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FOREWORD

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In the fall of 2022, all eyes were on the Twitter/Musk transaction. On April 25, 2022, after a very brief courtship¹ with minimal due diligence, Elon Musk entered into a merger agreement to buy Twitter for \$54.20 per share (a total of around \$44 billion).² Within days, he began to suffer buyer's regret and put the deal in doubt.³ On July 8, 2022, Musk formally claimed to terminate the transaction.⁴ On July 12, 2022, Twitter sued to

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1. Before entering into the merger agreement, Musk acquired a significant stake in Twitter, disclosing his ownership on Schedule 13G, the securities-disclosure form reserved for passive owners, only later disclosing his intentions on Schedule 13D. These choices remain the subject of practitioner bemusement and S.E.C. inquiry. *See, e.g.*, Matt Levine, *Elon Musk is Active Now*, BLOOMBERG (Apr. 6, 2022), <https://www.bloomberg.com/opinion/articles/2022-04-06/elon-musk-is-active-now> ("It all feels like a stretch. If he needed a 13D yesterday he probably needed one earlier."); Letter from U.S. Sec. & Exch. Comm'n to Elon Musk, Tr., Elon Musk Revocable Trust, Commission File No. 005-87919 (June 2, 2022).

2. Cara Lombardo et al., *Twitter Accepts Elon Musk's Offer to Buy Company in \$44 Billion Deal*, WALL ST. J. (Apr. 25, 2022), <https://www.wsj.com/articles/twitter-and-elon-musk-strike-deal-for-takeover-11650912837>.

3. *See, e.g.*, Sarah Needleman, *Behind Fake-Account Issue That Elon Musk Cited in Calling Twitter Deal 'On Hold'*, WALL ST. J. (May 15, 2022), <https://www.wsj.com/articles/behind-fake-account-issue-that-elon-musk-cited-in-pausing-twitter-deal-11652612403>.

4. Letter from Mike Ringler to Vijaya Gadde, Chief Legal Officer, Twitter, Inc. (July 8, 2022), https://www.sec.gov/Archives/edgar/data/1418091/000110465922078413/tm2220599d1_ex99-p.htm.

enforce the agreement in the Delaware Court of Chancery and sought specific performance.⁵

The case was assigned to Chancellor Kathaleen McCormick. Would she order Mr. Musk to close the transaction and pay Twitter shareholders \$54.20 per share? Would she allow him to get out of the deal? If she found a breach and imposed damages, how large would the damages be? What would happen to Twitter's stock price? As Twitter's stock price gyrated, trading in the range of \$34–44 per share, investors and academics of all sorts tried to calculate the odds.⁶

In the end, after some months of very active litigation, Musk completed the merger.⁷ According to an interview Musk gave shortly after closing, his lawyers convinced him that Chancellor McCormick would order specific performance.⁸ But were his lawyers right? Well, we urge you to read Chancellor McCormick and Robert Erikson's extraordinary article in this issue, on "Delaware's Approach to Specific Performance in M&A Litigation," and decide for yourself.

A few months after the fuss over Twitter, Chancellor McCormick presented a "Distinguished Jurist" lecture for New York University's Institute for Corporate Governance and Finance. Pursuant to the Institute's partnership with the *NYU Journal of Law & Business*, which had its debut with Chief Justice Collins J. Seitz, Jr.'s November 2022 Distinguished Jurist lecture,⁹ we are thrilled that Chancellor McCormick has graciously agreed to publish this very important article.

5. Cara Lombardo & Sarah Needleman, *Twitter Sues Musk Over Bid to Drop Purchase*, WALL ST. J. (July 13, 2022), <https://www.wsj.com/articles/twitter-sues-elon-musk-over-attempt-to-walk-away-from-44-billion-deal-11657660307>.

6. Some academic observers predicted that the Chancellor would grant Twitter's request for specific performance—and argued that she should. See Yair Listkoin & Jonathon Zytneck, *Elon Musk Bought Twitter. Now He Must Own It*, N.Y. TIMES (July 14, 2022) (citing Yair Listokin, *The Empirical Case for Specific Performance: Evidence from the IBP-Tyson Litigation*, 2 J. EMPIRICAL LEGAL STUD. 469 (2005)), <https://www.nytimes.com/2022/07/14/opinion/twitter-elon-musk.html>.

7. Lauren Thomas & Alex Corse, *Elon Musk Closes Twitter deal, Immediately Fires Top Executives*, WALL ST. J. (Oct. 28, 2022), <https://www.wsj.com/articles/elon-musk-completes-twitter-takeover-11666918031>.

8. James Clayton, *Elon Musk BBC interview: Twitter boss on layoffs, misinfo and sleeping in the office*, BRITISH BROAD. CORP. (APR. 12, 2023), <https://www.bbc.com/news/business-65248196> ("But he admitted he only went through with the takeover because a judge was about to force him to make the purchase.").

9. Collins J. Seitz, Jr., *A Declaration of Independence: Committees, Conflicts, and the Courts*, 19 N.Y.U. J. L. & Bus. 467 (2023).

As Chancellor McCormick and Robert Erikson explain, Delaware's embrace of specific performance as the presumptive remedy in broken deal cases is a bit puzzling, at least from the perspective of equity jurisprudence. Cases and treatises, along with law school contracts classes, all teach that specific performance is an extraordinary and discretionary remedy for breach of contract, appropriate only when remedies at law (i.e., damages) are inadequate.¹⁰ According to the American Law Institute's Restatement (Second) of Contracts, "This rule [is] the product of the historical division of jurisdiction between law and equity."¹¹

But is this disfavor more than an historical curiosity tied to the organization of the U.K. court system "prior to the separation of the American colonies"?¹² Should a court that is committed to resolving disputes among sophisticated parties in a reliable and predictable way be limited by this historical reticence? In this article, the authors recognize the tension with historical doctrines of equity and provide a full defense of a contractarian approach to specific performance.

As you will see, the authors document and defend the current Delaware practice of a presumption in favor of enforcing contracting parties' choice of specific performance as a remedy. The implications of this approach remain to be seen. Will Delaware courts give the same deference to other "bargained for terms" like large reverse termination fees, whether or not such fees are tethered to actual damages?¹³

As important as this is for M&A lawyers, it may be even more important for contract law more generally. Merger agreements are among the most heavily negotiated contracts that are also routinely litigated. If the leading court that interprets these agreements concludes that bargained for specific performance should be routinely enforced, why would courts interpreting contracts between sophisticated parties not do so

10. *See, e.g.*, E. ALLAN FARNSWORTH, *CONTRACTS* 849-71 (2d ed. 1990).

11. Restatement (Second) of Contracts Introductory Note to Ch. 16 (Remedies) (Am. L. Inst. 1981).

12. 10 Del. C. § 369 (2022) ("The Court of Chancery has jurisdiction to hear and determine all matters and causes in equity. The general equity jurisdiction of the Court is measured in terms of the general equity jurisdiction of the High Court of Chancery of Great Britain as it existed prior to the separation of the American colonies.")

13. *See, e.g.*, *Vintage Rodeo Parent, LLC. v. Rent-a-Center, Inc.*, 2019 WL 1223026 (Del. Ch. Mar. 14, 2019).

more generally? Having rejected the historical resistance in favor of party autonomy, why would any court interpreting a contract insist on favoring history over sophisticated parties' freedom to contract as they see fit?

A focus on party autonomy raises at least three additional questions. First, will a court enforce a provision in a merger agreement that explicitly limits or entirely rejects specific performance in favor of monetary damages? Logically, the commitment to party autonomy would seem to imply respect for a bargained-for rejection of specific performance.¹⁴

Second, in the absence of an agreement over specific performance—i.e., when the contract is silent—will specific performance still be available as a remedy, assuming its requirements are met? For example, will a merger agreement that includes liquidated damages provisions such as termination fees and reverse termination fees preclude the granting of specific performance? Under classic contract law, “[s]pecific performance or an injunction may be granted to enforce a duty even though there is a provision for liquidated damages for breach of that duty.”¹⁵ But a strong deference to party autonomy could interpret silence as rejection of specific performance, at least when the contract at issue is one in which parties could and often do negotiate over its availability.¹⁶

Third, to what extent will party autonomy be limited by the interests of third parties or broader public policy concerns? In the 2008–09 Rohm & Haas/Dow Chemical litigation in which Rohm & Haas sought specific performance of its merger agreement with Dow, Dow argued that forcing it to close would render the combined company insolvent, with negative effects on workers and communities.¹⁷ Although the parties reached an agreement to close on the courthouse steps, Dow evidently

14. *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715, 762–63 (Del. Ch. 2008); *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810 (Del. Ch. 2007).

15. Restatement (Second) of Contracts § 361.

16. *United Rentals*, 937 A.2d at 840–44.

17. Complaint, *Rohm and Haas Co. v. The Dow Chem. Co. and Ramses Acquisition Corp.*, 2009 WL 247606 (Del. Ch. Feb. 6, 2009); see also, Zachery Kouwe, *Dow Chemical and Rohm Settle a Dispute over \$15.3 Billion Merger*, N.Y. TIMES, (Mar. 9, 2009), <https://www.nytimes.com/2009/03/10/business/10chemical.html>; Alexander H. Tullo, *Dow, Rohm and Haas Deal Gets Ugly*, CHEM. & ENG'G NEWS (Feb. 2, 2009), <https://cen.acs.org/articles/87/i5/Dow-Rohm-Haas-Deal-Ugly.html>.

thought that the specter of bankruptcy might make Chancellor Chandler reluctant to order specific performance.

As any corporate-law practitioner knows, these questions will be resolved by Delaware's court of equity as individual cases and controversies warrant. But for an intellectually rigorous framework under which those cases could be considered, we commend the commentary from Chancellor McCormick and Robert Erikson that follows.