

This draft Essay is an academic exploration of issues related to the Twitter-Musk litigation. It is intended solely for educational purposes and does not constitute legal or investment advice. Nothing herein may be construed as a prediction as to the outcome on any issue or the case as a whole. The Essay is updated from time to time.

Limited Specific Performance in the Musk-Twitter Case and Beyond

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Twitter's suit against Elon Musk is one of the most closely watched corporate law cases in a generation. From even before Musk agreed to acquire Twitter through his purported termination of the agreement and the subsequent litigation, the case has drawn unprecedented attention in part because of the high visibility of the target, as well as the spectacle of bots, spam, whistleblowers, and the colorful personality of Musk himself. The case will determine who controls one of the most powerful and influential communications platforms in existence, with effects that will reverberate throughout the world.

The importance of Twitter itself threatens to overshadow the fact that the issues in the case implicate the fundamental economics of M&A deal-making. After Musk purported to terminate the deal, Twitter sued for specific performance of the merger agreement, which would force Musk to purchase the company rather than escape by paying the \$1 (or perhaps \$2) billion termination fee and damages cap. With some estimates of Twitter's current value as low as \$25 billion and an agreed price of approximately \$46.5 billion,¹ the *remedy* chosen by the court, completely aside from the adjudication of the merits of the case, could mean a difference of \$20 billion or more. Thus, a vast sum of money hinges on the interpretation a relatively short boilerplate provision at the end of the merger agreement.

A majority of expert commentators have opined that it is very likely that Twitter will receive specific performance in this case. This Essay raises some issues that may make the specific performance

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¹ See Twitter Proxy Statement at 12 (this amount includes certain expenses of the transaction in addition to the purchase price).

analysis more complicated than that consensus suggests. Among the central questions to be resolved is whether the parties themselves control equity jurisdiction, whether the specific performance remedy should be available in private equity deals if the debt financing is unavailable, and what the standards are for awarding specific performance in M&A cases. This broken deal reveals a certain brittleness of the current standard private equity deal documentation in general, and likely defective specific performance provisions in this case in particular, which place enormous economic consequences on the court's choice of remedy. The decision is certain to become a landmark because of the notoriety of the case, but the consequential decision for future deals is one of remedy that will shape private equity M&A specifically, and perhaps contract law more generally.

I. The Deal Background

The Twitter deal has implicated just about all aspects of M&A—creeping open market purchases by Musk, a seemingly delayed 13D, a looming hostile takeover, a poison pill deployed by Twitter, a negotiated acquisition agreement, a termination of the agreement based on a purported material adverse change, and finally litigation in the Court of Chancery. Alongside the legal maneuvering was the drama of the parties' barbs on the social media platform itself.

On April 25, 2022 the parties signed a merger agreement, in which Twitter agreed to an acquisition by Musk and his entities. The relationship soon soured, with Musk tweeting on May 13 that the deal was “temporarily on hold” over a dispute about the percentage of “spam/fake accounts.”² On July 8, Musk purported to terminate the transaction under the Merger Agreement. On July 12, Twitter filed suit in the Delaware Chancery Court in a case now presided over by Chancellor McCormick. Twitter asked the Court for specific performance under Section 9.9 of the merger agreement, which if granted would result in a court order for Musk to fund his equity investment and close the transaction.

The litigation on the merits (whether Twitter or Musk breached the agreement) is a fact-intensive dispute that may not generate significant new precedent. But the dispute over the available remedy—choosing between the reverse termination fee and specific performance—will affect deal-making for years or decades to come. Rather than seeking damages, Twitter is seeking specific performance of the agreement, an “extraordinary remedy” that normally is only granted as a matter of course in certain types of contracts.³ The Court will ultimately need to choose between legal and equitable remedies, a decision that likely implicates about \$20 billion in value.

II. Debt Financing and the Prevention Doctrine

If Elon Musk is deemed in breach of the agreement, the court must choose what remedy to award Twitter. The choice is between specific versus substitutionary remedies,⁴ in this case specific performance of approximately \$46.5 billion, or damages (likely of either \$1 or \$2 billion). The most relevant section of the merger agreement is a boilerplate provision in the “General Provisions” Article that provides for what is called “limited specific performance.” Under this provision, Twitter is entitled to specific performance

² See <https://twitter.com/elonmusk/status/1525049369552048129?s=20&t=5oSP1LtmSxkBK7xnsZIC5g>

³ The most notable exception is contracts for the sale of real estate, where land is considered “unique” and therefore specific performance is granted more as a matter of course.

⁴ See, e.g., DAN B. DOBBS, LAW OF REMEDIES § 3.1, at 209 (2d ed. 1993) (explaining the difference between specific and substitutionary remedies).

if and for so long as (1) that conditions to closing have been satisfied, (2) the debt financing has been funded (or will be funded) and (3) Twitter commits to close.

In most deals, the limited specific performance provision normally causes few problems, because the target company's prospects do not decline so substantially as to make the cost of specific performance radically different from the cost of damages. But in some cases, especially those where the target's business or the general market declines substantially between signing and closing, debt financing may not materialize. In many cases, the acquirer may be somewhat to blame for the failure of debt financing, by perhaps not using its "reasonable best efforts" to secure the financing.⁵ Again, this is particularly likely when the target's prospects have declined. In either case, the second requirement of the limited specific performance remedy is not met, so the literal terms of the specific performance provision do not apply. Thus, the reverse termination fee or damages would be the appropriate remedy.

What if the acquirer, possibly suffering from buyer's remorse, is at least partly the cause of the financing failure? Should the acquirer be able to avoid specific performance because the second requirement is not met, even if the acquirer played a role in the failure of the financing? The closest case to the scenario of a financing failure is a 2021 case that Chancellor McCormick herself decided, *Snow Phipps Group, LLC v. KCAKE Acquisition* ("KCAKE").⁶ In that case, the Chancellor applied prevention doctrine to excuse the debt financing "condition" on specific performance. Thus, the Chancellor ordered specific performance even though the literal terms of the contract precluded it, on the basis that the acquirer caused the condition not to occur.

On the one hand, the analysis seems to honor the parties' intent. The parties provided for specific performance, provided that the debt financing was in place. Although the debt financing was not in place, it was the buyer's failure to use reasonable best efforts that caused the financing to fall through. Thus, under the doctrine of prevention, the Court effectively writes a provision into the agreement to remove the limitation on the specific performance remedy, allowing the target to force the sale.

In analyzing the applicability of prevention doctrine, the Court in KCAKE relied on the Restatement (Second) of Contracts, explaining that it "supplies the basis for Delaware's formulation of the prevention doctrine."⁷ In other words, Delaware's prevention doctrine is drawn from the Restatement, of course with an overlay of Delaware caselaw. The Court reasoned that "Under the Restatement, the relevant question is limited to whether a party's breach 'contribute[d] materially to the non-occurrence of a condition.'" Finding that the buyer's breach of the financing covenant did contribute materially to the non-occurrence of the financing condition, the Court excused that condition and awarded specific performance.

The KCAKE Court thereby interpreted the debt financing limitation on specific performance as a "condition" whose non-occurrence can be excused under the Restatement. However, further examination of the Restatement shows that the financing requirement under the specific performance section is not a condition, as used therein. The Restatement defines a condition as "an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes

⁵ Although the "efforts" formulation is different in different agreements, in the Twitter merger agreement Musk is required to use "reasonable best efforts." See Section 6.10.

⁶ *Snow Phipps Group, LLC v. KCAKE Acquisition, Inc.*, No. 2020-0282-KSJM, 2021 WL 1714202 (Del. Ch. April 30, 2021).

⁷ See *id.* at 117, citing *Anthem-Cigna*, 2020 WL 5106556, at *90, *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d at 273 and *WaveDivision*, 2010 WL 3706624, at *14-15)).

due.”⁸ Although the availability of debt financing is in fact “an event, not certain to occur,” its non-occurrence does not prevent any other parties’ performance from becoming due. Musk’s performance is due whether or not the financing is in place. It is merely the specific performance remedy for the failure of that performance that is tied to the availability of financing, not any duty of performance.

To see that the financing limitation is not a condition, consider that the Restatement states that the effect of a condition not occurring is that “performance of a duty” is not “due” or in some cases is “discharged.”⁹ But the failure to secure the debt financing does not prevent any duty of Musk from becoming due, and does not discharge any of his duties. Musk’s duty is to fund the equity funding and close the merger, as well as to use “reasonable best efforts” to arrange financing and the other covenants in the agreement. But the contract itself says the financing “is not a condition...to any of its obligations,”¹⁰ as does Twitter’s proxy statement.¹¹ Accordingly, the specific performance provision is not an “obligation” or the limitation is not a “condition” or both. The failure of financing has two primary effects under the merger agreement: it gives the company the right to collect the reverse termination fee from Musk, but it takes away Twitter’s specific performance right under the specific performance section.

The problem with applying prevention doctrine to specific performance is easier to see by looking at how the Restatement describes the effects of applying prevention doctrine. The Restatement says, “[w]here a party’s breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.”¹² But even if the financing is a condition, isn’t a condition of a contractual duty. It’s a condition on a *remedy* for breach of a contractual duty. In other words, specific performance is not a contractual duty, any more than a damages is a contractual duty. It is a court-ordered remedy for breach of a contractual duty. Musk has the same legal duties whether or not specific performance is granted as a remedy for breach of his duties.

Prevention would be appropriate if the debt financing were a condition of Musk’s obligations under the merger agreement and Musk were trying to escape from those obligations for that reason. If that were the case, Musk would not be able to escape his obligation to perform (i.e., not be in breach) under the merger agreement, unless the condition were excused. In such a case, he could also escape paying the reverse termination fee. But the debt financing isn’t a condition of Musk’s obligations, so no such problem arises. Instead, the provision is a limitation on the specific performance remedy available under certain circumstances. To sweep away the financing limitation is to require the buyer to perform something more than was bargained for; the buyer is required to purchase a company with 100% equity when the bargain was to purchase the company with substantial debt financing. Read this way, by not excusing the “condition,” the court is simply giving Twitter what it bargained for.

In determining whether to award specific performance, the Court normally would start with established equitable principles. These principles provide that specific performance is an “extraordinary remedy” with certain prerequisites beyond the agreement of the parties. The controlling Delaware case provides that “[a] party must prove by clear and convincing evidence that he or she is entitled to specific

⁸ RESTATEMENT (SECOND) OF CONTRACTS § 224.

⁹ RESTATEMENT (SECOND) OF CONTRACTS § 225.

¹⁰ See Merger Agreement, Section 5.4 (“Notwithstanding anything contained in this Agreement to the contrary, the Equity Investor, Parent and Acquisition Sub each acknowledge and affirm that it is not a condition to the Closing or to any of its obligations under this Agreement that the Equity Investor, Parent, Acquisition Sub and/or any of their respective Affiliates obtain any financing (including the Debt Financing) for any of the transactions contemplated by this Agreement.”)

¹¹ See Proxy Statement at 156.

¹² *Restatement (Second) of Contracts* § 245.

performance.”¹³ Additionally, the for specific performance the “contract must contain all material terms in order to be enforceable, and specific performance will only be granted when an agreement is clear and definite and a court does not need to supply essential contract terms.”¹⁴

The KCAKE approach raises the question of whether there is clear and convincing evidence that specific performance was warranted in that case or in this one. The KCAKE case itself did not mention the clear and convincing evidence requirement except as to the balancing of equities, so it’s unclear what standard was applied as to the other issues. It is also unclear as to what, exactly, needs to be proven by clear and convincing evidence beyond “entitlement” to specific performance. Is it merely the contract terms and balancing of the equities that must be proven by clear and convincing evidence, or does it also apply to the merits determination of the other party’s breach, a possibility raised in *Tyson v. IBP*?¹⁵ Depending on how the court defines what is meant by the entitlement, it is possible that Twitter’s demand for specific performance could make the *merits* determination of whether Musk breached subject to clear and convincing evidence, a standard higher than the normal preponderance of the evidence standard.¹⁶ Thus, the requested remedy of specific performance could make it more difficult for Twitter to prevail on the merits of the case.

Moreover, as mentioned above, Delaware law provides that specific performance will not be granted if the Court needs to supply essential contract terms. Yet that is arguably what a court must do to use prevention doctrine to excuse the limitation on specific performance. The court must effectively insert a proviso to the condition, overriding the explicit limitations on specific performance that the parties agreed to. The court may need to find clear and convincing evidence that the parties intended such an unwritten term to rewrite the contract in such a way. This is among the many questions raised by the requirements of clear and convincing evidence and a “clear and definite” agreement.

If the Court concludes it is possible to apply prevention doctrine or the duty of good faith and fair dealing more generally to the specific performance remedy, the question arises as to what the parties’ intention was. In general, parties should get what they were promised-their expectation interest, and the question is whether those expectations are best fulfilled by applying prevention doctrine or not. As will be discussed below, the KCAKE opinion relied on the fact that the parties are highly sophisticated in determining to give effect to their language. But sophisticated parties also know how to craft provisions that protect them, without the court reading new words into the contract to protect what they meant but failed to articulate. The fact that sophisticated parties failed to provide for a particular contingency “does not mean that there is a gap in the remedial fabric of the business law that equity should fill.”¹⁷ It may simply mean that they didn’t intend the provision that prevention doctrine would apply. It is not likely that sophisticated parties would intentionally rely on the possible deployment of prevention doctrine to protect the most important economic rights against such an obvious eventuality. They would draft terms to explicitly protect against that eventuality.

¹³ *Osborn v. Kemp* at 1158.

¹⁴ *Id.* at 1159, quoting *Ramone v. Lang*, 2006 WL 905347, at *10 (Del.Ch. Apr. 3, 2006).

¹⁵ See *Tyson v. IBP*, at 54, n. 98.

¹⁶ The Delaware Supreme Court has described the standard as “an intermediate evidentiary standard, higher than mere preponderance, but lower than proof beyond a reasonable doubt,” and as requiring “evidence which produces in the mind of the trier of fact an abiding conviction that the truth of [the] factual contentions are ‘highly probable.’” See *Cerberus Intern., Ltd. v. Apollo Mgt., L.P.*, 794 A.2d 1141, 1151 (Del. 2002).

¹⁷ *Trenwick America Lit. v. Ernst & Young*, 906 A. 2d 168, 199 (2006).

This is particularly true because Delaware is fond of saying sophisticated parties know how to draft contracts that reflect their intentions, and therefore there is no need for the Court to write in additional clauses to protect them from the words they've chosen. Prevention doctrine is no different, and not surprisingly the fact that a contract is between sophisticated parties weighs against applying prevention doctrine under the "assumption of risk" exception, as Delaware courts have held.¹⁸ The application of prevention doctrine is therefore equivalent to the conclusion that the parties did not foresee the possibility that an acquirer might slow walk the financing, which is an implausible oversight for experienced counsel in a transaction of the magnitude and visibility of this one.

One piece of evidence against the interpretation that the parties would excuse the financing requirement if Musk's breach caused the failure of the financing is that they drafted similar provisions in other sections. For example, in Section 8.1(b)(i), allows the parties to terminate the deal under certain circumstances if the merger drags on too long. There, however, the parties specifically provided that the termination right is not available to any party is the cause of the delay.¹⁹ If the parties had intended to excuse the financing condition, they could have easily achieved the result by copying and pasting this one sentence carveout from Section 8.1(b)(i). The defendant will argue large company like Twitter, advised by some of the most sophisticated law firms in the world, doesn't need Court of Chancery help them effectuate their contractual intentions. This is especially the case when effectuating the intention would simply require inserting a brief carveout, of a type they did use in other sections, to clarify what they are now treating as the centerpiece of the merger agreement's remedial provisions.

The real challenge, at least on the surface, arises when the buyer intentionally sabotages the financing, as opposed to simply making halfhearted efforts to secure it. It is too early to know whether that happened in this case, although it appears that Twitter will make that argument if the financing fails. Although an intentional breach may seem to call for more harsh treatment of the defendant, it is anomalous in contracts generally to take intention into account, yet M&A contracts often do.²⁰

In this case, however, the topic has already been dealt with in the merger agreement, with special provisions that kick in in the event of "knowing and intentional breach" of one of the parties.²¹ The agreement appears to (indirectly) use a tiered approach to the termination fee. In the case of a knowing and intentional breach, the agreement then entitles Twitter to seek monetary damages, possibly of an extra \$1 billion.²² The parties could have chosen to uncap damages for such a knowing and intentional breach as agreements often do, but instead they chose to keep them capped, although at a possibly higher

¹⁸ See, e.g., *Bobcat N.A., LLC v. Inland Waste Holdings, LLC*, CVN17C06170PRWCCLD, 2019 WL 1877400 *6-8 (Del. Super. Apr. 26, 2019). See also *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 2021 WL 4344172 (2021) (using the fact that the parties were sophisticated and knew a contingency might not occur to invoke the "assumption of the risk" exception).

¹⁹ Merger Agreement, Section 8.1(b)(i) ("provided, however, that (x) the right to terminate this Agreement pursuant to this Section 8.1(b)(i) shall not be available to any party if the failure of such party to perform or comply with any of its obligations under this Agreement has been the principal cause of or resulted in the failure of the Closing to have occurred on or before such date.")

²⁰ See, e.g., Theresa Arnold, Amanda Dixon, Madison W. Sherrill, Hadar Tanne & Mitu Gulati, *The Cost of Guilty Breach: Willful Breach in M&A Contracts*, 62 B.C. L. Rev. E.Supp. I.-32 (2021)

²¹ See Section 8.2; 8.3(c)

²² This is also ambiguous because Section 9.9 limits "aggregate monetary damages" to \$1 billion, but if the termination fee is an alternative performance, rather than damages, then this would not limit the recovery. This is discussed in more detail in Part IV.A.

amount.²³ Thus, the parties themselves have provided for what should happen if there is an intentional sabotage of the agreement, and that provision is for damages, not prevention doctrine to override the limited specific performance. In Delaware, when a contingency is covered by the agreement, the courts do not use the duty of good faith to augment what the parties have negotiated.²⁴ Knowing and intentional breaches are clearly covered; the remaining question is whether the contract was intentionally silent, or whether the parties didn't think of the issue.

One could argue that prevention doctrine should be extended to specific performance, on the ground that it entails similar policy considerations as conditions. Perhaps the Court will do that. It is true that both approaches are essentially concluding the parties overlooked a contingency, and had they thought about it, they would have included a proviso to the limit on specific performance. However, Delaware has adopted the Restatement as the "basis" for its law on this issue, and the text of the Restatement doesn't contemplate such an application. In addition, even from a policy perspective there are important differences between using the provision to excuse conditions and to expand specific performance. The existing prevention doctrine is used to avoid a situation where a party is able to act in bad faith to escape their contractual duties and (damages) liability altogether. If prevention doctrine is not applied to limited specific performance, it would not allow any parties to escape any of their duties; instead, they simply wouldn't receive the "extraordinary" remedy of specific performance, instead receiving their agreed damages. Finally, the principle underlying prevention doctrine is that parties wouldn't rationally agree to let a party's lack of cooperation deprive the other party of a remedy—essentially that they overlooked the contingency. But this agreement already contains a provision that provides extra damages to Twitter for a "knowing and intentional" breach. They did not overlook that contingency; they provided for it but simply may have chosen to limit damages to an extra \$1 billion.

Finally, there is the KCAKE case itself, which the Court might presume the parties were aware of. Perhaps the fact that parties substantially copied language that had been interpreted (through prevention doctrine in KCAKE) to insert a proviso on the condition suggests they intended that proviso by not changing the language. But that cuts both ways. If the parties were in fact aware of that decision, they would be aware of the supposedly overlooked contingency as well, making it implausible they weren't aware of the need for the proviso. The idea that sophisticated parties would choose to rely on the use of prevention doctrine in one case by one judge to allocate billions of dollars through the specific performance provision the plaintiffs argue is the centerpiece of the merger agreement's remedies, is not likely. It is more likely they would put the proviso in explicitly, especially given they did so in similar situations in other sections of the agreement.

III. Adequacy of Damages

The debt financing for the Musk agreement may well come through, making the literal terms of specific performance provision available. However, there is another hurdle for specific performance, which the Court may need to address in greater detail than in KCAKE. Equitable remedies, including specific performance, are within the discretion of the court and the parties don't control the Court's

²³ There is an argument that the merger agreement uncaps damages for knowing and intentional breaches, which has been made by Eric Talley. See <https://twitter.com/ProfEricTalley/status/1568094622726987776?s=20&t=hUgtdztwPHjC8r4hB5RTIA>.

²⁴ See ("It follows that where the subject at issue is expressly covered by the contract, or where the contract is intentionally silent as to that subject, the implied duty to perform in good faith does not come into play.")

exercise of those remedies. In other words, the parties do not have a right to equitable remedies in the same way they do a legal remedy.²⁵

The controlling Supreme Court case in Delaware requires that for specific performance to be granted, “[a] party must prove by clear and convincing evidence that he or she ... has no adequate legal remedy.”²⁶ In the words of a case that did award specific performance, the question is whether “is this a truly unique opportunity that cannot be adequately monetized?”²⁷ Twitter will face headwinds in showing that damages are inadequate as it is well known that specific performance will be more readily awarded to the buyer than the seller, for assets in general²⁸ and for M&A in particular.²⁹

The idea that damages are inadequate in this case is will be much more difficult to show than in some of the otherwise comparable recent cases. This isn’t a contract for the sale of a privately held cake company,³⁰ or “thirty-four yoga studios,”³¹ or a strategic combination of two meat companies,³² to take some of the examples that Twitter will likely cite. This is a cash sale of one of the most well-known and closely followed companies in the world. Although there are some difficulties assessing damages *exactly*, even in a case like this,³³ they are minimal, and exact computation isn’t necessary. The shareholders of Twitter simply need to receive \$54.20 in cash or cash equivalents. If damages aren’t adequate in this case, it is difficult to conceive of any M&A case in which they will be adequate.

Again, the closest case for awarding specific performance is KCAKE. In the KCAKE case, the buyer was trying to escape purchasing target DecoPac, a privately held company. In that case, the target’s competitors were also mostly privately held, making most relative valuation methods infeasible, and even comparable companies valuation challenging.³⁴ The inability to determine damages is one of the prime reasons for finding damages would be inadequate, and may have been met in that case. Perhaps that was the reason the Court awarded specific performance.

The next argument for specific performance is likely *Tyson v. IPB*. The Court there awarded specific performance even in the (apparent) absence of a provision requiring it. There, however, the issue of whether specific performance is appropriate wasn’t briefed by the defendants in the case, meaning that the Court didn’t have available the type of information that briefing would produce.³⁵ Perhaps because of the lack of briefing, the Vice Chancellor didn’t engage with the buyer/seller distinction for specific

²⁵ See *Pomeroy* at 114-116. It is true that the modern trend is toward awarding specific performance more liberally, and toward respecting the parties’ choice in the matter. See *infra* notes __ to __ and accompanying text.

²⁶ *Osborn v. Kemp* at 1158.

²⁷ *IBP*, 789 A. 2d at 82.

²⁸ The buyers can more easily make the argument that what they are buying is unique in some way and that damages are inadequate, whereas the sellers typically are only entitled to the payment of the price, for which damages is usually entirely adequate.

²⁹ Arthur Fleischer, Jr., Gail Weinstein and Scott B. Luftglass, *Takeover Defense: Mergers and Acquisitions* § 19.06 ENFORCEMENT OF THE MERGER AGREEMENT, TKRDF § 19.06 (“The bar for sellers is higher than for buyers (especially in an all-cash deal) given that its damages may be more readily calculated (as the difference between the amount of the proceeds of the sale and the value of the business to the seller without the buyer’s premium) and/or because protections for the buyer failing to close were already specified in the merger agreement.”)

³⁰ See KCAKE.

³¹ *Level 4 Yoga, LLC, v. CorePower Yoga, LLC, et al.*

³² See *Tyson v. IPB*.

³³ See *Coates*.

³⁴ KCAKE text accompanying fn. 442.

³⁵ *In re IBP, Inc. Shareholders Litig.*, 789 A.2d 14, 82 (Del. Ch. 2001)

performance should, other than to note that no compelling reason “came to [] mind.”³⁶ The *IBP* case also differed in that the consideration in that case was a mix of cash and stock, meaning target shareholders would have a continued stake in going concern where two operating businesses (presumably with substantial operating synergies).³⁷ That makes the determination of damages *much* harder, because the court would need to determine the value of a combination that didn’t happen. Thus, even aside from the lack of defense briefing, the *IBP* case doesn’t offer much to support specific performance analysis in a financial acquisition for cash of a widely followed public company. It is worth noting, however, that in a study examining the incidence of specific performance, none of these distinctions seemed to make a difference in the likelihood a specific performance provision was included.³⁸

From a legal perspective, the primary reason damages would not be adequate in the sense of providing full expectation damages in this case is not because they are difficult to assess, but because Twitter agreed to cap them. Twitter is entitled to \$1 billion in reverse termination fee if the financing falls through, and potentially an additional \$1 billion in damages for a “knowing and intentional” breach of the obligation to secure financing. The fact that the parties agreed to cap monetary liability in the form of damages doesn’t seem like a reason to impose larger monetary liability through specific performance. Quite the contrary. In a merger agreement, the reverse termination fee is a highly negotiated provision the parties use to allocate risk; in contrast, the specific performance section is boilerplate text copied and pasted into the “General Provisions” at the end of the agreement. The boilerplate section at the end is an unlikely candidate for the parties to add \$20 billion in settlement value to the otherwise carefully capped liability provisions. When the agreement is read as a whole, the carefully capped damages (in multiple places) make the specific performance provision tacked on to the end almost seem like an end run around the agreed limits.

Assuming the Court examines the adequacy of damages, which jurisdictionally it appears required to do, Twitter will presumably argue that damages are inadequate in large part because they can’t be quantified. In addition to the fact that a cash-out merger of a public company seems uniquely suited for quantification, there is another peculiarity of the argument. Twitter seemed to know without the slightest hesitation they wanted specific performance over the \$1-2 billion termination fee. How do they know with such certainty that a possible \$2 billion might not be better if damages are impossible to quantify?

In light of these questions as to how Twitter would show inadequacy of damages in the abstract, the question, therefore, is whether the agreement of the parties that damages are inadequate overcomes the adequacy requirement. As is typical, the parties stipulate that damages would be inadequate and that irreparably harm would result from breach, which at least some practitioners view as a recitation of a formula to “pay homage to history.”³⁹ Courts generally do not consider themselves bound by these provisions.⁴⁰ As one of the most prominent commentators on specific performance put it, “[t]he parties to a contract may try to circumvent the adequacy requirement and other judicial restrictions on the availability of specific relief by negotiating an express provision mandating specific performance or an injunction in the event of breach.”⁴¹ This forces the court into a dilemma between two principles:

³⁶ *Id.* at 83.

³⁷ The Tyson/IPB case is exactly the type of case where the traditional theory would expect that damages would be difficult to estimate. See Theresa Arnold, Amanda Gray Dixon, Hadar Tanne, Madison Whalen Sherrill & Mitu Gulati, *Lipstick on a Pig: Specific Performance Clauses in Action*, 2021 WIS. L. REV. 359, 362-363 (2021).

³⁸ See *id.* at 370-375.

³⁹ See *id.* at 364.

⁴⁰ See EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS 20.1 453 (1989).

⁴¹ *Id.* at 19.1 440.

respecting the terms of a voluntary agreement on the one hand and the discretionary nature of equity on the other.⁴²

The question of whether the parties control specific performance has arisen in a jurisdictional context in the Delaware Supreme Court, showing that the parties may not have full control over the issue. In that case, dealing with equitable jurisdiction, the Court was not persuaded by the “argument that courts sometimes give credence to agreements stipulating to the granting of equitable relief. Even assuming the validity of the Settlement Agreement, as previously discussed, jurisdiction cannot be conferred on the Court of Chancery by contract or agreement.”⁴³ This decision has been applied by Chancery as recently as 2017.⁴⁴ The Restatement, which the KCAKE also used on the issue of specific performance,⁴⁵ is in agreement, providing that “[b]ecause the availability of equitable relief was historically viewed as a matter of jurisdiction, the parties cannot vary by agreement the requirement of inadequacy of damages, although a court may take appropriate notice of facts recited in their contract.”⁴⁶

The KCAKE case, which awarded specific performance, did not engage with these principles, awarding specific performance based exclusively on the parties’ agreement with little discussion of the traditional requirements.⁴⁷ KCAKE cites *Osborn v. Kemp* for the rule that there are just three elements required to award specific performance.⁴⁸ But leaves out the preceding sentence that states that clear and convincing evidence is required and the plaintiff must prove there is no adequate remedy at law.⁴⁹ The court did not analyze the adequacy of damages at all, other than to cite a conclusion in a previous Chancery case, effectively deferring the jurisdictional issues to the parties’ agreement.⁵⁰

The notion of completely deferring to the parties’ agreement without analyzing the appropriateness of the equitable remedy seems to pose potentially serious risks. In awarding specific performance, courts often consider the interests of third parties, including the court system itself, and even as society at large.⁵¹ The Twitter case involves stronger third-party interests than most M&A contracts, as its ownership strongly influences the public dialogue around the world. Twitter’s own moderation policy suggests it recognizes how important control of Twitter is to third parties and society as a whole. Twitter is not a cake decorating company; it is a company that deeply implicates the interests of third parties. Ordering the transfer of a company of this size and significance to an unwilling buyer is tectonic event that will be felt worldwide. It is unlikely that Delaware would want to set a precedent of ceding this control entirely to the parties, without conducting a thorough analysis of all of these factors.

Finally, there is another reason why specific performance might not be available. In general, the termination fee may be thought of in one of two ways: as a liquidated damages provision or simply an alternative means of performance.⁵² The Delaware Supreme Court has determined that a termination fee should be treated as liquidated damages when the parties so designate it, even if it technically is not a

⁴² See *id.* at 19.1 440 (describing this situation as “forces the legal system to wrestle with two important principles that may be in conflict: freedom of contract and the discretionary nature of equitable relief”).

⁴³ *EL PASO GAS CO. v. TransAmerican Gas Corp.*, 669 A. 2d 36, 41 (1995).

⁴⁴ *N RE UNITED BioSOURCE LLC v. BRACKET HOLDING CORP.*, Del: Court of Chancery 2017

⁴⁵ See KCAKE, fn. 597.

⁴⁶ RESTATEMENT (SECOND) OF CONTRACTS § 359 cmt. a.

⁴⁷ The “analysis” of specific performance was literally one sentence that cited to another Chancery opinion.

⁴⁸ Citing *Osborn v. Kemp*, 991 A.2d 1153, 1158, 1161 (Del. 2010)

⁴⁹ *Osborn v. Kemp*, 991 A.2d 1153, 1158, 1161 (Del. 2010)

⁵⁰ See KCAKE at 113 fn. 566.

⁵¹ See YORIO, *supra* note 40, at 19.2.3 444-446.

⁵² See Albert H. Choi, Deal Protection Devices, 88 U. Chi. L. Rev. 757, 784-785.

liquidated damages provision.⁵³ The (regular) termination fee payable by Twitter was designated as liquidated damages in the merger agreement.⁵⁴ However, the reverse termination fee payable by the acquirer was not.⁵⁵ It is hard to know what was intended by the parties in designating the two fees differently, but an early influential commentator opined that a liquidated damages clause would be an admission the agreed amount was adequate, eliminating the right of specific performance.⁵⁶ Later, courts recognized the distinction between liquidated damages and alternative performances, allowing specific performance for the former but not the latter.⁵⁷

The reverse termination fee, once relatively rare, became increasingly common during the private equity boom from 2005-2007. The view of these provisions interpreted as an alternative performance—a pure option that financial buyers had—caused problems when the Financial Crisis erupted.⁵⁸ Termination fees are not strictly speaking liquidated damages payable upon breach but negotiated fees payable when the contract is terminated.⁵⁹ That was the very problem that arose in the spate of private equity M&A litigation during the downturn of the Financial Crisis. This was the period when dealmakers began to regularly put the limited specific performance into private equity acquisition contracts to deal with the “pure option” problem. But adding specific performance as a remedy didn’t prompt most drafters to change the way they characterized the reverse termination fee as an alternative performance; many just bolted specific performance boilerplate onto the end of an agreement that continued the option approach.

In the case of Twitter, the reverse termination fee serves both as an alternative performance and as a cap on damages. The fact that it is an alternative performance is evident that it can be payable even if the acquirer doesn’t breach—it uses its best reasonable efforts and the financing still falls through. In the case of liquidated damages, on the other hand, the usual inquiry is whether penalty analysis applies.⁶⁰ The main section dealing with damages, Section 8.3(c) clearly distinguishes between two types of money remedies of the company. The remedy for breaches by the buyer that are *not* knowing and intentional only entitle the buyer to receive the reverse termination fee—not damages capped at the amount of the reverse termination fee. In contrast, knowing and intentional breaches give Twitter the right to “seek monetary damages” capped at the amount of the reverse termination fee. At least if the buyer is not deemed in “knowing and intentional breach”, the buyer might therefore argue that the receipt of the reverse termination fee is an alternative performance and not a breach that could trigger specific performance remedy.⁶¹

However, there is a more important implication in the limited specific performance cases. Although a liquidated damages provision does not prevent specific performance from being awarded,⁶² a

⁵³ *Brazen v. Bell Atlantic*, 695 A.2d 43, 47-48 (1997), following *In Kysor Indus. Corp. v. Margaux, Inc.*, Del.Super., 674 A.2d 889 (1996).

⁵⁴ Merger Agreement, Section 8.3(d).

⁵⁵ *Id.*

⁵⁶ POMEROY, *SPECIFIC PERFORMANCE* Section 50 (3rd ed. 1926).

⁵⁷ See YORIO, *supra* note 40, at 20.4 459-464.

⁵⁸ See Steven M. Davidoff, *The Failure of Private Equity*, 82 S. CAL. L. REV. 481, 482–87 (2008).

⁵⁹ Brian JM Quinn, Response to The Cost of Guilty Breach: What Work Is “Willful Breach” Doing?, 62 B.C. L. REV. E. SUPP. I.-49 (2021).

⁶⁰ See Choi, at 784-786.

⁶¹ The Court of Chancery has in the past applied a very low bar for a breach to qualify as “knowing and intentional,” effectively equating it with knowingly taking an action that results in a breach. See *Hexion Spec. Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 746 (Del. Ch. 2008); *In re Anthem Cigna Litigation* (2020). In doing so, the court has distinguished the concept of “knowing and intentional” from that of “willful breach.” See

⁶² See RESTATEMENT (SECOND) OF CONTRACTS § 361 (1981).

fee that is a true alternative performance prevents specific performance from applying, unless the alternative performance is not forthcoming.⁶³ One way of viewing this is that if the reverse termination fee is a true alternative performance, the acquirer is not actually in breach of the agreement, just performing one of two alternatives—perform or pay a fee. Although this is probably a less likely argument to prevail, it is logically coherent and perhaps even the expectation of at least some private equity buyers.

Finally, there is the argument of how, as a practical matter, the adequacy of damages will be raised in the litigation. The agreement says that the parties “will not oppose the granting of an injunction, specific performance and other equitable relief on the basis that any other party has an adequate remedy at law or that any award of specific performance is not an appropriate remedy for any reason at law or in equity.” Assuming that a provision of this type is enforceable and not against public policy, it makes little difference. As discussed above, the adequacy of damages is a question of equitable jurisdiction that the Court itself must inquire into.⁶⁴

IV. The Broader Implications of the Remedy Decision

The Court’s choice of a discretionary *remedy* in this case means potentially \$20 billion difference in what Twitter shareholders receive, in a situation where legal remedies are relatively easy to ascertain. Although it’s not uncommon for the cost of legal remedies to differ from specific performance, this normally arises in cases where the relevant contractual language was insufficient, not between two sophisticated parties.⁶⁵ This fact suggests that the terms of the standard private equity deal documentation, which now normally contain specific performance provisions, may simply be broken. The idea of the agreed limitation on monetary damages being an order of magnitude smaller than the deal premium puts a lot of strain on the boilerplate section governing specific performance.

Still, it is crystal clear that the attorneys representing parties in M&A favor the inclusion of specific performance clauses.⁶⁶ In light of this, the persistent ambiguity in the clauses, combined with the careful caps on damages, is puzzling. The seeming tension between the careful liability caps and the prevalence of specific performance is heightened by the fact that it appears participants are prompted to include specific performance for fear they wouldn’t receive enough in damages.⁶⁷ There are some important factors the Court should consider to navigate this tension. The first is that, there is the possibility that the ambiguity as to specific performance simply reflects a lack of even objective agreement among the parties on the issue—a negotiated stalemate. Second, the Court needs to consider Delaware’s unique role in corporate litigation, especially in light of its unusual continued separation between law and equity courts. Twitter case may require closer examination of the economics of the deal

⁶³ See *id.* at cmt. b.

⁶⁴ Furthermore, this provision doesn’t make sense with limited specific performance, where the parties specifically negotiated specific limits on its availability. It seems likely this provision was inadvertently copied from an agreement that provided for unconditional specific performance, as is common in an acquisition by a strategic acquirer.

⁶⁵ See, e.g., *Peevyhouse v. Garland Coal & Mining Company*, 382 P.2d 109 (Okla. 1962), cert. denied, 375 U.S. 906 (1963).

⁶⁶ See Arnold, Dixon, Sherrill, Tanne & Gulati, *supra* note 20, at 378-383 (conducting interviews about specific performance with M&A participants).

⁶⁷ See *id.* at 381-382.

and equity principles, or action by the Delaware Supreme Court or even the Delaware legislature to preserve equity jurisdiction.

A. The Possibility of Negotiated Stalemate

The question raised by the preceding analysis is why parties would intentionally design such a system. The simple answer may be that they didn't. The Twitter merger agreement contains enough ambiguity about remedy that the Court must at least consider the possibility that despite the parties signing the same document, and despite that document containing a section on specific performance, there was no agreement as to when specific performance would be available. In other words, it may be that the seemingly contradictory clauses are the memorialization of a "negotiated stalemate" on the specific performance issue. And there is Delaware precedent for just such a situation.

The reason why the parties may not have reached agreement becomes evident when one explores the perplexities of the agreement. Section 8.3(c) provides that "shall constitute the sole and exclusive monetary remedy of the Company against the Parent, Acquisition Sub and the Equity Investor." Specific performance would be a "monetary remedy," but importantly the preceding is made subject to the specific performance provision (Section 9.9). However, Section 9.9 itself provides that "that in no event shall the Company be permitted or entitled to receive aggregate monetary damages in excess of the Parent Termination Fee [again in addition to certain amounts for expense reimbursement, indemnification, interest, and taxes]." Note that this does not refer to Twitter receiving the reverse termination fee; it relates to payment of damages in excess of that amount (effectively, \$1 billion). This latter provision, limiting "aggregate monetary damages," is a proviso at the end of the specific performance section, not in the section relating to legal damages.

The term "damages" is sometimes thought of as not including specific performance to pay money, but often courts use the term "damages" to include specific performance to pay money, and not merely when they are speaking loosely.⁶⁸ The term "damages" can include the specific relief to pay money.⁶⁹ It is often used to include "any type of monetary award," which can be specific performance if, as in this case, the money was the specific thing bargained for rather than substitutionary in nature.⁷⁰ Although standing alone, "monetary damages" might be thought unlikely include specific performance, when placed as a limitation in the specific performance section, the balance tips toward the interpretation that "monetary damages" limits a specific performance award of money to the reverse termination fee.

The argument isn't that the parties agreed to limit specific performance to the reverse termination fee amount—it does not appear they did—but that they may not have come to agreement on the limits on specific performance at all. The drafting of these provisions suggests the parties may have had different views on the availability of specific performance. This circumstance is reminiscent of *United Rentals v. RAM Holdings* (often known as the Cerberus case), where the parties drafted conflicting provisions on specific performance, creating ambiguity as to its availability. There, the Court held that the principles of Restatement 201 prevented specific performance. A reasonable argument can be made that Twitter likely knew or should have known that Musk's understanding was different as to when specific performance

⁶⁸ See Colleen P. Murphy, *Money as a Specific Remedy*, 58 ALA. L. REV. 119, 139-144 (2006).

⁶⁹ *Id.*

⁷⁰ *Id.* at 140-141. The notion of "damages" as "legal" rather than equitable is only one sense in which the word is used. See *id.*

would be permitted and what the total amount would be. It is possible that the parties (or more likely, their attorneys), under extreme time pressure to reach an agreement, simply memorialized their stalemate in conflicting and ambiguous language in the agreement, letting both the boilerplate specific performance section remain, along with the seemingly contradictory limitation in the very same section.

One reason that the “negotiated stalemate” interpretation might be reasonable is the history of the limited specific provisions. The reverse termination fees were once viewed as “pure options” that allowed the buyer to simply walk away by paying the fee. This imposed unacceptable risk to targets during the Financial Crisis, so the limited specific performance provisions started to appear more frequently. But the target has a pure option through shareholder approval, making the contract asymmetric. Perhaps increasing the reverse termination fee might be seen as a penalty, so the parties used a negotiated stalemate on specific performance to provide the cudgel toward closing or renegotiating. They did this with enough legal and contractual ambiguity that it wouldn’t actually happen,⁷¹ except that it did.

If this interpretation is accurate, then KCAKE destabilized this stalemate. Instead, by awarding specific performance, the Court there raised the stakes of merger agreements with limited specific performance clauses by striking out the most important limitation on those clauses—the availability of financing. Financial acquirers rely on the debt financing to meet the returns that are expected for their funds. It is possible that financial acquirers cannot agree to limited specific performance within the constraints of their business model.

Another way of thinking about the “negotiated stalemate” is as a form of “deliberate ambiguity.”⁷² It is possible that the conflicting and anomalous provisions suggest that the parties were unable to resolve the disagreement about specific performance, so they let the ambiguities remain, effectively deferring the issue for a court to decide in litigation. The unusual inconsistencies in the merger agreement suggest this may be such a case. In the *RAM Holdings* case, Chancery rejected that idea in a similarly ambiguous specific performance provision and *denied* specific performance for that reason.⁷³ It should be noted that the ambiguities in this case, although significant, are not as stark in those in *RAM Holdings* where the provisions were hopelessly conflicted.

Further evidence that the specific performance remedy may not have been intended the way KCAKE would suggest it be interpreted is the relatively meager reverse termination fee. Reverse termination fees are normally larger than termination fees, as they don’t implicate the same fiduciary concerns of stockholder preclusion or coercion.⁷⁴ The reverse termination fee here is both small compared to typical practices and the same as the regular termination fee. Why parties don’t negotiate for larger reverse termination fees remains something of a mystery. A larger reverse termination fee could reduce

⁷¹ As support for this interpretation, note the anonymous article by a “a partner at an elite international law firm” who argued that limited specific performance was an “illusion.” See Anonymous, *The Illusion of Limited Specific Performance in Mergers and Acquisitions*, 17 *Berkeley Business L.J.* 314 (2020). It is difficult to know how many private equity lawyers shared this view before (or after) KCAKE.

⁷² See Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 *TEX. L. REV.* 1581, 1583 (2005) (“Deliberate ambiguity may be a necessary condition of making the contract; the parties may be unable to agree on certain points yet be content to take their chances on being able to resolve them, with or without judicial intervention, should the need arise.”).

⁷³ *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A. 2d 810 (Del. Ch. 2007).

⁷⁴ ARTHUR FLEISCHER, JR., GAIL WEINSTEIN AND SCOTT B. LUFTGLASS, *TAKEOVER DEFENSE: MERGERS AND ACQUISITIONS* § 19.06 (“Importantly, the size of a reverse termination fee may be agreed by the parties without regard to the fiduciary concerns that are relevant to regular (not “reverse”) termination fees....Reverse termination fees have tended to be higher than (but sometimes are the same as) the regular termination fee provided for in the deal”).

the need for specific performance, while still averting dramatic choices over remedy like that in the Twitter case. It appears that the specific performance clauses in M&A contracts, at least in their present form, are a stopgap measure between the older “optionality” approach to financial acquisitions, and the newer, more sophisticated deal technology that may be developed to resolve these problems.

Ultimately, the importance of this case extends beyond Twitter, to the incentives it will create for the parties to draft more careful specific performance provisions, instead of relying on a mishmash of boilerplate provisions as in the Twitter merger agreement. The choice between a property rule like specific performance and a liability rule like damages implicates a vast literature in law and economics.⁷⁵ Although it’s impossible to adequately summarize in this short Essay, the law and economics scholarship suggests that specific performance is the efficient remedy.⁷⁶ Indeed, contracts scholars have argued that specific performance should be routinely available.⁷⁷ To some extent, this depends on the cost of renegotiation, as specific performance leads parties to try to negotiate around inefficient allocations of property rights..

In private equity acquisition contracts, the limited specific performance provision, especially with the conflicting language in this case, may best be seen as an *in terrorem* clause, designed to coerce the buyer to continue working toward financing, but not necessarily with the expectation it would be literally enforced. The Twitter case seems destined to reveal that the limited specific performance is a defective deal technology; a band-aid solution for the “pure option” problem of the Financial Crisis. One way or the other, law firms are likely to revise it after this transaction.

Even if the Court is not persuaded that the negotiated stalemate is the most likely explanation of the ambiguous terms, Musk could still prevail as to specific performance. The party demanding specific performance has a significantly higher burden under Delaware precedent than the party opposing it, for multiple reasons. As mentioned previously, the bar is higher for specific performance than for damages—the parties need to be clear and definite about the terms of specific performance, and show the entitlement to specific performance with clear and convincing evidence. Although the content of the “clear and convincing” standard is not entirely clear, it definitely means that the Court could believe Twitter’s version is more likely than not, and be required to find for Musk on specific performance, as opposed to damages.

B. Specific Performance in Delaware Specifically

The KCAKE decision, by deferring completely to the parties’ boilerplate specific performance clause, attempted to honor the parties’ intent but ultimately neglected longstanding Delaware approach to interpreting contracts between sophisticated parties by effectively rewriting the parties’ agreement. A contrary approach, one that enforced the specific performance clauses as written, would encourage the parties need to craft provisions to deal with these issues rather than relying on the courts to rewrite their

⁷⁵ See, e.g., Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. (1972). The original article focused on torts, nuisance, and crime, but Kronman extended the analysis to contractual duties. See Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 359, 362-63 (1978).

⁷⁶ See Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 343 (1984).

⁷⁷ Alan Schwartz, *The Case for Specific Performance*, 89 YALE L. J. 271 (1979).

contracts and use specific performance to overcome the failure of those contracts to address deal contingencies.

The limited specific performance remedy poses complex management challenges for the court in cases the debt financing is not in place, something that was recently noted in an anonymous short article.⁷⁸ That article went so far as calling limited specific performance “unenforceable” and an “illusion.”⁷⁹ The reason is that limited specific performance involves the Court attempting to supervise a process of forcing third parties to negotiate and agree to complex documents.⁸⁰ Moreover, the debt commitment letters typically lack third-party beneficiary provisions, do not give the buyer specific performance rights, and apply different (often New York) law.⁸¹ These complications will weigh on the courts as they try to evaluate the costs of an automatic specific performance remedy as in KCAKE.

The KCAKE decision might have benefitted from more discussion of these complexities, because although the Court’s description of its objective as “chalking up a victory for deal certainty” is attractive to law firms, it may not be the goal for the parties. Deal certainty is more than closing certainty. The parties do not want the closing to be certain. They want the court to respect the allocation of risks, including those in capped damages and reverse termination fees, that they negotiated in the agreement. This is particularly the case with private equity buyers, who have a specific business model and return hurdles that must be met. Moreover, as discussed in the previous section, it’s possible the two sides’ expectations never actually meet on specific performance. The Delaware judiciary must meet the expectations of the parties, which is more than reading a boilerplate provision literally, then dismissing its literal limitations with prevention doctrine.

The KCAKE case, by treating specific performance as automatic when in the contract, raises the stakes for Delaware: is the Court willing to simply hand over the keys to equity jurisdiction to the parties? The issues raised in this case have relevance to Delaware more than the typical jurisdiction, and not simply because many of these cases are litigated in Delaware. The Chancery Court is the heart of Delaware’s corporate law empire, and equity is the key to the gateway. One of the main reasons courts guard equity is because of the potentially immense judicial resource costs of supervising performance. Although those costs may seem justified in this gigantic case, setting this precedent will hand the keys to drafters of contracts in all sorts of cases, potentially leading to an onslaught of specific performance cases in all types of contracts. Because “the Court of Chancery has exclusive jurisdiction where injunctive relief is sought,”⁸² the case potentially makes Chancery the forum for any type of contract, not just ones involving Delaware corporate law.

It is true that the modern trend is clearly toward respecting the parties’ contractual preferences for specific performance.⁸³ As a result, the fact that the parties agreed to specific performance “may be an important and even decisive factor” in the court granting specific performance.⁸⁴ The traditional limitations on specific performance is often viewed as a relic of an earlier era, when law and equity courts

⁷⁸ See Anonymous, *The Illusion of Limited Specific Performance in Mergers and Acquisitions*, 17 BERKELEY BUSINESS L.J. 314 (2020). The author describes themselves as “a partner at an elite international law firm” took much the same position

⁷⁹ *Id.*

⁸⁰ *Id.* at 316-317.

⁸¹ *Id.* at 317.

⁸² *Kerns v. Dukes*, 707 A. 2d 363, 368 - Del: Supreme Court 1998; *NATIONAL IND. GROUP v. Carlyle Inv. Mgmt.*, 67 A. 3d 373, 382 Del: Supreme Court 2013

⁸³ See YORIO, *supra* note 40, at 19.2.2 443.

⁸⁴ See *id.* at 19.1 441; 19.3 447-448.

divided jurisdiction. Thus, one of the reasons for not applying the adequacy of damages requirement is that modern courts have law and equity merged, both in the federal system and in the vast majority of states.⁸⁵ Not so in Delaware, however. To the extent the separate law and equity courts are a relic, they are a relic still venerated in Delaware. Thus, uncritical party autonomy is a greater risk there.

The KCAKE decision builds on an apparently long-standing practice of Chancery to defer to parties' stipulations of irreparable harm. In doing this, Chancery cites a string of Chancery cases, many unpublished. These Chancery cases do indeed appear to regularly award specific performance primarily or solely in deference to the parties' inclusion of a specific performance clause. However, these cases (many of which are dated) are seemingly in conflict with Supreme Court precedents in *El Paso Gas* and *Osborn v. Kemp*.⁸⁶ The result is that the parties can manufacture equity jurisdiction in the Chancery Court. This case may provide a vehicle for the Supreme Court to provide clarity on party autonomy over Chancery jurisdiction.

V. The Substance of the Specific Performance Remedy

The previous sections have discussed possible reasons why the Court might not apply the specific performance remedy. But what will happen if Elon Musk loses all these arguments, and the Court decides to award specific performance? The agreement and circumstances make the economic outcome more complicated than one might expect, again suggesting a possible defect in the standard private equity deal documentation.

Section 9.9(b) provides for Twitter's entitlement to specific performance if the debt financing is in place (or its absence excused because of prevention, as discussed above). The entitlement is "to enforce Parent and Acquisition Sub's obligations to cause the Equity Investor to fund the Equity Financing, or to enforce the Equity Investor's obligation to fund the Equity Financing directly, and to consummate the Closing."⁸⁷ Thus, Twitter is entitled to (1) an order that Parent cause Musk to fund the equity financing (\$33.5 billion), (2) an order to enforce the equity funding against Musk directly, and (3) an order that Parent and Acquisition Sub "consummate the closing,"

⁸⁵ See *id.* at 19.2.2 442.

⁸⁶ See, e.g., *GTSI Corp. v. Eyak Technology LLC, LLC*, 10 A. 3d 1116, 1121-1122 n.1 (Del. Ch. 2010) (citing several unpublished Chancery cases for the proposition that courts defer to parties' stipulation of irreparable harm).

⁸⁷ 9.9 provides "(b) Notwithstanding anything herein to the contrary, including the availability of the Parent Termination Fee or other monetary damages, remedy or award, it is hereby acknowledged and agreed that the Company shall be entitled to specific performance or other equitable remedy to enforce Parent and Acquisition Sub's obligations to cause the Equity Investor to fund the Equity Financing, or to enforce the Equity Investor's obligation to fund the Equity Financing directly, and to consummate the Closing if and for so long as, (i) all of the conditions set forth in Section 7.1 and Section 7.2 (other than those conditions that are to be satisfied at the Closing; provided, that such conditions are capable of being satisfied if the Closing were to occur at such time) have been satisfied or waived and Parent has failed to consummate the Closing on the date required pursuant to the terms of Section 2.2, (ii) the Debt Financing (or, as applicable, the Alternative Financing) has been funded or will be funded at the Closing if the Equity Financing is funded at the Closing, and (iii) the Company has confirmed that, if specific performance or other equity remedy is granted and the Equity Financing and Debt Financing are funded, then the Closing will occur."

The way Section 9.9(b) is worded, it does not obligate Musk to personally “consummate the closing.” Simply as a grammatical matter, the obligation to consummate the closing only applies to Parent and Acquisition Sub. The only way to read the provision to obligate Musk to consummate the closing is to use the word “and” to link Musk’s obligations to the closing. But that would result in a sentence that read that Twitter was entitled “to enforce the Equity Investor’s obligation to fund the Equity Financing directly, and to consummate the Closing.” The comma and the placement of “directly” indicate that Musk is not obligated to “consummate the closing” under this provision; it is Parent and Acquisition Sub that are obligated to do that.

The limits on Musk’s personal obligation here make sense. As a natural person, Musk is not even capable of personally “consummating the closing.” He can cause X Holdings I to cause X Holdings II to consummate the closing as their sole stockholder and director, but he cannot consummate it himself. Moreover, under the preamble Musk is not a party to Article II or Article III, the portions of the merger agreement which contain the obligation to consummate the closing and payment for Twitter securities. Simply put, there is no provision of the merger agreement that obligates Musk to “consummate the closing.” Those are obligations of the acquisition entities.

Although the agreement operates in a seemingly circuitous way, this actually follows a very familiar private equity pattern. The provisions used come from private equity, where they are designed limit the obligations of private equity sponsors through the exact delineation of the obligations. As is typical, the equity commitment letter is executed between Musk and his entity. As the seller, Twitter is made a third-party beneficiary, meaning that Twitter has the right to enforce the rights of X Holdings I against Musk. This is because the equity commitment is not a payment to Twitter. It is a contribution to X Holdings so that it might fulfill its obligation to consummate the merger.

The merger agreement is also not the only source of limitations on Musk’s liability. The merger agreement provides that “[f]or the avoidance of doubt, any liability or obligation of the Parent, Acquisition Sub or Equity Investor hereunder shall be subject to the terms of the Equity Commitment Letter and the Parent Guarantee.”⁸⁸ The limited guarantee primarily exists so that Twitter could receive the reverse termination fee. The entities generally have no assets before they are funded. The limited guarantee purports to limit Musk’s liabilities to the reverse termination fee, but it is important to note that it expressly states it does not limit Twitter’s rights under the specific performance section of the Merger Agreement.⁸⁹ It does, however, pose an obstacle to some sort of remedy beyond the specific performance obligation to fund the equity commitment.

The debt financing may not materialize. As Matt Levine has pointed out recently, the deal has become much worse for the lenders since the signing.⁹⁰ The lenders have executed debt commitment letters with the buyer, X holdings I and X Holdings II. As is common in private equity financings, Twitter is not a third-party beneficiary to the debt commitment letter. Any dispute with the lenders would be litigated in New York, under New York law.⁹¹ All of these pose obstacles for the Court of Chancery to force the lenders to fund the transaction.

The question again arises what happens if Musk fails to use reasonable best efforts to secure the debt financing. That would constitute a breach under Section 6.10(c), potentially entitling Twitter to the

⁸⁸ Merger Agreement, Section 8.3(c).

⁸⁹ See Limited Guarantee, at 1.

⁹⁰ See <https://www.bloomberg.com/opinion/articles/2022-09-22/buyout-loans-have-a-bad-week>.

⁹¹ See Merger Agreement, Section 9.13.

reverse termination fee. If he does so knowingly and intentionally, then it would trigger the potential \$1 billion in damages in addition to the reverse termination fee. In other words, it's just another breach of the agreement that Twitter already claims has been breached by Musk. The agreement provides for no further consequences.

The result is that if the debt financing does not come through but Twitter otherwise prevails, Section 9.9 allows Twitter to receive an order of specific performance for Musk to fund his equity commitment (\$33.5 billion), and for Musk's acquisition entities to consummate the closing. That would theoretically mean that Twitter would have to settle for a price in between \$41-44 per share, depending on how expenses and Twitter's existing debt are dealt with.

Twitter, of course, is unlikely to (at least willingly) accept such a reduction. Accordingly, it may attempt to pierce the corporate veil of X Holdings, so as to treat Musk as effectively the obligor for the merger. That will be an uphill battle, as Delaware is not receptive to veil-piercing in general, with the Chancellor herself recently describing it as "exceptionally rare stuff."⁹² In this case in particular, the parties allocated the rights and responsibilities in excruciating detail. It is difficult to imagine that Twitter was in any way misled about the scope of Musk's liability. Furthermore, the limited guarantee signed by the parties explicitly provides that Twitter "acknowledges the separate organizational existence of Parent" and that no recourse shall be had against Musk "by or through attempted piercing of the corporate ... veil or otherwise."⁹³

Another argument Twitter might make is that breaching the financing obligation in Section 6.10, if done willfully or in bad faith, might put Musk on the hook for the entire purchase price, not just his \$33.5 billion. The use of prevention doctrine likely won't work to enlarge Musk's obligations, as the problem isn't that there's an unfulfilled condition to Musk's obligation to perform; it's that Musk never promised to fund the entire purchase price. The specific performance provision is careful to only entitle Twitter to enforce Musk's equity commitment, not the whole purchase price. Thus, although it will be frustrating to Twitter that there may be no mechanism to close the merger on the original terms, the parties appear to have clearly provided for these limited remedies in such a situation.

The resolution of these issues will be contentious and likely protracted. It is uncertain how the Court of Chancery (and New York courts, if necessary) would resolve the issues raised by the specific performance remedy. A settlement would, of course, facilitate the closing and avoid some of the thorny issues outlined here, but full litigation to the Supreme Court might provide useful certainty for future transactions.

VI. Conclusion

This brief Essay can only scratch the surface of the important issues raised by the Twitter case, but tries to identify some considerations the Court may wish to consider. Of course, the Chancellor in this case has already implicitly rejected these arguments and therefore probably will not be receptive to them. However, if an appeal to the Supreme Court occurs they may receive a fuller discussion in light of the larger policy considerations for Delaware. Although one might describe some of the arguments in this Essay as "technicalities" or "formalistic," the sort of distinctions that equity might not respect, it is

⁹² *Verdantus Advisors, LLC v. Parker Infrastructure Partners, LLC*, CV 2020-0194-KSJM, 2022 WL 611274 at *2 (Del. Ch. Mar. 2, 2022)

⁹³ See Limited Guarantee, Section 9.

important to note that parties craft their agreements in relation to formalistic categories, and doing equity requires the Court to take that into account. Ultimately, the case may come down to the fact that the proponent of specific performance carries a significantly higher burden to show clear agreement.

Regardless of whether Musk or Twitter wins, and regardless of the remedy awarded, the Twitter case will create an important precedent in Delaware law regarding remedies in M&A agreements, and will affect private equity acquisitions in the decades to come. The draw of specific performance and the preference for certainty of closing in this individual case may be strong enough to overcome the collateral effects. The larger question is really one of how dealmakers will respond to the resolution of issues in the case. How the Court resolves these issues will help to guide the response of drafters that will resolve disputes when the next sustained economic downturn arrives. One way or the other, clarity from the Court as to most or all of these issues is necessary to assist dealmakers in striking efficient bargains in the future.

The recent cases testing the limited specific performance are largely limited to COVID-related attempts by buyers to exit acquisition contracts. However, the financial disruption of the COVID era was a relatively short and the rebound rapid. In the next sustained downturn, however, private equity buyers will be looking for escape hatches again. If the Twitter litigation resolves these issues, that will help to create an orderly process. If Delaware makes the wrong decision, the next downturn could trigger a replay of the Twitter case, but many times over. In the short term that may serve the interests of Delaware and its influential bar, but in the long term it may not.