IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: ANCESTRY.COM INC.)	CONSOLIDATED	REDACTED VERSION
SHAREHOLDER LITIGATION)	C.A. No. 7988-CS	E-FILED DECEMBER 18, 2012

PERMIRA DEFENDANTS' ANSWERING BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

POTTER ANDERSON & CORROON LLP
Stephen C. Norman (No. 2686)
Kevin R. Shannon (No. 3137
James G. Stanco (No. 5702)
1313 N. Market Street
Hercules Plaza, 6th Floor
P.O. Box 951
Wilmington, Delaware 19899-0951
(302) 984-6000

Attorneys for Defendants Permira Advisers LLC, Global Generations International Inc., and Global Generations Merger Sub Inc.

OF COUNSEL:

David B. Hennes
Justin Santolli
David Yellin
Mark Siegmund
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10004
(212) 859-8000

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

CASES **Page(s)**

STATUTES AND RULES

Defendants Permira Advisers LLC, Global Generations International Inc., and Global Generations Merger Sub Inc. (collectively, "Permira") join in the Ancestry Defendants' Answering Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction (the "Ancestry Brief") and the Spectrum Defendants' Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction (the "Spectrum Brief"), and respectfully submit this Answering Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction. Permira respectfully submits that there is no factual or legal basis for an injunction. Moreover, Plaintiffs, who collectively own approximately 25,000 shares of Ancestry.com Inc. ("Ancestry" or the "Company") common stock, are seeking to deprive the overwhelming majority of the Company's stockholders of the opportunity to decide for themselves whether to accept a premium bid where there is no prospect for a higher bid and full disclosure has been made to the stockholders. As such, Permira respectfully submits that injunctive relief would not be in the best interests of Ancestry's stockholders, who can pursue a claim for money damages or seek appraisal if they do not wish to accept the $32 per share offer. For these reasons, and the others described below, no injunction should be issued.

NATURE OF THE CASE

After a nearly eight-month sale process, Ancestry announced on October 22, 2012 that it had agreed to be acquired by an entity controlled by investment funds advised by Permira Advisers LLC, and had entered into a merger agreement, pursuant to which shareholders of Ancestry would receive $32 cash per share (the "Transaction"). The $32 per share price represents a 41% premium to the closing price of Ancestry's common stock on June 5, 2012, the last trading day prior to the publication of press reports stating that Ancestry had retained a financial advisor to explore a possible sale of the Company.

As is often the case, within mere days of the announcement of the Transaction, multiple complaints were filed challenging the Transaction. Those complaints that were filed—each setting forth substantially identical, boilerplate allegations—were then consolidated. But the theory asserted in the lead complaint was simply false: that Ancestry, at the insistence of Spectrum Equity ("Spectrum"), had declined a $35 per share offer to accept Permira's $32 per share offer in order to allow Company management and Spectrum to have a continued equity investment in Ancestry.[1] It is undisputed that this core allegation was and always has been untrue and that the Company never received a final offer higher than the $32 per share offer made by

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[1] *See Pontiac Gen. Emps. Ret. Sys. v. Billings*, C.A. 7988-CS, at 10 ("The Ancestry Board, however, likely upon Spectrum's recommendation, rejected the $35 per share as being inadequate.") (Ex. 6). Unless otherwise noted, all exhibits cited herein are included in the accompanying appendix submitted by Permira.

Permira (or, for that matter, a final offer even close to $32 per share). Reflecting this reality, nowhere in Plaintiffs' Opening Brief is the theory set forth in the lead complaint raised as the grounds for the relief that they seek.

Having received hundreds of thousands of pages of documents from the defendants and taken six depositions, Plaintiffs' aiding and abetting claim against Permira remains devoid of all factual and legal merit. Plaintiffs' only allegation in support of their claim is the bare, conclusory statement that Permira offered continued equity participation to Tim Sullivan, the Chief Executive Officer of Ancestry, to Howard Hochhauser, the Chief Financial Officer of Ancestry, and to Spectrum (which currently owns approximately 30% of Ancestry's common stock) in order to induce an allegedly defective sale process that would secure for itself favored status as a bidder rather than maximize shareholder value. The factual record developed during expedited discovery, however, offers no support for this theory:

First, notwithstanding multiple press articles reporting on the Ancestry sale process and the robust auction run by Qatalyst Partners LLP ("Qatalyst"), Ancestry's financial advisor, the $32 per share price offered by Permira was several dollars higher than the next highest definitive bid.

Second, Mr. Sullivan understood that any transaction between Ancestry and a private equity buyer, Ancestry's primary potential acquirors, would require him to reinvest equity into the Company to show his continued commitment to the business.

Third, both Ancestry's management and Spectrum (which repeatedly expressed no interest in continuing its Ancestry investment) were motivated to get the highest possible price under any scenario because they were always selling a significant number of shares in the Transaction.

Fourth, and most importantly, the "rollover" of their existing equity by management and Spectrum at the end of the sale process was agreed to solely to help fill an undisputed equity gap in Permira's bid to allow the Transaction to proceed at a price as high as $32 per share, which provided a substantial premium to Ancestry's shareholders relative to where the Company's stock was trading before news of the sale process was leaked.

In short, the detailed account of the negotiation process leading up to the Transaction, as reported in Ancestry's Schedule 14A (the "Proxy Statement") (which is not challenged in any respect in Plaintiffs' motion), and the extensive expedited discovery taken thus far, reveal nothing more than that Permira conducted arms-length and good faith negotiations regarding its potential acquisition of Ancestry. Because it is black letter law that transactions negotiated at arms-length cannot give rise to an aiding and abetting claim, Plaintiffs have failed to demonstrate a likelihood of success on the merits, and thus their motion for a preliminary injunction should be denied for this and other reasons.

STATEMENT OF FACTS

Plaintiffs' factual presentation in their opening brief is fatally flawed. As demonstrated at length in the Ancestry Brief and the Spectrum Brief, because of these fatal factual flaws, Plaintiffs have sought to contrive an alternative universe—one that bears little or no resemblance to what actually occurred during the sale process—in which there is evidence to support their distorted view of the facts. The foundation on which Plaintiffs' entire motion is premised is their claim that Permira was the preferred bidder for Ancestry because of the potential for an equity rollover by Spectrum and Ancestry management to occur. *See* Pl. Br. at 1-2. But Plaintiffs are unable to offer any factual support for that conclusion; instead, a fair and balanced reading of the record shows that Permira neither sought nor received preferential treatment, which is evidenced at every step in the process.

A. PERMIRA'S INITIAL INTEREST IN ANCESTRY

Based on its own research, Permira first became interested in Ancestry in the spring of 2012. *See* Ruder Tr. 34:4-22 (Ex. 1). At that time, Permira decided, based on information from publicly available sources, that it wanted to learn more about Ancestry's business to determine if it could be a viable private equity investment. *See id.* As a result, Brian Ruder, a Permira partner based in Menlo Park, California and head of what would become Permira's Ancestry deal team, contacted an acquaintance, Ancestry director David Goldberg, and asked to have lunch to discuss Permira's interest in

exploring a transaction with Ancestry. *See id*. 35:23-36:1. In April 2012, Ancestry stock was trading in the low $20s per share. *See id.* 35:12-15.

At a lunch meeting on April 20, 2012, Mr. Ruder and Mr. Goldberg had a general discussion about Ancestry. *See* Ruder Tr. 36:25-37:15 (Ex. 1). In response to comments from Mr. Ruder that Ancestry could be a prospect for a "going private" transaction, Mr. Goldberg provided no insight other than to suggest that Permira should speak with Ancestry management to learn more about the Company. *See id.* 36:25-37:18. At the meeting, Mr. Goldberg mentioned that Permira should also contact Spectrum. *See id.* 37:19-38:3. Mr. Goldberg recommended reaching out to Spectrum, which owned approximately 30% of Ancestry's shares. *Id.* 38:4-12. Shortly thereafter, on April 23, 2012, Mr. Goldberg introduced Mr. Ruder to Messrs. Sullivan and Hochhauser via email. *See* Ex. 7, at PA17173.

The initial meeting between Ancestry management and Permira was known to, and explicitly authorized by, the Ancestry board. At a May 15, 2012 Ancestry board meeting, the board specifically authorized management "to negotiate a confidentiality agreement with Permira and to engage in discussion with [Permira]." Ex. 8, at 16-17; Ex. 9, at ACOM174916. Unbeknownst to Permira, it was not the only private equity firm that had made contact with Ancestry. Prior to Mr. Ruder's meeting with Mr. Goldberg, REDACTED and REDACTED had also expressed interest in a "going private" transaction with Ancestry. *See* Ex. 10, at ACOM342.

After Permira executed a non-disclosure agreement, on May 18, 2012, Mr. Ruder met with Messrs. Sullivan and Hochhauser. *See* Ex. 7, at PA17172; Ex. 8, at 17. At this introductory meeting, Mr. Ruder was asked about how Permira typically worked with management of a company that it acquires. *See* Ruder Tr. 185:4-8 (Ex. 1).

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Id. 185:5-19. No specifics were discussed and Ancestry management was not offered the opportunity to invest in a "going private" transaction at that time. *See id.* 185:4-19. Nor would it have made sense to have had those discussions, as this was Permira's first introduction to Ancestry.

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See Ruder Tr. 185:9-16 (Ex. 1); Ex. 11, at PA28037.

Plaintiffs claim that, as a result of this May 18 meeting, Permira became management's favored bidder because of "the explicit rollover invitation from Ruder."[2] Pl. Br. at 16. However, neither the discussions that took place on May 18 nor any of the actions taken by the Company thereafter support this conspiracy theory. Mr. Ruder's statement was no shock to Mr. Sullivan, who testified that "it was [always] his

[2] Indeed, it was such a non-event that Mr. Hochhauser did not even recall that the parties had discussed the prospect of an investment by management. *See* Hochhauser Tr. 127:4-9 (Ex. 3).

understanding that in a private buyout where a private equity firm would be acquiring a company, the management was expected to roll some portion of their position in the company. Seemed to me always to be a very logical expectation for a buyer." Sullivan Tr. 111:10-18 (Ex. 2).

Moreover, the notion that Permira would be the only private equity firm contemplating an investment by management is false and contrary to logic. In its May 18, 2012 initial indication of interest, REDACTED, the bidder against whom Ancestry management allegedly discriminated in favor of Permira (*see* Pl. Br. at 12-13), specifically stated: "Our proposal and enthusiasm for this transaction is predicated upon the [Ancestry management] team continuing to lead the organization going forward" and "creating alignment of incentives through the appropriate compensation structure for senior leadership." Ex. 12, at ACOM99462; Sullivan Tr. 119:25-120:8 (Ex. 2). Thus, REDACTED, the suitor allegedly spurned because it would not permit a co-investment by Ancestry management, was explicit in detailing its incentives for management and was far ahead of Permira in considering a potential transaction since Permira only had its introduction to Ancestry management that same day.

On May 23, 2012, following his meeting with Ancestry management, Mr. Ruder met with Victor Parker and Benjamin Spero, managing directors of Spectrum and Ancestry board members. *See* Ruder Tr. 185:20-24 (Ex. 1). At that meeting, Mr. Ruder raised the issue of whether Spectrum had any interest in "rolling over into a private

company." *Id.* 186:9-18. Directly contrary to Plaintiffs' original theory and contradicting any claim that Permira was favored in order to allow Spectrum to continue its investment in Ancestry, Spectrum did nothing to indicate that it had any interest in participating in a deal: Mr. Ruder described Spectrum's response to Permira's inquiry as

Id. 186:22-187:11. Mr. Parker testified similarly and without contradiction that offering to allow Spectrum to rollover its equity was in no way a precondition to obtaining Spectrum's approval of a transaction with Ancestry (*see* Parker Tr. 214:23-215:3 (Ex. 4)), and that Spectrum was not looking to rollover any or all of its investment. *See id.* 215:6-8.

B. THE QATALYST LED SALE PROCESS

In negotiating a potential transaction with Ancestry, Permira knew that it was dealing with an experienced and tenacious representative for Ancestry. Immediately before the May 18 meeting with Ancestry management, Permira was told that the Ancestry board had retained Qatalyst as its financial advisor. *See* Ex. 7, at PA17172; Ruder Tr. 43:8-13 (Ex. 1). Throughout the sale process, Permira viewed Qatalyst as the representative of the Ancestry board and the lead negotiator for the board. *See, e.g.*, Ex. 13, at PA8838-41; Ruder Tr. 88:1-24, 145:6-25 (Ex. 1); Ex. 14, at PA122919-28; Ex. 15, at PA171827. From recent prior experience with Qatalyst (Ruder Tr. 42:16-43:2 (Ex. 1)), Permira understood Qatalyst would run an expansive sales process, and be a strong

negotiator on price and business points. *See id.* 80:19-81:4 ("I believe Qatalyst is very good at soliciting interest in the companies that they advise."); *see also* Ex. 16, at PA1267; Ex. 17, at PA17070.

Consistent with the notion that Qatalyst would seek the highest price attainable for Ancestry, on June 5, 2012, an article appeared in Bloomberg News stating that "Ancestry.com Inc., the family-history research website, is weighing a sale and working with Frank Quattrone's Qatalyst Partners LLC to find buyers." Ex. 18.[3] Shortly after the leak, on June 9, 2012, Qatalyst provided Permira with a process letter, which called for initial indications of interest to be submitted on June 20, 2012. *See* Ex. 23, at PA199982. After obtaining approval from the Permira investment committee, (Ex. 24, at PA171855), on June 20, 2012, Permira submitted an initial, non-binding indication of interest of $32.50 to $35.00 per share. *See* Ex. 13, at PA8839.[4]

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See Ruder Tr. 79:18-80:7 (Ex. 1); Ex. 19, at PA13638. This was not the last press report, however, about the potential sale of Ancestry. There were at least four other press reports during the eight-month sale process appearing in Bloomberg News, The New York Times, and Reuters News. *See* Ex. 20; Ex. 21; Ex. 22.

[4] The June 20, 2012 initial indication of interest states that Permira

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As is to be expected from a banker representing a seller, Qatalyst then told Permira that its "range was too low." Ruder Tr. 88:1-24 (Ex. 1); Ex. 25, at PA13488. This was not an improper "tip," as Plaintiffs suggest. *See* Pl. Br. at 18. Mr. Ruder testified that he assumed Qatalyst was "telling everybody the same thing." Ruder Tr. 89:5-12 (Ex. 1). Not surprisingly, Jonathan Turner, the partner at Qatalyst who was running the Ancestry sale process, confirmed that he "had the same conversation with everybody." Turner 71:11-73:13 (Ex. 5).[5] The obvious purpose of Mr. Turner's statements was to encourage the bidders to increase their offers for the benefit of his client, Ancestry.

Because Mr. Ruder viewed Mr. Turner's admonition as credible (Ruder Tr. 88:25-89:4 (Ex. 1)), Permira raised its initial indication of interest to $34.00 to $37.50 per share.

REDACTED REDACTED Ruder Tr. 86:21-87:3 (Ex. 1). As shown by the use of similar language in letter (Ex. 12, at ACOM99462), such expressions are fairly typical in initial indications of interest by private equity buyers and Permira's statement here was far from unique. *See also* Ex. 26, at ACOM614

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[5] Plaintiffs try to make much of the fact that, in their words,

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See Pl. Br. at 20 n.84. This has no basis in fact. First, as noted above, Mr. Turner testified that he had the same conversation with all bidders. *See* Turner Tr. 71:11-73:13 (Ex. 5). Second, as noted below, Permira did not actually follow Mr. Turner's price guidance—it started its range at $34.00. *See* Ruder Tr. 92:7-16 (Ex. 1).

See id. 91:12-21.[6] On June 22, 2012, Permira was informed that it had advanced to the next round of the process. *See* Ex. 27, at PA8847. Despite Plaintiffs' unsupported assertion to the contrary, Permira never believed that it "was a foregone conclusion" that it would be chosen to advance into the next round of the process. Pl. Br. at 22. If advancing to the next round in what it believed was a competitive auction was a "foregone conclusion," then Permira would have had no reason or incentive to increase its bid. *See* Ex. 25, at PA13488.

C. PERMIRA'S DIFFICULTY IN FUNDING A TRANSACTION AND THE EMERGENCE OF AN EQUITY GAP

Ancestry established August 6, 2012 as the deadline for final bids. *See* Ex. 28, at PA1563. REDACTED

See

Ruder Tr. 92:10-99:2 (Ex. 1); Ex. 29, at PA171845.

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[6] Given that it had not yet completed much, if any due diligence, at the time the revision to Permira's initial indication of interest was made, Permira "did not have a Permira plan completed yet, and [Permira] needed more information in order to do so." Ruder Tr. 91:2-5 (Ex.1).

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See Ruder Tr. 98:25-99:2 (Ex. 1); Ex. 30, at PA27792.

See Ruder Tr. 97:10-99:2 (Ex. 1); Ex. 31, at PA25296; Ex. 30, at PA27792.

As a result, on August 6, 2012, Permira was unable to meet the deadline imposed by Ancestry to make a firm offer due to insufficient equity co-investments.

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Thus, on that same day, Mr. Ruder told Qatalyst that Permira was "working with between 50 and 75 percent of the equity that would be required to fund [up to] a $33 bid," and that it "had not identified a source" of the equity. Ruder Tr. 142:7-19; 142:21-143:4 (Ex. 1) ("[Permira] was very clear that it was up to a $33 bid.").

Plaintiffs assert that, despite Permira's need for equity funding, "nothing in the record suggests that Permira ever seriously considered partnering with REDACTED despite its need for additional funds to make its bid." Pl. Br. at 25. This is yet another factual mischaracterization. In a presentation prepared in advance of its August 13, 2012 investment committee meeting, the Permira deal team had set forth preliminary thoughts

on "potential deal constructs in consortium with REDACTED." Ex. 33, at PA170960. The minutes of the August 13, 2012 investment committee meeting reflect a discussion about a partnership with , and states that REDACTED REDACTED

Ex. 34, at PA171839. Pursuant to this request, the investment committee authorized the deal team to REDACTED *Id.* at 171840. Despite the deal team's willingness to partner with , the Ancestry board, in the exercise of its business judgment, refused to permit Permira to partner with because the Ancestry board, through Qatalyst, informed Permira that it would need to raise its bid to $35 per share and Permira was unwilling to do so. Ruder Tr. 145:18-25 (Ex. 1).

Because of the equity gap that it faced in filling out its bid, Permira continued to explore alternative possible sources of equity and continued to canvass limited partners in the Permira funds.

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However, given the equity gap that it faced, Permira, shortly after its August 6 discussion with Qatalyst, raised with Qatalyst the possibility of a Spectrum rollover investment as a way to attempt to fill the gap. *See* Ruder Tr. 148:8-13 (Ex. 1). Qatalyst instructed Mr. Ruder that he should contact "directly" a representative of Spectrum, which he did. *See id.*

In a call with Mr. Parker, Mr. Ruder raised the issue of whether Spectrum would consider rolling over a portion of its equity in a transaction. *See id.* 155:10-19. Consistent with the lack of interest in such an investment expressed by Spectrum during their May 23 meeting, Mr. Parker never got back to Mr. Ruder. *Id.* ("[H]e never got back to me."). Several weeks later, Mr. Ruder again reached out to Mr. Parker to gauge Spectrum's potential interest in rolling over some of its equity and concluded that Mr. Parker "hadn't really put a lot of thought into the rollover plan." Ex. 35, at PA15709. As a result, Mr. Ruder told Qatalyst that he believed

Id.[7]

In early September, given the continued unwillingness of Permira's potential co-investors to commit sufficient capital to fill the equity gap, Qatalyst suggested that

[7] Plaintiffs claim that in a September 2, 2012 email Mr. Ruder reported that Mr. Turner told him "that the Board would 'trade off price to do this quickly.'" Pl. Br. at 27. This, however, did not mean that the Ancestry board was willing to sell the Company for an unfair price. Rather, Mr. Turner listed a set of alternatives to proceeding with a sale transaction, and indicated that the Ancestry board was seriously considering all of its strategic options. In the same email, Plaintiffs assert that Mr. Turner instructed Mr. Ruder

Thus, Plaintiffs' implication that Qatalyst was telling Mr. Ruder to circumvent the Ancestry board mischaracterizes the facts.

Permira partner with REDACTED . *See* Ruder Tr. 145:12-17 (Ex. 1). In suggesting that and Permira partner, Qatalyst instructed the two firms to aim to submit a joint proposal in the $33-$33.50 per share range. *See* Ex. 8, at 22; Ex. 36, at PA15744. An acceptable joint bid with REDACTED , however, never materialized because , after conducting its own due diligence, told Permira that it would not bid above $30 per share but had not, in any event, received approval to make a bid of any amount. *See* Ex. 37, at PA171851. Moreover, when a $30 per share offer was communicated to Qatalyst, Permira was told that such an offer "was a nonstarter." Ex. 38, at PA15617. With no joint REDACTED bid, Qatalyst proposed that Permira target an offer of $33 per share with the equity gap filled by Spectrum rolling $100 million of equity and the remaining $150 million equity gap to be filled by growth equity firms. *See id.* Permira had no discussions with Spectrum regarding this potential equity contribution, but Qatalyst represented to Permira that Spectrum was willing to make that investment to facilitate a transaction at $33 per share. Ex. 34, at PA171839. The growth equity firms, however, that were contacted by Permira were not interested in pursuing a transaction. *See* Ex. 8, at 23; Ex. 39, at PA14280.

D. PERMIRA'S INABILITY TO OFFER MORE THAN $32 PER SHARE

Throughout Permira's evaluation of Ancestry, one constant was that the Permira investment committee, which must recommend any formal offer to the Permira funds,

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See Ruder Tr. 141:17-142:5 REDACTED

; 158:18-25 (Ex.1). [8]

[9]

Indeed, a review of the investment committee minutes definitively establishes the

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[8] Plaintiffs rely on a May 28, 2012 preliminary investment recommendation to the Permira investment committee that provided a preliminary indication of interest of $32.50 per share. *See* Pl. Br. at 16. However, what Plaintiffs fail to point out that this price was based solely on publicly available information, and that Permira had not yet commenced due diligence on Ancestry. *See* Ruder Tr. 74:1-11 (Ex. 1). Plaintiffs' claim that the same document states that the "deal team believe[d] the metrics on the business may support a higher price" (Pl. Br. at 16), but omit the key qualification that this assumption was predicated on "positive diligence results" (Ex. 11, at PA28037-39), which did not materialize.

[9] Plaintiffs contend that the "investment committee reduced the amount of equity it was willing to commit to the transaction, even, though nothing had changed with respect to Permira's valuation of Ancestry." Pl. Br. at 23-24. This claim is directly contradicted by Mr. Ruder's testimony. Mr. Ruder testified that Permira continually reduced its price because

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Ruder Tr. 158:18-25 (Ex. 1).

- June 16, 2012: The investment committee agrees to recommend a $32.50 to $35 non-binding indicative offer. *See* Ex. 24, at PA171855.

- July 23, 2012: REDACTED

  Ex. 40, at PA1270.

- July 30, 2012:

  REDACTED

  Ex. 41, at PA171843.

- August 6, 2012: REDACTED

  Ex. 29, at PA171845.

- August 13, 2012:

  Ex. 34, at PA171839.

- September 10, 2012: REDACTED

  Ex. 42, at PA171849.

- September 17, 2012: REDACTED

  Ex. 37, at PA171852.

- October 10, 2012: The investment committee recommends a price of $32 per share and
  See Ex. 43, at PA172769. REDACTED

See Ex. 30, at PA27792; Ex.

55, at ACOM23105 REDACTED

See Ruder Tr. 97:13-25 (Ex.1); Ex. 30, at PA27792; Ex. 31, at PA25296. REDACTED

(Ex. 32, at PA168980),

Ruder Tr. 180:17-24 (Ex. 1).

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See Ex. 31, at PA25296.

On October 3, 2012, Permira made a firm offer of $31 per share, which assumed rollover commitments from Spectrum and management. *See* Ex. 14, at PA122919. More specifically, "the proposal was that we have $75 million and an assumption from Spectrum, an assumption that the management team would roll at least $60 [million]." Ruder Tr. 165:15-20 (Ex. 1). As Mr. Ruder made clear, there were no negotiations concerning these numbers—with either Ancestry management or Spectrum—but rather they were assumptions that Permira made to fill out the equity in a $31 per share proposal based on prior discussions with Qatalyst. *See id.*; Ex. 14, at PA122919. Indeed, prior to this offer, Permira had never negotiated the terms on which Spectrum and Ancestry management would be willing to rollover any of their equity.

Following Permira's $31 per share offer, Ancestry countered with a proposal of $32.25, based on an extra $25 million from Spectrum, an additional $20 million from management, and an increase in balance sheet cash. *See* Ex. 45, at PA1093. In response, Mr. Ruder told Tom Lister and Kurt Björklund, the co-managing partners of Permira, that he REDACTED

Ex. 45, at PA1093.

On October 5, 2012, Permira raised its offer to $31.25, which was quickly rejected. *See, e.g.*, Ex. 8, at 24; Ex. 46, at ACOM5024. Permira was told by Qatalyst, Mr. Sullivan, and Mr. Goldberg that "a line in the sand" had been drawn at $32 per share. *See* Ex. 47, at PA171827. Indeed, Mr. Sullivan told Mr. Ruder directly that he "would not even take the transaction to his board at a price less than $32." *See id.*; Ruder Tr. 170:14-20 (Ex. 1); Sullivan Tr. 191:18-192:12 (Ex. 2) (same). Based on these discussions, the Permira deal team

REDACTED Ex. 47, at PA171827.

At this time,

REDACTED [10] As a result, on October 10, 2012, the Permira investment committee reluctantly agreed to support an offer of up to $32 per

[10] *See* Ex. 17, at PA17070 REDACTED ; Ex. 48, at PA18081 .

share, but made clear to Mr. Ruder that it would not, under any circumstances, recommend an offer higher than $32. *See* Ex. 43, at PA172769. Following the investment committee's discussion, Mr. Ruder communicated to Qatalyst that Permira had increased its offer to $32 per share but would not go any higher. *See* Ex. 8, at 24; *see* Ex. 49, at PA52-53. Permira's offer of $32 a share was the highest non-indicative bid that any party had made during the months-long negotiations involving numerous potential investors, and the Ancestry board accepted the offer on October 11. *See* Ex. 8, at 25.

Only *after* its $32 per share offer was accepted by the Ancestry board did Permira receive the board's approval to speak directly with Spectrum and Messrs. Hochhauser and Sullivan regarding their participation in the transaction. *See* Ex. 50, at PA16810. Prior to that time, all discussions with respect to management and Spectrum were handled through Qatalyst, or occurred with Qatalyst's explicit approval.[11] While certain documents reflect that Permira anticipated Ancestry management as being part of the

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[11] The general conversations that Permira had with management about a potential continued equity investment were in no way unique (or specific), as other potential private equity bidders of the Company had similar conversations. *See* Sullivan Tr. 124:14-125:9 (Ex. 2). Indeed both and Permira had calls with Ancestry management shortly before the August 6, 2012 deadline. *See id.* The call that Permira had with Ancestry was arranged through Qatalyst and cleared by the Company's outside counsel. *See* Ex. 56, at PA27415. Mr. Sullivan recounted that "Permira and asked for permission to speak to Howard and Tim in a general way about their [sense of] solidity of these bid indications." Sullivan Tr. 124:14-125:9 (Ex. 2).

funds used to finance a transaction relatively early in the process, (Pl. Br. at 23-24), Mr. Ruder made clear in his testimony that the numbers reflected in those scenarios

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did not reflect any actual discussions with Ancestry or Qatalyst regarding the size of the investment or the specific mechanics of how such an investment would work. *See* Ruder Tr. 143:25-144:12 (Ex. 1); Ex. 14, at PA122919; Ex. 34, at PA171839. The only conversations that Permira had with Messrs. Sullivan and Hochhauser prior to reaching an agreement with the Ancestry board on price were general discussions about their willingness to reinvest some of their equity alongside Permira, an investment which was to occur after the transaction had closed. *See supra* at 7-8 & note 11; Sullivan Tr. 124:14-125:9 (Ex. 2).[12]

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[12] Plaintiffs' reliance on a September 9, 2012 email exchange among Messrs. Sullivan, Hochhauser, and Turner is misplaced because it does not suggest any impropriety but rather is an illustration of the arms-length negotiations that occurred between Ancestry and Permira. *See* Sullivan Tr. 133:24-134:19 (Ex. 2) ("[T]he purpose of this . . . communication to both Brian [Ruder] and REDACTED who were, as you recall partnering at that point, was a very tactical and intentional indication to them that I was prepared to go a bit farther than that. And I did that very consciously and very intentionally to provide them with greater confidence in my view of the business in a way that I hoped would lead them to provide the board with the best possible bid that they could muster. So this was a real tactical effort on my part to get them even more excited about providing the board with a great offer."); *id.* at 135:5-23 ("Please keep in mind, I was negotiating with potential buyers of the company and I was doing everything I could to maximize the value of a bid to maximize shareholder value.").

In sum, there is simply no merit to any claim that Permira undervalued Ancestry or only won the auction because of purportedly improper conduct by Ancestry management or because it was allegedly the favored bidder. During the eight-month sale process, Qatalyst conducted a wide-ranging public auction and Permira's offer was the best that Ancestry received by several dollars per share, despite the fact that there were several leaks to the press regarding the status of the process. *See* Parker Tr. 188:20-189:9 (Ex. 4) ("But unfortunately, anyone who had submitted bids had fallen to prices far below 32 [dollars per share].").

REDACTED

Ex. 51, at PA1089.

ARGUMENT

PLAINTIFFS HAVE NOT MET THE CONSIDERABLE BURDEN REQUIRED TO OBTAIN THE EXTRAORDINARY AND DRASTIC RELIEF OF A PRELIMINARY INJUNCTION

A preliminary injunction is a form of "extraordinary relief" that may be granted only if Plaintiffs demonstrate:

> (1) a reasonable probability of ultimate success on the merits at trial; (2) that the failure to issue a preliminary injunction will result in immediate and irreparable injury before the final hearing; and (3) that the balance of hardships weighs in the movant's favor.

La. Mun. Police Emp. Ret. Sys. v. Crawford, 918 A.2d 1172, 1185 (Del. Ch. 2007). "The moving party bears a considerable burden in establishing each of these necessary elements. . . . [P]laintiffs must establish clearly each of the required elements, and because injunctive relief will never be granted unless earned." *In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *5 (Del. Ch.).

I. PLAINTIFFS CANNOT SHOW A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR AIDING AND ABETTING CLAIM

To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must allege: "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, . . . (3) knowing participation in that breach by the defendants, and (4) damages proximately caused by the breach." *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001) (internal quotation marks and citations omitted). Plaintiffs fail to demonstrate any underlying breach of fiduciary duty by the Ancestry directors or that Permira "knowingly participated" in any alleged breach.

A. PLAINTIFFS FAIL TO DEMONSTRATE THAT THE ANY OF THE DIRECTOR DEFENDANTS BREACHED THEIR FIDUCIARY DUTIES

For the reasons set forth in the Ancestry Brief and Spectrum Brief (which are incorporated herein by reference), Plaintiffs have failed to demonstrate a reasonable probability of success on the merits of their claims that the director defendants breached their fiduciary duties in negotiating and approving a transaction with Permira at $32 per

share. On this basis alone, Plaintiffs' aiding and abetting claim necessarily fails. *See, e.g.*, *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *14 (Del. Ch.) ("As a matter of law and logic, there cannot be secondary liability for aiding and abetting an alleged harm in the absence of primary liability."); *Related Westpac LLC v. JER Snowmass LLC*, 2010 WL 2929708, at *8 (Del. Ch.) (same)); *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *23 (Del. Ch.), *aff'd*, 897 A.2d 162 (Del. 2006) (same).

B. PLAINTIFFS FAIL TO DEMONSTRATE PERMIRA KNOWINGLY PARTICIPATED IN ANY ALLEGED BREACH OF FIDUCIARY DUTY

Plaintiffs' aiding and abetting claim against Permira also fails because Plaintiffs have not offered any facts to suggest Permira's "knowing participation" in a breach of a fiduciary duty. This standard requires, at a minimum, that Permira *actually knew* that there was a breach of the fiduciary duties owed to stockholders. *See Malpiede*, 780 A.2d at 1097 ("Knowing participation in a board's fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach."). "Conclusory statements of knowing participation will not suffice." *Gen. Motors (Hughes)*, 2005 WL 1089021, at *24 (citation omitted).

Courts will infer knowing participation only if the Plaintiffs demonstrate that the third party used knowledge of the breach to gain a bargaining advantage or the third party offered side payments as an incentive for the fiduciaries to ignore their duties. *See In re Telecomms., Inc. S'holders Litig.*, 2003 WL 21543427, at *2 (Del. Ch.). But where, as

here, the parties negotiated at arms length, no claim for aiding and abetting can exist. *See Malpiede*, 780 A.2d at 1097 (under the knowing participation standard, "a bidder's attempts to reduce the sale price through arms-length negotiations cannot give rise to liability for aiding and abetting"); *Morgan v. Cash*, 2010 WL 2803746, at *8 (Del. Ch.) ("[T]he long-standing rule that arms-length bargaining is privileged and does not, absent actual collusion and facilitation of fiduciary wrongdoing, constitute aiding and abetting helps to safeguard the market for corporate control by facilitating the bargaining that is central to the American model of capitalism." (footnotes omitted)).[13]

Here, Plaintiffs' allegations of knowing participation are based on mischaracterizations and/or misrepresentations of the initial conversations Permira had with Ancestry and Spectrum. As set forth above, when examined objectively and fairly, the record clearly establishes that Permira had no knowledge of an alleged breach of fiduciary duty and never gained a bargaining advantage. To the contrary, the facts more than amply demonstrate that Ancestry treated Permira as an arms-length bidder and that

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[13] In support of their aiding and abetting claim, Plaintiffs rely on *Zirn v. VLI Corporation*, 1989 WL 79963 (Del. Ch.). As this Court has previously explained, the decision in *Zirn* was based on the fact that "the complaint adequately alleged that the acquiror was aware that the target's directors were exposed to potential fiduciary duty liability, and that the acquiror used that potential liability as leverage in negotiations to secure an outcome benefitting the acquiror and the target's directors at the expense of the target's stockholders." *Morgan*, 2010 WL 2803746 at *6. The decision in *Zirn* clearly does not stand for the sort of broad liability for which Plaintiffs cite it, and it is inapposite to this case as there are no allegations that Ancestry was exposed to any pre-existing liabilities that Permira could have even theoretically exploited.

the parties engaged in a lengthy, spirited bargaining process, where each side sought to obtain the best deal possible. The Ancestry board, through Qatalyst, repeatedly attempted to assist Permira in structuring a bid of $33 or higher. In the final round of negotiations, the Ancestry board made clear—through Mr. Sullivan, Qatalyst, and Mr. Goldberg—that Permira's offers of $31 and $31.25 were unacceptable and that no offer below $32 would be considered. With the Ancestry board drawing a hard line at $32 per share, it ran a significant risk that Permira would not raise its offer to that price and would walk away from the process. *See supra* at 20-22. These good faith, arms-length negotiations are fatal to Plaintiffs' aiding and abetting claim. *See Gen. Motors (Hughes)*, 2005 WL 1089021, at *26 ("This Court has consistently held that 'evidence of arms-length negotiation with fiduciaries negated a claim of aiding and abetting, because such evidence precludes a showing that the defendants knowingly participated in the breach by the fiduciaries.'" (footnote omitted)).[14]

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[14] Plaintiff's reliance on the decision in *In re Shoe-Town, Inc. Stockholders Litigation*, 1990 WL 13475 (Del. Ch.), is misplaced as that decision actually supports the dismissal of any aiding and abetting claim against Permira. In that case, the court dismissed the aiding and abetting claim against the acquiror because the "allegations entirely support defendants' characterizations of GECC as a party engaged in an arms-length negotiation of a business transaction. The complaint states that GECC representatives met with Shearson about the proposed transaction. Then GECC made a tentative offer. GECC next conducted a due diligence meeting with representatives of Shoe-Town. Finally, GECC made a bid and then agreed to a price. The complaint describes classic arms-length bargaining, not knowing participating in the breach of a fiduciary duty." *Id.* at *8. The same is true here, as the record clearly demonstrates the extensive arms-length bargaining between Permira and Ancestry. Moreover, the parenthetical proffered

Also baseless is Plaintiffs' claim that the introductory conversation that Mr. Ruder had with Messrs. Sullivan and Hochhauser on May 18 can constitute "knowing participation." Plaintiffs mistakenly claim that, during this meeting, Mr. Ruder asked Messrs. Sullivan and Hochhauser "to rollover their Ancestry equity." Pl. Br. at 77 n.275. Nothing of the sort happened. At this initial meeting, the parties only discussed management investing after the merger was closed and did not discuss the specifics of any potential investment. As Mr. Sullivan testified, he always understood that if a private equity firm acquired the Company, management would be expected to make an equity investment. Given these facts, this general conversation regarding Permira's typical practices—five months before a deal was reached—cannot come close to forming the basis of a finding of "knowing participation." *See supra* 7-8.

Plaintiffs' claim that "Permira also met with Spectrum directors Parker and Spero to discuss the possibility of an equity rollover from Spectrum, rendering Spectrum (and Parker and Spero) conflicted," is likewise without merit. Pl. Br. at 77 n.275. The record is abundantly clear that Spectrum had no interest in continuing its investment in Ancestry and, likewise, REDACTED

Indeed, Spectrum was so disinterested in continuing its investment

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by Plaintiffs in footnote 275 is based on the aiding and abetting claim that was allowed to proceed against Shearson Lehman Hutton, Inc., the financial advisor to the acquired Company. Unlike Shearson, Permira, as an arms-length potential third party acquiror, was not present (and thus not active) at any management meeting or board meeting of Ancestry. *See id.*

that, in mid-August, when it became clear that Permira did not have sufficient equity to make a firm offer, and after Permira received permission from Qatalyst to contact Spectrum directly, Mr. Parker did not even bother to call Mr. Ruder back to discuss the idea. It cannot be reasonably disputed that Spectrum only agreed to contribute a portion of its equity to help facilitate a premium transaction for all of Ancestry's shareholders at $32 per share. *See supra* 9, 15-16.

In short, Plaintiffs' aiding and abetting claim against Permira is based on the self-serving assertion of Plaintiffs' counsel that the price Permira is paying is too low. That, however, is not a basis for an aiding and abetting claim. *See Morgan*, 2010 WL 2803746, at *8 ("To allow a plaintiff to state an aiding and abetting claim against a bidder simply by making a cursory allegation that the bidder got too good a deal is fundamentally inconsistent with the market principles with which our corporate law is designed to operate in tandem."). Further undermining Plaintiffs' central thesis is the fact that the $32 per share price was *the best final offer* that Ancestry received by several dollars as well as REDACTED

As the facts make clear, given the number of sophisticated investors that analyzed a potential investment in Ancestry but either refused to make an offer or made an offer substantially lower than Permira's final offer, Permira's $32 per share bid was REDACTED [15] *See supra* 23-24.

[15] Ex. 51, at PA1089.

Plaintiffs have not pled or identified any facts to suggest Permira knowingly participated in any alleged breach of fiduciary duty. Accordingly, Plaintiffs' aiding and abetting claim against Permira has no possibility of succeeding on the merits.

II. PLAINTIFFS HAVE NOT DEMONSTRATED IRREPARABLE INJURY

To obtain injunctive relief, Plaintiffs must also demonstrate a likelihood that they will be irreparably harmed by the consummation of the Transaction. There is no irreparable harm here because Plaintiffs can be fully compensated by monetary damages for any alleged harm or exercise their appraisal rights. *See Crawford*, 918 A.2d at 1185 ("My conclusion that shareholders face neither irreparable harm nor extraordinary inequity in the absence of the desired injunction rests critically upon the availability of another remedy: appraisal rights."). Thus, Plaintiffs have an adequate remedy at law and therefore cannot demonstrate the irreparable harm necessary to obtain the extraordinary remedy of a preliminary injunction. S*ee, e.g.*, *Braunschweiger v. Am. Home Shield Corp.*, 1989 WL 128571, at *5-7 (Del. Ch.) (presence of a threat of irreparable injury to the plaintiffs if the preliminary injunction is not granted is the "sine qua non" of the entry of such an order); *Yanow v. Scientific Leasing, Inc*., 1988 WL 8772, at *6 (Del. Ch.) ("[T]he injunction motion must fail because no likelihood of irreparable has been established . . . . If plaintiffs are correct in their view that the . . . acquisition price is unfair, money damages or an appraisal would be a sufficient remedy.").

Injunctive relief is particularly inappropriate where, as here, there is no competing offer. As previously observed by this Court,

> [O]ne can have no confidence that entry of an order requiring more active marketing would be beneficial to the shareholders of the [target company] . . . . The failure of an alternative to emerge may . . . be explained by the contention that the proposal is at a full price—higher than any other buyer would pay. . . . In all events, the failure of a better proposal to emerge over the lengthy period is relevant to the present question. There is at this time ground for a shareholder to conclude that the [potential acquiror's] offer is the best offer available. To enjoin consummation of it, if it is approved by the shareholders, would necessarily run the risk of upsetting the transaction.

Braunschweiger, 1989 WL 128571, at *6-7; *see also Yanow*, 1988 WL 8772, at*6 ("[A] theoretical possibility, without more, that an unknown potential offeror might submit a higher offer if an injunction is granted does not constitute irreparable injury.").

In their opening brief, Plaintiffs make no real attempt to explain why monetary damages would not remedy any alleged harm resulting from their claims relating to process and price, or their claim related to the alleged aiding and abetting of any purported misconduct. In essence, Plaintiffs' claims are merely complaints about the ultimate price that Ancestry received in the Transaction. *See* Pl. Br. at 4 (requesting an injunction "so that the Ancestry Board has an opportunity to receive and consider potential superior proposals from other suitors"). As explained above, the $32 per share offer by Permira is by the far the highest final offer for the Company and there is no basis

to believe that anyone, after an eight-month auction process and multiple press leaks, is willing to pay more.

Accordingly, Plaintiffs have failed to meet their burden on the second prong required for the issuance of a preliminary injunction.

III. THE BALANCE OF EQUITIES STRONGLY FAVORS DEFENDANTS

Plaintiffs' request for a preliminary injunction must also be denied because the balance of equities tips decidedly in Defendants' favor. The Plaintiffs who are seeking to enjoin the Transaction own collectively approximately 25,000 shares out of the over 48 million common shares and equivalents outstanding of Ancestry stock.[16] As such, the owners of less than one-half of one percent of outstanding Ancestry stock are attempting to block their fellow shareholders from considering Permira's premium offer on its merits. If Plaintiffs believe that the terms of the Transaction are inadequate, then they can vote against the Transaction at the upcoming stockholder meeting and seek appraisal for their limited holdings. *See In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 434 (Del. Ch. 2012) (finding that although the Plaintiffs had demonstrated a reasonable likelihood of success a preliminary injunction was not appropriate "because . . . there is no other bid on the table and the stockholders of El Paso, as the seller, have a choice

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[16] *See, e.g.*, Ex. 53, at BOCA01-02, Ex. 54, at PONTIAC_01-04. With respect to the holdings of Boca Raton Police & Fire Department, it is unclear from their production the exact amount of their holdings of Ancestry common stock, and the approximately 25,000 shares may actually overstate the Plaintiffs ownership stake in Ancestry.

whether to turn down the Merger themselves, the balance of harms counsels against a preliminary injunction").

Moreover, Plaintiffs acknowledge that an injunction could potentially result in the loss of the Transaction. *See* Pl. Br. at 77-78. The merger agreement provides that if the certificate of merger is not filed with Delaware Secretary of State on or before April 21, 2013 than either the Company or Permira may terminate and abandon the Transaction. *See* Ex. 8, Annex A, Merger Agreement, § 7.1(b). Given the uncertainties and additional litigation that would accompany an injunction, there would be the potential that the Transaction would not close before the April 21, 2013 deadline, thus enabling the parties to abandon the Transaction.

In response to the possibility that Permira could abandon its offer of $32 per share, Plaintiffs offer the flippant response that "the consideration offered [by] Permira is so weak that shareholders are not really losing much if it goes away." Pl. Br. at 78. This response is surprising, as it shows a decided indifference to the members of the class that they purport to represent. One of the Lead Plaintiffs in this litigation, Pontiac General Employees Retirement System, sold Ancestry shares in April 2012 at a price of $23.1535.[17] That price is 27.65% lower than the $32 per share that is being offered in the Transaction. By seeking to prevent Ancestry's shareholders from voting on a transaction that offers a 41% premium to the last unaffected trading day before the June 5, 2012 leak

[17] Ex. 54, at PONTIAC_03.

when at least one of the Lead Plaintiffs was, itself, willing to sell at prices substantially below $32 per share demonstrates that the interests of the Ancestry shareholders are being ignored. [18]

Further, the notion that reopening the process will result in a proposal superior to the Transaction is highly speculative and ignores entirely the history of the Ancestry sale process. *See* Pl. Br. at 4. Plaintiffs' speculation regarding the possibility of a "superior proposal" emerging (which is, in fact, inconsistent with the reality of this auction) does not warrant the issuance of injunctive relief. *See Yanow*, 1988 WL 8772, at *6 ("[A] theoretical possibility, without more, that an unknown potential offeror might submit a higher offer if an injunction is granted does not constitute irreparable injury."). Qatalyst and Ancestry ran a full and fair process, and no other bidder ever submitted a fully-developed offer even approaching Permira's $32 per share offer. Thus, there is no reason for court intervention. *See In re El Paso Corp. S'holder Litig.*, 41 A.3d at 449.

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[18] There is further reason to believe that delaying the closing will harm the overwhelming majority of Ancestry's shareholders. It is generally acknowledged that capital gains taxes are likely to rise in the coming year. *See, e.g.*, Ex. 52 (reporting that in 2013 "the maximum tax on investment income is scheduled to rise from 15% currently to at least 23.8% on most capital gains, at least for higher-income households"). By seeking to force the completion of the Transaction into 2013, Plaintiffs and their lawyers are actually causing the class members that they represent to suffer a deleterious economic impact on their investment. Based on the rates mentioned in the above-cited article, Plaintiffs lawyers are likely imposing a substantial additional tax burden on the shareholders of Ancestry.

Finally, Plaintiffs have alleged absolutely no unlawful or wrongful conduct on the part of Permira. In such circumstances, courts have long recognized the need to protect the rights of the innocent acquiror. *See Arnold v. Soc'y for Sav. Bancorp*, 1995 WL 376919, at *4 (Del. Ch.) ("Plaintiff has yet to demonstrate that [the acquiring company] engaged in any unlawful or improper activities in carrying out the merger. . . . I consider [the acquiring company] an innocent party who acquired [the target company] in good faith in an arms-length transaction. A court of equity should protect the rights of an innocent acquiror, just as commercial law protects the rights of a good faith purchaser."); *see also In re R.J.R. Nabisco, Inc. S'holders Litig.*, 1989 WL 7036, at *12 (Del. Ch.) ("[T]he court must be alert to the legitimate interests of the public or innocent third parties whose property rights or other legitimate interests might be affected by the issuance of the [preliminary injunction]."). [19]

[19] In light of the very real likelihood that an injunction would harm the Transaction and result in significant losses to all Defendants, in the event that this Court grants Plaintiffs' request for a preliminary injunction, Plaintiffs should be required to post a significant undertaking under Delaware Court of Chancery Rule 65(c).

CONCLUSION

For the foregoing reasons, Permira respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction in its entirety.

POTTER ANDERSON & CORROON LLP

By: */s/ Stephen C. Norman*
Stephen C. Norman (No. 2686)
Kevin R. Shannon (No. 3137
James G. Stanco (No. 5702)
1313 N. Market Street
Hercules Plaza, 6th Floor
P.O. Box 951
Wilmington, Delaware 19899-0951
(302) 984-6000

Attorneys for Defendants Permira Advisers LLC, Global Generations International Inc., and Global Generations Merger Sub Inc.

OF COUNSEL:

David B. Hennes
Justin Santolli
David Yellin
Mark Siegmund
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10004
(212) 859-8000

Dated: December 13, 2012
1086521

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2012, a copy of the foregoing document was served electronically via *LexisNexis File & Serve* upon the following counsel of record:

Stuart M. Grant, Esquire
Cynthia A. Calder, Esquire
Diane Zilka, Esquire
GRANT & EISENHOFER P.A.
123 Justison Street
Wilmington, Delaware 19801

Seth D. Rigrodsky, Esquire
Brian D. Long, Esquire
Gina M. Serra, Esquire
RIGRODSKY & LONG, P.A.
2 Righter Parkway, Suite 120
Wilmington, Delaware 19803

Ryan M. Ernst, Esquire
O'KELLY ERNST & BIELLI, LLC
901 North Market Street, Suite 1000
Wilmington, Delaware 19801

Carmella P. Keener, Esquire
ROSENTHAL, MONHAIT & GODDESS, P.A.
919 North Market Street, Suite 1401
Wilmington, Delaware 19801

Martin S. Lessner, Esquire
Kathaleen St. J. McCormick, Esquire
YOUNG CONAWAY STARGATT & TAYLOR, LLP
Rodney Square
1000 North King Street
Wilmington, Delaware 19801

Michael Hanrahan, Esquire
Paul A. Fioravanti, Jr., Esquire
Kevin H. Davenport, Esquire
PRICKETT, JONES & ELLIOTT, P.A.
1310 North King Street
Wilmington, Delaware 19801

James P. McEvilly, III, Esquire
Craig J. Springer, Esquire
FARUQI & FARUQI LLP
20 Montchanin Road, Suite 145
Wilmington, Delaware 19807

Gregory P. Williams, Esquire
Anne C. Foster, Esquire
Jillian G. Remming, Esquire
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801

Joel Friedlander, Esquire
Anastasiya Malchenko, Esquire
BOUCHARD MARGULES & FRIEDLANDER, P.A.
222 Delaware Avenue, Suite 1400
Wilmington, Delaware 19801

/s/ James G. Stanco
James G. Stanco (No. 5702)

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

CERTIFICATION PURSUANT TO RULE 5(G)

The undersigned counsel hereby certify that they have personally reviewed Permira Defendants' Answering Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction which was filed under seal in the above referenced action on December 13, 2012, and each signatory believes to the best of his or her knowledge, information and belief that the information redacted therefrom should continue to be sealed for good cause. The continued sealing of this information is appropriate because the redacted portions contain non-public, confidential, sensitive information.

POTTER ANDERSON & CORROON LLP

By: */s/ James G. Stanco*
Stephen C. Norman (No. 2686)
Kevin R. Shannon (No. 3137)
James G. Stanco (No. 5702)
1313 N. Market Street
Hercules Plaza, 6th Floor
P.O. Box 951
Wilmington, Delaware 19899-0951
(302) 984-6000

Attorneys for Defendants Permira Advisers LLC, Global Generations International Inc., and Global Generations Merger Sub Inc.

OF COUNSEL:

David B. Hennes
Justin Santolli
David Yellin
Mark Siegmund
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10004
(212) 859-8000

YOUNG CONAWAY STARGATT & TAYLOR, LLP

By: */s/ James M. Yoch, Jr.*
Martin S. Lessner (No. 3109)
Kathaleen St. J. McCormick (No. 4579)
James M. Yoch, Jr. (No. 5251)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
(302) 571-6600

Attorneys for Defendants Ancestry.com Inc., Timothy Sullivan, Charles M. Boesenberg, David Goldberg, Thomas Layton, Elizabeth Nelson, Michael Schroepfer, Paul R. Billings and Howard Hochhauser

OF COUNSEL:

William D. Savitt
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, New York 10019
(212) 403-1000

RICHARDS, LAYTON & FINGER, P.A.

By: */s/ Scott W. Perkins*
Gregory P. Williams (No. 2168)
Anne C. Foster (No. 2513)
Scott W. Perkins (No. 5049)
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for Defendants SEI III Entrepreneurs' Fund, L.P., Spectrum Equity Investors III, L.P., Spectrum Equity Investors V, L.P., Spectrum III Investment Managers' Fund, L.P., Spectrum V Investment Managers' Fund, L.P., Victor Parker and Benjamin Spero

OF COUNSEL:

Yosef J. Riemer
Devora W. Allon
Michael A. Onufer
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800

Date: December 18, 2012
1087091

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2012, a copy of the foregoing document was served electronically via *LexisNexis File & Serve* upon the following counsel of record:

Stuart M. Grant, Esquire
Cynthia A. Calder, Esquire
Diane Zilka, Esquire
GRANT & EISENHOFER P.A.
123 Justison Street
Wilmington, Delaware 19801

Seth D. Rigrodsky, Esquire
Brian D. Long, Esquire
Gina M. Serra, Esquire
RIGRODSKY & LONG, P.A.
2 Righter Parkway, Suite 120
Wilmington, Delaware 19803

Ryan M. Ernst, Esquire
O'KELLY ERNST & BIELLI, LLC
901 North Market Street, Suite 1000
Wilmington, Delaware 19801

Carmella P. Keener, Esquire
ROSENTHAL, MONHAIT & GODDESS, P.A.
919 North Market Street, Suite 1401
Wilmington, Delaware 19801

Martin S. Lessner, Esquire
Kathaleen St. J. McCormick, Esquire
YOUNG CONAWAY STARGATT & TAYLOR, LLP
Rodney Square
1000 North King Street
Wilmington, Delaware 19801

Michael Hanrahan, Esquire
Paul A. Fioravanti, Jr., Esquire
Kevin H. Davenport, Esquire
PRICKETT, JONES & ELLIOTT, P.A.
1310 North King Street
Wilmington, Delaware 19801

James P. McEvilly, III, Esquire
Craig J. Springer, Esquire
FARUQI & FARUQI LLP
20 Montchanin Road, Suite 145
Wilmington, Delaware 19807

Gregory P. Williams, Esquire
Anne C. Foster, Esquire
Jillian G. Remming, Esquire
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801

Joel Friedlander, Esquire
Anastasiya Malchenko, Esquire
BOUCHARD MARGULES & FRIEDLANDER, P.A.
222 Delaware Avenue, Suite 1400
Wilmington, Delaware 19801

/s/ James G. Stanco
James G. Stanco (No. 5702)