QE Wins Rare Victory For Buyer in Delaware Terminated Takeover Case

On November 30, 2020, Quinn Emanuel obtained a complete victory in the Delaware Court of Chancery for its client Mirae Asset in *AB Stable VIII v. MAPS*, the first terminated takeover case of the COVID-19 era to go to trial. The Court denied all relief sought by the seller, including specific performance, and awarded Mirae Asset with the return of its $581.7 million deposit with interest, $3.685 million in damages (including legal and other transaction costs), and attorneys' fees and costs as the prevailing party.

The case concerned a failed transaction in which Anbang Insurance Group, Ltd. attempted to sell Strategic Hotels & Resorts LLC and its portfolio of 15 ultra-luxury hotels to affiliates of Mirae Asset for $5.8 billion.

Mirae entered an agreement with Anbang to purchase Strategic in September 2019. Shortly before that, Anbang disclosed that someone had recorded grant deeds purporting to transfer ownership of six of the hotels to entities that were not owned by Strategic. Anbang and its counsel said that they had just learned about the deeds, but assured Mirae that they were nothing to worry about as they claimed the grant deeds were the work of a twenty-something year old Uber driver with a criminal record. Still, Mirae insisted that the transaction be reworked to account for the deeds, including a closing condition that required a title insurance policy that did not take any exception for the deeds.

Once the parties signed the purchase agreement, Anbang and its counsel engaged in litigation that they told Mirae would resolve the grant deeds issue. But the grant deeds issue was never resolved; it got much worse. As the parties moved towards closing in February 2020, Mirae Asset learned for the first time that Anbang had known the parties who had recorded the deeds for years. And that those parties were attempting to enforce multi-billion dollar arbitration awards related to the deeds in courts in Delaware and California. Anbang and its counsel had never mentioned their knowledge of these parties, let alone the lawsuits, to Mirae Asset or its counsel even though they had been providing Mirae Asset and its counsel with regular updates about their efforts to clear the deeds for months after the purchase agreement was signed. The belated revelations that Anbang and its counsel had withheld this information immediately put Mirae Asset's attempts to obtain financing for the transaction on hold as the prospective lenders conducted due diligence on the issue. A few weeks later, there was yet another deal-halting discovery: a filing in one of the previously undisclosed Delaware litigations revealed that the parties who had filed the deeds were asserting ownership to the hotels pursuant to a "DRAA Blanket Agreement." This development caused even further concern for Mirae Asset's lenders and prompted the title insurance companies to take a broad exception for all matters related to or arising from the DRAA Blanket Agreement, including the grant deeds.

At the same time Mirae Asset was learning about these issues with the title to the hotels, Strategic began to implement drastic changes to the hotels' operations amidst the COVID-19 pandemic. Strategic completely closed two of its hotels, severely reduced its offerings and amenities at its other properties, and relieved 5,200 employees. Needless to say, Strategic had never taken such drastic steps before.

Given the lingering title issues and the severe operational cutbacks at the hotels, Mirae Asset provided Anbang with a notice of breach in mid-April 2020. Anbang responded by suing Mirae Asset in late April 2020, seeking to compel Mirae Asset to close the transaction.

Soon after it was filed, the case was put on an extremely expedited schedule, at which point Quinn Emanuel was brought in to represent Mirae Asset. While the case had initially been framed as a narrow one involving mostly legal issues and requiring little discovery, Quinn Emanuel quickly developed a counter narrative and filed counterclaims that detailed Anbang's deception and serial breaches of the sale agreement and set forth more than a dozen independent bases on which Mirae Asset was entitled to terminate the agreement and receive its deposit back. Over the course of the ensuing three months, in what the Court's opinion described as "Herculean efforts," Quinn Emanuel reviewed and exchanged hundreds of thousands of documents, prepared dozens of expert reports, and conducted forty-nine depositions (all of which took place in a month's time). Through that process, Quinn Emanuel methodically built a record showing not only that Anbang had breached the sale agreement, but that Anbang and its counsel had actually withheld material information from Mirae asset throughout the sale process in an effort to force the deal through. In particular, Quinn Emanuel uncovered overwhelming evidence showing that Anbang and its counsel had known about the deeds since December 2018 but chose not to disclose them to until mid-August 2019, right as Anbang and Mirae Asset were close to finalizing a deal. Moreover, Anbang and its counsel had known all along that the deeds were not the work of a lone Uber driver. In fact, Anbang had been engaged in a years-long, international legal battle with the people and entities behind the grant deeds and were well-acquainted with them. Finally, Anbang and its counsel were aware that the parties who had filed the deeds had also sued Anbang in Delaware in August 2019 before the purchase agreement was signed, but withheld that information from Mirae Asset until it ultimately discovered that fact in February 2020.

Quinn Emanuel put this evidence on display in a week-long trial before Vice Chancellor Travis J. Laster in late August 2020. Quinn Emanuel's core trial theme was that the delay occasioned by Anbang's repeated concealment of key information ultimately ran out the clock on the transaction and relieved Mirae Asset of its obligation to close.

The Delaware Court of Chancery ultimately agreed. In its 241-page opinion, the Court largely adopted Quinn Emanuel and Mirae Asset's account of the facts, concluding that Anbang and its counsel had "committed fraud about fraud" in their dealings with Mirae Asset and its counsel regarding the grant deeds and related issues. The Court ruled that because the title insurance companies had taken a broad exception for the grant deeds in their draft policy, the condition precedent in the purchase agreement requiring that Mirae Asset obtain clean title insurance had failed and Mirae Asset was therefore relieved from its obligation to close.

In perhaps the most broadly applicable aspect of its opinion, the Court further held that the drastic operational changes Strategic implemented at the hotels also constituted a violation of the purchase agreement's ordinary course covenant. As the court reasoned, a seller's promise to operate in the ordinary course is meant "to ensure that the business of the target will be substantially the same at closing as it was on the date the purchase agreement was signed." Where the ordinary course covenant is unqualified, as it was in this case, it places an unconditional obligation on the seller. This is a potentially seminal ruling under Delaware law, which will likely have significant impact on future M&A deals and litigations.

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If you have any questions about the issues addressed in this Client Alert, or if you would like a copy of any of the materials we reference, please do not hesitate to contact us.

Michael Carlinsky
Email: michaelcarlinsky@quinnemanuel.com
Phone: +1 212-849-7150

Andrew Rossman
Email: andrewrossman@quinnemanuel.com
Phone: +1 212-849-7282

Christopher Kercher
Email: christopherkercher@quinnemanuel.com
Phone: +1 212-849-7263

John Rhie
Email: johnrhie@quinnemanuel.com
Phone: +852 3464 5602

Rollo Baker IV
Email: rollobaker@quinnemanuel.com
Phone: +1 212-849-7513

Kimberly Carson
Email: kimberlycarson@quinnemanuel.com
Phone: +1 212-849-7309

Jared Ruocco
Email: jaredruocco@quinnemanuel.com
Phone: +1 212-849-7625

Jonathan Feder
Email: jonathanfeder@quinnemanuel.com
Phone: +1 212-849-7015