked that they were asked to roll their equity? No. I think they would have been shocked if Heller had emerged or

TPG had emerged or KKR would have gotten back in the process, I think they would have been shocked if they had not been asked to do that, unless they were going to be fired.

And see, here's another thing about this process that just is sort of pretty clear to me. There is nothing about the relationship between Mr. Sullivan and Mr. Hochhauser and Spectrum that's personal. I'm not saying they want harm to Mr. Sullivan and Mr. Hochhauser, but Mr. Sullivan and Mr. Hochhauser were found through a professional search of this thing. I have no doubt that Spectrum, if there had been 36, 35 bucks available, without management, they would have said, This is why we've been giving you equity grants. And we're going to take the highest bid, and you'll be compensated richly because we've been giving you equity grants. And the $36 is what you're going to take.

And therefore, with Spectrum being motivated, every seller, every buyer, frankly, had -- this is not a situation where -- there are many -- and I'm sensitive when the plaintiffs make these arguments, because they're right to make it. When you have a founder-dominated company where the block is

really those three top managers who own that 25 percent, who they're happy with is extremely critical.

Here, you have Spectrum. Spectrum is the big gorilla in terms of voting power. And there is no sense in this record that Spectrum would have ever traded out its own interest and that of its investors in order to get a better deal for Mr. Sullivan and Mr. Hochhauser. And as I'll repeat, I have no sense in this that there was some reason, rational reason, for Sullivan and Hochhauser to believe that the Permira bid was especially beneficiary to them. I don't believe they were threatened by any of the private equity bids because they believed that the MO of private equity is going to be to retain management.

So the basic theory -- and even when we get to the point of August, why -- I get exactly why Qatalyst -- again, we can all make different choices in this world. That's the point of the law, a little bit, is we look at motivations; right? The original *Revlon* was about Michel Bergerac not wanting to sell to the upstart from Philly, and to doing anything he could to avoid a level playing field.

When you see a motivation like that, you're more skeptical of these choices. I don't see a motivational factor.

And why you wouldn't -- nobody thought H&F really needed Permira as a partner. H&F, you're trying to get them to 35. You're going to partner them up with somebody at 33 so you can be sure that the only thing you have on the table is the possibility of getting 33, or then when they go to 32.30 or 31 or 30? I don't believe there is any indicia in this record of Heller being actually unloved. They might have felt some frustration. They might have felt some time pressure. That is all the kind of thing that, frankly, a well-motivated seller will make people feel at times. You're not supposed to have the buyer fall in love with you. You're supposed to get the buyer to make a real bid. There is nothing here that kept Heller from topping. And there is nothing in the record. What it suggests is that Heller looked at this, and the more it looked at it, the less confident it got that it wanted to pay that price, and it ultimately went away with a whimper.

In terms of the time of due diligence,

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

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

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

Let me talk first about the change in the projections. I do think that this scenario is one that's a bit vexing to deal with. I'm not sure what I think is the reality. I think the defendants' story that the original projections were bullish, plausible but bullish, makes a lot of sense. It could have been documented much better. And I think there are lessons in this, again, for everybody writing these hygienic depictions of the process where they take everything that's actually told to the directors that might be valuable out of it because the directors are actually supposed to be entitled to rely upon that.

And when there is nothing contemporaneously when you get to write the script, and when the script in terms of the PowerPoint presentations -- PowerPoint is ubiquitous. Doesn't even have to be in the minutes. Could be a discussion

of the banker's process. There are all ways to do it. But when none of it is in there, it makes you wonder.

But even if it's optimistically plausible, you have a situation where the investment banker says something that's more than a little bit in tension with the idea that these things were never going to be the basis for an actual valuation of the deal. When the banker says, I can't render a fairness opinion based on these numbers, well, if they were just sell-side puffery to begin with, you would never expect that that would have been the case. That might have been your high side in your sensitivity case; right? With a base case and a low case.

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

I can't honestly in good conscience premise an injunction on the idea that people are lying. I don't have enough in this record to get

close to where I think people are behaving in bad faith. I think it is very plausible that these were optimistic, and if you are asking what the best estimate was of the company's future cash flows, that these were higher.

But I do think the process by which the things were changed was a bit unusual. I tend to lean a little bit more towards the plaintiffs, saying, it doesn't look exactly like the original process. It looked like the bank -- and I'm not faulting the bank. I think the bank was trying to figure out what was going on with the bidders, trying to figure out where it is. Ultimately, says, We don't do projections. You've got to do your own.

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

Now, had the plaintiffs asked for an injunction in those words? No, but Mr. Grant, it's fair to say, reminded me, because I spent a whole lot of time reading the opening brief and it was all about

these projections and about them being changed. And I think to the extent that the Court is not willing to grant, you know, a full-bodied, stop-the-deal-dead-in-its-tracks injunction does not rule out an equity taking note of a fairly important omission of actual objective fact, which is I couldn't grant an injunction -- I'm not going to grant a self-flagellating injunction saying that the board has to disclose that they actually believed the sensitivity case.

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

I'm not going to -- on this hack sheet thing, I will say that adds color to my finding there. I don't know what this is. I heard the CEO -- I read his testimony. I take serious people seriously. If something is crazy, why is the CEO of a public company musing on it? People involved in money, like CEOs, worried about their equity, were they sticking in numbers? Was it just something they saw on a

Powerball billboard chart? Is that what the Powerball got up to where he was driving on the New Jersey Turnpike? I don't know the roads out west. Maybe it was Route 66. It is a number that looks a lot like numbers that have been used in the sale process, numbers that the CEO had come up with himself. And he's doing it to value his own stake. That's a little -- that is troubling.

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

vote on this deal.

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

I think the plaintiffs actually had a reasonable probability of success until December 11th on the substance of the thing. And let me be clear about why I think that is and why I do not.

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

deal with it.

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

Per se rulings where judges invalidate contractual provisions across the bar are exceedingly rare in Delaware, and they should be. It's inconsistent with the model of our law. I always tell my students, there are two kinds of corporate law questions, essentially: The law question, and then there is the equity question. And the law question is what the board did. Did it comply with the law in the sense of is it consistent with the statute? With other elements of positive law? Some governing contract? And then there is the equitable overlay, which is even assuming it's lawful, is it equitable under the circumstances?

This Court is a court of equity, and usually we're dealing with the latter question. And it's usually for the Legislature to determine when

something is per se unlawful. It's not for the Court. Now, sometimes people do something that's totally inconsistent with the statute. That's not the Court making up a law. That's the Court saying, That provision violates a statute.

I know of no statute, I know of nothing, that says that these provisions are per se invalid. And I don't think there has been a prior ruling of the Court to that effect. I know people have read a bench opinion that way. I think there was a lot going on in that case. Again, there is a role that bench opinions play, and I don't think it's to make per se rules.

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

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

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

That's what I understand the additional part of this no-ask part of the waiver

provision is. Not talking about the standstill itself, which gives the board the ability to control what happens with an offer. We're talking about the ability for someone to even ask for a waiver. And it's on this idea of we've identified the most likely potential bidders. In advance of any deal protections inhibiting them from making a bid, we're bringing them in. We think they're the most likely. We recognize that other people may come forward, and they'll be subject to different rules. But how do we, in a public company context, get these most likely bidders to actually put their full bid on the table rather than hold something in reserve? We can use this tool to gain credibility so that those final-round bidders know the winner is the winner, at least as to them.

That's what I understand the argument is around these things, in that you're running an auction. I'm not prepared to rule that out. I don't think the judges of this Court should be ruling that out. That sounds like if you want to say per se invalidity, that sounds like something for the Legislature to decide. But we do have an inescapable obligation to do what is the core job of this Court, which is to do that equitable overlay. Which is if

you're going to use a powerful tool like that, are you using it consistently with your fiduciary duties, not just of loyalty, but of care?

And I think the plaintiffs here in terms of -- I'll talk about the disclosure, but let's talk about this as if December 11th hadn't happened, because December 11th would have only happened because of this litigation. I think the plaintiffs have pretty obviously shown that this board was not informed about the potency of this clause. The CEO was not aware of it. It's not even clear the banker was aware of it.

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

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

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

I think, actually, what has happened on December 11th, I think, would have been absolutely essential to let them know. Why do I think that? Because I think it would have created the false impression that any of the folks who signed the standstill could have made a superior proposal. That's not true. They could only make it by breaching the standstill. Because in order to make the superior

proposal, you would have to request for a waiver, either directly or indirectly.

And again, I mentioned this silliness before. These things either mean what they say and are enforceable or they're silly. Treating people with dignity and respect as adults requires that you assume that they mean what they say, that they are enforceable. I think treating people with dignity and respect assumes there is a class of buyer out there that actually takes legal obligations seriously, that is not willing to play Chicago School efficient breach theory games just for fun. Especially when it's not about the company's situation. And I don't know that for anyone in the world, buying Ancestry.com is about the company's situation. The only company for which it's about the company's situation is Ancestry.com itself.

And even as to private equity players, playing by the rules and having a reputation of playing by the rules might actually be something that's of value to them. So they made us sign this up. They take it seriously. I'm not sure why they haven't sent us the non-waiver letter, but they haven't. Our MO is not to get edgy with people, not

to get confrontational. That's not how we get the deal flow in the long run. They never asked us back in the game. We're moving on.

Well, at least when the electorate votes -- if these things are going to be used, and they're used for a gavel, then the electorate should know that with respect to the comfort they should take in the ability to make a superior proposal, they should understand that there is a segment of the market where that segment cannot take advantage of that; that the board made the cost/benefit trade-off that the best way to get the value was to draw the highest bid out from those people while they were in the process; that in order to do that, it had to incur the cost of giving to the winner the right to enforce it. But what you as a stockholder know is, We invited these people in on the front end. That's how we tried to maximize value. You still have the ability of somebody we didn't test the market with coming in, but you shouldn't assume that these other people can come in. That's if it's actually been assigned.

What's harder to explain is if the winning bidder didn't ask for the assignment, how it is that the seller -- I admit I wouldn't do it until I

signed the definitive acquisition agreement with Permira. I don't want to tip Permira, but I would have had you guys sign first. And then the nanosecond after you didn't sign, I would have sent a letter to all those people and said, We're waiving the sentence in your standstill that says, Blank has hereby waived. The remainder remains in force and effect. Which then makes clear to all of them that if they wish to ask for a waiver in order to make a superior proposal, that they are legally allowed to do that. That makes sense. That took this litigation for that to occur.

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

So in terms of my balance of the equities, I may have jumped to it already, which is

I'm not prepared to give the plaintiffs a further injunction than that, precisely because I think that there was a -- and I want to be fair to the defendants.

I think that this was a process that had a lot of vibrancy and integrity to it, probabilistically. I think they tried to kick the tires. I think that even when I look at the communications by Mr. Sullivan, I think they were trying to get these buyers to pay as full a price as possible. They were trying to create a competitive dynamic.

Given that and given the ability of stockholders to vote for themselves, I'm disinclined to take it out of their hands. If someone has the courage of his or her convictions and doesn't want to accept it, then they should vote no. And a lot of times, these deals -- I don't know whether there is an appraisal cap. But even if people are going to tell me that Spectrum has a lot of votes and Sullivan has a lot of votes, if the bulk of the remaining electorate says, We don't like this stinky deal; we believe everybody in America wants another genealogy tree and is going to want to know how Norwegian they are or how

Irish or how Belgian or how Kenyan they are, they can protect themselves. I think given the market test that was done here, I'm poorly positioned to take that risk for them, and I'm not prepared to do so.

And I think that is what separates out the absence of having a bidder on the table. That's a very powerful dynamic, and it's one that this Court has to consider for the best interests of stockholders. That said, the stockholders should vote knowing the material facts. And I've identified two that the plaintiffs have convinced me -- and in fairness to Mr. Savitt, they did not ask for a disclosure preliminary injunction, but I am considering this what I would call lesser-included, because I believe that they fully briefed the merits of these issues. They've convinced me that there were flaws. And I believe that my balance of the harms calculus only works if the electorate in fact has that full information.

And so I want to give you that right now so that you can do something about that. I would think, given the alacrity with which lawyers can work, it should allow you to get to your vote. But I want it done, or I'm going to -- and I'm going to enjoin

the deal subject to those disclosures being promptly made.

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

And I'm also talking about the fact of the December 11th waiver of the no-ask waiver, and that before that time, the bidders had not been -- and that the literal language of it -- I mean, I'm going to ask you all to scriven that, but I think you wrote language -- unless you can tell me otherwise, you wrote language that, if you follow the literal language for that, anyone who was a signatory to that could not, before the waiver on December 11th, approach the board in order to ask permission to make a superior proposal. Because if you did that, that would, in fact, be asking for a waiver of the standstill. And it was only until December 11th that you were able to do that. I think that the stockholders should be aware of that, in the mix of information, before they cast their vote.

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

And the gateway for the electorate is to think, Ha, I'm voting. I know that somebody, if they had a second thought, could have come in, I realize now, after December 11th, but what we've said today is it's not even clear -- there wasn't even an 8-K about the December 11th, was there?

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

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

MR. GRANT: I have one other request, and it's unrelated to the injunction. I'd like to ask permission to send the plaintiffs' brief, all defendants' briefs, the reply brief, and the transcript from today to the Proxy Advisory Services so that, really, this information can get out to all

folks. Is there any reason we can't do that? I know the number of days hasn't expired for the 5(g), but the problem is this is moving so quickly that I think it's important for these folks to have this information so they can deal with it as they wish.

THE COURT: I mean, I have no problem with you sending the briefs. I have not sealed any part of today's transcript. And I believe our good reporting staffs is already feeling the time pressure to get it to you. And the sooner I leave the room, the sooner I will give her and her mighty team the chance to get it to you. So we haven't sealed one bit of today. And so our good friends in Rockville, I don't know where Glass Lewes is, but --

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

THE COURT: San Francisco.

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

going to limit it to that.

I think you all have enough going on, and I'm not going to do persnickety things. I'm not so sure that helps the plaintiffs' class either, because to the extent that there are people among those who have expressed interest, and we haven't talked about them today, but they don't want to be talked about anymore, I'm not sure it will warm the cockles of their hearts to have all of the appendices out there, if you get me. People have strange sensitivities. I know part of your case that I only partially embraced dealt with strange sensitivities.

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

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

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

THE COURT: Yes.

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

THE COURT: What I'm saying is I don't want to hold you all up. If the plaintiffs -- you know the things. If the plaintiffs confirm -- I'm sure Mr. Grant and Mr. Lebovitch and Mr. Wagner and their team wish I had gone further. I'm asking them to realize this is as far as I went. You can craft an order that bases off of this transcript. If you all reach agreement that the language does the trick, you can go forward.

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

MR. GRANT: Unless, of course, there

is another bid.

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

Absent something like that, then it's probably in everybody's interest to keep things moving. So I'm not expecting to hold off the process. I'll be around tomorrow. And I issued my ruling so that you could address it. And if nothing changes on that -- at least what I would say is, what we're saying, Mr. Grant, is once those two pieces of disclosure are required, there is no judicial reason at this point. If there are other emerging market developments, that's a whole different factor. Make sense?

MR. GRANT: Yes, Your Honor.

THE COURT: Anything else?

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

(Court adjourned at 2:43 p.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 239 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 18th day of December, 2012.

/s/ Jeanne Cahill

Official Court Reporter
of the Chancery Court
State of Delaware

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