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Insights Into Corporate Governance, M&A and Securities Law

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Table of Contents:

Nationwide Injunction Pauses Implementation of the Corporate Transparency Act


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On December 3, 2024, the U.S. District Court for the Eastern District of Texas issued a nationwide preliminary injunction in *Texas Top Cop Shop, Inc., et al. v. Garland*, enjoining the federal government from enforcing the Corporate Transparency Act (CTA), its implementing regulations, and its reporting deadlines, and finding that Congress exceeded its authority in enacting the law.[1]

As a result of the decision, reporting companies are not required to comply with the CTA at this time, as the court ordered that "reporting companies need not comply with the CTA's January 1, 2025, [beneficial ownership information] reporting deadline pending further order of the Court."[2]

A FinCEN alert published after the *Texas Top Cop Shop* injunction states that reporting companies will not be subject to liability if they fail to file a beneficial ownership information report while the preliminary injunction remains in effect. FinCEN also stated that reporting companies may continue to voluntarily submit their reports.

The Department of Justice has appealed. On December 13, 2024, the Department of Justice filed an Emergency Motion for Stay Pending Appeal in the Fifth Circuit.[3] The government requested an expedited briefing schedule and a ruling "as soon as possible, but in any event no later than December 27, 2024, to ensure that regulated entities can be made aware of their obligation to comply before January 1, 2025."[4] The government's requested briefing schedule could be read to indicate that the government intends to enforce the January 1, 2025 deadline if the stay is granted. Therefore, reporting companies are well-advised to closely monitor developments in the coming days in case the January 1, 2025 deadline for filing is revived. The Fifth Circuit appears to be accommodating the government's request for a December 27, 2024 ruling; briefing on the Emergency Motion for Stay Pending Appeal is scheduled to be complete by December 19, 2024.[5]

The constitutionality of the CTA has been challenged in several other courts. The issue is on appeal in a separate case in the 11th Circuit, where a federal district court in Alabama also found the CTA unconstitutional.[6] However, in two federal district courts in Virginia and Oregon, courts denied preliminary injunctions after finding that the CTA likely is constitutional.[7] FinCEN's recent alert states, "[t]he government continues to believe—consistent with the conclusions of the U.S. District courts for the Eastern District of Virginia and the District of Oregon—that the CTA is constitutional."

Any decision on the merits may take months or longer, and the matter ultimately may be heard by the Supreme Court. It remains to be seen whether the incoming Trump administration will continue the appeal, but the first Trump administration supported the CTA legislation.

A version of this article was originally produced as a Clients & Friends Memo here.

[1] *Texas Top Cop Shop, Inc. v. Garland*, No. 4:24-CV-478, 2024 WL 4953814 (E.D. Tex. Dec. 3, 2024).

[2] *Id*. at *37.

[3] Emergency Motion for Stay Pending Appeal, Texas Top Cop Shop, Inc. v. Garland, No. 24-40792 (5th Cir. Dec. 13, 2024), ECF No. 21.

[4] *Id*. at 2.

[5] Court Directive, Texas Top Cop Shop, Inc. v. Garland, No. 24-40792 (5th Cir. Dec. 13, 2024), ECF No. 25.

[6] Notice of Appeal, *Nat'l Small Bus. United v. Yellen*, No. 5:22-CV-1448-LCB (N.D. Ala. Mar. 11, 2024), ECF No. 54.

[7] Notice of Appeal, *Cmty. Associations Inst. v. Yellen*, No. 1:24-CV-1597 (MSN/LRV) (E.D. Va. Nov. 4, 2024), ECF No. 41; Notice of Appeal, Firestone v. Yellen, No. 3:24-CV-1034-SI (D. Or. Nov. 18, 2024), ECF No. 19.

“Not Inquisitors”: Delaware Court of Chancery Shuts Down Sprawling Stockholder Inspection Demand Seeking to Investigate Corporation’s Global Regulatory Woes

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In a recent decision, *Roberta Ann K.W. Wong Leung Revocable Trust v. Amazon.com, Inc.*, No. 2023-1251-BWD (Del. Ch. Oct. 24, 2024), the Delaware Court of Chancery answered that question in the affirmative, shutting down a sprawling request for books and records regarding alleged anticompetitive conduct at Amazon.com, Inc. The decision shows that no matter what legal travails a Delaware corporation faces, a stockholder must pick and choose its target in any Section 220 inspection demand.

Roberta Ann arose from a recent wave of regulatory scrutiny into alleged anticompetitive practices at Amazon. In 2019, the European Commission launched a formal investigation into agreements between Amazon and marketplace sellers and how it uses third-party seller data. In 2020, the House Judiciary Committee questioned Amazon on a range of topics relating to its competitive practices. In 2021, the Italian Competition Authority fined Amazon $1.3 billion for violating European Union competition rules. And over the last several years, the Federal Trade Commission and states attorneys general have launched multiple actions against Amazon alleging violations of consumer protection and antitrust laws, including a September 2023 suit in the Western District of Washington drawing evidence from a four-year investigation and dozens of witnesses.

The latter action spurred a Section 220 demand from the Roberta Ann K.W. Wong Leung Revocable Trust, an Amazon stockholder, seeking to investigate whether “Amazon’s fiduciaries have authorized or allowed the Company [to] take unlawful advantage of [its] dominant position to engage in anticompetitive practices, leading to U.S. and international regulatory scrutiny, lawsuits, and fines.” After the parties failed to agree on a confidentiality stipulation as a precursor to the production of certain information, the trust brought suit in Delaware’s Court of Chancery to enforce its demand. The matter went to trial before Magistrate Bonnie David, who issued a final report recommending judgment for Amazon. In the Magistrate’s view, the trust’s recitation of “ongoing inquiries and litigation,” without more, did not establish a “credible basis” to suspect wrongdoing, and so the demand lacked a proper purpose. The trust took exception to the report, placing the matter before Vice Chancellor Lori W. Will of the Chancery Court.

Reviewing the matter *de novo*, Vice Chancellor Will agreed with the Magistrate that the trust lacked a proper purpose for its demand, but declined to address whether the litigation and investigations faced by Amazon sufficed to meet the “credible basis” bar. The demand, the Vice Chancellor observed, suffered from a “more fundamental problem”: its stated purpose, to investigate wrongdoing by Amazon fiduciaries regarding anticompetitive conduct, was “facially improper.” That “astoundingly broad” purpose, the Vice Chancellor explained, could open the door to an investigation into “*any* possible anticompetitive conduct by a global conglomerate at *any* time *anywhere* in the world”—an unacceptable result. The “boundlessness” of the trust’s demand was further evident in its “scattershot” allegations, ranging from Amazon’s sales of a “car trunk organizer” and “discount diapers,” to the design of its website, to its “market share” and alleged use of an algorithm to raise prices. Section 220, the Vice Chancellor cautioned, does not permit stockholders to “act as inquisitors, seeking a corporation’s documents for any hint of transgression.” The Vice Chancellor thus adopted the Magistrate’s recommendation, entering judgment for Amazon.

Takeaways: Although not fundamentally altering Section 220 standards, *Roberta Ann* offers an important new nuance: a court will not even reach the question of a “credible basis” unless the demand states a “lucid” purpose that allows a court to

"discern" the "specific" wrongdoing to be investigated. Even if a corporation faces an onslaught of investigations and litigation around the globe, that does not give an individual stockholder *carte blanche* to scour books and records relating to each and every allegation. A stockholder must pick and choose its target, regardless of how many potential targets may be available.

Roberta Ann will serve as an important precedent for large, multinational Delaware corporations like Amazon that, by the very nature of their business and extent of their operations, regularly face scrutiny and litigation on a range of matters around the globe. The decision may also prove useful for smaller and mid-sized corporations seeking to avoid the burden and expense of producing documents in response to overzealous, "fishing expedition"-style demands. At minimum, the decision should encourage stockholders to be a bit more circumspect, and articulate more narrowly tailored investigative purposes, in their Section 220 demands moving forward. Whether *Roberta Ann* reflects a new, more searching approach to evaluating Section 220 demands in Delaware—or stands alone as an unusually egregious case of stockholder overreach—remains to be seen.

Nasdaq Board Diversity Rules Overturned by US Court of Appeals

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On December 11, 2024, in *Alliance for Fair Board Recruitment v. SEC*, the US Court of Appeals for the Fifth Circuit ruled in a 9-8 vote that the Securities and Exchange Commission's (SEC) adoption of the Nasdaq board diversity rules (which aimed to increase the representation of women and minorities on boards of directors for publicly-traded companies) exceeded the commission's statutory powers. The rules would have required boards of Nasdaq-listed companies to be comprised of at least one female identifying director and one director who identified as an underrepresented minority or LGBTQ+, and provide annual disclosure of the demographic compositions of the board. The SEC originally approved the Nasdaq rules in 2021.

Under proposed Nasdaq Listing Rule 5605(f), companies traded on Nasdaq were required, subject to certain transition periods, to have "at least two members of [their] board of directors who are Diverse, including (i) at least one Diverse director who self-identifies as Female; and (ii) at least one Diverse director who self-identifies as an Underrepresented Minority or LGBTQ+." As an alternative to appointing or electing diverse directors, a company could publicly disclose in its SEC filings why it failed to have the required level of board diversity. Under proposed Nasdaq Listing Rule 5606 (5605(f) and 5606 together, the "Nasdaq Rules"), companies traded on Nasdaq were required to annually disclose information relating to each director's voluntary self-identified characteristics in a standardized matrix. A company that did not comply with the Nasdaq Rules or regain compliance with either rule during their respective applicable cure periods would be subject to delisting.

In October 2024, 22 states attorneys general announced an inquiry in the form of a joint letter to Nasdaq alleging that the Nasdaq Rules may conflict with both state and federal anti-discrimination laws. Similar proposed state laws have also been successfully challenged. In 2018, California enacted a mandatory gender quota for corporate boards, and in 2020, it enacted an additional diversity requirement making it mandatory for public company boards organized in California to include directors from "underrepresented communities". In 2022, the Los Angeles County Superior Court found that the gender diversity requirement violated the equal protection clause of the California constitution and permanently enjoined the rules. In 2023, the US District Court for the Eastern District of California ruled the "underrepresented communities" requirement constitutes an unconstitutional racial quota in violation of the Equal Protection Clause of the Fourteenth Amendment. The state is currently appealing both decisions.

In October 2023, Alliance for Fair Board Recruitment and the National Center for Public Policy Research challenged the Nasdaq Rules before a three-judge panel on the Fifth Circuit. The Court ruled that the constitutional claims failed because Nasdaq is a private entity and not a state actor. The Court also found no violation of the Administrative Procedures Act ("APA"), which governs the process by which federal agencies develop and issue regulations, because the SEC did not exceed the authority designated by the Securities Exchange Act of 1934 in implementing the Nasdaq Rules. In response to the 2023 decision, plaintiffs requested review by the full Fifth Circuit.

In December 2024, the Court reviewed the APA claims, rejecting the prior ruling. The Fifth Circuit sided with plaintiffs holding that the Exchange Act did not grant

the SEC the power to approve board of director diversity requirements. The Court stated that any disclosure requirement must have "some connection to the ails Congress designed the [Exchange] Act to eradicate" (*e.g.*, "speculation, manipulation, and fraud, and removing barriers to exchange competition"). Reviewing under this requirement, the Court did not find any such connection that would "saddle[] companies with an obligation to explain why their boards of directors do not have as much racial, gender, or sexual orientation diversity as Nasdaq would prefer."

In response to the decision, Nasdaq stated that it stands by the merits of the rule but will respect the Court's decision without seeking further review. The SEC announced that it is reviewing the decision, but would have to appeal to the US Supreme Court to overturn the Fifth Circuit. Pending an SEC appeal, Nasdaq-listed companies are not presently required to meet the diversity requirements of the Nasdaq Rules. Companies should still consider the impact of board diversity on their stakeholders. Proxy advisory firms such as Institutional Investor Services and Glass Lewis continue to base voting recommendations on board composition and diversity. Large institutional holders such as Blackrock, State Street and Vanguard have all expressed expectations that companies in which they invest promote and attain a certain level of diversity. It remains to be seen whether any such policies will be revised in light of the recent Fifth Circuit ruling. Several states also continue to mandate board diversity or disclosure, including Washington and Maryland, while others, including Maryland, Massachusetts, Colorado and Illinois each have non-binding resolutions encouraging gender diverse boards. As part of its "Women on Corporate Boards Study," New York has also imposed a gender reporting mandate on public and privately held companies in the state.

Corporate Compliance Programs: Updated DOJ Guidance in Antitrust Investigations

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The Department of Justice (Department or DOJ) considers the "adequacy and effectiveness of [a] corporation's compliance program" as a factor in "conducting an investigation of a corporation, determining whether to bring charges, and [in] negotiating plea or other agreements." (See Department of Justice Manual, Principles of Federal Prosecution of Business Organizations, 9-28.300.) In September, the Department's Criminal Division updated its guidance on the Evaluation of Corporate Compliance Programs ("Evaluation of Criminal Compliance Programs") to "assist prosecutors in making informed decisions as to whether, and to what extent, [a] corporation's compliance program was effective."

There are three "fundamental questions" the Department considers in evaluating a corporate compliance program:

(1) Is it well designed?

(2) Is the program being applied earnestly and in good faith; that is, is it adequately resourced and empowered to function effectively?

(3) Does it work in practice?

The guidance document identifies various factors relevant to answering these "fundamental questions" in the affirmative and should be consulted closely by internal counsel in designing and implementing a compliance program. Evaluation of Criminal Compliance Programs at 1-2.

In November, the Antitrust Division (Division) provided guidance specific to the Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (Evaluation of Antitrust Compliance Programs). (Criminal antitrust conduct is generally limited to price fixing, bid rigging, and market allocation schemes, but can extend to certain monopolization matters). While "even an effective antitrust compliance program may not deter every violation" the guidance notes that "an effective compliance program should enable a company to swiftly detect and address" potential antitrust issues. Evaluation of Antitrust Compliance Programs at 2. Notably, the Division indicated that the guidance is relevant to the investigation, evaluation, and settlement of civil antitrust matters. Id. at 3. The Division's guidance draws heavily on the framework articulated in the Criminal Division's recent updated guidance, and the principles in the Department of Justice Manual, Principles of Federal Prosecution of Business Organizations.

The Division will consider the company's compliance program: (i) when making charging decisions; and (ii) when making sentencing recommendations, assessing the program at the time of the violation and improvements after the identification of the offense. Id. at 2. When making charging decisions, the compliance program is evaluated in accordance with the three fundamental questions set out above; the Division's guidance identifies nine elements of an effective compliance program.

1. Design and Comprehensiveness: In considering the design, format and comprehensiveness of an antitrust compliance program, the Division considers, among other things: (i) the format of the antitrust compliance program, and how it fits into the company's broader compliance program; (ii) how the program is implemented and how often it is updated; (iii) who has the responsibility for integrating antitrust policies and procedures into the company's business practices; (iv) what guidance is provided to those employees most likely to identify potential antitrust violations – such as participation in meetings with competitors, and those with approval for price

changes; (v) mechanisms the company has put in place to manage and preserve communications, including electronic communications; (vi) whether the company has clear guidelines on the use of "ephemeral messaging" or "non-company methods of communication;" and (vii) the guidance the company provides to employees about document destruction and obstruction of justice. Id. at 5-6.

2. Culture of Compliance: The Division will examine "the extent to which corporate management – both senior leadership and managers at all levels – has clearly articulated and conducted themselves in accordance with the company's commitment to good corporate citizenship." Specific factors in evaluating the culture of compliance include, but are not limited to: (i) the company's leadership's efforts – through their words and actions – to convey the importance of antitrust compliance to company employees; (ii) how, and how often, the company measures the effectiveness of its compliance program; (iii) whether and how the company's commitment to compliance is reflected in its hiring practices and design of incentives (including compensation incentives); and (iv) the role and expertise of the board of directors with respect to compliance. Id. at 6 7.

3. Responsibility for the Compliance Program: "Those with operational responsibility for the [compliance] program must have sufficient qualifications, autonomy, authority, and seniority within the company's governance structure, as well as adequate resources for training, monitoring, auditing and periodic evaluation of the program." The Division will consider, among other factors: (i) whether there is a chief compliance officer or executive within the company responsible for antitrust compliance; (ii) how the compliance function compares with other functions in the company, in terms of stature, experience, compensation, rank or title, resources, and access to key-decision makers; (iii) whether compliance personnel are dedicated to compliance responsibilities or have additional non-compliance responsibilities within the company and, if so, what proportion of their time is dedicated to compliance responsibilities; (iv) whether compliance personnel report to senior leadership of the company, including the board of directors, and the format of such reporting; and (v) who reviews the effectiveness of the compliance function, and the review process for such evaluation. Id. at 7-8.

4. Risk Assessment: "An effective antitrust compliance program should be appropriately [designed and] tailored to account for antitrust risk." Factors relevant to the Division's evaluation of the compliance programs risk assessment include whether: (i) the antitrust compliance program is tailored to the company's lines of business, the industry, and consistent with industry best practices; (ii) the company collects information or metrics that will help detect antitrust violations; (iii) the company's risk assessment is current and subject to periodic review; and (iv) the company's program addresses its use of technology to conduct business, including new technologies such as artificial intelligence and algorithmic revenue management software, how the company mitigates any risk associated with its use of such tools and technology, and whether compliance personnel are involved in the deployment of new technologies, so as to assess the risks such technologies may raise. Id. at 8-10.

5. Training and Communication: "An effective antitrust compliance program includes adequate training and communication so that employees understand their antitrust compliance obligations." Consideration will be given to, among other factors, whether: (i) the company has mechanisms in place to ensure that employees follow the compliance policy; (ii) employees certify that they have read the compliance policy; (iii) antitrust policies and principles are included in a company Code of Conduct; (iv) training is required before attending trade shows or trade association meetings; (v) employees and senior leadership receive antitrust compliance training, how often such training occurs, including whether attendance at such training is recorded and preserved; and (vi) training is revised and updated, and what

factors help determine when and how such training is revised. Id. at 10-12.

6. Periodic Review, Monitoring and Auditing: "An effective compliance program includes monitoring and auditing functions to ensure that employees follow the compliance program." The Division will consider, among other similar factors: (i) the methods the company uses to evaluate the effectiveness of the compliance program; (ii) the frequency of evaluation, and whether the company has revised its compliance program in response to any prior antitrust violations or compliance failures; (iii) the monitoring and auditing mechanisms the company has in place to detect violations, such as routine or unannounced audits of documents and communications; (iv) whether the company uses analytic or statistical tools to identify potential antitrust violations; and (v) how monitoring and auditing influence changes to the compliance program. Id. at 12-13.

7. Confidential Reporting Structure and Investigation Process: "An effective compliance program includes reporting mechanisms that employees can use to report potential antitrust violations anonymously or confidentially and without fear of retaliation." The Division will consider, among other similar and related factors, whether (i) the company has a publicized system in place for employees to report or seek guidance about potentially illegal conduct; (ii) there are positive or negative incentives for reporting antitrust violations; (iii) supervisors or employees have a duty to report potential antitrust violations, and the disciplinary measures the company has in place for those who fail to report such conduct; (iv) the company has mechanisms to allow for confidential or anonymous reporting; and (v) the company's use of non-disclosure agreements or other restrictions deter whistleblowers from reporting violations. Id. at 13-14.

8. Incentives and Discipline: "[R]elevant to an antitrust compliance program's effectiveness are the 'systems of incentives and discipline that ensure the compliance program are well-integrated into the company's operations and workforce.'" The Division will consider and evaluate: (i) the incentives, if any, the company provides to promote compliance; (ii) whether the company has considered the implications for antitrust compliance of its incentives, compensation structure and rewards; (iii) whether the company has taken specific actions in response to compliance violation – e.g., promotions denied, compensation clawed back; (iv) the disciplinary measures the company has in place for those who engage in illegal antitrust conduct or who fail to take reasonable steps to prevent or detect violations; (v) the employment status of culpable executives; and (vi) whether antitrust violations are disciplined in the same manner as other types of misconduct. Id. at 14-15.

9. Remediation and Role of the Compliance Program in the Discovery of the Violation: The Division's prosecutors are instructed to "assess whether and how the company conducted a comprehensive review of its compliance training, monitoring, auditing, and risk control functions following [an] antitrust violation" and "should also consider what modifications and revisions the company has implemented to help prevent similar violations from reoccurring, and what methods the company will use to evaluate the effectiveness of its antitrust compliance program going forward." In evaluating the company's remediation efforts, the Division will consider, among other things: (i) whether the company has conducted a "root-cause" analysis of the antitrust misconduct; (ii) what controls of the existing antitrust compliance program failed; (iii) whether the company revised its antitrust compliance program as a result of the antitrust violation and any lessons learned; (iv) what role the senior leadership of the company played in addressing the antitrust violation, identifying and disciplining employees and supervisors, and revising the compliance program to better detect the conduct that resulted in the antitrust violation; and (v) whether the company reported the antitrust violation to the government before learning of the government's investigation, and how long after learning of the conduct did the company report it to the government. Id. at 15-16.

When a decision is made to charge a company with a violation, the Division's prosecutors may also recommend a sentencing reduction based on an evaluation of the effectiveness of a company's compliance program. Where a company does not have an adequate compliance program, a prosecutor may recommend a corporate defendant face probation, and will also consider whether a monitor should be put in place to implement a compliance program. Creation of or improvements to an antitrust compliance program, the incorporation of disciplinary procedures for violations, and the demonstration of efforts to ensure future compliance and a change in corporate culture may result in reduction of criminal fines. Id. at 17-19.

The development, maintenance and implementation of, and allocation of sufficient resources to an antitrust compliance program is a critical component of a company's protection from the bad acts of its employees. An antitrust compliance program may not deter or identify, in a timely manner, all antitrust violations. However, significant and reasonable efforts to comply with the law and develop a culture of compliance, and of improvement and evaluation of compliance efforts, are a relatively low-cost method of protecting the corporation from criminal liability. Compliance officers, senior company officials and board members, working with inside and outside counsel, should consider improvements to their corporate compliance programs based on the new and updated guidance from the Criminal and Antitrust Divisions of the Department of Justice.

Delaware Court Reinforces Limits of Integration Clauses in *Cytotheryx*

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On October 16, 2024, in *Cytotheryx, Inc. v. Castle Creek Biosciences* (*Cytotheryx*), the Delaware Court of Chancery underscored the limitations of integration clauses in merger agreements in barring claims based on extra-contractual assurances and allowed fraud and promissory estoppel claims based on a buyer's oral assurances to survive a motion to dismiss. The holding in Cytotheryx aligns with the Chancery Court's ruling earlier this year in *Trifecta Multimedia Holdings, Inc., et al. v. WCG Clinical Services LLC* (*Trifecta*). In *Trifecta*, the Chancery Court reached a similar conclusion where a buyer's alleged promises to support the target's business post-closing induced a seller to enter into a purchase agreement. These recent decisions further the view that reliance on integration clauses alone will likely be inadequate in the face of alleged verbal assurances regarding post-closing actions, especially when the claims are not directly contradictory to the representations made in the purchase agreement.

The *Cytotheryx* litigation arose from the failure of Castle Creek Biosciences, a late-clinical stage cell and gene therapy company, to undertake a contractually required stock redemption following Castle Creek's 2021 acquisition of Novavita Thera, Inc., a then-subsidiary of Cytotheryx. As consideration for the sale of Novavita, Cytotheryx received a combination of cash and redeemable preferred shares of Castle Creek. The preferred shares were subject to a put right which, if exercised, required Castle Creek to redeem the stock to the extent the redemption did not violate Castle Creek's governing documents or credit agreement. During merger negotiations, Castle Creek executives allegedly assured Cytotheryx that any obstacles to obtaining lender approval for the redemption had been removed. Following consummation of the merger, Cytotheryx exercised its put right on the preferred shares and, at that time, Castle Creek cited prohibitive language in its credit agreement and informed Cytotheryx that Castle Creek's lenders refused to consent to the redemption. Cytotheryx filed suit, alleging fraud and promissory estoppel due to Castle Creek's false representations, which Cytotheryx alleged were made with the intent to induce Cytotheryx to enter into the merger agreement and to accept preferred shares as consideration for the sale of Novavita. Castle Creek argued that the integration clause in the merger agreement encompassed the entirety of the parties' understanding and thereby precluded reliance by Cytotheryx on Castle Creek's alleged assurances.

The integration clause at issue in *Cytotheryx* provides in pertinent part:

This Agreement, together with the Exhibits and Annexes hereto, and the Disclosure Letters and the other Transaction Documents, contains the entire understanding of the parties hereto with respect to the subject matter contained herein and supersedes all prior agreements and understandings, oral and written, with respect hereto.

In its opposition to Cytotheryx's claims, Castle Creek largely relied upon the Chancery Court's 2014 decision in *Black Horse Capital v. Xstelos Holdings* (*Black Horse*), which enforced a contractual integration clause to bar reliance on extra-contractual statements. Judge Vivian Medinilla (presiding over the *Cytotheryx* case by designation of the Chief Justice) distinguished the *Cytotheryx* case from *Black Horse*, pointing out that while the alleged misrepresentations in *Black Horse* directly contradicted the contract and the integration clause, the alleged statements made by Castle Creek regarding lender approval did not. Furthermore, unlike in *Black Horse* where the alleged misrepresentations occurred only before

the contract containing the integration clause was executed, in *Cytotheryx* the alleged statements at issue were made both prior to and more than a year after the closing, facts that Justice Medinilla noted implied an ongoing obligation.

The Chancery Court noted that while Delaware law allows parties to contractually limit reliance on extra-contractual statements through integration clauses, it also sets a high bar for excluding fraud claims. Absent a clear statement disclaiming reliance on a fraudulent statement, "Delaware law does not protect a defendant from liability" for fraud. In *Cytotheryx*, Judge Medinilla found that no such statement was made by Cytotheryx, and as such, even if the integration clause could supersede extra-contractual statements, it did not bar a fraud claim. Moreover, the merger agreement explicitly preserved Cytotheryx's right to bring an action for fraud "relating to the representations, warranties, and covenants contained in" the agreement. Accordingly, the *Cytotheryx* court concluded that such an unambiguous preservation of fraud claims, combined with Castle Creek's post-closing statements, warranted a rejection of Castle Creek's motion to dismiss despite the integration clause. Because the promissory estoppel claim was "based on the same alleged material misrepresentations" as the fraud claim, and the promissory estoppel claim was equally conceivable, the Chancery Court found the plaintiff had alleged sufficient facts for both claims to survive the motion to dismiss.

The *Cytotheryx* ruling serves as a reminder for parties engaging in strategic transactions to carefully consider the implications of extra-contractual assurances and to exercise caution in relying solely on integration clauses to cleanse potential problematic discussions and to insulate against fraud and estoppel claims. The decision sheds light on the limitations of integration clauses and suggests that Delaware courts may allow extra-contractual claims to survive in the face of an integration clause in certain circumstances.