Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions

*By the Annual Survey Working Group of the M&A Jurisprudence Subcommittee, Mergers and Acquisitions Committee, ABA Business Law Section**

The Annual Survey Working Group reports annually on judicial decisions that we believe are of the greatest significance to mergers and acquisitions ("M&A") practitioners.[1] This year's survey covers:

Contract Interpretation

1. *Crispo v. Musk* (Del. Ch. Oct. 11, 2022) (merger agreement did not confer third-party beneficiary status to stockholders)
2. *Williams Cos. v. Energy Transfer LP* (Del. Ch. Aug. 25, 2022) (merger agreement's provisions concerning fee shifting did not bar contingency fee arrangement)
3. *Menn v. ConMed* (Del. Ch. June 30, 2022) (buyer satisfied "commercially best efforts" standard, with court interpreting "commercially best efforts" as having same meaning as "best efforts")

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1. To be considered for the survey, a decision must (1) address a transaction involving a change of control or sale of all or substantially all of a company's assets or a subsidiary or division and (2) interpret or apply the provisions of an acquisition agreement or a related agreement (e.g., a letter of intent) or a state statute that governs one of the constituent entities or address a successor liability or fiduciary duty issue. Cases dealing exclusively with securities law, tax law, or antitrust law are excluded.

4. *SPay, Inc. v. Stack Media Inc.* (Del. Ch. Dec. 21, 2021) (contractual survival period did not bar claims for breaches of covenants or fundamental representations)

5. *Fortis Advisors v. Johnson & Johnson* (Del. Ch. Dec. 13, 2021) (exclusive remedy provision was not sufficient to bar extra-contractual fraud claims in connection with earnout)

6. *Level 4 Yoga, LLC v. Corepower Yoga, LLC* (Del. Ch. Mar. 1, 2022) (seller did not breach its ordinary course covenant with actions in response to the COVID-19 pandemic nor was COVID-19 an MAE)

7. *Arwood v. A.W. Site Services, LLC* (Del. Ch. Mar. 9, 2022) (interpreting asset purchase agreement's provisions related to fraud and contractual indemnifications claims, including sandbagging provisions)

8. *Protégé Biomedical LLC v. Duff & Phelps Securities LLC* (8th Cir. Apr. 4, 2022) (financial advisor not liable for failing to obtain effective signature of a client's non-disclosure agreement)

Fiduciary Duties

9. *In re Tesla Motors, Inc. Stockholder Litigation* (Del. Ch. Apr. 27, 2022) (post-trial opinion concluding fair price carries the day in entire fairness analysis despite flaws in sales process)

10. *In re BGC Partners, Inc. Derivative Litigation* (Del. Ch. Aug. 19, 2022) (post-trial opinion concluding defendants satisfied burden of showing transaction was entirely fair).

11. *In re Match Grp., Inc. Derivative Litigation* (Del. Ch. Sep. 1, 2022) (company complied with *MFW* conditions and stockholder could not plead direct claim for breach of fiduciary duty)

12. *Strategic Investment Opportunities LLC v. Lee Enterprises Inc.* (Del. Ch. Feb. 14, 2022) (clear, unambiguous language setting forth advance notice bylaws will generally be enforced even under enhanced scrutiny)

13. *City Pension Fund for Firefighters & Police Officers in the City of Miami v. The Trade Desk, Inc.* (Del. Ch. July 29, 2022) (concluding amendment of certificate of incorporation to extend duration of dual-class structure complied with *MFW*)

Statutory

14. *In re GGP, Inc. Stockholder Litigation* (Del. July 19, 2022) (dividends expressly conditioned on a merger are merger consideration and, for purposes of an appraisal proceeding, must be treated as if they had not been paid)

Contract Interpretation

1. *Crispo v. Musk* (Del. Ch. Oct. 11, 2022) (merger agreement did not confer third-party beneficiary status to stockholders)

In *Crispo v. Musk*,[2] the Delaware Court of Chancery granted a motion to dismiss, in part, holding that Luigi Crispo ("Crispo"), a stockholder of Twitter, Inc. ("Twitter"), (i) did not have standing to seek an order of specific performance of a merger agreement against Elon Musk and entities he controlled (together, "Musk") because stockholders were not third-party beneficiaries under the merger agreement for purposes of seeking specific performance, and (ii) failed to state a claim for breach of fiduciary duty against Musk because the plaintiff failed to adequately plead that Musk controlled Twitter and therefore owed fiduciary duties. However, the court ordered supplemental briefing on the issue of whether Crispo had standing, as a third-party beneficiary, to bring a damages claim against Musk for breach of the merger agreement.

Background

On April 9, 2022, Musk, who owned approximately 10 percent of Twitter's outstanding stock, informed Twitter that he would not be joining Twitter's board, as previously agreed between Musk and Twitter, and would instead be making an offer to acquire Twitter.[3] Musk made an offer of $54.20 per share four days later.[4] In response, Twitter adopted a shareholder rights plan to limit Musk's ability to acquire additional Twitter stock.[5] Then, on April 25, 2022, Twitter and Musk signed a merger agreement.[6]

Musk later purported to terminate the merger agreement.[7] Twitter sued Musk and sought specific performance. Crispo filed a separate action against Musk asserting a claim for breach of the merger agreement and seeking specific performance or, in the alternative, damages, and a claim for breach of fiduciary duties.[8] Musk moved to dismiss.

Analysis

The Court of Chancery first held that the complaint failed to state a claim for specific performance because the merger agreement did not confer third-party beneficiary status on Twitter stockholders with respect to such claims.[9] The court explained that Delaware law had only extended third-party beneficiary

2. C.A. No. 2022-0666-KSJM, 2022 WL 6693660 (Del. Ch. Oct. 11, 2022).
3. *Id.* at *1.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at *2.
8. *Id.*
9. *Id.* at *2–11.

status to stockholders in limited circumstances.[10] Because boards of directors are afforded the authority to manage the business and affairs of the corporation, including with respect to the corporation's litigation assets, "Delaware law imposes pleading hurdles on stockholders who seek to stand in the shoes of a corporation and enforce a corporate contract."[11] Affording stockholders third-party beneficiary status would lead to the "proliferation of stockholder suits" and "considerable inefficiencies."[12]

The merger agreement contained a "no third-party beneficiaries" provision that contained a blanket prohibition on third-party beneficiaries with three carve-outs where third-party beneficiary status was conferred, and the plaintiff did not argue that any of the three carve-outs applied.[13] The court noted that where a "no third-party beneficiaries" provision is "customized" and contains carve-outs conferring third-party beneficiary status, the parties knew how to confer third-party beneficiary status and decided not to confer it in other circumstances.[14]

The court also rejected the plaintiff's argument that a provision describing the effect of termination on liability or damages conferred upon stockholders standing to seek an order of specific performance of the merger agreement.[15] The "Effect of Termination" provision provided that the damages available in the event of a breach of the merger agreement would not be limited to reimbursement of expenses and costs and would include "the benefits of the transactions contemplated by this Agreement lost by the Company's stockholders . . . including lost stockholder premium."[16] The court held that although the language suggested that Twitter and Musk intended that stockholders be placed in the position that they would have been had the merger agreement been fully performed, to the extent the provision "evinces an intent to confer third-party beneficiary status to Twitter stockholders," then "such standing is restricted to claims for damages."[17]

The court left open the possibility that Section 8.2 of the agreement conferred upon stockholders third-party beneficiary status to assert such claim for damages. The issue of whether such a provision "conveys third-party beneficiary status to stockholders as to damages claims is a thorny legal issue,"[18] and the court traced the history of similar language that appeared in response to the decision of the U.S. Court of Appeals for the Second Circuit in *Consolidated Edison, Inc. v. Northeast Utilities* ("*Con Ed*").[19] In *Con Ed*, the Second Circuit held that neither the target corporation nor its stockholders could recover lost stockholder premium as damages

10. *Id.* at *3.
11. *Id.*
12. *Id.*
13. *Id.* at *4.
14. *Id.* at *5.
15. *Id.* at *9–11.
16. *Id.* at *9.
17. *Id.*
18. *Id.* at *10.
19. 426 F.3d 524 (2d Cir. 2005).

for breach of a merger agreement.[20] The merger agreement at issue in *Con Ed* contained a "no third-party beneficiaries" provision that meant stockholders lacked standing to sue for breach of the merger agreement, and the target corporation could not recover damages for any lost stockholder premium.[21]

Following *Con Ed*, deal counsel started using language in merger agreements that defined the damages that a target corporation could recover to include lost stockholder premium.[22] The court cited to an article discussing the development and explained that such provisions do not confer third-party beneficiary status upon the target corporation's stockholders.[23] That observation had also been endorsed by a "leading treatise."[24] The parties' decision to adopt language that such commentary had "identified as setting the parties on a course free of the hazard of direct stockholder claims like those filed by Plaintiff" weighed against a finding that the merger agreement conferred third-party beneficiary status on Twitter stockholders to seek damages for breach of the merger agreement.[25] However, because the court raised the issue *sua sponte*, it gave the parties leave to submit supplemental briefing addressing the issue.[26]

Finally, the court rejected the argument that Musk controlled Twitter in connection with the execution and termination of the merger agreement.[27] Such a request was "simply not a reasonable ask" given Twitter's separate litigation against Musk over the deal.[28] And Musk's approximate 10 percent equity ownership of Twitter, without additional allegations of control, was insufficient to confer controller status.[29] Even assuming that it was appropriate to consider the shares of Twitter owned by Musk's co-investors, the combined 26.85 percent of Twitter stock owned by Musk and the co-investors was also insufficient to infer control.[30] The plaintiff's argument that the court should count the shares of Twitter that Musk would acquire in the merger was "illogical."[31] The court then rejected the plaintiff's argument that the existence of the merger agreement itself was indicia of Musk's control over the Twitter board, stating that the board's adoption of a shareholder rights plan demonstrated the board's independence from Musk and that the plaintiff had failed to allege that Musk exercised any contractual rights in the merger agreement to veto actions of the Twitter

20. *Id.* at 531.
21. *Id.* at 527–31.
22. *Crispo*, 2022 WL 6693660, at *10.
23. *Id.* (citing Victor I. Lewkow & Neil Whoriskey, *Left at the Altar: Creating Meaningful Remedies for Target Companies*, M&A LAW. (Oct. 2007)).
24. *Crispo*, 2022 WL 6693660, at *11 (citing ARTHUR FLEISCHER ET AL., TAKEOVER DEFENSE: MERGERS AND ACQUISITIONS § 19.06(C) (9th ed. 2022)).
25. *Crispo*, 2022 WL 6693660, at *11.
26. *Id.* After the court issued its decision but before supplemental briefing had been filed, Musk agreed to acquire Twitter and the transaction closed on October 27, 2022, mooting any damages action that the plaintiff could pursue against Musk.
27. *Id.* at *12–16.
28. *Id.* at *13.
29. *Id.*
30. *Id.*
31. *Id.* at *14.

board.[32] Finally, the court held that neither Musk's "immense wealth, celebrity status, and large Twitter following" nor his relationship with Jack Dorsey, Twitter's founder and a board member and significant stockholder of Twitter, demonstrated that Musk controlled Twitter.[33]

Conclusion

Crispo confirms that a target corporation can contract for damages provisions that incorporate lost stockholder premium while preventing stockholders from obtaining third-party beneficiary status to seek specific performance of the merger agreement. Given the court's *sua sponte* questions concerning the standing to enforce the damages provision, deal counsel should consider removing any doubt by clarifying damages provisions to state they do not confer upon stockholders third-party beneficiary status to bring a damages action.

2. *Williams Cos. v. Energy Transfer LP* (Del. Ch. Aug. 25, 2022) (merger agreement's provisions concerning fee shifting did not bar contingency fee arrangement)

In *Williams Companies, Inc. v. Energy Transfer LP*,[34] the Court of Chancery held that the contingent fee arrangement entered into between the plaintiff and its attorneys to pursue an enforcement/damages action against the defendant following a busted deal was reasonable under the fee-shifting provision of the merger agreement that obligated the defendant to pay plaintiff's reasonable attorneys' fees. The court further held that in the absence of any language in the merger agreement specifying whether interest on the breakup fee should be calculated as simple or compound interest, the court could determine which calculation best fulfilled the intent of the award and determined that to be quarterly compound interest.

Background

In prior litigation, The Williams Companies, Inc. ("Williams") was awarded a $410 million judgment as liquidated damages pursuant to a merger agreement (the "Merger Agreement") between Williams and Energy Transfer LP, formerly known as Energy Transfer Equity, L.P. ("ETE").[35] The Merger Agreement provided that if Williams prevailed, it was entitled to recover its reasonable attorneys' fees and expenses from ETE.[36] While the litigation was pending, Williams switched to a contingency fee arrangement with its counsel.[37] As counsel for the

32. *Id.* at *14–15.
33. *Id.* at *15.
34. C.A. No. 12168-VCG, 2022 WL 3650176 (Del. Ch. Aug. 25, 2022).
35. *Id.* at *2. *See also* Williams Cos. v. Energy Transfer LP, C.A. No. 12168-VCG, 2021 WL 6136723 (Del. Ch. Dec. 29, 2021).
36. 2022 WL 3650176, at *2.
37. *Id.*

prevailing party, counsel's fee was 15 percent of the $410 million judgment, or approximately $74.8 million.[38]

As the prevailing party, Williams was also entitled to prejudgment interest.[39] However, the Merger Agreement was silent as to whether prejudgment interest should be simple or compounded, and the parties disputed how interest should be computed.[40]

Analysis

Contingent Fee Is Reasonable

The main dispute was whether Williams' attorneys' fees and expenses were reasonable. Other than the requirement that attorneys' fees be "reasonable," the Merger Agreement contained no limitation on attorneys' fees and expenses that could be shifted to the losing party.[41] To determine reasonableness in contractual fee-shifting cases, Delaware applies the eight factors of Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct.[42] Rule 1.5(a) explicitly contemplates contingent fees, and the comments to the rule explain that reasonableness depends on the particular circumstances.[43] Williams' general counsel made the business decision to switch to a contingent fee to align the interests of the client and law firm.[44] That was reasonable under the circumstances, as were the number of hours counsel spent working on the matter, and the rates it charged (which reflected a discount and rate freeze).[45]

The court did caution that the decision to switch mid-litigation from an hourly arrangement to a contingent fee arrangement may be unreasonable in some circumstances.[46] For example, if the litigation has progressed significantly or the uncertainty of the outcome has diminished, switching to a contingent fee in an attempt to penalize the other side would be unreasonable.[47] However, in this case, the nature of the case changed from one seeking injunctive relief (which called for a non-contingent representation) to one seeking recovery of the break fee (for which contingent representation could be seen as a better business option).[48]

Because the Merger Agreement was silent as to whether interest should be simple or compound, the parties left that determination to the discretion of the court.[49] The court held that prejudgment interest should be compounded

38. *Id.*
39. *Id.*
40. *Id.* at *6.
41. *Id.* at *3.
42. *Id.*
43. *Id.*
44. *Id.* at *2.
45. *Id.* at *5.
46. *Id.* at *4.
47. *Id.*
48. *Id.*
49. *Id.* at *6.

quarterly because compounding more accurately reflects the standard form of interest in the financial market.[50]

Conclusion

The court held that the contingent fee arrangement was reasonable under the Merger Agreement's fee-shifting provision and Delaware law. In addition, practitioners should be aware that in the absence of a contractual provision otherwise, the Court of Chancery is inclined to compound interest quarterly.

3. *Menn v. ConMed* (Del. Ch. June 30, 2022) (buyer satisfied "commercially best efforts" standard, with court interpreting "commercially best efforts" as having same meaning as "best efforts")

In *Menn v. ConMed Corp.*,[51] the Delaware Court of Chancery ruled that the efforts of ConMed Corporation ("ConMed" or "Buyer") to develop and commercialize the SureClip product of EndoDynamix, Inc. ("EndoDynamix" or "Target") post-acquisition complied with contractual obligations to use "commercially best efforts" to maximize payouts and net sales, even though ConMed ultimately discontinued development of the product. The decision underscores that, while deal practitioners may have a sense of the hierarchy among efforts clauses, Delaware courts are not necessarily persuaded by this hierarchy or that such a hierarchy exists.

Background

The case arises from the stock purchase agreement ("SPA") governing ConMed's acquisition of EndoDynamix. EndoDynamix was a medical device company that had been developing the SureClip—a clip applier product for use in laparoscopic surgeries. Importantly, the bulk of consideration to be paid to sellers depended on the SureClip's continued development and commercial success post-acquisition via a contingent payment structure that would pay amounts based upon both development objectives and percentages of net sales.

As a result, under the SPA, ConMed agreed to "work in good faith" with EndoDynamix and use "commercially best efforts" to maximize the milestone and earn-out payments for the benefit of the stockholder parties.[52] ConMed also agreed to grant sellers the right to demand accelerated payment of unpaid milestone and earn-out payments upon the occurrence of certain events, one of which was permanent discontinuation of the development or sale of the SureClip.[53] There were contractually specified exceptions, however, to the accelerated payment obligation. The relevant exception for this case was that ConMed would not be required to make acceleration payments if the decision to discontinue

50. *Id.*
51. C.A. No. 2017-0137-KSJM, 2022 WL 2387802 (Del. Ch. June 30, 2022).
52. *Id.* at *5.
53. *Id.*

the product was based on a "commercially reasonable determination" made in its "sole discretion" that the SureClip posed risk of injury to patients.[54]

Before the parties executed the SPA, ConMed had identified certain safety issues with the SureClip's design.[55] The SPA permitted ConMed to implement design changes to the product in order to address those safety issues, and these specific design changes were identified in a schedule to the SPA. After the deal closed, ConMed dedicated significant resources to developing the SureClip, including implementing the specified design modifications, subjecting the product to multiple animal lab studies, and applying for United States Food and Drug Administration clearance (which it received). Further, ConMed continued to satisfy its payment obligations to sellers, making the up-front payment and three of the four milestone payments.

However, ConMed's board of directors ultimately decided to discontinue the development of the SureClip in May 2016 because it was determined that the product posed a risk of injury to patients. The determination was made following guidance from consultants and a development team that had been tasked with reevaluating the product and was informed by the persistence of continued problems including relating to some of the safety features identified prior to closing.[56] Following the decision, sellers demanded acceleration payments pursuant to the SPA, which ConMed declined to pay.[57]

Plaintiff asserted breach of contract claims against ConMed for failing to (1) make acceleration payments to the stockholder parties and (2) use "commercially best efforts" to develop and sell the SureClip, and a claim for violating the implied covenant of good faith and fair dealing.[58]

Analysis

Regarding the first breach of contract claim, the court concluded that ConMed had appropriately discontinued the product "based on a commercially reasonable determination . . . in their sole discretion" that the product posed a risk of injury to patients.[59] The court was persuaded by evidence of the history of persistent concerns by ConMed personnel that the product posed a risk of injury to patients.

To interpret what a "commercially reasonable determination" meant in this context, the court cited a legal dictionary definition, namely "in accordance with commonly accepted commercial practice."[60] The opinion noted that in other contexts, the court had held that a "commercially reasonable" standard requires a showing that the determination was "in keeping with prevailing trade practice among reputable and responsible business and commercial enterprises

54. *Id.* at *6.
55. *Id.*
56. *Id.* at *21–22.
57. *Id.*
58. *Id.*
59. *Id.* at *23.
60. *Id.* at *29.

engaged in the same or similar businesses."[61] In applying these concepts here, the court concluded that ConMed's determination was made in accordance with commonly accepted commercial practices and thus was a commercially reasonable determination.[62]

As to the second contract claim, the court concluded that ConMed's "aggressive redesign" efforts to address product safety concerns, brief delay in product development, and ultimate decision to permanently discontinue the SureClip did not violate ConMed's obligation to use commercially best efforts to maximize payouts for the stockholder parties. Though practitioners often define benchmarks by which to measure "commercially reasonable" efforts standards within contracts, the parties had not included any such yardstick. In the absence of a contractual benchmark, the court went on to note the difficulty of placing the "hierarchy" of efforts clauses:

> Deal practitioners who draft efforts clauses "have a general sense of [the] hierarchy" of such clauses. One commonly cited version of this hierarchy places "best efforts" as the highest standard with "reasonable best efforts," "reasonable efforts," "commercially reasonable efforts," and "good faith efforts" following in descending order. "Commercially best efforts" provisions are not found on the standard hierarchy. Logically, such provisions would fall between "best efforts" and "commercially reasonable efforts." Although deal practitioners have some sense of the hierarchy among efforts clauses, courts applying the standards have struggled to discern daylight between them. This court, for example, has interpreted "best efforts" obligations as on par with "commercially reasonable efforts". . . . [I]t follows that there is even less daylight between "best efforts" and "commercially best efforts" provisions.[63]

The court interpreted "commercially best efforts" as imparting the same meaning as "best efforts."[64] In other cases, parties had breached "best efforts" obligations by failing to work with counterparts to jointly solve problems, failing to keep the deal on track, and submitting false data to and refusing to cooperate with regulators.[65] Nothing similar was alleged here.

With respect to the implied covenant claim, the court explained that the covenant does not constitute a "free floating duty imposed on a contracting party."[66] Rather, the implied covenant can only be employed "conservatively" to ensure the "'reasonable expectations'" of the parties are fulfilled.[67] Because the court found that plaintiff's arguments were duplicative of express contractual provisions, the claim failed because the implied covenant cannot be used to "override express contractual provisions."[68]

61. *Id.*
62. *Id.* at *30.
63. *Id.* at *34.
64. *Id.* at *35.
65. *Id.*
66. *Id.* at *39.
67. *Id.*
68. *Id.*

Conclusion

This case highlights the evident misalignment between practitioners' general understanding of the meaning or supposed hierarchy of efforts standards and the Delaware courts' interpretation of those standards. Delaware courts have struggled to discern the daylight between the range of efforts standards upon which practitioners rely, having interpreted "best efforts" clauses to be on par with "commercially reasonable efforts" and, here, concluding that "commercially best efforts" provides the same meaning as "best efforts." In light of these decisions, deal practitioners may consider including contractual definitions, or "yardsticks," by which to measure efforts going forward.

4. *SPay, Inc. v. Stack Media Inc.* (Del. Ch. Dec. 21, 2021) (contractual survival period did not bar claims for breaches of covenants or fundamental representations)

In *SPay, Inc. v. Stack Media Inc.*,[69] the Delaware Court of Chancery largely denied a motion to dismiss a buyer's claims for breach of contract, fraud, breach of fiduciary duty, conversion, and unjust enrichment because that buyer's claims against the seller parties were not barred by the purchase agreement as defendants argued.[70]

Background

In 2017, SPay, Inc. entered into an asset purchase agreement for the purchase of substantially all of the assets of Stack Media Inc.[71] Following the closing, SPay discovered that Stack Media owed more than $4 million in unpaid bills and was generating negative earnings.[72] The purchase agreement provided that the representations and warranties expired as of December 2, 2018.[73] This limitation specifically did not apply to fundamental representations or to covenants.

SPay filed suit alleging that Stack Media and its owners (the "seller parties") had breached several fundamental representations and several covenants, seeking rescissory damages and other relief as a result of seller parties' breach of contract, breach of fiduciary duty, and fraud.

Analysis

After addressing defendants' claims that the court did not have proper personal jurisdiction, the court moved on to review the substance of plaintiff's claims to determine if they were time barred by the purchase agreement.[74]

69. No. 2020-0540-JRS, 2021 WL 6053869 (Del. Ch. Dec. 21, 2021).
70. *Id.* at *1.
71. *Id.* at *2.
72. *Id.*
73. *Id.* at *5–6.
74. *Id.* at *2–5.

SPay's breach of contract claims were based on the purchase agreement's fundamental representations or the covenants.[75] Accordingly, these claims were not barred even though they were brought after December 2, 2018.[76] While the parties could have included a time limitation for claims for breach of covenant, they did not elect to contractually limit the time period for breaches of covenants. Thus, the statutory limitations period of three years applied.[77]

SPay's complaint also alleged fraud against the seller parties for making knowingly false representations in the purchase agreement.[78] Although some of these claims arose with respect to non-fundamental representations, the court determined that these claims were also not time barred even though they were brought after the December 2, 2018, deadline.[79] The asset purchase agreement contained specific language stating that claims based on fraud were not governed by the article of the purchase agreement dealing with indemnification, including the provision that addressed survival of the representations and warranties.[80]

The seller parties also argued that the claims against the owners for breaches of covenants should be dismissed. The court rejected this argument because the indemnification provisions specifically obligated the owners to indemnify SPay for breaches of any covenants or other agreements by Stack Media.[81] Thus, as a matter of contract law, the owners could be held liable for Stack Media's breaches.

The court did dismiss certain non-fraud claims against one of the owners. The purchase agreement stated they bore no contractual indemnification responsibility. The court determined that parties can contractually limit the portion of liability that a party would have for non-fraudulent breach of the contract.[82]

Conclusion

The conclusions here were not surprising and apply settled Delaware law. The case is a good reminder that contractual language will be respected by the courts. As to non-fraud claims, the court will respect limitations agreed to by the parties, but the parties should be certain to be clear about which limitations they intend to impose.

5. *Fortis Advisors v. Johnson & Johnson* (Del. Ch. Dec. 13, 2021) (exclusive remedy provision was not sufficient to bar extra-contractual fraud claims in connection with earnout)

75. *Id.* at *6.
76. *Id.*
77. *Id.*
78. *Id.* at *7.
79. *Id.*
80. *Id.*
81. *Id.* at *8.
82. *Id.* at *10–11.

On December 13, 2021, Vice Chancellor Will denied the defendants' motion to dismiss the plaintiff's fraud claim in *Fortis Advisors, LLC v. Johnson & Johnson*.[83] The Court of Chancery read the merger agreement's exclusive remedy provision as not preventing the plaintiff from pursuing a fraud claim based on extra-contractual statements made by the buyer. The contract's exclusive remedy clause only carved out fraud contained in the agreement's representations and warranties. However, only the buyer disclaimed reliance on extra-contractual statements. Accordingly, the court refused to dismiss the sellers' fraud claim, finding that the absence of sellers' disclaimer of reliance suggested that the sellers may rely on the defendants' assurances.

Background

This case arose from a merger agreement entered into in February 2019, in which defendant Ethicon, Inc. ("Ethicon"), a wholly owned subsidiary of Johnson & Johnson ("J&J"), acquired Auris Health, Inc. ("Auris").

Auris makes robotically assisted surgical devices ("RASDs"), including the iPlatform device.[84] Under the merger agreement, the selling stockholders received $3.4 billion upfront at closing with another $2.35 billion payable upon achievement of certain regulatory and sales milestones.[85] The specific regulatory milestones contained in the merger agreement included a requirement that iPlatform obtain FDA approval through a specifically articulated process.[86]

With respect to the sales milestones, during negotiations J&J provided representations regarding the development, marketing, and management of the iPlatform due to competing RASDs already in the J&J portfolio, with J&J providing assurances that post-merger iPlatform would have the space and staffing needs to meet its sales targets.[87] However, these representations were not reflected in the merger agreement. Instead, the merger agreement contained a "one-sided anti-reliance provision in which Ethicon disclaimed reliance"[88] on any statements made by the sellers, outside of the agreement itself.

Several months after the transaction closed, the FDA changed its process for approving the Auris technology, replacing the process contemplated in the merger agreement with a different process that was not mentioned in the merger agreement.[89] After the FDA changed the regulatory clearance process for iPlatform, J&J announced that it would no longer carry reserves for payment of the earnout amounts to the sellers.[90]

Fortis Advisors LLC, as representative of the former stockholders of Auris, filed suit alleging breach of the merger agreement, fraud, and a variety of

83. C.A. No. 2020-0881-LWW, 2021 WL 5893997 (Del. Ch. Dec. 13, 2021).
84. *Id.* at *2.
85. *Id.* at *3.
86. *Id.*
87. *Id.* at *3, *12.
88. *Id.* at *3.
89. *Id.* at *4.
90. *Id.*

other causes of action. The plaintiff's fraud claim is based on certain assurances that the plaintiff alleges the buyers made about how the iPlatform device would fit into the Ethicon portfolio post-closing.

Analysis

The plaintiff alleged that J&J committed fraud by making false extra-contractual representations to Auris during the merger negotiations.[91] The defendants argued that claims arising from extracontractual misrepresentations were not carved out of the exclusive remedy provision and therefore rescission was not available.

Balancing public policy in favor of freedom to contract with strong public policy against intentional fraud, the Court of Chancery concluded the agreement's exclusive remedy provision did not prevent the plaintiff from pursuing a fraud claim based on extra-contractual statements made by the buyer, writing "[n]o Delaware court has found that an exclusive remedy provision bars a plaintiff from bringing a fraud claim based on extra-contractual representations in the absence of express anti-reliance language."[92]

Here, while the buyer had explicitly disclaimed reliance on extra-contractual statements, the sellers had not. The one-sided disclaimer was a drafting choice. The parties knew that in order to preclude fraud claims the agreement needed an explicit statement disclaiming reliance, which the merger agreement had. The court viewed the one-sided non-reliance provision as evidence of "a bargained for allocation of risk."[93]

The court further explained that the fact that only one party disclaimed reliance on extra-contractual statements supported an inference that the non-disclaiming party was justified in relying on extra-contractual statements, writing: "the fact that Ethicon expressly disclaimed reliance but Auris did not suggests that Auris was permitted to rely on the defendants' assurances. . . . To find otherwise would ignore the delicate balance that Delaware courts have struck between supporting freedom of contract and condemning fraud."[94]

Conclusion

This case reinforces Delaware precedent that Delaware courts will recognize the parties' decision to shield themselves from liability for fraud when negotiating contracts. However, in order to do so, the parties must clearly and unambiguously express their intent to disclaim reliance on extra-contractual statements and to bar fraud claims based on such statements.

91. *Id.* at *8.
92. *Id.* at *11.
93. *Id.*
94. *Id.* at *12.

6. *Level 4 Yoga, LLC v. Corepower Yoga, LLC* (Del. Ch. Mar. 1, 2022) (seller did not breach its ordinary course covenant with actions in response to the COVID-19 pandemic nor was COVID-19 an MAE)

In *Level 4 Yoga, LLC v. CorePower Yoga, LLC*,[95] the Delaware Court of Chancery determined that the COVID-19 pandemic did not constitute a Material Adverse Effect under the acquisition agreement, and that the closure of yoga studios by Level 4, as seller, did not violate its covenant to operate in the "Ordinary Course of Business" during the interim period. Level 4 was entitled to specific performance and compensatory damages in addition to pre-judgment interest on the deal price. On November 2, 2022, the Delaware Supreme Court affirmed the Delaware Court of Chancery's judgment.[96]

BACKGROUND

Level 4 Yoga LLC ("Level 4") was a franchisee of CorePower Yoga, LLC and CorePower Yoga Franchising, LLC (together "CorePower").[97] Through a franchise agreement, Level 4 owned and operated a series of yoga studios. CorePower's form of franchise agreement had several relevant features. One, it required franchisees to follow certain operational standards "even when [the franchisee] 'believe[s] that a System Standard is not in the Franchise System's or [its own] best interests.'"[98] Two, it permitted CorePower to regulate certain operational matters of the Level 4 studios—notably the days and hours of their operation, their membership terms, their compliance with law, and their adherence to good business practice.[99] Three, it gave CorePower a call option. Level 4 successfully negotiated to require the acquisition of all, rather than a portion, of Level 4's CorePower branded yoga studios in the event such call option was exercised. The terms of the call option were memorialized in a Call Option Agreement.[100]

A private equity firm acquired CorePower in April 2019 triggering the call option.[101] However, the PE firm that acquired CorePower thought that the acquisition of all of Level 4's studios concurrently would pose integration issues.[102] Level 4 agreed to amend the existing Call Option Agreement, provided that the definitive acquisition agreement would not contain any closing conditions or express rights to terminate.[103] This atypical acquisition structure was described by Level 4 as a "one way gate."[104]

95. C.A. No. 2020-0249-JRS, 2022 WL 601862 (Del. Ch. Mar. 1, 2022) [hereinafter *Level 4 Yoga*].
96. No. 109, 2022, 2022 WL 16579468 (Del. 2022).
97. *Id.* at *1.
98. *Level 4 Yoga*, 2022 WL 601862, at *3.
99. *Id.* at *4.
100. *Id.*
101. *Id.* at *5.
102. *Id.*
103. *Id.*
104. *Id.* at *1.

On November 27, 2019, Level 4 and CorePower entered into a definitive Asset Purchase Agreement (the "APA"). The APA provided for the acquisition of Level 4's yoga studios to occur in tranches, the first of which was to close on April 1, 2020.[105]

Then came the COVID-19 pandemic. On March 15, 2020, in response to COVID-19, CorePower required all of its branded yoga studios, including those run by Level 4, to close for two weeks.[106] Five days later, the CorePower board of directors met and decided to delay the closing of the acquisition under the APA.[107] CorePower claimed that the temporary closure of Level 4's studios meant that it was not operating in the "Ordinary Course of Business" as required by the APA.[108] Meanwhile, during that same five-day period between the closures and the CorePower board of directors meeting, CorePower drew down on its lending facility certifying to its lenders that it "'had not experienced and was not reasonably expected to experience a Material Adverse Effect under its credit agreement.'"[109] Level 4, on the other hand, refused to delay or terminate the transactions and stood ready and willing to close on April 1, 2020.[110]

The day after CorePower failed to close, Level 4 filed suit seeking a declaratory judgment of the validity of the APA and CorePower's breach. CorePower counterclaimed seeking a declaration that Level 4 repudiated or materially breached the APA and thus CorePower was excused from performing.

Analysis

The court found that CorePower was obligated to close and that its refusal to do so was a breach of the APA.[111] There was no basis in contract for CorePower to terminate. Unlike many "busted deal" cases, (i) CorePower's role as franchisor gave it a contractual right to direct how Level 4 operated its business during the interim period under the APA, and (ii) Level 4 was not a willing seller—rather it was bound by the call option.[112] The structure of the APA itself was bargained for, and the agreement was drafted as a "one way gate" with no closing conditions or express right to terminate.[113] CorePower had remedies within the APA, including purchase price adjustments and indemnification, but those remedies did not include termination.[114]

CorePower proffered several common law arguments as a justification for its failure to close. CorePower asserted a repudiation had occurred because the effects of the COVID-19 pandemic caused Level 4 to breach its representation that

105. *Id.* at *6.
106. *Id.* at *7.
107. *Id.* at *8.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at *10.
112. *Id.* at *10–11.
113. *Id.* at *12.
114. *Id.* at *13.

no MAE had occurred.[115] To determine that an MAE had occurred, the court stated that it "must find that the magnitude of the downward deviation in the affected company's performance [was] material and that the effect [would] substantially threaten the overall earnings potential of the target in a durationally-significant manner."[116] The court determined that "at the time that CorePower purported to invoke the No-MAE representation, there was absolutely no basis for CorePower to conclude that the business effects of COVID-19 were then, or later would be, significant."[117] In fact, CorePower had certified to its lenders that it had not experienced an MAE itself.[118] Elaborating that because "CorePower was seeking to acquire Level 4 as part of a long-term strategy, to such an acquiror the important thing is whether the Company suffered an MAE in its business or results of operations that is consequential to the company's earning power over a commercially reasonable period, which would be measured in years rather than months."[119]

CorePower also asserted a repudiation had occurred because Level 4 had breached its ordinary course covenant and related representations. The court explained that when an "ordinary course" provision includes the phrase "consistent with past practice," as in the APA, the court will look to how the company itself "historically has operated, both generally and under similar circumstances."[120] Level 4 "followed the example set by its franchisor" and closed its "studios at CorePower's direction," which "reflected Level 4's compliance with its obligations as franchisee, not deviations from past practice."[121] There was no repudiation of the APA by virtue of a breach of the ordinary course covenant. The court also reasoned that because there was no repudiation and no material breach under the APA, there was no frustration of purpose.[122]

Conclusion

Level 4 Yoga applied an analytical framework that was consistent with that used in both *AB Stable*[123] and *Snow Phipps*[124] to interpret the ordinary course covenant. When a covenant to operate in the "ordinary course" is qualified by the words "consistent with past practice" it necessitates that the factfinder examine how the party itself has historically operated, both generally and under similar circumstances. The case also applied the same rationale as *Snow Phipps* when determining whether COVID-19's effect on Level 4's business constituted an

115. *Id.* at *20.
116. *Id.* at *21 (quoting *In re* IBP, Inc. S'holders Litig., 789 A.2d 14, 68 (Del. Ch. 2001)).
117. *Id.*
118. *Id.* at *8.
119. *Id.* at *21 (quoting *In re IBP, Inc.*, 789 A.2d at 67).
120. *Id.* at *24.
121. *Id.* at *25.
122. *Id.* at *26.
123. AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, C.A. No. 2020-0310-JTL, 2020 WL 7024929 (Del. Ch. Nov. 30, 2020).
124. Snow Phipps Grp., LLC v. KCAKE Acquisition, Inc., C.A. No. 2020-0282-KSJM, 2021 WL 1714202 (Del. Ch. Apr. 30, 2021).

MAE at the time that CorePower declared that an MAE had occurred. At the time tested, an MAE must be of a durationally significant manner.

7. *Arwood v. A.W. Site Services, LLC* (Del. Ch. Mar. 9, 2022) (interpreting asset purchase agreement's provisions related to fraud and contractual indemnifications claims, including sandbagging provisions)

In this post-trial decision,[125] the Delaware Court of Chancery addressed tort claims by a buyer premised upon extra-contractual fraud (fraudulent concealment), as well as contractual indemnification claims premised upon the breach of express representations and warranties set forth in an asset purchase agreement. In so doing, the court interpreted an asset purchase agreement and analyzed Delaware law on sandbagging.

BACKGROUND

A.W. Site Services, LLC ("AWS") was an acquisition vehicle formed by Broadtree Partners, LLC, a private equity firm, to acquire a waste disposal business from John D. Arwood.[126] Apparently, Broadtree Partners was granted virtually unlimited access to Mr. Arwood's business during due diligence, largely because Mr. Arwood had no financial statements and "did not know how to package a business to be sold."[127] Indeed, the financial statements that were ultimately prepared, and which formed the basis for certain representations and warranties set forth in the Asset Purchase Agreement ("APA"), were prepared by Broadtree Partners, AWS's sponsor, not by Mr. Arwood or any of his representatives.[128] Despite the extensive pre-closing due diligence and access by the buyer, the business allegedly did not perform as well post-closing as it had pre-closing. This was apparently due to the fact that certain improper billing practices that had been engaged in pre-closing were discontinued post-closing.[129]

The buyer claimed that Mr. Arwood "had somehow managed to defraud them, notwithstanding [the buyer's] intimate knowledge of the business pre-closing, by concealing a massive fraudulent billing scheme that caused a substantial overstatement of revenue."[130]

ANALYSIS

Fraud Claims

In evaluating the fraud claims leveled against Mr. Atwood, Vice Chancellor Slights held that the buyer had failed to prove that Mr. Atwood had either

125. Arwood v. AW Site Servs., LLC, C.A. No. 2019-0904-JRS, 2022 WL 705841 (Del. Ch. Mar. 9, 2022).
126. *Id.* at *3.
127. *Id.* at *2, *11.
128. *Id.* at *9, *33.
129. *Id.* at *34.
130. *Id.* at *2.

acted intentionally or recklessly in making representations/concealing facts concerning the business; indeed, Mr. Atwood had not actively concealed anything about the business.[131] Instead, Mr. Atwood had provided unfettered access to the business.[132] According to Vice Chancellor Slights, it was the buyer who had acted recklessly and, therefore, could not reasonably have relied upon any purported misrepresentations or misleading omissions: "[I]f this buyer did not appreciate the facts it now claims were fraudulently concealed from it, that incognizance was the product of its own reckless failure to observe what was right in front of it."[133]

Indemnification Claims

Having found that the buyer lacked the required "justifiable reliance" necessary to sustain any fraud-based claim, Mr. Atwood raised a classic "sandbagging" defense to the buyer's indemnification claims—i.e., "the buyers cannot rely upon representations in the APA to sue for breach of contract when they either knew pre-closing that the representations were false or were recklessly indifferent to their truth."[134] But Vice Chancellor Slights rejected Mr. Atwood's sandbagging defense respecting the indemnification claims:

> In my view, Delaware is, or should be, a pro-sandbagging jurisdiction. The sandbagging defense is inconsistent with our profoundly contractarian predisposition. Even if Delaware were an anti-sandbagging jurisdiction, I am not satisfied that a buyer's reckless, as opposed to knowing, state of mind would trigger the doctrine in any event.[135]

The issue of whether Delaware was a reliably pro-sandbagging state was joined several years ago as a result of a footnote in a Delaware Supreme Court decision, *Eagle Force Holdings, LLC v. Campbell*.[136] In that footnote, while acknowledging that the majority view "holds that traditional reliance is not required to recover for breach of an express warranty," the court simply noted that Delaware had "not yet resolved this interesting question."[137] But subsequent Court of Chancery decisions all appear to suggest that the issue has in fact been resolved—i.e., the proof of justifiable reliance required to succeed on a tort-based fraud claim is not required to succeed in a contract-based indemnification claim. And the *Arwood* decision is very decidedly on that side of the ledger.

In resolving the sandbagging defense to the indemnification claim, Vice Chancellor Slights noted that there was a deal lawyers' "sandbagging playbook" that had developed to address this issue:

131. *Id.* at *2, *20–22.
132. *Id.* at *1.
133. *Id.*
134. *Id.* at *3.
135. *Id.*
136. 187 A.3d 1209 (Del. 2018).
137. *Id.* at 1236 n.185.

> While there certainly is nuance in how a planner might approach sandbagging, the playbook boils down to three approaches: (1) including a clause within the acquisition agreement that expressly permits buyer to engage in sandbagging even if buyer has previous knowledge of the falsity of seller's representations and warranties; (2) including a clause within the acquisition agreement that expressly prevents buyer from pursuing indemnification for a breach of seller's representations or warranties if buyer had prior knowledge of its inaccuracy; or (3) remaining silent on the issue.[138]

In this case, the APA had specifically included a pro-sandbagging or benefit of the bargain clause.[139] But in an effort to be complete, Vice Chancellor Slights explained that even in the absence of this clause, the result would have been the same under Delaware common law. In other words, following the first or third approach from the playbook "leads to the same result"—i.e., proof of reliance on an express contractual warranty is not required to enforce that express warranty through a contractual indemnification regime.[140] So only in the face of the inclusion of an actual anti-sandbagging clause does the issue of what the buyer knew about the possible breach of an express warranty matter. When it comes to an express contractual warranty, the buyer has purchased a promise of the warranty's accuracy regardless of any potential knowledge the buyer may have regarding that warranty's falsity. Vice Chancellor Slights reached this result acknowledging that the Delaware Supreme Court had not yet spoken definitively on this issue.[141]

In an interesting twist, Vice Chancellor Slights also added, as an alternative basis for his rejection of the seller's sandbagging defense, that even if Delaware were not a pro-sandbagging state, the type of knowledge necessary to defeat a buyer's reliance on an express warranty would be "actual knowledge" of the falsity of the express warranty, not simple recklessness.[142] In other words, even though recklessness may be sufficient to defeat the justifiable reliance necessary to prove a fraud claim, it is insufficient to defeat the reliance necessary to prove an express warranty claim, even if Delaware was an anti-sandbagging state. Because only recklessness had been proved, not actual knowledge of falsity respecting any of the express representations and warranties that formed the basis for the indemnification claim, then no sandbagging defense would be available even should one be recognized by the Delaware Supreme Court.[143]

Conclusion

While the Delaware Supreme Court has still not officially resolved this issue, the strong and well-reasoned precedent from the Court of Chancery seem

138. *Id.* at *29 (cleaned up).
139. *Id.* at *30–31.
140. *Id.* at *29.
141. *Id.*
142. *Id.* at *32.
143. *Id.*

decidedly in favor of Delaware's continued reputation as a pro-sandbagging state. That means a buyer can rely on an indemnification regime to compensate for inaccurate express representations and warranties, without being concerned about questions being raised about what it knew or should have known about the accuracy of those bargained for promises. And according to *Arwood*, only the inclusion of an anti-sandbagging clause implicates the possibility of a sandbagging defense.

8. *Protégé Biomedical LLC v. Duff & Phelps Securities LLC* (8th Cir. Apr. 4, 2022) (financial advisor not liable for failing to obtain effective signature of a client's non-disclosure agreement)

On April 4, 2022, the United States Court of Appeals for the Eighth Circuit in *Protégé Biomedical LLC v. Duff & Phelps Securities LLC*[144] affirmed a lower court's dismissal of claims asserted against Duff & Phelps Securities LLC based on a client's allegation that it failed to obtain an effective signature from a potential acquiror on a non-disclosure agreement.

Background

Protégé Biomedical LLC ("Protégé") engaged Duff & Phelps Securities LLC ("Duff & Phelps") to help find a buyer for its business under the terms of an engagement letter. A potential buyer, Z-Medica, designated a member of its board of directors to discuss a potential transaction with Protégé.[145] The Z-Medica director signed a non-disclosure agreement before the discussion. The non-disclosure agreement did not identify Z-Medica or provide for a signature by Z-Medica.

Protégé disclosed its trade secrets to the Z-Medica director during the conference call.[146] Z-Medica did not pursue a transaction with Protégé, but instead allegedly used the information learned during the conference call to create its own competing product because it was not bound by the non-disclosure agreement, given the individual signed the agreement in his personal capacity and not as a representative of Z-Medica.

Protégé sued and settled with Z-Medica and then brought this action against Duff & Phelps. The district court granted a motion to dismiss Protégé's complaint under Rule 12(b)(6) and Protégé appealed.[147]

Analysis

The court of appeals first analyzed the district court's conclusion that a Duff & Phelps employee had been fraudulently joined in Protégé's state court action in his individual capacity. The court of appeals determined that he had been, observing that there was no reasonable basis in fact or law for Protégé's claims

144. No. 21-1368, 2022 WL 1008281 (8th Cir. Apr. 4, 2022).
145. *Id.* at *1.
146. *Id.*
147. Civ. No. 19-3152, 2020 WL 5798516 (D. Minn. Sept. 29, 2020).

against the employee that he was liable for breach of contract (since he was not a party to the engagement letter), the unlawful practice of law (since he did not provide legal advice), breach of professional services (since the engagement letter provided immunity from a breach of professional services claim), and breach of fiduciary (since he did not serve as a fiduciary).[148]

The court of appeals then turned to Protégé's claims against Duff & Phelps. Protégé's primary claim against Duff & Phelps was that it breached the engagement letter by failing to prevent Protégé from disclosing its own confidential information to Z-Medica's director.[149] Upholding the district court's dismissal of this claim, the court of appeals observed that the confidentiality provision in the engagement letter only regulated Duff & Phelps's own conduct—requiring it to keep confidential all Protégé nonpublic information and not to disclose that information to third parties. It did not require Duff & Phelps to prevent Protégé from disclosing its own confidential information.[150]

A dissenting opinion disagreed, and would have reversed the district court's dismissal of Protégé's breach of contract, negligence, and professional malpractice claims.[151] The judge concluded that under the Duff & Phelps engagement letter, its employee undertook the responsibility of getting the signatures of potential buyers on the non-disclosure agreement and that, as an entity providing professional services, it assumed a duty to act with reasonable care and diligence under New York law.[152] He further concluded that the engagement letter did not immunize Duff & Phelps from its gross negligence and that whether Duff & Phelps's conduct constituted gross negligence or a breach of its duty to act with reasonable care and diligence were matters for a jury to decide.[153]

Conclusion

This decision highlights the need to exercise care in having non-disclosure agreements and other agreements in the early stage of a transaction properly executed. Since non-disclosure agreements, and sometimes letters of intent, are entered into before counsel is involved in a transaction, it would be beneficial for counsel to review these documents for proper execution at the outset of counsel's engagement.

Fiduciary Duties

9. *In re Tesla Motors, Inc. Stockholder Litigation* (Del. Ch. Apr. 27, 2022) (post-trial opinion concluding fair price carries the day in entire fairness analysis despite flaws in sales process)

148. *Protégé Biomedical*, 2022 WL 1008281, at *1.
149. *Id.* at *2.
150. *Id.*
151. *Id.* at *2–3.
152. *Id.*
153. *Id.* at *3–5.

In *In re Tesla Motors, Inc. Stockholder Litigation*,[154] the Delaware Court of Chancery issued a post-trial verdict in favor of the remaining defendant, finding that Tesla's acquisition of SolarCity was entirely fair. The stockholder plaintiffs alleged that Elon Musk, as Tesla's controlling stockholder, breached his fiduciary duties by causing Tesla to acquire SolarCity at an unfair price pursuant to a flawed sales process.

In determining the appropriate standard of review, Vice Chancellor Slights passed on addressing certain unsettled areas of Delaware law and, instead, assumed that entire fairness governed. Even though the board's process was "far from perfect," the court found that the preponderance of the evidence revealed that Tesla paid a fair price for SolarCity and the acquisition was therefore entirely fair.[155] Despite dodging several novel issues of Delaware law, the *Tesla* decision provides important guidance to practitioners on advising clients in a potentially conflicted transaction.

Background

On June 21, 2016, Tesla Motors, Inc. ("Tesla") announced that it would acquire a solar energy company, SolarCity Corporation ("SolarCity"), in a stock-for-stock merger. The Tesla board did not form a special committee in connection with the SolarCity acquisition.

At the time of the merger, Elon Musk ("Elon") owned approximately 22 percent of Tesla's common stock and served as Tesla's chief executive officer and the chairman of the board of directors.[156] Meanwhile, Elon was also chairman of the board of directors of SolarCity, which was founded by Elon's cousins. He was also SolarCity's largest stockholder, holding approximately 21.9 percent of its common stock at the time of the merger.[157] Space Exploration Technologies Corporation ("SpaceX"), a company founded by Elon, owned $255 million in SolarCity corporate bonds.[158]

Plaintiffs alleged that all directors (except Robyn Denholm) were conflicted to some degree with respect to the merger. Tesla's directors were Elon, Kimbal Musk, Brad Buss, Robyn Denholm, Ira Ehrenpreis, Antonio Gracias, and Stephen Jurvestson.[159] The court largely relied on the facts provided in the background section of the opinion when it addressed the independence of said directors.

Tesla articulated its intention to enter the solar energy market in 2006 when Elon published a "Master Plan" declaring Tesla's mission to "accelerate the world's transition to sustainable energy."[160] The Master Plan specifically mentioned SolarCity.[161] In line with its business strategy, Tesla heavily invested in

154. C.A. No. 12711-VCS, 2022 WL 1237185 (Del. Ch. Apr. 27, 2022).
155. *Id.* at *2.
156. *Id.* at *3.
157. *Id.*
158. *Id.*
159. *Id.* at *4.
160. *Id.* at *6.
161. *Id.*

certain technologies necessary to unlock solar energy, leading to board-level discussions of Tesla's goal to acquire a solar company.[162]

Beginning in late 2015, SolarCity began to experience liquidity problems due to its rapid growth, business model, substantial debt, and macroeconomic headwinds.[163] Nevertheless, it remained the undisputed market share and cost leader in the solar energy sector.[164] In February 2016, Elon first approached one of SolarCity's co-founders about a potential acquisition, and then proposed the merger to the Tesla board later that month.[165] The Tesla board declined Elon's proposal in order to focus on internal operational issues, but authorized management to "gather additional details and to further explore and analyze a potential transaction with SolarCity or other related businesses."[166] The Tesla board rejected the acquisition proposal again the next month amidst rumors of Elon taking SolarCity private.[167] However, it still authorized management to prepare for a solar energy acquisition, including engaging independent outside counsel.[168]

SolarCity continued to raise cash, albeit at lower amounts than expected, from commercial lenders, in spite of continued liquidity issues.[169] In private discussions with one of SolarCity's co-founders in May 2016, Elon promised that Tesla's proposal would include a bridge loan to SolarCity.[170] On May 31, 2016, the board determined that the timing was right to assess a potential solar acquisition.[171] It engaged an independent financial advisor soon thereafter.

The next month at a special meeting called by Elon, the Tesla board decided to pursue an acquisition of SolarCity. It also determined that Elon and Gracias could participate in certain high-level strategic discussions based on their knowledge of the solar industry and SolarCity, but that they would be recused from any vote relating to the potential transaction.[172] At the same meeting, the financial advisor presented a preliminary valuation of SolarCity and recommended that Tesla pursue a stock-for-stock merger. Elon and Gracias actively participated in finalizing Tesla's proposed stock exchange ratio prior to recusing themselves from the remainder of the meeting.[173] With Elon and Gracias recused, the Tesla board approved an initial offer, subject to due diligence, using an exchange ratio of between 0.122 and 0.131 shares of Tesla common stock per share of SolarCity common stock.[174] It also conditioned any acquisition on the approval of a majority of disinterested SolarCity stockholders and a majority of disinterested

162. *Id.* at *7–8.
163. *Id.* at *8–10.
164. *Id.* at *11.
165. *Id.* at *12.
166. *Id.*
167. *Id.* at *13.
168. *Id.*
169. *Id.* at *14.
170. *Id.*
171. *Id.* at *15.
172. *Id.*
173. *Id.* at *16.
174. *Id.*

Tesla stockholders.[175] It did not include a bridge loan in the preliminary proposal. SolarCity formed a special committee in response to Tesla's offer.

Denholm took full charge of leading due diligence and negotiations with SolarCity.[176] Meanwhile, SolarCity's co-founder provided Elon with updates on SolarCity's cash positions and need for bridge financing.[177] Immediately following Tesla's discovery of SolarCity's cash crisis, Elon scheduled daily meetings with Tesla's financial advisor and he published a second installment of the Master Plan, declaring Tesla's intention to acquire SolarCity.[178] In response to certain diligence findings, the Tesla board lowered the proposed exchange ratio to 0.105 shares of Tesla stock per SolarCity share.[179] The Tesla board ultimately agreed to pay 0.110 shares of Tesla stock for each share of SolarCity stock, well below the initial offer range and within or below the financial advisor's valuation ranges.[180] The financial advisor also provided a written opinion that the acquisition consideration was fair to Tesla.[181]

The merger agreement was executed on July 31, 2016.[182] The merger agreement required SolarCity to comply with its current debt covenants pending closing.[183] However, SolarCity's cash needs became dire and its access to funding sources became more difficult. As a result, SolarCity sold $100 million of SolarCity bonds to Elon and his cousins in August 2016.[184] Tesla and SolarCity also participated in investor outreach to increase market support, which included Elon publicly announcing the near-term launch of a SolarCity product that was still conceptual in nature.[185] Tesla's stockholders overwhelmingly approved the acquisition, with approximately 85 percent of votes cast by Tesla's stockholders voting in favor and most of the votes cast by sophisticated institutional investors.[186] The merger closed on November 21, 2016. Tesla's value increased significantly post-closing, realizing approximately $1 billion in cash flows from the acquisition of SolarCity with at least $2 billion more expected.[187]

Several Tesla stockholders brought claims against the Tesla board. The court consolidated the claims and denied defendants' motions to dismiss.[188] All claims against members of the board (except Elon) were settled for $60 million.[189] The case proceeded to trial with four counts against Elon—(i) two counts asserting

175. *Id.*
176. *Id.* at *17.
177. *Id.* at *18.
178. *Id.*
179. *Id.* at *20.
180. *Id.* at *21.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at *22.
185. *Id.* at *23.
186. *Id.* at *24.
187. *Id.* at *25.
188. *In re* Tesla Motors, Inc. S'holder Litig., C.A. No. 12711-VCS, 2018 WL 1560293 (Del. Ch. Feb. 4, 2018).
189. *Id.*

derivative breach of the duty of loyalty against Elon in his capacity as Tesla's controlling stockholder and as member of the Tesla board by causing Tesla to essentially bail out an insolvent SolarCity, (ii) an unjust enrichment claim, and (iii) a waste claim.

Analysis

The court held that, even assuming the plaintiff-friendly entire fairness standard of review and in spite of the flawed sales process, the acquisition was entirely fair because Elon proved that the price Tesla paid for SolarCity was fair.

In determining the applicable standard of review, the court assumed, without deciding, that entire fairness governed either by virtue of Elon's control or irreconcilable board-level conflicts.[190] In its entire fairness analysis, the court assessed the weaknesses (e.g., Elon's overinvolvement in the process at all stages[191]) and strengths of Tesla's process (e.g., Denholm's unwavering independence and leadership throughout,[192] the disinterested stockholder vote,[193] and using the due diligence to negotiate a lower price[194]). It concluded that, even though the process was far from ideal, Elon "did not *impede* the Tesla Board's pursuit of a fair price."[195] The court's entire fairness determination was primarily a result of the persuasive evidence regarding SolarCity's value and the fairness of the price that Tesla paid to acquire it.[196] The court rejected plaintiffs' expert's position that SolarCity was worth nothing and insolvent.[197] Instead, it found that market evidence, the resulting valuable cash flows and synergies to Tesla, and the stockholder approval, among other things, supported a finding that Tesla paid a fair price for SolarCity.[198] The court thus also found in the defense's favor with respect to the unjust enrichment and waste claims as well.

Conclusion

The *Tesla* decision was not the landmark decision that many expected it to be given the court's fact-dependent analysis and its passing on deciding several hotly debated topics of Delaware law. Such topics included, among others, the "contours and nuances of Delaware's controlling stockholder law, the extent to which personal and business relationships among fiduciaries will result in disabling conflicts of interest [and] the applicability and effect of stockholder ratification of fiduciary conduct as a defense to various breach of fiduciary duty claims."[199] However, certain inclinations of the court could be gleaned from

190. *Id.* at *30.
191. *Id.* at *34.
192. *Id.* at *38.
193. *Id.* at *36.
194. *Id.* at *37.
195. *Id.* at *39.
196. *Id.* at *29, *40.
197. *Id.* at *40.
198. *Id.* at *41–47.
199. *Id.* at *2.

the decision's *dicta*. The court called upon guidance in Delaware precedent, albeit under different circumstances, particularly in situations like *Tesla* where the alleged controller held less than 50 percent of the company.[200] With respect to the disinterested stockholder vote, the court left it to others to decide whether votes cast by institutional investors who hold stock in both constituent corporations should be included in the denominator of the disinterested stockholder vote.[201]

Despite not providing the answers that many hoped for, the court used the Tesla board as a teaching lesson by offering several practice pointers. The court coined this case a "parable of unnecessary peril, despite the outcome" because the parties could have avoided litigation entirely "had they just adopted more objectively evident procedural protections" outlined under Delaware law.[202] The court advised that: (i) Elon should have recused himself entirely from the Tesla board's consideration of the acquisition, "providing targeted input only when asked to do so under clearly recorded protocols"; (ii) the Tesla board should have formed a special committee of indisputably independent and disinterested directors, "even if that meant it was a committee of one"; and (iii) the deal process should have "been more compliant with the guidance provided by" Delaware courts despite the "laudable" decision to obtain majority-of-the-minority approval of the acquisition.[203] The *Tesla* analysis provides helpful guidance for practitioners to refer to when advising on certain potentially conflicted transactions.

10. *In re BGC Partners, Inc. Derivative Litigation* (Del. Ch. Aug. 19, 2022) (post-trial opinion concluding defendants satisfied burden of showing transaction was entirely fair)

In this case, the fairness of a transaction involving a conflicted controlling stockholder was challenged by the company's minority stockholders.[204] While acknowledging that the sale process undertaken by the special committee had certain shortcomings, the Delaware Court of Chancery ultimately held that both the acquisition process and price nonetheless satisfied the entire fairness standard of review.

The defendants were able to overcome the minority stockholder challenges and entire fairness review by proving that they had formed an independent special committee that acted objectively in its ultimate decision to approve the transaction. Through the evidence presented, the defendants demonstrated that Berkeley Point was a valuable strategic asset for BGC Partners with significant market synergies. Defendants also demonstrated that the special committee's process was robust and did have integrity despite some deficiencies and, through

200. *Id.* at *29 n.375.
201. *Id.* at *24 n.311.
202. *Id.* at *33.
203. *Id.* at *33 n.397.
204. Consolidated C.A. No. 2018-0722-LWW, 2022 WL 3581641, at *1 (Del. Ch. Aug. 19, 2022).

successful negotiations on behalf of BGC Partners, the special committee secured economic terms in the transaction that were arguably below market value.

Background

Howard Lutnick was the chairman and chief executive officer of both Cantor Fitzgerald, L.P. ("Cantor Fitzgerald"), a privately held brokerage and financial services firm, and BGC Partners, Inc. ("BGC Partners"), a publicly traded brokerage and financial technology company that was spun off from Cantor Fitzgerald in 2004.[205] He was the sole stockholder of Cantor's managing partner, and also had voting control of BGC through affiliates holding approximately 55 percent of the outstanding voting power.[206] In the transaction at issue, BGC Partners acquired Berkeley Point Financial LLC ("Berkeley Point") from a Cantor Fitzgerald affiliate for a purchase price of $875 million and committed to invest an additional $100 million for a 27 percent equity interest in the commercial mortgaged-backed securities business of a second Cantor Fitzgerald affiliate (the "Transaction").[207] The BGC Partners audit committee, which consisted of four independent directors, was authorized to act as a special committee to evaluate any proposed transaction. The special committee retained financial and legal advisors and oversaw the deal process.

The minority stockholder plaintiffs sued in 2018, and the court denied a motion to dismiss in September 2019,[208] and in September 2021, the court granted in part and denied in part the defendants' motion for summary judgment,[209] with the key result being the entry of judgment in favor of two of the special committee members in *In re Cornerstone Therapeutics Inc. Stockholder Litigation*.[210]

Analysis

The minority BGC Partners stockholders alleged the Transaction was a vehicle for Lutnick to pay himself (indirectly through controlled Cantor Fitzgerald affiliates) nearly a billion dollars while leaving BGC Partners with the burden of significant third-party debt incurred to finance the Transaction. They argued that Lutnick tried to control the deal timeline, that Cantor Fitzgerald withheld valuation information, that the price paid by BGC Partners for Berkeley Point was excessive by about $300 million, and that the $100 million CMBS investment would not generate a return.[211] On this basis, the plaintiffs alleged that Howard

205. *Id.* at *2.
206. *Id.*
207. *Id.* at *29 n.207.
208. Consolidated C.A. No. 2018-0722-LWW, *In re* BGC Partners, Inc. Derivative Litig., 2019 WL 4745121 (Del. Ch. Sept. 30, 2019).
209. Consolidated C.A. No. 2018-0722-LWW, *In re* BGC Partners, Inc. Derivative Litig., 2021 WL 4271788 (Del. Ch. Sept. 20, 2021).
210. 115 A.3d 1173 (Del. 2015).
211. *In re BGC Partners*, 2022 WL 3581641, at *18–19, *24, *30.

Lutnik, Cantor Fitzgerald, and certain members of the BGC Partners' board of directors had breached their fiduciary duties by orchestrating and approving the Transaction with self-serving terms.

The court's analysis started with a demand futility analysis, before moving onto the two components of entire fairness: fair process (or dealing) and fair price. On demand futility, in line with its previous decisions, the court concluded demand was excused. In analyzing the independence of the special committee members for purposes of fair process, however, the court explained that lacking independence for demand futility purposes is different than lacking independence during the actual negotiations.[212] Based on the testimony of those directors concerning their willingness to end negotiations and walk away from the deal, and the acts of independence during "real-world negotiations," including that one director "pushed back firmly on Lutnick on multiple occasions," the court concluded they had in fact acted independently and strengthened its conclusion concerning the fairness of the process.[213]

As to that fairness conclusion, the court considered relevant factors from *Weinberger v. UPO, Inc.*,[214] including the timing and initiation of a transaction, transaction structure, and transaction negotiations and approval.[215] The record showed that Howard Lutnick did initiate the Transaction and attempted to press an accelerated timeline.[216] Those preferences alone, however, did not render the process unfair. Because on balance the special committee was able to maintain control of the deal timeline and the court found no evidence that the plaintiffs had been disadvantaged, it concluded there was "no suggestion that this timing disadvantaged BGC's minority stockholders."[217]

Concerning deal structure and whether the Transaction process embraced procedural protections intended to uphold a fair outcome, the court highlighted the use of an independent special committee with its own advisors.[218] The court acknowledged that Lutnick's efforts to identify committee chairs and his role in selecting financial and legal advisors were "missteps" and "flaws."[219] But because Lutnick had ceased participating in the committee's affairs after it was fully empowered, and his efforts to shape key aspects of the committee's dealings were effectively neutralized, the special committee had not been improperly influenced by conflicts of interest.[220] The special committee's use of experienced legal and financial advisors who objectively advocated for the minority stockholders in negotiations further supported a finding of fair process.[221]

212. *Id.* at *16.
213. *Id.* at *20–21.
214. 457 A.2d 701 (Del. 1983).
215. 2022 WL 3581641, at *24.
216. *Id.* at *18–19.
217. *Id.* at *19.
218. *Id.* at *21–22.
219. *Id.* at *20, *42.
220. *Id.* at *22.
221. *Id.* at *22–23.

Finally, the court commended the special committee's handling of the negotiations.[222] While the evidence showed that initially certain material information was withheld, the special committee and its advisors repeatedly requested, and eventually received, the information.[223] Moreover, the special committee's hard bargaining resulted in meaningful concessions in terms of the structuring of the Transaction (that were counter to the controller's preferred structure and desire to achieve certain tax benefits), as well as other favorable economic changes.[224]

In reaching its conclusion as to the fairness of process in *BGC Partners*, the court noted that Delaware law does not require perfection even when an interested party is involved.[225] The court concluded that "[c]onsidering the evidence in its totality . . . the process—albeit imperfect—was ultimately fair."[226]

The court then turned to price, concluding the value paid for both acquiring Berkeley Point and the CMBS investment were within the range of reasonableness. The court was persuaded that the reliable evidence presented by the defendants, in the form of analyses from both the special committee's financial advisor and expert reports in the litigation, supported a value range that exceeded the $875 million price.[227] Similarly, with respect to the CMBS investment, the facts that (1) Cantor invested alongside BGC, (2) the special committee negotiated the cost of the investment down from $150 million to $100 million, and (3) BGC obtained downside protections, while maintaining a preferred return on the investment, all gave the court confidence the terms of the investment were economically fair.[228]

Conclusion

BGC Partners emphasizes the scrutiny involved in applying the entire fairness standard to an interested-party transaction under Delaware law. Like the *Tesla* decision discussed above, the post-trial judgment in favor of defendants confirms that fiduciaries can survive that scrutiny. Together with *Tesla*, *BGC Partners* underscores the litigation risk inherent in interested-party transactions and the importance of proactively taking protective measures to minimize exposure should the entire fairness standard apply.

11. *In re Match Grp., Inc. Derivative Litigation* (Del. Ch. Sept. 1, 2022) (company complied with *MFW* conditions and stockholder could not plead direct claim for breach of fiduciary duty)

In *In re Match Group, Inc. Derivative Litigation*,[229] the Delaware Court of Chancery determined (i) plaintiffs lacked standing to bring derivative claims and

222. *Id.* at *24–28.
223. *Id.* at *24–25.
224. *Id.* at *26–28 & n.309.
225. *Id.* at *18 (citing Brinckerhoff v. Tex. E. Prod. Pipeline Co., 986 A.2d 370, 395 (Del. Ch. 2010)).
226. *Id.* at *18.
227. *Id.* at *30–31.
228. *Id.* at *41–42.
229. Consolidated C.A. No. 2020-0505-MTZ, 2022 WL 3970159 (Del. Ch. Sept. 1, 2022).

(ii) *Kahn v. M & F Worldwide Corp.*[230] ("*MFW*") cleansed plaintiffs' direct claims since plaintiffs failed to adequately plead any facts demonstrating that *MFW*'s six requirements were not met.

Background

A 2019 multi-step reverse spinoff lay at the center of the dispute in this case (the "Separation"). IAC/InterActiveCorp ("Old IAC") acquired Match.com in 1999.[231] Match Group, Inc. ("Old Match") was formed as a subsidiary of Old IAC in 2009.[232] As of 2015, Old IAC held "98.2% of [Old Match's] voting power by virtue of owning 24.9% of Old Match's outstanding publicly traded common stock and all of Old Match's Class B high-vote common stock."[233]

Pursuant to an agreement dated September 19, 2019 (the "Transaction Agreement"), Old IAC separated its dating businesses and some debt obligations (the "Exchangeables") from the rest of its business. Old IAC formed a new subsidiary, IAC/Interactive Corp. ("New IAC"), contributed to New IAC such other businesses, and then spun off New IAC to Old IAC's stockholders, leaving Old IAC with its stake in Old Match and the Exchangeables.[234] Old IAC then reclassified Old IAC's two classes of high-vote, publicly traded stock into one class of common stock, decreasing certain Old IAC stockholders' voting control of Old IAC, and changed Old IAC's name to Match Group Inc. ("New Match").[235] New Match then merged Old Match with and into a New Match merger subsidiary in which the latter was the surviving corporation and Old Match ceased to exist (the "Merger").[236] As a result of that merger, the minority stockholders of Old Match received New Match shares.[237]

The plaintiffs argued that Barry Diller, who together with his family collectively held over 42 percent of Old IAC's total outstanding voting power, controlled Old IAC and accordingly also owed fiduciary duties to Old Match, Old IAC's controlled subsidiary, and its stockholders.[238] Plaintiffs alleged that the Separation generally and, with respect to the fiduciary duty claims, the Merger specifically, was a conflicted controller transaction that had the result of benefitting New IAC to the detriment of Old Match and New Match minority stockholders.[239] The defendants argued they complied with *MFW* and so the business judgment rule was the applicable standard of review.

230. 88 A.3d 635 (Del. 2014).
231. *In re Match Grp.*, 2022 WL 3970159, at *1.
232. *Id.*
233. *Id.*
234. *Id.* at *2.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. Plaintiffs alleged that the Separation, among other things, left New Match with Old IAC's Exchangeables, approximately 60 percent of the cost of Old IAC's options, potential litigation liabilities, burdened New Match with Old IAC's tax attributes with the tax benefits flowing to New IAC, and extracted from New Match and transferred to New IAC substantial amounts of cash. *Id.* at *3.

Analysis

The court started by reiterating the six procedural protections required under *MFW*:

> (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.[240]

The plaintiff had not challenged the first and sixth elements.

The plaintiff argued none of the members of the committee were independent or disinterested. Under *MFW*, if the facts pled "support a reasonable inference that either (i) 50% or more of the special committee was not disinterested and independent, or (ii) the minority of the special committee somehow infected or dominated the special committee's decision-making process, then the plaintiffs have called into question this aspect of the *MFW* requirements."[241] To successfully plead that a director is not independent, "a plaintiff must allege facts supporting a reasonable inference that a director is sufficiently loyal to, beholden to, or is otherwise influenced by an interested party so as to undermine the director's ability to judge the matter on its merits."[242] An analysis of the facts regarding director independence is a holistic assessment, "looking at personal and professional ties collectively" to determine whether the relationship between a director and an interested party "gives rise to a reasonable doubt about the director's ability to act impartially."[243]

With respect to committee member McInerney, the plaintiff highlighted that McInerney had been an employee or director of Old IAC or an employee of one of Old IAC's affiliates since 1999, and uninterrupted since 2003.[244] Additionally, McInerney had earned at least $58 million during his time working with Old IAC and its affiliates.[245] In holding that plaintiff sufficiently pled facts supporting a reasonable inference that McInerney lacked independence from Old IAC, the court noted the similarities between McInerney's relationship with Old IAC and two other cases finding lack of independence.[246]

The court nevertheless rejected the notion that McInerney "infect[ed]" or "dominat[ed]" the committee, explaining that, although McInerney was the lead negotiator, plaintiff had not adequately alleged that McInerney dominated the committee, "controlled the information flow to his fellow directors,

240. *Id.* at *15.

241. *Id.* at *16 (cleaned up).

242. *Id.*

243. *Id.* The court rejected plaintiffs' assertion that a single member of a special committee who is interested or lacking independence, without more, may call *MFW* into question when there is a special committee of more than two directors. *Id.* at *16 n.142.

244. *Id.* at *19.

245. *Id.*

246. *Id.* at *18–19.

undermined the Committee's process, or exerted any undue influence or control over Seymon or McDaniel [the other two committee members]."[247] With respect to Seymon, the court rebuffed plaintiff's claim that she lacked independence by virtue of her prior employment as outside counsel to Old IAC and likened her to "an arms' length service provider, and no more."[248] The court similarly did not buy plaintiff's argument that the overlap of McDaniel's employment at Graham Holding Company ("GHC") with Diller was proof that McDaniel lacked independence.[249] A majority of the committee was thus independent.

The court then analyzed the third *MFW* element, whether the committee was sufficiently empowered to (i) "freely select its own advisors" and (ii) "say no definitively."[250] The board resolutions establishing the committee granted both rights, which the committee then exercised.[251] While some members of the financial adviser had previously provided services to Old IAC and Match,[252] the court observed that, as specified in the disclosure letter provided to the committee by Goldman Sachs, the transactions for which Goldman Sachs provided such services were "relatively small,"[253] and that the committee had considered and met with three potential candidates, and consulted with counsel, before it chose the advisor.

The next prong was whether the committee had met its duty of care. To show it had not, the plaintiff needed to plead gross negligence, meaning "conduct that constitutes reckless indifference or actions that are without the bounds of reason."[254] The plaintiff only had disagreed with the strategy of the committee, which was insufficient to prove a duty of care violation, which focuses on process, rather than price.[255]

The plaintiff also alleged that the committee acted with a "controlled mindset" over the course of negotiating the Separation by agreeing to certain terms, issues, and personnel too quickly or not quickly enough.[256] The court rejected this argument, as the committee met at least twenty times, consulted with financial and legal advisors, considered the implications of saying "no" to the Separation, and successfully negotiated for improved terms in the Separation that were beneficial for the minority stockholders and not originally part of Old IAC's proposal.[257] Based on these facts, the court concluded that the committee did not act with a "controlled mindset."[258]

247. *Id.*
248. *Id.* at *20.
249. *Id.* at *21.
250. *Id.*
251. *Id.* at *4.
252. *Id.* at *5.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at *24.
257. *Id.*
258. *Id.*

The court quickly dispensed with plaintiff's final argument that the primary purpose of the Separation's structure was to eliminate derivative standing, reiterating that plaintiff himself had pled otherwise and that his challenges to the Separation's structure ultimately were a disagreement with the committee's "strategy and not examples of 'reckless indifference' or unreasonable acts."[259] Therefore, the court determined that plaintiff was unsuccessful in its attempt to plead that the committee was grossly negligent and violated its duty of care.[260]

The remaining *MFW* element at issue was whether Old Match's minority stockholders were fully informed when they voted to approve the Separation. For this fact-intensive analysis, a court must consider whether a company's "disclosures apprised stockholders of all material information and did not materially mislead them."[261] Plaintiff alleged a number of disclosure issues that precluded *MFW*'s application to the Separation, including: (i) the proxy statement failed to disclose the committee's "disabling conflicts with respect [to] Diller and IAC, particularly the deep and decades-long professional and financial ties of McInerney and Seymon to Diller and IAC," and (ii) the proxy statement's disclosures about the board's reasons for structuring the Separation as it did.[262]

With respect to Seymon and McDaniel, the court stated that disclosures related to any supposed conflicts were immaterial because Hallendale had already failed to sufficiently plead that Seymon and McDaniel were conflicted.[263] Regarding McInerney, the court noted that the proxy statement incorporated previous securities filings, which provided details of McInerney's employment history and board service dating back to 1986.[264]

In addressing plaintiff's allegations that the proxy statement's disclosures regarding the Separation's governance changes were "false and misleading," the court noted that "the Proxy disclosed the Board's reasons for structuring the Separation as it did, including the governance provisions," which were "antitakeover measures to prevent a change of control."[265] The court stated that "as a general rule, proxy materials are not required to state 'opinions or possibilities, legal theories or plaintiff's characterizations of the facts.'"[266] So long as the board's disclosures completely and accurately disclose a transaction's material facts, the board's "subjective motivation or opinions are not *per se* material" and plaintiff's belief that the board had additional motivations regarding

259. *Id.* at *26.

260. *Id.*

261. *Id.*

262. *Id.* at *27, *29. Plaintiff also alleged misleading and incomplete disclosure regarding the 2015 Tax Sharing Agreement and a 2015 investor rights agreement. *Id.* at *29, *31. The court rejected both claims. The court's view of the former was that, "fundamentally, under the facts as [plaintiff] has pled them, the 2015 Tax Sharing Agreement was immaterial." *Id.* at *31. As to the latter, "Delaware law does not require a play-by-play description of every consideration or action taken by a Board." *Id.* at *32.

263. *Id.* at *28.

264. *Id.*

265. *Id.*

266. *Id.*

the Separation's governance structure did not make the provided disclosures false or misleading.[267]

Because plaintiff failed to plead sufficient facts that threatened the cleansing effect of any of the six elements of *MFW*, the court concluded that the Separation was subject to the business judgment rule.[268] Under the "otherwise irrebuttable application" of the business judgment rule, the remaining claim for plaintiff to make was a claim for waste.[269] As plaintiff did not attempt to make such a claim, the court dismissed plaintiff's direct claims.[270]

Conclusion

In re Match Group, Inc. demonstrates the difficulty stockholders face when attempting to prove that the "cleansing effect" of *MFW* does not apply to a transaction and, accordingly, the benefit of structuring a transaction to comply with *MFW*, even if it is unclear whether there is a controlling stockholder involved in a merger.

12. *Strategic Investment Opportunities LLC v. Lee Enterprises Inc.* (Del. Ch. Feb. 14, 2022) (clear, unambiguous language setting forth advance notice bylaws will generally be enforced even under enhanced scrutiny)

In *Strategic Investment Opportunities LLC v. Lee Enterprises Inc.*,[271] the Court of Chancery upheld a company's advance notice bylaws finding that they were clear and unambiguous and finding that the board's rejection of a non-compliant nomination survived enhanced scrutiny.

Background

In 2019, the board of directors of Lee Enterprises Inc. (the "Company") adopted advance notice bylaws that permitted only record owners of the Company's stock to submit a director nomination.[272] The advance notice bylaws also required a Company-prescribed questionnaire to be submitted with respect to each nominee. The failure to comply with all of the advance notice procedures would result in a nominee not being eligible to serve as director.

In January 2021, the Company announced that November 26, 2021, would be the nomination deadline for directors to be elected at the Company's 2022 annual meeting.[273] Plaintiff, Strategic Investment Opportunities Inc. ("Opportunities"), beneficially acquired shares in the Company in January 2020.[274] At the time of its investment, Opportunities' investments were managed by Alden

267. *Id.*
268. *Id.* at *33.
269. *Id.*
270. *Id.*
271. No. 2021-1089-LWW, 2022 WL 453607 (Del. Ch. Feb. 14, 2022).
272. *Id.* at *2.
273. *Id.* at *6.
274. *Id.* at *3.

Global Capital LLC ("Alden"), which also was an indirect owner of Opportunities. Alden's investment management relationships with Opportunities ended in March 2021.

On Friday, November 19, 2021, Alden determined it wanted to bid on the Company. Over the weekend, Alden also decided to nominate three individuals for election to the Company's board of directors.[275] On November 22, 2021, Alden asked its broker to move 1,000 shares of the Company's stock into the name of Opportunities.[276] Because this process could take two to three business days, Alden also asked its broker to submit a letter from the record holder, Cede & Co., of the shares.[277] Also on November 22, 2021, Alden submitted an offer to acquire the Company at a price of $24 per share.[278] Later in the day, Opportunities asked the Company for a copy of the nomination questionnaire, which, under the bylaws, the Company had ten days to provide to record stockholders.[279] The Company rejected the request for the questionnaire citing that Opportunities was not a stockholder of record and thus the Company was not required to provide a copy of the questionnaire under the bylaws. As of November 26, 2021, the nomination deadline, the requested share transfer had not been completed and Opportunities was not yet a record holder of the Company's shares. Thus, Cede & Co., the record holder of the shares, submitted a letter on behalf of Opportunities stating that Opportunities would be nominating three directors. Opportunities became a stockholder of record on December 2, 2021.[280] In December 2021, the board of directors of the Company determined that the nomination submitted by Opportunities was invalid because the nomination was not made by a record stockholder and because the prescribed Company form of questionnaire was not used in the submission.[281] Approximately one week later, the Company notified Alden that it rejected its acquisition proposal.

Opportunities filed suit alleging breach of contract and breach of fiduciary duties by the board of directors.

Analysis

The court began by noting that the use of advance notice bylaws was commonplace among public companies to facilitate informed stockholder meetings.[282] Courts analyze advance notice bylaws under general contract law principles determining whether the bylaws were clear and unambiguous and whether the nomination complied with the clear language of the bylaws.[283] The court explained

275. *Id.* at *4.
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.* at *5.
280. *Id.* at *7.
281. *Id.* at *6–7.
282. *Id.* at *9.
283. *Id.*

that non-compliance can sometimes be excused if directors acted unreasonably or inequitably.[284]

In this instance, the court determined that not only were the bylaws clear and unambiguous, but that Opportunities failed to comply with the requirements for nomination.[285] Although there was no restriction in Cede & Co. from making a nomination alongside a beneficial owner (i.e., Opportunities), those were not the facts in front of the court. Instead, Cede & Co.'s letter only served to introduce Opportunities' nomination.[286]

Additionally, the court noted that Opportunities failed to submit the required questionnaire. It was not sufficient that Opportunities provided similar information on its own form of questionnaire. This was an express requirement of the bylaws and was a permissible basis for the Company's rejection of Opportunities' nominations.[287]

The court then turned to whether the board of directors of the Company acted inequitably in rejecting the nomination. In light of Alden's pending bid at the time the board of directors considered Opportunities' nomination, the court applied enhanced scrutiny in reviewing the board's decision to reject the nomination.[288] Nevertheless, even under enhanced scrutiny, the court determined that the board's decision to reject the nomination was appropriate.[289] The court highlighted that the advance notice bylaws had a valid purpose, could have been easily complied with by any stockholder, and there was no evidence of manipulation by the Company.[290] The court cited Alden's own delay for the reason that it was not able to comply with the nomination procedure.[291]

Conclusion

As with clear contractual language, the courts will enforce the plain language of bylaws, including those setting the requirements for the nomination of directors. In this case, the requirements for nominating directors were set out well in advance of any interest by Alden in acquiring the Company or nominating directors. Had Cede & Co. made the director nomination or had Alden begun the nomination process earlier, including the share transfer, the result may have been different.

13. *City Pension Fund for Firefighters & Police Officers in the City of Miami v. The Trade Desk, Inc.* (Del. Ch. July 29, 2022) (concluding amendment of certificate of incorporation to extend duration of dual-class structure complied with *MFW*)

284. *Id.*
285. *Id.* at *10.
286. *Id.* at *11–12.
287. *Id.* at *13.
288. *Id.* at *15.
289. *Id.* at *16.
290. *Id.*
291. *Id.* at *17.

In *City Pension Fund for Firefighters & Police Officers in the City of Miami v. The Trade Desk, Inc.*,[292] the Delaware Court of Chancery ruled that an amendment to the certificate of incorporation of The Trade Desk, Inc.'s ("TTD" or "the Company") that extended the duration of its dual-class stock structure, and effectively extended the CEO's voting control, complied with the framework set forth in *Kahn v. M & F Worldwide Corp*.[293] Consequently, the transaction was subject to business judgment review, which required granting the defendants' motion to dismiss.

Background

TTD, a digital marketing company, has two classes of common stock: (1) publicly traded Class A common stock with one vote per share and (2) non-publicly traded Class B common stock, with ten votes per share.[294] As of March 2020, Jeffrey Green, TTD co-founder, chairman, and CEO, owned almost 98 percent of Class B stock and so controlled approximately 55 percent of the Company's voting power.[295] TTD's certificate of incorporation contained a "Dilution Trigger," which provided for the automatic conversion of all Class B stock to Class A stock on a one-for-one basis as soon as the number of outstanding shares of Class B stock constituted less than 10 percent of the aggregate number of shares of then-outstanding Class A and Class B common stock.[296]

By March 31, 2020, Class B common stock represented 11.2 percent of TTD's total outstanding stock, with the number of Class B common shares continuing to decline as Green sold shares pursuant to a Rule 10b5-1 trading plan.[297] In late May 2020, Green became aware of the approaching Dilution Trigger and began contacting Company officers, personal financial professionals, and the other holders of Class B stock for help in avoiding the control-stripping event.[298] On May 29, Green sent an email to the TTD board calling a special meeting to discuss the Dilution Trigger.[299] At the meeting, the board formed a special committee consisting of three of the board's seven outside directors.[300]

The special committee hired independent counsel and a financial advisor to explore amending the certificate of incorporation to extend the Company's dual-class stock structure.[301] In addition, the board invited Green to submit his own proposal, with Green indicating he would present an "*MFW*-compliant offer."[302] By August 14, the special committee had approved a counterproposal consisting of a number of substantive modifications to Green's initial terms, the

292. C.A. No. 2021-0560-PAF, 2022 WL 3009959 (Del. Ch. July 29, 2022).
293. 88 A.3d 635 (Del. 2014).
294. *The Trade Desk*, 2022 WL 3009959, at *2.
295. *Id.*
296. *Id.*
297. *Id.* at *3.
298. *Id.*
299. *Id.* at *4.
300. *Id.*
301. *Id.*
302. *Id.* at *5.

majority of which Green ultimately accepted.[303] Following additional negotiations, Green and the special committee struck an agreement pursuant to which the Dilution Trigger would be removed in exchange for a new sunset provision that would convert the Class B shares to Class A shares in five years and specified governance measures such as the direct election of certain directors by holders of Class A shares.[304] On October 16, the board approved an amendment to the certificate of incorporation incorporating the transaction terms.[305]

Due to insufficient stockholder support for the amendment, the Company adjourned the December 7, 2020, special meeting of stockholders to allow for more time to generate votes in favor of the transaction.[306] The special meeting was reconvened on December 22, at which 52 percent of the unaffiliated shares voted in favor of the amendment.[307] A few days before the special meeting, TTD's compensation committee considered a stock option grant to Green in his capacity as TTD's CEO. However, the compensation committee did not recommend the grant, nor did the board approve it, until almost a year later.[308]

Plaintiff filed a complaint asserting breach of fiduciary duty claims against Green (in his capacity as a controlling stockholder), TTD officers, and the TTD board for approving and obtaining stockholder support for the Dilution Trigger amendment.[309] Defendants moved to dismiss the complaint for failing to state a claim.

Analysis

Applying the framework established in the Delaware Supreme Court's seminal *MFW* decision, the court ultimately sided with defendants and found that TTD had satisfied all six conditions required under *MFW*, thus entitling the transaction to business judgment review.[310] Because the plaintiff had not even attempted to plead a claim for waste, the court granted the defendants' motion and dismissed plaintiff's complaint with prejudice.[311]

Application of *MFW* Framework

As discussed above as part of the *Match* summary, the Delaware Supreme Court has set out six conditions as part of the *MFW* framework.[312] Plaintiff alleged breach of the second and fifth elements—namely that the special committee's independence was tainted by the committee's chair, and that the stockholder vote was uninformed due to lack of disclosure surrounding factors

303. *Id.* at *6.
304. *Id.* at *7.
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.* at *8.
310. *Id.* at *1.
311. *Id.*
312. *See supra* note 240 and accompanying text.

such as the expected tripping of the Dilution Trigger and Green's desire to sell his shares.[313]

1. Special Committee's Independence

Plaintiff argued that one of the committee members, Lise Buyer, lacked independence and infected the committee process such that the committee labored under a "controlled mindset," deferring to Green's wishes.[314] Plaintiff claimed that Buyer's director compensation ($535,558 in 2019 and $408,492 in 2020) and compensation received in 2016 for consulting services before she was a director ($175,000 and 2,500 options to acquire Class A stock) were material to her.[315]

The court expressed a hesitancy to infer materiality of compensation in the absence of well-pleaded facts, noting that even under the more plaintiff-friendly standard of the *MFW* framework, a plaintiff must still allege well-pleaded facts that support a reasonable conceivability of compensation materiality to the director.[316] The court reasoned that, even assuming plaintiff had met this burden with respect to Buyer, Plaintiff had not alleged facts sufficient to cast doubt on the independence of a *majority* of the special committee or that Buyer had so dominated the committee process as to undermine its integrity as a whole.[317]

The court rejected Plaintiff's argument that the court should infer that Buyer's lack of independence "somehow infected the special committee's process."[318] The court concluded that Plaintiff failed to allege that Buyer "dominated" the committee process or that she "steered it in a direction . . . that undermined its independence."[319] The court also rejected Plaintiff's contention that the special committee "labored under a controlled mindset," as there were no well-pleaded allegations that the special committee was "beholden" to Green or tainted by any "disabling personal interest" in the Dilution Trigger amendment.[320] The court was not persuaded by Plaintiff's *ipse dixit* that the special committee's approval of the amendment was, on its own, sufficient to demonstrate the committee's lack of independence, noting that a director could believe in good faith that it is optimal and even value-maximizing for a company to be controlled by its founder.[321]

In addition, the court further reinforced that its role in applying the *MFW* framework is limited to a process analysis, rather than, for example, substantive review of the economic fairness of a deal approved by a functioning special committee.[322] The latter, as the court noted, would improperly import into a due

313. *The Trade Desk*, 2022 WL 3009959, at *11.
314. *Id.*
315. *Id.* at *12.
316. *Id.* at *12–13.
317. *Id.* at *14.
318. *Id.*
319. *The Trade Desk*, 2022 WL 3009959, at *14.
320. *Id.* at *14–15.
321. *Id.* at *15.
322. *Id.* at *15–16.

care analysis the level of scrutiny applicable to entire fairness review and appraisal cases.[323]

2. *The Stockholder Vote*

Plaintiff further alleged six material omissions in the 2020 special proxy rendered the stockholder vote uninformed: (1) Green's desire to sell Class B stock; (2) TTD's expectations as to when the Dilution Trigger would be tripped; (3) advice that Centerview (the special committee's financial advisor) provided to the special committee; (4) Green's counsel's acknowledgement that a business rationale would be required to justify an amendment to the Dilution Trigger; (5) the special committee's efforts to obtain stockholder support for the Dilution Trigger amendment; and (6) the compensation committee's consideration of a stock option grant to Green in December 2020.[324] The court rejected plaintiff's argument, noting that as long as the proxy statement, when viewed in its entirety, sufficiently discloses and explains the matter to be voted on, the decision to include or exclude a particular fact is generally left to management's business judgment.[325]

For example, disclosing Green's desire to sell TTD stock would not have significantly altered the total mix of information available to stockholders when deciding how to vote on the amendment, as the "obvious effect" of the amendment was that Green could continue to dispose of his Class B shares without tripping the Dilution Trigger.[326] After all, the Dilution Trigger amendment would have been unnecessary were it not likely to be tripped in the near term, either due to the continued sale of Class B shares by Green or another triggering event.[327] Further, none of plaintiff's allegations supported a reasonable inference that Green "had a desperate need for liquidity" or that he had pressured the special committee to accelerate the process.[328]

The court also concluded that not disclosing discussions about potential financial consideration was similarly not material because "additional disclosure that the [s]pecial [c]committee could have demanded economic consideration, but did not do so, would have been obvious to any reasonable stockholder."[329]

Conclusion

The decision reinforces the viability of using *MFW* to avoid the entire fairness standard to interested transactions involving a controlling stockholder. The opinion confirms the broad application of *MFW* to transactions outside the context of a merger. In addition, the decision supports respecting a special committee's process despite circumstances where facts surface after the committee's

323. *Id.* at *15.
324. *Id.* at *16.
325. *Id.*
326. *Id.* at *17.
327. *Id.* at *18.
328. *Id.* at *17.
329. *Id.* at *19–20.

formation that may call into question one member's independence, as long as a *majority* of the committee is independent. As a result, boards may consider forming special committees consisting of at least three directors when practicable in order to benefit from such a majority-rule understanding of committee independence.

Statutory

14. *In re GGP, Inc. Stockholder Litigation* (Del. July 19, 2022) (dividends expressly conditioned on a merger are merger consideration and, for purposes of an appraisal proceeding, must be treated as if they had not been paid).

On July 19, 2022, the Delaware Supreme Court issued *In re GGP Stockholder Litigation*,[330] in which it affirmed—albeit for different reasons—the Court of Chancery's ruling[331] that payment of a large portion of the merger consideration by way of a pre-closing dividend did not effectively and unlawfully eliminate appraisal rights.[332] In a three-to-two decision, the majority disagreed with the lower court's conclusion that the merger proxy's disclosures regarding appraisal were sufficient. As a result, stockholder approval did not have a *Corwin* "cleansing" effect,[333] and the alleged non-exculpated breaches of the fiduciary duty of disclosure survived defendants' motion to dismiss.[334]

Background

In late 2017, Brookfield Property Partners, L.P. ("Brookfield"), which held a 35.3 percent stake in GGP, sent an unsolicited letter offering to purchase the remaining GGP shares and requesting (i) that the board appoint a special committee consisting of independent directors to evaluate the offer and (ii) that any transaction be conditioned on a "majority of the minority" stockholder vote.[335] The Company honored both requests. The special committee held over thirty meetings considering Brookfield's various proposals.[336] Shortly following the special committee's active and successful resistance to an appraisal rights closing condition, which Brookfield had requested, Brookfield and the special committee agreed on a deal pursuant to which Brookfield would acquire the outstanding shares of GGP that it did not already own for $23.50 per share.[337] Approximately 98.5 percent of the consideration was to be paid as a pre-closing dividend to all

330. 282 A.3d 37 (Del. 2022).
331. *In re* GGP, Inc., Stockholders Litig., C.A. No. 2018-0267-JRS, 2021 WL 2102326 (Del. Ch. May 5, 2021).
332. 282 A.3d at 43.
333. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015).
334. *In re GGP, Inc.*, 282 A.3d at 71.
335. *GGP, Inc.*, 2021 WL 2102326, at *6.
336. *Id.* at *7.
337. *Id.* at *8.

stockholders regardless of whether they sought appraisal (the "Pre-Closing Dividend"), and the balance ($0.312 per share) was to be paid at closing to those stockholders who did not exercise their appraisal rights (the "Per-Share Merger Consideration").[338] Approximately 94 percent of the unaffiliated shares approved the transaction, which then closed.[339]

The plaintiff stockholders brought suit seeking quasi-appraisal damages and alleging breaches of fiduciary duty by Brookfield and the Company's directors. Plaintiffs also alleged Brookfield aided and abetted the directors' fiduciary duty breaches.[340] The defendants moved to dismiss, asserting that the transaction was subject to a cleansing stockholder vote under *Corwin*. The plaintiffs countered that *Corwin* was inapplicable, either because Brookfield was a controlling stockholder standing on both sides of the transaction or, in the alternative, because the various disclosure violations regarding existence of appraisal rights meant that the stockholder vote was not fully informed.[341]

Analysis

Court of Chancery Decision

The court concluded that Brookfield was not a controlling stockholder, neither controlling the transaction specifically nor controlling GGP generally.[342] Because the special committee had exclusive control of the negotiation, the court focused its "transactional control" inquiry on whether the directors alleged by plaintiff to be "conflicted" controlled such committee.[343] While only two such allegedly conflicted directors served on the five-person special committee, plaintiffs argued that transactional control could be reasonably conceivable if they pled even one such director were interested in the transaction or lacked independence.[344] The court rejected that approach, stating: "[w]here, as here, a plaintiff alleges only a minority of special committee members are incapable of disinterestedly and independently considering a transaction, a plaintiff must proffer at the pleading stage some factual predicate from which the court can infer the compromised director(s) somehow infected the special committee's process."[345] No such allegations were adequately pled in the case.[346]

338. *Id.* at *1, *9.

339. *Id.* at *9.

340. According to plaintiffs, the defendant GGP directors, having twice rejected Brookfield's demand for an appraisal rights closing condition, agreed with Brookfield to solve the latter's appraisal rights concern by structuring the merger so that, as a practical matter, the GGP stockholders' appraisal rights were either eliminated or so reduced as to be meaningless. 282 A.3d at 43.

341. Plaintiffs argued that, if the Pre-Closing Dividend were in fact merger consideration for appraisal rights purposes, then the proxy statement was intentionally misleading because it "expressly, directly and repeatedly said" "that appraisal would be limited to the [Per-Share Merger Consideration]." *Id.* at 72 (Dissent, quoting from plaintiffs' opening brief).

342. 2021 WL 2102326, at *24.

343. *Id.* at *15.

344. *Id.*

345. *Id.*

346. *Id.* at *18.

As to control generally, the court observed that an ownership stake approximating Brookfield's 35.3 percent was "not impressive on its own," and was equally unimpressed by Brookfield's contractual right to acquire up to 45 percent of GGP's stock: "our law is not concerned with the mere 'potential' that a stockholder might increase its stockholdings and thereby increase its influence."[347] Similarly, plaintiffs failed to establish that Brookfield's three designated directors had the ability to impose their will on the Company's corporate governance,[348] and the fact that a Brookfield-affiliated director was the chief executive officer of the Company did not "move the needle."[349] Since Brookfield was not a controlling stockholder, Brookfield owed no fiduciary duties to GGP's stockholders, and so any allegations of its breach of such duties failed.[350] Moreover, under *Corwin*, assuming the stockholder approval was fully informed and uncoerced, the business judgment rule would apply.[351]

The court then determined that plaintiff had failed to prove either remaining basis for avoiding *Corwin*'s application.[352] The court rejected plaintiffs' allegations that the proxy statement did not "adequately disclose to stockholders the true nature of appraisal rights."[353] Plaintiffs had argued that (i) Section 262 of the DGCL ("Section 262") required that GGP stockholders be offered appraisal for their shares at pre-transaction value, (ii) by paying the Pre-Closing Dividend separately, the defendants had removed almost all value underlying the GGP shares available for appraisal, and (iii) the design of the transaction was a bad-faith attempt by the defendants to deny GGP stockholders the right to seek appraisal for the full pre-transaction value of their shares as required by Section 262.[354] Plaintiffs further had argued that even if the two-step structure did not itself violate Delaware law, the proxy statement's disclosures were designed to disincentivize stockholders from pursuing appraisal by misleadingly implying that only the Per Share Merger Consideration (namely, the post-dividend payment compromising a small portion of their overall consideration) was subject to appraisal.[355] The court first noted that plaintiffs had failed to identify any statutory text restricting merger parties from authorizing a pre-closing dividend prior to the closing of a merger transaction.[356] It then observed that, while neither party could identify case law addressing how a pre-closing dividend should be treated in an appraisal proceeding, "the answer lies in the statute itself"—Section 262(h) directs that a court value GGP shares as if GGP were a going concern "exclusive of any element of value arising from the accomplishment or expectation of the merger," and then empowers such court "to take

347. *Id.* at *21.
348. *Id.* at *22.
349. *Id.* at *23.
350. *Id.* at *24.
351. *Id.*
352. *Id.* at *30.
353. *Id.*
354. *Id.*
355. *Id.* at *32.
356. *Id.* at *31.

into account all relevant factors."[357] In the *GGP* court's view, such language endowed it with the flexibility to elevate form over substance, and the Pre-Closing Dividend was a "relevant factor" that empowered the court to choose to determine whether the Pre-Closing Dividend plus the Per Share Merger Consideration undervalued the dissenting stockholder's shares.[358] Accordingly, the two-step structure did not deny stockholders their statutory appraisal rights or otherwise violate Delaware law.[359] As to the proxy statement's disclosures, while they "could have been more clearly drafted,"[360] they disclosed to the stockholders as required by Section 262 their right to appraisal of their shares and urged stockholders to seek out legal advice in considering whether to exercise their appraisal rights, "which necessarily would have entailed evaluating the role of the Pre-Closing Dividend on a hypothetical appraisal proceeding."[361] In the court's view, that was all that was required.[362] Because the proxy statement's disclosures concerning appraisal rights were sufficient, the stockholder vote was adequately informed.[363] Similarly, because the two-step structure allowed a court in an appraisal proceeding to account for the Pre-Closing Dividend in its determination of fair value, and because the proxy statement adequately disclosed to stockholders their right to seek appraisal, there was no structural coercion[364] and the business judgment rule applied, insulating the transaction from all attacks other than on the ground of waste.[365] No waste having been pled, the court granted the defendants' motion to dismiss.[366]

Delaware Supreme Court Decision

On appeal, the Delaware Supreme Court agreed with the Court of Chancery that, "whether or not they may have intended to," defendants did not eliminate the GGP stockholders' appraisal rights.[367] Rather than construing Section 262 as permitting an appraising court to consider—or to *not* consider—the Pre-Closing Dividend as a "relevant factor" when determining GGP's pre-merger value, the Supreme Court held that dividends expressly conditioned on a merger were as a matter of Delaware law merger consideration, and like all other merger consideration, must be treated as if they had not been paid.[368] Thus, a properly conducted appraisal of GGP would have valued the Company as if neither the Pre-Closing Dividend nor the Per-Share Merger Consideration

357. *Id.*
358. *Id.*
359. *Id.* at *31–32.
360. *Id.* at *33.
361. *Id.* at *32.
362. *Id.*
363. *Id.* at *33.
364. *Id.* at *34.
365. *Id.*
366. *Id.* at *35.
367. *In re* GGP, Inc. Stockholder Litig., 282 A.3d 37, 43 (Del. 2022).
368. *Id.* at 58, 60.

had been paid.[369] Unlike the lower court, however, the Delaware Supreme Court then inquired whether each GGP stockholder's choiceless receipt of the mandated Pre-Closing Dividend forfeited that appraisal right, since acceptance of merger consideration under Delaware law is an abandonment of the appraisal right, "at least in the usual case."[370] Turning to the text of Section 262(a), the court noted it contained no specific prohibition against receiving consideration offered in the merger,[371] but rather precluded otherwise eligible stockholders from seeking appraisal when they have either "voted in favor of the merger" or "consented thereto in writing."[372] Since the Pre-Closing Dividend was payable to supporting and dissenting stockholders alike, receipt of such dividend did not offend such prohibition.[373] Moreover, because the Pre-Closing Dividend was payable the day *before* the closing of the merger, its receipt did not contravene Section 262(k).[374] As a result, receipt of the Pre-Closing Dividend did not effect a waiver of appraisal rights.[375]

Splitting three-to-two, however, the majority took issue with the Court of Chancery's conclusion that the proxy statement's disclosures were sufficient.[376] In the majority's view, the manner in which the merger proxy statement described the merger and the stockholders' attendant appraisal rights was "at best, materially misleading,"[377] and did not provide the stockholders the information they needed to decide whether to dissent and demand appraisal.[378] Noting that the parties had agreed to bifurcate the deal consideration into two pieces only after the special committee had twice-rejected Brookfield's demand for an appraisal-rights closing condition, and that the defendants had not identified any other justification for doing so, the majority concluded that it was reasonably conceivable that director defendants, aided and abetted by Brookfield, had breached their fiduciary duty of disclosure by settling on the two-step structure and the related proxy statement descriptions as a back-door method of limiting Brookfield's appraisal demand exposure.[379] Given that such a breach might not be exculpated under the GGP charter's Section 102(b)(7) exculpatory provision, the majority reversed the lower court's dismissal of the plaintiff's disclosure and fiduciary breach claims and remanded them.[380]

369. *Id.*
370. *Id.* (quoting *In re* PNB Holding Co. S'holders Litig., 2006 WL 240399, at *22 (Del. Ch. Aug. 18, 2006)).
371. *Id.* at 60.
372. *Id.*
373. *Id.* at 61. "Here, qualifying GGP stockholders had no choice: they all received the Pre-Closing Dividend, and the only election they could make was whether it came in prorated cash or stock." *Id.*
374. *Id.*
375. *Id.* at 60.
376. *Id.* at 44.
377. *Id.*
378. *Id.* at 66–67.
379. *Id.* at 70–71.
380. *Id.* at 71. In their dissent, the two dissenting Justices rejected the majority's interpretation of the appraisal rights disclosure and concluded that it was not reasonably conceivable that the proxy statement disclosure was misleading. *Id.*

Conclusion

The opinion provides important guidance from the Delaware Supreme Court on two appraisal rights matters. First, it has eliminated any uncertainty about how a pre-closing dividend should be treated in an appraisal proceeding—if conditioned on the merger, it is merger consideration and taken into account when determining the fair value of a stockholder's shares prior to the transaction. Second, disclosure in the proxy statement better be clear on that front—failure to do so could implicate not only the duty of care but the non-exculpated duty of loyalty.