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## Corporate Governance

### **'Don't Ask, Don't Waive' Provisions Questioned in Pair of Del. Decisions**

**A** pair of recent decisions by the Delaware Court of Chancery scrutinize the use of “don't ask, don't waive” provisions in standstill agreements, suggesting that boards be fully informed of the impact of using such a tool in mergers.

“The court wants to make sure that the directors know about the tool, know what the tool can do, and [understand] the implications of it,” Anne C. Foster, a director of the Delaware firm of Richards, Layton & Finger PA said during a March 14 Delaware corporate law webcast.

The Court of Chancery decisions in *In re Ancestry.com Inc.* and *In re Complete Genomics Inc. Shareholder Litigation* should not be read as an invalidation of “don't ask, don't waive” provisions, Foster said. The court will look at the totality of the circumstances and facts in each case. “It is an ‘information question,’ in large part,” she said.

A standstill agreement typically prohibits a potential acquirer from taking certain actions related to the acquisition of control of the target company. Such actions include buying shares and proxy contests. A “don't ask, don't waive” provision of a standstill agreement bars a potential bidder from making any public or private requests that a target company waive the standstill prohibitions.

**Confidential Agreements in *In re Ancestry.com*.** In May 2012, the board of Ancestry.com Inc. began an auction after having received a number of unsolicited expressions of interest, according to court documents (*In re Ancestry.com Inc. Shareholder Litigation*, Del. Ch., C.A. No. 7988-CS, consolidated 12/17/12) (see 16 MALR 130, 1/28/13; 16 MALR 522, 4/1/13).

By June, at least 12 parties entered into confidentiality agreements with Ancestry.com as a condition to receiving due diligence information. Those agreement contained “don't ask, don't waive” provisions prohibiting those parties from asking the board, privately or publicly, to waive the standstill restrictions without an invitation from the board to do so.

Following the public announcement of a merger with Permira Advisers LLC, the winning bidder, several Ancestry.com shareholders filed a lawsuit in the Court of Chancery, alleging breach of the Ancestry.com directors' *Revlon* duties and seeking to enjoin a shareholder vote on the merger slated for Dec. 27, 2012.

Plaintiffs argued that the “don't ask, don't waive” provisions impermissibly precluded directors from being fully informed of possible superior offers. They also claimed that Ancestry.com shareholder Spectrum Equity Investors, along with Ancestry.com management, violated their duty of loyalty to Ancestry.com by giving preferential treatment to Permira.

Spectrum supported the Permira purchase, and Ancestry.com management revised its long-term financial projections in May 2012 to justify selling to Permira for \$32 a share, which plaintiffs deemed an “unfair” and “tainted” deal that hurt unaffiliated shareholders.

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ANNE C. FOSTER  
RICHARDS, LAYTON & FINGER

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**Waiver of Provisions for Bidders.** Chancellor Leo Strine, in his Dec. 17, 2012, decision told Ancestry.com that it could not go forward with the \$1.6 billion sale of the family-history site to Permira until it disclosed more information about the deal before the shareholder vote.

He ordered Ancestry.com to publicly disclose that its financial adviser would not issue a fairness evaluation of the deal until management changed the revenue projections, as well as disclose that the standstill agreement barred other bidders from attempting to top Permira's offer.

Ancestry.com made those disclosures, and shareholders approved the sale to Permira Dec. 27.

In arguing that “don't ask, don't waive” provisions necessarily are impermissible under Delaware law, the plaintiffs relied primarily on Vice Chancellor J. Travis Laster's recent bench ruling in *In re Complete Genomics Inc. (In re Complete Genomics Inc. Shareholder Litigation)*, Del. Ch. C.A. No. 7888-VCL, 11/28/12) (see 16 MALR 130, 1/28/13; 16 MALR 522, 4/1/13).

**'Flow of Incoming Information' Disrupted.** In *Genomics*, Laster found that the “don't ask, don't waive” standstill provision precluded the “flow of incoming information” to the Genomics board, which “impermissibly limited its ongoing statutory and fiduciary obligations to properly evaluate a competing offer, disclose material information, and make a meaningful merger recommendation to its stockholders.”

According to Foster, the purpose of a “don’t ask, don’t waive” provision is to encourage bidders to put their best bids forward prior to the target’s execution of the definitive merger agreement “rather than allow a bidder to stand on the sidelines and jump in and out of the bidding process at will.”

In his opinion, Laster did not question Genomics’ ability to prohibit a public waiver request but he viewed the prohibition of private requests “something similar to an impermissible bidder-specific no-talk clause,” Foster explained.

Laster said that by agreeing to that provision, which he said prohibited incoming information from that bidder under any circumstances, the Genomics board “impermissibly limited its ongoing statutory and fiduciary obligations to properly evaluate a competing offer, disclose material information, and make a meaningful merger recommendation to its stockholders.”

Laster enjoined Genomics from enforcing the “don’t ask, don’t waive” provision against that one bidder.

**What Now?** Such provisions are merely one type of tool directors can use in the merger process, and companies should not interpret these decisions as ones that deem “don’t ask, don’t waive” provisions to be per se invalid, Foster said.

“I think, just as with everything else, especially in a court of equity, the facts are really the key to what happens in a case,” she said.

“It’s how you use these provisions. The courts will really look at whether directors are fully informed, and if the directors are aware,” of the implications of using a “don’t ask, don’t waive” provision, she added.

BY CHE ODOM

*The opinion in In re Ancestry.com is available at <http://op.bna.com/car.nsf/r?Open=codm-96er5v>.*

*The opinion in In re Genomics is available at <http://op.bna.com/car.nsf/r?Open=codm-96er6y>.*

### Review of Recent Key Delaware Corporation Law Cases—First Quarter 2013

Topic	Case Name Case Citation (MALR Citation)	Holding
Shareholder Rights	<i>In re Novell Inc. Shareholder Litigation</i> , Del. Ch., Consolidated C.A. No. 6032-VCN, 1/3/13 (16 MALR 49, 1/14/13)	Former Novell shareholders have argued a “reasonably conceivable bad faith claim” that Novell boards favored the company’s ultimate acquirer, Attachmate, over other bidders during the sale process.
Executive Compensation	<i>Freedman v. Adams</i> , Del., No. 230, 2012,1/14/13	The Delaware Supreme Court rules that a derivative complaint challenging a corporate board’s decision to pay over \$130 million in executive bonuses without adopting a plan that could make the bonuses tax deductible does not state a claim for waste.
Shareholder Rights	<i>In re Plains Exploration &amp; Production Co.</i> , Del. Ch., C.A. No. 8090-VCN, 1/25/13 (16 MALR 166, 2/4/13)	The court refuses to stay shareholder derivative actions over the acquisition of two oil and gas ventures by mining giant Freeport-McMoRan Copper & Gold Inc. to give the plaintiffs a chance to inspect Freeport’s books and records.
Contract Interpretation	<i>Henkel Corp. v. Innovative Brands Holdings LLC</i> , Del. Ch., No. C.A. 3663-VCN, 1/31/13 (16 MALR 209, 2/11/13)	A dispute on damages in the wake of a collapsed deal for Innovative Brands Holdings to purchase a segment of Henkel Corp.’s consumer adhesive business must continue, the Delaware Chancery Court declares.
Shareholder Rights	<i>Doerler v. American Cash Exchange Inc.</i> , Del. Ch., Civil Action No. 7640-VCG, 2/19/13	There is sufficient evidence for the plaintiffs to receive books and records inspection specifically related to allegations of self-dealing with the corporation.
Class Actions	<i>New Jersey Carpenters Pension Fund v. InfoGROUP Inc.</i> , Del. Ch., C.A. No. 5334-VCN, 2/13/13 (16 MALR 294, 2/25/13)	The court grants class certification to litigation over alleged improprieties in the sale of InfoGROUP to a private equity firm.

## Review of Recent Key Delaware Corporation Law Cases—First Quarter 2013 – Continued

Topic	Case Name Case Citation (MALR Citation)	Holding
<b>Jurisdiction and Procedure</b>	<i>In re Freeport-McMoRan Copper &amp; Gold Inc. Derivative Litigation</i> , Del. Ch., Consolidated C.A. No. 8145-VCN, 2/14/13 (16 MALR 294, 2/25/13)	The court certifies for interlocutory appeal an order refusing to stay shareholder derivative actions over the acquisition of two oil and gas ventures by Freeport-McMoRan Copper & Gold Inc. to give the plaintiffs an opportunity to inspect Freeport's books and records.
<b>Jurisdiction and Procedure</b>	<i>Jepsco Ltd. v. B.F. Rich Co. Inc.</i> , Del. Ch., C.A. No. 7343-VCP, 2/14/13 (16 MALR 295, 2/25/13)	Court dismisses lawsuit filed by Jepsco Ltd., minority shareholder of Rich Realty Inc., alleging breach of fiduciary, statutory duties by court-appointed custodian of RRI.
<b>Reverse Mergers</b>	<i>Meso Scale Diagnostics LLC v. Roche Diagnostics GMBH</i> , Del. Ch., C.A. No. 5589-VCP, 2/22/13 (16 MALR 333, 3/4/13)	A reverse triangular merger was not an "assignment by operation of law, a Delaware court rules.
<b>Jurisdiction and Procedure</b>	<i>Bean v. Fursa Capital Partners LP</i> , Del. Ch., C.A. No. 7566-VCP, 2/28/13 (16 MALR 373, 3/11/13)	Court holds that a limited partner's claims seeking access to the LP's financial statements and damages are not barred by laches except for his request for the 2008 financials.
<b>Jurisdiction and Procedure</b>	<i>Amalgamated Bank v. Dauphin County Employees Retirement Fund</i> , Del., No. 67,2013, 2/26/13 (16 MALR 333, 3/4/13)	The Delaware Supreme Court rejects an interlocutory appeal from an order refusing to stay shareholder litigation over the acquisition of two oil and gas ventures by Freeport-McMoRan Copper & Gold Inc. to give the plaintiff a chance to inspect Freeport's books and records.
<b>Asset Sales</b>	<i>Edgewater Growth Capital Partners LP v. H.I.G. Capital Inc.</i> , Del. Ch., C.A. No. 3601-CS, 2/28/13  (16 MALR 373, 3/11/13)	Court rejects claims by private equity firm over the sales process for its troubled ATM venture.
<b>Jurisdiction and Procedure</b>	<i>In re Diamond Foods Inc. Derivative Litigation</i> , Del. Ch., Civil Action No. 7657-CA, 2/28/13 (16 MALR 379, 3/11/13)	The court tosses a lawsuit by derivative plaintiffs asserting claims over an alleged accounting scheme and its fallout at snack maker Diamond Foods Inc. given their nearly identical lawsuit in California federal court.
<b>Jurisdiction and Procedure</b>	<i>Kallick v. SandRidge Energy Inc.</i> , Del. Ch., C.A. No. 8182-CS, 3/8/13 (16 MALR 415, 3/18/13)	The court grants preliminary injunction blocking SandRidge Energy Inc.'s incumbent board from interfering with shareholders' attempt to replace the company's board.
<b>Private Equity</b>	<i>Carsanaro v. Bloodhound Technologies Inc.</i> , Del. Ch., C.A. No. 7301-VCL, 3/15/13 (16 MALR 451, 3/25/13)	Venture capitalists/board members must in large part face Delaware claims over their alleged orchestration of dilutive transactions and the fairness of an \$82.5 million merger.
<b>Jurisdiction and Procedure</b>	<i>Zutrau v. Jansing</i> , Del. Ch., C.A. No. 7457-VCP, 3/18/13	The Delaware Chancery Court refuses to dismiss derivative and direct claims against a president of a proxy-processing company, finding that doctrines of res judicata and collateral estoppel do not bar the plaintiff's claims, and that an appointment of a custodian to the corporation may be necessary "at some later stage."
<b>Source: BNA</b>		