IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF

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PRELIMINARY STATEMENT

If Defendants are to be believed, the process of selling Ancestry.com ("Ancestry" or the "Company") is one filled with deception. From the sell side, Ancestry claims that its May 2012 projections were not accurate projections regarding the true performance of the business but rather were "stretchy" numbers designed solely to mislead potential investors into overbidding for the Company. From the buy side, there is Permira, which in response to a tip raised its indication of interest so that it could move to the next round of bidding despite having insufficient equity to ever make a firm bid within the range of its indication. From the legal side, there is the "Don't Ask, Don't Waive" Standstill, imbedded in the Non-Disclosure Agreements ("NDA"), that we are told is commonplace, but really is a relatively new invention of Wachtell Lipton. The NDAs were signed by all of the bidders who were to have any opportunity of performing diligence. And yet, when shown its preclusive effect (which the Board did not understand), Defendants say the most likely topping bidder is not one that has signed an NDA but rather a complete stranger to the process, who is now supposed to do due diligence within two weeks. Finally, from the investment banking side, there was a brief moment of integrity when Qatalyst said it could not give a fairness opinion based on the May projections. That moment was fleeting, however, as it was promptly followed by the creation of the Sensitivities to allow a fairness opinion to be given, which was in turn even more promptly followed by an effort to sanitize the Sensitivities by getting management and the Board to adopt them as their own.

With a breach of duty clear, Defendants claim that an injunction should not issue because there is no other bidder. That is not true. There were numerous other bidders. Defendants' unlawful actions gave the transaction to Permira and the "Don't Ask Don't Waive" Standstills precluded any chance of a topping bid. Having rigged the deal, it is with ill grace that Defendants now seek to neuter the Court from taking remedial action.

I. THE STANDARD OF REVIEW

Defendants concede that the process leading up to the Proposed Transaction is quintessentially *Revlon* and that their conduct is subject to heightened review. What Defendants object to is the application of the more rigorous entire fairness standard, contending that Spectrum is not a controlling shareholder. To get there, however, Defendants look at each indicia of control disjunctively and argue why each, in a vacuum, does not establish control. This misses the critical mark.

Spectrum exerted influence over the entire process leading up to the Proposed Transaction. When inquiries came in even as early as 2009, to whom were they directed? Spectrum's Parker.[1] When Sullivan and Hochhauser needed guidance about the sales process, whose counsel did they seek? Spectrum's Parker.[2] When the Board told management to retain a financial advisor, who steered management to Qatalyst? Spectrum's Parker.[3]

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[1] Parker Tr. at 74:4-75:14. (Pl. App. Ex. 9); Parker Tr. Ex. 6, ACOM00064090 (Pl. App. Ex 26).
[2] The fact that Sullivan claims to regularly communicate with other Board members about Company business does not negate the fact that Sullivan regularly talked with Parker throughout the sales process outside of Board meetings, and sought out Parker's strategic thinking on how to communicate with potential bidders.
[3] Parker Tr. Ex. 2, ACOM00170261. (Pl. App. Ex. 17).

Even when viewed in isolation, factors demonstrating Spectrum's control are compelling. For example, although Defendants argue that the evidentiary support for the fact that Goldberg is a co-investor in [redacted] is not express, they do not deny that he is a co-investor.[4] [redacted] and that Parker and Spero are members of its board of directors.[5] They argue that Schroepfer is not beholden to Goldberg because he does not directly report to Goldberg's wife, Sheryl Sandberg, Facebook's chief operating officer, but they do not deny that Ms. Sandberg is Schroepfer's ultimate boss in that she is a member of Facebook's board of directors.[6] With the appropriate perspective – viewing the indicia of control in its totality – the evidence demonstrates Spectrum is a controlling shareholder.[7]

Defendants also contend that, like Ancestry's other shareholders, Spectrum is "a seller, not a buyer" in the Proposed Transaction, and therefore could not have steered the process "toward a low-ball Permira."[8] But try as Defendants might to ignore it, ***Spectrum is undeniably a buyer in this transaction with $50 million worth of equity in the new entity***, a key fact that shifts the analysis into the entire fairness realm.

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[4] Ancestry Defs'Ans. Br. ("ADAB") at 41-42.
[5] "Board of Directors," http://www.surveymonkey.com/mp/aboutus/directors, as of December 6, 2012 (Pl. App. Ex. 5).
[6] Schroepfer Tr. at 9:24–12:16 (Pl. App. Ex. 12).
[7] *See Williamson v. Cox Commc'ns. Inc.*, 2006 WL 1586375, at *6 (Del. Ch. June 5, 2006) (Court held that plaintiffs had "plead[ed] a nexus of facts all suggesting that the [defendants] were in a controlling position" even though "[n]o single allegation in the plaintiff's complaint was sufficient on its own to defeat defendant's motion to dismiss"); *In re Loral Space and Commc'ns Inc.*, 2008 WL 4293781, at *20 (Del. Ch. Sept. 19, 2008).
[8] ADAB at 38, 54-55; Spectrum Ans. Br. ("SAB") at 5.

Defendants also ignore the fact that Sullivan and Hochhauser are on both sides of the transaction to the tune of $67 million, again, triggering entire fairness.

Regardless of which standard ultimately applies, Plaintiffs have demonstrated that the Defendants cannot meet either one.

II. DESPITE DEFENDANTS' DISTORTIONS OF THE FACTUAL RECORD, PLAINTIFFS HAVE DEMONSTRATED THE MERITS OF THEIR CLAIMS

A. THE ELEPHANT IN THE ROOM: THE ANCESTRY DEFENDANTS IGNORE QATALYST'S REFUSAL TO OPINE $32 WAS FAIR BASED UPON THE MAY 2012 PROJECTIONS AND THAT QATALYST'S REFUSAL DROVE THE CREATION OF THE SENSITIVITIES

While the Ancestry Defendants go to great lengths to make it seem that they ran a fair process to sell the Company, the one fact they steadfastly ignore is that Qatalyst told the Board at the end of the process that it *could not* opine that $32 was a fair price based upon the May 2012 projections. Turner explained: "[w]hat we told them was that it would be difficult to give them an opinion if they believed that the [May 2012] projections represented the best available estimates of the company."[9] Rather than acknowledge this fact and the fact that the May 2012 projections were revised downward so that Qatalyst could give a fairness opinion, the Ancestry Defendants tell a made up story about how, when and by whom the May 2012 projections were altered. But the inconsistencies in that story reveal that the projections were deliberately manipulated so that $32 would fall in a range on which Qatalyst could opine.

The story starts with Defendants' claim that the May 12 projections were artificially high because the Board designed them that way. They say that at the May 15

[9] Turner Tr. at 26:7-16 (Pl. App. Ex. 10).

Board meeting, the Board instructed management to "increase the growth rates of certain assumptions" to end up with "higher revenue and EBITDA" because the Board knew that "buyers would likely discount [the projections.]"[10] What do the Board minutes for that meeting actually show? That management presented "revised financial forecasts" that

> reflected recent developments at the business, as well as management's view of the potential impact on 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 a discussion relating to the financial forecasts. At the conclusion of the discussion, senior management was requested to consider taking into account the matters discussed.[11]

That passage does not reflect a direction by the Board to management to inflate the projections, let alone something as specific as increasing the growth rate of certain assumptions.[12] Moreover, Goldman Sach's September 4 presentation to the Board sets forth projections for Ancestry as a stand-alone public company which are even higher than the May 2012 projections prepared by Ancestry.[13]

Even if the Board thought it was just "stretching" the numbers, then the Board knew exactly which variables it altered to get there. Thus, it knew exactly which variables it had to dial back at the end of the process to give Qatalyst management's "true" projections. But the Board did not ratchet back those variables when Qatalyst "asked" whether the May 2012 projections were management's best estimate of future

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[10] ADAB at 9.
[11] May 15 Board Minutes (Pl. App. Ex. 29 at 1-2).
[12] Defendants conveniently ignore Hochhauser's further testimony that the increases in growth rates made to the projections in May, leading to higher revenues and EBITDA, were as much a function of the Board's experience with Ancestry meeting and exceeding management's projections every quarter since Ancestry became a public company in 2009. Hochhauser Tr. at 116:1-117:10 (Pl. App. Ex. 8). In other words, the Board believed that *based on past performance* management was being too conservative with the projections.
[13] *See* ACOM0017504-29 at 520 (Pl. Supp. App. Ex. 117).

performance. What they did was resort to the awkward construct of employing "Sensitivities" to those projections to supposedly account for past bidders' criticisms of the Company.[14]

The Ancestry Defendants try to portray the Sensitivities as changes to the May 2012 projections which were "the culmination of a months-long process" wherein management was evaluating the "data-driven feedback of potential bidders."[15] A time line of the events surrounding the creation of the Sensitivities is attached as Appendix 1 and shows that this assertion is rubbish.

The Ancestry Defendants claim that the process began in "late September."[16] But Hochhauser was clear that the Board did not direct him to reflect the feedback given by bidders until October 16, 2012,[17] **five days after** the Permira negotiations had concluded. The October 16 Board minutes reflect that instruction – "the Board requested that management prepare Sensitivities to help it understand the potential downside risks that could arise from reasonable deviations in the assumptions underlying the May 2102 Management Case."[18]

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[14] Defendants contend that the Board "had come to the view that the May 2012 projections were unrealistic." ADAB at 69. But Defendants also say that everyone knew starting in May that the May 2012 numbers were unrealistic because they were "stretchy." ADAB at 8-9. So which is it? One certainly cannot tell from the Ancestry Defendants' brief. But if one goes to the contemporaneous documents, one can conclude that Sullivan thought as late as October 19 that the Sensitivities were not high enough because he was employing projections substantially higher than them in a spreadsheet he created to determine the value of his rolled over options. (Pl. Supp. App. Ex. 118). (Sullivan Dep. Ex. 17).

[15] ADAB at 35.

[16] ADAB at 67.

[17] Hochhauser Tr. at 216:8-217:21 (Pl. App. Ex. 8).

[18] Pl. App. Ex. 104 at 2. The Ancestry Defendants do not explain how the Board could have instructed Hochhauser to employ the Sensitivities based on bidder feedback in "late September" when the Board did not examine that feedback until October 7. Oct. 7 Board Minutes,

Why would management or Qatalyst be working on the Sensitivities in late September if: (i) the Sensitivities were the result of the Board's examination of bidders' criticisms of the business *on October 7*;[19] and (ii) the Board did not give the instruction to develop the Sensitivities until *October 16*? The answer is that what was driving the need for the Sensitivities was not the cooked up reason of bidders' criticisms but rather that Qatalyst had told the Board it could not opine on $32 with the May 2012 projections underlying its analysis. While Turner could not pin the precise date he had told the Board, he said that it could have been late September, and that it was definitely ***before*** the Board supposedly came up with the notion of the Sensitivities.[20] And, what is absolutely clear from a comparison of the Board minutes with Turner's testimony is that the idea of employing Sensitivities came up ***after*** he made it known that Qatalyst could not give a fairness opinion based on the May 2012 projections. Thus, it is clear that the Sensitivities were driven by the need to get a fairness opinion – not a desire to get to the best projections possible.

B. THE "DON'T ASK DON'T WAIVE" STANDSTILL PRECLUDED ANY TOPPING BID

Ancestry defends the "Don't Ask Don't Waive" Standstill provisions by claiming that their impact is "mooted" by Ancestry's very recent waiver and that, in any event,

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ACOM00000371-2 (McCormick Aff. Ex. 25) *see also* ADAB at 33. In fact, as of October 1, 2012, Sullivan was telling Parker that they did not have [redacted] or [redacted] analyses and that he "cannot say if their conclusions were correct and/or important." Sept. 28-Oct. 1 email chain between Sullivan and Parker, Pl. App. Ex. 98.

[19] Oct. 7 Board Minutes, ACOM00000371-2 (McCormick Aff. Ex. 25), *see also* ADAB at 33.

[20] Turner Tr. at 29:23-30:13 ("I don't know whether it was the very end of September, which day of October, but it's—it wasn't the—it wasn't the night before. It was, you know, call it ten days before would be my—a reasonable estimate.") (Pl. App. Ex. 10).

such preclusive measures are somehow proper.[21] These arguments ignore both Delaware law and common sense.

Ancestry's assertion that the illegality of the "Don't Ask Don't Waive" Standstill provision set forth in each of the NDAs is somehow moot because of Ancestry's recent partial waiver is underwhelming at best.[22] This eleventh hour waiver does not permit bidders subject to the NDA to top Permira, but rather states that the Company "shall not enforce, and hereby waives, [the] obligations" which precluded those bidders from requesting a waiver or amendment to the standstill.[23] Thus, bidders can now ask the Board for a waiver of the "Don't Ask Don't Waive" Standstill provision. They cannot simply make an immediate topping bid.

The waiver is of no significance just 16 days before the shareholder vote.[24] A bidder does not have the time or access to consider whether to improve upon Permira's $32 deal.[25] If, as Ancestry Board member Parker testified, [redacted] who was then in deal mode, needed "two weeks here to do their work" and further due diligence before

[21] Notably, Ancestry claims that it "sent letters to each of the third parties that had signed NDAs confirming that it would not enforce the provision precluding those parties from seeking any waiver of the standstills" but only provides one such letter, to [redacted] No evidence is provided that the other 10 parties who signed NDAs received such letters. ADAB at 61 n.368.
[22] ADAB at 62.
[23] McCormick Aff. Ex. 106.
[24] The shareholder vote is scheduled for December 27, 2012. Proxy at 2, 64. (Pl. App. Ex. 6).
[25] Only Permira had the benefit of full due diligence. Fourteen parties, though, were likely candidates to be interested in buying Ancestry. Of them, [redacted] has already made clear it would need two additional weeks to complete due diligence. Parker Tr. at 138:14-139:1 (Pl. App. Ex. 9). Nor is two weeks a reasonable time for the other entities that actually bid – [redacted] – or the entities that entered NDAs but did not bid – [redacted] – to complete appropriate due diligence.

submitting another bid,[26] then the notion that 16 days at year end is enough time for others not in deal mode is laughable. That a bidder could ask for and obtain a waiver from the Board under the Standstill, complete due diligence and submit a topping bid all in the span of two weeks is contrary to the Company's own understanding of the process.

The Ancestry Defendants alternatively contend that even unwaived these Standstill provisions are lawful because they can be used to incentivize higher bids earlier in the process. They rely on *In re Topps Co. Shareholders Litigation*, 926 A.2d 58 (Del. Ch. 2007) for this proposition.[27] But what the Court observed in *Topps* in **granting** plaintiffs' request for a preliminary injunction is that "standstills are [] subject to abuse," if "a standstill [is] used by a target improperly to favor one bidder over another, not for reasons consistent with stockholder interest, but because managers prefer one bidder for their own motives." *Id.* at 91. And even where the board retains the right to waive the standstill agreement, it can still breach its fiduciary duties by failing to do so. *Id.* Here, the Board's eleventh hour waiver of just the "don't ask" portion of the Standstill – a waiver that came only after Ancestry was in possession of Plaintiffs' Opening Brief – simply was too little, too late not to run afoul of *Topps*.

Ancestry does not dispute that *Complete Genomics* explicitly enjoined enforcement of a "Don't Ask Don't Waive" Standstill virtually identical to the one at bar, but merely disagrees with the Court's conclusion. That is hardly surprising given that the Court's ruling undercuts Ancestry's claim that such clauses are proper. Noticeably absent from Ancestry's brief is *any* case law upholding the validity of a "Don't Ask

[26] Parker Tr. at 138:14-139:1 (Pl. App. Ex. 9).
[27] ADAB at 62.

Don't Waive" Standstill provision. Other decisions by Delaware courts confirm that Ancestry's attempt to dismiss *Complete Genomics* as an outlier is simply wrong.

Complete Genomics relied in part on *Ace Ltd v. Capital Re Corporation*, 747 A.2d 95 (Del. Ch. 1999), where Ace, the merger partner of Capital Re, sought to enforce a requirement in the merger agreement's fiduciary out that the Capital Re board must obtain written advice of counsel that another offer was superior. *Id.* at 103-4. This Court rejected Ace's argument, concluding that "a contractual commitment is particularly suspect when a failure to consider other offers guarantees the consummation of the original transaction, however more valuable an alternative transaction may be and however less valuable the original transaction may have become since the merger agreement was signed." *Id.* at 106. The Court also held that even if Ace were right about what the fiduciary out required, it still could not prevail because the provision was likely invalid and "Ace was on notice of its possible invalidity." *Id.* at 109. Likewise, the Capital Re board could not escape a finding that they breached their duty of care by claiming ignorance of the preclusive effect of the provision. *Id.* at 108-9. So too for the Ancestry Board, which – to a man – suffered from the delusion that nothing prevented other bidders from coming forward to top Permira's $32 bid.[28]

[28] Sullivan Tr. at 247:25-248:16. (Pl. App. Ex. 11) ("Q: If any of Ancestry's suitors other than Permira now wanted to submit a topping bid for the company, they could, right?.... A: 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."); *id.* at 248:17-249:25 ("Q:... 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?....A:.... I suppose it would be."); Parker Tr. at 204:7-22 (Pl. App. Ex. 9) (Q: 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? ... A: If you're asking that would

This Court's opinion in *Phelps Dodge Corporation* v. *Cyprus Amax Minerals Company*, 1999 WL 1054255 (Del. Ch. Sept. 27, 1999) highlighted that it is a Delaware board's duty to "be informed of all material information reasonably available" and that even a decision whether or not to negotiate with a party "must be an informed one." *Id.* at *1. The Court concluded that plaintiffs had demonstrated a likelihood of success on the merits with respect to the no-talk provision and noted that "[n]o-talk provisions... are troubling precisely because they prevent a board from meeting its duty to make an informed judgment with respect to even considering whether to negotiate with a third party." *Id.* at *2. Specifically, the Court concluded that defendants "simply should not have completely foreclosed the opportunity [to engage in nonpublic dialogue with third parties], as this is the legal equivalent of willful blindness, a blindness that may constitute a breach of a board's duty of care; that is, the duty to take care to be informed of all material information reasonably available." *Id.*[29] Numerous other cases decided by this Court underscore that board members may not abdicate their fiduciary obligations to identify the best terms for shareholders even after a deal has been reached in contexts similar to a "Don't Ask Don't Waive" standstill.[30]

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completely prevent the acceptance of any higher offer? Q: Yes. A: I would think that would be inappropriate.); Schroepfer Tr. at 51:13-19. (Pl. App. Ex. 12).

[29] Notably, authority relied upon by Ancestry makes this exact point in connection with standstills generally, not merely in the "Don't Ask Don't Waive" context: "The harm to shareholders of precluding a bidder who is subject to a standstill agreement from making a higher bid above that resulting from the auction process may lead a board or a court to decline to enforce, *at least by injunction*, the standstill agreement depending upon the circumstances of the situation." Fleischer and Sussman, Takeover Defense, Mergers and Acquisitions § 14.04(C)(1).

[30] *See, e.g.*, *Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027, at *28 (Del. Ch. Apr. 29, 2005) ("it was the duty of the Holly Board to review the transaction to confirm that a favorable recommendation would continue to be consistent with its fiduciary duties."); *Omnicare, Inc. v.*

C. CONFLICTS OF INTEREST AND FAVORABLE TREATMENT INFECTED AND TAINTED ANCESTRY'S SALES PROCESS

This Court has warned of "highly problematic" yet "easily imagined circumstances" where a board could allow conflicted company insiders to direct a sales process and thereby place their own financial interests ahead of the company's shareholders. *See In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 194 (Del. Ch. 2007). One clear reason for such concerns is "the possibility that some bidders might desire to retain existing management or to provide them with future incentives while others might not." *Id.* A board that permits "the process [to] be driven by management," particularly where management had reason to favor a particular bidder, could be inappropriately skewing the sales process in favor of management's preferred bidder. Even things as subtle as "using different body language and verbal emphasis with different bidders" during due diligence meetings could be used to inappropriately tilt the sales process. *Id.*

While Defendants claim that the Ancestry Board actively directed the sales process in a fair, even-handed way that was unaffected by conflicts of interest,[31] that claim is categorically false. Rather, Sullivan and Hochhauser, with the help of Parker

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NCS Healthcare, Inc., 818 A.2d 914, 936 (Del. 2003) (noting that requirement of stockholder approval coupled with absence of fiduciary out clause "completely prevented the board from discharging its fiduciary responsibilities" and concluding that, "[t]o the extent that a [merger] contract, or a provision thereof, purports to require a board to act or not to act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable."); *Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1207 (Del. Ch. 2001) ("The directors were required to consider all available alternatives in an informed matter until such time as the SPA was submitted to the stockholders for approval" and noting that, "directors cannot willfully blind themselves to opportunities that are presented to them, thus limiting the reach of 'no talk' provisions.").

[31] ADAB at 1.

and Qatalyst, acted to serve their personal financial interests, tailored the sales process to favor Permira, and successfully pushed out [redacted].

1. Sullivan and Hochhauser's Conflicts of Interest Were Clear and Unguarded

Defendants argue that the Board provided rigid direction to ensure that any potential conflicts of interest of Ancestry management did not infect the sales process. Ancestry claims that there "was no discussion of management participation in a potential deal,"[32] relying on the testimony of Hochhauser that Ancestry's "board was pretty specific in directing us not to talk about anything personal" and "everybody was pretty clear from the get-go" that "management had to stay away from any conversations about that."[33] But this testimony is unsupported by the rest of the record. None of the Board minutes produced in this litigation reflect this supposed admonition. Schroepfer testified that management participation in the Proposed Transaction was not even discussed until the end of the process, and that as soon as it was discussed, the Board excused management from its deliberations because it did not "want to have any chance that there is any possibility that it could be perceived that there were any conflicts."[34]

Even had the claimed directive truly been given, Sullivan and Hochhauser failed to follow it. On May 18, Sullivan and Hochhauser met with Permira's Ruder, without Qatalyst present, to discuss Permira's plans for Ancestry.[35] Sullivan and Hochhauser, in flagrant violation of the alleged directive, asked Ruder how Permira typically treated

[32] ADAB at 5.
[33] ADAB at 6.
[34] Schroepfer Tr. at 19:21-20:6. (Pl. App. Ex. 12).
[35] ADAB at 10.

existing management in a buyout. Their flouting of the Board's rules paid off when Ruder responded that it was Permira's policy for management to roll over a portion of its equity.[36]

Faced with Ruder's May response, Defendants pivot and assert it is commonplace for private equity firms to solicit roll over investments from management in connection with a buyout, and that all involved – the Board included – knew that to be the case.[37] Yet the Board allowed Sullivan and Hochhauser to lead this process – a Board that did not want even the "appearance" of a conflict? A Board that supposedly gave the directive that management could not even speak of equity participation let management be the primary interface with bidders it "knew" would require equity participation from management?

Defendants pivot once again when they cast Sullivan and Hochhauser as white knights who agreed to a rollover investment merely to help ensure a transaction could be completed for the benefit of the shareholders at the $32 price, rather than $31.[38] But Hochhauser testified that it was "industry standard" for management to rollover 50% of its total equity with a private equity buyer,[39] so Sullivan and Hochhauser knew from the beginning that if Permira were successful that they would be rolling over at least 50% of their equity. Sullivan and Hochhauser increased their rollover beyond that industry standard 50%, not to help the shareholders, but to garner a bigger share of the post-deal

[36] Ruder Tr. at 185:4-8 (Pl. App. Ex. 7).
[37] ADAB at 27.
[38] ADAB at 29-30.
[39] Hochhauser Tr. at 189:10-190:14 (Pl. App. Ex. 8).

entity. Sullivan's own words reveal his true motivation -- "ANCESTRY.COM IS GOING TO BE HUGE!!!!" [40]

2. The Sales Process Favored Permira

Ancestry claims that "Permira received no special treatment,"[41] despite Plaintiffs' allegations that Permira was the only bidder given concrete guidance by Qatalyst on how to increase its initial bid to assure passage into the second round. Defendants claim that Qatalyst "reached out to all parties – including [redacted] – and told those who had provided the lowest indications that they needed to raise their bid or risk not being allowed to proceed in the process."[42] But Ancestry's citation to testimony from Turner and Parker shows that those bidders were only given the general instruction to raise their bid. Nowhere does either Turner or Parker say that those bidders were given the specific pricing information that Permira was given.

While Defendants spend many pages claiming that they never disadvantaged [redacted] the reality is that [redacted] was held at bay during the sales process while Sullivan, Hochhauser and Qatalyst engaged in robust and vibrant negotiations with Permira. Ancestry claims there is "no evidence of [redacted] complaining about its treatment."[43] To support this claim Ancestry relies exclusively on self-serving statements by Ancestry's Board and management. The relevant inquiry, however, is what [redacted] felt, and [redacted] felt that it was not being given a fair shot, a concern it relayed to Turner, and which Turner in turn passed on to the Board. The August 9, 2012 Ancestry Board Minutes explain: "Mr.

[40] Sullivan Tr. Ex. 9, ACOM00008290 (Pl. App. Ex. 93).
[41] ADAB at 57.
[42] ADAB at 57.
[43] ADAB at 59.

Turner said he had spoken to [redacted] and they expressed concerns relating to their chance in the process."[44] Similarly, Sullivan testified that [redacted] had "express[ed]…concern" about how it was being treated in the process, questioning "were we using them as a stalking horse in some way, or were we, you know – did they have a reasonable shot at completing this transaction."[45] Thus, contrary to Ancestry's unsupported claim, the record is clear that [redacted] did complain about the uneven process.

The Board allowed Permira to partner with [redacted] for the purposes of submitting a joint bid, but would not allow [redacted] to partner with Permira.[46] Sullivan testified that Permira and [redacted] were allowed to partner because both companies had made bids around $33.50 per share, but that [redacted] was not allowed to partner with Permira because that might cause [redacted] to reduce its current offer of $35 per share bid.[47] Ultimately, Permira balked at a potential partnership with [redacted] and went looking to management and Spectrum to fill its equity gap.[48] While Sullivan and Hochhauser were happy to oblige, such a commitment did not cause Permira to increase its bid back into its final offer range.[49] Instead, the Board and Permira agreed to $32 per share, a price that only weeks earlier would have been insufficient to get Permira to the final round of bidding.[50]

Similarly, Defendants attempt to establish that [redacted] was enamored with Ancestry management, and it had no plans to bring in new leadership if it completed an

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[44] August 9 Board minutes. (Pl. App. Ex. 79).
[45] Sullivan Tr. at 171:15-172:19 (Pl. App. Ex. 11)
[46] Parker Tr. at 146:15-25 (Pl. App. Ex. 9); Sullivan Tr. at 176:15-177:24 (Pl. App. Ex. 11).
[47] Sullivan Tr. 174:1-176:14 (Pl. App. Ex. 11)
[48] ACOM00000366-7 (Pl. App. Ex. 91); ACOM00023407 (Pl. App. Ex. 90).
[49] Hochhauser Tr. Ex. 20; Oct. 4 board minutes, ACOM00000368. (Pl. App. Ex. 100).
[50] Ruder Tr. Ex. 10, PA0000013487-8. (Pl. App. Ex. 58).

acquisition.[51] This position, however, is entirely unsupported. In reality, even if [redacted] initial bid letter expressed any support for existing management, Sullivan was well aware of [redacted] concerns about Sullivan's management style, and "whether [the Company] was managed in the best possible way."[52]

3. Permira's Reduced Bid Was Not Based On Its Perceived Value Of Ancestry

Defendants' attempts to tie Permira's reduced final-round bid with a declining view on the value and future prospects of Ancestry mischaracterizes the record.[53] Rather, Permira's bids were directly tied to its equity constraints, not its views on valuation. According to Ruder, Permira's "base case" model for Ancestry [redacted][54] Prior to June 20, 2012, when Permira made its preliminary offer to acquire Ancestry,[55] it did so without the benefit of due diligence.[56] Thus, Permira's initial bid of $32.50-$35 per share (later revised to $34-$37.50 per share) assumed that, among other things, Ancestry would achieve 2012 revenue and EBITDA of [redacted] and [redacted] and 2016 revenue and EBITDA of [redacted] million and [redacted] million.[57] Permira's bid was based on a maximum leverage of [redacted] LTM EBITDA and [redacted].[58]

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[51] ADAB at 61 n. 363.
[52] Sullivan Tr. at 179:8-12. (Pl. App. Ex. 11).
[53] ADAB at 15-16.
[54] Ruder Tr. at 103:12-14 (Pl. App. Ex. 7).
[55] *See* Parker Tr. Ex. 11(ACOM00114487) (Pl. App. Ex. 54).
[56] *See* Ruder Tr. 82:11-14 ("Q: Certainly, completed due diligence had not been completed at this point? A: That's correct, it had not been completed at this point.") (Pl. App. Ex. 7).
[57] *See* Pl. Supp. App. Ex. 119 at Figure 1 (Base Case Inputs Used for Permira's Bid Evaluation).
[58] *See* Pl. Supp. App. Ex.119 at Figure 2 (Evolution of Permira Financing).

After Permira was invited to participate in the second round of bidding, Permira conducted due diligence, which prompted Permira to alter its base case financial projections for Ancestry to 2012 revenue and EBITDA of [redacted] million and [redacted] million, respectively, and 2016 revenue and EBITDA of [redacted] million and [redacted] million.[59] By August 6, Permira had again revised its base case EBITDA projections for 2012 and 2016 this time upward to [redacted] million and [redacted] million.[60] [redacted] Thus, due diligence increased Permira's view of the value of Ancestry.[61]

Contrary to Defendants' assertions, Permira believed Ancestry was on a positive upward trajectory.[62] While Permira dropped its offer price as diligence proceeded, this was for ***reasons completely unrelated to its views on Ancestry's future financial performance***. Instead, as time went on, the funds available to Permira to invest in Ancestry were reduced. In fact, Ruder testified, "frankly, the most attractive source of equity is paying a lower price."[63] As contemplated in Permira's initial bid letter, [redacted].[64]

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[59] *See* Pl. Supp. App. Ex. 119 at Figure 1.
[60] *Id.*
[61] *See id*; *See also* PA0000013299 (Pl. Supp. App. Ex. 120) (Internal Permira email dated Sept. 16, 2012 stating Ancestry is a [redacted] and [redacted]
[62] *See* Ruder Tr. At 123:12-19 [redacted] *Id.* at 123:21-24 ("Q: Paying it down from [redacted] A [redacted]) (Pl. App. Ex. 7).
[63] Ruder Tr. at 156:14-16 (Pl. App. Ex. 7).
[64] *See* Pl. Supp. Ex. 119 at Figure 2.

D. EVEN IF THE SENSITIVITIES WERE MANAGEMENT'S PROJECTIONS AT THE TIME THE DEAL WAS ACCEPTED, THEY ARE UNRELIABLE AND DO NOT SUPPORT $32 BEING A FAIR PRICE

The Ancestry Board accepted Permira's $32 offer on October 11, 2012.[65] Sullivan and Turner testified that the best available projections on October 11 were the May 2012 projections that had been (i) management's best estimates for the Company's future performance since May 2012, (ii) reviewed by Qatalyst to ensure they were "concrete and thoughtfully prepared" and (iii) changed only to incorporate actual results and not otherwise touched for five months.[66] Only after Qatalyst refused to opine on $32 using those projections[67] did the Board purportedly determine that the May 2012 projections were no longer the best estimates of the Company's future performance and that they must be lowered by the Sensitivities.[68] But the Board's reliance on the after-the-fact Sensitivities and on Qatalyst's fairness opinion when it agreed to the $32 merger price was not reasonable for multiple reasons.

1. Self-Interested Parties Prepared the Sensitivities

The "[S]ensitivities were produced by ... Hochhauser's finance team" after Hochhauser knew that he and Sullivan would be rolling over substantial equity in the new

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[65] Permira Ans. Br. ("PAB") at 21; ADAB at 34-35. *See also* Turner Tr. at 116:8-13 ("Q. So the negotiations over price between Ancestry and Permira were essentially concluded on October 11; is that right? A. That's correct.") (Pl. App. Ex. 10).

[66] Sullivan Tr. at 212:2-3 (Pl. App. Ex. 11). Turner Tr. at 51:9-16 (Pl.App. Ex. 10). Turner Tr. at 5:9-16.

[67] Turner Tr. at 25:16-21, 26:4-10 and 29:15-21 (Pl. App. Ex. 10). The Qatalyst warning occurred about ten days to two weeks before the October 18, 2012 Board meeting. Turner Tr. at 29:23-30:13.

[68] The October Board minutes and the Proxy's description of the October Board meetings do not reflect these critical (supposed) Board decisions. Proxy Statement at 31-32 (Summary of Qatalyst Analyses) and Annex B (Qatalyst Fairness Opinion) (Pl. App. Ex. 6). Defendants concede that the Board did not even request that management prepare the Sensitivities until the October 16 Board meeting. ADAB at 35.

company.[69] Sullivan and Hochhauser agreed to rollover more than $67 million in the deal, and Qatalyst had an $18.5 million fee riding on the close of the Transaction. Thus, all involved had a strong incentive to make sure Qatalyst had the numbers it needed to issue a fairness opinion.

2. Qatalyst Played a Major Role in Creating the Sensitivities

The origin of the Sensitivities was Qatalyst's unsolicited creation of "illustrative operating Sensitivities" in August.[70] Those Sensitivities "did not reflect Qatalyst's, management's or anyone else's view as to the likely performance of the company."[71] Qatalyst continued to manipulate "Sensitivities" in September and October.[72] And it was Qatalyst, not Plaintiffs, who attributed "the term 'backsolving' to [Qatalyst's] math."[73]

Defendants attempt to downplay Qatalyst's work on the Sensitivities as merely "illustrative." But accepting that premise would mean that all the DCF analyses in Qatalyst's October 18 DCF presentation, including the Sensitivities, must be rejected because they too are labeled "illustrative."[74] Hochhauser's October 16, 2012 e-mail confirms that the Sensitivities were the product of collaboration between Qatalyst and Hochhauser.[75] Moreover, the Proxy Statement actually states that Qatalyst created the numbers for 2013 – 2015 using its own assumptions.[76] To conceal its role in creating the

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[69] ADAB at 67; *see also* ADAB at 36.
[70] ADAB at 68.
[71] ADAB at 68.
[72] ADAB at 68.
[73] ADAB at 68; QP-ACOM00431479 (Pl. App. Ex. 94) ("backsolving for the number of subscribers") and figuring out 2016 EBITDA margin "by growing SAC slightly faster and adding the delta to operating expenses"); QP-ACOM00443039 (Pl. App. Ex. 96) ("backing into subs").
[74] Pl. App. Ex. 97 at ACOM00000539-542. The presentation also says it is a "draft."
[75] ACOM-00460900 (Pl. App. Ex. 106).
[76] Proxy Statement at 34 (Pl. App. Ex. 6).

Sensitivities, Qatalyst ignored requests by the Company's legal advisor to retitle portions of its presentation.[77] Qatalyst understood that if it were known that Qatalyst created the Sensitivities, its fairness opinion could be called into question.

3. The Sensitivities Were Not the Best Available Estimates of Future Performance

Unlike the May 2012 projections, the Sensitivities were mathematical calculations based on generalized assumptions necessary to reverse engineer support for the $32 per share price.[78] Defendants claim that "nothing in the record supports this view."[79] Defendants have obviously not reviewed the record. In a September 28, 2012 email to Hochhauser, Curtis Tripoli (Hochhauser's direct report) writes: "This process [creating the Sensitivities] is a blend of art and science because it is a top-level model driven off of Y o Y growth/decline assumptions (a bit tricky on the expense side and quite time consuming)... Hopefully, this gives you the range of sensitivities you were looking for."[80] Twelve days later, Tripoli explains "to get to $285M I would have to assume churn remains flat from 2014-2016 (not totally outrageous....)."[81] Clearly, Tripoli was adjusting the assumptions to hit the target EBITDA that Hochhauser needed to justify the $32 offer. This was done not to a standard of management's best estimate but rather to a lesser standard of "not totally outrageous."[82]

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[77] ACOM-00461676 (Pl. App. Ex. 108).
[78] Pl. Op. Br. at 58-60.
[79] Pl. Op. Br. at 58-6; 65-66.
[80] ACOM00170394-96. (McCormick Aff. Ex. 92).
[81] ACOM00171110 (McCormick Aff. Ex. 99).
[82] ACOM00171110 (McCormick Aff. Ex. 99)

The Sensitivities did not conform to the rigor with which the May projections were derived. There is no historical basis for their use of constant annual growth rates for 2012-2016.[83] As Qatalyst admitted, the Sensitivities "were not a full bottoms-up reforecast of the business. It was using the key drivers and assumptions in the business...to get to a final year – final year difference of view."[84] The focus of the Sensitivities was 2016 because, as the terminal year, it represented a "disproportionate amount of value on a discounted cash flow basis."[85] Projections of likely performance are supposed to be built from the present year to the terminal year, not by first assuming terminal year performance necessary to get a particular result and then backing into performance for prior years. But even the Proxy Statement shows that Qatalyst did just that.[86] Plugging in artificial numbers for 2016 and then for 2013 – 2015 to "the same model," with "the same…drivers"[87] does not make the "output" a set of projections of expected performance. This Court has enjoined mergers where the supporting valuation opinion was based upon a "quick and dirty" analysis of value and ignored earlier, more thorough valuation analysis.[88]

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[83] Pl. Op. Br. at 58-60.
[84] Turner Tr. at 149:12-23 (Pl. App. Ex. 10)
[85] Turner Tr. at 149:12-24; 151:8-10. (Pl. App. Ex. 10)
[86] Proxy Statement at 34 (Pl. App. Ex. 6).
[87] ADAB at 67.
[88] *Solar Cells, Inc. v. True North Partners, LLC,* 2002 WL 749163, at **6, 8 (Del. Ch. Apr. 25, 2002).

4. Defendants' WACC Contentions Are Not Supported By The Record

Defendants claim that the change in WACC from 11-14% in August to 9-14% in October was due, in part, to a change in beta.[89] They do not offer any explanation as to what the other causes for the change were.[90] How did a 9% WACC (versus the prior 11-14% WACC) suddenly become appropriate at the same time the Sensitivities were being applied supposedly to reflect newly perceived "downside risks" for the Company? The reason is that the WACC was changed so that the value range derived from the Sensitivities DCF analysis would bracket $32.00/share.[91]

5. Qatalyst's Dilution Discount Is Not Supported By The Record On Equity Grants

Qatalyst's 10% discount of its DCF value for future equity dilution was a material error.[92] Defendants have not cited a single case discounting DCF present value based on possible future issuance of equity securities of unknown quantities, varieties and terms.[93] In contrast, there are numerous cases where the Court has adopted a DCF analysis without applying such a dilution discount.[94] A DCF analysis is based on how many

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[89] ADAB at 70 & n 398.

[90] Turner Tr. at 159:12-16 ("Q. So the change in the WACC from 11 to 14 percent to 9 to 14 percent was not strictly because of a change in beta, right? A. Not exclusively.") (Pl. App. Ex. 10); ADAB at 70 & n.398.

[91] Pl. Op. Br. at 60-61.

[92] Pl. Op. Br. at 62-63; Beach Expert Report at ¶ 41 (Pl. App. Ex. 116).

[93] ADAB at 71, n. 402. Among the numerous unknowns are the number of shares, options, restricted stock units or other forms of equity that will be issued, the vesting requirements, the grant price and exercise price of options, the forfeiture or cancellation of options and RSUs and the potential repurchase of shares. Turner Tr. at 195:19-24 (Pl. App. Ex. 10).

[94] *In re Sunbelt Beverage Corp. S'holder Litig.*, 2010 WL 26539, at *14 (Del. Ch. Jan. 5, 2010); *In re Appraisal of Orchard Enter., Inc.*, 2012 WL 2923305, at *9 (Del. Ch. July 18, 2012); *Crescent/Mach I P'ship, L.P. v. Turner*, 2007 WL 1342263, at *16 (Del. Ch. May 2, 2007); *In re PNB Holding Co. S'holder Litig.*, 2006 WL 2403999, at *26-27 (Del. Ch. Aug. 18, 2006).

shares or share equivalents are known to have a claim on the value of the firm at the time of the valuation.[95] Speculative future issuances should not be considered in evaluating the fair value of the Company.[96]

The 10% dilution discount applied by Qatalyst is simply unreasonable.[97] Sullivan and Hochhauser, the individuals who supposedly provided Qatalyst with the 10% figure, forecasted 1% annual dilution at most.[98] Defendants' claim that Ancestry granted equity awards constituting 2.5% of its outstanding shares in 2011[99] – primarily to Sullivan as a true-up for his lack of equity awards prior to that time – ignores that the Board did not contemplate any additional equity grants to Sullivan and that, therefore, the 2011 anomaly was hardly indicative of future trends.[100]

III. THE PRESENCE OF AN IMMINENT THREAT OF IRREPARABLE HARM, COUPLED WITH A BALANCING OF THE EQUITIES, COUNSELS IN FAVOR OF AN INJUNCTION

Predictably, like the child who kills his parents and then seeks mercy as an orphan, Defendants contend that an injunction should not issue because "there is no competing offer" for Ancestry.[101] However, Plaintiffs have established that the absence of a competing bid was a direct consequence of Defendants' favoritism towards Permira and the preclusive effect of the "Don't Ask Don't Waive" Standstill contained in the

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[95] Lutz Kruschwitz and Andreas Loeffler, Discounted Cash Flow: A Theory of the Valuation of Firms (John Wiley & Sons, 2006) at 37.
[96] *Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357, 362 (Del. 1997) ("speculative elements of value should be excluded from the valuation calculus").
[97] Pl. Op. Br. at 62-63.
[98] Pl. Op. Br. at 62 n. 260 (citing ACOM00169651-54, 51) (Pl. App. Ex. 114); Beach Expert Report at ¶ 41 (Pl. App. Ex. 116) (citing ACOM00173698) (Pl. Supp. App. Ex. 118).
[99] ADAB (citing 2011 10-K at 71, n. 402).
[100] Pl. Op. Br. at 62-63.
[101] PAB at 31; SAB at 24-25.

NDAs. While it is true that this Court has been loathe to grant an injunction preventing stockholders from determining for themselves whether to accept a transaction in the face of no other bid, the situation at bar presents strong reason to depart from this practice.

First, the Proxy is false and misleading, particularly with regard to its disclosures relating to the Fairness Opinion. While Plaintiffs did not bring a separate disclosure claim (which also appears to be loathed by the Court), it is clear that if Qatalyst was creating the "Sensitivities" solely to justify an already agreed upon $32 deal, and this information was not disclosed to shareholders, a fair vote cannot be held.[102]

Second, while the Court has expressed concern that injunctive relief is too drastic a remedy when there is no evidence of another bidder,[103] here Permira was not the only bidder. In fact, there were ***at least five other viable bidders***,[104] and it is only because of Defendants' unlawful actions that Permira wound up in the acquirer's seat. Moreover, the absence of a topping bid is the direct result of the "Don't Ask Don't Waive" standstill contained in the NDAs. This is not a leg up for the acquirer but an actual lock-up that is completely preclusive. It cannot, and should not, be the law of Delaware that if one is

[102] *See Maric Capital Master Fund, Ltd. v. Plato Learning Inc.*, 11 A.3d 1175, 1176-78 (Del. Ch. 2010) (enjoining merger where proxy statement presented a materially misleading description of how financial advisor came to its discount rate for its DCF by presenting a range suggesting that the merger price was far more attractive than what the bank's valuation would have shown had it used the discount rate generated by the bank's actual WACC analysis).

[103] *See In re El Paso Corp. S'holder Litig.*, 41 A.3d 434,492 (Del. Ch. Feb. 29, 2012) (declining to enjoin transaction despite likelihood of success on the merits because "no rival bid for [the target] exists").

[104] The other bidders were: [redacted] (Proxy pp. 18-19 (Parker Tr.) [redacted]) (Pl. App. Ex. 6); [redacted] (June 20 [redacted] bid letter, ACOM00017601-6 (Pl. App. Ex. 52); [redacted] (Parker Tr. Ex. 10; June 20 [redacted] bid letter, ACOM00017607 (Pl. App. Ex. 53); [redacted] (Hochhauser Tr. Ex. 12, June 22 Board Minutes, ACOM00174919-20 (Pl. App. Ex. 63); and [redacted] (Hochhauser Tr. Ex. 16, ACOM00000357 at 358) (Pl. App. Ex. 79).

sufficiently successful in precluding all other bidders that injunctive relief is not available.[105]

Third, although damages may also be available to Plaintiffs, particularly for claims alleging bad faith, absent an injunction, Plaintiffs may be without a means of redress for Defendants' actions that violated the duty of care. *See* DGCL §102(b). As this Court has explained, "[e]xculpation under Section 102(b)(7) can render empty the promise of post-closing damages," and "[for] directors who have relied upon qualified advisors chosen with reasonable care, Section 141(e) provides another powerful defense."[106] While Plaintiffs will have a strong argument that any reliance on Qatalyst cannot be in good faith given the compelling and uncontroverted evidence regarding Qatalyst's fundamentally flawed fairness opinion, it is still a "long and steep uphill climb" to a damage award against directors who did **not** stand to personally benefit from the proposed transaction.[107]

Fourth, the acquirer here is not an unrelated third party. Rather Sullivan, Hochhauser and Spectrum are on the buy side for $117 million. Equity should be extremely hesitant to protect a transaction sponsored by those who breached their fiduciary duties in entering that transaction.

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[105] *See In re Topps Co. S'holders Litig.*, 926 A.2d at 92 (enjoining shareholder vote on merger until target waived standstill agreement used improperly); *see also In re Celera Corp. S'holders Litig.*, 2012 WL 1020471, at *22 (Del. Ch. Mar. 23, 2012) (in approving a settlement that included defendants' waiver of a "Don't Ask Don't Waive" standstill agreement, court concluded that had the parties not settled and plaintiffs succeeded on their breach of fiduciary claim with respect to the standstill agreement, the likely remedy would have been an injunction against its enforcement.)

[106] *See In re Del Monte Foods Co. S'holder Litig.*, 25 A.3d 813, 838 (Del. Ch. 2011).

[107] *See id.*

Fifth, Permira threatens the Court that if the Merger is not consummated by April 21, 2013, either party may walk and therefore, the Court should refuse to enjoin the Merger.[108] Permira conveniently ignores the fact that there is still more than four months until the "drop-dead" date. This Court has enjoined a merger where the injunction would not prevent the deal from closing by the drop-dead date.[109] Four months is enough time for the Company to (a) run a fair and balanced process to test whether Permira's deal is actually the best price available and (b) put the Permira deal to a shareholder vote in the event the Merger remains the winner. Heck, Defendants think two weeks is sufficient.

Sixth, Defendants' argument that a preliminary injunction should be denied because of a potential drop in Ancestry's stock price should be rejected. As the Beach Expert Report explained, the fair value of Ancestry's stock is $38 a share. Any temporary fluctuation in stock price if the transaction is enjoined is irrelevant because stockholders are still better off keeping stock that is more valuable than $32 a share instead of cashing it out in the Merger. Moreover, any temporary fluctuation in Ancestry's stock price is speculative. The average closing price for the entire 2011 calendar year was $32.24. The stock closed as high as $33.09 in February 2012. Thus, this is not a case where the merger price is far above any level that the Company had historically traded. There is no reason to believe the stock price will drop to the June 5, 2012 "unaffected price" of $22.63. Since that time, the Company reported outstanding

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[108] PAB at 33.

[109] *In re Del Monte Foods Co. S'holders Litig.*, 25 A. 2d 813, 842-43 (Del. Ch. 2011) (enjoining a merger where the injunction would lift "over two months before the drop dead date" and thus there would be "no injunction then 'in effect' that would restrain, enjoin, or otherwise prohibit consummation of the Merger" by the drop dead date.").

results in both the second and third quarters of 2012. Furthermore, the median price target set by analysts covering Ancestry was $35 and $36 both before and after the June 2012 "leak," respectively. Finally, Ancestry's senior management is "bullish" on the Company's future prospects. Accordingly, even if there is a drop in the Company's stock price, it will likely be modest and temporary.

Defendants' remaining arguments that taxes are going up, appraisal is available and one plaintiff sold some stock are likewise of no merit. Defendants make much of the potential for an increase in the capital gain tax rate in 2013.[110] This potential increase has yet to be enacted so this hypothetical outcome can only be given minimal weight. Moreover, the Ancestry Board seems to be arguing that its duty to minimize shareholders' tax burden (especially Spectrum's burden) trumps the Board's duty to secure the highest price reasonably available in a sale of the Company. That is simply not true and there is good reason for it. The Board is not in a good position to serve as shareholders' personal tax planner because shareholders each have different bases, different investment strategies, different investment portfolios and different tax planning needs and desires. By contrast, the Board is well-positioned to take all actions necessary to maximize value in a sale of the Company and has a duty to do so.

Permira and Spectrum claim that appraisal is a sufficient remedy for Ancestry shareholders, so there is no need for the Court to issue an injunction.[111] Permira and Spectrum ignore the practical realities of appraisal. Appraisal is expensive and the costs must generally be borne by the shareholder rather than on a class-wide basis. Thus,

[110] ADAB at 73-74; PAB at 34, n 18.
[111] SAB at 25; PAB at 32.

appraisal is not a viable remedy for the overwhelming majority of Ancestry's shareholders.

Finally, Permira argues that Pontiac General's sale of approximately 1,200 Ancestry shares (around 10% of the fund's total Ancestry stake) for $23.15 in April 2012 is compelling evidence that $32 is a fair price and Pontiac is "ignoring" the best interests of Ancestry shareholders in pursuing its claims. The fact that Pontiac, which relies on its outside investment managers to make all of its investment decisions, sold a portion of its Ancestry stock has little bearing on whether Pontiac believes $23.15 is a fair price for the Company's stock. Pontiac's investment decisions are driven by a complex set of factors, including, among other things, performance across the entire portfolio, allocation and rebalancing. Moreover, Pontiac's purchase of 700 shares of Ancestry stock in May 2012 at $22.49 undercuts Permira's argument. If Pontiac believed that $23.15 was a fair price for Ancestry stock, Pontiac would not have purchased Ancestry shares at a comparable price one month later.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for preliminary injunction should be granted, and the Court should enjoin the shareholder vote on the Merger as well as the enforcement of the Don't Ask Don't Waiver Standstill as well as the other deal protection provisions, so the Board can fulfill its fiduciary duty to maximize shareholder value by: (i) reopening the process through which the Company was sold, and (ii) allowing it to receive and consider proposals from other bidders.

Dated: December 15, 2012

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CERTIFICATE OF SERVICE

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