COVID-19: Impact on M&A Litigation

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M&A Litigation Landscape

- **Since the onset of the COVID-19 crisis, there has been a wave of lawsuits relating to attempts by buyers to delay or terminate pending M&A transactions on grounds related to the coronavirus**
- **The most commonly cited grounds for refusing to close have been breaches of interim operating covenants in transaction agreements**
  - Buyers have claimed both breaches of the affirmative covenant to operate in the ordinary course / consistent with past practice, as well as the negative covenants not to take specified actions without the buyer's consent
  - Some buyers have asserted that various cost-cutting measures implemented by the sellers (e.g., furloughing employees, reducing compensation or capital expenditures) violated the ordinary course covenant, while others have argued the opposite – that the failure to take such measures was not consistent with acting in the ordinary course when faced with a crisis
- **Buyers have also challenged deals due to alleged breaches of access provisions, both as they relate to access to information and physical access to properties and employees**
- **Pure business "Material Adverse Effect" ("MAE") claims have been rare**
  - This is due to (i) the fact that most standard MAE definitions contain broad carve-outs for general economic, market or industry conditions (and some have express carve-outs for pandemics, force majeure events or acts of God), and (ii) the difficulty of establishing disproportionate adverse impact on the relevant target business given the sweeping effects of COVID-19 on entire industries
- **Buyers have brought MAE claims asserting inability of the seller to perform its obligations under the transaction agreement (in transactions where the MAE definition contains such a prong)**
  - This prong of the definition of "Material Adverse Effect", which is not included in all transactions, is usually not subject to the above-referenced carve-outs which render a traditional business MAE case difficult to make in the current environment
  - Failure to perform obligations under the interim operating covenant and even certain post-closing obligations has been at the heart of cases challenging pending deals on these grounds
- **Some buyers have also attempted to assert common law contract defenses (like impossibility, impracticability or frustration of purpose)**
  - Arguments of such nature are unlikely, though, to gather traction with a court, where sophisticated contracting parties affirmatively allocated risk through negotiated provisions relating to closing conditions and termination rights

Key Considerations

- **As illustrated by the case studies summarized on the following slides, buyers seeking to renegotiate or terminate pending transactions typically alleged multiple breaches, often coupled with MAE claims, to justify their position that they are not required to consummate a transaction**
  - Going forward, contracting parties (both on the buy-side and on the sell-side) should be mindful, when drafting and negotiating transaction agreements, of the following considerations, which have come into the spotlight in the current COVID-19-driven M&A litigation environment

- **Interim operating covenant ("IOC")**
  - Does the covenant contain a flat obligation to operate in the ordinary course of business or is the covenant qualified by an efforts standard (e.g., commercially reasonable efforts)?
  - Does the covenant impose an additional requirement that the business be conducted consistent with past practice?
  - Does the covenant impose additional affirmative obligations (e.g., to maintain the existing business organization, keep services of employees, preserve relationships with key suppliers, customers and other business partners, etc.)?
  - Does the covenant contain exceptions for actions required by applicable law / governmental authority?
  - Does the covenant contain exceptions for actions related to COVID-19 (e.g., actions required to comply with or in response to COVID-19 measures)?
  - What is the standard for buyer consent – sole discretion or consent not to be unreasonably withheld, conditioned or delayed?
  - How must buyer consent be given (e.g., in writing in accordance with the notices provision)? Does the agreement allow for implied consent?

Delaware Vice Chancellor J. Travis Laster noted during a hearing held on May 8, 2020:

"The real question is whether an ordinary course covenant means 'ordinary course' on a clear day or 'ordinary course' based on the hand you're dealt [...] If you have flooding, is it the 'ordinary course' of what you do consistent with past practice when you are in a flood, or is it 'ordinary course' on a clear day when there hasn't been any rain? [...] Are people doing things that are 'ordinary course' when one is in a pandemic, and is that what the contract contemplates? Or, as the defendant casts it, is this really a clear-day type provision where you have to deliver in the condition that they were when you signed?"

Key Considerations

- **Representation relating to conduct of the business in the ordinary course**
  - Is the representation date limited to the date of signing, i.e., does it cover only the period between a specified date in the past (usually the date of the most recent financial statements provided to the buyer) and the date of signing, when the interim operating covenant kicks in?
  - If the representation is not limited to the signing date, this creates the danger of overlap (and inconsistency) with the interim operating covenant and its exceptions
    - IOC would ordinarily contain several exceptions (e.g., for actions required by applicable law / governmental authority) that are not normally included in the representation
    - IOC often contains the requirement that buyer's consent to departures from the interim operating restrictions may not be unreasonably withheld, conditioned or delayed, a standard which is not usually applied to excusing representation breaches

- **Access covenants**
  - Does the covenant provide for an unqualified right to access or only reasonable access?
  - Does the covenant contain specific limitations on access / materials that are not required to be provided?
  - Does the covenant indicate that physical access must be provided?
  - What is the purpose for which materials may be accessed?
    - Is access provided solely to facilitate the closing and transition? Or can the access covenant be utilized for any purpose (e.g., to confirm the satisfaction of the closing conditions)?
    - Even if the access covenant is silent with respect to purpose, does it incorporate by reference the parties' confidentiality agreement (e.g., by providing that any information obtained pursuant to the access covenant is subject to the terms of the existing NDA between the parties)? If so, what are the use restrictions under the NDA?
  - Is the seller required to produce new financial information / prepare projections if requested by the buyer? Alternatively, does the agreement specifically provide that the seller is not required to do so?
    - Even if the access provision is silent on this topic, do any of the financing assistance / cooperation provisions require the seller to (or alternatively excuse the seller from having to) prepare and produce such information?

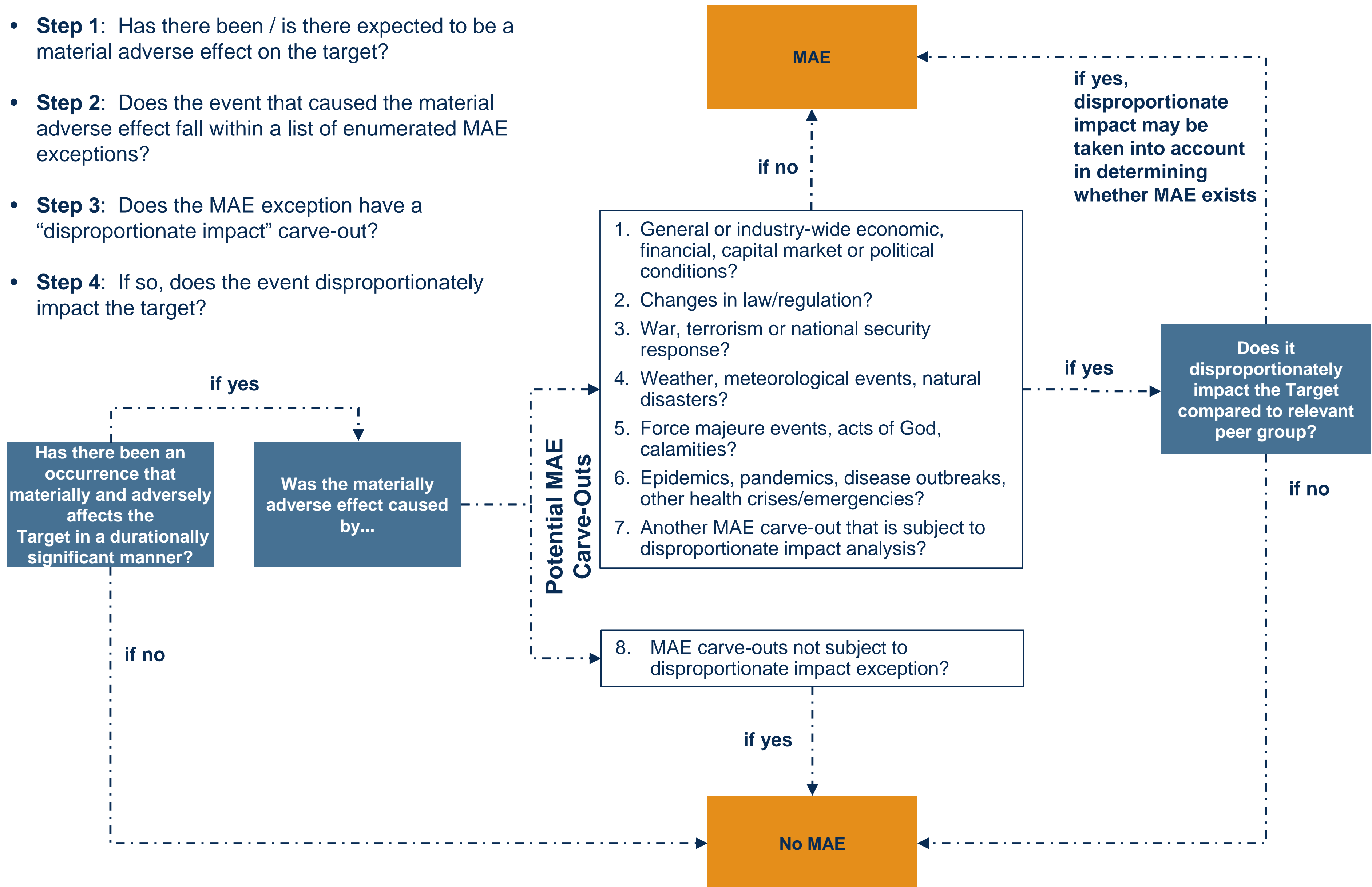
Key Considerations

- **Material Adverse Effect**
  - Does the MAE definition contain a two-prong structure?
    - Prong one: any state of facts, circumstance, condition, event, change, development, occurrence, result or effect that has had, or would reasonably be expected to have, **a material adverse effect on the financial condition, business, assets or results of operations of the target company / acquired business**
      - This prong is usually subject to a number of carve-outs, some of which require a showing that the target company has been disproportionately affected relative to its relevant industry peers in order to make an MAE case
    - Prong two: any state of facts, circumstance, condition, event, change, development, occurrence, result or effect that would **prevent, materially delay or materially impede the performance by seller / target of its obligations under the agreement or seller's / target's consummation of the transactions**
      - This prong historically has not been subject to carve-outs
  - Is the absence of MAE a stand-alone closing condition? Or is it tested through bring-down of the representation that no MAE has occurred / is continuing?
    - Consider implications with respect to the buyer's right to terminate the transaction agreement
      - If the buyer is relying on a stand-alone closing condition only, must the buyer wait to terminate until the outside date?
      - If the buyer is asserting the failure to bring down the "no MAE" representation, what is the cure period, if any, applicable to the rep? Is a cure right even applicable in the context of an MAE (which by definition must be durationally significant)?

MAE Roadmap

Note: Determination of events qualifying for consideration as MAE, carve-outs and disproportionate impact will be subject to fact-specific analysis and the actual language in the transaction agreement. Set forth below is an illustration for how to consider an MAE with carve-outs under a single-prong structure or under the relevant prong of a two-prong structure

- **Step 1**: Has there been / is there expected to be a material adverse effect on the target?
- **Step 2**: Does the event that caused the material adverse effect fall within a list of enumerated MAE exceptions?
- **Step 3**: Does the MAE exception have a "disproportionate impact" carve-out?
- **Step 4**: If so, does the event disproportionately impact the target?



Case Studies

- **The case studies that follow are organized around the main themes underlying the buyer's case for refusing to close a pending transaction**
  - As noted above, buyers routinely advanced several arguments in support of their position that they were not required to close; the case studies, therefore, are not exclusively limited to the indicated theme, and in many cases, cover more than one topic

Failure To Operate in Ordinary Course:	
L Brands / Sycamore Partners	**8**
AB Stable / Mirae	**13**
Failure To Operate in Ordinary Course and Material Adverse Effect: Simon Property / Taubman	**18**
Material Adverse Effect:	
Tiffany / LVMH	**24**
Realogy / SIRVA	**33**
Breach of Negative Interim Operating Covenant: Delphi / BorgWarner	**39**
Access to Information: Oberman / Cast & Crew	**42**
Access to Properties and Employees: Khan / Cinemex	**45**
Unavailable Debt Financing: Snow Phipps / KCAKE	**49**
Contract Repudiation: Level 4 Yoga / CorePower Yoga	**54**
Unilaterally Delaying Closing: Bed Bath & Beyond / 1-800-Flowers	**58**
Material Adverse Effect, Financing and Breaches of Other Representations / Covenants: Carlyle and GIC / Juweel	**62**

L Brands / Sycamore Partners

L Brands / Sycamore Partners

- **On February 20, 2020, L Brands, Inc. ("L Brands") and affiliates of Sycamore Partners ("Sycamore") entered into a transaction agreement, pursuant to which Sycamore agreed to acquire a 55% interest in L Brands' Victoria's Secret business**
  - Under the terms of the transaction agreement, the Victoria's Secret business would be separated from L Brands and placed into a privately held company, which would be majority owned by Sycamore, with L Brands retaining a 45% stake
- **On April 22, 2020, Sycamore terminated the transaction agreement and filed a complaint in the Delaware Court of Chancery seeking a declaratory judgment that its termination was valid**
  - Sycamore alleged that L Brands breached its obligation to operate the Victoria's Secret business in the ordinary course and, related to that, breached several of its representations and warranties and suffered a Material Adverse Effect
- **On April 23, 2020, L Brands filed a countersuit against Sycamore seeking specific performance of its obligation to close the transaction**
- **On April 24, 2020, Sycamore filed suit seeking declaratory judgment that its equity commitment letter had terminated**
  - Sycamore alleged that, in its April 23rd complaint, L Brands sought monetary damages as an alternative remedy to specific performance, which was not a permitted claim and therefore triggered termination of the Sycamore equity commitment letter
- **On May 4, 2020, Sycamore and L Brands mutually agreed to terminate the transaction agreement and settle the pending litigation**
  - Neither party paid the other a termination fee or any other consideration

Case Reference: *SP VS Buyer LP v. L Brands, Inc.*, No. 2020-0297 (Delaware Court of Chancery); *L Brands, Inc. v. SP VS Buyer L.P. et al.*, No. 2020-0304 (Delaware Court of Chancery); *Sycamore Partners III, L.P. et al. v. L Brands, Inc.*, No. 2020-0306 (Delaware Court of Chancery)

Sycamore's Basis for Termination

- **Sycamore alleged that the following actions by L Brands constituted a material and incurable breach of the covenant to operate the Victoria's Secret business in the ordinary course consistent with past practice:**
  - Furloughing most employees
  - Reducing by 20% the base compensation of all employees at the level of senior vice president and above
  - Deferring annual merit increases for 2020
  - Significantly reducing receipt of new merchandise, which, along with the failure to dispose of out-of-season merchandise, left Victoria's Secret with obsolete merchandise with diminished value
  - Failing to pay rent for April 2020 for retail stores in the U.S.
- **Covenant to operate in the ordinary course of business in the transaction agreement was not qualified by an efforts standard**
- **While the covenant contained an exception for actions "required by Applicable Law or any Governmental Authority", the foregoing actions, in Sycamore's view, were not excused by the exceptions**
- **While the covenant provided that the buyer's consent for departures from the interim operating restrictions was "not to be unreasonably withheld, conditioned or delayed", L Brands did not formally request Sycamore's consent to these actions, and Sycamore neither formally consented nor acquiesced to them**

Sycamore's Basis for Termination

- **Sycamore alleged that L Brands has suffered a Material Adverse Effect:**
  - The MAE definition contained two prongs. It was defined as "any state of facts, circumstance, condition, event, change, development, occurrence, result or effect":
    - Prong one: "that has a material adverse effect on the financial condition, business, assets, or results of operations of the Business"; or
    - Prong two: "that would prevent, materially delay or materially impede the performance by [seller] of its obligations under this Agreement or [seller's] consummation of the transactions contemplated by this Agreement"
  - Whereas the first prong contained an express carve-out for pandemics (unless the Victoria's Secret business was materially and disproportionately adversely affected as compared to similarly situated businesses in its industry), the other prong did not
  - As a result, Sycamore asserted that the risk of L Brands' failure to operate the Victoria's Secret business in the ordinary course, even in the face of the COVID-19 pandemic, was to be expressly borne by L Brands

- **Sycamore alleged that L Brands had breached the following representations and warranties, and such false representations collectively constituted a Material Adverse Effect:**
  - Representation that since November 2, 2019, the Victoria's Secret business had been conducted in the ordinary course of business consistent with past practice in all material respects
  - Representation that since November 2, 2019, there had been no actions that, if taken after signing, would have been prohibited by the negative restrictions of the interim operating covenant
    - Neither of these representations terminated at signing; instead they operated in parallel with the IOC through the closing or termination of the agreement
    - These representations were also more restrictive on the seller than the corresponding IOCs—neither contained an exception for actions required by applicable law or governmental authority, and neither provided that the buyer could not unreasonably withhold consent for requests for deviations
  - No undisclosed liabilities
  - No material default / breach of material contracts (including leases that are material contracts)

L Brands' Basis for Seeking Specific Performance

- **L Brands argued there was no breach of the interim operating covenant, as the challenged actions were:**
  - Taken to comply with applicable law and governmental authority
  - Taken in the ordinary course, as reflected by the fact that they were consistent with steps taken by other retailers in the country and by Sycamore on behalf of its portfolio companies
  - Previewed with Sycamore, who had previously described them as "reasonable" and had raised no objections to them
- **L Brands asserted that the parties had agreed that the buyer would bear the risk of adverse impacts resulting from COVID-19, as evidenced by the exclusion of pandemics from the prong of the MAE definition focused on a material adverse effect on the business**
  - L Brands did not address the fact that the other prong, which is the prong Sycamore attacked, did not contain such an exception
- **L Brands did not respond to Sycamore's assertion that its equity commitment letter had terminated as the parties ultimately mutually agreed to part ways**

AB Stable / Mirae

AB Stable / Mirae

- **On September 10, 2019, AB Stable VIII LLC ("AB Stable") and MAPS Hotels and Resorts One LLC ("MAPS"), an affiliate of Mirae Asset Global Investments Co. ("Mirae"), entered into a Sale & Purchase Agreement (the "SPA"), pursuant to which MAPS agreed to purchase Strategic Hotels & Resorts LLC (the "Company"), a subsidiary of AB Stable owning 15 luxury hotels located in the United States**
  - Mirae made a $581 million deposit at signing and provided a $2.2 billion equity commitment; Mirae intended to finance the remainder of the $5.8 billion purchase price through debt financing
  - Closing of the deal was scheduled to take place on April 17, 2020
- **On March 4, 2020, MAPS requested a three-month extension of the closing deadline to enable it to obtain debt financing**
  - MAPS asserted that MAPS and its lenders planned to execute the term sheets and commitment letter on February 24, 2020, but that these plans were derailed when litigation was discovered concerning the ownership of AB Stable's hotels (which MAPS alleges AB Stable concealed)
- **On March 12, 2020, AB Stable indicated that it would be open to considering an extension, as it understood the difficulties facing MAPS in raising debt financing in the current climate**
  - According to AB Stable, MAPS did not, however, meaningfully engage in a proposed extension
  - MAPS argued that the extension was requested in order to allow it to fully investigate the previously undisclosed litigation regarding ownership of AB Stable's hotels, but that AB Stable conditioned the requested extension with unreasonable demands including (among others) (i) an additional $581 million deposit, (ii) waiver of the conditions to closing under the SPA and (iii) amending the purchase price adjustment to be effective as of April 17, 2020

Case Reference: *AB Stable VIII LLC v. MAPS Hotel and Resorts One LLC*, No. 2020-0310 (Delaware Court of Chancery)

AB Stable / Mirae

- **On April 14, 2020, MAPS gave notice to AB Stable that it was in breach of the representation that AB Stable had good and marketable fee title to its owned real property, free and clear of liens**
  - The claimed breaches were related to the newly discovered litigation dispute over ownership of the AB Stable hotels and were unrelated to COVID-19
- **Three days later, MAPS sent AB Stable a notice of default, also claiming that AB Stable was in material breach of the ordinary course interim operating covenant**
- **On April 27, 2020, AB Stable filed a complaint in the Delaware Court of Chancery seeking specific performance**
- **On May 3, 2020, MAPS served AB Stable with a notice purporting to terminate the SPA**
- **On May 8, 2020, the Delaware Vice Chancellor J. Travis Laster scheduled trial to begin on August 24, 2020**
- **On May 20, 2020, MAPS filed an answer and counterclaims (subsequently amended) to AB Stable's April 27th complaint seeking a declaratory judgment that its termination was valid and that MAPS was entitled to the return of its $581 million deposit**
- **Trial was held the week of August 24, 2020, with additional briefing and post-trial argument to take place in September and October**
  - Of the many issues that the court will need to address, in preliminary comments after the final day of trial Vice Chancellor Laster questioned whether specific performance was appropriate given the fact that the special purpose vehicle through which MAPS agreed to acquire the Company "could not access the money to close" after debt financing became unavailable

Mirae's Basis for Termination

- **While much of the dispute centered around AB Stable's disclosure / handling of allegedly fraudulent third-party ownership claims to AB Stable's hotels, MAPS also asserted several COVID-19-related claims as a basis for termination**
  - MAPS asserted that it was not required to close the transaction because, among other reasons, AB Stable breached the interim operating covenant
    - AB Stable's hotels were no longer operating in the ordinary course of business consistent with past practice, as required by the SPA, and AB Stable had "allowed material business relationships to deteriorate"
      - Two of the hotels to be acquired by MAPS were completely closed; the other hotels were functioning at less than 10% occupancy
    - "Nonessential" capital expenditures were halted, employees were furloughed and laid off, food and beverage and health / fitness facilities were closed (along with other amenities), and the properties stopped hosting events such as conferences, weddings and outings
    - The interim operating covenant is not subject to a best or commercially reasonable efforts modifier or "industry standard" practices carve-out, and requires AB Stable to operate "consistent with past practice"
      - As a result, MAPS argued that the covenant required strict compliance and that the court must look to the "business's normal and ordinary operations—not how the business reacted in any prior extraordinary circumstances" in order to assess compliance
  - MAPS claimed that the Company suffered a Material Adverse Effect due to the COVID-19 pandemic and the discovery of challenges to title of AB Stable's properties
    - MAPS emphasized a "staggering" fall-off in financial performance relative to 2019, and indicated the hotel segment in which the Company operates is unlikely to return to 2019 levels until at least 2023
    - The MAE definition did not include a carve-out for a pandemic, epidemic or health crisis, and MAPS argued that none of the other broad carve-outs (e.g., general industry changes or developments) applied

AB Stable's Basis for Seeking Specific Performance

- **In addition to AB Stable's responses to MAPS regarding its handling of the ownership dispute, which it characterized as an attempt by MAPS to get out of the deal when unfavorable financing options arose due to COVID-19, AB Stable asserted:**
  - Its actions were entirely in the ordinary course and fully consistent with past practices in all material respects
    - AB Stable asserted that its responsible stewardship of the properties in the face of the industry-wide disruption caused by the COVID-19 pandemic was required by, rather than a breach of, its obligations under the SPA
    - The SPA did not require AB Stable to operate the properties in "the ordinary course of business consistent with past practice in all material respects" in situations where the SPA itself required AB Stable to diverge from past practices to "preserve intact in all material respects [its] business organization and to preserve in all material respects the present commercial relationships with key Persons with whom [it does] business"
      - AB Stable argued "ordinary course" is not measured by "whether the Company has stood idly by and operated identically to how it did before the pandemic . . . but rather whether the Company responded as it and others typically would under the circumstances", and thus asserted its "commercially reasonable" responses were "ordinary course" in the context of the business circumstances of the pandemic
      - Failure to respond to the relevant circumstances would constitute a breach of the ordinary course covenant because it would harm the business, which is what the covenant is meant to prevent, and would ignore the fact that businesses frequently respond and adapt to new circumstances
    - Since the MAE definition allocates pandemic-related risks to the buyer (discussed below), the contract contemplates that the buyer would also bear the risk that the Company would have to operate in a way that responds to the pandemic, and any other interpretation would create a "back-door MAE" in the contract
  - The Company had not suffered a Material Adverse Effect
    - While the MAE definition did not include an express carve-out for pandemics, AB Stable argued that it was covered by the exclusions for (i) general changes or developments in any of the industries in which the Company operates, (ii) changes in general economic, business, regulatory, political or market conditions and (iii) natural disasters or calamities
    - AB Stable also argued that the Company had not suffered an MAE, attacking MAPS' expert's analysis by claiming: (i) declines in performance were consistent with the Company's peer group and comparable hotels; (ii) the expert's opinion of the Company's valuation decline was based on projected results for fiscal year 2020 (which is an approach that AB Stable claims the market has rejected); and (iii) MAPS' own updated models contradicted the expert's conclusion that the luxury hotel market would not reach pre-pandemic performance for several years

Simon Property / Taubman

Simon Property / Taubman

- **On February 9, 2020, Simon Property Group ("Simon Property") entered into an agreement and plan of merger with Taubman Centers Inc. ("Taubman"), pursuant to which Simon Property agreed to acquire most of Taubman for approximately $3.6 billion**
  - Taubman is a retail real estate company that operates shopping centers in the United States
- **On June 10, 2020, Simon Property terminated the merger agreement and filed a complaint in the Circuit Court for the 6th Judicial Circuit of Michigan seeking a declaratory judgment that its termination was valid**
  - Simon Property alleged that Taubman suffered a Material Adverse Effect and breached its obligation to operate its business in the ordinary course
- **On June 17, 2020, Taubman filed an answer and counterclaims to Simon Property's complaint seeking specific performance or, alternatively, a declaration that Taubman can terminate the agreement and recover damages**
- **On June 23, 2020, Michigan's Sixth Judicial Circuit ordered that the case be referred to facilitative mediation to be completed by July 31, 2020 and that the case be ready for trial by mid-November 2020**
- **On July 31, 2020, trial was set for November 16, 2020**

Case Reference: *Simon Property Group, Inc. v. Taubman Centers, Inc.*, No. 2020-181675-CB (Mich. Cir.)

Simon Property's Basis for Termination: Material Adverse Effect

- **Simon Property asserted that the COVID-19 pandemic constitutes an MAE because it had a devastating and disproportionate effect on Taubman compared to other participants in the retail real estate industry**
  - The MAE definition contained an express carve-out for pandemics unless the business was disproportionately adversely affected as compared to other participants in its industry
- **Taubman's properties were uniquely vulnerable to the post-COVID-19 retail environment**
  - Taubman's properties are primarily indoor malls in densely populated areas that many consumers will prefer to avoid
    - Taubman's competitors, in contrast, have far more open-air malls, outlet centers, strip malls and outdoor "lifestyle centers" or "power centers"
  - Taubman's malls are heavily dependent on tourism—an industry that is among the worst hit by COVID-19 and expected to suffer for many years
  - Taubman's malls serve wealthy consumers who are now more likely to shop online
  - Taubman's centers feature high-end upscale stores and the demand for high-end discretionary goods is severely depressed
    - Taubman has fewer retail stores that are selling the types of essential goods consumers are still buying in physical stores
  - To survive, Taubman will need to spend significant amounts redeveloping its malls to secure new tenants to replace key anchors such as Neiman Marcus and JCPenney, which are bankrupt

Simon Property's Basis for Termination: Breach of Interim Operating Covenant

- **Simon Property alleged that Taubman violated the ordinary course covenant by failing to make essential cuts in operating expenses and capital expenditures and financing those unnecessary expenses by borrowing millions of dollars**
  - Acting in the ordinary course requires companies to respond to changing market conditions and, when faced with a crisis, to take appropriate actions
  - Taubman's competitors have taken responsible steps to reduce costs and maintain capital, including furloughing and laying off employees, reducing executive compensation and cutting operating expenses and capital expenditures
  - Taubman has taken no comparable measures; instead, Taubman borrowed hundreds of millions of dollars to fund significant expenditures
  - Taubman itself has recognized the need for employee and executive salary cuts during past financial crises
    - For example, in response to the 2008 financial crisis, Taubman acted in the ordinary course of business by decreasing its bonus pool

Taubman's Basis for No MAE

- **Taubman argued that Simon Property was fully aware of the risks of COVID-19 and of changing market conditions, including in the shopping mall industry, when it entered into the agreement**
  - Simon Property extracted price reductions during the negotiations as the COVID-19 pandemic was unfolding, after initially agreeing to a significantly higher price

- **Taubman asserted that Simon Property had no legitimate basis to refuse to close the transaction and claimed that Simon Property expressly assumed the risk of material adverse effects caused by the COVID-19 pandemic**
  - Taubman asserted that pandemics were expressly covered by the carve-outs to the MAE definition, and thus can only be taken into account "to the extent" there is a disproportionate adverse effect on Taubman as compared to other participants in the industry in which Taubman operates
    - Taubman argued that, in assessing whether an MAE has occurred, the relevant inquiry is whether an incremental disproportionate effect of a pandemic on Taubman, to the extent there is any, itself constitutes an MAE
    - Taubman claimed that such an incremental disproportionate effect compared to other participants in the industry in which Taubman operates has not occurred
      - Taubman's regional and super-regional shopping malls should not be compared to strip centers and power centers that have grocery stores and big box anchors, but relative to the other companies in the high-end mall sector
    - Taubman argued that Simon Property failed to allege any facts to show that the pandemic has harmed Taubman's overall earnings potential in a "durationally significant" manner
  - Taubman argued that the MAE definition also excludes any effect, change, event or occurrence arising out of any action that Simon Property has consented to in writing
    - Simon Property consented to Taubman closing its malls in response to the pandemic, and thus any effect Taubman experienced from the closing of its malls cannot constitute or contribute to an MAE, even if Taubman experienced an effect disproportionate to other participants in the industry

Taubman's Basis for No Breach of Interim Operating Covenant

- **Taubman alleged that the interim operating covenant is limited by a "commercially reasonable efforts" standard**
  - Taubman claimed that it did not fail to use commercially reasonable efforts to conduct its business consistent with its past practices and/or in accordance with the operational budget that Simon Property received
- **Taubman asserted Simon Property's claims regarding breaches of the interim operating covenant were based on an assertion that Taubman failed to take actions that were otherwise outside the ordinary course in response to COVID-19, and that there was no covenant in the agreement requiring Taubman to do this**
- **Taubman claimed that it acted at all times with the consent or acquiescence of Simon Property, which was apprised of all of Taubman's actions in response to the pandemic**
  - This included Simon Property's consent to the closing of Taubman's malls, its consent to Taubman's annual budget in March, and its consent to the revolver draw-down of $350 million in March
  - Until Simon Property sent the termination notice on June 10, 2020, it had not given any notice that Taubman had breached any covenant, and by its words and actions, Simon Property made clear that it had consented or acquiesced to Taubman's conduct
- **Taubman argued that it had taken commercially reasonably actions in response to COVID-19, including actions that Simon Property consented to, such as cutting Taubman's discretionary spending by almost 50%**
  - Taubman cut its discretionary spending by almost 50%, which was approved by Simon Property
  - Taubman paid its executives only for compensation earned in 2019, and not in 2020, which was approved by Simon Property
  - Taubman's CEO and COO waived their salaries for the past three years

Tiffany / LVMH

Tiffany / LVMH

- **On November 24, 2019, Tiffany & Co. (“Tiffany”) and LVMH Moët Hennessy-Louis Vuitton SE and related entities (“LVMH”) entered into a merger agreement pursuant to which LVMH agreed to acquire Tiffany in a transaction valued at $16.2 billion**

- **In August 2020, Tiffany exercised its right to extend the outside date in the merger agreement from August 24 to November 24, 2020**
  - Tiffany asserted that it was entitled to extend the outside date because receipt of certain required regulatory approvals was the only outstanding condition to closing
  - LVMH disputed Tiffany’s right to extend the outside date, alleging that Tiffany had suffered an MAE
    - Under the merger agreement the outside date could only be extended if regulatory approvals were the only unsatisfied closing conditions at the initially scheduled outside date

- **On September 8, 2020, LVMH disclosed that it had received a letter dated August 31, 2020 from the French Ministry for Europe and Foreign Affairs**
  - Tiffany alleged they were never provided a copy of the letter, but that LVMH provided an English translation that stated that the Ministry suggested that LVMH defer closing the Tiffany transaction until January 6, 2021 to support France’s efforts against certain sanctions to be imposed by the US

- **On September 9, 2020, Tiffany filed suit in the Delaware Court of Chancery seeking specific performance against LVMH to take the necessary steps to obtain required antitrust clearances as promptly as practicable and close the transaction**
  - On the same day, Tiffany contemporaneously filed a motion for expedited proceedings
  - On September 16, 2020, LVMH filed an opposition to Tiffany’s motion for expedited proceedings

Case Reference: *Tiffany & Co. v. LVMH Moët Hennessy-Louis Vuitton SE et al.*, C.A. No. 2020-0768- (Delaware Court of Chancery)

Tiffany / LVMH

- **On September 21, 2020, the Delaware Court of Chancery set oral arguments for the trial to begin on January 5, 2021**

- **On September 28, 2020, LVMH filed its counterclaim against Tiffany**
  - LVMH asserted that it was not required to close the transaction because (i) Tiffany had suffered a Material Adverse Effect, (ii) Tiffany had materially breached its interim operating covenants and (iii) the letter received from the French Foreign Minister was a legal restraint issued by a governmental entity precluded closing before the outside date

- **On October 13, 2020, Tiffany filed an answer to LVMH's counterclaim**
  - Tiffany asserted that (i) it did not suffer a Material Adverse Effect, (ii) it did not breach its interim operating covenants and (iii) that the letter received from the French Foreign Minister is not a legal restraint and that LVMH breached the merger agreement by soliciting the letter

- **On October 28, 2020, the parties (i) entered into a settlement agreement pursuant to which each party would dismiss the claims that it brought against the other and (ii) amended the merger agreement to:**
  - Reduce the per share merger consideration to $131.50 in cash from $135.00 in cash
  - Stipulate that closing cannot occur prior to January 7, 2021, taking into account the French Foreign Minister's request
  - Remove certain closing conditions, including the absence of a Material Adverse Effect
  - Expressly permit Tiffany to declare and pay regular quarterly dividends of up to $0.58 per share

Tiffany's Case for Breach by LVMH

- **Tiffany alleged that LVMH breached the regulatory efforts covenant in the merger agreement (which it alleged contained a "hell or high water" undertaking on the part of LVMH to obtain all required regulatory approvals) by failing to respond to information requests by competition authorities and failing to file merger-clearance applications**

- **To avoid the transaction, according to Tiffany, LVMH refused to formally request antitrust clearance in two jurisdictions and delayed the clearance process for more than nine months in two others, despite no substantive concerns from the relevant antitrust authorities**
  - Tiffany alleged that after the initial onset of the pandemic LVMH began to reconsider the merger, resulting in a dramatic slowdown of its efforts to achieve approval in the EU and other jurisdictions while it explored its legal options
    - Tiffany alleged this strategy "matured into a concerted corporate strategy on the part of LVMH to sabotage the antitrust-clearance processes"
  - According to Tiffany, LVMH generally claimed the delays resulted from LVMH's "'decentralized' business structure and related inefficiencies exacerbated by the COVID-19 pandemic"
    - Tiffany, however, disputed this explanation, noting, "LVMH's structure did not seem to inhibit LVMH during the period when it was motivated to pursue this transaction," in which it was able to secure antitrust clearances in other jurisdictions
    - Tiffany also noted that LVMH's decentralized structure did not impede LVMH when it "previously had pursued other major acquisitions, many of which received all required regulatory approvals in just a few months"
    - Tiffany also cited the 10 largest M&A transactions since the fourth quarter of 2019, of which LVMH's acquisition of Tiffany was the only one in which the parties are yet to formally file for antitrust clearance with the EC

Tiffany's Case for No MAE

- **Tiffany asserted that it had not experienced an MAE**
  - While the MAE definition in the merger agreement did not explicitly exclude pandemics, it excluded, among other things, "changes or conditions generally affecting the industries in which [Tiffany] operate[s]", "general economic or political conditions" and "the outbreak or escalation of hostilities (including the Hong Kong protests and the 'Yellow Vest' movement)"
    - These carve-outs to the MAE definition did not apply only to the extent such changes or conditions had a "materially disproportionate adverse effect" on Tiffany "relative to others in the industries and geographical regions in which affected businesses of [Tiffany] operate"
  - Tiffany argued that the effects of COVID-19 and social-justice protests on the company were not significant enough in duration or magnitude to rise to the level of an MAE
    - LVMH had announced that it viewed the acquisition of Tiffany as a "centuries-long investment"
    - While temporary store closures caused by the COVID-19 pandemic had a substantial impact on Tiffany's financial performance in its first quarter, Tiffany swung back to a profit in the second quarter and anticipated continuing financial improvement going forward
      - More than 96% of Tiffany's stores worldwide had reopened, Tiffany's e-commerce platform was outperforming expectations (Q2 2020 sales were up 123% over the prior year), and the company's recovery was faster than Tiffany had originally projected just a few months ago
  - Tiffany also argued that, even if the effects of the COVID-19 pandemic and social-justice protests would otherwise constitute an MAE, these effects clearly fell within the general exclusions to the definition of MAE, and that Tiffany had not experienced a "materially disproportionate adverse effect" relative to others in the industries and geographic regions in which it operates
    - The COVID-19 pandemic had affected all luxury-goods retailers, and Tiffany's results compared favorably with others in the industry
    - Social-justice protests in the United States had not impacted Tiffany more than others operating in the U.S. (in fact, Tiffany believed these had impacted its stores less), and all stores that were closed had since been reopened

Tiffany's Case for Compliance with IOCs

- **Tiffany asserted that it had complied in all material respects with its obligations under the interim operating covenants**
  - According to Tiffany, LVMH raised for the first time on September 8, 2020 (without providing details) that it did not believe that Tiffany had complied with the operating covenants in the merger agreement to "conduct its business in all material respects in the Ordinary Course of Business"
  - Tiffany asserted that:
    - Like other retailers, it had taken reasonable measures to manage its business and mitigate the effects of COVID-19
    - It had attempted to coordinate closely with LVMH on these efforts, including discussing temporary store closures, real estate negotiations, and personnel matters
    - In many cases, Tiffany had taken the same approach as LVMH (an approach that is commercially reasonable and one that other similarly situated companies have taken in the ordinary course of their businesses)
    - Temporary store closures and other restrictions were implemented in accordance with applicable government guidance, laws and regulations, and in accordance with Tiffany's pre-existing health and safety guidance
  - Tiffany also alleged that LVMH evaded requests for LVMH's consent to various business decisions, and that after initially insisting for months that it be included in important decisions regardless of whether its consent was technically required, LVMH began to delay responses
    - Tiffany alleged that LVMH indicated it "would no longer respond to consent requests unless Tiffany represented that the requests 'actually require LVMH's consent under the merger agreement'"

Tiffany's Case Against other Bases for Termination

- **Tiffany alleged that LVMH used information requests in bad faith to manufacture a claim for breach by Tiffany**
  - Despite the merger agreement only allowing for "reasonable" requests and the fact such information under the parties' confidentiality agreement was only permitted to be used to "evaluate, negotiate and implement the transaction", LVMH made seven separate requests for information over a two-month period
  - According to Tiffany, the requested information was irrelevant to the process of closing the transaction or integrating the two companies, and were in furtherance of LVMH seeking to find a way out of the deal

- **Tiffany asserted that the French Foreign Minister's letter did not provide a basis for not closing the transaction**
  - The French Foreign Ministry letter did not constitute a "final and non-appealable" legal restraint prohibiting LVMH from closing
  - LVMH's actions surrounding the letter (including the alleged delay in disclosing it to Tiffany and "improper contact" with the French government) evidenced stalling tactics on the part of LVMH

- **Tiffany also asserted that LVMH breached the merger agreement by soliciting the French Foreign Minister's letter**

LVMH's MAE Case

- **LVMH asserted that Tiffany's business had suffered a Material Adverse Effect**
- **LVMH argued that the MAE definition in the merger agreement did not contain a carve-out for pandemics or other public health events**
  - LVMH noted that, in contrast, the merger agreement contained 9 specific exclusions that covered, for example, isolated movements and historic events like the "'Yellow Vest' movement" and the "Hong Kong protests"
    - The absence of an express cave-out for pandemics, in contrast, demonstrated that the risk of a pandemic lied with Tiffany
  - LVMH argued that interpreting generic carve-outs, such "general economic or political conditions", to cover the pandemic would render pandemic carve-outs superfluous in other merger agreements which contain them
  - LVMH also argued that general economic conditions carve-outs only apply where the changed conditions themselves, and not a specific event bringing about those changed conditions, such as a pandemic, cause the MAE
- **LVMH asserted that Tiffany's business has been "devastated" by the COVID-19 pandemic and that Tiffany was particularly "ill-suited" for the challenges ahead**
  - LVMH asserted that Tiffany consistently relied on its physical store retail experience as the centerpiece of its sales strategy and in 2019 derived 90% of its 2019 revenues from brick-and-mortar locations
    - Tiffany's business model was store focused, and website, catalog and telephone orders combined accounted only for 7% of its net sales; Tiffany's e-commerce business remained limited
  - LVMH noted that most of Tiffany's US locations were concentrated in urban areas and shopping malls, which consumers were reluctant to return to
  - LVMH also noted that Tiffany was particularly reliant on the US market, which had been among the hardest hit by the pandemic, and that Tiffany was heavily dependent on tourist spending
  - LVMH further stated that Tiffany's projections included vast reductions in marketing spending and capital expenditures, which were fundamental to maintaining Tiffany's brand, image and sales growth
- **In addition, LVMH argued that an MAE had occurred under the second prong of the MAE definition in the merger agreement — the prong which concerns the ability to Tiffany to perform its obligations under the merger agreement, which did not have any carve-outs**

LVMH's Other Claims

- **LVMH asserted that Tiffany had materially breached the covenants to operate its business in the "Ordinary Course of Business" and to "preserve its and its subsidiaries' business organizations substantially intact"**
  - LVMH noted that while Tiffany was experiencing devastating operational losses and negative cash flows, it had issued $140 million in dividends (which exceeded those paid during the same period in 2019, when the company was profitable)
  - LVMH also alleged that Tiffany covertly negotiated amendments to its credit agreements to avoid breaching the covenants pre-closing
  - LVMH further asserted that Tiffany had significantly reduced its marketing expenses and capex
- **LVMH asserted that the French Minister for Europe and Foreign Affairs (the "Minister") imposed a "legal restraint" that prohibited the parties from closing the transaction before the outside date**
  - According to LVMH, under French public law, the August 31st letter from the Minister is an order issued by a governmental entity that is binding and non-appealable and prohibits closing before January 6, 2021, which is past the November 24, 2020 outside date
- **LVMH asserted that it was in compliance with the regulatory efforts covenant and that Tiffany's allegations that LVMH intentionally delayed the regulatory approval process were without merit**
  - LVMH noted that eight out of 10 antitrust clearances had been obtained, and LVMH anticipated clearances in the two remaining jurisdictions "well in advance" of the November 24, 2020 outside date in the merger agreement
  - LVMH also emphasized that it was able to achieve this, notwithstanding the unprecedented pandemic, Europe's annual summer slowdown, and the decentralized nature of dozens of independent brands, or "*maisons*", composing LVMH

Realogy / SIRVA

Realogy / SIRVA

- **On November 6, 2019, Realogy Holdings Corp. ("Realogy") and SIRVA Worldwide, Inc. ("SIRVA"), a portfolio company of Madison Dearborn Partners ("MDP"), entered into a purchase agreement for the sale by Realogy of Cartus Corporation ("Cartus") to SIRVA**
  - Cartus provides relocation counseling to newly hired or transferring employees of large corporations, logistical relocation support, international assignment compensation services, intercultural and language training and consulting solutions
  - SIRVA arranged debt and equity financing to finance the acquisition, and entered into a debt commitment letter with debt financing sources and an equity commitment letter with funds advised by MDP
- **On April 24, 2020, Realogy sent a letter to SIRVA stating that the closing conditions in the purchase agreement had been satisfied and that Realogy was planning for the transaction to close on April 29**
- **The next day, a SIRVA board member held a phone conversation with Realogy's CEO in which SIRVA indicated that it did not believe all of the closing conditions had been satisfied, citing the impact of COVID-19 on Cartus's business**
  - SIRVA indicated that it believed the updated go-forward financial model for Cartus (provided at SIRVA's request) was "unsupported and inaccurate", and that a Material Adverse Effect had occurred
  - SIRVA followed up the same day with a formal letter providing additional detail, claiming that:
    - Cartus suffered a Material Adverse Effect because it had been disproportionately impacted by COVID-19
    - Realogy suffered a Material Adverse Effect because solvency issues would materially impair its ability to perform its post-closing obligations under the purchase agreement and related ancillary agreements
- **On April 27, 2020, Realogy filed a complaint (amended on May 17) in the Delaware Court of Chancery alleging breach of the purchase agreement by SIRVA and seeking specific performance**
  - Realogy's initial complaint defined "Defendants" as both SIRVA and MDP and alleged that they breached the purchase agreement
- **SIRVA terminated the agreement the next day and then again on May 1 after the outside date**

Case Reference: *Realogy Holdings Corp. v. SIRVA Worldwide, Inc. et al.*, C.A. No. 2020-0311-MTZ (Delaware Court of Chancery)

Realogy / SIRVA

- **On April 30, 2020, Realogy filed a motion to expedite**
  - The Court rejected Realogy's call for a September trial but expedited the motion to dismiss hearing to July
- **SIRVA's debt commitments expired on their own terms on May 7, 2020**
- **During a hearing held on July 17, 2020, the Court granted SIRVA's motion to dismiss on the basis that specific performance was not an available remedy**
- **On July 27, 2020, Realogy requested an interlocutory appeal, and on August 7, 2020, Vice Chancellor Zurn wrote a letter advising against such appeal**
- **On August 8, 2020, the parties settled the lawsuit in a confidential settlement**

Case Reference: *Realogy Holdings Corp. v. SIRVA Worldwide, Inc. et al.*, C.A. No. 2020-0311-MTZ (Delaware Court of Chancery)

SIRVA's MAE Case

- **"Material Adverse Effect" definition contained two prongs:**
  - Prong one: "Any change, event, occurrence, circumstance or effect that, individually or in the aggregate, . . . has, or would reasonably be expected to have, *a material adverse effect on the results of operations or financial condition of [Cartus]*"
    - Prong one contained several carve-outs, including exceptions for general economic conditions, acts of God and natural disasters (but not for pandemics generally or COVID-19 specifically)
      - Carve-outs were subject to a disproportionate impact exception, i.e., they did not apply to the extent Cartus was disproportionately adversely affected relative to other similarly situated participants in the industries in which it operates
  - Prong two: "Any change, event, occurrence, circumstance or effect that would or would reasonably be expected to *prevent or materially impair or materially delay the ability of [Realogy] to consummate the Transaction*"
    - Prong two was not subject to the above, or any other carve-outs

- **SIRVA asserted that COVID-19 had a material and disproportionate adverse effect on Cartus, constituting an MAE under prong one**

- **SIRVA also asserted that an MAE under prong two existed due to concerns with respect to Realogy's solvency in the future**
  - SIRVA claimed that Realogy may not remain a going concern long enough to fulfill its post-closing obligations under the purchase agreement and related ancillary agreements (i.e., transition services agreement, sublease agreements)

Realogy's Basis for No MAE

- **Realogy asserted that SIRVA had no legitimate basis to refuse to close the transaction and argued that Cartus has not suffered a Material Adverse Effect**
  - Realogy asserted that COVID-19 was covered by the carve-outs to prong one of the MAE definition, and Cartus was not disproportionately adversely affected by COVID-19 relative to other similarly situated participants in its industry
    - Cartus's entire industry was significantly impacted by COVID-19, and SIRVA itself (a participant in the industry) was significantly impacted
- **Realogy also claimed that it has not suffered a Material Adverse Effect**
  - According to Realogy, SIRVA, "concocted a combination of Realogy's recent stock performance, analyst commentary, and SIRVA's own self-serving assumptions to conclude that Realogy will not remain a going concern *after the Transaction closes*, . . . calling into question Realogy's ability to fulfill its post-closing obligations . . ."
    - SIRVA improperly attempted to create a closing condition that did not exist, as the purchase agreement did not require Realogy to prove it would remain a going concern for the entirety of its post-closing obligations
    - "Consummation" of the transaction occurs at the time of closing, before Realogy is obligated to fulfill any post-closing obligations
    - Realogy expected to remain a going concern for the duration of its post-closing obligations, which were minor compared to the overall value of the transaction
      - Post-closing obligations primarily related to the maintenance / upgrade of a third-party database platform

SIRVA's Basis for Dismissal

- **SIRVA argued that specific performance was not an available remedy because SIRVA's debt financing had terminated**
  - Under the purchase agreement, specific performance was an available remedy only if (and for so long as) the debt financing was available, and under MDP's debt commitment letter, the debt financing was conditioned on MDP's equity financing being available
- **By naming MDP as a "Defendant", Realogy's April 27th lawsuit contained claims that were not "Retained Claims" under the MDP equity commitment letter and therefore resulted in its automatic termination**
  - The equity commitment letter permitted Realogy only to sue MDP under its limited guaranty and not the purchase agreement and only to recover a termination fee after termination
- **The termination of the equity commitment letter, in turn, caused the debt commitment letter to terminate**
- **The debt financing also terminated on its own terms on May 7th (the automatic termination date under the debt commitment letter)**
- **Since the debt financing was no longer available, Realogy could not seek specific performance**
- **The Court sided with SIRVA and dismissed the case**

Delphi / BorgWarner

Delphi / BorgWarner

- **On January 28, 2020, BorgWarner Inc. (“BorgWarner”) and Delphi Technologies PLC (“Delphi”) entered into a transaction agreement pursuant to which BorgWarner would acquire Delphi in an all-stock transaction**
  - Upon the closing of the transaction, current BorgWarner stockholders were expected to own approximately 85% of the combined company, while current Delphi shareholders were expected to own approximately 15%
- **On March 30, 2020, Delphi drew the full available amount under its revolving credit facility, resulting in a total of $500 million outstanding under the revolver**
  - Delphi elected to draw down its revolver “to provide additional liquidity and financial flexibility in light of current economic conditions and uncertainties arising in connection with the COVID-19 pandemic”
- **On the same day, BorgWarner provided written notice to Delphi asserting that Delphi materially breached the interim operating covenants by effecting the revolver draw without its consent**
  - The transaction agreement prohibited the incurrence of indebtedness for borrowed money in excess of $5 million without BorgWarner’s consent
  - BorgWarner asserted that, if the breach was not cured within 30 days, it had the right to terminate the transaction

Delphi / BorgWarner

- **Delphi disputed BorgWarner's breach allegation by stating that BorgWarner unreasonably withheld its consent to the revolver draw**
  - Covenant provided that BorgWarner is not permitted to unreasonably withhold, condition or delay its consent for deviations from the interim operating covenant
- **On May 6, 2020, BorgWarner and Delphi entered into a consent and amendment agreement, pursuant to which:**
  - BorgWarner consented to the revolver draw, as long as Delphi's revolver borrowings at the time of closing did not exceed $225 million and, net of cash balances, did not exceed $155 million
  - The stock consideration payable to Delphi's stockholders was reduced by lowering the exchange ratio by 5%
  - The parties added a closing condition that Delphi has satisfied a specific net-debt-to-adjusted EBITDA ratio
- **On June 25, 2020, Delphi shareholders approved the transaction**

Oberman / Cast & Crew

Oberman / Cast & Crew

- **On February 5, 2020, Oberman, Tivoli & Pickert, Inc. d/b/a Media Services ("Oberman") and Cast & Crew Indie Services, LLC ("Cast & Crew") entered into an Asset Purchase Agreement (the "APA") pursuant to which Cast & Crew agreed to acquire all of Oberman's assets**
  - Oberman is an accounting, payroll and software company providing services to the entertainment industry and corporate and internet productions
- **On March 17, 2020, Cast & Crew requested extensive information regarding the existing and forecasted financial condition of Oberman**
  - Oberman responded on March 19, objecting to the request, as it appeared to it that the buyer was making the request in an attempt to avoid the transaction due to COVID-19; still Oberman provided certain information in response
  - Oberman provided additional information on March 22, which in its view was all of the responsive information as of that date; on March 23, Cast & Crew sent another letter indicating it remained unsatisfied
- **On March 25, 2020, Oberman sent Cast & Crew information required to fulfill the closing conditions under the APA, with the goal to close on March 30, 2020**
  - Cast & Crew refused to close, citing the unfulfilled information request and a number of other alleged deficiencies to satisfy the closing conditions, including an entity dissolution (which Oberman claimed was immaterial) and failure to provide a third-party consent
  - Oberman responded on March 28, providing a sensitivity analysis of the impact of COVID-19 on its business, as well as the requested third-party consent, and communicated that it expected the parties would close on April 6, 2020
  - On March 31, 2020, Cast & Crew again claimed that the closing conditions under the APA had not been satisfied, indicating it had not received the needed information to alleviate its COVID-19 concerns and requesting information regarding whether Oberman had operated in the ordinary course
- **On April 6, 2020, Oberman filed suit in the Delaware Court of Chancery seeking specific performance and declaratory judgment that the conditions to closing had been satisfied**
- **On April 20, 2020, the parties reached a settlement, the terms of which were not disclosed**

Case Reference: *Oberman, Tivoli & Pickert, Inc. v. Cast & Crew Indie Services, LLC and Camera Holdings, LP*, C.A. No. 2020-0257-PAF (Delaware Court of Chancery)

Access Covenant Arguments

- **Oberman asserted that Cast & Crew was making illegitimate information requests under the access to information covenant in order to claim a breach of the APA**
  - Access to information covenant only required Oberman to provide reasonable access to properties, books and records and did not require Oberman to create information that did not exist
    - Information requests focused on detailed information regarding the current financial performance of the business and, in many cases, required Oberman to produce new information that did not yet exist
  - Access to information was only for the purpose of facilitating the consummation of the transactions and to carry out the provisions of the APA
    - Instead, Cast & Crew "weaponized these provisions by requesting unreasonable amounts of information for the purpose of attempting to avoid consummation of the transactions"
  - Oberman made a good faith effort to facilitate the closing and provided recent, relevant and responsive information
    - Oberman provided all recent material financial information already available, and even though not required, created additional information that previously did not exist to satisfy any legitimate requests

- **While Cast & Crew did not specifically allege a "Material Adverse Effect" had occurred, Oberman viewed the information requests as an attempt to find information and build an MAE case**

Khan / Cinemex

Khan / Cinemex

- **On March 10, 2020, Cinemex, a large Mexican cinema company, entered into two related equity purchase agreements to purchase Star Cinema Grill, a Houston-based dine-in theater business owned by Omar Khan, a local businessman**
- **On March 24, 2020, Khan notified Cinemex that the closing conditions were satisfied, and asked Cinemex to confirm it would close the transaction within the next two business days, as required by the purchase agreements**
  - Cinemex responded that it was not required to close the transaction
- **On April 2, 2020, Khan filed a complaint in the U.S. District Court for the Southern District of Texas seeking specific performance of Cinemex's obligation to close the transaction**
- **On April 23, 2020, Cinemex filed a motion to dismiss Khan's lawsuit**
  - Cinemex asserted (i) breach of the access provisions in the purchase agreements, (ii) breach of the representation and warranty that Star Cinema was authorized to conduct its business and (iii) common law equitable defenses
- **On April 25, 2020, Cinemex filed for Chapter 11 bankruptcy protection and sought to halt all district court proceedings**
- **On April 27, 2020, the U.S. District Court for the Southern District of Texas ordered that the case be completely stayed and that any further action involving the dispute take place before the bankruptcy court**

Case Reference: *Omar Khan, SCGC, Inc. et al. v. Cinemex USA Real Estate Holdings, Inc. et al.*, No. 20-1178 (Tex. S.D.)

Cinemex's Refusal to Close

- **According to Cinemex, Khan had breached the access provisions in the purchase agreements**
  - Cinemex's operations and finance teams lacked pre-closing access to the Star Cinema theaters and employees
  - Attempting to close under the current circumstances would imperil Cinemex personnel
    - Cinemex said that there were "very real health risks involved with attempting to undertake any activities related to the Closing — including meetings and interviews of theater personnel, meeting landlords and other third-party providers"
    - "Attempting to close the transaction under these circumstances would expose Cinemex personnel to potentially mortal danger"
  - Key Cinemex personnel were located in Mexico City and Miami and could not get to Houston because the U.S./Mexico border was closed and due to travel restrictions implemented in Florida
  - Cinemex was entitled to perform a physical inspection of the theaters at closing
    - Physical access was necessary so that Cinemex could assess and take over the facilities, review the various technology systems, take stock of cash-on-hand and the assets in general, review physical inventory, and perform other needed actions on-site to ensure an orderly and successful transition of the business
  - Closing was required to physically take place in Houston, Texas
    - Cinemex cited that the purchase agreements specified that the Closing "shall take place … in Houston, Texas, unless another time, date or place is agreed to in writing by the Parties"

- **Star Cinema was in breach of the "permits" representation and warranty**
  - Cinemex asserted that Star Cinema breached the representations and warranties that it had authorization to operate its business, as Star Cinema could not operate its theaters due to the government shut-downs

- **Cinemex was entitled to protections under Delaware law, including the doctrines of frustration of purpose and impossibility**
  - Cinemex argued that the parties did not envision an indefinite, government-enforced shut-down of theaters and expected to close on functioning, available movie theaters

Khan's Basis for Seeking Specific Performance

- **Khan asserted that Cinemex was seeking to exploit the COVID-19-induced public health disaster as a pretext for walking away from the transaction**
- **Khan noted that the parties explicitly addressed the COVID-19 outbreak during their negotiations, and Cinemex received a significant purchase price reduction in light of the COVID-19 threat**
- **Khan cited that the "Material Adverse Effect" definition in the purchase agreements contained express carve-outs for "epidemics, pandemics, outbreaks . . . and other natural disasters"**
- **Khan further argued that the purchase agreements only provided for "reasonable access to and the right to inspect all of the properties, assets, premises, books and records . . ." and "reasonable access to Corporate Employees"**
- **Khan offered several concessions to facilitate the closing of the transaction**
  - Khan offered to provide transition services to Cinemex at no cost until its team was able to travel to the U.S.
  - Khan offered to push back the closing for months until Cinemex representatives were able to travel to Houston, if Cinemex provided a reasonable deposit
  - Khan offered to make relevant documents or personnel available via videoconferencing or other electronic / virtual means

Snow Phipps / KCAKE

Snow Phipps / KCAKE

- **On March 6, 2020, Snow Phipps Group, LLC ("Snow Phipps") and KCAKE Acquisition, Inc. ("KCAKE") entered into a Stock Purchase Agreement (the "SPA"), pursuant to which KCAKE agreed to acquire DecoPac, a supplier and marketer of cake decorating products and solutions**
  - KCAKE was a special purpose vehicle created by the private equity firm Kohlberg & Company; it had secured debt financing commitments from five major lenders and an equity financing commitment from Kohlberg
  - The closing of the transaction was not subject to a financing condition, but specific performance was only available as a remedy to Snow Phipps if KCAKE's debt financing was available
- **On April 1, 2020, KCAKE notified Snow Phipps that, in its view, debt financing was no longer available to fund the transaction and that it would not proceed with closing**
  - In subsequent exchanges, KCAKE also cited the occurrence of a "Material Adverse Effect" at DecoPac, and changes to the ordinary course of business at DecoPac, as bases to refuse to close
  - On April 9, 2020, KCAKE sent a letter to Snow Phipps terminating the SPA on the following day
- **On April 14, 2020, Snow Phipps filed a complaint (amended on May 12, 2020) in the Delaware Court of Chancery asking the court to compel KCAKE to (i) comply with its obligations under the SPA to use reasonable best efforts to secure debt financing and (ii) close the deal**
  - It also sought expedited proceedings, as KCAKE's debt commitment papers were scheduled to expire on May 12, 2020

Case Reference: *Snow Phipps Group, LLC v. KCAKE Acquisition, Inc. et al.*, No. 2020-0282 (Delaware Court of Chancery)

Snow Phipps / KCAKE

- **On April 16, 2020, KCAKE filed an opposition to Snow Phipps' motion for expedited proceedings**
  - KCAKE argued that the request for a remote trial to be held in two weeks was not workable and mandatory specific performance was not available to Snow Phipps under the SPA
  - On April 17, 2020, the Court denied the motion to expedite in view of "the extraordinary cost of moving forward on the requested schedule"
- **On April 20, 2020, KCAKE terminated the SPA re-alleging breaches by Snow Phipps of the SPA; on April 22nd, Snow Phipps rejected the purported termination notice as insufficient and invalid and later filed another motion for expedited proceedings which KCAKE opposed on May 26, 2020**
- **On May 12, 2020, KCAKE's debt commitments expired**
- **On June 18, 2020, KCAKE filed a motion to dismiss, arguing that specific performance was not an available remedy because its debt commitments had expired and Snow Phipps's sole remedy under the SPA is to seek and recover the negotiated reverse termination fee**
- **On August 6, 2020 and August 24, 2020, the court held oral arguments on KCAKE's motion to dismiss**

Case Reference: *Snow Phipps Group, LLC v. KCAKE Acquisition, Inc. et al.*, No. 2020-0282 (Delaware Court of Chancery)

KCAKE's Basis for Refusing to Close

- **KCAKE asserted that debt financing was not available on acceptable terms**
  - KCAKE alleged that DecoPac suffered a financial collapse due to COVID-19, which impeded its ability to secure debt financing on acceptable terms
    - COVID-19 dramatically curtailed birthday and similar celebrations for the foreseeable future, negating demand for DecoPac's products and hurting its financial performance and long-term prospects
  - KCAKE argued that it was only required to "use its reasonable best efforts to arrange and obtain Debt Financing on terms and conditions acceptable to Buyer," including pursuing "definitive agreements with respect to the Debt Financing that are on terms and conditions no less favorable to Buyer than those contained in the [Debt Commitment Letter]"
  - KCAKE argued that the Debt Commitment Letter permitted it to negotiate additional EBITDA add-backs which were necessary because otherwise it would be in breach of its financial covenants when first tested after closing due to COVID-19
    - Snow Phipps asserted that KCAKE could not reject the Debt Financing just because the lenders declined its request for additional EBITDA add-backs, noting that the Debt Commitment Letter only allowed further EBITDA add-backs if mutually agreed and not unilaterally demanded; KCAKE disagreed with such assertion, noting in its opening brief that such negotiation was expressly contemplated under the Debt Commitment Letter and was critical
    - According to Snow Phipps, the lenders remained committed to lend on the initial terms, they just refused to grant concessions beyond those terms
  - KCAKE pursued alternative financing, but the market would only lend on terms and conditions materially less favorable to KCAKE than those contained in the initial debt commitment letter
  - As the debt financing was not available and the debt commitments expired, specific performance is not a possible remedy under the SPA and the only available remedy is to seek recovery of the negotiated reverse termination fee.

- **KCAKE also intended to demonstrate it was entitled to terminate the SPA because DecoPac had suffered a Material Adverse Effect and failed to operate in the ordinary course of business**
  - It noted that Snow Phipps had tried to include a pandemic carve-out in the MAE definition, but KCAKE rejected the inclusion and the final definition of "Material Adverse Effect" in the SPA did not include this exception
  - Snow Phipps' amended complaint indicated that KCAKE also argued that Snow Phipps deviated from the ordinary course of business by partially drawing on DecoPac's revolving debt

Snow Phipps' Basis for Seeking Specific Performance

- **Snow Phipps asserted that KCAKE was intentionally attempting to torpedo its financing as an excuse not to close the transaction and that under the prevention doctrine, KCAKE cannot claim the debt financing was not available due to its failure to perform its obligations under the SPA**
- **At the time the deal was signed, KCAKE was aware of the risks posed by COVID-19**
  - It had, in fact, asked for and received a significant purchase price reduction in light of unfolding events one day before the deal was signed
- **Debt financing remained available on the terms set forth in the initial debt commitment letter**
  - KCAKE had approached the lenders seeking favorable changes to the debt financing; however, the lenders were only willing to accept those changes if the buyer offered other concessions (which it refused to do)
  - As a result, KCAKE unilaterally deemed the debt financing unavailable even though the financing commitments remained in effect
- **KCAKE breached its obligations to use "reasonable best efforts" to maintain debt financing by seeking to renegotiate its terms and not moving forward with the existing debt commitments**
- **KCAKE was also required to use reasonable best efforts to obtain alternative financing to close**
- **Obtaining debt financing was not a condition to closing under the SPA**
- **DecoPac had not suffered a Material Adverse Effect or changes to the ordinary course of business**
  - While the MAE definition did not include an express carve-out for pandemics, it contained exclusions for general economic or political conditions in any of the markets where DecoPac operated or that affected generally companies in the same or similar industries
  - The company continued to operate as an essential business (exempt from Minnesota's stay-at-home-order) and believed it had experienced a short-term dip in sales and would rebound quickly; moreover, over the previous 10 weeks, sales increased in one of two of DecoPac's two principal revenue streams compared to the same period in 2019
  - Drawing on a revolving credit facility does not constitute a material breach of the ordinary course of business provision and, in any event, DecoPac has offered to repay the revolver draw in full, which would cure any purported breach

Level 4 Yoga / CorePower Yoga

Level 4 Yoga / CorePower Yoga

- **On November 27, 2019, Level 4 Yoga LLC (“Level 4”) and CorePower Yoga LLC (“CorePower”) entered into an Asset Purchase Agreement (the “APA”), pursuant to which CorePower agreed to purchase 34 yoga studios located in five states from Level 4**
  - The APA provided that the sale of the studios would occur in groups based on a specified closing schedule, with the first closing set to occur on April 1, 2020 and subsequent closings to occur on July 1 and October 1, 2020
  - <u>The APA did not include any stated closing conditions</u>
- **On March 24, 2020, CorePower’s counsel informed Level 4’s counsel that they were instructed by their client to suspend work on the closing process**
- **In correspondence over March 26 and March 30, CorePower notified Level 4 that Level 4 had repudiated multiple material obligations under the APA and, as a result, CorePower’s contractual performance was discharged and CorePower was not required to close the transaction**
  - CorePower alleged breach of the affirmative interim operating covenant and the related representation relating to conduct of the business in the ordinary course
- **On April 2, 2020, Level 4 filed a complaint in the Delaware Court of Chancery seeking declaratory judgment that CorePower was obligated to close the transaction, specific performance of CorePower’s obligations and monetary damages**
- **On May 7, 2020, CorePower filed a motion to dismiss**
- **On August 24, 2020, CorePower’s motion to dismiss was denied**

<u>Case Reference</u>: *Level 4 Yoga, LLC v. CorePower Yoga, LLC et al.,* C.A. No. 2020-0249-, compl. (Delaware Court of Chancery)

Repudiation of Asset Purchase Agreement

- **In its correspondence and various briefs to support its motion to dismiss, CorePower claimed that Level 4 had failed to operate the yoga studios in the ordinary course and had thus repudiated several material obligations under the APA, including:**
  - Breach of the affirmative interim operating covenant that Level 4 conduct the business only in the ordinary course consistent with past customs and practice
  - Breach of the unconditional and unqualified (i.e., by a reasonable / commercial / best efforts standard) representation that the business has been conducted in the ordinary course consistent with past customs and practice and has not suffered material loss (which rep was not limited to the date of signing)
  - Breach of the representation that Level 4 has not terminated or closed any facility, business or operation
  - Breach of the representation that there has been no Material Adverse Effect

Repudiation of Asset Purchase Agreement

- **In its complaint and opposition to the motion to dismiss, Level 4 asserted that CorePower has seized upon the COVID-19 crisis to renege on its obligation to close, which was baseless:**
  - The APA did not contain any closing conditions or termination rights
    - CorePower stressed in its opening brief that the absence of closing conditions does not render nugatory the representations
  - The APA also did not include any *force majeure* provision
    - CorePower acknowledged this in its opening brief, but claimed that the principle purpose of the APA had been frustrated (i.e., to convey studios to CorePower that were operating consistent with "past customs and practices")
    - Level 4 argued that the purposes of the APA were several (studio spaces, equipment, etc.) and the frustration of one purpose (impossibility to temporarily operate the yoga studios) is not sufficient for a frustration of purpose claim
    - CorePower, however, argued that the principal purpose of the contract—the sale of operational yoga studios that would conduct business—was substantially frustrated, which is what matters for a frustration of purpose claim
  - Temporary closure of yoga studios had became "ordinary course of business" in light of COVID-19 and was in compliance with applicable laws and studio franchise agreements; there had been no change in business that was unique to target
    - CorePower claimed that Level 4 had warranted that at closing, the business would be operating both legally and consistent with its prior robust practice and customs, i.e., being the same as "normal day-to-day operations" of the business before January 2019
  - The interim operating prohibitions on terminating and closing studios were not intended to cover temporary closures required by governmental authorities in response to COVID-19
    - CorePower claimed that the word "temporary" is nowhere to be found in the APA
  - No Material Adverse Effect had occurred:
    - No adverse change in the target's business that is consequential to the company's long-term earnings power over a commercially reasonable period
    - Target had not been disproportionately impacted by COVID-19 to any greater extent than any other yoga studios

Bed Bath & Beyond / 1-800-Flowers.com

Bed Bath & Beyond / 1-800-Flowers.com

- **On February 14, 2020, Bed Bath & Beyond Inc. (“BBB”) and 1-800-Flowers.com, Inc. (“1-800-Flowers”) entered into an Equity Purchase Agreement (the “EPA”) for the sale by BBB of its PersonalizationMall.com business (“PMall”) to 1-800-Flowers**
- **On March 23, 2020, 1-800-Flowers informed BBB that it did not intend to close the transaction on March 30, 2020 as scheduled, and requested that closing be delayed by one month**
- **The next day, 1-800-Flowers sent a letter to BBB unilaterally postponing the closing until April 30, 2020 to allow the parties the opportunity to address the continuing impact of COVID-19**
  - While in its letter and in subsequent correspondence 1-800-Flowers indicated that it still desired to proceed with the transaction, it also stated that it was not in a position to determine if the closing conditions have been or will be satisfied
- **On April 1, 2020, BBB brought suit in the Delaware Court of Chancery seeking specific performance of 1-800-Flowers’ obligation to close the purchase**
  - In its motion to expedite, BBB sought that trial be scheduled for July 2020 (thereby effectively delaying the closing for several months)
- **On April 17, 2020, 1-800-Flowers filed answers to BBB’s complaint to mainly deny BBB’s allegations**
- **On July 21, 2020, 1-800-Flowers and BBB entered into a settlement agreement with respect to the litigation**
  - Pursuant to the settlement agreement, the purchase price was reduced from $252 million to $245 million
  - The purchase price reduction was conditioned on the closing occurring by August 3, 2020
- **On August 3, 2020, the transaction closed**

Case Reference: *Bath & Beyond, Inc. v. 1-800-Flowers.com, Inc. et al.,* C.A. No. 2020-0245-, compl. (Delaware Court of Chancery)

1-800-Flowers’ Basis for Delaying the Closing

- **1-800-Flowers’ stated reasons for delaying the closing included:**
  - Closing at the originally scheduled date was “commercially impracticable” and would be “extremely and unreasonably difficult” in light of COVID-19
  - 1-800-Flowers had limited resources available to complete the documentation and other actions required to close the transaction, as well as to complete the integration of the PMall business into its existing business
  - Given the unprecedented circumstances, the parties were not in a position to determine if the closing conditions have been or will be satisfied, including to assess:
    - Whether the PMall business has been, or would reasonably be expected to be, materially adversely affected by the COVID-19 pandemic
    - Whether the PMall business has operated consistent with past practice (including facilities closures and ceasing operations)
    - Whether PMall’s employees, customers and suppliers have been adversely affected

BBB's Case for Seeking Specific Performance

- **BBB asserted that 1-800-Flowers had no basis to refuse to close and unilaterally impose a 30-day extension, without any assurance that the transaction will indeed close and when it will close**
  - Closing was a simple procedure and the only remaining closing items were the delivery of signature pages to ancillary agreements and the wiring of the purchase price, both of which could be done by remote communications
  - The PMall business was relatively stand-alone and required very little integration into 1-800-Flowers' existing operations
    - BBB offered 1-800-Flowers flexibility with respect to transition services to facilitate the closing
  - No "Material Adverse Effect" had occurred; MAE provision in the EPA was customary and PMall was in the same situation as millions of businesses worldwide facing the impact of COVID-19
    - MAE definition excluded broad-based industry or market-wide impacts, unless such impacts had a disproportionate effect on PMall compared to others in the industry or market in which PMall operates
    - PMall's position was similar to virtually all other retail business
  - BBB believed 1-800-Flowers' strategy was designed to allow it to "wait and see" what impact the COVID-19 outbreak would have on the PMall business and whether it should attempt to assert in the future a retroactive invocation of an MAE

Carlyle and GIC / Juweel

Carlyle and GIC / Juweel

- **On December 16, 2019, a consortium of investors including affiliates of The Carlyle Group ("Carlyle") and GIC (Ventures) Pte. Ltd (together, the "Buyers") entered into a share purchase agreement (the "SPA") with Juweel Investors Limited ("Juweel") and other sellers to acquire a minority interest in GBT JerseyCo Limited ("GBT")**
  - GBT is a corporate travel management company that operates under the brand name American Express Global Business Travel; it was created as a joint venture between American Express and Juweel in 2014
- **On April 8, 2020, the Buyers indicated that they believed an MAE had occurred; they subsequently also claimed that GBT had failed to operate in the ordinary course of business due to its cost-cutting steps**
- **On April 27, 2020, the parties amended the SPA to move the closing to May 7, 2020**
- **On May 1, 2020, after communicating in a series of letters their belief that the sellers could not satisfy the conditions to closing, the Buyers informed Juweel that they were not obligated to close**
- **On May 6, 2020, Juweel brought suit against the Buyers in the Delaware Court of Chancery seeking specific performance of their obligation to close the transaction**
- **On May 8, 2020, the Buyers brought separate suits seeking declaratory judgments that they were not obligated to close**
- **On May 11, 2020, Juweel filed a motion to expedite the proceedings over concerns that the financing for the transaction would fall apart if the transaction did not close by June 30, 2020 (the date the debt financing agreements are set to terminate)**
  - On May 14, 2020, the motion for expedited proceedings was denied by the Delaware Court of Chancery

Case Reference: *Juweel Investors, Ltd. v. Carlyle Roundtrip, LP et al.*, C.A. No. 2020-0338-JRS (Delaware Court of Chancery)

Carlyle and GIC / Juweel

- **On June 1, 2020, Juweel terminated the SPA after providing the Buyers a final breach notice on May 21, 2020**

- **On July 8, 2020, Juweel filed an amended complaint in the Delaware Court of Chancery seeking a damages award**
  - After the Delaware Court of Chancery held that there was no possibility that Juweel's lawsuit could be resolved before June 30, 2020, when the funding commitments by the lenders were set to expire, Juweel decided to pursue damages after termination of the SPA

- **On July 8, 2020, the Delaware Court of Chancery scheduled the trial for November 15-19, 2021**

Carlyle and GIC's Refusal to Close

- **The Buyers alleged that GBT has suffered a Material Adverse Effect**
  - COVID-19's impact is "severe and durationally significant", as it has caused a severe and long-lasting impact on GBT's earning potential
    - Declines in revenues from both corporate customers and suppliers, such as airlines and hotels, that far exceed 20%
    - Overall U.S. travel demand has fallen by more than 95% due to the pandemic, corporate travel has almost stopped and industry consensus indicates the impact of COVID-19 will persist over the course of several years
  - GBT's forecasts provided to the Buyers were far too optimistic, not in line with industry consensus and ignored the impact that the transaction itself would have on GBT's cash flow and cash balance
- **The carve-outs in the MAE definition do not apply to pandemics**
  - MAE definition contains generic carve-outs allocating particular risks to the buyer, but it "unambiguously" does not contain a carve-out for public health crises, pandemics or epidemics, acts of God or force majeure events, confirming that the parties agreed that this risk would remain with the sellers
    - Such carve-outs are well-known in the market and were known (along with the risk of pandemics) to sellers and their counsel; sellers could have sought to include such carve-outs in the definition of MAE but did not
  - Interpreting generic carve-outs to cover a pandemic would make the specific pandemic carve-outs used in other transaction agreements meaningless and would meaningfully alter how sophisticated parties have priced pandemic risk into their transactions
- **Even if the carve-outs apply, GBT has still experienced an MAE because it has been disproportionately adversely affected by COVID-19 relative to other industry participants**

Carlyle and GIC's Refusal to Close

- **The Buyers alleged that GBT failed to comply with the covenant to operate its business in the ordinary course consistent with past custom and practice**
  - GBT implemented cost-cutting measures, including reducing employees' salaries, imposing a hiring freeze, reducing investment and capital expenditures and cutting other operating expenses without consultation / consent from the Buyers
    - The measures GBT is taking completely transform the company the purchasers agreed to buy and are far more extreme than measures taken in the past (even in response to the financial crisis)
- **The Buyers claimed that the impact of COVID-19, as well as measures taken by GBT in response, would render a number of representations and warranties inaccurate at closing, including those relating to material contracts, suppliers / customers**
- **The Buyers argued that GBT's plans with respect to the leveraged recapitalization transaction (including its use of the proceeds from its new credit facility) did not comply with the requirements of the SPA**
  - The Buyers asserted that GBT manipulated the refinancing transaction mandated by the SPA to increase the amount of cash in its balance sheet and thereby the purchase price the Buyers had to pay at closing
  - These provisions are heavily redacted from the publicly filed versions of the complaints
- **Other alleged violations of the SPA that resulted in a failure to satisfy closing conditions:**
  - GBT's failure to provide requested information for the Buyers to assess whether an MAE occurred means the covenant to provide access and investigation was not complied with in all material respects
  - GBT's refusal to have GBT's officer certify in their personal capacities (as opposed to on behalf of GBT) the accuracy of certain representations

Juweel's Basis for Damages

- **Juweel asserted that the Buyers had no legitimate basis to refuse to close the transaction**
- **Juweel claimed that GBT had not suffered a Material Adverse Effect**
  - GBT continued to have a strong market and liquidity position
  - GBT had additional buffers against adverse impacts on its business due to COVID-19 (e.g., ability to obtain third-party financing, potential for COVID-19-related relief from the government)
  - GBT had also implemented cost-saving initiatives and a business response plan to maintain its competitive position based on its experiences with prior downturns and travel disruptions
  - The impact of COVID-19 will be a short-term phenomenon, even with respect to the travel industry
- **Juweel claimed that, even if an MAE had occurred, several carve-outs in the MAE definition apply**
  - Even though the SPA did not include a specific carveout for pandemics, multiple carve-outs were broad enough to capture the effect of pandemics on GBT (e.g., general business or economic conditions, national or international political or social conditions or any disruption in financial, banking or securities markets)
  - Carve-outs reflected in the MAE definition were written broadly for a reason and "are not intended to spell out in detail every possible scenario under which their terms will be triggered," instead focusing on "economic effects that could possibly be trigged by many possible causes—including a pandemic"
  - GBT and its competitors in the travel industry have been equally affected by COVID-19, thus the Buyers cannot establish an MAE on the basis of disproportionate impact
- **Juweel claimed no breach of the interim operating covenant had occurred**
  - Cost-cutting measures were in the ordinary course and consistent with GBT's past custom and practice, including its practices during the global financial crisis of 2008, as well as the types of measures taken by all other businesses in the corporate travel industry

Juweel's Basis for Damages

- **Juweel claimed that the Buyers' other claims are without merit**
  - GBT had fully complied with the requirements of the SPA relating to its refinancing
  - Representations and warranties are brought down at closing to an MAE standard, and GBT had not suffered an MAE
  - GBT officers are not required to certify representations in their personal capacities

- **Juweel asserted that the Buyers' willful and intentional breach of the SPA provided a basis for Juweel to terminate the SPA and recover the damages suffered as a result of the Buyers' breach**

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