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DELAWARE'S APPROACH TO SPECIFIC PERFORMANCE IN M&A LITIGATION

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INTRODUCTION

The *Twitter v. Musk* litigation brought specific performance in the busted deal context to the attention of the chattering (and tweeting) classes. As the judge and her clerk tasked with deciding the case, we were certainly thinking about the issue. We do not offer any thoughts in this essay as to how the lawsuit

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would have ended were it resolved by the court. With that forced opportunity for reflection, however, we emerged with some thoughts on the Court of Chancery's approach to specific performance. This essay and the speech that preceded it are the result.

The common law has branded specific performance as an extreme remedy, attainable only where legal remedies are unavailable and the equities tilt in the claimant's favor. Yet, in 2001, the Delaware Court of Chancery forced a strategic buyer to close on a merger agreement. The case was *In re IBP, Inc. Stockholder Litigation*, and the jurist was then-Vice Chancellor, later Chancellor and Chief Justice, Leo E. Strine.[1] In what would be viewed as a watershed moment in Delaware law, Strine deployed a common law framework when analyzing the target's claim for specific performance, weaving an assessment of the uniqueness of the transaction and the difficulty in pricing damages into the specific-performance analysis, while expressly balancing the equities to consider stakeholder interests, as well as the will of the parties.

Post-*IBP*, parties to M&A contracts increasingly stipulated specific performance as an appropriate remedy in the event of breach. They also increasingly agreed to Delaware choice of law and forum selection provisions. As specific performance provisions became ubiquitous in M&A agreements, Delaware law's analysis of specific performance in the merger context shifted away from the traditional equitable approach to instead prioritize the parties' contractual scheme. This contractarian approach led the court to, in effect, invert the common-law framework for specific performance and treat specific performance as the presumptive remedy in the event of breach.

In our view, this shift was a positive development. By enforcing specific performance provisions, Delaware courts help foster a contracting culture in which parties expect that their agreements will be enforced. Promoting deal certainty, in turn, creates space for fiduciaries and companies to invest time into securing the best deal reasonably attainable.

Of course, Delaware's contractarian approach to busted deal remedies raises the question: What role, if any, should the traditional equitable considerations play in the analysis of requests for specific performance of M&A agreements? Are

1. *In re* IBP, Inc. S'holders Litig, 789 A.2d 14 (Del. Ch. 2001).

there circumstances in which the equities might override the parties' stipulation to specific performance? To this question, we offer an (in our view) uncontroversial conclusion: Yes, equitable principles will continue to play a role in suits for specific performance of M&A agreements, although perhaps a less prominent role than called for historically.

Our essay proceeds in three parts. To ground our remarks, we begin with a whirlwind overview of what we call the "traditional" approach to specific performance. We then discuss the Delaware approach to specific performance in M&A cases, beginning with *IBP*. We last draw our modest conclusions concerning the continued role of equity.

I.
The Traditional Approach

Under common law, specific performance is an equitable and extraordinary remedy. It is "entirely in the discretion of the court upon a view of all the circumstances[.]"[2] It has been described as "a matter of grace and not of right."[3] As an equitable remedy, it is only available when legal remedies like damages are inadequate.[4] The paradigmatic argument for meeting this requirement asserts that the asset is unique—art and land are

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2. Willard v. Tayloe, 75 U.S. 557, 566 (1869) (citing Godwin v. Collins, 1868 WL 1255, at *9 (Del. Ch. Mar. 1868)); Gildor v. Optical Solutions, Inc., 2006 WL 4782348, at *11 & n.31 (Del. Ch. June 5, 2006) (Strine, V.C.) ("Specific performance, of course, is a form of relief available at the discretion of this court." (citing Marvel v. Conte, 1978 WL 8409, at *4 (Del. Ch. Oct. 24, 1978) (Marvel, C.) and Esso Standard Oil Co. v. Cunningham, 114 A.2d 380, 383 (Del. Ch. 1955) (Marvel, V.C.)); Restatement (Second) of Contracts § 371(1) ("[S]pecific performance of a contract duty will be granted in the discretion of the court against a party who had committee or is threatening to commit a breach of the duty.").

3. Marvel v. Conte, 1978 WL 8409, at *4 (Del. Ch. Oct. 24, 1978) (Marvel, C.).

4. Restatement (Second) of Contracts § 359; 25 Williston on Contracts § 67:1 (4th ed.) Eisenberg at 29; *see also* Theodore Eisenberg and Geoffrey P. Miller, *Damages Versus Specific Performance: Lessons from Commercial Contracts*, 12 J. Emp. Legal Studies 1, 29 (Mar. 2015) ("[b]lack-letter law holds that an injunction—specific performance—is available in an action for breach of contract only in cases where damages are inadequate.") (citing Javierre v. Central Altagracia, 217 U.S. 502, 508 (1910); William Bishop, *The Choice of Remedy for breach of contract*, 14 J. Legal Stud. 299 (1985)), Lewis Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. Colo. L. Rev. 683 (1986); Anthony T. Kronman, *Specific Performance*, 45 U. Chi. L. Rev. 351 (1978)); Restatement (Second) of Contracts § 359(1) ("Specific

common examples. Some say that this is a proxy for the relative thickness of the market, which in turn speaks to the difficulty in fashioning damages. The difficulty in fashioning damages is also frequently proffered as a separate argument for why a party might lack an adequate remedy at law.

In addition to demonstrating the lack of a remedy at law, a claimant seeking specific performance must demonstrate—by clear and convincing evidence under Delaware law[5]—three elements: that the contract at issue is valid and enforceable; that the party seeking specific performance is ready, willing, and able to perform its obligations under the contract; and that the balance of the equities favors specific performance.[6]

In his 1990 decision, *Bernard Personnel Consultants, Inc. v. Mazarella*, Chancellor Allen described the elements of a claim for specific performance as falling into two levels of analysis.[7] "The first level of analysis raises contract law questions: was there agreement in fact; is there an enforceable contract in law; what are its terms, etc."[8] The second level of analysis addresses "other issues that do not focus upon the time of contracting, but upon the time of enforcement," asking whether the claimant remains ready to perform its obligations and whether the equities counsel in favor of closing the transaction.[9]

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performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.").

5. Some states, including New York, require a claimant seeking to specific performance to prove their case only by a preponderance of the evidence. *See* ROI, Inc. v. Hidden Valley Realty Corp., 45 A.3d 1010, 1011 (2007).

6. Restatement (Second) of Contracts § 364 (Am. L. Inst. 1979); 25 Williston on Contracts § 67:16 (4th ed.); Bernard Personnel Consultants, Inc. v. Mazarella, 1990 WL 124969, at *3; Morgan's Heirs v. Morgan, 15 U.S. 290, 4 L. Ed. 242 (1817). Slight variants of this articulation can be found in Delaware case law. *See, e.g.*, Osborn *ex rel.* Osborn v. Kemp, 991 A.2d 1153, 1158 (Del. 2010) ("A party must prove by clear and convincing evidence that he or she is entitled to specific performance and that he or she has no adequate legal remedy. A party seeking specific performance must establish that (1) a valid contract exists, (2) he is ready, willing, and able to perform, and (3) that the balance of equities tips in favor of the party seeking performance."); *see also* Twin Willows, LLC v. Pritzkur, Tr. for Gibbs, 2021 WL 3172828 (Del. Ch. July 27, 2021) (quoting *Osborn* for specific performance elements).

7. *See Mazzarella*, 1990 WL 124969, at *3.

8. *Id.*; *see also* Williston on Contracts § 67:2, 4 (4th ed.).

9. *See Mazzarella*, 1990 WL 124969, at *3.

When balancing the equities, the Chancellor made clear that a court will consider the effect of the injunction on the parties as well as non-parties to the contract.[10] He explained:

> These issues of course reflect the traditional concern of a court of equity that its special processes not be used in a way that unjustifiably *increases human suffering*. Therefore, in determining whether or not to issue injunctions or de[c]ree specific performance[,] equitable courts have for centuries "balanced the equities" and in appropriate circumstances declined to specifically enforce even a valid contract provision, if to do so would cause greater harm than it would save.[11]

The Chancellor's consideration of the interests of non-parties to a contract when awarding specific performance was not his innovation. This approach to the specific performance analysis can be traced at least as far back as the 19th century,[12] although it is unclear whether this approach was

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10. Public Water Supply Dist. v. Fowlkes, 407 S.W.2d 642, 647 (Mo. App. 1966) (cited in Schwartz at 471 n.4).

11. *Mazarella*, 1990 WL 124969, at *3 (emphasis added); *see also* Kansas v. Colorado, 1994 WL 16189353 (U.S. Oct. 3, 1994) ("[S]pecific performance . . . requires some attention to the relative benefits and burdens that the parties may enjoy or suffer as compared with a legal remedy in damages. [S]pecific performance is never demandable as a matter of absolute right, but as one which rests entirely in judicial discretion, to be exercised, it is true, according to the settled principles of equity, but not arbitrarily and capriciously, and always with reference to the facts of the particular case." (internal quotation marks and citations omitted)).

12. *See, e.g.*, Thomas v. Dering, I Keen, 729, 747–48 (English Chancery Ct. 1837) (refusing to enforce a contract conveying a life estate out of concern for the interests of non-parties in the land, observing that "upon the general principle that the Court will not execute a contract, the performance of which is unreasonable, or would be prejudicial to persons interested in the property, but not parties to the contract, the Court, before directing the partial execution of the contract by ordering the limited interest of the vendor to be conveyed, ought to consider how that proceeding may affect the interests of those who are entitled to the estate, subject to the limited interest of the vendor"); Curran v. The Holyoke Water Power Company, 1874 WL 13593 (Mass. 1874) (denying specific performance in a boundary dispute, citing in part the interests of subsequent land purchasers who had relied upon the disputed boundary; observing that ("[i]f the plaintiff can have full and complete indemnity upon his contract otherwise, equity does not require that he should have specific performance by which he will inflict great and unnecessary injury upon other persons who are in no way responsible for the position in which he is placed"); Edmund Snell, *The Principles of Equity* 654–55 (8th ed. 1887) ("Courts of equity will not, however, at the suit of a purchaser, compel

universally accepted during that period.[13] By the 20th century, most treatises listed the interests of non-parties as relevant to balancing the equities. The 1905 edition of Pomeroy's *Equity Jurisprudence* states that specific performance will be refused when it would "work injury to third persons[.]"[14] Subsequent editions include similar language,[15] as do an abundance of early 20th century authorities.[16] Current articulations of black letter law acknowledge that a court may consider the interests of non-parties to a contract when resolving a request for specific performance.[17]

In sum, the traditional approach is averse to the remedy of specific performance. It treats specific performance as an extraordinary remedy to which contracting parties are not entitled. It requires a party seeking specific performance to prove, under a heightened evidentiary standard, the lack of an adequate remedy at law and irreparable harm. And it invites the court to consider the interests of non-parties to the contract when balancing the equities.

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a partial performance of a contract which is unreasonable or prejudicial to third parties interested in the property[.]" (citing *Curran*, 1874 WL 13593).

13. *See, e.g.*, George Tucker Bispham, The Principles of Equity, 491–92 (5th ed. 1893) (identifying an expansive list of circumstances in which specific performance should be refused but making no mention of unfairness or hardship to third parties).

14. John Pomeroy, Equity Jurisprudence § 1405, p. 2770 (3d ed. 1905) (citing *Curran*, 1874 WL 13593).

15. John Pomeroy Jr., Equity Jurisprudence Students' Edition § 1405, p. 893–94 n.5 (1907); John Pomeroy, Equity Jurisprudence § 1405, p. 3332–33 n.5 (4th ed. 1919); Spencer Symons, Pomeroy's Equity Jurisprudence § 1405a, p. 1044 (5th ed. 1941)

16. *See, e.g.*, George Clark, Equity: An Analysis and Discussion of Modern Equity Problems § 169, p. 217–18 (1924) ("In some cases the fact that the giving of specific performance against the defendant would work a hardship on persons other than the defendant has been an element in refusing specific performance."); Charles Barney, Equity and Its Remedies, p. 116 (1915) ("The right to specific performance of an agreement is not absolute but rests in the discretion of the court, to be exercised upon equitable considerations and in view of all the circumstances of the case . . . rights of third person are an equitable consideration" (footnote omitted) (citing *Curran*, 1874 WL 13593).

17. *See, e.g.*, Restatement (Second) of Contracts § 364 (1981) ("Specific performance or an injunction will be refused if such relief would be unfair because" among, other reasons, "the relief would cause unreasonable hardship or loss to the party in breach or to third persons."); Williston on Contracts § 67:15 (4th ed.) ("Specific performance may be and generally is denied if the hardship to the defendant or to a third person will be out of all proportion to the value of the performance to the plaintiff.").

In our research, we attempted to find the source of the common law's aversion to specific performance. We were largely unsuccessful—there were many theories but no definitive one. Of particular interest, one scholar traced our law's aversion to specific performance to historical developments within the British courts of equity in the nineteenth century. In a 1985 article, Professor Berryman commented that during that period, the chancery in Britain was "totally inadequate to handle what could be termed a litigation explosion. The dilatory nature with which chancellors discharged their business had been the subject of comment since Lord Bacon's occupancy."[18] He went on: "In a period when chancery was called to account for its jurisdiction, there was little choice but to relinquish jurisdiction and acknowledge the supremacy of the common law."[19] The professor described this as a "self-imposed" restriction.[20] To put a fine point on the Professor's theory, he believes that the damages rule arose in part from the fact that the English Court of Chancery was too overburdened and hence too slow for specific performance to be viable. This made us laugh, of course, because the Delaware Court of Chancery does not face that criticism.[21]

II.
The Delaware Approach

Having dug into the traditional approach, we turn now to Delaware courts' treatment of specific performance in the M&A context, beginning with *IBP*.

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18. Jeff Berryman, *The Specific Performance Damages Continuum: An Historical Perspective*, 17 Ottawa L. Rev. 295, 305 (1985).

19. *Id.*

20. *Id.*

21. *See, e.g.*, Jeff Montgomery, *Chancery Issues Lightspeed Injunction As Case Tempo Rises*, Law360 (Mar. 12, 2019) (describing the Delaware Court of Chancery as "known for prompt action"); *see also* League of Women Voters of Del., Inc. v. Dep't of Elections, 250 A.3d 922 (Del. Ch. 2020) (submitted October 6, decided October 9); Vintage Rodeo Parent, LLC v. Rent-a-Center, Inc., 2019 WL 1223026 (Del. Ch. Mar. 14, 2019) (submitted March 11, decided March 14); Akorn, Inc. v. Fresenius Kabi AG, 2018 WL 4719347 (Del. Ch. Oct. 1, 2018) (submitted September 25, decided October 1).

A. *In re IBP, Inc. Stockholder Litigation*

In 2000, IBP, a major meat products firm,[22] started shopping itself to potential acquirers.[23] Around the same time, it began to uncover evidence that a company it had recently acquired, DFG, had fudged some of its accounting.[24] IBP's outreach generated a lot of interest.[25] The auction ultimately came down to two of the big players in the meat industry: Smithfield and Tyson.[26] Tyson knew about IBP's accounting problems, and by the end of the auction process it had lost confidence in IBP's management,[27] but it raised its bid twice.[28]

Between signing and closing, IBP experienced a business downturn and was forced to restate its financials due to the DFG fraud. This prompted Tyson to slow-walk the deal, attempt to renegotiate its terms, and, ultimately, terminate the agreement.[29] Tyson terminated on the grounds that IBP had purportedly breached representations about its financials and that IBP's poor performance constituted a materially adverse effect.[30] IBP filed suit in the Court of Chancery to compel Tyson to close, and the case was assigned to then-Vice Chancellor Strine.

When the lawsuit was filed, specific performance clauses had not achieved the ubiquitous status in M&A agreements that they now enjoy, and no court had meaningfully grappled with such a contractual provision in the M&A context. At least, there was not a sufficient body of learning on this issue. Perhaps for these reasons, there was uncertainty in the market as to whether Strine would level the "judicial shotgun" at the contracting parties. But he did. Applying New York law, as called for by the merger agreement, Strine held that IBP had not breached its warranties under the merger agreement nor suffered a MAE.[31] He also determined that specific performance was the appropriate remedy and required Tyson to close the deal.[32]

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22. *In re IBP*, 789 A.2d at 24.
23. *Id.* at 25–28.
24. *Id.*
25. *Id.* at 27–29.
26. *Id.* at 27–29.
27. *Id.* at 38–39.
28. *Id.*
29. *Id.* at 47–50.
30. *Id.* at 51–52.
31. *In re IBP,* 789 A.2d at 55–72.
32. *Id.* at 82–84.

Of the elements of a claim for specific performance, two were undisputed. The contract was valid, and IBP was ready to perform. The court was therefore left to address whether IBP had an adequate remedy at law and to balance the equities.

In analyzing these elements, Strine identified four justifications for specific performance—the first two spoke to the lack of an adequate remedy at law and the second two spoke to the equities.

First, Strine held that acquiring IBP was "a unique opportunity that cannot be adequately monetized[.]"[33] Uniqueness is a common and somewhat obvious justification for a buyer in a strategic transactions. And Strine was quick to note that, as a basis for specific performance, the uniqueness argument is more naturally wielded by an acquirer arguing that "the target company is unique and will yield value of an unquantifiable nature, once combined with the acquiring company."[34] But it would be an unusual case where the acquirer was seeking specific performance, because the target usually wants to capture the premium that the deal provides, and the "fiduciary out" in a merger agreement permits a target board to terminate in favor of a better offer. An acquirer will only need to seek specific performance if the target simply rethinks its standalone prospects and refuses to close, which will be rare. For this reason, the strongest form of "uniqueness" argument does not typically come into play in broken deal litigation. In *IBP*, however, the *seller* was able to make a similar argument, because the stockholders had the right to elect to take stock as merger consideration. The potential for stockholders to receive stock in the deal gave rise to the "chance to share in the upside of what was touted by Tyson as a unique, synergistic combination,"[35] which was a unique opportunity.

Second, Strine observed that a combination was practicable. Forcing the companies to merge seemed dicey given that they had been embroiled in heated litigation and attendant mudslinging. But the court took solace in the fact that "Tyson itself admit[ed] that the combination still [made] strategic sense" during trial testimony.[36] Also, whether the management teams would be able to work together was somewhat beside the

33. *Id.* at 82.
34. *Id.* at 83.
35. *Id.*
36. *In re IBP*, 789 A.2d at 83.

point—once the company was acquired, Tyson could decide who would run it.

Third, the Vice Chancellor cited difficulties with calculating damages as a basis for specific performance, observing that "the determination of a cash damages award will be very difficult in this case."[37] He stated that "[a] damages award can, of course, be shaped; it simply will lack any pretense to precision" and "[a]n award of specific performance will entirely eliminate the need for a speculative determination of damages."[38] In a variant of this justification, the court noted that a damages award "could be staggeringly large."[39]

Some have commented that the point of the "staggeringly large" statement was to signal the judge's reticence to enter a large damages award. But reading his statement in context, two alternative interpretations seem more likely. For one, it seems possible that this language was in support of Strine's conclusion that the *acquirer* would have preferred specific performance to a staggeringly large damages award. Another alternative is that the "staggeringly large" message was intended to dissuade other acquirers from backing out of deals or, at least, to inform the risk calculus for future acquirers and promote deal certainty.[40]

Fourth, Strine considered the "impact on other constituencies,"[41] including both companies' stockholders and employees. For the stockholders, he observed that a synergistic transaction would be value-enhancing for both sides and seemed preferable to a large damages award against Tyson.[42] For the employees, Strine was more hesitant, stating that "[t]he impact of a forced merger on constituencies beyond the stockholders and top managers of IBP and Tyson weighs heavily on my mind."[43] After all, synergies generated by mergers often come from personnel cuts.

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37. *Id.*
38. *Id.*
39. *Id.*
40. *Cf.* Ryan D. Thomas & Russell E. Stair, *Revisiting Consolidate Edison—A Second Look at the Case That Has Many Questioning Traditional Assumptions Regarding the Availably of Shareholder Damages in Public Company Mergers*, 64 BUS. LAW. 239 (Feb. 2009) (interpreting the "staggeringly large" statement in *IBP* to mean that Strine "contemplated an expectancy-based award of damages that would have compensated IBP's shareholders for their damages").
41. *Id.* at 84.
42. *Id.*
43. *Id.* at 82.

Some of the themes of the *IBP* specific-performance analysis seem to apply across all M&A deals. Although *IBP* applied New York law, that did not seem to be a driving factor given the similarity in black-letter law. Given the difficulty in calculating damages in most M&A deals, even all-cash ones, specific performance may be a more precise way to honor the intent of the parties.

But many of the aspects of the analysis seemed unique to the facts of the case. The major issue was that one of the bases for granting specific performance—namely, the uniqueness argument—appeared peculiar to the part-stock nature of the transaction. The uniqueness argument does not work as well for sellers seeking to enforce all-cash deals. Other bases for granting specific performance—the acquirer's seeming concession that it was more desirable an outcome than a large damages award, as well as the continued practicability of the merger—also seemed unique to the facts of the case. In some ways, the *IBP* analysis left open as many questions as it resolved as to the availability of specific performance in future M&A litigation. Consequently, the course of specific performance in Delaware M&A litigation post-*IBP* was arguably unclear.

B. *The Rise in Specific-Performance Provisions*

But deal practitioners did not focus on the nuances. *IBP* came to stand for the broad proposition that specific performance is the presumptive remedy in Delaware M&A cases. Practitioners viewed *IBP* as a sign that "Delaware is different" and that "the Delaware judiciary [takes] a more expansive perspective on the specific performance remedy," at least in M&A cases.[44] It is perhaps unsurprising that, in the decades following *IBP*, specific performance clauses in M&A transactions became relatively commonplace. That period witnessed a similar increase in Delaware choice of law provisions and Delaware forum selection clauses.[45]

Post-*IBP*, jurists could have emphasized aspects of *IBP* that were unique to that case to restrict the availability of specific performance in the M&A context. But that is not what happened. Rather, parallel to the increase in specific-performance

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44. Arnold et al. at 381.

45. Matthew D. Cain and Steven Davidoff Solomon, *Delaware's Competitive Reach*, 9 J. Empirical Legal Stud. 92, 125–26 (2012).

provisions, Delaware decisions trended increasingly contractarian.[46]

Gildor v. Optical Solutions, Inc. is emblematic of this trend. There, the Court of Chancery was asked to enforce a specific performance clause found in a stockholders' agreement when a preferred stockholder of Optical Solutions sought specific performance of his preemptive rights to buy new preferred shares.[47] This case too was assigned to Strine. After finding that the plaintiff's rights were in fact triggered, Strine did not hesitate to enforce the parties' contractual stipulation to specific performance. To be sure, Strine began his analysis of the plaintiff's requests for specific performance by noting that specific performance "is a form of relief available at the discretion of the court."[48] Thereafter, however, his discussion deviated from the traditional analysis and focused on the parties' contractual scheme. He wrote:

> If the Stockholder Agreement was silent as to the availability of specific performance, [the plaintiff] would bear the burden of showing that a legal remedy would be inadequate. The central question in that situation would be whether a monetary award would be sufficient to remedy [the plaintiff's] inability to purchase additional [company stock]. Contracts providing preemptive rights to purchase non-listed securities have given rise to specific performance orders and there is a colorable argument for that remedy here. *But given Delaware's public policy of favoring freedom of contract, there is no need to make that inquiry.* Section 16(f) specifically states that the parties can enforce their contractual rights by seeking specific performance. . . . *Although this court has not had the prior opportunity to determine*

46. *See, e.g.*, Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc., 794 A.2d 1191 (Del. Ch. 2001) (giving weight to contractual provision stipulating that the parties will suffer irreparable harm in the event of breach); Potter v. Community Commc'ns Corp., 2004 WL 550757 (Del. Ch. Mar. 11, 2004) (giving weigh to contractual provision acknowledging that the rights subject to the agreement were unique assets); Abry Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1031 (Del. Ch. 2006) (applying contractually specified choice of law to tort claims seeking to rescind the contract); Gildor v. Optical Solutions, Inc., 2006 WL 4782348 (Del. Ch. June 5, 2006) (enforcing a specific performance provision).

47. *See Gildor*, 2006 WL 4782348.

48. *Id.* at *11.

> *whether a contractual provision granting an aggrieved party a contractual right of specific performance is enforceable, Delaware courts do not lightly trump the freedom of contract and, in the absence of some countervailing public policy interest, courts should respect the parties' bargain.*[49]

The above passage is notable for several reasons. First, it expressly based his order of specific performance on the parties' contractual scheme. Second, although the decision interpreted a stockholders' agreement, the reasoning was not limited to this contractual context. Third, although the analysis expressly deferred to the parties' contractual scheme, it left open the possibility that in some circumstances a countervailing interest, such as a public policy interest, might warrant an outcome contrary to the parties' contractual agreement.

To be clear, we do not suggest that *Gildor* played any meaningful role in the M&A cases that followed—it was neither prominently cited nor discussed by Delaware jurists resolving M&A cases. We point to it because it is one of the earliest indicators of a broader change in judicial mindset that foreshadowed how Delaware courts would react to the proliferation of specific-performance provisions that followed.

C. *Subsequent M&A Decisions*

Between *IBP* and early 2023, Delaware courts resolved fewer than ten busted deal cases. A review of those decisions reveals that deference to contractual remedies clauses predominated over specific performance analysis, though to varying degrees.[50]

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49. *Id.* at *11 (emphasis added).

50. United Rentals, Inc. v. RAM Holdings, Inc., 937 A.2d 810 (Del. Ch. 2007) (Chandler, C.) (denying specific performance where the plaintiff failed to show that the common understanding of the parties was that the merger agreement allowed for specific performance*);* Hexion Specialty Chemicals, Inc. v. Huntsman Corp., 965 A.2d 715 (Del. Ch. 2008) (Lamb, V.C.) (ordering specific enforcement of the obligation to use reasonable best efforts but declining to order specific performance to close based on an interpretation of the merger agreement the foreclosed the option); Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd., 2013 WL 5787958 (Del. Ch. Oct. 25, 2013); Cooper Tire & Rubber Co. v. Apollo (Mauritius) Hldgs.Pvt. Ltd., 2013 WL 5977140, at *1–2 (Del. Ch. Nov. 9, 2013); Cooper Tire & Rubber Co. v. Apollo (Mauritius) Hldgs. Pvt. Ltd., 2014 WL 5654305 (Del. Ch. Oct. 31, 2014) (Glasscock, V.C.) (ordering specific performance of obligation to use reasonable efforts to engage in labor negotiations but declining to specifically enforce obligation to close given other indicia of party's intent); Williams

Four themes emerge from these decisions. First, some denied specific performance because the claimant failed to prevail on its claim for breach of contract.[51] Second, there are cases that granted specific performance of a provision requiring an acquirer to use reasonable best efforts to obtain financing but did not order the acquirer to close.[52] These cases evidence a contractarian approach, but they are uninformative as to how that approach translates to claims to specifically enforce the transaction as a whole, because they did not reach that issue.[53] So, we set those cases aside.

Third, there are decisions that reflect a more extreme reaction to the phenomenon of specific-performance provisions. Recall that, in *Gildor*, Strine suggested that a contractual provision could serve as a burden-shifting device obviating the need for clear and convincing evidence.[54] A year later, in *United Rentals*, Chancellor Chandler took this presumption a

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Cos., Inc. v. Energy Transfer Equity, L.P., 2016 WL 3576682 (Del. Ch. June 24, 2016) (Glasscock, V.C.) (declining to specifically enforce merger agreement where acquirer proved that a condition to enforcement had not been met), *aff'd*, 159 A.3d 264 (Del. 2017); *Akorn*, 2018 WL 4719347(declining to specifically enforce merger agreement where acquirer proved the existence of a material adverse effect), *aff'd*, 198 A.3d 724 (Del. 2018); Channel Medsystems, Inc. v. Boston Sci. Corp., 2019 WL 6896462 (Del. Ch. Dec. 18, 2019), *judgment entered*, (Del. Ch. 2019) (Bouchard, C.) (ordering specific performance, relying heavily on a specific performance clause when balancing the equities); Snow Phipps Grp., LLC v. KCAKE Acquisition, Inc., 2021 WL 1714202 (Del. Ch. Apr. 30, 2021) (McCormick, V.C.) (ordering specific performance based largely on a specific performance clause); Bardy Diagnostics, Inc. v. Hill-Rom, Inc., 2021 WL 2886188 (Del. Ch. July 9, 2021), judgment entered, (Del. Ch. 2021) (Slights, V.C.) (ordering specific performance where the acquirer did not dispute that specific performance was the appropriate remedy upon a finding of breach); Level 4 Yoga, LLC v. CorePower Yoga, LLC, 2022 WL 601862 (Del. Ch. Mar. 1, 2022), judgment entered, (Del. Ch. 2022) (ordering specific performance, relying heavily on a specific performance clause, and rejecting the acquirer's objection that such a remedy would be impracticable) (Slights, V.C.), *aff'd*, 2022 WL 16579468 (Del. Nov. 2, 2022).

51. Williams Cos.,2016 WL 3576682, at *21 (Del. Ch. June 24, 2016) (Glasscock, V.C.), *aff'd*, 159 A.3d 264 (Del. 2017); Akorn, 2018 WL 4719347, at *101, *aff'd*, 198 A.3d 724 (Del. 2018). *Bardy* can also be placed in this category, because there the acquirer seemed to concede that specific performance was the preferred remedy in the event the court found it in breach—it reflects the parties' expectations but does not directly inform the evolution of Delaware court's treatment of specific-performance provisions.

52. Hexion, 965 A.2d at 762–63; *see also* Cooper Tire, 2014 WL 5654305, at *19 (Del. Ch. Oct. 31, 2014) (Glasscock, V.C.).

53. *See* Bardy, 2021 WL 2886188, at *40.

54. *See* Gildor, 2006 WL 4782348, at *11.

step further, bypassing the traditional equitable analysis and refusing to grant specific performance due to the lack of clear contractual language expressing a desire for specific performance. That was, in some ways, an extreme departure from the traditional analyses featured in *IBP*. This may also have been a strange way in which the parties packaged the issue for the Chancellor in order to get an expedient resolution. In any event, neither the approach of *Gildor* nor *United Rentals* became Delaware law, at least not explicitly.

Fourth, there are cases that ordered specific enforcement of the transaction based largely on a specific-performance provision—*Snow Phipps, Channel Medsystems*, and *Level 4 Yoga*. For purposes of this essay, we zoom in on this last category of cases enforcing specific-performance provisions, discussing *Snow Phipps* as illustrative.

In *Snow Phipps*, private equity firm Kohlberg & Company agreed to acquire DecoPac, a supplier of cake decorating supplies.[55] The parties signed the agreement on March 6, 2020, right as the COVID-19 pandemic took hold and the demand for decorated cakes declined precipitously. Shortly after signing, Kohlberg developed buyer's remorse and tried to extricate itself from the deal.[56] Toward that end, Kohlberg prepared unreasonably pessimistic forecasts and shared them with lenders in an attempt to scuttle financing.[57] Kohlberg claimed that financing had collapsed by early April and refused to close the deal.[58] *Snow Phipps* held that DecoPac had not breached its obligations under the merger agreement.[59] The decision also found that Kohlberg had failed to use reasonable best efforts to obtain debt financing, thereby breaching its obligations under the merger agreement.[60]

The court began its analysis of DecoPac's claim for specific performance by citing to the common law elements of the claim, but that was the extent of any reference to the traditional approach. After citing the common law elements, the court's opinion landed on a new analytical starting point, observing that "[t]his court does not hesitate to order specific performance

55. *Id.* at *4–5.
56. *Id.* at *12–14.
57. *Id. at* *18–19.
58. *Id.* at *21–22.
59. *Id.* at *28–40.
60. *Id.* at *50.

in cases of this nature, particularly where sophisticated parties represented by sophisticated counsel stipulate that specific performance would be an appropriate remedy in the event of breach."[61] From there, the court conducted a contractual analysis, noting that the parties had stipulated to that remedy as long as debt funding for the deal was available.[62] Although that funding was not available, the court ordered specific performance based on the prevention doctrine,[63] which establishes that when a party's contractual breach by "nonperformance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused."[64] The court ultimately found that Kohlberg's dubious projections and lackadaisical efforts to secure financing contributed to its absence at the time of closing, and ordered the acquisition to close.[65]

Some have criticized *Snow Phipps* for giving the traditional analysis of specific performance short shrift and jumping right to a contractual analysis.[66] Fair enough. Constructive criticism is welcome. But the fact that the court did not discuss the traditional approach at length does not mean that the court did not consider it, nor that it is forever torn from the pages of Court of Chancery case law. Judges seeking to resolve expedited disputes like *Snow Phipps* must choose where to focus their analysis. One-hundred-and-twenty-pages into the decision, they might choose to not dilate on all reasons why the selected remedy is appropriate. And that is ok. Even lions of the equitable tradition have been known to de-emphasize the discretionary elements of the specific performance analysis. As Pomeroy writes, when the essential elements for the granting of specific performance are present, "it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach. . . . The term 'discretionary' as thus used is, in my opinion, misleading and inaccurate."[67]

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61. *Id.* at *51.
62. *Id.*
63. *Id.* at *56.
64. *Id.* at *53 (quoting Restatement).
65. *Id.* at *54–55.
66. Robert Anderson, *Limited Specific Performance in the Musk-Twitter Case and Beyond*, 4–5 (Sept. 19, 2022), https://ssrn.com/abstract=4222557.
67. Pomeroy, *Equity Jurisprudence* § 1405, p. 3329–30 (4th ed. 1919).

D. *Embracing the Contractarian Approach*

But we now take the criticism head-on and defend a regime in which the court prioritizes the parties' contractual scheme when awarding specific performance in the M&A context, as the court did in *Snow Phipps*, *Channel Medsystems,* and *Level 4 Yoga*.

When analyzing requests for specific performance in busted deal litigation, acknowledging that Delaware law is focused foremost on the parties' contractual scheme and only secondarily on the equities is intellectually honest. Put simply, Delaware favors the certainty promoted by enforcement of specific-performance provisions.

Busted deals cases come to the Court of Chancery as contract disputes. In that context, the court's prevailing consideration is effectuating the parties' intent.[68] In the M&A space, parties want specific performance—as we discussed earlier, almost all public and private merger agreements include specific performance clauses.[69] Moreover, most specific performance clauses are bespoke and not boilerplate, suggesting that parties invest negotiating time and capital on these clauses.[70] Parties negotiate over specific performance clauses even when time pressure leads them to fall back on boilerplate terms in other areas of the agreement.[71]

There are many reasons why parties to M&A agreement prefer specific performance. For buyers, specific performance allows them to avoid a potentially "staggeringly large" damages awards in the event of breach.[72] For sellers, specific performance promotes deal certainty, which minimizes the operational disruptions, as well as the reputational and economic harm of a busted deal.[73] By minimizing these risks, deal certainty

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68. Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 739 (Del. 2006) ("When interpreting a contract, the role of a court is to effectuate the parties' intent."); GRT, Inc. v. Marathon GTF Tech., Ltd., 2011 WL 2682898, at *12 (Del. Ch. July 11, 2011) ("Under Delaware law, which is more contractarian than that of many other states, parties' contractual choices are respected[.]" (footnote omitted)).

69. Arnold et al. at 367.

70. *Id.* at 375; *see also* Kling & Nugent.

71. Adam B. Badawi et al., *The Value of M&A Drafting*, 26–27 (Jan. 25, 2023), https://ssrn.com/abstract=4337075.

72. *In re* IBP, 789 A.2d 14, 83 (Del. Ch. 2001).

73. Arnold et al. at 380.

facilitates corporate planning, among other things. For these reasons, Delaware courts have recognized that fiduciaries for target companies can appropriately place deal certainty over the economics of the deal in certain circumstances.[74]

By enforcing specific performance provisions, Delaware courts help foster deal certainty and a contracting culture in which parties are encouraged to invest time in the sale process. This, in turn, creates space for fiduciaries to pursue transactions that are in the best interest of their stockholders. These are all salutary goals from a Delaware law perspective. It is therefore good policy to look first to the parties' contractual scheme when addressing specific performance in the busted deal context.

III.
The Role of Equity

The question remains: Is there a continued role for equity in the analysis of specific performance in M&A litigation? As discussed earlier, historically, when balancing the equities, courts of equity have considered the effect of an equitable remedy beyond the parties to the contract, including on stakeholders and societal interests.[75] Recall Chancellor Allen's extreme articulation of this analysis—his call to account for human suffering.[76]

A robust balancing approach that factors in issues like human suffering would raise a host of definitional and practical concerns in the adversarial process. What constitutes human suffering and how should it be measured? Who will present the case for the "others?" How do we build a record on this point, and do so at the pace of business to honor the parties' intent and avoid harm to the target? Increased scope would render

74. *See, e.g.*, *In re* Fam. Dollar Stores, Inc. S'holder Litig., 2014 WL 7246436, *23 (Del. Ch. Dec. 19, 2014) (positively describing Board's decision "to maximize stockholder value by focusing on the financial terms and deal certainty, not the financial terms in isolation."); Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 66–67 (Del. 1989) (describing deal certainty as one of the "classic factors upon which a board may base a proper business decision to accept or reject a proposal."); *In re* RJR Nabisco, Inc. S'holders Litig., 1989 WL 7036, at *17–18 (Del. Ch. Jan. 31, 1989) (declining to enjoin a decision to accept an arguably lower exploding bid out of a concern for deal certainty).

75. *See* Wolfe & Pittenger § 16.01 (collecting cases).

76. *Mazarella*, 1990 WL 124969, at *3.

prompt resolution difficult, to say the least. Moreover, if the difficulty in valuing contractual damages renders specific performance a more precise alternative, imagine the imprecision that valuing the benefit of a corporation to society, and the potential harm of the transaction to societal interests, would raise.

Beyond the practical problems posed by a strong equitable analysis, there are obvious tensions between the traditional approach and a predominantly contractarian one. A robust judicial override would risk ignoring specific performance provisions and thus threatening the benefits created by enforcing those provisions. As tempting as it is to follow the clear guidance of the contractual language, however, Delaware's court of equity should not come completely unmoored from equitable principles. In our opinion, equity does and should continue to play a role in resolving requests for specific performance of M&A agreements, albeit a limited one.

In our view, the solution is to call out in doctrine what is currently happening in practice. Where the parties have stipulated to specific performance as the preferred remedy in an M&A agreement, Delaware courts currently treat it as the presumptive remedy. That truth can be spoken: Contractual stipulations to specific performance in M&A agreements can and should give rise to a legal presumption in favor of specific performance.

Like all true presumptions, it is rebuttable. It is in this context that the traditional approach continues to play a role. A court can and should continue to consider equitable factors when determining whether to follow the parties' intent, but a judicial override must be used sparingly. At this point in the essay, an academic might list the hypothetical scenarios in which that override might come into play, but we decline to provide that advisory opinion here. It is enough to say that, for the equitable analysis to counsel against the parties' contractual scheme, the factors weighing against specific performance would have to be extreme.[77]

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77. A recent decision by Vice Chancellor Laster, *26 Capital Acquisition Corp. v. Tiger Resort Asia Ltd.*, 2023 WL 5808203 (Del. Ch. Sept. 7, 2023), illustrates one set of extreme circumstances. There, the court issued a post-trial decision resolving a SPAC's claim for specific performance of a transaction agreement that called for specific performance in the event of breach. The court found that the remedy of specific performance was unavailable due to a variety of

In the end, equitable principles will continue to provide the backdrop for claims for specific performance, even in the M&A context. They will continue to serve as a (rarely deployed and truly extraordinary) safety valve to ensure that our corporate law regime continues to serve human interests. In M&A suits brought in the Delaware Court of Chancery, a contractual stipulation for specific performance serves as a presumption that the court will order specific performance in the event of breach. But against the backdrop of common law and equitable principles, it serves as a rebuttable presumption; there may still be instances in which a reticent buyer could prove that equitable concerns override a clear indication of the parties' desire for specific performance. We surmise that those instances will be quite limited, but time will tell.

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unusual factors, including that the events necessary to close would have to occur in the Philippines where the Delaware Court of Chancery's coercive sanctions could not be deployed effectively.