

Desktop Metal, Inc. v. Nano Dimension Ltd. (Del. Ch.) **Another Victory for Deal Certainty**

On March 24, 2025, Quinn Emanuel secured a complete trial victory for Desktop Metal, obtaining an order that Nano Dimension obtain regulatory approvals within 48 hours and close its merger with Desktop Metal.

The Court’s decision followed a highly-expedited litigation that proceeded from complaint to trial in less than three months, and in which Nano Dimension (represented by Paul Weiss, Vinson & Elkins, and Abrams & Bayliss) asserted a slew of counterclaims and defenses, including that Desktop Metal allegedly breached its interim operating covenants. Ultimately, the Court found that Desktop Metal proved that Nano failed to use “reasonable best efforts to resolve any objection that may be asserted by any Governmental Entity,” and failed to “obtain CFIUS approval come hell or high water.” The Court also rejected all of Nano’s counterclaims and defenses. Nano did not appeal.

The \$300 million merger closed on April 2, 2025.

The opinion by Chancellor McCormick for the Delaware Court of Chancery is instructive for deal practitioners, especially in negotiating and executing upon efforts-based regulatory covenants. And the rapid pace of litigation—including a decision less than two weeks after trial, allowing the parties to close shortly within days of the merger agreement’s outside date—reinforces how litigation can be used to obtain deal certainty, even where regulatory approvals remain outstanding.

Inside the Winning Strategy

When deals break down, litigators often discover that the transaction documents gave little thought to, or even omitted to consider, some of the unanticipated contingencies that occur when one side sours on the transaction and deal-enforcement litigation ensues. As the only large litigation-only firm with unparalleled deal-litigation experience, Quinn Emanuel brings an independent perspective unconstrained by the need to defend transactional attorneys’ decisions. This advantage became important for this victory. We effectively demonstrated that, among other things, deal counsel omitted litigation contingencies in negotiating expense caps. By engaging Quinn Emanuel instead of the deal’s original transaction team, our client gained the important ability to make these types of arguments, as we were able to objectively assess the history of the deal negotiation on a litigation record rather than being constrained by loyalty to the original transactional firm and the deal team’s preferred narrative.

Background

Desktop Metal and Nano are publicly-traded companies in the additive manufacturing (3D printing) industry. *Desktop Metal Inc. v. Nano Dimension Ltd.*, No. 2024-1303-KJSM, 2025 WL 904521, at *1-2, *4 (Del. Ch. Mar. 25, 2025) (“Op.”). On July 2, 2024, Desktop Metal and Nano Dimension executed a final Merger Agreement. *Id.* at *6. Because Nano Dimension is an Israeli company and Desktop Metal is a U.S. company that supplies critical products to the U.S. government, the transaction would require the approval of the Committee for Foreign Investment in the United States (“CFIUS”). *Id.* at *1, *4, *6.

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During the negotiation process, Desktop bargained for two conditions: speed and certainty. Thus, Nano committed to use “reasonable best efforts” to close the transaction “as soon as reasonably possible.” *Id.* at *6. Nano also agreed to “use its reasonable best efforts to resolve any objection” from “any Governmental Entity,” and to take “all actions” “to obtain CFIUS approval.” *Id.* at *2, *6. The only exception to Nano’s hell-or-high water commitment to obtain CFIUS approval was that it could refuse to cede control to the U.S. government of 10% or more of the Desktop business (measured by revenue). *Id.* at *8. But that exception was qualified by a schedule of mitigation measures that Nano agreed to accept regardless of their effect on control. This included, for example, provisions “establishing guidelines and terms for handling ... contracts with the U.S. Government,” “assurances of continuity of supply to the U.S. Government for defined periods,” and “notification and consultation prior to taking certain business decisions.” *Id.* at *24.

After signing, the parties advanced productively toward closing. *Id.* at *10-11. By late 2024, the sole remaining condition to closing was CFIUS approval, and CFIUS provided the parties with a National Security Agreement as a final condition to provide its approval. *Id.* at *10, *44. At around that same time, an activist minority investor in Nano succeeded in ousting the board on a platform of killing the Desktop deal. *See id.* at *25. The newly installed Nano Board proceeded to stall the deal process. *Id.*

Using its deal counsel, Desktop filed an initial complaint on December 16, 2024 seeking an expedited trial. Nano opposed. In early January, Desktop retained Quinn Emanuel, filed an Amended Complaint, and proceeded through intensive and comprehensive pre-trial fact and expert discovery over a period of about eight weeks. *Id.* at *20. Desktop alone produced over 50,000 documents and took or defended more than 20 depositions, while filing motions to compel to ensure that Nano reciprocated.

The Court held a bench trial on March 11 and 12, followed by post-trial briefing which was completed in five and a half days after trial. On March 24, the Court ordered Nano to sign the national security agreement proposed by CFIUS within 48 hours, and to perform its obligations to close under the Agreement.

Key Aspects Of The Opinion

Hell or High Water:

The Court’s opinion demonstrates that parties can negotiate regulatory efforts provisions that have real teeth. As the Court noted, Desktop had a strong interest in protecting deal certainty and ensuring that the deal closed quickly despite significant regulatory hurdles. In negotiations, Desktop had proposed a reverse termination fee if CFIUS approval was not granted, and Nano instead negotiated for a provision requiring Nano to take “all action necessary” to obtain CFIUS approval. *Id.* at *8. The Court recognized this to be a hell-or-high-water clause, the strongest contractual efforts requirement, again demonstrating that Delaware courts will interpret “all efforts” language to impose this obligation. *Id.* at *24; *see, e.g., Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 716, 756 (Del. Ch. 2008) (describing an obligation to “take any and all action necessary” to obtain antitrust approval as a “come hell or high water” obligation). And the Court vindicated the protection through an order of specific performance.

Burden of Proof:

The Court held that Desktop bore the burden to prove breach of the hell-or-high-water clause and that Nano then bore the burden to prove that the 10% carveout applied to excuse it from any breach, after which Desktop could prove that Nano's obligation was carved back in, so to speak, by a limitation to the carveout. *Id.* at *24. The Court found that Nano breached the hell-or-high-water clause, and indicated that Nano likely failed to meet its burden on the 10% carveout, but that, in any event, Desktop proved that Nano's obligations fell within the limitations to Nano's exceptions. *See id.* at *24–31.

Proving Breach:

Because an activist investor “promise[d] to scuttle the Desktop deal,” the Court noted that Nano “face[d] an uphill battle in convincing anyone that it did everything it could, come hell or high water...after [the activist] took over the Nano Board” and “ma[de] good on that promise by obstructing CFIUS approval.” *Id.* at *24. Desktop proved breach by showing that Nano delayed closing for pretextual reasons. *Id.* at *32.

Specific Performance:

The Court's decision to order specific performance of an efforts obligation in the regulatory context sets an important precedent under Delaware law. Orders to specifically perform regulatory efforts covenants and close have been rare. The *Desktop Metal* decision demonstrates that while such relief may be rare, it is not unavailable.

In this case, since late 2024, the sole remaining impediment to closing was CFIUS approval. *See id.* at *10. And the final requirement to obtain that approval was that the parties agree to a national security agreement with CFIUS. *Id.* at *44. CFIUS had extensively negotiated the terms and proposed a finalized draft agreement, and Desktop had assented to CFIUS's terms, leaving Nano's assent as the sole hold-up to regulatory approval. *See id.* at *45. Although Nano argued that it was still negotiating, the Court chose to assess whether Nano was required to accept the last proposed terms from CFIUS.

Interim Operating Covenants:

In *Desktop Metal*, the Court also rejected counterclaims by Nano alleging that Desktop breached interim operating covenants, including an ordinary course covenant, a requirement to not stretch payables or accelerate receivables, and a commitment to not incur more than \$15 million in transaction expenses. The Court also rejected a claim that Desktop triggered a termination right by entering “Bankruptcy.” Instructive here were the Court's application of the prevention doctrine and refusal to adopt interpretations that would cause absurd results.

Desktop Metal's ordinary course covenant required it to “use commercially reasonable efforts” to “conduct its business in the ordinary course consistent with past practice in all material respects” and to preserve “business organization[s],” “business relationships” and the “services of its current officers and key employees.” *Op.* at *37. Provisions of this type are common in M&A agreements, and have been interpreted in numerous recent Delaware decisions. *See, e.g., Snow Phipps Grp. LLC v. KCAKE Acquisition, Inc.*, 2021 WL 1714202, at *37–40 (Del. Ch. Apr. 30, 2021); *AB Stable VIII v. MAPS Hotels & Resorts One*, 2020 WL 7024929, at *65–73 (Del. Ch. Nov. 30, 2020); *Akorn, Inc. v.*

Fresenius Kabi AG, 2018 WL 4719347, at *83–90 (Del. Ch. Oct. 1, 2018); *Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd.*, 2014 WL 5654305, at *15–17 (Del. Ch. Oct. 31, 2014). The Court held that Nano could not prove Desktop’s efforts to retain staff “were commercially unreasonable given that Nano was involved in those efforts” because it worked with Desktop on those retention plans as part of the post-merger integration process. *Id.* at *38. The Court also enforced the materiality limiter, finding that a 6% reduction-in-force was not a material departure from ordinary course. *Id.* Additionally, Nano failed to show that Desktop should have begun an annual audit, as it would have done absent a merger: “Nano cannot show that it would have been reasonable for Desktop to engage Deloitte to conduct an audit—an audit that Nano did not want and that would be immediately called off post-closing.” *Id.* at *39–40.

With respect to litigation fees incurred above the Merger Agreement’s \$15 million cap on “Company Transaction Expenses,” the Court held that litigation fees could not be construed as within the meaning of that cap, otherwise Nano would be able to terminate and prevent Desktop from mounting a zealous effort to enforce closing: “Nano’s reading effectively means that only Nano has a right to zealously enforce the Merger Agreement due to the asserted cap on litigation fees.[] This is the sort of non-sensical result that would defy any party’s reasonable expectations.” *Id.* at *43.

Nano insisted that Desktop experienced a “Bankruptcy” event, because the term was defined in the Merger Agreement to include an admission in writing that Desktop could not pay its debts as they matured. *Id.* at *32–35. The Court carefully scrutinized any evidence that Desktop met this trigger and concluded that none of the circumstantial evidence of financial distress cleared this threshold. *Id.* at *35–36. The Court also ruled that the prevention doctrine would have precluded Nano from relying upon a bankruptcy event caused by Nano’s delay: “Nano materially contributed to that circumstance by intentionally slow rolling the CFIUS approval process.” *Id.* at *37.

Elaborating on the prevention doctrine, the Court explained that failure of an operating covenant may be excused if it can be materially attributed to the counterparty’s breach. For instance, any failure of the Company Transaction Expense covenant based on litigation fees incurred to enforce the agreement would be excused because Nano’s breach caused Desktop to incur the fees. *Id.* at *37, *43.

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Quinn Emanuel has successfully represented both buyers (e.g., *Snow Phipps Group* and *Desktop Metal*) and sellers (e.g., *MAPS Hotels & Resorts*) enforcing and terminating merger agreements under Delaware law in expedited litigation. Over the past five years, the firm has won for its clients on both sides of those disputes, helping to create the seminal caselaw on this topic, and setting the standard for expedited litigation.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to contact:

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