Fried Frank

M&A/PE Quarterly

Fried Frank's quarterly roundup of key M&A/PE developments

December 2023

IN THIS QUARTERLY: We discuss key Delaware decisions issued during this last quarter of 2023 and then provide our fifth annual end-of-the-year summary of "Where Things Stand" in the M&A/PE world. We wish all of our clients and friends the very best for 2024.

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PE Firm, by Operating Related Businesses in Other Portfolio Companies, May Have Violated Fiduciary Duties and Implied Covenant of Good Faith—Malt v. 777 Partners

In *Malt v. 777 Partners* (Nov. 13, 2023), the Delaware Court of Chancery held that the parties' agreements did not specify any obligation of 777 Partners, a private equity firm, to operate all of its aviation-related businesses through its portfolio company Phoenicia LLC (the "Company"). The court held, however, that 777 Partners may have breached its fiduciary duties to the Company and its members, and may have breached the implied covenant of good faith in the Company's operating agreement, by operating two newly acquired aviation-related businesses not through the Company but through other portfolio companies.

Key Points

- **The decision highlights that any restrictions requiring a PE firm to operate a line of business only through a particular portfolio company should be expressed specifically and unambiguously.** In seeking to ensure the effectiveness of such restrictions, the parties generally should not rely on the "purpose clause" in a portfolio company's operating agreement, nor on general fiduciary or implied good faith principles, to indicate any such restriction.
- **The decision serves as a reminder that default statutory fiduciary duties will apply to an LLC manager or controller unless specifically and unambiguously waived or amended in the operating agreement.** Importantly, a private equity firm may be vulnerable to claims by members of its portfolio companies for usurpation of corporate opportunities if the portfolio company's operating agreement is not drafted clearly enough to eliminate default fiduciary duties.

Background. In late 2018, 777 Partners formed the Company to acquire two aviation-related companies from Timothy O'Neil-Dunne and other sellers. O'Neil-Dunne, the Company, and 777 Partners entered into: a stock purchase agreement, pursuant to which O'Neil-Dunne and the other sellers received sale consideration in cash and Company stock; an LLC Operating Agreement for the Company; and an Employment Agreement pursuant to which O'Neil-Dunne was employed by 777 Partners and received warrants for Company stock that vested based on the Company's reaching specified post-closing milestones over a four-year period.

In early 2021, O'Neil-Dunne discovered that 777 Partners had recently acquired two new aviation-related business lines (together, the "Jet Leasing Business") and was not operating them through the Company but though other portfolio companies. O'Neil-Dunne brought suit, alleging that there had been pre-stock-purchase-agreement promises, as well as provisions in the stock purchase agreement requiring, that all of 777 Partners' aviation-related businesses would be operated exclusively though the Company. Vice Chancellor Morgan T. Zurn held, at the pleading stage of litigation, that, although the parties' agreements did *not* specify any such obligation of 777 Partners, 777 Partners may have breached its fiduciary duties to the Company and its members, and may have breached the implied covenant of good faith, by usurping corporate opportunities from the Company.

Discussion

Purpose clause was not violated. The court rejected the plaintiff's argument that 777 Partners' conducting aviation-related businesses through portfolio companies

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other than the Company violated the "purpose clause" of the Company's Operating Agreement. The purpose clause stated that the Company's purpose was to engage in aviation-related businesses (the "Company Business") and to engage in all other lawful activities; and that O'Neil-Dunne would conduct the Company Business only through the Company. The court found nothing in the provision that restricted 777 Partners to engaging in aviation-related only through the Company. The court explained that a limited purpose clause generally is viewed as restricting the company, not its members, and does not itself restrict a company from competing with its own members. Here, there was no claim that *the Company* acted outside its lines of business as enumerated in the purpose clause.

Corporate opportunities provision was not violated. The court also rejected the plaintiff's argument that 777 Partners' conducting aviation-related businesses through portfolio companies other than the Company violated the "corporate opportunities" provision of the Company's Operating Agreement. The corporate opportunities provision stated that the Company's managers and its affiliates could engage in other businesses and activities and that the Company and its members would have no right to participate therein, but that, notwithstanding the foregoing, fiduciary duties of the managers and its affiliates to the company and its members would continue in effect with respect to such other business interests and activities. The court found that, based on the "notwithstanding" provision, it was "clear that the parties did not intend to waive fiduciary duties relating to usurpation of 'other business interests and activities.'"

Fiduciary duties may have been violated. The court agreed with the plaintiff, however, that, by conducting aviation-related businesses outside Phoenicia, 777 Partners may have breached its fiduciary duties to the Company and its members by usurping the Company's corporate opportunities. The court held that, at the pleading stage, it was reasonably conceivable that, as the Operating Agreement did not expressly waive fiduciary duties of the Company's managers or controllers, and indeed made it clear that such fiduciary duties remained in place with respect to other business interests and activities, 777 Partners may have violated its duty of loyalty by usurping corporate opportunities from which the Company could have benefited.

Implied covenant of good faith may have been violated. The court also held that, by conducting aviation businesses outside Phoenicia, 777 Partners may have breached the Operating Agreement's implied covenant of good faith. The court stated that it was unable to dismiss the claim of breach of the implied covenant given the plaintiffs' "broad pleadings" and the defendants' failure to identify any contractual language specifically addressing the issue in dispute. Accordingly, noting that the implied covenant of good faith attaches to every agreement, the court concluded that the parties had provided "no foothold" from which to grant the defendants' request to dismiss the implied covenant claim on the grounds that it was duplicative of the contract claims.

Earnout obligation may have been breached. The court also held that, by conducting aviation businesses outside the Company, the Company may have breached its earnout obligation. The acquisition agreement provided that, if certain financial targets were reached post-closing, additional consideration would be due to the plaintiff and the other sellers. The targets were not met. The plaintiff argued that the targets would have been met had the acquired aviation businesses not been operated outside the Company. The court held that, at the pleading stage, it was reasonably conceivable that, if the defendants' fiduciary duties and/or implied covenant of good faith had not been breached, the targets may have been met and the earnout payment thus would be due.

Corporate governance obligations may have been breached. The court also held that the Company may have breached the Operating Agreement by failing to hold board meetings at least quarterly; to submit and approve an annual budget; and to consult with the board about certain actions. The defendants did not dispute that the Company was obligated to take these actions and had not taken them. They contested the claim, however, on the basis that the plaintiff, as a manager of the Company, had the power to take, or at least to request, the very actions he complained the Company did not take. The plaintiff responded that he did not have authority to take unilateral action for the Company. The court held that, at the pleading stage, "the fact that the parties agreed that these actions were required and were not taken is sufficient to state a claim for breach."

Practice Points

- **Need for clear restrictions with respect to operating the same or similar businesses exclusively through a particular portfolio company.** Although the court in this case let the portfolio company's claims survive based on general principles of fiduciary duties and the implied good faith covenant, to ensure the effectiveness of such restrictions, the parties should set them forth expressly, clearly and specifically.
- **Need for clear and unambiguous waiver of fiduciary duties.** Fiduciary duties of LLC managers and controllers can be waived or tailored, but only to the extent expressly set forth in the operating agreement. To protect against claims of

usurpation of corporate opportunities of a portfolio company, the operating agreement should state clearly and specifically the extent, if any, to which a particular line of business is to be run only through the portfolio company.

PE Executive Who Left to Work at Another PE Firm Did Not Breach the Non-Compete Provisions in the Funds' Operating Agreements—Brown v. Court Square Capital

In *Brown v. Court Square Capital Management* (Dec. 15, 2023), the Delaware Court of Chancery held that Kevin Brown—who had left private equity firm Court Square to join MSD Capital (a competitor of Court Square), and then advised MSD on two potential investment opportunities that Court Square had been considering—did not violate the terms of the non-compete provisions in the LLC Agreements governing the funds managed by the firm in which he was a member.

Key Points

- **The court interpreted the non-compete provisions narrowly.** The court was unwilling to apply a broader interpretation given that Court Square could have, but did not, craft the non-compete provisions more clearly, directly and specifically to so provide. Although the court relied on the express language of the provisions to reach its conclusion, the decision is consistent with the general current environment of increased skepticism toward non-compete restrictions.
- **The case underscores the potential for contractual uncertainty to arise based on the *interrelationship* of provisions.** Although the court held that the non-compete provisions were unambiguous as drafted, certain provisions appeared to be potentially inconsistent with others, which created the dispute.

Background. Brown, while an employee and partner at Court Square Capital Management, was a member of and granted carried interest in certain funds managed by Court Square. The LLC Agreements governing the funds provided that employees who departed Court Square (i) would continue to be entitled to receive their "carried interest" in the funds and (ii) would be subject for one year to certain "Non-Compete Provisions." Brown departed Court Square to join MSD Capital (a competitor of Court Square). He continued to receive carried interest payments from Court Square for years after his departure. Then, after several employees had left to join Brown at MSD, Court Square, apparently fearing a mass exodus of employees, ceased making carried interest payments to Brown and the other departed employees. Brown and the other departed employees sued to obtain the payments. Court Square counterclaimed, alleging that the plaintiffs had breached the Non-Compete Provisions; and sought a declaratory judgment that, as a result, the plaintiffs were not entitled to continued carried interest payments. The other employees settled with Court Square, but Brown did not. After a two-day trial, Chancellor McCormick held in Brown's favor on all of the claims and counterclaims.

Discussion

The non-compete provision. The LLC Agreements stated as follows with respect to members who departed Court Square ("Terminated Members"):

(i) A Terminated Member shall not acquire any direct or indirect equity interest in any entity listed on the "Deal Sheet" delivered by Court Square to the member at the time of the departure. (The Deal Sheets list entities which, at the time, Court Square is actively considering as a potential investment to become a portfolio company ("Investment Opportunities")).

(ii) Notwithstanding (i) above, the Non-Compete Provisions shall not be construed, in and of themselves, as prohibiting a member from obtaining employment with or investing in any fund or entity engaged in activities similar to Court Square.

(iii) For purposes of (ii), a Terminated Member will be deemed to have acquired an indirect interest in an Investment Opportunity if he receives "any form of direct or indirect fee, payment or other compensation based on the rendering of investment advice to a third party regarding such Investment Opportunity."

The alleged violation of the non-compete provision. When Brown departed, the Deal List that Court Square delivered to him included on the list of Investment Opportunities companies called Hayward Industries and Zodiac Pools. Brown advised MSD on both of these companies, and MSD (with Brown leading the deal team) acquired Hayward. Court Square contended that Brown's salary and bonus from Capital represented "compensation based on the rendering of investment advice" to MSD

regarding these two Investment Opportunities on the Deal List—and thus that, under the non-compete provision, Brown was deemed to have acquired an equity interest in those Investment Opportunities, in violation of the non-compete provision.

The court's interpretation of the non-compete provision. The court rejected Court Square's argument that, under the terms of the non-compete provision, Brown's salary and bonus were compensation that constituted the acquisition of an equity interest in Hawyard and Zodiac.

First, the court read the non-compete provision, when pared down, as providing simply that Brown could not, for one year, "acquire an interest in an Investment Opportunity." The court wrote: "It does not categorically prohibit Brown from working for a competitor. Nor does it prohibit Brown from advising a competitor regarding an Investment Opportunity. Rather, the language narrowly defines the prohibited conduct to acquiring an interest (directly or indirectly) in an Investment Opportunity." That "narrow definition," the court reasoned, was consistent with the provision stating that the non-compete provision in no event should be construed as prohibiting a member from obtaining employment with or investing in a fund or any entity involved in similar activities as Court Square.

Second, the court rejected Court Square's contention that Brown's salary and bonus from MSD were "based on" rendering investment advice concerning Investment Opportunities because he was hired to identify and pursue potential acquisitions like Zodiac and Hayward. The court stated that this argument might have validity if Brown's salary or bonus had been tied to MSD's successful investment in Zodiac or Hayward—but his salary and bonus were *not* tied to any Investment Opportunity. Under his employment agreement with MSD, he would have been paid the same regardless of the number of deals he worked on and regardless of whether the deals included Zodiac or Hayward.

Third, the court reasoned that, had Court Square wanted to prohibit Brown from working on an Investment Opportunity, or from working for a company that pursued an Investment Opportunity, "it could have crafted language tailored to prohibit that conduct." Instead, the court wrote, Court Square "narrowly defined the prohibited conduct in terms of an acquired interest."

The confidentiality provisions. The LLC Agreements also contained usual confidentiality provisions, which required that Terminated Members not make accessible to others information "that is not generally known to or available for use by the public," including, among other information and materials, those relating to business methods, processes, prospective investments, and other proprietary information.

The alleged breach of the confidentiality provisions. Court Square argued that Brown breached the confidentiality provisions by requesting and receiving the HUMs, as the HUMs contained information not generally known to or available for use by the public—specifically, third-party information drawn from confidential information memoranda received pursuant to NDAs; and Court Square's analyses and conclusions regarding investment opportunities.

The court's interpretation of the confidentiality provisions. The court rejected Court Square's argument that the HUMs contained confidential information; and concluded that, even if there had been a breach of the confidentiality provisions, the breach was only a minor one. The court noted, first, that the financial information in the HUMs was widely circulated among private-equity firms and would have been easily accessible to anyone in Brown's position—in addition to which Brown himself had developed "the strategies and angles" reflected in the HUMs, "raising questions as to whether that information was confidential as to Brown." The court stated, however, that it did not need to reach the merits of the confidentiality breach claim because Court Square did not argue that Brown's alleged breach of the Confidentiality Provisions was material or had resulted in any harm to Court Square. The court wrote: "Brown used these memos, which he co-authored, containing stale information for companies that were no longer on the market, as templates. Neither MSD nor Brown ever considered investing in the seven HUM companies.... If Brown's actions constituted breach, then it was exceptionally minor and did not permit Court Square to abandon performance [of its obligation under the LLC Agreements to pay Brown carried interest]."

Practice Points:

- **Clarity in drafting non-compete provisions.** In *Brown*, the drafters of the LLC Agreements should have recognized the potential inconsistency, within the non-compete provision, between (a) the part stating that any payment or compensation based on rendering investment advice to a third party on an Investment Opportunity constituted the acquisition of an equity interest in the Investment Opportunity and (b) the part stating that nothing should be construed as prohibiting employment by a competitor. We note that, particularly in the current general environment of increased judicial and other

skepticism toward non-compete restrictions, the courts are not likely to reach to interpret non-compete provisions more broadly than the specific, express language clearly mandates.

- **Focus on confidentiality provisions.** Given the environment of skepticism surrounding non-compete restrictions, as well as actions that have been taken and are being considered by state legislatures and federal regulatory authorities to restrict non-compete protections, employers should consider crafting *confidentiality* provisions to provide the maximum possible level of protection against unfair competition. *Brown* underscores that a court will be less inclined to enforce confidentiality provisions if the company itself has not made a serious effort to protect the information. In the case of confidential information obtained by a PE firm from third parties under NDAs relating to potential investments, which was at issue in *Brown*, the firm should have in place and effectively implement policies and practices to track what NDAs have been entered into and which have expired; to segregate and restrict access to such information; and to destroy or archive the documents and materials after the firm ceases to consider the investment.

Other Decisions of Note Issued in Q4 in 2023

Court of Chancery Focuses on "Unsustainable Trend" of Including Restrictive Covenants in LLC Agreements—*Sunder Energy v. Tyler Jackson* (Nov. 22 and Dec. 22, 2023)

In *Sunder*, the Court of Chancery found unenforceable, and declined to blue-pencil, restrictive covenants in an LLC operating agreement on the basis that they were overbroad. The covenants were applicable to holders of "Incentive Units" of the LLC for so long as the units were held and two years thereafter. Vice Chancellor J. Travis Laster held that the covenants were overbroad, as they (i) applied not only to the holder of the units but the holder's "Affiliates," defined to include the holder's spouse, parents, siblings and descendants; and (ii) were potentially of "perpetual" duration because the unitholder was not entitled to transfer them (while the company could, but did not have to, elect to acquire them for zero dollars).

In a subsequent decision in *Sunder*, the Vice Chancellor granted the company's request to recommend that the Delaware Supreme Court accept an interlocutory appeal of the earlier decision. The Vice Chancellor acknowledged that "[f]rom a big picture standpoint, it does seem like more recent Delaware decisions have been less likely to enforce the full scope of restrictive covenants and related provisions designed to protect them from challenge (such as stipulations as to reasonableness and blue-penciling requirements)." The Vice Chancellor stated that: "If the Delaware Supreme Court wants this court to afford less significance to context, defer to provisions designed to protect covenants from challenge, enforce broad restrictive covenants as written, and generally prioritize contract law over equity in this setting, then it would be helpful to know that."

Also, in the later decision, the Vice Chancellor noted what he considers to be a "problematic and unsustainable trend" of LLCs organized in Delaware, but with operations based elsewhere, utilizing the "now widespread legal technology" of inserting restrictive covenants into internal governance documents. The practice has arisen so that such businesses "can invoke Delaware's contractarian regime and argue that it should override how other jurisdictions regulate restrictive covenants." As a result, Delaware courts are called on "to adjudicate post-employment disputes for the country and potentially the world." The Vice Chancellor noted that he has been speaking about the troubling trend of a growing "flow of restrictive covenant cases" since 2020. The Vice Chancellor noted that just in the past five years, the Court of Chancery has issued written decisions addressing disputes over restrictive covenants for LLCs organized in Delaware but with the operations based in Hong Kong, Italy, Alabama, Arizona, California, Colorado, Idaho, Illinois, Louisiana, Nebraska, New Jersey, New York, Oklahoma, and Texas. Only two businesses bringing such suits operated in Delaware. "Entertaining restrictive covenant cases from far and wide" generates more work, requires more resources, and detracts from the court's core mission to resolve internal governance disputes for Delaware entities, the Vice Chancellor wrote. Moreover, he stated, "[t]he factual issues are difficult because they frequently involve assertions about surreptitious activity and betrayal, and the discovery disputes regularly involve questions about spoliation. The legal questions are equally complex because they require determining what law applies, parsing dense contractual clauses, and balancing competing interests." The Vice Chancellor posted his discussion in *Sunder* of this problematic trend on his Linked-In account and advocated for amendment of DGCL § 2707 ("Agreements not to compete") to address the problem.

In response to these developments reflecting increased uncertainty about the enforceability of non-competes in some circumstances, companies should consider pursuing backstop strategies to protect against unfair competition—such as by bolstering confidentiality and/or customer non-solicitation agreements; leveraging protections available under federal and state trade secret laws; and utilizing alternative compensation structures. It should be kept in mind that: confidentiality obligations

may be less likely to be enforceable if the company itself has not guarded the confidentiality of the information; customer non-solicitation agreements may be less likely to be enforceable if they restrict the employee from soliciting customers based on public information rather than, more narrowly, based on customer information that may constitute a trade secret; and alternative compensation structures could include fixed-term employment agreements, "garden-leave" arrangements (that allow an employer to pay an employee not to work for a competitor while extending the employee's duty of loyalty through the leave period), and/or agreements providing for reimbursement by the employee to the company of training costs.

Court of Chancery Calls into Question the Enforceability of Lost-Premium Damages Provisions—*Crispo v. Musk* (Oct. 31, 2023)

So-called ConEd provisions, which have been included in merger agreements for almost two decades, state that, if a buyer wrongfully terminates a merger agreement and the target company seeks damages, the damages will include the merger premium lost to the target stockholders. In *Crispo*, the Court of Chancery, for the first time, indicated that these provisions may not be enforceable.

The court reasoned that such provisions may not be enforceable by the target company because it is the target *stockholders*, rather than the target company, that would have received the merger premium if the deal had not been terminated. The court reasoned, further, that such provisions may not be enforceable by the target stockholders either, *unless* they are third-party beneficiaries of the merger agreement (an impractical path), and perhaps even then only once the target company has exhausted the possibility of a specific performance remedy.

One response to the *Crispo* decision has been an effort to consider a possible amendment to the DGCL to provide a mechanism under which target company stockholders could appoint the target company as their agent to collect lost premium damages. Practitioners are also considering whether other merger agreement structures or provisions could effectively provide for lost-premium damages. See our Briefing, *Possible New Approaches to ConEd Provisions in Merger Agreements—In Response to Crispo v. Musk.*

Delaware Supreme Court Reverses Dismissal of *Caremark* Claims Against AmerisourceBergen for Its Role in the Opioid Crisis—*Lebanon County Employees' Retirement Fund v. Collins* (Dec. 18, 2023)

Reflecting Delaware's increased receptivity to *Caremark* claims in recent years, the Supreme Court reversed and remanded the Court of Chancery's decision below that had dismissed *Caremark* claims against directors and officers of AmerisourceBergen in connection with the company's role in the opioid crisis in the U.S.

The plaintiff claimed that AmerisourceBergen directors and officers breached their oversight duties by fostering a culture of noncompliance with laws and regulations relating to the company's opioid sales (a so-called "*Massey* claim") and by repeatedly ignoring clear evidence of widespread illegal sales by the company (a so-called "Red Flags claim"). The company had suffered billions of dollars of fines, possible loss of its drug distribution licenses, and other harm. The Court of Chancery had concluded that it was reasonably conceivable that "the avalanche of investigations and lawsuits" against the company (representing "a staggering number of red flags…over an extensive period of time"), when combined with the litigation settlement the company ultimately entered into (which resulted in reforms to the company's systems and oversight relating to its opioid sales) supported well-pled *Caremark* claims. At the same time, the Court of Chancery concluded that it was *also* reasonably conceivable that the company *had* substantially complied with its obligations relating to sales of opioids.

The Court of Chancery decided to dismiss the claims, however, based on a West Virginia federal court's factual findings in opioid-related multidistrict litigation against the company, on the basis of which the West Virginia court decided that the plaintiffs in that case had not proved that the company had failed to comply with its regulatory obligations. In light of that ruling, the Court of Chancery determined, it was "impossible" to infer that the company had breached its oversight duties. Therefore, the court held, as the company's directors did not face a likelihood of liability on the *Caremark* claims, demand by the plaintiffs on the board for the board to bring the derivative *Caremark* claims would *not* have been futile and so was not excused.

On appeal, the Supreme Court held, first, as a matter of first impression, that it was not permissible for the Court of Chancery to have relied so heavily on the findings of another court on matters of fact (as opposed to matters of law) where the facts were reasonably in dispute between the parties. Second, the Supreme Court, in its *de novo* review, and not taking the West Virginia court's fact-finding into account, concluded that the pleading-stage record supported a reasonable inference of breach of the

oversight duties—and therefore that demand by the plaintiffs on the board to bring the *Caremark* claims *would* have been futile and so was excused. Third, the Supreme Court agreed that the pleading stage record conceivably supported *both* an inference of a failure of oversight duties and *also* an inference of substantial compliance with oversight duties. Accordingly, the Supreme Court reversed the lower court's dismissal of the *Caremark* claims and remanded the case for discovery, and if necessary a trial, to determine "which set of inferences prevails."

Court Confirms High Bar to Successful Pleading of *Caremark* Claims Against Officers—*Segway v. Cai* (Dec. 14, 2023)

In *Segway*, the court addressed officers' potential liability under *Caremark*—for the first time since the court established earlier this year in *McDonald's* that corporate officers have oversight duties under *Caremark*.

The court definitively confirmed that the same high bar to successful pleading of a Caremark claim against a director also applies to pleading such a claim against an officer. Vice Chancellor Lori W. Will stated that, although it was established in *McDonald's* that an officer's oversight duties under *Caremark* are "context-specific" and generally limited to matters within the scope of the officer's corporate responsibilities, that framework does *not* "craft a lower standard for oversight claims brought against officers" as compared to directors. Further, the court emphasized the generally high bar to successful pleading of *Caremark* claims given the requirement of bad faith conduct by the defendant, whether an officer or director.

Although the President of Segway allegedly had "consciously disregarded" financial discrepancies in her reports to the parent company about Segway's declining customer base and rising accounts receivable, the court held that there were no allegations from which it could reasonably be inferred that she had acted in bad faith. The court noted that Segway's allegations were not that the President had overlooked fraud, accounting improprieties or material legal violations, but that she had ignored matters relating to customers, sales, revenues, and accounts receivable that had come to her attention. "Such generic financial matters are far from the sort of red flags that could give rise to *Caremark* liability if deliberately ignored," the court wrote.

The decision reinforces the line of cases in which the court has dismissed *Caremark* cases on the basis that the alleged misconduct involved "classic business decisions" rather than red flags of noncompliance with law, as well as those cases dismissing *Caremark* claims on the basis that knowledge of and ignoring general risks does not equate to conscious disregard of the risk of a specific corporate trauma. For further discussion of the case and related practice points, see our Briefing, *Court of Chancery Confirms High Bar to Pleading Caremark Oversight Claims Against Officers*.

Buyer's Delays in Hiring New Scientists May Have Breached its Covenants to Use Reasonable Efforts and Good Faith to Achieve an Earnout—*FMLS v. Integris BioServices* (Oct. 30, 2023)

In a post-trial decision, the Court of Chancery held that the buyer's post-closing delays in hiring new scientists breached its contractual covenants to use "commercially reasonable efforts" to achieve an earnout and not to use "bad faith" to frustrate the earnout.

During the pre-acquisition discussions between the parties, two key scientists at the target company departed, and the buyer allegedly promised to prioritize the hiring of new scientists post-closing. The parties' agreement required that the buyer use "commercially reasonable efforts to ensure the Earnout Business will have access to funding, personnel, compensation for employees, and support as is reasonably necessary to operate the Earnout Business reasonably consistent with the manner in which the Earnout Business was conducted by Seller immediately prior to the Closing Date" (the "Efforts Obligation"). The agreement also required that the buyer not take actions, or omit to take actions, "in bad faith that would have the purpose or effect of avoiding or reducing any Earnout Payment" (the "Good Faith Obligation").

The agreement provided that: an earnout payment would be due five months after closing if revenues during that period reached a specified target; if the first earnout target was reached, then additional earnout payments would be due if additional specified revenue targets were hit in months six through eight; and, if those targets were reached, additional earnout payments would be due if additional specified targets were hit in months nine through eleven. If the first earnout target was not reached, no earnout payments would be due and the Efforts Obligation would not extend beyond the first five months post-closing.

In the first five months, revenue declined and the first earnout target was not reached. No earnout payments were made. Very soon thereafter, however, revenue surged. The seller sued, citing the buyer's failure even to put a recruitment team for new

scientists into place until two months after closing, and the buyer's failure to hire even one new scientist until four months after closing. The buyer argued that the Efforts Obligation was limited to ensuring the same support for the business that the business had had pre-closing—and that, as the business had gone months before the closing without hiring new scientists, the buyer could take a similar amount of time post-closing. The court disagreed with the buyer, reasoning that, at least at the pleading stage, the Efforts Obligation appeared to be meant by the parties as a protection toward ensuring achievement of the earnout rather than as a provision permitting the buyer to withhold support.

Further, the court found it reasonably conceivable, at the pleading stage, that the buyer, in delaying the hiring of new scientists, had acted with a bad faith intent to frustrate the earnout. The court cited the plaintiff's allegations that the buyer had waited to hire the first new scientist until two and a half months after having received his CV; and on two separate occasions had refused to engage recruiters the sellers had introduced to the buyer. The court also noted the almost immediate increase in revenue once the new scientists had been hired and trained—which, especially given the buyer's alleged pre-agreement promises to prioritize hiring new scientists, raised the inference that the buyer knew that hiring new scientists was critical for achievement of the earnout and that the buyer may have "intended to withhold support to cause [the acquired company] to miss its revenue targets."

Claims of Buyer's Breach of Its Efforts Obligation to Achieve Earnout Milestones Were Not Ripe Because the Earnout Period Had Not Yet Ended—*VT Shareholder Representative v. Edwards Lifesciences and Valtech Cardio* (Dec. 12, 2023)

The Court of Chancery held that sellers' claims that the buyer had breached its contractual covenant to use reasonable efforts to achieve earnout milestones during the 10-year earnout period were not ripe for judicial consideration given that the full 10-year period had not ended.

Edwards Lifesciences acquired Valtech Cardio pursuant to a merger agreement with a earnout arrangement. Edwards' primary product was PASCAL; Valtech's primary product was Cardioband, which was the main competitor to PASCAL. The merger agreement provided for payment by Edwards and Valtech, to the former holders of Valtech (the "Sellers"), of four earnout amounts, each contingent on the achievement of specified milestones relating to the development and net sales of Cardioband. The merger agreement provided that Edwards and Valtech would use "commercially reasonable efforts" to achieve each of the earnout milestones; and that, in the event of breach of the reasonable efforts obligations, any unearned earnout amounts would be payable immediately to the sellers even if the milestones had not been met.

In the first three years post-closing, the development efforts for Cardioband stalled and its annual net sales (between $3 million and $5 million) came nowhere close to the net sales milestone target (of $650 million). During that same time, Edwards emphasized the development of PASCAL and its sales increased dramatically. The plaintiff-Sellers' representative asserted that Edwards had acquired Cardioband to "shelve it and eliminate PASCAL's main competitive threat despite such a strategy directly violating the Merger Agreement." The plaintiff cited the defendants' failure to enroll more patients in studies needed for FDA approval of Cardioband and their focus on PASCAL's development as evidence of breach of their ongoing obligations to use reasonable efforts to achieve the milestones.

The Court of Chancery held that the plaintiff's claims were not ripe because the milestones still might be achieved by the end of the earnout period "in such a way that is commercially reasonable." In reaching this decision, the court distinguished the *Alexion* decision (2022), in which the court had held that claims of breach of an efforts obligation with respect to an earnout were ripe although the earnout period had not expired. The court observed the following distinguishing factors:

- The *Alexion* defendants conceded that their past conduct breached their efforts obligation (but argued that their future conduct could overcome the failures in the past conduct). By contrast, in *Edwards Lifesciences*, the defendants did not concede that their past conduct fell below the required efforts.
- In *Alexion*, there were also indemnification claims, with factual issues that overlapped the earnout issues—thus it arguably made practical sense to adjudicate the two sets of issues at the same time. In *Edwards Lifesciences*, there were no separate claims to be litigated that were tied to the earnout claims.
- Alexion ceased its efforts to achieve earnout milestones when the suit was filed—thus creating a "definitive point in which a Court [could] assess past actions for commercially reasonable efforts." In *Edwards Lifesciences*, while Edwards' efforts to achieve the earnout were alleged to have been below the threshold for reasonable efforts, the plaintiff did not allege that the efforts were completely abandoned or had ceased—thus, the efforts were ongoing and, the court stated, therefore

the claims were not ripe as the merger agreement provided that the milestones could be achieved at any time during the earnout period.

- The *Alexion* agreement did not contain the language that the *Edwards Lifesciences* agreement included that suggested that the buyer had until the last day of the earnout period to achieve the milestones. The *Edwards Lifesciences* agreement stated that the buyer would pay the earnout consideration amount upon completion of the milestones "on or prior to the last day of the Earnout Period." As the reasoning in *Alexion* was based on "the concession to a breach and the fact that the breach [was] based on past conduct," the court wrote in *Edwards Lifesciences*, the court "[could] not ignore the [*Edwards Lifesciences*] contract's explicit language to determine if, and when, a breach can occur."

Court Interprets an Acquisition Agreement to Restrict the Arbitrator from Considering Issues Raised in Notices Delivered After the *Initial* Dispute Notice—*Darling Ingredients v. Smith* (Dec. 11, 2023)

The Court of Chancery concluded that, under the parties' stock purchase agreement, the arbitration of disputed issues by an accountant had to be limited to matters raised in the seller's initial protest notice.

The parties' stock purchase agreement set forth a dispute resolution process that included the referral of certain matters to an accountant. Post-closing, the parties engaged an accountant to resolve a dispute that arose between them as to a closing adjustment to the purchase price, based on an agreed-upon tax model set forth in the agreement, to reflect an estimated tax benefit to the seller. The buyer calculated a final tax benefit amount that was below the parties' initial estimate (resulting in the sellers owing the buyer the difference). The sellers then had 30 days to issue a protest notice challenging the calculation. Although the stock purchase agreement permitted the sellers to send the buyer an information request, which would have tolled the 30-day deadline, instead the sellers sent the buyer a formal protest notice, which triggered the dispute resolution process set forth in the agreement and the parties' engaging the accountant.

The process stalled, however, when the accountant presented an engagement letter that confined the scope of his work to the issues raised in the sellers' initial protest notice. The sellers objected, arguing that the accountant should also review a new set of disputes that it had raised in a second protest notice sent to the buyer. The accountant declined the parties' request to decide the legal question as to how the stock purchase agreement defined the accountant's role. The buyer then filed this suit; the sellers filed counterclaims; and the parties cross-moved for summary judgment on whether the sellers must sign the accountant's engagement letter.

The court concluded that, under the stock purchase agreement, the accountant's review had to be limited to matters raised in the seller's initial protest notice. Engaging in what it called "a straightforward contract interpretation exercise," the court stressed that the specific language of the stock purchase agreement. The court observed that the agreement referred to review by an accountant of matters raised in "the Protest Notice." The court stressed that the agreement did not specifically provide for multiple protest notices—it referred only to one protest notice and used the article "the" before the defined, singular term "Protest Notice"; and the agreement made no mention of an "amended" protest notice or plural protest notices.

Where Things Stand at the End of 2023

Pressure on boards to take public positions on political issues and events

In the current politically charged and divisive environment, corporate boards have increasingly been under pressure to take public positions on political issues and events, even when they do not directly relate to the company's business. The issues and events have included, for example, Florida's don't-say-gay legislation, the Israel-Hamas conflict, and the auto workers strike. The Delaware courts have acknowledged that corporate speech on external policy matters, such as those involving political, social, or religious issues, involves both risks and opportunities for companies. Given the diversity of viewpoints on these types of issues that may be held among the company's stockholders, directors, management, employees, and other stakeholders, it is the board's responsibility to weigh the competing corporate considerations and decide what policy is in the best interests of the corporation and its stockholders.

The court made clear in *Simeone v. The Walt Disney Company* (June 27, 2023) that a board's significant discretion in guiding corporate strategy includes decisions as to whether to speak out or not, or to take other action or not, on political or social issues; and that such decisions, even if they lead to negative effects on the company, generally will be subject to judicial

deference under the business judgment rule. A stockholder's disagreement with such a decision will not, without more, provide a basis for the court to infer potential wrongdoing by the board. The ongoing debate over a boards' proper role in reaction to social impact issues suggests that, at a minimum, boards should be sensitive to these issues, understand the views of their key stockholders, anticipate what areas of the company's business or the board's own decision-making are most likely to raise these issues, and be proactive in being prepared to respond to challenges in these areas.

Focus by corporations and courts on workers

As workers continue a focus on work-life balance and fair wage issues, corporations and the Delaware courts have been increasingly focused on employees' health and welfare. Under Delaware law, a board has fiduciary duties to act in the best interest of the stockholders, but has wide leeway to act in the interests of other stakeholders so long as there is any rational basis to conclude that those actions will ultimately redound to the benefit of the stockholders. In various contexts, the Delaware courts recently have emphasized the importance of employees as corporate stakeholders.

Indeed, in *McDonald's* (Mar. 1, 2023), the Court of Chancery characterized "taking care of the corporation's workers" (in that case, the issue being their being protected from the risk of sexual harassment) as a "mission-critical" risk for companies, requiring board-level oversight. The court acknowledged that a board may conclude, in the exercise of its business judgment, that addressing the interests of "the workforce that drives the company's profits" is rationally related to building long-term value. In *Disney* (June 27, 2023), the Court of Chancery found it permissible that the board—when deciding to speak out against Florida's then-proposed "don't-say-gay" bill (which then led to significant negative consequences for the company)—heavily weighted the views of its employees and creative talent against the law and in favor of the company speaking out against it. Even the plaintiff in *Disney* conceded that the company's relationship with its employees and creative talent was crucial to the company's success.

Continued stricter antitrust environment

M&A transactions continue to be subjected to a stricter antitrust environment in the U.S. and globally. In the U.S., on December 18, 2023, the DOJ and the FTC issued their final 2023 Merger Guidelines, which reflect the agencies' intention to continue aggressive antitrust scrutiny of mergers, using novel legal theories. The new guidelines depart significantly from prior horizontal and vertical merger guidelines issued in 2010 and 2020, respectively. The changes reflect reduced tolerance for market concentration; adopt a presumption that increased market concentration and a combined share greater than 30% is anticompetitive; heightened focus on serial acquisition and "roll-up" strategies; a combined analysis of vertical and horizontal mergers; introduction of a "dominant firm" concept; greater focus on harm to workers; and a focus on potential competitive concerns raised by minority investments. The changes make it even more critical that companies act thoughtfully and avoid hyperbole when describing their market position; and that merger parties engage in upfront planning (including tailored risk allocation and timing provisions in merger agreements, proactive consideration of divestitures, and other remedies to address perceived antitrust concerns) and demonstrate a willingness to defend agency litigation.

In addition, the FTC has announced, and has begun to implement enforcement actions with respect to, a policy to target serial transactions and roll-up strategies typically used by private equity firms—again, grounded on novel theories of antitrust law and liability. Notably, in the lawsuits the FTC has commenced under the policy, it has asserted liability of the private equity investment funds for the activities of their portfolio companies (on the basis that the funds constructively control the portfolio companies).

In a notable major antitrust enforcement action relating a private equity transaction, the FTC, in order to permit the sale of assets by a private equity firm to a public company, imposed extensive and novel requirements and restrictions on the PE firm to resolve the agency's concerns about the PE firm's post-closing board rights, small minority stock ownership received as consideration by the seller, and pre-existing joint venture entanglements.

In a key development with benefit to buyers, the DOJ announced that it will be introducing a new "Safe Harbor" policy for the voluntary self-disclosure by acquirors of criminal misconduct by target companies, which is discovered by the acquiror and disclosed within six months, and then remediated within one year, after the acquisition closing. The timing deadlines may be extended in certain circumstances (*e.g.*, highly complex transactions). Acquiring companies will need to craft compliance programs and diligence efforts that permit them to take full advantage of this new safe harbor opportunity.

See our Antitrust Alerts: *New Merger Guidelines Reflect Continued Desire for Aggressive Antitrust Enforcement*; *Back to the Future? FTC and DOJ Propose New Merger Guidelines*; *FTC Requires Extensive Commitments from a Private Equity Investor*

to Resolve Director Interlock and Minority Stock Ownership Issues; and *DOJ Announces Opportunity to Seek Safe Harbor Following a Merger*.

Stockholder support for officer exculpation

Under amendments to DGCL Section 102(b)(7) effective as of August 2022, corporations can adopt charter provisions exculpating not only directors but, now, also officers from liability for violations of the duty of care (although officers cannot be exculpated for derivative claims brought against them by the board). Corporations generally adopted a wait-and-see approach to proposing such amendments, as proxy firms' and stockholders' support was uncertain. During the 2023 proxy season, the vast majority of proposals for officer exculpation amendments submitted to stockholders were approved, indicating strong stockholder support. Almost 300 public corporations have now adopted officer exculpation provisions, and we expect that their adoption will become more common. The Court of Chancery, in *Electrical Workers Pension Fund, Local 103, IBEW v. Fox Corp.* and *In Re Snap Inc.* (Mar. 29, 2023), held that a charter amendment providing for officer exculpation does not, under Section 242(b)(2), constitute an amendment adversely affecting the rights, powers and preferences of a class of stock and therefore does not require a separate class vote for approval.

Possible unenforceability of lost-premium damages provisions

The Court of Chancery, in *Crispo v. Musk* (Oct. 31, 2023), called into question the enforceability of so-called "*ConEd*" provisions. See the discussion above under "Other Decisions of Note Issued in Q4 2023."

Increased potential for buyer aiding and abetting liability for sell-side fiduciary breaches

An emerging judicial trend in 2023 has been an increased potential for buyer aiding and abetting liability for sell-side breaches of fiduciary duties—particularly for private equity buyers (given the greater likelihood of target executives' conflicts of interest), and particularly with respect to target breaches of the duty of disclosure in connection with the description of the sale process in the merger proxy statement.

In contrast to the Delaware courts' historic trend of virtually never holding a buyer or other third party liable for aiding and abetting sell-side fiduciary breaches, the Court of Chancery, in a post-trial decision in *In re Columbia Pipeline* (June 30, 2023), found the private equity firm buyer liable for aiding and abetting the target CEO's disclosure violations about the company's sale process. *Columbia Pipeline* followed two other recent cases—*In re Mindbody* (March 15, 2023) and *In re Presidio* (2021)—in which the court also found a buyer liable or potentially liable for aiding and abetting sell-side fiduciary breaches. Further, in two other cases in recent years—*Morrison v. Berry* (2020) and *In re Rural/Metro* (affirmed by the Delaware Supreme Court in *RBC Capital Markets v. Jervis* (2015))—the court found a target's financial advisor liable for aiding and abetting target directors' or executives' breaches of fiduciary duties in a sale process.

Nonetheless, and importantly, there is still a high bar for plaintiff success on such claims—as a plaintiff must establish that the buyer acted with scienter, which requires showing that the buyer "knowingly participated" in the sell-side fiduciary breaches (by creating, exacerbating, or exploiting the breaches for its own benefit at the expense of the target stockholders). Also of note, a buyer will not have aiding and abetting liability for fiduciary breaches that have been "cleansed" under *Corwin* (through the target's disclosure to its stockholders).

It should be kept in mind that aiding and abetting claims will subject the buyer to the potential for: expansive discovery demands (creating pressure to settle the claims early); liability even when the breacher has no liability (for example, due to exculpation or settlement); and joint and several liability for possibly significant damages (which may not be covered under standard insurance policies). Buyers should consider taking steps to mitigate the risk of aiding and abetting liability—which could include seeking confirmation from the target that the sale process was free of breaches of fiduciary duties, and/or informing the full target board of possible sale process fiduciary breaches when the buyer becomes aware of them.

For related practice points, see our article, *Court of Chancery Again Finds a Buyer Liable for Aiding and Abetting Sell-Side Breaches of Fiduciary Duties*.

Continued increased judicial receptivity to *Caremark* claims—and expansion to officers

The Delaware courts' recent greater receptivity to survival of *Caremark* claims (*i.e.*, claims of failure of oversight by directors or officers) past the pleading stage of litigation has continued.

In a series of decisions early this year in the *McDonald's* case, the Court of Chancery expanded the parameters for *Caremark* liability. In these decisions, Vice Chancellor J. Travis Laster established or clarified, for the first time, that: (i) *Caremark* duties of oversight apply not only to directors but also *to officers*; (ii) *Caremark* duties apply not only to a company's "mission critical risks" but may apply to other key risks even if not rising to the level of "mission critical"; and (iii) sexual harassment and similar issues (such as discrimination)—and, indeed, "maintaining workplace safety" and "tak[ing] care of the corporation's workers"—are mission critical risks for companies. In another case, *Lebanon County Employees' Retirement Fund v. Collins* (Dec. 18, 2023), the Delaware Supreme Court reversed the Court of Chancery's dismissal of *Caremark* claims against AmerisourceBergen's directors and remanded the case for further consideration whether the claims should survive the pleading stage. See the discussion of *Lebanon County* above under "Other Decisions of Note Issued in Q4 2023."

However, importantly, the Court of Chancery emphasized in *McDonald's* and other recent cases, such as *Segway v. Cai* (Dec. 14, 2023), that there is still a high bar to a finding of *Caremark* liability—both for directors and officers. The court emphasized in *McDonald's* and *Segway* that it is only when directors or officers act in bad faith (*i.e.*, engage in knowing and intentional wrongdoing) that *Caremark* liability arises. The court has stressed that directors and officers who act to address a problem of corporate misconduct once they learned of it generally would not be deemed to have acted in bad faith, even if the actions they took were insufficient or reflected poor decision-making (so long as they were not so off the mark as to suggest bad faith).

The scope of *officers'* oversight duties is yet to be judicially developed, but the essential duty appears to be to report information and "red flags" up the chain of authority. It is clear that an officer's oversight duties under *Caremark* will vary with the officer's particular level of authority and areas of responsibility. Accordingly, corporations (especially larger corporations with many officers or multi-level reporting structures) should evaluate their practices with respect to assigning officer titles and responsibilities to personnel. Notably, as reflected in *McDonald's*, *Caremark* claims against officers likely will be dismissed, based on a demand futility defense, if the *Caremark* claims against the board are dismissed.

For further discussion about *Caremark* claims against officers, and related practice points, see our Briefings: *Chancery Expands* Caremark *Parameters—But Dismisses Claims Against McDonald's Directors Because They Took Action to Address Sexual Harassment Once They Learned Of It*; and *What the Third McDonald's Ruling Means for Claims Against Officers*; and *Court of Chancery Confirms High Bar to Pleading* Caremark *Oversight Claims Against Officers*—Segway v. Cai.

Caremark claims are now less likely to be time-barred

The Court of Chancery established, in a decision issued by Vice Chancellor J. Travis Laster in *Ontario Provincial Council of Carpenters' Pension Trust Fund v. Walton* (Apr. 12, 2023), as a matter of first impression, that the "separate accrual" approach applies to determine when an "Information-Systems claim" under *Caremark* accrues. The separate accrual approach makes it less likely that a claim will be time-barred. The decision thus is consistent with the judicial trend in recent years of greater receptivity to survival of *Caremark* claims at the pleading stage of litigation. The court also has recently applied the separate accrual approach to "red-flags claims" and "*Massey* claims" under *Caremark*. Thus, with this decision, the court now has established that this approach may be applicable to each of the three types of *Caremark* claims. The court also indicated that, because *Caremark* claims implicate the duty of loyalty, in many cases equitable tolling would apply and render timely even claims otherwise accrued outside the actionable period.

Stockholder is not a controller if there was no attempt to control

In *In re Oracle Corporation Derivative Litigation* (May 12, 2023), the Court of Chancery, in a post-trial decision, held that a challenged transaction involving a conflicted non-majority stockholder who had *the ability to control* the transaction at issue *but who did not attempt to do so* will be reviewed under the business judgment rule, rather than entire fairness.

In an earlier decision, at the pleading stage, the court had rejected dismissal of the claims on the basis that Larry Ellison, due to his "outsized influence" at Oracle, potentially was a controller. After trial, however, Vice Chancellor Sam Glasscock III found that, although Ellison likely *could have* controlled the transaction in which Oracle acquired NetSuite (a company in which

Ellison also had a large equity stake), he in fact had not tried to control the transaction—and, therefore, he was not a controller with respect to the transaction. The Vice Chancellor emphasized that Ellison had absented himself from the process; a special committee had functioned effectively to consider and negotiate the transaction; the committee's members and advisors were independent and experienced; the committee had conducted extensive due diligence on NetSuite; and the committee had negotiated hard on Oracle's behalf, including having been willing to walk away from the deal and ultimately having obtained a price below the maximum the committee had decided Oracle should pay. The decision thus underscores the advantages of a board's use of an independent special committee to lead the process for a potentially conflicted transaction. The decision also underscores the importance of a board's establishing a record as to a potential controller's actions with respect to a transaction—and, also, in the event the transaction is challenged, how the record potentially could be used *at the pleading stage* to increase the likelihood of avoiding trial (which in this case continued for over six years).

We note that the court did not address whether, if the court finds that a person *was* a controller with respect to a transaction, the effective functioning of an independent special committee would "cleanse" a non-squeeze-out merger transaction that did not require a stockholder vote. The court also did not address whether there might be circumstances under which a person with the ability to control a transaction could, by virtue of his or her general influence and clout, be deemed to have controlled a transaction even if he or she had been fully absented from the process.

Entire fairness standard is now more often found to be met

Another recent judicial trend has been the increased potential for a buyer who is a controller to establish that a conflicted transaction met the stringent "entire fairness" standard—even if the sale process was seriously flawed.

In *In re BGC Partners* (Aug. 10, 2023) and in *In re Tesla Motors* (June 6, 2023), the Delaware Supreme Court affirmed the Court of Chancery's post-trial decisions holding that the acquisition of a company indirectly controlled by the buyer's controller met the entire fairness standard. Notably, the Court of Chancery so found in *BGC* notwithstanding that there were serious flaws in the sale process and, in *Tesla*, notwithstanding that the board did not utilize a special committee to negotiate and approve the transaction. These decisions follow a few others in recent years in which the Court of Chancery also found entire fairness satisfied in conflicted-controller transactions despite serious flaws in the transaction process—for example, *Hsu Living Trust v. Oak Hill* (2020) and *ACP Master v. Sprint/Clearwater* (2017). These decisions stand in contrast to the Delaware courts' historic trend of virtually never finding, when the entire fairness standard applied, that it had been satisfied.

Each of these decisions has furthered the court's evolution in recent years toward an emphasis on the fairness of the *price* over the fairness of the *process* in the "unitary" entire fairness analysis. Notwithstanding this evolution, however, in our view, in the event of a clearly materially unfair price or process, it would be unlikely that the court would find entire fairness satisfied. It is to be noted that there is still a high bar to establishing entire fairness—in each of the recent decisions, the court found that, although there were serious process flaws, there was strong evidence that the special committee or board had functioned effectively and had achieved a fair price.

For further discussion and practice points relating to steps buyers can take to maximize the potential of a finding of entire fairness, see our articles, *Entire Fairness Can Be Satisfied Without Use of a Special Committee*; and *Transaction Satisfied "Entire Fairness," Despite Serious Sale Process Flaws*.

Debate emerges over *MFW*'s future

A debate has emerged as to whether the *MFW* prerequisites should have to be met to cleanse fiduciary breaches in *all* conflicted controller transactions (as has been the case), or whether the *MFW* prerequisites for cleansing fiduciary breaches should be required only in going private ("squeeze-out") mergers (the context in which *MFW* itself was decided)—and that all other types of conflicted transactions should be subject to business judgment review *without* compliance with *MFW* so long as the merger was approved either by the independent directors or the minority stockholders.

Certain Delaware law experts have advocated for the new approach, arguing that the *MFW* protections (designed to replicate a third-party non-conflicted transaction) are only required for squeeze-out mergers, which, by definition, involve a controller benefitting at the expense and to the exclusion of the minority stockholders, which makes the dangers of overreaching particularly grave. For other conflicted-controller transactions, however, they argue, that the *MFW* protections are not necessary in today's world, with primarily institutional stockholders, sophisticated independent directors, and robust disclosure requirements, either independent directors' or minority stockholders' approval should be sufficient to invoke business judgment review.

In a significant recent development, the Delaware Supreme Court, *sua sponte*, requested that parties in the appeal of the Court of Chancery's decision in *In re Match Group* brief the issue whether *MFW* should apply to all conflicted controller transactions or only to squeeze-out mergers. In the litigation below, Vice Chancellor Morgan T. Zurn had held that the *MFW* prerequisites were satisfied in the challenged reverse spinoff in which the controller allegedly obtained a non-ratable benefit—and she thus applied business judgment review and dismissed the case. On appeal, the Delaware Supreme Court, conceding that the parties had waived this very issue in the litigation below, stated that it was requesting briefing on this issue so that the Supreme Court can "provide certainty to boards and their advisors who look to Delaware law to manage their business affairs."

It should be kept in mind that, pending the Supreme Court's decision in *Match Group*, the court may now question in stockholder challenges to conflicted-controller transactions whether *MFW* cleansing applies in a non-squeeze-out context—or, instead, business judgment standard applies so long as the transaction was approved by the independent directors or the minority stockholders.

Another *MFW* development this year is that, in *Smart Local Union v. BridgeBio Pharma*, the Delaware Supreme Court (Aug. 9, 2023) affirmed the Court of Chancery's decision that a conflicted controller merger satisfied the *MFW* prerequisites, even though a credible competing bidder made a substantially higher offer than that made by the controller and that bid was rejected by the controller and not considered by the board. The case reinforces that Delaware law does not require a controlling stockholder to accept a sale of the company or the controller's shares to a third party. The court observed that the special committee had responded to the competing bidder's proposals, had pushed the controller to consider selling its shares, and had caused the full board to discuss the proposals.

Use of earnouts continues (but has not spiked)

Since the COVID-19 pandemic began in 2020, there has been a higher proportion of M&A deals including earnouts. Earnouts have been used, as usual, to bridge gaps in buyers' and sellers' views of valuation in light of economic and financial uncertainties in the marketplace generally and with respect to specific businesses. Also, earnouts have been used in some deals this year to address difficulties in upfront financing as the M&A financing environment has remained challenging. Recent reports indicated that there has been a spike in 2023 in both the use of earnouts and litigation over earnout disputes. To the contrary, however, our study (which, unlike others, excluded de-SPAC mergers—because the so-called earnouts in those deals do not function as traditional earnouts that bridge valuation gaps but as added "sweeteners" for the SPAC's sponsors and insiders) indicates that usage of earnouts in 2023 deals was consistent with the usage in the years since the pandemic (which is higher than the historic rate of usage). Our study of litigation actually involving earnout disputes (rather than, as in other reports, involving the mention of the word "earnout" in the litigation papers but not necessarily involving a dispute about the earnout) indicates that there has been no dramatic increase in litigation over earnout disputes.

Also notable this year has been the greater frequency with which the Court of Chancery has held in favor of sellers making earnout claims—usually, on the basis that the buyer breached its obligations relating to conduct of the acquired business during the earnout period. While Delaware law principles applicable to earnouts set a high bar for sellers to succeed on such claims, and while historically the judicial trend was in favor of buyers, in six of seven recent major earnout decisions, a Delaware court found in favor of the seller seeking earnout payments. This recent trend may put more pressure on buyers to settle rather than litigate earnout disputes. It is to be noted, however, that the Delaware courts continue to emphasize the specific agreement language and the specific factual context—and, thus, the outcome in earnout cases tends to be highly uncertain.

Also, see above, under "Other Decisions of Note Issued in Q4 2023," the discussions of *VT Shareholder Representative v. Edwards Lifesciences* (Dec. 15, 2023)—where the court dismissed the sellers' claims of breach of the buyer's covenants to use reasonable efforts to achieve the earnout milestones, on the grounds that the claims were not yet ripe because the buyer did not concede a failure to use reasonable efforts and, as the parties had agreed to a 10-year earnout period, there was still time that the milestones might be met; and *LMS v. Integris BioServices* (Oct. 31, 2023)—where the court held that the buyer's post-closing delays in hiring new scientists may have breached its covenants, set forth in the parties' agreement, to use reasonable efforts to achieve the earnout and not to use bad faith to frustrate an earnout.

For further discussion and practice points relating to earnouts, see our article, *Earnouts Update 2023*.

Non-competes continue to be under attack

Reflecting widespread recent attention to the negative effect of non-compete agreements on employees, in January 2023 the FTC announced a new proposed rule that would ban almost all non-compete and non-solicitation agreements with employees—including retroactively, and without any express exceptions for such agreements when entered into with high-wage employees or in connection with the sale of a business.

In addition, a handful of states now have laws banning almost all non-competes (and in some cases non-solicitation agreements), with very limited exceptions such as when in connection with certain sales of businesses; and almost half the states have enacted laws that bar several categories of non-competes (such as all non-solicitation agreements, and non-competes with lower-wage workers). Other states are considering enacting bans or restrictions. In June 2023, the New York State legislature passed a sweeping bill that, if enacted, would have prohibited almost all non-competes (potentially, even those entered into in connection with the sale of a business). Governor Kathy Hochul sought to reach agreement with legislators to narrow the bill to cover only low-income earners, but was unsuccessful and, in December 2023, vetoed the legislation. See our article, *Ambiguities in New York's Noncompete Ban*.

Further, federal agencies are expanding their capabilities for challenging such agreements, including through cooperation agreements with the FTC entered into between the NLRB and (as announced in September 2023) the Department of Labor, through which they will share additional information to help police non-competes—increasing the risk that an agency investigation into an unrelated topic could prompt an investigation into compliance with non-compete law. See our Antitrust Alert: *The End of Employee Non-Competes?*

Also, the courts have been recognizing new legal theories, particularly under the antitrust laws, for challenging non-compete and non-solicitation agreements. And Delaware courts have been more restrictive in their view of what constitutes a permissible scope for non-competes, and have underscored that they will reject in their entirety overbroad non-competes rather than "blue-pencilling" them to make them legally acceptable. The court has reinforced the approach it took in last year's *Kodiak* decision—a decision that surprised practitioners with the court's refusal to enforce any part of a non-compete entered into in connection with the sale of a business on the basis that the provision was impermissibly broad because it prohibited competition not only with the acquired business but with the private equity firm buyer's other portfolio companies.

In *Ainslie v. Cantor Fitzgerald* (Jan. 4, 2023), the court declared unenforceable provisions in a limited partnership agreement that imposed a one-year non-compete on former partners, and a longer duration arrangement (a so-called "forfeiture-for-competition" agreement) that conditioned payout of the former partners' capital accounts on their not having competed with the partnership or its affiliates over the four-year payout period. The court found the provisions overbroad as to scope because they applied worldwide and covered not only the business of the partnership but any of its affiliates. In *Sunder Energy v. Tyler Jackson* (Nov. 22 and Dec. 22, 2023), the Court of Chancery found unenforceable, and declined to blue-pencil, restrictive covenants in an LLC operating agreement on the basis that they were overbroad. See the articles above discussing *Sunder, Brown v. Court Square Capital,* and *Malt v. 777 Partners*.

Portfolio company competition may violate fiduciary duties

In *Malt v. 777 Partners* (Oct. 31, 2023), the court held that. Although there was no agreement specifying that a PE firm would operate all of its aviation-related businesses through one particular portfolio company, its operating some aviation-related businesses through its other portfolio companies may have violated its fiduciary duties and implied covenant of good faith. See the article above, *Chancery Holds PE Firm, by Operating Related Businesses in Other Portfolio Companies, May Have Violated Fiduciary Duties and Implied Covenant of Good Faith*.

SPACs' slowdown continues

The dramatic slowdown in SPAC activity has continued, with many SPACs having failed to find targets and liquidated without completing a de-SPAC merger and many completed de-SPACs showing poor post-closing performance. SPAC sponsors continue to adapt their strategies and terms to meet the challenging environment. Among the obstacles they face are high redemption rates, difficulties in obtaining third-party financing, and heightened judicial and regulatory scrutiny and skepticism.

In *Delman v. GigAcquisitions3* (Jan. 4, 2023), the Court of Chancery, reaching the same result as in last year's *MultiPlan* decision, held at the pleading stage that, based on conflicts of interest inherent in the typical SPAC structure, the most onerous standard of judicial review—entire fairness—applies to the court's evaluation of fiduciary claims in connection with a de-SPAC transaction. In addition, Vice Chancellor Lori W. Will held (as in *MultiPlan*) that it was reasonably conceivable that the de-SPAC at issue was *not* entirely fair. Importantly, the court found in both *Delman* and *MultiPlan* that the disclosure to stockholders may have been materially inadequate (such that the stockholders' redemption right was impaired)—thus, it remains an open question whether entire fairness would apply to a de-SPAC challenge in a case in which the court found that the disclosure was adequate.

Corwin cleansing not available for claims subject to *Unocal* standard

In *In re Edgio* (May 1, 2023), the Court of Chancery, at the pleading stage of litigation, answered the unsettled question whether stockholder approval of defensive measures results in *Corwin* business judgment review. The court held that, if stockholders sue to enjoin defensive measures, then, even if the defensive measures had been approved in a fully informed and uncoerced vote of stockholders, *Corwin* business judgment review would *not* apply if the defensive actions otherwise were subject to enhanced judicial scrutiny under the *Unocal* standard. The court stated that *Corwin* is intended to be applicable to post-closing damages claims and is inapplicable in the context of claims for post-closing injunctive relief under *Unocal*. The case related to certain transfer restrictions and voting commitments in a stockholders' agreement with a 35% stockholder, which the plaintiff alleged were defensive in nature by allegedly creating a 35% voting block. We note that the judgment is subject to appeal to the Delaware Supreme Court. We note, also, that the court may conclude not to enjoin the provisions based on a more fully developed trial record. Pending ultimate resolution of the case, Vice Chancellor Morgan T. Zurn's opinion provides important guidance for corporations with respect to negotiating transfer, voting and similar restrictions and requirements in agreements with major stockholders.

Guidance on what constitutes a sale of "all or substantially all" assets

There has been relatively sparse judicial development as to what constitutes a sale of all or substantially all the assets of a corporation. The issue may arise in the context of the requirement under DGCL Section 271 for a stockholder vote for a sale of all or substantially all of a company's assets. It also may arise in connection with a preferred stockholder's rights in a charter; other contractual rights of investors (such as a veto or consent right) or the company (such as a drag-along right) in a stockholders' agreement or LLC operating agreement; a lender's negative covenants under an indenture; or a financial advisor's engagement letter with respect to the types of transactions that trigger payment of advisory fees. The case law has established that there are no bright line tests; and that the concept does not include all significant asset sales, but only those that, based on a combination of quantitative and qualitative factors, "strike at the heart of [the company's] corporate existence and purpose." Practitioners generally have considered judicial precedent as creating a significant degree of unpredictability on this issue.

In *Altieri v. Alexy* (May 22, 2023), the Court of Chancery broke no new ground in this area, but reinforced the facts-intensive and nuanced nature of the judicial analysis and amplified the factors the court views as most critical in determining whether there has been a sale of all or substantially all of a company's assets. Chancellor Kathaleen St. J. McCormick determined that Mandiant Inc.'s sale of its "crown jewel" division did not constitute a sale of all or substantially all of Mandiant's assets and therefore a stockholder vote approving the sale was not required. The sale of the company's primary operating division altered the course of Mandiant's operations—changing it from a business focused primarily on cybersecurity detection and prevention services to a business providing only cybersecurity response services. The court emphasized that, notwithstanding the significant change in operations, both before and after the sale Mandiant was "a cybersecurity company." The critical factor for the court appeared to be that Mandiant, which had grown through regular acquisitions and dispositions of various businesses, was returning to a focus on what had been "a historical part of its business."

Continued expansive approach to Section 220 books and records demands

The Court of Chancery continued its generally expansive approach to the right to inspection of company books and records under DGCL Section 220.

In *Bruckel v. TAUC Holdings, LLC* (July 17, 2023), the manager of an LLC, who was one of the LLC's co-founders, sought inspection of books and records of the company to which he was entitled under the Delaware LLC Act and the LLC's

operating agreement. His demand was made following "extreme disdain" between him and the other managers of the LLC, which "impeded necessary information between the two managerial factions." The company resisted providing access to the LLC's books and records both during the trial and afterward. The Court of Chancery found that: (i) the manager had "unfettered rights" to the books and records the company had withheld; (ii) the company failed to identify whether formal board materials existed; (iii) the company "altered the way the board function[ed] in an attempt to duck the company's production obligations"—by ceasing to meet as a full group and, instead, over sixty times during the trial, holding "weekly group updates," in which the CEO and other managers would meet as a subgroup to manage the LLC, but would "rotate out one participant to avoid the appearance they were holding board meetings without the Plaintiff"; (iv) the company "manufactur[ed] weeks-long delays" in conveying books and records"; (v) the company "overdesignated documents and communications as privileged"; and (vi) the company was in contempt of orders the court issued in the case. Also, Vice Chancellor Morgan T. Zurn appointed a receiver to produce the documents; granted only a limited privilege waiver; and, most notably, ordered that the manager's fees incurred in the action be shifted to the company, in light of the company's egregious conduct.

Specific performance not available in a case involving a cross-border transaction

In *26 Capital Acquisition v. Tiger Resort Asia* (Sept. 7, 2023), although the merger agreement provided for specific performance, and the Court of Chancery assumed for purposes of its decision both that the buyer had not fulfilled its merger agreement obligation to use best efforts to close and that the target was ready, willing and able to close, the court exercised its discretion not to order specific performance by the buyer.

The transaction at issue would have taken a Philippine resort casino public through a $2.6 billion de-SPAC merger. "The existence of [a specific performance] provision [in a merger agreement] is sufficient to support a decree of specific performance but does not mandate its issuance," Vice Chancellor J. Travis Laster explained. While specific performance would be awarded if this were a domestic transaction, the Vice Chancellor stated, the court would not order it in this case where "the target is a Philippine corporation that owns a casino in Manila," the parties were neither domiciled nor had significant assets in the U.S., and the parties were unable to identify "any sanction [to noncompliance with a specific performance order by the court] that could be deployed effectively in the Philippines."

In addition to considerations relating to difficulties involving jurisdictional, enforcement, and political issues with respect to the Philippines, the Vice Chancellor cited additional problematic features in granting specific performance. First, specific performance may be inappropriate where the tasks that must be completed in order to close are complex. Here, the principal tasks remaining were preparation of audited financial statements and filing a registration statement for the shares that would be issued. These would not ordinarily, in the domestic context, be viewed as so complex as to counsel against a decree of specific performance, but in this case "dealing with the SEC will be more complex than usual, because the transaction does not contemplate the issuance of securities by an already listed domestic issuer, or even a domestic entity." Further, the registration statement would have to "address the securities of a Philippine corporation engaged in the gaming industry, which suffered a forcible takeover last year, and which has a history of internal corporate governance issues," with those governance problems exacerbated "as a result of [a] dodgy bargain" involving interference by a senior political official in the Philippines that enabled the casino's controller to regain control.

The Vice Chancellor observed that it would be "awkward, to say the least, to craft disclosures that truthfully describe" that situation, which included, among other problematic features, the controller having "delivered an item to [the government official] to secure his intervention in [the controller]'s favor." In addition, the merger was potentially tainted by a $2.5 million investment in the SPAC by a New York hedge fund, as the hedge fund had been retained as an advisor to the casino and purported to be working in the casino's interest but in reality was working behind the scenes on the SPAC's behalf. The Vice Chancellor stated that the hedge fund and the SPAC had "acted as partners to gain and exploit their inequitable advantage over [the target; and had] concealed their relationship and misled [the target] about its existence," and they were "exceedingly aggressive, demonstrated terrible judgment, knew about the dodgy bargain, and engaged in other questionable transactions of their own"—all, "the type of conduct that should not be rewarded with a decree of specific performance." The Vice Chancellor noted that the SPAC had attempted to disclaim responsibility for the hedge fund's actions, "but the SPAC and the hedge fund worked as partners," he wrote. "The SPAC kept the hedge fund's double-dealing secret and lied about its relationship to the hedge fund." Although the SPAC's stockholders were potentially damaged, they "cannot truly claim the status of innocent victims," as they had "signed up for the ride." If, however, "they think they have claims [(such as for damages)] against… members of the SPAC]'s management, then they can bring them," the Vice Chancellor wrote.

New standard of review for disenfranchising actions by a board

Coster v. UIP (affirmed by the Delaware Supreme Court on June 28, 2023) is the first case, so far as we know, in which a Delaware court, in the context of a contested board election, has validated a board of directors' action that had the effect of disenfranchising a stockholder. Notably, the case presented a highly unusual factual setting. The Supreme Court addressed in detail the overlapping applicability of the *Schnell*, *Blasius* and *Unocal* standards in this context and, combining these doctrines, established a unitary standard for review of board actions that have a disenfranchising effect. The new standard appears to be, essentially, a heightened *Unocal* standard—namely, a board action that has the effect of disenfranchising a stockholder in the face of a contested director election or stockholder vote touching on board control is permissible if it is a "reasonable and proportionate" response to a threat to the corporation (the *Unocal* standard), but the court will apply the "special sensitivity" toward stockholder disenfranchisement issues that the *Schnell* and *Blasius* doctrines bring.

The decision furthers the Delaware courts' longstanding trend of blending these doctrines, with the effect, clarified in *UIP*, of essentially relegating *Schnell* and *Blasius* to being specific applications of the *Unocal* standard rather than being standards of review themselves. In our view, there will still be a very high bar to judicial validation of board action that has the effect of disenfranchising a stockholder in the face of a contested director election or stockholder voting touching on board control. While the standard of review articulated in this case may appear to be less stringent than the *Schnell* and *Blasius* standards that have often been applied in this context, we believe it likely that the new standard will not significantly change the court's general approach to or outcome in these cases—first, because the decision just reaffirms the court's evolution toward a combination of the *Schnell*, *Blasius* and *Unocal* doctrines in this context; and, second, because, as the Supreme Court emphasized, the facts in *UIP* were highly unusual.

For further discussion and related practice points, see our Briefing, *Delaware Supreme Court, for the First Time, Upholds a Board Action that Has a Disenfranchising Effect on a Stockholder—and Clarifies the Standard of Review for Such Actions*.

Company changes, after the deadline for director nominations under the advance notice bylaw, were insufficient to enjoin enforcement of the deadline

Changes at a company after the deadline has passed for director nominations under the company's advance notice bylaw have been a basis for the Court of Chancery to enjoin enforcement of the deadline and permit late nominations. *Sternlicht v. Hernandez* (June 14, 2023), however, highlights that the court generally will *not* enjoin enforcement of an advance notice bylaw deadline based on post-deadline changes at the company *unless*: the post-deadline changes were material in the sense that they altered the "policies and direction" of the company, and, critically, the changes were *caused by the board of directors* (and not, for example, a minority faction of the board).

In *Sternlicht*, the plaintiff-stockholders sought a preliminary injunction against enforcement by Cano Health, Inc. of its advance notice bylaw deadline for the nomination of directors at its then-upcoming annual stockholders meeting. The plaintiffs were three of the directors on the company's nine-member board, who together had resigned six weeks after the deadline for nominations had passed and then sought to make director nominations. The plaintiffs contended that it would be inequitable to permit enforcement of the deadline, due to the radical change in circumstances at the company after the deadline for nominations had passed (namely, the fracturing of the board and the plaintiffs' resignations). Vice Chancellor Paul A. Fioravanti, Jr. declined to grant the plaintiffs' request to enjoin enforcement of the nominations deadline. The decision serves as a reminder that, generally, the court will enforce an advance notice deadline for director nominations unless there are "compelling circumstances"—and a material change at the company occurring after the deadline has passed may, but does not necessarily, constitute compelling circumstances for this purpose.

For further discussion and related practice points, see our Briefing, *Court of Chancery Amplifies Circumstances Under Which the Court Will Not Enforce an Advance Notice Bylaw's Deadline*.

"Conclusive and binding" charter provision was still subject to fiduciary duties

In *CCSB Financial Corp. v. Totta* (Jul. 19, 2023), the Delaware Supreme Court affirmed the Court of Chancery's post-trial decision that, although a corporation's charter provided that certain determinations made by the board in good faith were to be conclusive and binding, the determinations nonetheless were subject to judicial review for the directors' compliance with their fiduciary duty of loyalty.

The charter provision at issue capped at 10% the stock that could be voted by any stockholder or group of stockholders acting in concert, with the board's determinations as to whether stockholders were acting in concert to be conclusive and binding so long as made in good faith based on reasonably available information. The board determined that certain stockholders were acting in concert and capped their combined vote at 10%, which defeated the election of three insurgent directors to the staggered board. The Court of Chancery determined that the stockholders were not acting in concert and the votes therefore should not have been restricted. The Delaware Supreme Court explained that, in this context, the Court of Chancery must, as it did, first, review the claim to test the legality of the board's action under the charter and, second, to apply enhanced scrutiny review.

The Supreme Court reasoned that the conclusive-and-binding provision was inconsistent with DGCL Section 102(b)(7) as it effectively exculpated directors for breaches of the duty of loyalty. The Supreme Court wrote that the provision "would render any breach of the duty of loyalty relating to a self-dealing transaction beyond the reach of a court to remedy by way of damages." While such a provision could be included in an LLC's or partnership's organizing documents, "where freedom of contract is the guiding and overriding principle," it was prohibited, by statute and public policy, in a corporate charter, the Supreme Court stated. The Supreme Court also affirmed that the insurgents' efforts in obtaining a judicial construction of the charter provision constituted a corporate benefit and therefore they were entitled to be reimbursed for their attorneys' fees and expenses.

Corporate fiduciary duties can be waived by sophisticated stockholders

While the waiver of fiduciary duties in the alternative entity context is common and well-known, the waiver or modification of *corporate* fiduciary duties is also possible under certain albeit limited) circumstances.

New Enterprise Associates 14, L.P. v. Rich ("*Fugue*") (May 2, 2023) indicates that the Court of Chancery generally is likely to be receptive to covenants-not-to-sue (which effectively are a form of waiver of fiduciary duties) when agreed by very sophisticated stockholders. The court held that a contractual covenant by certain stockholders (the "Funds") not to challenge a sale of the company that met specified criteria was enforceable (excluding only with respect to claims involving *intentional* breach of fiduciary duties, such as fraud or bad faith). The court emphasized that the covenant, which was contained in a drag-along provision in a stockholders' agreement, was both narrow in scope (as it applied only to a sale meeting specified criteria) and reasonable (as the stockholders were "uber-sophisticated" and had received bargained-for consideration in exchange). The decision is notable for Vice Chancellor J. Travis Laster's extensive analysis of the various ways that Delaware law permits the "tailoring" of fiduciary duties in the corporate context The court found that "[t]his case provides an optimal scenario for enforcement" of the covenant in question. "Sophisticated repeat players consented explicitly to a clear provision in a stockholder-level agreement that applies only to a specific transaction," the court wrote.

Arbitration award not overturned although clearly flawed

In *Evolve Growth Initiatives v. Equilibrium Health* (July 26, 2023), the Court of Chancery refused to overturn an arbitration award although the court found that the arbitration proceeding and the resulting award were clearly flawed. The court emphasized the "narrow window of judicial oversight" when parties agree to arbitration to resolve disputes. Indeed, the court stated that "[a]rbitral awards are nearly impervious to judicial oversight." Parties agreeing to binding arbitration thus take a risk that an arbitration decision they receive may be "questionable under the law and facts" but will nonetheless be "not reviewable."

In reviewing the arbitration award in *Evolve Growth*, Vice Chancellor Sam Glasscock III stated that, unlike in the case of an appellate court reviewing lower court decisions, "[q]uestionable legal support or a misreading of the law alone are insufficient to vacate an arbitration award." The seller representative in this case, who was not a party to the acquisition agreement at issue, failed to raise as a defense in the arbitration proceeding lack of contractual liability for representation and warranty breaches. Further, the seller representative knew or should have known that the claims before the arbitrators included alleged fraud and misrepresentations that *could* support his liability. The court explained that, although there were no findings stated in the arbitration award that the seller representative had acted intentionally or with gross negligence, the court could not determine from the "lite" reasoned award whether the seller representative had been found liable under the fraud or gross negligence theories. As the court could not determine with certainty that the arbitrator had not reached such a finding, the court could not set aside the award.

The case highlights that, when parties agree to resolution of disputes by arbitration, and agree to limited review of such an award, and particularly when they then request a "lite" reasoned award, the court generally will not disregard the parties'

agreement—potentially even if the arbitration award reflects clear error, so long as there is some basis in the record on which the award may be justified. Parties should consider carefully the benefits and disadvantages of agreeing to arbitration; state clearly the legal standards and other parameters governing the arbitration, as well as review of the award; keep in mind the potential pitfalls of requesting a "lite" (instead of full) reasoned arbitration award; and assert, or respond to, all claims made in an arbitration proceeding. As always in the Court of Chancery, the overall factual context matters—in this case, the court observed that the arbitration award indicated "[a] compelling picture of intentionality support[ing] a finding of fraud, intentional misconduct or gross negligence."

In another decision about arbitration, *Darling Ingredients v. Smith* (Dec. 11, 2023), Vice Chancellor Lori W. Will interpreted an acquisition agreement to limit the arbitrator's role to the issues raised in the sellers' initial dispute notice (and not to include disputes set forth in a second dispute notice), when the acquisition agreement referred only to a single dispute notice in the dispute resolution process provisions. See the discussion above under "Other Decisions of Note Issued in Q4 2023."

RoundUp

2023 Third Quarter Highlights

Deals:

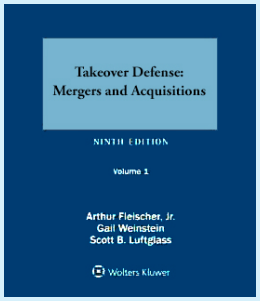
- Counsel to Tradeweb Markets Inc. in its definitive agreement to acquire r8fin, a technology provider that specializes in algorithmic-based US treasuries and interest rate futures.
- Counsel to the conflicts committee of Capital Product Partners L.P. (CPP) in CPP's pending $3.13 billion acquisition of 11 newbuild LNG carriers from Capital Maritime & Trading Corp.
- Counsel to Broadcast Music Inc. in its sale to a shareholder group led by New Mountain Capital.

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Takeover Defense: Mergers and Acquisitions

The Ninth Edition of Fried Frank's "Takeover Defense: Mergers and Acquisitions," a one-of-a-kind resource by corporate senior counsel Arthur Fleischer, Jr. and Gail Weinstein and partner Scott B. Luftglass, has recently been published. The treatise is a comprehensive, must-have resource for practitioners representing any participant in M&A activity, including bidders, sellers, senior management, sponsors, and investment banks.



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