Going Once . . . Going Twice . . . Sold: The Continued Use of "Don't Ask, Don't Waive" Standstills in Corporate Auctions

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IN CORPORATE AUCTIONS

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I. INTRODUCTION

“Don’t ask, don’t waive” (“DADW”) provisions are a form of standstill agreement often included in confidentiality agreements with potential bidders looking to participate in a structured public company auction.1 Generically, a DADW provision may read as follows:

Unless approved in advance in writing by the board of directors of the Company, Buyer agrees that neither Buyer nor any of its Representatives acting on behalf of or in concert with Buyer (or any of its Representatives) will, from the date hereof and for a period extending until 18 months after the date on which the Company last provides Evaluation Material under this Agreement, directly or indirectly:

(a) make any public announcement, proposal or offer with respect to (including, for the avoidance of doubt, indirectly by means of communication with the press or media) (i) any business combination, merger, tender offer, exchange offer or similar transaction involving any of the Companies, (ii) any restructuring, recapitalization, liquidation or similar transaction involving any of the Companies, (iii) any acquisition of any of the Companies’ loans, debt securities, equity securities or assets, or rights or options to acquire interests in any of the Companies’ loans, debt securities, equity securities or assets, (iv) any proposal to seek representation on the board of directors of the Company or otherwise seek to control or influence the management, board of directors or policies of the Company, (v) any request or proposal to waive, terminate or amend the provisions of this Agreement or (vi) any proposal, arrangement or other statement that is inconsistent with the terms of this Agreement, including this Section 9(a).2

DADW provisions preclude a bidder from submitting an offer for the company unless expressly invited by the company’s board of directors—this is the “don’t ask” half.3 They also prohibit the bidder from privately and/or publicly requesting that the board of directors waive the just described preclusion—this is the “don’t waive” half.4

The fundamental purpose of using DADW provisions is to wring the highest possible offer from a bidder because that bidder only gets one chance to make an offer unless the company delivers another invitation.5 Simply put, bidders may only get one bite at the apple.

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2 Letter from John B. Crowe, Chairman of the Bd. & Chief Exec. Officer, Buckeye Technologies Inc., to David G. Park, Senior Vice President, Georgia-Pacific LLC (Jan. 30, 2013) (on file with Bloomberg Law).
3 See Walsh et al., supra note 1.
4 See id.
5 See id.
Without another bite, a losing bidder would be unable to deliver a topping bid before or after the target reaches a definitive agreement with the winning bidder.⁶

Recent rulings from the Delaware Court of Chancery call the enforceability of DADW provisions into question.⁷ Challengers argue, and the chancery court rulings agree, DADW provisions are restrictive covenants that can result in breached duties of care, disclosure, and value-maximization.⁸ Unlike traditional auctions where the drop of the gavel means the end of the auction, corporate auctions technically continue until any required stockholder vote approves the proposed sale transaction.⁹ Challengers argue that enforcing a DADW provision and ignoring a potentially topping bid could amount to willful blindness and, therefore, an uninformed board decision.¹⁰

This Article will show that, despite concerns, DADW provisions maintain validity in the Delaware courts and should perhaps receive greater respect than jurists currently grant. The Article will first explain the background illuminating the use of DADW provisions by target corporations.¹¹ Then the Article will show DADW provisions aid target boards in fulfilling both value-maximizing Revlon duties and do not automatically thwart satisfaction of informational

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⁶ See In re Ancestry.com Inc. Shareholder Litigation: Delaware Court of Chancery Rules that “Don’t Ask, Don’t Waive” Standstills Are Not Per Se Unenforceable, but Their Use and Effect Should Be Disclosed to Shareholders, SULLIVAN & CROMWELL LLP, 3 (Jan. 9, 2013), http://www.sullcrom.com/files/Publication/9ed56469-7044-4595-a2ef-f65074bf86ae/Presentation/PublicationAttachment/2a8e61f7-44bb-4098-9c30-f751a4bb556b/SC_Publication_In_re_Ancestry_com_Inc_Shareholder_Litigation.pdf (“Chancellor Strine acknowledged that . . . a ‘Don’t Ask, Don’t Waive’ provision could service a value-maximizing purpose by forcing potential bidders to put their highest bid forward or risk being shut out of the opportunity to top the winning bidder after a definitive agreement is reached.”).

⁷ See infra Part II.B.3.

⁸ See Walsh et al., supra note 1 (“Several recent court rulings and decisions by the Delaware Court of Chancery have prompted discussions . . . [whether] a board’s use of these restrictive provisions constitutes a breach of the duty of care, duty of disclosure, and value-maximizing Revlon duties.”).

⁹ Id.


¹¹ See infra Part II.
burdens carried by a target board.\textsuperscript{12} The Article will also describe how the recent court rulings are not fatal to using DADWs going forward.\textsuperscript{13} Finally, the Article will summarize fundamental practices for utilizing DADWs.\textsuperscript{14}

II. PREPARING TO GO TO AUCTION

A. AUCTION TYPE

Selling a company is a complex legal and business exercise. Selling a company involves auction design. Thus, quite naturally, auction design is a complex legal and business exercise.\textsuperscript{15} Understanding the theory and design underlying different auction types is critical to optimizing the sale of a company.

There are four primary types of auctions.\textsuperscript{16} An English auction is familiar to most people—it is the “going, going, gone” type used by art houses and the like.\textsuperscript{17} A Dutch auction is another type where the auctioneer begins at a high price and lowers the price until a bidder is willing to pay.\textsuperscript{18} A first-price auction is one where the bidders submit their bids and the highest bid wins, paying that bid price.\textsuperscript{19} Finally, a second-price auction is a type where the bidders

\begin{footnotesize}
\begin{enumerate}
\item See infra Part III.A.
\item See infra Part III.B.
\item See infra Part III.C.
\item See Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1287 (Del. 1989) (“We recognize that the conduct of a corporate auction is a complex undertaking both in its design and execution.”).
\item See Leslie R. Fine, The Concise Encyclopedia of Economics: Auctions, LIBR. ECON. & LIBERTY, http://www.econlib.org/library/Enc/Auctions.html (last visited Apr. 4, 2013) (“William Vickrey first established the taxonomy of auctions based on the order in which the auctioneer quotes prices and the bidders tender their bids. He established four major (one-sided) auction types: (1) the ascending-bid (open, oral, or English) auction; (2) the descending-bid (Dutch) auction; (3) the first-price, sealed-bid auction; and (4) the second-price, sealed-bid (Vickrey) auction.”).
\item Id. The bid price begins low and continues to increase until the second-highest bidder drops out of the auction and the highest bidder pays its high bid price.
\item See id.
\item See id.; see also Paul Milgrom, Auctions and Bidding: A Primer, 3 J. ECON. PERSP., no. 3, at 3, 6 (1989) (“In a sealed bid auction, each bidder independently and privately picks a price and offers to buy the goods at that price.”).
\end{enumerate}
\end{footnotesize}
submit sealed bids like a first-price auction, but the highest bidder wins and only pays the second-highest price.  

Corporate auctions are an interesting blend of two of the preceding auction types. Corporate auctions combine elements of the English auction with the first-price auction. From the first-price type, most corporate auctions use sealed-bids and the target corporation’s board will declare the highest-valued bid the winner, thereby requiring the associated bidder to pay that winning bid price. From the English type, corporate auctions push interested buyers to submit bids that ascend in value across more than one round of bidding. Thus, corporate auctions can be described as first-price ascending auctions.

This blended auction generates a series of stresses that target corporations face during the solicitation and selling process. Perhaps most importantly, the first-price nature of corporate

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20 Fine, supra note 16.
21 Cf. Paul Klemperer, Auctions: Theory and Practice 111 (2004), available at http://www.nuff.ox.ac.uk/users/klemperer/VirtualBook/13_Chapter3.pdf (“The famous RJR-Nabisco sale went through several supposedly final sealed-bid auctions . . . . But if, after a sealed-bid auction, the auctioneer can re-open the auction to higher offers, the auction is really an ascending-bid auction and needs to be recognized as such. In fact . . . since a director who turns down a higher bid for his company after running a ‘sealed-bid auction’ may be vulnerable to shareholder lawsuits.”).
22 See, e.g., Macmillan, 559 A.2d at 1275 (explaining how the Macmillan executive, Evans, improperly tipped a Kohlberg, Kravis and Roberts Co. (“KKR”) representative about another bid).
23 See, e.g., id. at 1274 (describing how the Macmillan, Inc. directors met and came to the opinion that an $85 per share blended bid was higher than an $84 per share all-cash bid).
24 Compare, e.g., id. at 1272 (identifying Mills Acquisition Co. controlling shareholder, Robert Maxwell, as presenting a first all-cash bid of $80 per share on July 20, 1988), with id. at 1273 (identifying a subsequent offer from Maxwell of $84 per share (all-cash) on September 9, 1988).
25 Compare In re Holly Farms Corp. S’holder Litig., 564 A.2d 342, 343-44 (Del. Ch. 1989) (providing revised auction guidelines that declared “[t]he purpose of the auction is to obtain each bidder’s best and highest bid and to conclude finally the contest for control of Holly Farms,” and explaining the board of directors had no interest in holding multiple rounds, but would disclose one bidder’s terms to another “in order to reach a conclusive result” (i.e., there could be multiple rounds)), with In re RJR Nabisco, Inc. S’holders Litig., Civ. A. No. 10389, 1989 WL 7036, 14 Del. J. Corp. L. 1132, 1142-53 (Del. Ch. Jan. 31, 1989) (describing how RJR Nabisco decided to pursue a going private transaction and sought “final submission of bids” from the outset, but on multiple occasions had to extend or create new bidding deadlines); see also J. Russel Denton, Note, Stacked Deck: Go-Shops and Auction Theory, 60 Stan. L. Rev. 1529, 1533 (2008) (“Regardless of the potential impact on expected revenue, it is difficult, if not impossible, for a selling board to auction a company by any means other than a first-price ascending auction.”).
auctions causes bidders to engage in “shading.”

Bidders in first-price auctions will lower their bid from their full valuation in order to seek a profit margin. First-price auctions also lead to winning bidders that do not actually possess the highest valuation for the auctioned item. All this indicates that shading can create a downward pressure on a target corporation’s expected gain from its auction.

Second, and related to shading, the sealed-bid component of a first-price auction leads weaker bidders to enter the corporate auction process. Salient features of auction markets, such as those for a corporation, include: (1) high information costs and bidding costs; (2) heterogeneous valuation distributions among bidders; and (3) collusion possibilities involving bidders. Accounting for these features, some economists conclude that sealed bidding favors

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26 Milgrom, supra note 19, at 9 (explaining how a first-bid auction does not necessarily lead to higher payments compared to second-bid auctions).

27 Id.

28 Compare William S. Vickrey, Counterspeculation, Auctions, and Competitive Sealed Tenders, 16 J. Fin. 8, 20 (1961) (describing how a first-price auction “is isomorphic with the Dutch auction”), with Vickrey, supra, at 17 (describing how, without the assumption of bidder homogeneity valuing the auctioned item, Dutch auctions will not generally produce Pareto-optimal allocations of the auctioned item), and Vickrey, supra, at 14 (demonstrating how progressive auctions most often lead to Pareto-optimal results (i.e., the purchaser who had the highest valuation for the auctioned item wins that auction)).

29 Compare Vickrey, supra note 28, at 21 (identifying how the first-price method can create non-Pareto-optimal results and leave an aggregate increase in profits on the table when there is asymmetry among bidders (e.g., informational asymmetry), evaluation errors, or strategy mistakes), with id. (emphasis added) (“[T]he study of the asymmetrical case indicates that there are some extremes where the Pareto-optimal progressive auction . . . result[s] in a lower average expected price to the seller than the non-optimal . . . top-price method . . . .”).

30 See Susan Athey et al., Comparing Open and Sealed Bid Auctions: Evidence from Timber Auctions, 126 Q.J. Econ. 207, 208 (2011) (describing the features incorporated into the model that the authors chose to consider). At first blush, this article by Athey et al. may seem off-point, but the general principles do relate to corporate auctions because the article focused on open bidding versus sealed bidding with exploration of bidder entry, bidder competition, and the possibility of bidder collusion. See Athey et al., supra, 207-08. For instance, corporate auctions can involve collusion among prospective bidders. E.g., In re Holly Farms, 564 A.2d at 347 (“[T]he Holly Farms Board was convinced that Tyson Foods was not planning to submit a higher bid and the directors feared that any delay in approving ConAgra’s superior economic proposal risked losing it because it feared that ConAgra and Tyson would reach a collusive settlement and, as a consequence, ConAgra’s improved offer would be withdrawn.”). Corporate auctions may also involve a type of collusion between the target corporation and a favored bidder. E.g., The Upper Deck Co. & Northwood Investors, LLC v. The Topps Co., Inc. (In re The Topps Co. S’holders Litig.), 926 A.2d 58, 61 (Del. Ch. 2007) (“From the time the insurgents were seated, Eisner was on the scene, expressing an interest in making a bid. Two other financial buyers also made a pass. But Topps’s public message was that it was not for sale. Eventually, the other bidders dropped out after making disappointingly low value expressions of interest. Eisner was told by a key Incumbent Director that the Incumbent Directors might embrace a bid of $10 per share. Eisner later bid $9.24 in a proposal that envisioned his retention of existing management, including Shorin’s son-in-law.”).
weak bidders because strong bidders have a higher incentive to shade their true valuations.\textsuperscript{31} With a higher chance of winning sealed bid auctions, weak bidders have greater incentive to enter the auction in the first place.\textsuperscript{32} 

Finally, the English auction side to a corporate auction incentivizes bidders to only incrementally approach their highest valuation. In each round of bidding announced or permitted by a target corporation, the target corporation expects participants to make successively greater bids.\textsuperscript{33} Successive rounds can reveal information to bidders about the competition for the target corporation (i.e., more rounds signals more competition).\textsuperscript{34} Unfortunately, because corporate auctions resemble English auctions, “[t]hey can take a long and unpredictable amount of time to terminate.”\textsuperscript{35} Partly to blame, unlike actual English auctions, corporate auctions hamper information revelation because bidders for a corporation often cannot observe the prices where other bidders drop-out.\textsuperscript{36}

B. AUCTION EXECUTION

\textsuperscript{31} See Athey et al., supra note 30, at 208 (citing Eric Maskin & John Riley, Asymmetric Auctions, 67 REV. ECON. STUD. 413 (2000)). It is noteworthy, however, that in Maskin’s and Riley’s article, there is an underlying assumption that the strong bidder and weak bidder are able to identify each other as such. Maskin & Riley, supra, at 423 (“[I]f a weak buyer faces a strong buyer rather than another weak buyer, he responds with a more aggressive bid distribution (in the sense of stochastic dominance). And symmetrically . . . if a strong buyer faces a weak buyer rather than another strong buyer, he will respond with a less aggressive bid distribution.”).

\textsuperscript{32} Athey et al., supra note 30, at 209.

\textsuperscript{33} See, e.g., Fujishima et al., Speeding Up Ascending-Bid Auctions 2 (2011), available at https://faculty.fuqua.duke.edu/~dm121/papers/speedy.pdf (“In the English auction, participants make successively higher bids.”). An important difference between traditional English auctions and corporate auctions is that a target corporation does not act as the auctioneer calling out higher prices; instead, the target corporation solicits bids and receives bid submissions without setting a price itself.

\textsuperscript{34} See Fujishima et al., supra note 33, at 1.

\textsuperscript{35} See Fujishima et al., supra note 33, at 1 (identifying a distinct disadvantage to ascending-bid auctions).

\textsuperscript{36} Cf. Fujishima et al., supra note 33, at 1 (“In an ascending-bid auction, bidders with high estimates of a good’s value can see the drop-out points of other bidders who have lower estimates . . . . For example, in an auction of a purported Rembrandt painting, very aggressive bidding by several experts should convince a non-expert that the painting is unlikely to be fake.”).
Even after understanding the general structure of corporate auctions, there remain a great deal of challenges and nuances to actually executing the auction. This is because each auction must be tailored and executed to the situation at hand. To shed light on some of the particular events that arise and challenge auction participants, we need turn no further than the famous *In re RJR Nabisco, Inc. Shareholders Litigation* from the Delaware Court of Chancery. The transaction scrutinized in *In re RJR* was described at the time as the biggest acquisition in United States history. With those high of stakes, it was unsurprising that RJR Nabisco, Inc. struggled to control the auction process.

The *In re RJR* case presented a number of common behaviors that targets and bidders exhibit during corporate auctions. For instance, on the target side of behaviors, RJR Nabisco: (1) disseminated a set of rules and procedures to bidders for submitting proposals; (2) intended to hold only “a single round of bidding”; (3) attempted to set a deadline for “final submission of bids”; and (4) waived the rules and procedures in place in order to consider any new and forthcoming bids in light of bidder displeasure and pressures. Examples on the bidder side of behaviors included one or more of the bidders: (a) submitting blended offers (i.e., offers with cash and non-cash components) that presented valuation challenges; (b) submitting an offer

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37 See Paul Klemperer, *What Really Matters in Auction Design*, 16 J. ECON. PERSP., no. 1, at 169, 184 (2002) ("Good auction design is not ‘one size fits all’ and must be sensitive to the details of the context.").
41 In re RJR, 14 DEL. J. CORP. L. at 1143. In fact, “[t]he rules specified that . . . [a]ny proposal should reflect the potential purchaser’s highest offer.” Id.
42 See id. at 1143, 1149-51 (describing how the RJR Nabisco special committee set a deadline of November 7, 1988 for “final submission of bids,” but RJR Nabisco did not ultimately receive a final set of bids until November 30 of that same month).
43 See id. at 1145 (describing KKR’s displeasure with a potential leak of its bid to the press, KKR’s pressure for a decision to be made that day, and the Management Group informing the special committee that it was willing “to discuss all aspects of its proposal”).
44 See id. at 1143 (describing the three bids handed to the RJR Nabisco special committee by November 18, 1988, where each consisted of different combinations of consideration).
that was incomplete but appealing enough to warrant more time for development, even after a submission deadline; 45 (c) submitting a second bid with a tactical error in how much higher the second bid was over the first bid; 46 (d) pressuring the target corporation to act or risk losing their valuable bid; 47 and (e) submitting what appeared to be final and best offers before the target tried to make a decision. 48

These behaviors can make auction execution intense and interesting, but they can also frustrate the actual sale of the target corporation. No target corporation wants to be in the position of RJR Nabisco where a bidder effectively takes control of setting the deadline for executing an agreement. 49 Likewise, no target corporation wants the auction process to drag on for an extended period of time. 50 Thus, target corporations and their lawyers often look for ways to improve control over the auction process with provisions like “don’t ask, don’t waive” standstills. 51 Despite these good intentions, however, target corporations must always be mindful of their fiduciary duties during the auction process, especially when using deal-making or deal-protecting provisions.

45 See id. at 1143-44 (“The First Boston approach was innovative, appealing and problematic. . . . [I]ts terms were not fully worked out. . . . In view of the fact that the First Boston Group’s proposal was at this point potentially the most attractive, and that more time was necessary to develop it further, the Committee decided to extend the bidding deadline until November 29.”).
46 See id. at 1144 (“The Management Group apparently realized that it had made a tactical error in raising its bid only $1 when, as later events show, it was willing to pay substantially more.”).
47 See id. at 1145 (“In light of its fears, KKR had requested, first informally and then by letter, that its bid be acted upon that day. The letter required action on the bid by 1:00 p.m. November 30. This assertedly created concern in the minds of some directors that the KKR bid might be withdrawn if not acted upon in a timely manner.”).
48 See id. at 1150-52 (describing KKR’s and the Management Group’s final communications with the RJR Nabisco special committee before the committee met with its investment advisors to review the “final” bids).
49 See, e.g., id. at 1145, 1147 (revealing KKR threatened to withdraw its bid if its bid was not acted upon before 1:00 p.m. on November 30, and demonstrating that the special committee actually asked KKR for an extension of that 1:00 p.m. deadline).
50 See, e.g., Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1265 (Del. 1989) (describing how Macmillan, Inc. began preparing for its potential takeover in May of 1987, but was still considering an offer and facing litigation regarding a potential merger in October of 1988).
51 See Walsh et al., supra note 1 (explaining how, if the target uses a “don’t ask, don’t waive” standstill, the standstill promotes an orderly auction and the target gets to control when a bidder may make an offer).
C. TARGET’S FIDUCIARY DUTIES

Inescapably, a target board’s fiduciary duties affect auction execution, both with respect to auction rules and behaviors. Delaware’s corporate fiduciary duty law is both well-developed and greatly followed. So it is unsurprising that chancellors on the Delaware Court of Chancery would be the point of origin for raising questions about “don’t ask, don’t waive” provisions facilitating mergers and the like.

This subpart provides an overview of pertinent Delaware cases. The first section reviews Delaware case law on board duties during an auction. The second section reviews the most on-point cases related to “don’t ask, don’t waive” provisions. The third section reviews recent Chancery court rulings and an opinion scrutinizing “don’t ask, don’t waive” provisions.

1. Foundational Law

As an article focused on auctions in mergers and acquisitions, the fundamental starting place is Revlon, Inc. v. MacAndrews & Forbes Holding, Inc. from the Delaware Supreme Court. In Revlon, the Delaware court concluded directors of Revlon, Inc. failed to adequately focus their efforts toward maximizing shareholder profit and ended the company’s auction to the ultimate disadvantage of Revlon shareholders. On October 12, 1985 Revlon’s board unanimously approved a Forstmann Little & Co. bid of $57.25 per share conditioned upon the inclusion, inter alia, of a lock-up option and no-shop provision. The board made this approval despite Pantry Pride, Inc. previously announcing it would “top any Forstmann offer by a slightly

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52 See infra Part II.C.1.
53 See infra Part II.C.2.
54 See infra Part II.C.3.
57 See Revlon, 506 A.2d at 178 (describing the October 12 offer and conditions presented by Forstmann).
higher one.”58 The court determined the asset option lock-up granted to the approved acquirer represented a breach of the Revlon board’s duty of care.59

The Delaware Supreme Court identified two significant lenses for scrutinizing a board’s decision to sell the company. First, when a board authorizes management to find a buyer for the company, the duty of the board changes from preserving the corporate entity to maximizing shareholder benefit from the corporate sale.60 In the words of the court, “[t]he directors’ role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.”61 Second, provisions such as lock-ups can attract bidders to a profit maximizing auction for a company,62 but measures that prematurely end an active auction operate against the interests of the company’s shareholders.63

A significant post-Revlon case on auctions from the late 1980s is Mills Acquisition Co. v. Macmillan, Inc.64 from the Delaware Supreme Court. In Macmillan, the Delaware Supreme Court reversed the Court of Chancery after finding that court’s legal conclusions and refusal to enjoin a lockup agreement were inconsistent with the factual findings about unfairness in the bidding process for Macmillan, Inc.65 The Delaware Supreme Court determined the record reflected clear breaches of corporate fiduciary duties of loyalty and care that tainted the evaluations and deliberations of the Macmillan board and detrimentally affected general shareholder interests.66

58 Id.
59 Id. at 185. Thus, the board was not entitled to deference under the business judgment rule. Id.
60 Id. at 182.
61 Id.
62 Id. at 183.
63 See id. (citing Note, Lock-up Options: Toward a State Law Standard, 96 HARV. L. REV. 1068, 1081 (1983)).
64 559 A.2d 1261 (Del. 1989).
66 Macmillan, 559 A.2d at 1264.
The Delaware Supreme Court focused a significant portion of its attention to the fairness of the auction process. The court’s opinion included two important messages. First, the *Macmillan* court explained a board of directors’ auction design and execution finds protection under the business judgment rule when board member “self-interest” is absent and when the board has satisfied *Unocal Corp. v. Mesa Petroleum Co.* enhanced duties. Demonstrating the absence of self-interest is difficult due to the omnipresent specter of the board acting to the contrary when corporate control is at stake. This “specter” triggers the enhanced duties that are a threshold before the business judgment rule can attach. The *Macmillan* court laid out how to fulfill *Unocal* enhanced duties in an auction: if the plaintiff shows the target company’s board treated a bidder on unequal terms, then that board must demonstrate the inequality enhanced shareholder interests and was reasonable with respect to the sought-after advantage.

Second, like it did in *Revlon*, the Delaware Supreme Court reiterated that auction-ending provisions are not *per se* illegal, but they cannot be used to foreclose additional bidding to the harm of shareholders or to prematurely end active auctions. The court stated that auction-ending provisions are appropriate only if they confer a substantial benefit to the shareholders. What’s more, the board’s decision to use an auction-ending provision must be informed *and* not

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67 See id. at 1279 (“[T]he board’s own lack of oversight in structuring and directing the auction afforded management the opportunity to indulge in the misconduct which occurred. In such a context, the challenged transaction must withstand rigorous judicial scrutiny under the exacting standards of entire fairness.”).
68 493 A.2d 946 (Del. 1985).
69 *Macmillan*, 559 A.2d at 1287. More generally phrased, the business judgment rule provides “[i]rrationality is the outer limit of the business judgment rule. Irrationality may be the functional equivalent of the waste test or it may tend to show that the decision is not made in good faith, which is a key ingredient of the business judgment rule.” Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000) (footnote omitted).
70 *Macmillan*, 559 A.2d at 1287 (quoting *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985)).
71 Id. (citing *Unocal*, 493 A.2d at 954).
72 See id. at 1288 (“When *Revlon* duties devolve upon directors, this Court will continue to exact an enhanced judicial scrutiny at the threshold, as in *Unocal*, before the normal presumptions of the business judgment rule will apply. However, as we recognized in *Revlon*, the two part threshold test, of necessity, is slightly different.”).
73 Id. at 1284 (citing *Revlon*, 506 A.2d at 183-84).
74 Id.
induced by a breach of fiduciary duty.\textsuperscript{75} Despite these limitations, the court made it clear that it did not intend to limit corporate negotiating authority nor the diverse set of devices a board may rationally use to achieve the best price available to the shareholders.\textsuperscript{76}

2. \textit{Standstill Law}

The oldest, most relevant case related to “don’t ask, don’t waive” (“DADW”) provisions is \textit{In re The Topps Co. Shareholders Litigation}\textsuperscript{77} (“\textit{In re Topps}”) from the Delaware Court of Chancery. For the court, then-Vice Chancellor Strine issued a preliminary injunction against a shareholder vote on a merger agreement until, \textit{inter alia}, The Topps Company, Inc. (“Topps”) released The Upper Deck Company (“Upper Deck”) from a standstill prohibiting Upper Deck from making an as favorable or more favorable tender offer than the then-outstanding offer it had already made.\textsuperscript{78} The chancery court has since emphasized \textit{In re Topps} was a case about instances when a target corporation’s board of directors must set aside its contractual rights to fulfill fiduciary duties to optimize the best interests of target shareholders.\textsuperscript{79}

In the case, Topps’ board of directors made a promise to explore the company’s strategic options.\textsuperscript{80} Topps’ board approved a merger agreement with former Disney CEO Michael Eisner at $9.75 per share, including a fiduciary out for Topps’ board in the form of a “go shop” provision.\textsuperscript{81} Upper Deck was as a strategic bidder during the “go shop” period with an initial

\textsuperscript{75} Id.
\textsuperscript{76} See id. at 1287.
\textsuperscript{77} 926 A.2d 58 (Del. Ch. 2007).
\textsuperscript{78} The Upper Deck Co. & Northwood Investors, LLC v. The Topps Co., Inc. (\textit{In re The Topps Co. S'holders Litig.}), 926 A.2d 58, 63 (Del. Ch. 2007).
\textsuperscript{80} \textit{In re Topps}, 926 A.2d at 61.
\textsuperscript{81} See id. (“One of the Incumbent Directors . . . reached agreement with Eisner on a merger at $9.75 per share. The ‘Merger Agreement’ gave Topps the chance to shop the bid for 40 days after signing, and the right to accept a
willingness to acquire Topps for $10.75 per share subject to some conditions including additional
due diligence.\textsuperscript{82} Topps’ board decided Upper Deck’s initial bid was not superior to Eisner’s bid
despite Upper Deck’s higher bid price, so Upper Deck made an unsolicited second bid after the
“go shop” period ended, again at $10.75 per share but with different conditions attached.\textsuperscript{83} However, Topps had required Upper Deck to enter a standstill and the Topps board continued to
treat Upper Deck’s bid as inferior to Eisner’s bid.\textsuperscript{84}

The standstill and the actions of the Topps’ board regarding Upper Deck’s post-“go shop” offer mirrored a DADW provision. First, like the “don’t ask” portion of a DADW provision, the Upper Deck standstill prohibited Upper Deck from attempting a tender offer to acquire any of Topps’ shares without the permission of Topps’ board.\textsuperscript{85} Second, like the “don’t waive” portion of a DADW provision, the Upper Deck board refused to waive the standstill in order for Upper Deck to present a tender offer after the “go shop” period.\textsuperscript{86}

Then-Vice Chancellor Strine provided several reasons for issuing the preliminary injunction against the shareholder vote sought by Topps. The vice chancellor explained that directors for a Delaware corporation must provide shareholders with the material facts relevant

\textsuperscript{82} See id. at 62 (describing how Upper Deck emerged as a potential buyer during the go shop period).
\textsuperscript{83} See id. (‘‘Although having the option freely to continue negotiations to induce an even more favorable topping bid by finding that Upper Deck’s interest was likely to result in a Superior Proposal, the Topps board, with one Dissident Director dissenting, one abstaining, and one absent, voted not to make such a finding. After the end of the Go Shop period, Upper Deck made another unsolicited overture . . . .’’).
\textsuperscript{84} See id. (explaining how Topps’ board avoided finding Upper Deck’s second bid as superior, which would have triggered Eisner’s match right).
\textsuperscript{85} Compare id. at 62 (‘‘Topps did that knowing that it had required Upper Deck to agree to a contractual standstill (the ‘Standstill Agreement’) prohibiting Upper Deck from . . . proceeding with a tender offer for Topps shares without permission from the Topps board.’’), with Walsh et al., supra note 1 (describing how DADWs “prohibit the bidder from making an offer for the company without an express invitation from the company’s board of directors”).
\textsuperscript{86} Compare In re Topps, 926 A.2d at 62 (‘‘The Topps board has refused Upper Deck’s request for relief from the Standstill Agreement in order to allow Upper Deck to make a tender offer and to tell its side of events.’’), with Walsh et al., supra note 1 (describing how DADWs “preclude the bidder from publicly and/or privately asking the board of directors to waive the [‘don’t ask’ bidding] restriction’’).
for shareholders to make an informed decision whether to approve a merger.\textsuperscript{87} Topps’ board improperly used its standstill agreement with Upper Deck, thereby threatening the Topps shareholders with making a substantial choice on an uninformed basis.\textsuperscript{88}

The former vice chancellor also provided guidance on the use of standstills. Then-Vice Chancellor Strine realized that standstills serve legitimate objectives, including the prevention of misused confidential information and the establishment of rules to an orderly auction.\textsuperscript{89} However, the vice chancellor pointed out that standstills can be abused, especially at the insistence of a particular bidder seeking deal protection or if managers of a target intend to improperly favor a bidder for their own motives.\textsuperscript{90} The record did not indicate that Topps used its standstill with Upper Deck to extract concessions that would unlock higher value to Topps’ shareholders.\textsuperscript{91} Rather, Topps’ board used its standstill to keep its shareholders in the dark regarding information from Upper Deck and to prevent shareholders from accepting a potentially more valuable deal.\textsuperscript{92} Thus, on behalf of the court, Vice Chancellor Strine was convinced Upper Deck demonstrated a reasonable probability of success on its assertion that Topps’ board misused its standstill with Upper Deck.\textsuperscript{93}

Another important case related to standstills was \textit{Phelps Dodge Corp. v. Cyprus Amax Minerals Co.},\textsuperscript{94} which came from the chancery court in 1999. In \textit{Phelps Dodge}, then-Chancellor Chandler preliminarily enjoined the enforcement of a “no-talk” provision after the plaintiffs demonstrated a reasonable likelihood of succeeding on the merits of at least one part to the

\textsuperscript{87} \textit{In re Topps}, 926 A.2d at 64.
\textsuperscript{88} \textit{Id.} at 92.
\textsuperscript{89} \textit{Id.} at 91.
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{See id.} at 92 (“The Topps board refused. That refusal not only keeps the stockholders from having the chance to accept a potentially more attractive higher priced deal, it keeps them in the dark about Upper Deck’s version of important events . . . .”).
\textsuperscript{93} \textit{Id.} at 91.
\textsuperscript{94} Nos. CIV. A. 17398, CIV. A. 17383, CIV. A. 17427, 1999 WL 1054255 (Del. Ch. Sept. 27, 1999).
litigation. Explaining why he enjoined the no-talk provision, the chancellor started with the board duty to be informed about all material information that is reasonably available about that board’s corporation. On behalf of the court, the chancellor accepted the defendants’ argument that boards are not under a duty to always negotiate with a potential bidder in a sale of the company or change of control scenario. However, Chancellor Chandler continued by limiting the board’s ability to rebuff negotiations to only after the board has informed itself of the circumstances precipitating that negotiating opportunity.

The chancellor went on to explain the no-talk provision at hand created the legal equivalent of willful blindness that could breach the board’s duty of care. The defendants’ no-talk provision blocked them from engaging in any private dialogue with a potential buyer, Phelps. The defendants and Phelps could explore public information, but the defendants foreclosed their ability to exchange valuable private information with Phelps. The defendants’ no-talk obligation made an ex ante bargain not to even become informed of whether it should negotiate with Phelps. Thus, the no-talk provision troublingly kept a board from coming to an

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96 See Phelps Dodge, 1999 WL 1054255, at *1 (“Under our law, a board of directors must be informed of all material information reasonably available.”).
97 See id. (“The defendants properly argue that Cyprus Amax and Asarco are under no duty to negotiate, under the teachings of Time Warner and other cases in the Delaware Court of Chancery and Supreme Court. And in a transaction not involving a change of control or sale of the company, that is undoubtedly the case.”).
98 See id. (“Nevertheless, even the decision not to negotiate, in my opinion, must be an informed one. A target can refuse to negotiate under Time Warner, but it should be informed when making such refusal.”).
99 See id. at *2 (“[A]s this is the legal equivalent of willful blindness, a blindness that may constitute a breach of a board’s duty of care . . . .”).
100 Id.
101 See id. (“Now, here, despite the presence of publicly exchanged information, the no-talk provision has apparently prevented either Cyprus or Asarco from engaging in nonpublic dialogue with Phelps.”).
102 See id. at *1-2 (drawing a comparison between the board in Paramount Commc’ns, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1990), and the defendants before explaining that the defendants’ no-talk provision “apparently prevented either . . . from engaging in nonpublic dialogue with Phelps”).
informed judgment about even considering third party negotiations— a probable duty of care violation for failure “to be informed of all material information reasonably available.”

3. **Recent Concerns**

As already indicated, several recent proclamations from the judges on the Delaware Court of Chancery have described concerns with the use of “don’t ask, don’t waive” (“DADW”) provisions. These proclamations come from five different shareholder litigation cases at the chancery court.

First, in the settlement hearing for *In re RehabCare Group, Inc. Shareholders Litigation*, Vice Chancellor Laster questioned the ability for DADW provisions to withstand judicial scrutiny. The Vice Chancellor articulated doubts that DADW provisions would ever withstand litigation post-*In re The Topps Co. Shareholders Litigation* because, in his opinion, using the provisions simply looks bad. Vice Chancellor Laster queried the overall benefit of DADW provisions with losing bidders able to argue *In re Topps* applies or, alternatively, able to make a competing offer through a possible back channel.

Second, Vice Chancellor Parsons expressed his views about DADW provisions on behalf of the chancery court for *In re Celera Corp. Shareholder Litigation* from early 2012. In the case, the Celera Corp. forced a number of potential bidders into confidentiality agreements that

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103 See id. ("No-talk provisions, thus, in my view, 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. ...")

104 See supra notes 8-10 and accompanying text.


106 See *In re RehabCare*, supra note 105, at 46 (“I do think it is weird that people persist in the ‘agree not to ask’ in the standstill.”).

107 926 A.2d 58 (Del. Ch. 2007).

108 See *In re RehabCare*, supra note 105, at 46 (expanding on his criticism about the “agree not to ask” in the subject standstill by asking “[w]hen is that ever going to hold up if it’s actually litigated, particularly after *Topps*”).

109 Id. at 46.

included a DADW provision. Ultimately, Celera narrowed its sights on a deal with Quest Diagnostics, Inc. and the parties began crafting a merger agreement. Already subject to the DADW provision, Quest successfully persuaded Celera to include several deal protection devices in the merger agreement, including a “no solicitation provision.” The combination of the DADW provision and the no solicitation provision proved problematic, however, in the eyes of the court. The court determined the combination suggested an informational vacuum existed that increased the risk Celera’s board lacked the information needed to make an enlightened evaluation of the merger it was contemplating. The vice chancellor believed the combination operated like “a measure of willful blindness” that could constitute a breach of the Celera board’s fiduciary duties. Significantly, though, Vice Chancellor Parson’s opinion also made it clear that he did not find DADW provisions, specifically the “don’t waive” half, as generally unenforceable.

Third, Vice Chancellor Laster had another opportunity to evaluate a DADW provision in an oral argument and court ruling for In re Complete Genomics Shareholder Litigation from November 2012. Vice Chancellor Laster responded to arguments with a ruling to enjoin

111 See In re Celera Corp. S’holder Litig., Civil Action No. 6304-VCP, 2012 WL 1020471, at *3 (Del. Ch. Mar. 23, 2012), aff’d in part, rev’d in part, 59 A.3d 418 (Del. 2012) (“All five of these companies entered into confidentiality agreements with the Company that, among other things, expressly prohibited them from making offers for Celera shares without an express invitation from the [Celera] Board. Moreover, the confidentiality agreements contained a broadly worded provision preventing the signing parties from asking the Board to waive this restriction (the ‘Don’t-Ask-Don’t-Waive Standstills’.”).
112 See In re Celera, 2012 WL 1020471, at *5 (“On March 17, 2011, the Board concluded that accepting Quest’s offer of $8 per share was fair and in the best interests of the Company and its shareholders. . . . Accordingly, the Board executed the definitive transaction agreements . . . .”).
113 See id. at *3, *6 (providing that Quest was one of five companies that entered into confidentiality agreements with Celera and that the agreement between the two bound Celera “to terminate any existing discussions with, and not to solicit competing offers from, potential bidders other than Quest . . . .”).
114 See id. at *21.
115 See id.
116 See id. at *22 (“To be clear, I do not find, either in the circumstances of this case or generally, that provisions expressly barring a restricted party from seeking a waiver of a standstill necessarily are unenforceable. Such a ruling should be made, if ever, only on the merits of an appropriately developed record, especially because these provisions may be relatively common.”).
Complete Genomics from enforcing the DADW provision.\textsuperscript{118} Compared to his general statement in the settlement hearing for \textit{In re RehabCare}, Vice Chancellor Laster specifically analogized a DADW provision to a “bidder-specific no-talk clause.”\textsuperscript{119} Relying on \textit{Phelps Dodge Corp. v. Cyprus Amax Minerals Co.},\textsuperscript{120} Vice Chancellor Laster concluded DADW provisions are problematic for a target corporation’s board and impermissible to use because they interfere with that board’s merger recommendation evaluation.\textsuperscript{121} The vice chancellor determined the DADW provision at-hand impermissibly limited the Complete Genomics board from fulfilling its ongoing statutory and fiduciary duties to: (1) review competing offers, (2) disclose information material to the potential merger, and (3) provide a meaningful recommendation about the potential merger to shareholders.\textsuperscript{122}

Interestingly, this injunction only came after Vice Chancellor Laster misunderstood the DADW provision between Complete Genomics and a “Party J.”\textsuperscript{123} Previously, the vice chancellor believed the provision only prohibited public requests for a waiver, while still permitting Party J to approach Complete Genomics with a waiver request in private.\textsuperscript{124} However, Complete Genomics submitted a letter explaining the standstill did bind Party J from privately seeking a waiver, as well.\textsuperscript{125} Thus, it appears Vice Chancellor Laster was of the

\begin{itemize}
\item \textsuperscript{118} \textit{See In re Complete Genomics, supra} note 117, at 11, 13 (“The Court: . . . I’m going to give you my ruling now. . . . I am consequently enjoining Genomics pending trial from enforcing the standstill agreement with Party J.”).
\item \textsuperscript{119} \textit{Compare In re RehabCare, supra} note 105, at 46 (“I do think it is weird that people persist in the ‘agree not to ask’ in the standstill. . . . It doesn’t give you any ultimate benefit . . . .”), \textit{with In re Complete Genomics, supra} note 117, at 14 (“In my view, a Don’t Ask, Don’t Waive Standstill resembles a bidder-specific no-talk clause.”).
\item \textsuperscript{120} Nos. CIV. A. 17398, CIV. A. 17383, CIV. A. 17427, 1999 WL 1054255 (Del. Ch. Sept. 27, 1999).
\item \textsuperscript{121} \textit{In re Complete Genomics, supra} note 117, at 17-18.
\item \textsuperscript{122} \textit{Id.} at 18.
\item \textsuperscript{123} \textit{See id.} at 13 (“Because I misapprehended that fact, it is appropriate to reconsider this one aspect of my ruling under Rule 59.”).
\item \textsuperscript{124} \textit{See id.} at 11-12 (“I understood that each standstill agreement prevented the counterparty from publicly requesting or proposing that the company or any of its representatives amend, waive, or consider amending or waiving any of its terms, but did not prevent the counter party from making a non-public request.”).
\item \textsuperscript{125} \textit{See id.} at 12 (“After the denial of the motion, the defendants submitted a letter advising that the standstill agreement . . . does contain a Don’t Ask, Don’t Waive provision.”).
\end{itemize}
opinion that a distinction exists between DADWs that only prevent public requests for a waiver and DADWs that prevent all requests, both public and private.\textsuperscript{126}

Fourth, during \textit{In re Ancestry.com Shareholder Litigation},\textsuperscript{127} Chancellor Strine commented about his view of DADW validity.\textsuperscript{128} After a brief explanation of the scope of his ruling, Chancellor Strine explained that he knew of nothing statutory or otherwise that made DADW provisions per se invalid.\textsuperscript{129} The Chancellor cautioned boards of directors that they must use DADWs “consistently with their fiduciary duties” and the “equitable overlay of the law.”\textsuperscript{130} He acknowledged DADW provisions may hold value-maximizing effects due to their power as a gavel for a well-motivated seller—that “there is really an end to the auction for those who participate.”\textsuperscript{131} However, Chancellor Strine went on to identify three reasons the DADW provision then-at-issue had been used improperly. First, it appeared the Ancestry.com board had not been informed of the potency of the DADW clause.\textsuperscript{132} Second, the bidder, Permira, did not demand nor receive an assignment of the benefit from Ancestry.com locking other bidders into DADW standstills.\textsuperscript{133} And, third, Ancestry.com’s board refused to waive the DADWs before litigation commenced to verify whether the other bidders subjected to DADW provisions could make superior proposals.\textsuperscript{134} Consequently, the chancellor determined these actions

\begin{itemize}
  \item \textsuperscript{126} Compare id. at 11 (explaining his denial of the injunction on enforcing the standstill resulted from the party having an opportunity to make a private request for waiver), \textit{with id.} at 12-13 (“After the denial of the motion, the defendants submitted a letter advising that the standstill agreement . . . in fact does contain a Don’t Ask, Don’t Waive provision. . . . I am consequently enjoining Genomics pending trial from enforcing the standstill agreement with Party J.”).
  \item \textsuperscript{128} See Walsh et al., supra note 1.
  \item \textsuperscript{129} See \textit{In re Ancestry.com}, supra note 127, at 19-21.
  \item \textsuperscript{130} See \textit{id.} at 22.
  \item \textsuperscript{131} \textit{Id.} at 23.
  \item \textsuperscript{132} \textit{See id.} at 24.
  \item \textsuperscript{133} \textit{See id.} at 25 (“And when Permira was signed up, Permira did not demand an assignment of it”).
  \item \textsuperscript{134} \textit{See id.} (“And the board and its advisors did not waive it in order to facilitate those bidders which had signed up the standstills being able to make a superior proposal.”).
\end{itemize}
probabilistically violated the duty of care, so he enjoined the shareholder vote until the Ancestry.com board made additional shareholder disclosures.\(^{135}\)

Finally, Vice Chancellor Glasscock stepped into the fray through *Koehler v. NetSpend Holdings Inc.*\(^ {136}\) with a full memorandum opinion. In *Koehler*, the vice chancellor ultimately denied the plaintiff-shareholder’s motion for a preliminary injunction.\(^ {137}\) However, he criticized the board of NetSpend Holdings Inc. for failing to design a sales process that would produce the best price for its shareholders, including “agreement to deal-protection devices . . . most significantly, a don’t-ask-don’t-waive provision.”\(^ {138}\)

The underlying factual details to NetSpend’s potential sale are extensive.\(^ {139}\) As the NetSpend board considered strategic alternatives for maximizing the company’s share price, two of NetSpend’s largest shareholders revealed an interest in disposing of their stake in the company.\(^ {140}\) One such shareholder, JLL Partners Inc., owned thirty-one percent of the NetSpend shares and filled two seats on the NetSpend board with JLL’s managing directors.\(^ {141}\) NetSpend’s board wanted to guard against a depression of its share price from a sale of JLL’s twenty million shares on the open market.\(^ {142}\) Thus, the board authorized fellow director and NetSpend’s CEO, Daniel R. Henry, to deliver financial projections on NetSpend to two private equity firms interested in JLL’s stake; the authorization came, however, with the express instruction that

\(^{135}\) See id. (“I think what’s more important is that I’m not prepared to allow this to go to a vote without stockholders being told about that.”).


\(^{138}\) *Koehler*, 2013 WL 2181518, at *1.

\(^{139}\) For sake of brevity, the facts outlined in this Article are limited to those most specifically related with DADW provisions.

\(^{140}\) *Koehler*, 2013 WL 2181518, at *3.

\(^{141}\) See id. at *1, 3 (describing the makeup of the NetSpend board and detailing JLL’s ownership interest in Netspend). JLL Partner’s interest in NetSpend derived from its being the management company of JLL Partners Fund IV, L.P. and JLL Partners Fund V, L.P. *Id.* at *1.

\(^{142}\) *Id.* at *3.
NetSpend was not yet for sale. To implement this express instruction, the two private equity firms executed confidentiality agreements that included standstills with DADW clauses.

Simultaneously, NetSpend started to explore a sale of the company to Total Systems Services, Inc. (“TSYS”) that was ultimately designed as a reverse triangular merger. NetSpend and TSYS marched toward exclusive negotiations, in part, after only one of the private equity firms looking at JLL’s stake offered $12.00 per share and TSYS delivered an indication of interest for 100% of NetSpend for $14.50 per share. JLL learned of the already higher valued indication of TSYS and retracted its interest in selling to either private equity firm, so NetSpend terminated discussions with both firms. Subsequently, NetSpend and TSYS executed a merger agreement that specifically prevented NetSpend from waiving any standstill agreement NetSpend had entered, except with TSYS’s consent; this included the standstills with the DADWs for the two private equity firms. Additionally, the merger agreement did not include a “go-shop” provision for NetSpend’s benefit, even after NetSpend pushed for its inclusion, because TSYS was unwilling to enter the agreement with such a provision as part of the deal.

143 Id.
144 See id. (explaining how NetSpend’s independent directors convened with representatives from private equity firms the court identified as “Private Equity Firm A” and “Private Equity Firm B”).
145 See id. at *1, 4, 9 (identifying Total Systems Services, Inc. along with its wholly-owned subsidiary that was created for the acquisition of NetSpend and providing terms of the merger agreement that developed between Total Systems, its subsidiary, and NetSpend).
146 See id. at *4 (detailing events in mid-November 2012). It is noteworthy that NetSpend was weary to engage in a sales process that gave no assurances of success because it had already experienced three prior failed attempts to sell itself and each attempt disrupted the company’s everyday operations. See id. (explaining how the NetSpend CEO had been tasked with facilitating the potential JLL share sale while the rest of the board would investigate further into the opportunity with TSYS).
147 Id.
148 Id. at *9.
149 See id. at *6-7 (describing the push-and-pull for including a “go-shop” provision that would have enabled NetSpend to solicit offers following execution of the merger agreement between NetSpend and TSYS). While it refused to allow a go-shop provision to be in the merger agreement, TSYS did suggest NetSpend seek out other potential bidders during the time it took NetSpend to complete its due diligence; the NetSpend board decided against that suggestion because it doubted “any serious bona fide bidders” would arise. Id. at *7.
Despite finding the balance of harms weighed against an injunction, Vice Chancellor Glasscock levied several critiques on the use and effects of the DADW provisions involved in the NetSpend sale process. Most generally, he called the incorporation of the DADW provisions “thoughtless.”

The vice chancellor reiterated the standstills between NetSpend and the two private equity firms prevented those firms from asking for a waiver even after the NetSpend board later decided to sell the company. Vice Chancellor Glasscock implied the merger agreement with TSYS exacerbated the potency of the DADWs because NetSpend could no longer waive the standstills on its own. Furthermore, the vice chancellor was concerned by NetSpend’s unsuccessful push for a go-shop provision, instead being subject to a no-shop provision. Finally, the vice chancellor opined that the NetSpend board’s most problematic DADW error was its failure to consider or even understand the clauses’ import, especially when incorporated into the merger agreement with TSYS. As a result, Vice Chancellor Glasscock found the sale process steered by the NetSpend board was unreasonable when reviewed as a whole, but denied issuance of the preliminary injunction for lack of risk of irreparable harm.

These five chancery cases have caused a stir for Delaware dealmakers. Commentators thus far have only cautioned parties to act with care if they choose to employ DADW provisions before more of the dust settles. The next part of this Article intends to provide greater assurances of DADW provisions’ value, validity, and use.

150 Id. at *23.
151 Id.
152 See id. at *18.
153 See id. (discussing how the standstill agreements NetSpend had previously entered with the two private equity firms were expressly incorporated into the merger agreement with TSYS).
154 See id. (“Meanwhile, NetSpend contracted away its opportunity to solicit offers via the no-shop.”).
155 Id. at *19.
156 Id. at *20.
157 See Walsh et al., supra note 1 (“Due to arguably conflicting rulings in the Delaware Court of Chancery, the validity of ‘Don’t Ask, Don’t Waive’ standstill provisions currently is unclear under Delaware law.”).
158 E.g., SULLIVAN & CROMWELL LLP, supra note 6.
III. SELLING AT AUCTION WITH A DON’T ASK, DON’T WAIVE GAVEL

“Don’t ask, don’t waive” (“DADW”) standstill agreements remain a legally valid and powerful tool for dealmakers to aid target companies in corporate auctions. These assertions have been consistently recognized by Delaware corporate jurisprudence. The Delaware courts typically recognize the value of DADW provisions by reciting that they help establish an orderly auction and act as a value maximizing device. Despite this consistency, however, the courts have yet to acknowledge why DADW provisions are value maximizing and have not accurately framed how DADW provisions affect the corporate auction.

Section A of this analysis explores the value maximizing nature of DADW provisions. Section A also describes how a target corporation’s board of directors should be scrutinized for using them. Then, Section B of this analysis organizes and addresses the concerns recently expressed by the Delaware Court of Chancery with respect to DADWs. Section C of this analysis aggregates and summarizes guidance for best utilizing DADWs.

A. AUCTION THEORY AND DELAWARE CORPORATE JURISPRUDENCE MAINTAIN DON’T ASK, DON’T WAIVE VIABILITY

1. “Going Once . . . Going Twice . . . ”: Proof of Value Maximization

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159 See, e.g., In re Ancestry.com, supra note 127, at 19-21 (providing that nothing statutory or otherwise made DADW provisions per se invalid).
160 Compare The Upper Deck Co. & Northwood Investors, LLC v. The Topps Co., Inc. (In re The Topps Co. S’holders Litig.), 926 A.2d 58, 91 (Del. Ch. 2007) (explaining how standstills serve legitimate objectives), and supra notes 97-98 and accompanying text (showing how the standstill in In re Topps effectively mirrored a DADW provision), with In re Ancestry.com, supra note 127, at 23 (providing the chancery court’s acknowledgement that DADW provisions have a value-maximizing effect).
161 See infra Part III.A.1.
162 See infra Part III.A.2-3.
163 See infra Part III.B.
164 See infra Part III.C.
Proponents of DADW provisions tout the provisions as value maximizing. A target corporation’s board must take value maximizing steps when it decides to put the target up for sale.\textsuperscript{165} The board takes steps it believes are value maximizing in order to fulfill fiduciary duties to the corporation and the shareholders.\textsuperscript{166} Thus, if DADW provisions are value maximizing, then the target board has taken steps toward fulfilling its \textit{Revlon} duties.\textsuperscript{167}

The phrase “value maximization” sounds simple enough, but it needs further framing. Value maximization does not put an onus on the target board to extract the absolute highest price possible. Instead, the target board will be scrutinized based on its commitment to maximization.\textsuperscript{168} That is, the target board meets its value maximizing burden by demonstrating it acted in good faith \textit{toward} extracting the best \textit{available} price and that the board’s good faith efforts were objectively reasonable.\textsuperscript{169}

A target board’s decision to enforce a DADW provision is best made after the board has allowed more than one round of bidding. First, this enables the target board to show it acted in good faith \textit{toward} value maximization. Second, the target board can demonstrate it made a good faith determination that it extracted the best \textit{available} price for value maximization.

Enforcing a DADW provision can show good faith movement \textit{toward} value maximization because the provision causes bids to increase in value faster than if a bidder is not

\textsuperscript{166} See Revlon, 506 A.2d at 182 (emphasis added) (“The duty of the board had thus changed . . . .”).
\textsuperscript{167} Compare Revlon, 506 A.2d at 182-83 (“[W]hen an auction among active bidders is in progress . . . the object . . . [is to] sell [the corporate enterprise] to the highest bidder. . . . [Deal provisions] can entice other bidders to enter a contest for control of the corporation, creating an auction for the company and maximizing shareholder profit.”), with id. at 185 (“[W]e must conclude that under all the circumstances the directors allowed considerations other than the maximization of shareholder profit to affect their judgment, and followed a course that ended the auction . . . to the ultimate detriment of its shareholders . . . [which] represents a breach of the directors’ fundamental duty of care.”).
\textsuperscript{168} In re Celera Corp. S’holder Litig., Civil Action No. 6304-VCP, 2012 WL 1020471, at *23 (Del. Ch. Mar. 23, 2012), aff’d in part, rev’d in part, 59 A.3d 418 (Del. 2012) (footnote omitted) (internal quotation marks omitted) (“When directors have commenced a transaction process that will result in a change of control, a reviewing court will examine whether the board has reasonably performed its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise.”).
\textsuperscript{169} In re Celera, 2012 WL 1020471, at *23.
bound by the provision. Generally, a bidder for a publicly-held Delaware corporation will value the target through a mix of common valuation and private valuation. The bidder’s mixed valuation represents the highest it is willing to pay, or capable of paying, in order to buy the target. The target auctions itself using an ascending price mechanism, so an individual bidder’s strategy will be to actively bid in the auction until the price exceeds that bidder’s mixed valuation for the target. The bidder will begin the ascending auction by shading its bid lower than its full mixed valuation. However, the “don’t ask” half of the DADW limits a bidder to actively bidding only after receiving a submission request from the target. Furthermore, the “don’t waive” half of the DADW prevents the bidder from asking the target to waive the bidder’s obligation not to submit an offer without permission. Thus, a bidder subject to a DADW provision feels greater pressure to bid its full mixed valuation for the target earlier in time than if

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170 Compare Brian J.M. Quinn, Re-Evaluating the Emerging Standard of Review for Matching Rights in Control Transactions, 36 DEL. J. CORP. L. 1011, 1024 (2011) (explaining how strategic bidders do not have the same objective value for the target because the expected value from purchasing the target depends on synergies with the buyer’s existing business and assets), and Quinn, supra, at 1027 (describing how common value bidders share the same (or very similar) “single objective value” for a target, but that pure common value auctions are rare), with Paul Povel & Rajdeep Singh, Takeover Contests with Asymmetric Bidders, 19 REV. FIN. STUD. 1399, 1404 (2006), available at http://www.tc.umn.edu/~rajsingh/povel_singh_rfs_2006.pdf (“We assume that . . . if α ∈ (1/2, 1), both private and common value components are present.”).

171 See Povel & Singh, supra note 170, at 1406 (“In the case of a bidder with an unknown willingness to pay, the seller [may know], for a given price, the probability with which the bidder’s willingness to pay is higher than that price . . . .”).

172 Compare Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1272-73 (revealing how the Mills Acquisition Co. controlling shareholder, Robert Maxwell, presented a first bid on July 20, 1988 and a later, higher bid on September 9, 1988), and FUJISHIMA ET AL., supra note 33, at 2 (“In the English auction, participants make successively higher bids.”), with Paul R. Milgrom & Rober J. Weber, 50 ECONOMETRICA 1089, 1091 (1982) (“[I]n an English auction . . . if a bidder knows the value of the object to himself, he has a straightforward dominant strategy, which is to bid actively until the price reaches the value of the object to him.”).

173 See Milgrom, supra note 19, at 9 (describing bidder shading in first-price auctions in order to seek a profit margin).

174 See supra note 3 and accompanying text.

175 See supra note 4 and accompanying text.
the bidder could, *sua sponte*, submit bids of ascending value.\(^{176}\) This satisfies the target’s responsibility to make a good faith effort *toward* value maximization.

Enforcing a DADW provision can show the target made a good faith determination that has extracted the best *available* price because applying the provision to multiple bidders has a cumulative effect on expected bid values. A *Revlon* corporate auction involves more than one potential bidder.\(^{177}\) Each individual bidder will have (or develop) its own valuation for what the target is worth.\(^{178}\) The target’s board decision to negotiate for and impose a DADW provision on one bidder often means the board will do the same with other bidders.\(^{179}\) This means each bidder is under the same pressure to make a serious first round bid and to quickly approach its full valuation in a subsequent but unguaranteed round of bidding. Additionally, DADWs attract bidders to the auction because their enforcement acts as a deal protection device for a winning bidder.\(^{180}\) Thus, the target board’s use of a DADW provision with multiple bidders means a higher likelihood the board will evaluate the best *available* bids.\(^{181}\)

2. *Bringing Down the Gavel: An Informed Decision by the Target Board*

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\(^{176}\) *Compare* Walsh et al., *supra* note 1 (explaining how DADW provisions may only give a bidder a single opportunity to bid), *with* FUJISHIMA ET AL., *supra* note 33, at 1 (explaining how ascending, English auctions “can take a long and unpredictable amount of time to terminate”).

\(^{177}\) *See* City Capital Assocs. Ltd. P’ship v. Interco Inc., 551 A.2d 787, 803 (Del. Ch. 1988), *rejected on other grounds*, 571 A.2d 1140 (Del. 1989) (explaining that *Revlon* duties attach when a target corporation entertains competing bids from two or more potential acquirers, but if such a contest has not formed, then no auction is necessary).

\(^{178}\) *See supra* note 170 and accompanying text.

\(^{179}\) *See, e.g.*, Plaintiffs’ Opening Brief in Support of Motion for Injunctive Relief at 8, In re Ancestry.com S’holder Litig., C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012), 2012 WL 6971058 (explaining that each potential bidder had to enter a non-disclosure agreement with a DADW provision).

\(^{180}\) *See* Walsh et al., *supra* note 1 (“By creating a contractual definitive end to the auction . . . [bidders] are less concerned that the winning party in the auction will be used as a stalking horse for other bidders.”).

\(^{181}\) *Compare supra* notes 170-76 and accompanying text (explaining how DADW provisions create upward pressure on bid prices), *with* Revlon, 506 A.2d at 183 (explaining that deal-making options such as lock-ups can entice bidders to enter an auction for a corporation that maximizes shareholder profit), and Walsh et al., *supra* note 1 (explaining how DADWs provide bidders assurance that they will not be a stalking horse after winning the auction).
After a target board uses a DADW provision to move toward the best available price, the target board will ultimately bring down the gavel to end the auction. Deciding to end the auction is, perhaps, the most difficult part of an auction for a public corporation. The target board has a duty to make an informed decision when declaring an auction winner and this raises the next set of fiduciary duty questions. The previous section identified how a DADW provision is value maximizing, which is a prospective question of DADW viability.\(^\text{182}\) This section explains the scrutiny target boards must navigate after ending an auction, which is a retrospective question of DADW viability.

In *Revlon*, the Delaware Supreme Court pronounced that target boards may not employ deal-making and deal-protecting devices to end an active auction, thereby foreclosing further bids and harming shareholders.\(^\text{183}\) Quite clearly, the court defines an active auction as one where the bidders continue to indicate they will go higher in a subsequent round of bidding. In normal ascending auctions, the auctioneer bears the burden of receiving the different bids and, in some scenarios, will also announce the current bid price.\(^\text{184}\) The bidders in that auction bear the burden of providing their bids across each announced bid price.\(^\text{185}\) Thus, the bidders are in complete control of their most direct indication that they are willing and able to go higher.\(^\text{186}\)

In contrast to typical English auctions, there is a shift of burdens to the target-auctioneer with respect to controlling and assessing auction activity when the target uses DADW provisions

\(^{182}\) See supra Part III.A.1.
\(^{184}\) See Milgrom & Weber, supra note 172, at 1103-04 (emphasis added) (“There are many variants of the English auction. In some, the bids are called by the bidders themselves, and the auction ends when no one is *willing* to raise the bid. In others, the auctioneer calls the bids, and a *willing* bidder indicates his assent by some slight gesture . . .”).
\(^{185}\) See Vickrey, supra note 28, at 14 (emphasis added) (identifying how in “the ordinary or progressive auction . . . bids are freely made and announced until no purchaser *wishes* to make any further higher bid”).
\(^{186}\) Compare Milgrom & Weber, supra note 172, at 1103-04 (explaining that bidders make bids when they are *willing* to go higher across the different variations of English auctions), with Vickrey, supra note 28, at 14 (identifying how bidders indicate they do not want to go higher—they refuse to submit a bid at the next announced price).
in a corporate auction. Regardless of whether a DADW is in place, the target must compare submitted bids to determine which bid or bids are better.\textsuperscript{187} However, whether a DADW is in place does affect the target board’s burden to evaluate each bidder’s willingness and capability to bid more. \textit{Without} a DADW, a bidder can determine it is willing and capable of bidding more, and it can act independently to deliver such a bid.\textsuperscript{188} \textit{With} a DADW, a bidder’s determination about its willingness and capability to bid more becomes less powerful because that bidder loses its independence to act.\textsuperscript{189} This loss did not disappear, however. Instead, the bidder’s loss is the target’s gain: the target board bears a higher share of the responsibility in honestly evaluating a bidder’s willingness and capability to submit a larger bid.\textsuperscript{190}

The higher share of responsibility borne by the target board using DADW provisions is consistent with \textit{Unocal Corp. v. Mesa Petroleum Co.}\textsuperscript{191} enhanced duties that kick in when corporate control is at stake.\textsuperscript{192} Similar to the “omnipresent specter” of board self-dealing, a board’s decision to enforce a DADW raises a specter of an auction ending too soon, thereby forcing courts to apply exacting scrutiny for substantial benefits conferred to the target’s

\textsuperscript{187} See \textit{Revlon}, 506 A.2d at 182 (“The directors’ role changed . . . auctioneers charged with getting the best price for the stockholders at a sale of the company.”).
\textsuperscript{188} See, e.g., In re RJR Nabisco, Inc. S’holders Litig., Civ. A. No. 10389, 1989 WL 7036, 14 Del. J. Corp. L. 1132, 1145 (Del. Ch. Jan. 31, 1989) (emphasis added) (“The Committee agreed to waive the terms of the rules and procedures and consider new bids from both parties \textit{should such bids be forthcoming}. It did not, however, invite or encourage further bidding. \textit{Further bidding did, however, eventuate . . . .}”).
\textsuperscript{189} See Walsh et al., supra note 1 (explaining the “don’t ask” half of the DADW, which prohibits a bidder from submitting an offer unless expressly invited by the target board).
\textsuperscript{190} Compare In re Celera Corp. S’holder Litig., Civil Action No. 6304-VCP, 2012 WL 1020471, at *20 (Del. Ch. Mar. 23, 2012), \textit{aff’d in part, rev’d in part}, 59 A.3d 418 (Del. 2012) (“In waiving the Don’t-Ask-Don’t-Waive Standstills . . . . Defendants invited back to the bargaining table the four bidders arguably most likely to make a superior offer . . . .”), and In re Ancestry.com, supra note 127, at 23 (acknowledging that sellers can use DADW provisions as a gavel so that “there really is an end to the auction for those who participate”), \textit{with Revlon}, 506 A.2d at 183, 184 (“\textit{[M]easures which end an active auction and foreclose further bidding operate to the shareholders’ detriment . . . . W}hen a board ends an intense bidding contest on an insubstantial basis . . . . the action cannot withstand the enhanced scrutiny which \textit{Unocal} requires of director conduct.”).
\textsuperscript{191} 493 A.2d 946 (Del. 1985).
\textsuperscript{192} See Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1287 (Del. 1989) (“\textit{A}ls we recognized in \textit{Unocal}, where issues of corporate control are at stake, there exists the ‘omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders.’”).
shareholders. 193 The exacting scrutiny applied by courts is slightly different in the *Revlon* context, though. 194 The initial burden on a plaintiff, such as a target-shareholder or a losing bidder, is to demonstrate the target board treated one or more losing bidders on unfair terms. 195 Then, the burden is on the board to meet *Revlon* duties in light of *Unocal*. Those duties are the board: (1) “properly perceived that shareholder interests were enhanced”; and (2) reasonably acted to extract “the advantage sought to be achieved, or conversely, [guard against] the threat which a particular bid allegedly pose[d] to stockholder interests.” 196 It is the duty to properly perceive enhanced shareholder interests that encompasses the shifted burdens weighing on a target corporation’s board as a result of its implementation of a DADW provision. 197

So, a target board cannot immediately avail itself of business judgment protections for its decision to enforce a DADW. 198 Instead, the board must first show it reasonably acted to extract and properly perceived the submitted bids were close or equal to the best available price for the

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193 Compare Macmillan, 559 A.2d at 1287 (“[A]s we recognized in *Unocal*, where issues of corporate control are at stake, there exists the ‘omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders.’”), and Revlon, 506 A.2d at 184 (“[W]hen a board ends an intense bidding contest on an insubstantial basis . . . the action cannot withstand the enhanced scrutiny which *Unocal* requires of director conduct.”), and In re Ancestry.com, supra note 127, at 23 (acknowledging that sellers can use DADW provisions as a gavel so that “there really is an end to the auction for those who participate”), with Macmillan, 559 A.2d at 1287 (“For that reason, an ‘enhanced duty’ must be met at the threshold before the board receives the normal protections of the business judgment rule . . . . When *Revlon* duties devolve upon directors, this Court will continue to exact an enhanced judicial scrutiny at the threshold, as in *Unocal*, before the normal presumptions of the business judgment rule will apply.”).

194 *Macmillan*, 559 A.2d at 1288 (“When *Revlon* duties devolve upon directors . . . the two part threshold test, of necessity, is slightly different.”).

195 Id.

196 Id. (emphasis added) (citing *Unocal*, 493 A.2d at 955).

197 Compare Revlon, 506 A.2d at 182 (“The duty of the board had thus changed . . . . to maximization of the company’s value at a sale for the stockholders’ benefit.”), and Macmillan, 559 A.2d at 1288 (“When *Revlon* duties devolve upon directors, this Court will continue to exact an enhanced judicial scrutiny at the threshold . . . .”), with *In re Celera*, 2012 WL 1020471, at *21 (“Here, the [DADW] Standstills block at least a handful of once-interested parties from informing the Board of their willingness to bid . . . .”), and *In re Complete Genomics*, supra note 117, at 18 (“By agreeing to this [DADW] provision, the Genomics board impermissibly limited its ongoing statutory and fiduciary obligations to properly evaluate a competing offer . . . .”).

198 See *Macmillan*, 559 A.2d at 1287 (“For that reason, an ‘enhanced duty’ must be met at the threshold before the board receives the normal protections of the business judgment rule.”).
Demonstrating the board reasonably acted to extract the best available price involves the board explaining its negotiating tactics meant to confer substantial benefits to target shareholders. A substantial benefit conferred on shareholders specific to DADWs is their recognized ability to end a sale process, which is important when considering the disruption the sale process can wreak on a target corporation’s continued business operations. The longer the sale process, the greater the disruption befalling business operations and the greater the effect on the business’s purchase price. Demonstrating the board properly perceived the submitted bids were close or equal to the best available price involves identification of auction behaviors and recognition of bidder strain to submit any higher offer, such as threats to remove a bid.

Once the target board successfully passes enhanced scrutiny, there should be no further judicial scrutiny of the board’s business judgment to employ and enforce a DADW provision.

The business judgment rule should protect the board’s recommendations when enforcing a

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199 Compare Macmillan, 559 A.2d at 1288 (“In the face of disparate treatment, the trial court must first examine whether the directors properly perceived that shareholder interests were enhanced. In any event the board’s action must be reasonable in relation to the advantage sought to be achieved, or conversely, to the threat which a particular bidder allegedly poses to stockholder interests.”), with In re Celera, 2012 WL 1020471, at *23 (“When directors have commenced a transaction process that will result in a change of control, a reviewing court will examine whether the board has reasonably performed its fiduciary duties . . . [to] maximize[e] the sale price of the enterprise.”” . . . [T]he directors must have tried in good faith to get the best available price, and those good faith efforts must have been objectively reasonable.”).

200 See, e.g., The Upper Deck Company and Northwood Investors LLC v. The Topps Company, Inc. (In re The Topps Co. S’holders Litig.), 926 A.2d 58, 61-63 (Del. Ch. 2007) (revealing how Topps Co. entered into the Eisner agreement and then required Upper Deck Co. to execute a standstill agreement before Topps would entertain an Upper Deck Co. offer, which ultimately resulted in Upper Deck’s standstill-burdened bid totaling $10.75 per share out of the gate while Eisner’s prior in-time final bid of $9.75 per share had only increased $0.51 per share from an initial bid).

201 Compare Koehler v. NetSpend Holding Inc., Civil Action No. 8373-VCG, 2013 WL 2181518, at *4 (Del. Ch. May 21, 2013) (“Because NetSpend had gone through three advanced failed attempts to sell itself before . . . each of which disrupted the everyday operations of the Company, the NetSpend directors were hesitant to engage in a sale process that they had no assurance would pan out.”), with In re Ancestry.com, supra note 127, at 23 (explaining that, with DADW provisions, “there is really an end to the auction for those who participate”).

202 See, e.g., In re RJR, 14 DEL. J. CORP. L. at 1145 (“In light of its fears, KKR had requested, first informally and then by letter, that its bid be acted upon that day. The letter required action on the bid by 1:00 p.m. November 30. This assertedly created concern in the minds of some of the directors that the KKR bid might be withdrawn if not acted upon in a timely manner.”).

203 See Macmillan, 559 A.2d at 1288 (“If on the basis of this enhanced Unocal scrutiny the trial court is satisfied that the test has been met, then the directors’ actions necessarily are entitled to the protections of the business judgment rule . . . . Once a finding has been made by a court that the directors have fulfilled their fundamental duties of care and loyalty under the foregoing standards, there is no further judicial inquiry into the matter.”).
DADW once the board passed enhanced scrutiny based on facts the board possessed at the time the board brought down its gavel and declared a winner.\textsuperscript{204} This means the prospect of post-declaration topping from already participating bidders should be judged based on bidder indications before a bidding deadline, not after.\textsuperscript{205} Applying this time standard settles the dispute whether the target corporation must remain apprised of losing bidders that might otherwise make a topping bid post-auction conclusion before the closing.\textsuperscript{206} These conclusions are sensible because of the limitations of enhanced judicial scrutiny. Enhanced scrutiny of a target board should review the board’s conduct for good faith assessments of particular bidders and available

\textsuperscript{204} Compare Macmillan, 559 A.2d at 1288 (“Once a finding has been made by a court that the directors have fulfilled their fundamental duties of care and loyalty under the foregoing standards, there is no further judicial inquiry into the matter.”), with In re Toys “R” Us S’holder Litig., 877 A.2d 975, 1016 (Del. Ch. 2005) (emphasis added) (explaining that the Delaware courts “advocate the type of close examination of the reasonableness of deal protections measures that is contemplated by the Unocal and Revlon standards . . . In that inquiry, the court must attempt, as far as possible, to view the question from the perspective of the directors themselves, taking into account the real world risks and prospects confronting them when they agreed to the deal protections . . . [W]hat matters is whether the board acted reasonably based on the circumstances then facing it”).

\textsuperscript{205} Compare Revlon, 506 A.2d at 178-79 (“Pantry Pride countered with a new proposal on October 7, raising its $53 offer to $56.25 . . . [On October 9], Pantry Pride announced that it would engage in fractional bidding and top any Forstmann offer by a slightly higher one . . . On October 12, Forstmann made a new $57.25 per share offer . . . [and] demanded immediate acceptance of its offer, or it would be withdrawn. The board unanimously approved Forstmann’s proposal . . . .”), and Revlon, 506 A.2d at 184 (“While Forstmann’s $57.25 offer was objectively higher than Pantry Pride’s $56.25 bid, the margin of superiority is less when the Forstmann price is adjusted for the time value of money. In reality, the Revlon board ended the auction in return for very little actual improvement in the final bid. The principal benefit went to the directors, who avoided personal liability to a class of creditors to whom the board owed no further duty under the circumstances.”), with In re Topps, 926 A.2d at 71 (“Upper Deck’s initial pursuit of a transaction with Topps went slowly and Upper Deck did not make a formal proposal until April 12, 2007, two days before the expiration of the Go Shop Period. Upper Deck’s proposal was a non-binding indication of interest to acquire Topps for $10.75 in cash per share.”), and In re Topps, 926 A.2d at 88 (“At the same time, Upper Deck hardly moved with the speed expected of an interested buyer that has a limited time in which to secure a deal. Rather, Upper Deck initially acted in a manner that created rational questions about its seriousness and whether it was simply looking to poke around in Topps’s files . . . Underlying Topps’s skepticism of the seriousness of Upper Deck’s proposal was perhaps the suspicion that Upper Deck was willing to pay $12 million simply to blow up Topps’s deal with Eisner.”).

This comparison shows that in Revlon, a competing bidder directly indicated it was still engaged in topping behavior while the target board was accepting bids, so the target board prematurely ended the auction; meanwhile in In re Topps, a competing bidder failed to exhibit strong topping behavior even after the bidding deadline, so the target board would have been on sounder ground to end the auction but for the competing bidder’s pre-deadline bid being $1 more than the “winning” bid. This comparison does not suggest the chancery court’s scrutiny was wrong in In re Topps. Rather, the comparison identifies a distinction between scrutinizing a target board’s perception of topping behaviors versus scrutinizing a target board’s use of a standstill to favor or disfavor a particular bidder.

\textsuperscript{206} See Walsh et al., supra note 1 (“Because the sales process continues even after the auction ‘concludes,’ challengers of [DADW] provisions contend that by prohibiting receipt and consideration of unsolicited offers from losing bidders who would otherwise make topping bids, such provisions impermissibly limit directors’ ongoing fiduciary obligations . . . .”).
However, enhanced scrutiny should not be permitted to second-guess a board’s judgment just because one or more participating bidders chose to submit less than their best offer, thereby pursuing a better profit margin over maximizing their chance of winning.  

3. “Sold!”: Informing the Target Shareholders About the Auction’s End

Possibly the clearest duty a target board has is to inform the shareholders about the auction’s end. Delaware courts have explained that a target corporation’s board of directors needs to give shareholders the whole story. More specifically, the board must disclose relevant material facts to shareholders for them to make an informed decision whether to approve a merger or the like. Specific to a DADW provision, the board should not use the standstill to keep shareholders in the dark about potentially higher valued bids. The courts impose this duty of disclosure so that shareholders are not irreparably injured by a foreclosure on their ability to ever consider an offer that potentially delivers more value.

The duty to inform the shareholders is nothing new. What is significant, though, is a target board needs to fortify their use of a DADW with its disclosures to shareholders. Before

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207 Compare In re Topps, 926 A.2d at 64 (“[W]hen directors have made the decision to sell the company, any favoritism they display toward particular bidders must be justified solely by reference to the objective of maximizing the price the stockholders receive for their shares.”), with id. at 89 (“Upper Deck’s first bid may not have been a Superior Proposal. But Topps had no reason to believe that the terms of Upper Deck’s bid were non-negotiable, and it would have been reasonable for the Topps directors to have believed that their financing and antitrust concerns were manageable ones that could and, indeed, should have been capable of reasonable resolution in subsequent negotiating rounds.”).

208 Compare Macmillan, 559 A.2d at 1288 (“If on the basis of this enhanced Unocal scrutiny the trial court is satisfied that the test has been met, then the directors’ actions necessarily are entitled to the protections of the business judgment rule. The latitude a board will have in responding to differing bids will vary according to the degree of benefit or detriment to the shareholders’ general interests that the amount or terms of the bids pose.”), with Milgrom, supra note 19, at 9 (explaining the first-price auction characteristic of “shading”).


210 In re Topps, 926 A.2d at 64.

211 See, e.g., id. at 92 (“The Topps board refused. That refusal not only keeps stockholders from having the chance to accept a potentially more attractive higher priced deal, it keeps them in the dark about Upper Deck’s version of important events . . . .”).

212 Id.
going further, it will be helpful to establish some terminology. Consistent with Part III.B.2 of this analysis, a “Submitted Bid” means a bid for the target received by the target board before an imposed deadline. Additionally, a “Potential Bid” means a bid from an already participating bidder that is potentially available and reasonably recognizable by the target board before the deadline. The qualifier “potentially available” addresses an already participating bidder possessing a topping attitude within the auction process. The qualifier “reasonably recognizable” addresses an already participating bidder either: (1) directly providing notice of its topping attitude to the target board;\(^{213}\) or (2) indirectly providing such notice in light of the board’s obligation to assess communications and/or a pre-deadline proposal from that bidder.\(^{214}\)

A Potential Bid might include a scenario where the already participating bidder quoted a per share price but did not follow up with a complete proposal at that price before the deadline.\(^{215}\)

With the terminology just defined, distinctions are possible concerning the target board’s recommendation in a shareholder proxy statement. Regardless whether Submitted Bids and Potential Bids are close in per share price, the board should disclose and describe the DADW uses in a proxy statement with their board recommendation, in addition to the share prices of Submitted Bids and Potential Bids.\(^{216}\) If Submitted Bids and Potential Bids are disparate not

\(^{213}\) See Revlon, Inc. v. MacAndrews & Forbes Holding, Inc., 506 A.2d 173, 178 (Del. 1985) (“At this meeting Pantry Pride announced that it would engage in fractional bidding and top any Forstmann offer by a slightly higher one.”).

\(^{214}\) See In re Topps, 926 A.2d at 89 (“Upper Deck’s first bid may not have been a Superior Proposal. But Topps had no reason to believe that the terms of Upper Deck’s bid were non-negotiable, and it would have been reasonable for the Topps directors to have believed that their financing and antitrust concerns were manageable ones that could and, indeed, should have been capable of reasonable resolution in subsequent negotiating rounds.”).

\(^{215}\) See In re RJR Nabisco, Inc. S’holders Litig., Civ. A. No. 10389, 1989 WL 7036, 14 DEL. J. CORP. L. 1132, 1143-44 (Del. Ch. Jan. 31, 1989) (“The First Boston approach was innovative, appealing and problematic. . . . [I]ts terms were not fully worked out . . . . In view of the fact that the First Boston Group’s proposal was at this point potentially the most attractive, and that more time was necessary to develop it further, the Committee decided to extend the bidding deadline until November 29.”)

\(^{216}\) See In re Ancestry.com, supra note 127, at 25-26 (explaining that the target board probabilistically breached its duty of care with respect to enforcing the DADW provision and that the stockholder vote should not occur when the stockholders had not been informed about the standstill and/or its effect on potentially receiving superior proposals).
only in per share price but also likely deal terms, then the board may need to take a different path. In the instance where the target recommends a Submitted Bid with a *higher* per share price than other Submitted or Potential Bids, the target should disclose the DADWs and prices as just advised.\textsuperscript{217} However, in the instance where the target recommends a Submitted Bid with a *lower* per share price than the other Submitted or Potential Bids, the target should disclose in the proxy statement:

1) the DADW uses;

2) the per share prices; \textit{and}

3) an explanation why that recommended deal is superior, including why a Potential Bid may have been blocked by the DADW if it possibly offered a higher per share price.\textsuperscript{218}

Failing to satisfy this duty to inform the shareholders translates to the board violating its fiduciary duty to provide a meaningful recommendation to the shareholders.

**B. RECENT OBJECTIONS TO ENFORCING DON’T ASK, DON’T WAIVE PROVISIONS**

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A per share price for a Potential Bid need only be a good faith estimate or reporting of what may have come from the potential bidder.

\textsuperscript{217} See supra note 216 and accompanying text.

\textsuperscript{218} Compare \textit{In re Topps}, 926 A.2d at 61-62, 78 (“One of the Incumbent Directors . . . reached an agreement with Eisner on a merger at $9.75 per share. The ‘Merger Agreement’ gave Topps the chance to shop the bid for 40 days after signing . . . . The Topps board approved the Merger Agreement . . . . By the end of the Go Shop period, Upper Deck had expressed a willingness to pay $10.75 per share . . . . [T]he Topps board, with one Dissident Director dissenting, one abstaining, and one absent, voted not to make such a finding [that Upper Deck’s initial bid was a superior proposal]. . . . [T]he Proxy Statement and other public statements of Topps have misrepresented the two acquisition overtures Upper Deck has made to buy Topps following the execution of the Eisner Merger Agreement.”), and \textit{In re Complete Genomics}, supra note 117, at 23-24 (“[J]ust because there is a topping bid out there doesn’t mean that there is automatically a problem with the recommendation.”), with \textit{In re Topps}, 926 A.2d at 92 (emphasis added) (“If Upper Deck makes a tender at $10.75 per share on the conditions it has outlined, the Topps stockholders will still be free to reject that offer if the Topps board convinces them it is too conditional.”), and \textit{In re Ancestry.com}, supra note 127, at 26 (“I think what’s more important is that I’m not prepared to allow this to go to a vote without stockholders being told about [the DADW]. . . . [W]hat has happened on December 11th, I think, would have been absolutely essential to let them know. . . . Because I think [silence] would have created the false impression that any of the folks who signed the standstill could have made a superior proposal [before that date].”).
Fiduciary duty concerns about DADW standstills come from four judges on the Delaware Court of Chancery: Chancellor Strine and Vice Chancellors Glasscock, Laster, and Parsons. The judges’ decisions whether to enjoin the enforcement of DADWs can be categorized into three jurisprudential issues. First, three of the judges essentially expressed concerns about DADWs fitting within principles of Delaware case law. Second, three of the judges expressed concerns about DADWs having a tolerable contractual scope. Third, Vice Chancellor Glasscock expressed concerns related to DADWs affecting on the aggregate reasonableness of the corporate auction process.

Vice Chancellor Laster has primarily raised the case law concerns. The vice chancellor had two separate occasions to consider the enforcement or injunction of DADW provisions. In the first instance, Vice Chancellor Laster queried whether a DADW provided a real benefit in light of holdings from In re The Topps Co. Shareholders Litigation possibly overriding the enforceability of the DADW. In the second instance, Vice Chancellor Laster analogized DADWs to “no-talk” clauses considered in Phelps Dodge Corp. v. Cyprus Amax Minerals Co., a 1999 chancery court case. Under his view, Vice Chancellor Laster determined the DADWs were unenforceable because past chancery court cases (In re Topps and Phelps Dodge)

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219 See infra Part III.B.1.
220 See infra Part III.B.2.
221 See infra Part III.B.3.
222 926 A.2d 58 (Del. Ch. 2007).
223 See In re RehabCare, supra note 105, at 46 (“I do think it is weird that people persist in the ‘agree not to ask’ in the standstill. When is that ever going to hold up if it’s actually litigated, particularly after Topps?”).
225 See In re Complete Genomics, supra note 117, at 14, 18 (“In my view, a Don’t Ask, Don’t Waive Standstill resembles a bidder-specific no-talk clause. . . . So in my view, by analogy to Phelps Dodge, a Don’t Ask, Don’t Waive Standstill is impermissible because it has the same disabling effect as the no-talk clause, although on a bidder-specific basis.”).
spoke to whether the DADWs could be given effect and those cases answered “no, they cannot” in sufficiently similar circumstances.\textsuperscript{226}

Three judges shared a common concern about the tolerable contractual scope of DADW power. In contrast to Vice Chancellor Laster’s more dismissive stance of DADW enforceability, Chancellor Strine and Vice Chancellor Parsons were careful to temper their injunctions with reminders that DADWs are not invalid per se.\textsuperscript{227} Rather, the two judges focused their concerns on the scope of DADWs being able to create informational vacuums that interfere with a target board’s fiduciary duties. Across the three judges, they encountered or considered three types of informational vacuums. The most restrictive vacuum encountered was one in which the target board bound a bidder with a DADW and bound itself with a “no solicitation” provision.\textsuperscript{228} The next most restrictive vacuum encountered was one in which the target board bound just the bidder with a DADW.\textsuperscript{229} The least restrictive vacuum considered was one in which the target

\begin{footnotesize}
\textsuperscript{226} Compare \textit{In re RehabCare}, supra note 105, at 46 (claiming that the “agree not to ask” in the DADW provision “doesn’t give you any ultimate benefit because you know that the person can get a Topps ruling making you let them ask, at a minimum, or can ask in a back channel way”), \textit{with In re Complete Genomics}, supra note 117, at 15, 17-18 (“Subsequent Delaware decisions have endorsed the \textit{Phelps Dodge} analysis. . . . So regardless of whether a no-talk provision, as in \textit{Phelps Dodge}, or a Don’t Ask, Don’t Waive provision here, would create problems for the decision to negotiate, and certainly \textit{Phelps Dodge} holds that it would, those provisions interfere with the target’s ability to determine whether to change its merger recommendation because they absolutely preclude the flow of incoming information to the board.”).

\textsuperscript{227} Compare \textit{In re Complete Genomics}, supra note 117, at 18 (“[A] Don’t Ask, Don’t Waive Standstill is impermissible because it has the same disabling effect as [a] no-talk clause, although on a bidder-specific basis.”), \textit{with In re Ancestry.com}, supra note 127, at 20-21 (“I’m giving you a bench ruling. Bench rulings are limited rulings. . . . I know of no statute, I know of nothing, that says that these [DADW] provisions are per se invalid. And I don’t think there has been a prior ruling of the Court to that effect.”), \textit{and In re Celera Corp. S’holder Litig.}, Civil Action No. 6304-VCP, 2012 WL 1020471, at *22 (Del. Ch. Mar. 23, 2012), aff’d in part, rev’d in part, 59 A.3d 418 (Del. 2012) (“To be clear, I do not find, either in the circumstances of this case or generally, that provisions expressly barring a restricted party from seeking a waiver of a standstill necessarily are unenforceable.”).

\textsuperscript{228} See \textit{In re Celera}, 2012 WL 1020471, at *21 (“Taken together . . . the Don’t-Ask-Don’t-Waive Standstills and No Solicitation Provision are more problematic. . . . Here, the Don’t-Ask-Don’t-Waive Standstills block at least a handful of once-interested parties from informing the Board of their willingness to bid . . . and the No Solicitation Provision blocks the Board from inquiring further into those parties’ interest. Thus . . . these constraints collectively operate to ensure an informational vacuum.”).

\textsuperscript{229} See \textit{In re Ancestry.com}, supra note 127, at 23, 25 (explaining his understanding of the don’t ask half as giving “a well-motivated seller . . . a gavel, to impress upon the people that it has brought into the process the fact that the process is meaningful; that if you’re creating an auction, there really is an end to the auction for those who participate” and explaining the don’t waive half as “the terms of this thing literally said, You cannot directly or
board bound a bidder with a DADW, but the provision only prohibited public requests for a waiver while allowing private waiver requests. This least restrictive DADW vacuum had escaped an injunction.

As for Koehler v. NetSpend Holdings Inc., Vice Chancellor Glasscock constructed a memorandum opinion evaluating DADW use in the context of a target corporation conducting a reasonable corporate sale process. The plaintiff argued the target corporation’s board breached its fiduciary duties under Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc. by, among other things, retaining DADW clauses in its merger agreement as applied against two previously identified private equity firms. The opinion placed its fact-specific criticisms of DADW use within an overarching review of deal protection devices. As part of the ultimate conclusion, the vice chancellor determined the target corporation’s board acted unreasonably based on the aggregate effect of its choices, rather than on a single choice or circumstance.

indirectly ask for a waiver of the standstill. That means you could not ask, once you were siphoned out of the process”.

See In re Complete Genomics, supra note 117, at 12-13 (“Based on the briefing, I continued to understand that the standstill agreements prohibited public waiver requests but otherwise were not ‘Don’t Ask, Don’t Waive Standstills’ of the type discussed in the Celera Corporation case that would purport to forbid a counterparty from ever asking for a waiver. As a result, on November 21st, I denied the motion . . . . After the denial of the motion, the defendants submitted a letter advising that the standstill binds the counterparty . . . does contain a Don’t Ask, Don’t Waive provision. . . . I am consequently enjoining Genomics pending trial from enforcing the standstill agreement . . . ”).

See id. at 11-12 (“In an oral ruling on November 9, 2012, I denied the plaintiffs’ application for preliminary in junction that would have enjoined a pending two-step acquisition . . . . As part of their applications, the plaintiffs sought preliminary relief barring Genomics from enforcing standstill agreements with four potentially interested parties. . . . I understood that each standstill agreement prevented the counterparty from publicly requesting or proposing that the company or any of its representatives amend, waive, or consider amending or waiving any of its terms, but did not prevent the counterparty from making a non-public request. I denied the motion . . . ”).


See id. at *20 (“Faced with the particular facts I have described . . . I believe that the Defendants will fail to meet their burden at trial of proving that they acted reasonably to maximize share price. Though several of these facts, alone, are not outside the range of reasonable actions the Board could take, in their aggregate, these facts indicate a process that is unreasonable.”).
These three categories of concern are the frames for which Parts III.A.2 and III.A.3 of this analysis should be judged. And, in fact, both analysis parts withstand such judgment. This is because both parts tied directly to the same overarching themes of fiduciary duty raised by these four chancery court judges.

1. Case Law Concerns

First, scrutinizing the target board based on participating bidder behavior before a bidding deadline and reviewing the board’s proxy statement for DADW related disclosures are consistent with the holdings of In re Topps. With respect to pre-deadline behavior, the court in In re Topps explained a target board must use a standstill agreement, such as a DADW provision, for a legitimate purpose to avoid an injunction for refusing to waive the standstill (i.e., enforcing the “don’t waive” half of the DADW). The court characterized a legitimate purpose as using the provision to ensure confidential information is not misused, to establish rules for an orderly auction, or to gain leverage for the extraction of bidder concessions. Pursuing each of these legitimate purposes precedes an auction’s formal conclusion, which a DADW is designed to create. That is, a target board should not be scrutinized based on new information from a

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237 See The Upper Deck Co. & Northwood Investors, LLC v. The Topps Co., Inc. (In re The Topps Co. S’holders Litig.), 926 A.2d 58, 91 (Del. Ch. 2007) (“Given that the Topps board has decided to sell the company, and is not using the Standstill Agreement for any apparent legitimate purpose, its refusal to release Upper Deck justifies an injunction.”).

238 In re Topps, 926 A.2d at 91.

239 Compare In re Celera Corp. S’holder Litig., Civil Action No. 6304-VCP, 2012 WL 1020471, at *21 (Del. Ch. Mar. 23, 2012), aff’d in part, rev’d in part, 59 A.3d 418 (Del. 2012) (“Viewed in isolation, these Don’t-Ask-Don’t-Waive Standstills arguably foster legitimate objectives: . . . establish[ing] rules of the game that promote an orderly auction, and . . . giv[ing] the corporation leverage to extract concessions . . . .”), and Walsh et al., supra note 1 (emphasis added) (“One way the target boards ensure such value maximization is by conducting an auction . . . and requiring potential bidders to enter into confidentiality agreements with standstill provisions before providing them access to confidential information or allowing them to participate in the process.”), with In re Ancestry.com, supra note 127, at 23 (“If you’re creating an auction, [the DADW shows] there is really an end to the auction for those who participate.”).
bidder that already had a chance to participate in the auction process if the target board can show its DADW use fulfills a legitimate purpose before the DADW ended the auction.

With respect to proxy statement disclosures, the In re Topps decision addressed whether the terms and effects of a standstill agreement should be provided to target shareholders. In the case, the plaintiffs panned the proxy statements as one-sided because the target’s standstill agreement blocked the rejected bidder’s ability to continue bidding or even publicly respond to target’s criticisms. The court addressed each proxy statement complaint in Section III.D of the opinion with a direct conclusion of whether the statement or omission was materially misleading. With its preceding pattern of decisiveness and clear skepticism of Topps’ disclosures, the court concluded the disclosures stemming from the target’s standstill use had a material adverse effect on shareholders. However, the court also determined the matter could not be rationally sorted by “a preliminary injunction proceeding so as to permit the formulation of a judicial order requiring the target to disclose,” in whole or in part, a losing bidder’s version of events. Thus, to act consistently with the material adverse effect finding in In re Topps,

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240 See In re Topps, 926 A.2d at 79 (“That raises as a final matter the failure of Topps to disclose that the terms of the Standstill Agreement prevent Upper Deck from making a tender offer to Topps stockholders or from even responding to Topps’s public statements about the negotiations between the two rivals or the nature of Upper Deck's bid. . . . Most of the remaining disclosure arguments of the Stockholder Plaintiffs and Upper Deck . . . are arguments premised on the notion that [the] Proxy Statement has told only one version of a disputed version of events.”).

241 See, e.g., In re Topps, 926 A.2d at 73 (“To avoid repetition later in the opinion, I will also note when I conclude that the moving parties have identified an omission or alleged misrepresentation of fact that rises to a material level. I also indicate when I believe that the moving parties have simply identified omitted facts that are either immaterial, or already disclosed in substance.”).

242 Compare In re Topps, 926 A.2d at 74 (“To be direct, the Proxy Statement should have disclosed these facts.”), with id. at 80 (drawing a comparison between the Topps’ shareholders being able to hear both sides of the issues with respect to disagreements between members of the Topps board and the shareholders being able to hear the sides of the story between the Topps directors and the bidder, Upper Deck), and id. at 82 (footnote omitted) (concluding that, “[i]n the usual circumstances, [a target’s decision not to include a bidder’s preferred version of events] does not have a materially adverse effect on stockholders, because the bidder can tell its side of events and the stockholders therefore have an opportunity to make their own judgment about who is right. But in this case, the Topps Incumbent Directors have refused to release Upper Deck from the Standstill, even for the limited purpose of communicating with the Topps stockholders.”).

243 In re Topps, 926 A.2d at 81-82.
Part III.B of this Article advises specifically for disclosure of a DADW standstill to avoid scrutiny for misrepresentations or material omissions.\textsuperscript{244}

Second, contrary to the suggestion from Vice Chancellor Laster, DADW provisions are not bidder-specific analogies to a “no-talk” provision described as impermissible in \textit{Phelps Dodge}. Former Chancellor Chandler encountered a no-talk provision that prevented the defendant-target from ever engaging in nonpublic (i.e., private) communication with a potential bidder.\textsuperscript{245} On behalf of the court, the former chancellor explained his view of the provision as troubling derived from the provision preventing the target board from making an informed judgment not “to even consider[] whether to negotiate with a third party.”\textsuperscript{246} He recognized the board was not legally obligated to negotiate with any particular potential bidder, but he explained the provision completely foreclosed the opportunity to do so.\textsuperscript{247} Thus, the no-talk provision was equated to willful blindness that could cause a breach of the board’s duty to make an informed decision with all material information at its reasonable disposal.\textsuperscript{248} Unlike the complete foreclosure of negotiations stemming from a no-talk provision, a DADW provision actually opens the door to negotiations because motivated targets require the provision before providing confidential information.\textsuperscript{249} It is only \textit{after} the target board has informed itself through negotiations with a bidder that the target will enforce a DADW, meaning the DADW is not equivalent to willful blindness.

\textsuperscript{244} \textit{See supra} Part III.A.3. \\
\textsuperscript{245} \textit{Phelps Dodge Corp. v. Cyprus Amax Minerals Co.}, Nos. CIV. A. 17398, CIV. A. 17383, CIV. A. 17427, 1999 WL 1054255, at *2 (Del. Ch. Sept. 27, 1999). \\
\textsuperscript{246} \textit{Phelps Dodge}, 1999 WL 1054255, at *1. \\
\textsuperscript{247} \textit{See id.} at *2 (“Now, this should not be understood to suggest that Cyprus or Asarco were legally required to or even should have negotiated, privately or otherwise, with Phelps Dodge. It is to say, rather, that they simply should not have completely foreclosed the opportunity to do so . . . .”). \\
\textsuperscript{248} \textit{Id.} \\
\textsuperscript{249} \textit{Compare id.} (“[T]he no-talk provision has apparently prevented either Cyprus or Asarco from engaging in nonpublic dialogue with Phelps. . . . [T]hey should not have completely foreclosed the opportunity to do so . . . .”), \textit{with Walsh et al., supra} note 1 (emphasis added) (“One way the target boards ensure such value maximization is by conducting an auction . . . and requiring potential bidders to enter into confidentiality agreements with standstill provisions \textit{before} providing them access to confidential information or allowing them to participate in the process.”).
2. Contractual Scope Concerns

The contractual scope of a “full-proof” DADW provision, by itself, falls squarely on the side of satisfying informational duties, rather than on the side of creating an informational vacuum. For purposes of this Article, a “full-proof” DADW provision is one in which the “don’t waive” half prohibits both public and private standstill waiver requests.250 When dealing only with a full-proof DADW provision,251 the contractual concerns that Chancellor Strine raised in In re Ancestry.com were three-fold. Recall the first criticism was the target board lacked knowledge and appreciation for the power of its DADW provisions.252 This guidance from Chancellor Strine most directly relates to communications between the target board and its counsel;253 it only indirectly relates to information concerns between the target board and participating bidders.254

The indirect relation from the first criticism helped raise the third and more relevant informational criticism, though, that the target board chose not to waive the standstill before litigation so that shutout bidders could make superior offers.255 The clear implication is that the target board lacked information whether a superior proposal existed among the shutout bidders, which created duty of care questions.256 However, having the power to choose not to waive the standstill is exactly the purpose of the “don’t waive” half of the DADW, a point earlier and

250 See Walsh et al., supra note 1 (emphasis added) (explaining that a DADW will “preclude the bidder from publicly and/or privately asking the board of directors to waive the ['don’t ask'] restriction”).
251 That is to say, the board does not subsequently execute a merger agreement (or the like) that includes a provision such as the “no solicitation” provision in In re Celera.
252 See In re Ancestry.com, supra note 127, at 25 (“None of the board seems to be aware of this.”).
253 See id. at 24 (“I think the plaintiffs have pretty obviously shown that this board was not informed about the potency of this [DADW] clause.”).
254 See id. at 25 (describing how the DADW can only be used as a gavel if the board is able to exclude a bidder from continued bid attempts once the board decides against that bidder).
255 See id. (“And the board and its advisors did not waive it in order to facilitate those bidders which had signed up the standstills being able to make a superior proposal.”).
256 See id. at 25-26 (“I think that probabilistically is a violation of duty of care.”).
approvingly recognized by Chancellor Strine in the same ruling.\textsuperscript{257} Furthermore and most importantly, the ruling issued an injunction under the umbrella of the duty of care, but particularized its reasoning along the spoke of disclosure concerns because the board had not told its shareholders of the full-proof DADW provision or the litigation-inspired waiver.\textsuperscript{258} Again, Part III.A of this Article specifically advises against this proxy statement failure,\textsuperscript{259} so it would pass Chancellor Strine’s duty of care concerns regarding shareholder disclosures.

The second criticism from Chancellor Strine’s \textit{In re Ancestry.com} ruling was the target board did not assign the right to enforce the DADW to the winning bidder.\textsuperscript{260} The suggestion that a target board should assign such a powerful right is wholly inconsistent with the target board’s fiduciary duties to remain informed.\textsuperscript{261} Providing a winning bidder with a right to enforce the “don’t waive” half of a DADW takes power away from the target board and could entirely frustrate its decision that fiduciary duties require a standstill waiver for an auction participant.\textsuperscript{262} This flawed suggestion may have been a function of the time pressured setting

\textsuperscript{257} See \textit{id.} at 23 (“But the value-maximizing purpose has to be to allow the seller as a well-motivated seller to use it as a gavel, to impress upon the people that it has brought into the process . . . there is really an end to the auction for those who participate.”).

\textsuperscript{258} See \textit{id.} at 26, 32 (“I think what’s more important is that I’m not prepared to allow this to go to a vote without the stockholders being told about that. . . . [I]t was only until December 11th that you were able to [ask for a waiver from the standstill]. I think that the stockholders should be aware of that, in the mix of information, before they cast their vote.”).

\textsuperscript{259} See \textit{supra} Part III.A.3.

\textsuperscript{260} See \textit{In re Ancestry.com, supra} note 127, at 25 (“And when Permira was signed up, Permira did not demand an assignment of [the DADW’s power to block waiver requests].”).

\textsuperscript{261} See \textit{Koehler v. NetSpend Holdings Inc.}, Civil Action No. 8373-VCG, 2013 WL 2181518, at *18, 19 (Del. Ch. May 21, 2013) (“The Merger Agreement forbad NetSpend from waiving the DADW provisions that prevent Private Equity A and Private Equity B from expressing any interest in bidding for the Company. . . . In agreeing to continue the vitality of the DADW provisions of the Standstill Agreements, the Board blinded itself to any potential interest from Private Equity A and Private Equity B.”).

\textsuperscript{262} Compare \textit{In re Ancestry.com, supra} note 127, at 28 (“What’s hard to explain is if the winning bidder didn’t ask for the assignment . . . . I admit I wouldn’t [assign the ‘don’t waive’ right] until I signed the definitive acquisition agreement with Permira.”), \textit{with In re Celera Corp. S'holder Litig.}, Civil Action No. 6304-VCX, 2012 WL 1020471, at *21 (Del. Ch. Mar. 23, 2012), aff’d in part, rev’d in part, 59 A.3d 418 (Del. 2012) (describing how the target board’s agreement with a winning bidder included “a ‘fiduciary out’ permitting the Board to waive the Don’t–Ask–Don’t–Waive Standstills if strict compliance with the Merger Agreement would violate the Board’s fiduciary duty to maximize shareholder value”).
Chancellor Strine operated under, and the chancellor was careful to temper his comments.\footnote{263 See In re Ancestry.com, supra note 127, at 20 ("I’m giving you a bench ruling. Bench rulings are limited rulings. They’re time-pressured ones. . . [so] they shouldn’t make broad law.").} Therefore, this second criticism about “don’t waive” assignment should not affect the calculus dealmakers use when employing and enforcing a DADW provision.

The remaining concerns about contractual scope identified by Vice Chancellors Laster and Parsons in \textit{In re Complete Genomics} and \textit{In re Celera} involve variations to full-proof DADWs. Vice Chancellor Laster showed an encouraging sign by admitting a DADW that only restricts public waiver requests created fewer fiduciary duty issues than a full-proof DADW.\footnote{264 See supra notes 123-26 and accompanying text.} Vice Chancellor Parsons encountered a more interesting challenge because the target entered DADWs and then subsequently executed a merger agreement with a no-solicitation provision.\footnote{265 See supra notes 110-16 and accompanying text.} This is combination is a much more potent damper on a target’s ability to receive information and fulfill fiduciary duties.\footnote{266 See In re Celera, 2012 WL 1020471, at *21 (internal quotation marks omitted) ("Taken together, however, the Don’t–Ask–Don’t–Waive Standstills and No Solicitation Provision are more problematic. ‘[The Delaware Supreme] Court has stressed the importance of the board being adequately informed in negotiating a sale of control: The need for adequate information is central to the enlightened evaluation of a transaction that a board must make.’").}

Critically, though, courts and dealmakers should not write off a DADW and no-solicitation combination as per se invalid. This is because a DADW and no-solicitation combination remains \textit{less} restrictive than the no-talk provision in \textit{Phelps Dodge}. To show this, it is instructive to assume a scenario where all three provisions might actually arise. That scenario is one in which a target corporation finds two or more potential buyers \textit{before} executing a merger agreement or the like with a particular party. Furthermore, it is important to remember fiduciary
concerns about DADW provisions have been about the time from executing an agreement until closing.\textsuperscript{267}

With a scenario drawn and concerns calibrated, the analysis is simple. A DADW limits bid submissions of specific potential buyers identified before agreement execution from the auction start until closing.\textsuperscript{268} A no-solicitation provision limits bid gathering of the target corporation from the auction end until closing.\textsuperscript{269} A no-talk provision limits bid submissions of all potential buyers and bid gathering of the target corporation from the auction end until closing.\textsuperscript{270} Thus, the target can still receive and evaluate bids by potential buyers arising after agreement execution from the auction end until closing if a DADW and no-solicitation are combined, whereas the target cannot receive such potentially superior bids in the no-talk scenario.\textsuperscript{271} An illustration below shows this point using the limits on bidding compared to a progression in time.

\textsuperscript{267} See Walsh et al., supra note 1 (“Because the sales process continues even after the auction ‘concludes,’ challengers of ‘Don’t Ask, Don’t Waive’ provisions contend that by prohibiting receipt and consideration of unsolicited offers from losing bidders who would otherwise make topping bids, such provisions impermissibly limit directors’ ongoing fiduciary obligations . . . ”).

\textsuperscript{268} See Walsh et al., supra note 1 (“One way that target boards ensure such value maximization is by conducting an auction or sales process and requiring potential bidders to enter into confidentiality agreements with standstill provisions before providing them access to confidential information or allowing them to participate in the process.”).

\textsuperscript{269} See In re Celera, 2012 WL 1020471, at *6 (“[T]he Board agreed to terminate any existing discussions with, and not to solicit competing offers from, potential bidders other than Quest (the ‘No Solicitation Provision’). . . . That is Celera could not reach out to the companies it already knew were interested.”).

\textsuperscript{270} See Phelps Dodge Corp. v. Cyprus Amax Minerals Co., Nos. CIV. A. 17398, CIV. A. 17383, CIV. A. 17427, 1999 WL 1054255, at *1-2 (Del. Ch. Sept. 27, 1999) (“No-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. . . . [T]he no-talk provision has apparently prevented either Cyprus or Asarco from engaging in nonpublic dialogue with Phelps.”).

\textsuperscript{271} Compare In re Celera, 2012 WL 1020471, at *21 (describing how the DADW and No-Solicitation provisions limited communications with already interested parties, but the No-Solicitation could not stop a new bidder from approaching the target \textit{sua sponte}, with \textit{In re Ancestry.com}, supra note 127, at 14 (“In Phelps Dodge . . . Chancellor Chandler considered whether a target board had breached its fiduciary duties by entering into a merger agreement containing a no-talk provision. . . . [A] no-talk clause—and here I’m quoting from the Chancellor—‘not only prevents a party from soliciting superior offers or providing information to third parties, but also from talking to or holding discussions with third parties.’”).
With this illustration, all that remains with respect to recent chancery court happenings is a review of whether Vice Chancellor Glasscock added anything new to the Delaware Court of Chancery guidance for DADWs.

3. Aggregate Reasonableness Concerns

By now, it is familiar that the activation of *Revlon* duties changes the level of scrutiny applied to a target corporation’s board of directors’ decision-making.\(^{272}\) The change in scrutiny is to an enhanced evaluation for reasonableness that is “‘more searching than rationality

\(^{272}\) Koehler v. NetSpend Holdings Inc., Civil Action No. 8373-VCG, 2013 WL 2181518, at *11 (Del. Ch. May 21, 2013) (“*Revlon* changes the level of scrutiny under which this Court reviews change-of-control transactions.”).
Directors must show they acted with full information and made a reasonable decision—not a perfect one.\footnote{Koehler, 2013 WL 2181518, at *11.} Vice Chancellor Glasscock judged the use of DADW provisions for their individual effects. For instance, the vice chancellor indicated that wielding DADWs incorrectly strongly tips the scale toward the conclusion that a sales process is unreasonable.\footnote{Id.} But more importantly, the vice chancellor conducted his reasonableness analysis within a field of several significant facts.

First, the target board intended to engage only one bidder once it decided to sell the company.\footnote{See id. at *20 (“[I]n their aggregate, these facts indicate a process that is unreasonable. In particular, in failing to waive the DADW provisions prior to entering the Merger Agreement, and in agreeing to forgo the right to waive them in the Merger Agreement, without considering or understanding the effect this would have on its duty to act in an informed manner, the Board acted unreasonably.”).} This fact is important because it shows the target corporation sought to avoid an auction process, which is when a DADW is most commonly used. Despite the target’s intentions, the vice chancellor was forced to point out that a change in circumstances can reasonably mean a change in interests.\footnote{See id. at *15 (“[T]he NetSpend Board made a deliberate decision to conduct a single-bidder sale of the Company.”).} The target in Koehler had already been in talks with two private equity firms before deciding to sell the entire company; the target board erred when it summarily ended communications with those firms without sufficiently inquiring into their interest for the company as a whole.\footnote{See id. at *19 (“[T]he fact that Private Equity A offered $12 and Private Equity B declined to bid for a minority stake in NetSpend does not necessarily mean that those entities are uninterested in purchasing 100% of NetSpend.”).} That is, Vice Chancellor Glasscock has told dealmakers that DADWs are not for shutting out potential bidders previously interested in only a minority

\footnote{Compare id. at *4-5 (explaining how NetSpend’s CEO and board member, Daniel Henry, attempted to facilitate a sale of one shareholder’s stake in NetSpend to two private equity firms before receiving an indication of interest for the entire company from Total Systems Services Inc., leading to NetSpend’s termination of discussions with the two private equity firms), with id. at *19 (“NetSpend argues that any failure to remove the DADW provisions is macht nichts, because NetSpend believes that neither Private Equity A nor Private Equity B is interested in bidding for NetSpend. NetSpend’s sanguine confidence is misplaced.”).}
stake; if the entire company later comes up for sale, the target board should revisit those earlier potential bidders.\textsuperscript{279}

Second, the target board imposed DADWs on potential bidders \textit{before} the corporate sales process had even begun.\textsuperscript{280} This spoke to evidence of the board’s failure to comprehend or even recognize the potency of the DADW provisions blocking out possible competition to the single bidder the board had decided to pursue.\textsuperscript{281} Without comprehending the potency of the DADW provisions, the target board was severely handicapped in proving satisfaction of its fiduciary duty of care.\textsuperscript{282}

Finally, the no-solicitation provision in the merger agreement drew negative attention to an abbreviated post-agreement, pre-closing period incapable of providing a sufficient alternative to a market check.\textsuperscript{283} The target board in \textit{Koehler} had already decided to forgo a pre-agreement market check.\textsuperscript{284} The target board then acted in reliance upon an ambiguous fairness opinion about the value of the target’s share price.\textsuperscript{285} By the time Vice Chancellor Glasscock reached a

\textsuperscript{279} \textit{Compare id.} at *3 (describing how discussions with the two private equity firms interested in JLL Partners’ minority stake began with the explicit instruction that NetSpend was not yet for sale in its entirety), \textit{with id.} at *19 (“In truth, the Board would never know if Private Equity B or Private Equity A was interested in making a bid unless the DADW clauses were removed. Therefore, it seemed appropriate to me, at oral argument, that the DADW clauses be enjoined.”).

\textsuperscript{280} \textit{See id.} at *3 (detailing the confidentiality agreements that included DADW provisions against the two private equity firms and that were entered into before NetSpend went up for sale in its entirety).

\textsuperscript{281} \textit{See id.} at *19 (“Most problematically, it does not appear that the Board even considered whether the standstill agreements should remain in place once the Board began negotiating with TSYS, which would have been the ideal time to waive the DADW clauses. . . . The record suggests that the Board did not consider, or did not understand, the import of the DADW clauses and of their importation into the Merger Agreement.”).

\textsuperscript{282} \textit{See id.} (“Nothing in the record indicates that the retention by the Board of the DADW provisions, or in the Board’s importation of the provisions in the Merger Agreement, was informed, logical and reasoned.”).

\textsuperscript{283} \textit{See id.} at *18 (“The Board only agreed to the no-shop once it had extracted further consideration from TSYS . . . . Notably, the Board anticipated a short period before the deal’s consummation . . . . Thus, the Board cannot have intended a leisurely post-agreement, pre-closing period would provide an adequate alternative to a market check.”).

\textsuperscript{284} \textit{See id.} at *15 (“[T]he NetSpend Board made a deliberate decision to conduct a single-bidder sale of the Company.”).

\textsuperscript{285} \textit{See id.} at *13, 17 (identifying that the NetSpend board relied on an ambiguous fairness opinion and calling the fairness opinion a “poor simulacrum of a market check”).
review of the DADW provisions and found uninformed director action, it became clear the target board had not been reasonable in creating a sales process for the target corporation.286

Therefore, ultimate conclusion regarding the reasonability of the target’s sale process should come as no surprise to careful observers of mergers jurisprudence and prior DADW rulings. *Koehler* did not add anything new or controversial to the math corporations must do when considering the use of a DADW provision. This is because Vice Chancellor Glasscock properly placed DADW evaluation within the context of whether there was reasonable use of deal protection devices in a corporate selling process.

In total, then, the concern for aggregate reasonableness raised in *Koehler* is consistent with Part III of this Article. Part III.A of this Article warned against prematurely shutting out bidders from an existing auction process, and this warning extends to circumstances having the potential to create an auction in spite of the target board’s preferences. Part III.A of this Article also touched on the extreme importance of fully briefing a target board on the power of DADW provisions when they are in use. And finally, Part III.B.2 of this Article touched on pairing a pre-auction DADW with a post-agreement no-solicitation provision. An auction creates a market check mechanism because, by definition, more than one bidder participates in an auction, which is unlike the single-bidder and limited pre-closing market check in *Koehler*. Thus, the analysis in Part III of this Article meshes well with the Delaware Court of Chancery, and the next subpart consolidates these points of consistency.

C. FUNDAMENTALS FOR UTILIZING DON’T ASK, DON’T WAIVE PROVISIONS

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286 *See id.* at *18-20 (reviewing the DADW clauses last before identifying the lack of market check, improper reliance on a fairness opinion, and acquiescence to strong deal protections as sufficient evidence to conclude that, “The sale process, reviewed as a whole, was unreasonable”).
In drawing near the conclusion of this Article, what follows is an attempt to concisely summarize how to properly wheel and deal with DADW provisions. While they are not a necessary tool for every public corporate sale, there is no question DADWs are powerful devices to consider using. Here is a fundamental baseline for target corporations to utilize DADW provisions:

**Before the Entire Corporation Is for Sale**

1) As always, maintain a close eye on the law of the jurisdiction governing the confidentiality agreement that may include a DADW provision.

2) If a party is interested in a significant minority stake in the target corporation and a DADW will bind that party, include a sunset for the “don’t waive” half that triggers when the target board subsequently decides to sell the entire company.

**Once the Entire Corporation Is for Sale**

1) Instruct counsel to consider and negotiate on a bidder-specific basis when and if a DADW provision is needed in a confidentiality agreement that precedes a potential bidder’s due diligence.

2) Draft a “don’t waive” half of a DADW to cover either public waiver requests only or both public and private waiver requests—make this decision very carefully based on the overall market position of the target corporation and the potential bidders.

3) Have a clear, detailed discussion between counsel and the board of directors about the effect of both halves to a DADW provision (i.e., the effect of the “don’t ask” and, more importantly, the effect of the “don’t waive”).
4) Confirm that bidders subject to DADWs fully understand the effect of both halves to the DADW provision.

**Entering a Merger Agreement**

1) Make a pre-signing judgment call as to what effect the DADW had on pushing the offer price per share toward maximized value.

2) Do not blindly assign the right to exercise the “don’t waive” half of the DADW provision to the buyer; if sought by the buyer, get something in return (e.g., incorporating a go-shop provision for post-agreement market check).

**Between Entering the Merger Agreement and Closing**

1) Hold a serious discussion within the board of directors whether any potential bidders subject to a DADW merit a waiver, thereby freeing such a bidder to submit a possible topping offer. Warning signs that a waiver is necessary to avoid charges of “willful blindness” include:

   a. imposing a DADW on a potential bidder before the entire company is actually for sale;

   b. knowing a potential bidder performed due diligence and made an earlier offer; and

   c. relying on a DADW to favor one bidder in feigned unawareness of potential topping offers.
2) Deliver requisite proxy statements with detailed disclosures about the target corporation’s active use of DADWs, including any incorporation thereof into the merger agreement.

3) Be prepared for greater scrutiny of actions if litigation develops and a DADW has been employed in the agreement process, especially when other deal protection devices have come into play (e.g., a no-solicitation provision in the merger agreement).

After the Closing

1) Review the events leading to the closing.

2) Evaluate the factors affecting how long the deal took to form and close.

3) Isolate any specific facts indicating how the DADW provisions created positive steps toward value maximization.

IV. CONCLUSION

“Don’t ask, don’t waive” (“DADW”) provisions are meant extract the highest possible offer from a bidder by limiting that bidder’s chances to make an offer.\(^\text{287}\) Simply put, bidders may only get one opportunity to win the for-sale corporation. Without multiple opportunities, a losing bidder would be unable to deliver a topping bid before or after the target reaches a definitive agreement with another bidder.\(^\text{288}\)

\(^{287}\) See Walsh et al., *supra* note 1.

\(^{288}\) See SULLIVAN & CROMWELL LLP, *supra* note 6, at 3 ("Chancellor Strine acknowledged that . . . a ‘Don’t Ask, Don’t Waive’ provision could service a value-maximizing purpose by forcing potential bidders to put their highest bid forward or risk being shut out of the opportunity to top the winning bidder after a definitive agreement is reached.").
Recent rulings from the Delaware Court of Chancery called the enforceability of DADW provisions into question.\footnote{See supra Part II.C.3.} Unlike traditional auctions, corporate auctions technically continue beyond the drop of the gavel until the stockholders approve the proposed sale transaction.\footnote{Walsh et al., supra note 1.} Challengers argue that enforcing a DADW provision and ignoring a potentially topping bid could amount to willful blindness and, therefore, an uninformed board decision.\footnote{See MORRISON FOERSTER: UNSOLICITED VIEWS, supra note 10, at 1 (explaining how the chancery court analogized one DADW provision to a no-talk clause in Phelps Dodge Corp. v. Cyprus Amax that created a legal equivalent of willful blindness).}

Contrary to these concerns, this Article has shown DADW provisions maintain validity in the Delaware courts. The Article first explained the background for DADW provisions.\footnote{See supra Part II.} Then the Article showed DADW provisions do aid target boards to fulfill value-maximization under Revlon.\footnote{See supra Part III.A.} The Article then assuaged informational and fiduciary anxieties about a target board wielding a DADW provision.\footnote{See supra Part III.B.} Finally, the Article provides a brief set of fundamental principles to follow when using DADWs.\footnote{See supra Part III.C.}

Corporations putting themselves up for auction have a powerful tool when using DADW provisions. A target corporation’s board must receive a thorough explanation of the DADW’s potency before attempting to use the provision. The target board then needs to construct clear rules and procedures for participating bidders to follow during the auction. Next, the board must carefully execute the auction and prudently choose when to enforce the “don’t waive” half of the DADW. Finally, if complaints arise from shareholders or a bidder, a board that used a DADW for a legitimate purpose should not panic. After all, longstanding Delaware precedent tells us the courts “do not intend to limit broad negotiating authority of [a board of directors] to achieve the

\begin{footnotes}
\item[289] See supra Part II.C.3.
\item[290] Walsh et al., supra note 1.
\item[291] See MORRISON FOERSTER: UNSOLICITED VIEWS, supra note 10, at 1 (explaining how the chancery court analogized one DADW provision to a no-talk clause in Phelps Dodge Corp. v. Cyprus Amax that created a legal equivalent of willful blindness).
\item[292] See supra Part II.
\item[293] See supra Part III.A.
\item[294] See supra Part III.B.
\item[295] See supra Part III.C.
\end{footnotes}
best price available to stockholders.” Don’t Ask, Don’t Waive provisions are part of the “panoply of devices” that a board may use to benefit its shareholders in a corporate auction, and they should be here to stay.297

297 See Macmillan, 559 A.2d at 1287 (“To properly secure that end may require the board to invoke a panoply of devices, and the giving or receiving of concessions that may benefit one bidder over another.”).