

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

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

- - -

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

- - -

TELEPHONIC ORAL ARGUMENT  
AND THE COURT'S RULING

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CHANCERY COURT REPORTERS  
500 North King Street  
Wilmington, Delaware 19801  
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1 APPEARANCES: (via telephone)

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-and-

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1 THE COURT: Hello. This is Travis  
2 Laster joining. Is the conference there?

3 MR. LONG: Yes, Your Honor.

4 MR. ARONSTAM: Yes, Your Honor.

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

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

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

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

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

20 THE COURT: All right.

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

24 THE COURT: Great. Thank you,

1 everyone, for getting on the line.

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

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

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

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

6 Why is this an acceptable provision?

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

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

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

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

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

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

22 MR. ARONSTAM: Exactly.

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

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

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

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

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

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

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

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

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

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

1 this point?

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

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

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

24 MR. ENRIGHT: Your Honor, this is Don

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

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

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

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

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

24           MR. ARONSTAM: Not at all, Your Honor.

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

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

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

1 counterparty from making a non-public request.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 entered into by agreement to the same degree that they  
2 apply to the one-step. So the fact that we're now at  
3 a stage where the recommendation is a product of a  
4 14D-9 rather than technically a product of 251 doesn't  
5 change the fiduciary analysis.

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

24           In terms of balancing, I don't see any

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

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

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

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

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

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

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

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

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

1 a problem with the recommendation.

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

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

24           The definition of Superior Proposal is

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

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

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

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

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

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

1 limited relief that has been granted.

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

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

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

19 THE COURT: Excellent.

20 Do you have any questions as to my  
21 ruling today?

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

24 THE COURT: Okay. Mr. Enright, does

1 your team have any questions as to my ruling today?

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

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

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

12 MS. UHLENBROCK: I do not, Your Honor.

13 MR. CLOSE: No, Your Honor.

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

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

1 you on that again and expressing my appreciation.

2 Have a good day, everyone.

3 MR. ARONSTAM: Thank you, Your Honor.

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

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CERTIFICATE

I, JEANNE CAHILL, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 29 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

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

/s/ Jeanne Cahill

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Official Court Reporter  
of the Chancery Court  
State of Delaware

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