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Judicial Update

A Victory for Deal Certainty: Reasonable Best Efforts Covenants Should Be Taken Seriously

By Ian D. Engstrand, Keith Schomig, Claudia Torres and Ryan Michael Poitras

The recent decision of the Delaware Court of Chancery in *Desktop Metal, Inc. v. Nano Dimension Ltd. and Nano USI I, Inc.* provides valuable lessons for both sellers and buyers on deal certainty and reasonable best efforts covenants.

The decision relates to a broken-deal suit filed by Desktop to enforce a July 2, 2024, merger agreement in connection with the acquisition of Desktop by Nano for approximately $183 million. The merger agreement was conditioned on Committee on Foreign Investment in the United States (CFIUS) approval and contained "hell-or-high-water" provisions requiring Nano to take all actions necessary to obtain CFIUS approval, including entering into a national security agreement (NSA). In addition, the court noted that because Desktop had concerns with having enough cash to get to closing, Desktop negotiated that Nano use "reasonable best efforts" to close "as soon as reasonably possible." The covenants were designed to ensure both deal certainty and speed to closing. The merger agreement also contained a no-bankruptcy closing condition and ordinary-course-of-business covenants on Desktop.

The court found that, arising from activist changes in control of the Nano board after entry into the merger agreement, Nano had a change of strategy and sought to purchase Desktop out of bankruptcy instead of closing the deal under the merger agreement. The new board controlled by the activist investor sought to use CFIUS approval as a means to defeat the deal, the court found. To that end, the decision noted that Nano went silent with respect to CFIUS and, ultimately, 38 days passed before Nano responded to the committee. After arriving at a proposed "final version" of the NSA with CFIUS, the court found that Nano ignored a CFIUS deadline for signatures by 10 days, forcing the parties to refile, and later engaged in further delays and backtracking on the NSA.

Desktop filed suit on December 16, 2024, seeking specific performance of Nano's closing obligation, including the hell-or-high-water provision to obtain CFIUS approval by signing the NSA. Nano filed a counterclaim contending that Desktop failed the ordinary-course-of-business covenant and no-bankruptcy condition, providing Nano a basis to terminate the merger agreement.

The Court of Chancery Order

Ultimately, the court awarded Desktop specific performance, finding that Nano breached its obligations to take all actions necessary to obtain CFIUS approval and use reasonable best efforts to close as soon as reasonably possible. The court also found that Nano failed to prove failure of the ordinary-course-of-business covenant and the no-bankruptcy condition. The court ordered Nano to enter into the NSA within 48 hours of the order and close the merger.

Key Takeaways for Buyers and Sellers

- **Delaware takes commitments to use "reasonable best efforts" seriously.**
  - Parties are required to "take all reasonable steps to solve problems and consummate the transaction."
  - Parties are required to take "appropriate actions to keep the deal on track."
  - "Good faith is relevant" — a party cannot go "looking for a way out of its deal."
    - The court found that Desktop proved the Nano board intended to use CFIUS approval to scuttle the deal through a pattern of delay and backtracking.

- **Sellers should pay close attention to the definition of "bankruptcy," be wary of including a solvency representation in agreements and be careful of any private or public admissions of inability to pay debts as they mature.**
  - In determining that Nano failed to meet its burden to prove Desktop failed the no-bankruptcy condition, the court kept the parties to the specific language contained in the definition of "bankruptcy," which required Desktop to "admit in writing its inability to pay its debts as they mature." It was not sufficient that Desktop was insolvent or that it did not pay debts as they matured.
  - The merger agreement did not contain a solvency representation, which was a carefully negotiated point by Desktop and could have been devastating to Desktop's case if included.
  - Forward-looking statements in SEC filings do not constitute admission of current inability to pay debts as they mature.

- **Deliberate acts can be sufficient to warrant the application of the prevention doctrine.**
  - The court noted that even if Nano had proven that Desktop failed the no-bankruptcy condition, Desktop demonstrated that Nano prevented Desktop from meeting the condition by slow rolling the CFIUS approval.

- **Parties should be conscious that their counterparties may seek to utilize the CFIUS process "offensively" based on their respective interests.**
  - Buyers may justify terminating a transaction that they do not wish to consummate by claiming that the requested mitigation terms from CFIUS are unacceptable and are outside the scope of their obligations under "efforts" covenants.
  - Sellers may seek specific performance of potentially burdensome CFIUS mitigation terms to force consummation of a transaction under "efforts" covenants if a buyer seeks to back out of an agreement.
  - Any adverse party may inform CFIUS of a transaction that was not voluntarily notified to CFIUS or of national security concerns arising from a transaction under review, and CFIUS maintains a hotline for such tips.

- **In agreements that include CFIUS-related "efforts" covenants, it is critical for buyers to carefully formulate the provisions to protect themselves from being forced to accept potentially burdensome mitigation terms requested by CFIUS.**
  - "Hell-or-high-water" provisions can present significant risks to buyers, particularly in conjunction with vague or unclear carveouts to "efforts" covenants that do not include discrete and specific mitigation terms which are unacceptable. Such carveouts should identify the specific actions that the buyer and/or the seller are not required to accept to consummate the transaction, as opposed to general language describing impacts or effects on the parties' business.
  - Such risks are heightened in the CFIUS context, where it may be difficult to anticipate the specific mitigation terms that CFIUS may request. Buyers should carefully consider any likely mitigation terms that CFIUS may request based on the national security considerations at issue in their case so that they are proactively "built in" as exceptions to "efforts" covenants.
  - Sellers should closely review any buyer-proposed carveouts from "efforts" provisions narrowing the range of unacceptable CFIUS mitigation terms that buyer is not obligated to undertake to complete a transaction.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Boston

Ian D. Engstrand
+1-617-912-1635
ianengstrand@paulhastings.com

Washington, D.C.

Keith Schomig
+1-202-551-1880
keithschomig@paulhastings.com

Ryan Michael Poitras
+1-202-551-1977
ryanpoitras@paulhastings.com

Claudia Torres
+1-202-551-1947
claudiatorresleal@paulhastings.com