[26]Decision of December 17, 2020, M.9660, *Google/Fitbit*. The *Google/Fitbit* decision also marks the EC's first developments around the concept of digital ecosystems.

CHANCERY FINDS BUYER'S POST-CLOSING ACTIONS MAY HAVE BREACHED EARNOUT COVENANTS—*GEORGIA SECURITY*

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In *Georgia Security Solutions v. NewCBN*,[1] the Delaware Court of Chancery, at the pleading stage of litigation, rejected dismissal of earnout-related claims brought against Security Services Holdings LLC (the "Buyer") in connection with its acquisition of the video monitoring business of Georgia Security Solutions, LLC (the "Seller").

The Agreement required resolution of disputes between the parties "related to the earnout payment" to be made by an independent accountant. The court held that the post-closing true-up procedure set forth in the Agreement called for the accountant to make an "expert determination," not to conduct an "arbitration." Therefore, the court held, it was the court (not the accountant) that would determine the legal issues—namely, whether the buyer (i) used the correct measurement period to calculate revenues to determine if the earnout target had been met; (ii) breached the Seller's right to obtain from the Buyer reasonably necessary information to verify the Buyer's earnout calculation (the "Information Right"); and (iii) breached its covenants to use reasonable efforts to retain employees and preserve business relations with customers (the "Reasonable Efforts Covenant") and not to take any action with the intention, nor having the primary effect, of thwarting the earnout (the "Negative Covenant").

The court held that the Buyer used the correct measuring period to calculate the revenues; and that the accountant's only role was to apply that ruling to calculate the revenues and the amount of any earnout payment. The court also held that the Seller's allegations supported a reasonable inference that the Buyer breached the Information Right, the Reasonable Efforts Covenant, and the Negative Covenant.

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Key Points

- **The decision reaffirms that a procedure resembling a traditional accountant "true-up" generally will be interpreted by the court as calling for an expert determination, not an arbitration.** The Agreement provided for a true-up procedure but stated that the accountant's result would be enforceable as an "arbitration award." The court stressed, as it has in prior cases, that the court will decide whether the parties intended to require an expert determination, or instead an arbitration, based on the substance of the procedure, not the parties' characterization of it. The court's decision as between an expert determination and an arbitra-

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tion is important because, where an expert determination is called for, the court will interpret the agreement as granting the expert narrow authority to decide only those issues within its particular expertise (in this case, the technical accounting and computation issues); but where an arbitration is called for, the court will interpret the agreement as granting the expert broad authority to decide the parties' disputes, including with respect to contract interpretation and whether obligations were breached.

- **The decision highlights again the need for extra clarity and precision in the drafting of earnout provisions.** Notably, the court in this case interpreted the accountant's remit, to resolve disputes "relating to the earnout payment," as covering only technical accounting issues relating to computation of the payment. In the recent *Stillfront* decision,[2] however, the court interpreted a provision with even narrower language ("relating to *computation of* the earnout payment") as covering, broadly, *all* disputes relating to the earnout, reasoning that all of the disputes would affect the amount (therefore, the computation) of the earnout payment.

- **The court viewed the "combination" of the Buyer's alleged actions (the "overall picture") as supporting a reasonable inference that the Buyer breached its earnout-related covenants.** Notably, the Reasonable Efforts Covenant was qualified by a clause stating that it would not restrict the Buyer from using its business judgment; and the Negative Covenant expressly permitted the buyer to take into account its own best interests. The court emphasized, however, with respect to the Reasonable Efforts Covenant, the allegations that the Buyer reduced the role of the Seller's founder-President ("RS"), who had been responsible for 80% of the customer relationships (which were key to the business' revenues). With respect to the Negative Covenant, the court emphasized the allegations that the Buyer changed its conduct just after the earnout period ended.

- **The court rejected the argument that the Buyer had no incentive to reduce revenues because increased revenues would have been to its benefit.** The court stated that, to the contrary, reducing revenue in the short terms would benefit the Buyer by reducing or avoiding the earnout.

Background

The parties entered into the Agreement, and closed the sale, on August 15, 2022. Under the Agreement, to facilitate the sale, the Seller contributed assets and interests to a newly formed entity, NewCBN, LLC (the "Company"), and sold membership interests in the Company to the Buyer. The Seller received about $13 million at closing; rollover equity in the Buyer valued at about $2 million; and a contingent right to an earnout payment of up to $6 million, scaled based on "Recurring Revenue" measured over a year-long period after closing. When the earnout period ended, the Buyer notified the Seller that the Recurring Revenue had fallen short of the target amount and therefore no earnout payment was owed. The Seller brought suit. Vice Chancellor J. Travis Laster declined the defendants' pleading-stage motion to dismiss the Seller's claims.

Discussion

The parties had agreed as follows:

- ***Reasonable Efforts Covenant:*** "[W]ithout limiting the Buyer's business judgment . . . , but acting in good faith" (the "Business Judgment Qualifier"), the Buyer shall "cause the Company to use its commercially reasonable best efforts" to "retain and keep available" its employees' services, "preserve the goodwill" with customers, suppliers, and other business relations, and "maintain an appropriate level of working capital" for the Business.

- ***Negative Covenant:*** The Buyer shall "refrain from taking any action which is intended to prevent, or, taking into account the best interests of Buyer and its equity holders, the primary effect of which is to

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prevent, the realization of the achievement of the Earnout Payment."

- ***Commitments relating to RS:*** The parties agreed that RS would remain as President of the Company under a five-year employment agreement. The Buyer had assured RS that he would have "executive control."

The Seller alleged as follows: (i) ***RS.*** Post-closing, the Buyer sidelined RS. His title and role were changed from "President" to "Founder," and then to "consultant"; his requests for more gradual transition to these roles were refused; and all of his authority, including his responsibility for customers, was eliminated; (ii) ***Other personnel.*** One of the Company's marketing employees and two of the sales personnel were reassigned to non-sales roles; support personnel were underpaid or terminated; novice accountants were put in charge of the Company's accounting; and new employees who were hired had no industry experience, including the person hired as the Vice President of Sales (who then generated no sales in 2023); (iii) ***Customers.*** The Company sent blank invoices, or omitted sending invoices, to certain customers; forgave amounts owed by certain customers; de-emphasized customer service; and ignored revenue disruptions; (iv) ***Recurring Revenue.*** The Buyer computed Recurring Revenue incorrectly by using the wrong measuring period; and it then withheld from the Seller requested documentation that was "reasonably necessary" to verify the Buyer's calculation; (v) ***Changes after the earnout period ended.*** The Buyer's "conduct changed" once the earnout period ended—with a renewed commitment to customer support, pursuit of new commercial contracts, and firing inexperienced personnel who had been hired during the earnout period.

The court interpreted the Independent Accountant Procedure as calling for an expert determination, not an arbitration. The Agreement provided that "items of disagreement related to the Earnout Payment" shall be resolved by an independent accountant under the procedure set forth in the Agreement, and that the accountant's decision shall be "enforceable as an arbitration award." The Buyer moved to dismiss the Seller's claims on the basis that the Procedure required arbitration of the disputes by the accountant in lieu of any judicial determination. The court observed that the Procedure closely resembled a traditional accountant post-closing "true-up," and reaffirmed that Delaware courts generally consider such a procedure to call for "a beefed-up expert determination, not a slimmed down legal arbitration." The court explained that, while the phrase "items of disagreement related to the Earnout Payment" might seem broad, "it [was] anchored to the Earnout Payment"—and the Earnout Payment involved just "a limited calculation based on Recurring Revenue." Thus, the accountant's remit was to "determine how much Recurring Revenue there was, including resolving disputes over GAAP and deciding whether particular revenue was properly excluded, deferred, diverted, or forgiven . . . [and to] interpret [Agreement] terms closely tied to the calculation task, but its authority [went] no further," the court wrote. The court noted that an agreement can designate an accountant to serve as an *arbitrator* if it delegates to the accountant "judge-like authority to decide factual and legal issues," but that "isolated references to an 'arbitrator' or 'arbitration' will not expand an expert's narrow charge." As the Procedure called for an expert determination, it was for the court, not the accountant, to resolve the disputed legal issues.

Additional factors that supported the conclusion that the Independent Accountant Procedure called for an expert determination (not an arbitration) included the following: (i) An accountant was chosen to be the decisionmaker—"that choice strongly suggest[ed] an intent to rely on the independent accountant's subject matter expertise, which [was] consistent with an accountant true-up mechanism and inconsistent with legal arbitration," the court stated. (ii) There was no reference to any arbitration organization or procedural rules—"which are defining characteristics of arbitration provisions," the court stated. (iii) The disputes were to be resolved without a hearing. The court noted that the Procedure stated that the accountant's determination would be "enforceable as an arbitration award," and that

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this "deserve[d] weight" toward the opposite conclusion. However, the court stated, "labels are not dispositive" and "[n]othing else in the [Procedure] suggest[ed] arbitration."

The court distinguished *Stillfront*. The Agreement described the Independent Accountant Procedure as the parties' "sole recourse in the event of a dispute in respect of [the earnout]" (the "Sole Recourse Clause"). The Buyer cited the Delaware Supreme Court's recent decision in *Stillfront* as supporting the Buyer's interpretation that the Sole Recourse Clause required *all* earnout-related disputes to be resolved by the accountant. In *Stillfront*, the parties' agreement provided that disputes relating to "calculation of the earnout amount" would be resolved by an independent accountant, and the accountant was referred to in the provision as "an arbitrator." The Supreme Court upheld the Court of Chancery's decision below that the agreement called for arbitration by the accountant of *all* of the earnout-related disputes (including legal issues, such as whether operational covenants were breached and the buyer had acted in bad faith). In *Georgia Security*, the court distinguished *Stillfront*. Vice Chancellor Laster noted that, in *Stillfront*, the record showed that both parties had operated under the assumption that the provision called for an arbitration—and the Supreme Court simply would not permit the seller to change its position on appeal. In addition, Vice Chancellor Laster noted that the *Stillfront* agreement provided that if the buyer breached the earnout covenants by acting in bad faith to reduce the earnout, then the seller would receive the maximum earnout amount. As such, the Supreme Court reasoned that it made sense that the accountant, who was tasked with calculating the earnout amount, would also "calculate the remedy for a bad faith breach." Vice Chancellor Laster wrote: "Whether that argument would have carried the day without the seller's concession [that the accountant was to act as an arbitrator] is an open question"; but, in any event, the Agreement in *Georgia Security* "[did] not contain anything resembling that remedial mechanism" nor did it specify other remedies for breaches.

"Sole Recourse Clause" did not mean that all disputes were to be resolved by the independent accountant. The Independent Accountant Procedure stated that "the Parties' sole recourse in the event of a dispute in respect of the earnout, including any failure to pay the Earnout Payment, shall be limited to the provisions of the earnout" (the "Sole Recourse Clause"). As noted, the Buyer argued that this Clause required that *all* disputes relating to the earnout must be resolved under the Procedure. The court, however, interpreted the Clause as "limiting the parties' recourse to the rights and remedies available in the sections of the Agreement governing the earnout." Stressing that an agreement must be interpreted "as a whole," the court noted several provisions of the Agreement that would have been rendered meaningless if disputes under those provisions had to be routed to the accountant for resolution. For example, the earnout section contained a provision exculpating the Buyer for certain types of damages. The exculpation provision "would have no work to do" if an accountant were to resolve exculpation disputes, the court stated, because the accountant "cannot award damages anyway." Also, the Information Right, the Reasonable Efforts Covenant and the Negative Covenant would be "toothless" because the accountant "cannot order specific performance to enforce the Information Right or craft a damages remedy for covenant breaches."

The Buyer may have breached the Reasonable Efforts Covenant. The court noted that the parties' covenant "unhelpfully combine[d] the concepts of commercially reasonable efforts and best efforts," but the court then analyzed the covenant as imposing a "reasonable efforts" obligation. The court reiterated that Delaware courts generally interpret reasonable efforts provisions as "placing an affirmative obligation on the parties to take all reasonable steps to achieve a particular end." The court "looks to whether the party subject to the clause had reasonable grounds to act as it did in attempting to achieve the agreed-upon end." The court concluded that the Seller's allegations supported a reasonable inference (the standard for survival of claims at the pleading stage) that the Buyer took actions that breached the Reasonable Efforts Covenant.

The court rejected the Buyer's arguments. The Buyer

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asserted that its reducing RS' role did not breach the covenant because RS had continued been "retained" and was "available" to the Company, as the covenant required. The court wrote that the covenant "[did] not prohibit every termination or reassignment, guarantee a particular title, or require an employee to remain in an identical function regardless of legitimate business considerations. Here, however, the alleged removal of customer responsibilities from the individual responsible for most of the customer relationships, the rejection of a proposed [gradual] transition [of his role], and the reassignment or loss of other experienced personnel support an inference that the Company did not use commercially reasonable best efforts." The Buyer also argued that, although it had terminated and reassigned employees, it had *increased* the total number of Company employees, having hired a general manager, two new sales executives, two additional salespeople, and an outside operations consultant. The court wrote: "Replacement hiring could bear on whether the Company used the requisite efforts, but it does not defeat the claim at the pleading stage"—particularly as the Seller alleged that the new hires lacked the experience and customer relationships of the displaced personnel. The Buyer also argued that its failure to cross-sell products could not be considered a breach because the Agreement did not require it to cross-sell. The court rejected an approach that looked at each allegation piecemeal and, instead, took the failure to cross-sell into account as part of the "overall picture."

The Business Judgment Qualifier did not change the result. The court stated that the Business Judgment Qualifier in the covenant "protect[ed] legitimate, good faith business decisions, including decisions that advance[d] the Buyer's economic interests," but it did "not permit the Buyer to use its discretion to undermine the objectives that the [Covenant] identifie[d]." The court wrote: "The complaint support[ed] an inference that the challenged actions lacked reasonable grounds and did not represent a good-faith effort toward the contractual objectives, [and] the [Q]ualifier therefore [did] not warrant dismissal [of the claim]."

The Buyer may have breached the Negative Covenant. The court concluded that the Seller's allegations—of "deliberate revenue deferral, customer losses, and a change in conduct after the Earnout Period"—"support[ed] a reasonable inference that preventing the earnout was the primary effect of the challenged actions, even after accounting for legitimate business interests." Of note, the court rejected the Buyer's argument that the Buyer had no incentive to reduce Recurring Revenue as more Recurring Revenue would benefit both parties. "To the contrary," the court stated, "reducing Recurring Revenue in the short term would benefit the Buyer by reducing or avoiding the earnout."

The Buyer may have breached the Seller's Information Right. The Agreement provided that the Buyer shall provide to the Seller documentation requested by the Seller that is "reasonably necessary" to verify the Buyer's calculation of Recurring Revenue. The Buyer produced "around 500 documents" in response to the Seller's request for verifying information. The Seller then sought a significant additional amount of information, which the Buyer refused to provide on the basis that it was not reasonably necessary for verification and/or did not exist. The court rejected the Buyer's argument that DGCL Section 220, as amended in 2025, indicates that "broad inspection" should be permitted where "atypical circumstances necessitate it." The court responded that, unlike document production in the context of a board's response to a Section 220 request, *contractual* provisions relating to document production do not implicate policy concerns and are to be interpreted according to their terms. The court observed that "the word 'necessary' impose[d] a more demanding standard than simple relevance," and that "the nouns 'records and work papers' suggest[ed] a verification right, not broad discovery into motive or operational misconduct." However, the court concluded that, at the pleading stage, at least some of the materials the Seller requested may have been "reasonably necessary" to verify the calculation of Recurring Revenue—these included "billing summaries, invoices, forgiveness and cancellation records, accepted-estimate data, and records concerning third-party services." Further, the court stated, the "underlying transactions support[ed] a reasonable infer-

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ence that responsive records existed and that the Buyer's contrary representation may have been inaccurate."

Practice Points

- **A dispute resolution provision should be drafted to be clear and unambiguous as to the nature and scope of the process called for**. Most critically, the parties should clearly indicate whether their intention is for an expert determination or instead an arbitration, and they should provide for a process that is consistent with that intention. It should be kept in mind that, while the parties' characterization of the process will be given some weight, Delaware courts will look primarily to the substance of the process. The courts tend to view the parties as intending an arbitration when the provision (i) states that the expert will have broad authority, will resolve "all" disputes or "any" dispute, or will "interpret" the parties' agreement or decide legal issues; (ii) references specific procedural rules that will govern the process, especially if they are detailed or refer to an arbitration organization's rules; and/or (iii) states that the expert's decisions will be final and binding on the parties. The courts tend to view the parties as intending an expert determination when the provision (i) states that the expert will have limited authority, will resolve only specified issues or types of issues, or cannot interpret agreement provisions or decide legal issues; (ii) does not provide procedural rules or provides for a short or informal process (*e.g.*, no discovery and/or hearing); and/or (iii) provides no authority for the expert to award relief or states that the expert's decision will not be final and binding.

- **Parties should consider avoiding the typical language stating that an expert will resolve disputes "relating to calculation of the earnout."** Parties may want to be more specific, keeping in mind that a court may interpret the typical language as providing broad authority to the expert, reasoning that all of the disputes will affect what the earnout amount will be (as was the case in *Stillfront*), or may interpret it as providing only narrow authority to the expert to resolve only technical accounting and computation issues (as in *Georgia Security*). Parties should consider including clarifying statements in the agreement as to their intentions, and/or providing hypothetical examples, as these may be helpful in guiding the court's interpretation. The kinds of disputes where extra specificity may be particularly called for include, for example, those that typically require resolution of *both* expert issues and legal issues (such as whether financial statements were prepared consistent with past practice, whether an earnout statement contained sufficient detail, or whether an earnout target or milestone was met); and/or those that are the most likely to arise, or to be the most significant, in the particular factual context. Parties may want to consider specifying a default provision—*i.e.*, that an expert determination (or, instead, an arbitration) will be utilized where it is otherwise uncertain which would apply.

- **Generally, the party not doing the calculation will want to negotiate for the broadest possible expert review of the calculation.** Thus, a seller often will want an arbitration process, with broad authority granted to the expert, while a buyer typically will want an expert determination, with limited authority for the expert. Parties also should consider that, generally, arbitration (i) takes longer and is more expensive; but (ii) may offer a better process where it is likely there will be multiple issues, complex evidence, and/or legal issues.

- **Parties should consider specifying materials that fall within, or are excluded from, a seller's information rights.** A buyer should consider seeking to specify the information or kinds of information the seller will be entitled to for purposes of verifying the buyer's calculation of the earnout, rather than (or in addition to) providing for an indefinite standard like "reasonably necessary" information. A seller should consider seeking to

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include, in addition to a general standard for access to information, specified information that the seller will be entitled to receive. (Also, a seller may wish to negotiate for an extension of the deadline for providing an earnout disagreement notice in the event that all, or specified, information has not been provided before then.)

- **The decision suggests the following additional drafting points:** *Business judgment or self-interest qualifiers.* If the parties provide that a buyer's post-closing earnout covenants will not limit the buyer's good faith business judgment nor its ability to act in its own self-interest, consideration should be given to specifying whether the qualifiers cover actions even that undermine the objectives of the covenants. *Sole recourse clause.* If the parties provide that the "sole recourse" for resolving disputes about the earnout will be "the provisions of the earnout" in the agreement, they should consider clarifying how that interrelates with the authority of an expert under a prescribed dispute resolution process.

ENDNOTES:

[1]*Georgia Security Solutions, LLC v. NewCBN, LLC* (Del. Ch. Aug. 3, 2026).

[2]*Fortis Advisors v. Stillfront* (Del Ch. Feb. 13, 2026).

FTC, REQUIRING DIVESTITURES, APPROVES FINAL CONSENT DECREE IN ASCENSION/AMSURG DEAL

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On August 25, 2026, the Federal Trade Commission ("FTC") announced it had finalized a consent order resolving antitrust concerns arising from Ascension Health Alliance's $3.9 billion acquisition of AmSurg.[1] This order arrives against the backdrop of heightened FTC attention to the healthcare sector. In March 2026, FTC Chairman Andrew Ferguson directed the agency to form a Healthcare Task Force[2] to pursue a "coordinated, integrated approach" to healthcare enforcement and advocacy in coordination with other agencies and law enforcement partners (such as the Department of Health and Human Services and Department of Justice). The final order in the Ascension/AmSurg matter reflects this continued focus and offers a useful window into how the FTC is applying it in practice.

The final order requires Ascension to divest seven AmSurg ambulatory surgery centers ("ASCs") across five metro areas, settling allegations that the deal would substantially lessen competition for certain outpatient surgical services. The order also imposes a 10-year prior notice obligation on Ascension for future ASC acquisitions in the affected markets, as well as transition assistance, non-solicitation, asset maintenance and monitor provisions typical of recent FTC healthcare merger remedies. True to FTC form, the matter demonstrates the agency's continued scrutiny of vertical and horizontal healthcare consolidation at the local, service level—even where the overall transaction value and combined entity size might not otherwise trigger significant antitrust concern nationally.

Background

On June 2, 2026, the FTC announced a proposed consent order requiring Ascension, a national nonprofit health system, to divest several ASCs in order to proceed with its proposed acquisition of AmSurg.[3] The FTC's June 1 complaint[4] alleged that the combination of Ascension and AmSurg, both providers of outpatient surgical services ranging from cataract surgeries to colonoscopies, would limit competition for certain outpatient surgical services performed by gastroenterologists, ophthalmologists and orthopedists in the

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