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DELAWARE LAW ALERT: COURT OF CHANCERY ORDERS SPECIFIC PERFORMANCE IN ACQUISITION OF A COMPANY APPROACHING INSOLVENCY

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On March 24, 2025, Chancellor Kathaleen McCormick of the Delaware Court of Chancery issued a post-trial opinion in *Desktop Metal, Inc. v. Nano Dimension Ltd.*,[1] ordering the parties to comply with a merger agreement and close a transaction to consummate Nano's acquisition of Desktop Metal. The decision offers a helpful case study of a deal involving a financially distressed target company's successful effort to force a buyer to close a merger where the buyer failed to use reasonable best efforts to close.

DEAL CONTEXT

The target, Desktop Metal, was a public company that made industrial-use 3D printers that created specialized parts for missile defense and nuclear capabilities. Prior to deal negotiations and increasingly after the merger agreement was signed, Desktop Metal was experiencing a financial decline. At the time of the merger negotiations, the company had added a going-concern qualification to its quarterly SEC filing. Over the two preceding years, the company had been undertaking aggressive cost-cutting measures, including efforts to extend payables, increase collection of receivables, consolidate its locations, and reduce its workforce.

Nonetheless, the buyer's board unanimously approved the merger with the target, and the parties executed the merger agreement. Because the target was a US government contractor, the parties anticipated review and approval of the transaction by the Committee on Foreign Investment in the US (CFIUS) as a condition to closing, which could potentially slow the acquisition. As Desktop Metal was concerned about having enough cash to get to closing, particularly given anticipated regulatory delays, it secured Nano's agreement to use reasonable best efforts to close as soon as reasonably possible, in addition to a "hell or high water provision" requiring that Nano take all actions necessary to obtain CFIUS approval. In addition, the agreement provided that the parties would negotiate a bridge loan by which the buyer would extend credit to the target in case the regulatory approvals pushed out the closing. Nano also negotiated for certain protections related to Desktop Metal's potential bankruptcy, in addition to certain covenants requiring the target to, among other things, maintain its business in the ordinary course, and maintain its policies and procedures regarding receivables and payables.

In the meantime, a major stockholder of the buyer had opposed the transaction and launched a proxy contest. The stockholder advocated for terminating the transaction and acquiring components of the target out of bankruptcy. The stockholder gained board seats, and at this time, the buyer began to deliberately delay its efforts in obtaining CFIUS approval, specifically by delaying the negotiation of a national security agreement (NSA) required by CFIUS. The stockholder won additional board seats and eventually took control of the board when the remaining directors resigned.

With the CFIUS review stalling over protracted NSA negotiations, in which the buyer appeared to be either non-responsive or moving backwards, the target sued for breach and specific performance, moving to expedite the case. The buyer asserted counterclaims, and in the interim continued to stall the negotiation of the NSA. After expedited discovery and trial, the Delaware Chancery Court determined that the target was entitled to specific performance and ordered the buyer to execute the NSA within 48 hours and otherwise comply with all of its obligations under the merger agreement.[2]

KEY TAKEAWAYS

Although the relevant provisions are discussed in more detail below, we highlight here a few high-level takeaways for transactions involving distressed target companies.

Target's Deal Protections: The court praised the outcome in this case as a "victory for deal certainty." For the target company, this victory hinged on a few key specifically bargained-for provisions.

- *The detailed reasonable best efforts clauses and CFIUS hell or high water provisions were key in preserving the deal.* The buyer identified the CFIUS process as the deal's weak point, believing it could tactically slow the process until the target entered insolvency. Of particular benefit to the target was the detailed nature of the hell or high water provision. Although the seller granted the buyer an exception if CFIUS required the buyer to relinquish control over a portion of the target accounting for 10% or more of revenues, this exception was narrowly tailored and would not apply with respect to a number of common requirements CFIUS would impose (such as certain manufacturing and software requirements that could theoretically reduce the buyer's control of the post-closing target). In litigation, the buyer claimed the 10% carveout applied, but the target was able to rebut these claims thanks to the detailed limitations in the provision.

Also, as discussed in greater detail below, these provisions helped prove that the target was entitled to specific performance. Once established that the buyer had breached these covenants and engaged in tactical delay, the court determined that equities balanced in favor of the target. In addition, the buyer's breach helped the target establish the prevention doctrine as a defense to the buyer's counterclaims of breach. The court held that, by establishing the buyer's breach of the hell or high water and reasonable best efforts covenants, the target had shown that the buyer's delay had materially contributed to the potential failure of the no-bankruptcy closing condition.

- *The specific performance provision was central to the court ordering the merger to close.* Because these two sophisticated deal parties had stipulated to specific performance in the merger agreement, the buyer's only defense was to claim that the equities favored not enforcing the agreement. Once the court determined that the buyer had breached its efforts covenants by slow-rolling the CFIUS process, this became a difficult argument for the buyer to win.

Buyer's Lines of Attack: The buyer in this case was not in a strong position to terminate the transaction, but we note those claims that probably provided the most promising grounds for termination.

- *The buyer nearly proved that the no-bankruptcy condition had failed*. Perhaps the buyer's strongest argument was that the buyer was insolvent. Importantly, though, the target had negotiated for a very carefully worded no-bankruptcy condition. The target had avoided including a solvency representation in the merger agreement, and the no-bankruptcy condition gave the buyer an opening to terminate only if it could identify *a written admission* that Desktop Metal could not pay its debts as they matured. Fortunately for the target, although there was extensive fact and expert evidence concerning the target's financial peril, there was no "smoking gun" written admission. The court held that forward-looking statements about insolvency did not qualify.

A distressed target company should be aware of the record it is creating. The buyer scoured the target's public filings, internal communications, discussions with customers and suppliers, and statements made to CFIUS for evidence of insolvency. A wrong statement in any of these materials could have given the buyer grounds to terminate. The court noted that the target appeared to have very carefully crafted its written statements to avoid breaching the no-bankruptcy condition.

- *The ordinary course conduct covenant gave the buyer another opening*. Although the buyer failed to prove that the ordinary course covenants were breached, the covenants were broad, allowing the buyer to search the target's operations for evidence of material changes in business conduct, especially among key personnel, customers, and suppliers. The buyers also targeted changes in collection and payables policies. The target required extensive expert analysis in these areas to prove that it had not made or experienced any material changes. Sellers should take care to avoid making material changes in these areas after signing.

THE AGREEMENT TERMS AND HOW THEY PLAYED OUT

Below are the key provisions from the merger agreement at issue, along with a brief summary of the parties' claims with respect to each and how they stood up in litigation.

1. REGULATORY APPROVAL COVENANTS

As a general matter, the parties agreed to use their "reasonable best efforts" to close the merger as soon as reasonably possible and to resolve any objections asserted by a governmental entity. Notably, for CFIUS approval, the buyer agreed to a "hell or high water" provision, by which it would take all action necessary to receive CFIUS approval, including providing assurances, entering into a national security agreement (NSA) or similar arrangements.

However, as a proviso to these obligations, the buyer was not obligated to close if any condition of CFIUS approval would effectively prohibit the buyer's board from exercising control over any portion the target's business that, in the aggregate, constituted more than 10% of revenue during certain periods (the "10% Carveout"). This limitation was pared back in a further proviso—the 10% Carveout would not apply to certain potential government remedies listed in the disclosure schedules. In other words, the buyer would still be obligated to close if CFIUS imposed any of the listed remedies (the "Permitted Remedies"). The Permitted Remedies included, among other things, CFIUS requirements regarding sensitive information; access to certain technology, facilities, and information; security protocols for products sold to the US government; and assurance of supply continuity and certain rights triggered upon changes to the target's business.

How the Provision Stood Up in Litigation

Target's Argument: The target claimed that that the buyer breached the regulatory approval covenants.

Legal Principles: The opinion did not offer specific guidance on the hell or high water provision, but it did provide some gloss on "reasonable best efforts," noting that it requires a party to "take all reasonable steps to solve problems and consummate the transaction" and to take "appropriate actions to keep the deal on track," including "engaging in forthright discussions with the counterparty." In addition, "[g]ood faith is relevant. A party cannot go looking for a way out of its deal."

Holdings:

- The buyer breached the hell or high water covenant. After the major stockholder took over the buyer's board, it identified the CFIUS approval process as a possible route to terminating the merger. By obstructing the NSA negotiations through delay and backtracking, the buyer did not act like a party taking all actions necessary to obtain CFIUS approval.
- The 10% Carveout did not apply. Although CFIUS would require certain restrictions on the manufacturing locations for US government products and on the use of certain remote access software, these limitations, even if constituting "control," affected products accounting for less than 10% of revenue. In addition, even if the 10% Carveout were to apply, the NSA limits were within several of the Permitted Remedies. Finally, the court noted that several of the positions the buyer took in the litigation did not align with the facts or timeline of negotiations and appeared manufactured for litigation.

- The buyer also breached its obligation to use reasonable best efforts to close as soon as reasonably possible by intentionally delaying the CFIUS approval.

2. NO-BANKRUPTCY CLOSING CONDITION

The no-bankruptcy closing condition provided that, as a condition precedent to the buyer's obligations, the target and its subsidiaries had not "experienced a Bankruptcy." A "Bankruptcy" would occur when the target "admits in writing its inability to pay its debts as they mature."

How the Provision Stood Up in Litigation

Buyer's Argument: The buyer claimed that this condition had failed. It relied on expert testimony that the target's public statements, internal statements, and vendor communications indicated that the target's past-due debts exceeded its available cash. In addition to the expert report, the target had pressed CFIUS to act quickly due to the severity of its financial situation and had retained bankruptcy counsel. Essentially, the buyer was arguing that the target was insolvent, but the merger agreement did not include a solvency representation or covenant.

Target's Argument: The condition did not fail because the target did not state in writing that it could not pay its debts as they matured. But even if the condition failed, the failure was excused under the prevention doctrine because the buyer contributed to the failure by delaying the closing in breach of the merger agreement.

Legal Principles: The court applied a strict reading of the text of the provision in the merger agreement and required a contemporaneous written admission by the target. As to the prevention doctrine, the court explained that when "a party's breach by nonperformance contributes materially to the non-occurrence of a condition . . . , the non-occurrence is excused." The non-breaching party must prove by a preponderance of the evidence that the other party's breach "contributed materially to the failure of the condition by making its satisfaction less likely." The doctrine requires a showing of deliberate action, although bad faith is not required. The prevention doctrine does not apply if the condition would have failed regardless of the non-performance.

Holdings:

- The buyer did not present sufficient evidence that the condition had failed. The court concluded that the evidence was a close call ("almost equipoise")—there was no doubt that the company was experiencing financial difficulties and that the risk of bankruptcy was increasing. However, there was no evidence of a specific admission as to the present (as opposed to forward-looking) inability to pay debts.
- Even if the buyer could prove the condition had failed, the prevention doctrine applied because the buyer materially contributed to the circumstance by intentionally delaying CFIUS approval until the target was forced into bankruptcy in breach of the merger agreement.

3. OTHER CLOSING CONDITIONS

The merger agreement also conditioned the buyer's obligation to consummate the merger on the target performing its covenants in all material respects. The covenants at issue included the following:

- **Ordinary Course Covenant Closing Condition.** The target agreed to an ordinary course conduct covenant, by which it would use commercially reasonable efforts to (1) "conduct its business in the ordinary course consistent with past practice in all material respects" and (2) keep available the services of its current officers and key employees and maintain relationships with key customers and suppliers.

How the Provision Stood Up in Litigation

Buyer's Argument: The buyer claimed the target had breached this covenant by:

- Allowing 10% of its workforce to leave without using commercially reasonable efforts to retain them;
- Failing to maintain relationships with customers and suppliers by suspending payments to vendors and employing aggressive collections efforts with customers; and
- Failing to conduct a 2024 audit and file its Form 10-K.

Holdings: The buyer failed to prove a breach. Notably:

- Because the buyer was involved in employee retention plans, it could not claim the efforts were commercially unreasonable. In addition, the buyer did not claim the employee losses related to officers or key employees, and its 10% figure did not account for new hires.
- Although the target was negotiating payment with vendors and customers, the buyer did not provide evidence of termination or change in the relationships. The buyer also failed to establish which relationships were "key" relationships.
- The parties expected the merger to close by the end of 2024 and planned to work with the buyer's auditor. The buyer was aware of this and agreed that it would not be reasonable under such circumstances for the target to engage an auditor as the transaction was expected to close before the Form 10-K would be due.

- **Receivables/Payables Covenant Closing Condition.** The agreement also included an interim covenant relating to accounts receivable and accounts payable. Prior to closing, the target could not change the existing credit, collection, or payment policies, procedures, or practices regarding accounts receivable and accounts payable.

How the Provision Stood Up in Litigation

Buyer's Argument: The buyer claimed the target breached this covenant because aggregate data for the target's last three quarters showed a material slowing in payables and a drastic increase in collection efforts. Internal communications also showed efforts to produce these results.

Holdings: The buyer failed to prove a breach. Generally, the buyer based its assessment on a few quarters of data, but the longer-term data presented by the target's expert showed that the payment and collection rates were in line with prior periods. Likewise, internal communications generally reflected a consistent approach to receivables and payables and not a change in policy.

- **Transaction Expense Covenant Closing Condition.** Another interim covenant related to the target's transaction expenses. The target could not incur transaction expenses over $15 million. Transaction expenses were defined to include (1) all fees, costs, and expenses incurred or payable by the target at any time in connection with the transaction and (2) the fees and expenses of legal counsel in connection with the agreement or the consummation of the transactions.

How the Provision Stood Up in Litigation

Buyer's Argument: Although the target had incurred only about $13 million in transaction expenses, the buyer claimed that, when the litigation fees and expenses incurred in connection with the merger were included, the total exceeded the $15 million limit.

Holdings: While acknowledging that the covenant may be subject to multiple interpretations, the court held that the buyer's interpretation was not tenable because it would effectively cut off the target's litigation budget while allowing the buyer to zealously enforce the merger agreement (the court noted the buyer had spent over $17 million so far). Even if the buyer's interpretation were adopted, the prevention doctrine would not allow the buyer to terminate the agreement. The target incurred litigation expenses as a result of the buyer's breaches, and the buyer should not be allowed to benefit from its own breach.

4. SPECIFIC PERFORMANCE

The agreement included a fairly typical specific performance provision, by which the parties acknowledged that money damages would not be an adequate remedy for non-performance or breach and that the parties would be entitled to injunctive relief to prevent breaches of the agreement and to enforce specifically the performance of its terms.

How the Provision Stood Up in Litigation

Target's Argument: As a remedy for the buyer's breach of the hell or high water provision and the reasonable best efforts provision, the target sought specific performance to require the buyer to consent to the NSA and other actions necessary to obtain CFIUS approval.

Legal Principles: Specific performance is appropriate when (1) a valid contract exists; (2) the plaintiff is ready, willing, and able to perform; and (3) the balance of equities tips in the plaintiff's favor. Specific performance is appropriate where the parties stipulate to such relief, unless the party opposing specific performance meets its burden of proving that the equities balance in its favor.

Holdings: The court held that the specific performance clause was sufficient to deem specific performance an appropriate remedy for the buyer's breach. Further, the equities favored specific performance because:

- The buyer's failure to take actions required to close created uncertainty for the target's customers, suppliers, and employees.
- There were "significant national security repercussions" if the transaction did not close.
- There was no evidence of harm to the buyer if the court enforced the buyer's obligations under the hell or high water and reasonable best efforts provisions.

The court ordered the buyer to agree to and execute the NSA in the form proposed by CFIUS within 48 hours, pay the full merger consideration, and perform its obligations under the merger agreement.

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ENDNOTES

[1] C.A. No. 2024-1303-KSJM (Del. Ch. March 24, 2025, McCormick, C.).

[2] Order and Partial Final Judgment, C.A. No. 2024-1303-KSJM (Del. Ch. March 24, 2025, McCormick, C.).