

April 13, 2020

## COVID-19 Pandemic Impacts Previously Announced M&A Transactions

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### **Bed Bath & Beyond Sues 1-800-Flowers for Refusing to Close; Hexcel and Woodward Agree to Terminate Merger of Equals – Adopt Limited Duration Rights Plans**

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On April 1, 2020, Bed Bath & Beyond Inc. (“BB&B”) filed a complaint in Delaware Chancery Court, Case No. 2020-0245, alleging that defendant 1-800-Flowers.com, Inc. (“1-800-Flowers”) unilaterally refused to close its pending \$252 million acquisition of BB&B’s Personalizationmall.com, LLC (“PMall”) business on the scheduled March 30, 2020 closing date due to the uncertainty and negative impacts of the COVID-19 pandemic.<sup>1</sup>

According to the complaint, on March 24, 2020, 1-800-Flowers communicated to BB&B that the scheduled March 30, 2020 closing was not feasible and that it would be postponing the closing to April 30, 2020. 1-800-Flowers cited a number of COVID-19-related impacts, including the “stay-at-home” orders issued in various states and the negative effects on both parties’ businesses, including the shut-down of PMall’s facilities until at least April 7, 2020. BB&B rejected any postponement of the closing, claiming that 1-800-Flowers’ failure to close the transaction would constitute a breach of the purchase agreement.<sup>2</sup> In correspondence that followed, despite BB&B’s attempts to facilitate the closing and make accommodations to ease the post-closing transition,<sup>3</sup> 1-800-Flowers continued to insist a March 30, 2020 closing was commercially impracticable and that closing must be postponed until April 30, 2020. After 1-800-Flowers failed to pay the purchase price on March 30, 2020, BB&B filed the complaint, requesting specific performance.<sup>4</sup>

In its correspondence with BB&B, 1-800-Flowers did not invoke the “material adverse effect” clause, or MAE, the absence of which was a condition to 1-800-Flowers’ obligations to close,<sup>5</sup> or any other provisions of the purchase agreement. 1-800-Flowers instead claimed that neither party was in a position to assess

whether PMall had been, or might be reasonably expected to be, materially adversely affected by the COVID-19 pandemic and any necessary government response.<sup>6</sup> According to BB&B's complaint, at the time of signing, which occurred on February 14, 2020, the COVID-19 outbreak "in other countries was universally public knowledge, as was its potential to impact the economy."<sup>7</sup> BB&B also argued that "PMall is in the same situation as millions of businesses worldwide facing the impact of COVID-19, and 1-800-Flowers cannot refuse to [c]lose the [t]ransaction on that basis."<sup>8</sup>

1-800-Flowers' decision to not invoke an MAE in its attempt to postpone the scheduled closing may have been informed by long-standing Delaware jurisprudence and the specific terms of the MAE in question. Delaware courts have long held that MAE claims present a very high bar to success and that an MAE "is best read as a backstop protecting the acquiror from the occurrence of *unknown* events that substantially threaten[s] [...] the target in a durationally-significant manner."<sup>9</sup> With respect to the terms of the MAE, the purchase agreement specified that, among other things, "any change resulting from conditions affecting any of the industries or markets in which [PMall] operates [and] any change resulting from changes in general business, financial [...] and economic conditions" cannot be considered an MAE or taken into account in determining whether or not an MAE has occurred, except to the extent such a change "has a disproportionate effect on [PMall] compared to other participants in the industries or markets in which [PMall] operates."<sup>10</sup>

The dispute between BB&B and 1-800-Flowers is one of the first public examples of a party attempting to postpone a pending M&A transaction because of the COVID-19 pandemic. Although every transaction is different, depending on its development and outcome, this dispute may encourage parties to other transactions to react similarly or dissuade disputes and encourage negotiated outcomes.

In contrast to the dispute between BB&B and 1-800-Flowers, on April 6, 2020, Hexcel Corporation ("Hexcel") and Woodward, Inc. ("Woodward") announced the mutual termination of their merger agreement that contemplated an all-stock merger of equals in response to economic uncertainties in the aerospace and industrial sectors. Notably, neither party will be required to make any termination payment.<sup>11</sup> The parties—both suppliers of Boeing Co., with Boeing accounting for approximately 25% of Hexcel's sales and 15% of Woodward's sales<sup>12</sup>—had announced the transaction on January 12, 2020 pursuant to which Hexcel and Woodward shareholders would own approximately 45% and 55% of the combined company, respectively, and the combined company's board would have five directors from each company.<sup>13</sup> In conjunction with the decision to terminate the transaction, both parties announced limited-duration shareholder rights plans, in connection with which the respective parties' boards declared a dividend distribution of one preferred share purchase right on each outstanding share of common stock that would be exercisable only if a person or group acquires 15% or more of the applicable party's common stock without the approval of the board.<sup>14</sup> Parties should continue to consider adoption of limited-duration

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shareholder rights plans in light of the COVID-19 pandemic, the recent market moves and the potential for a prolonged period of economic uncertainty.

As parties consider their rights, obligations and options with respect to their signed deals in light of the COVID-19 pandemic and the resulting impact on either or both parties, for example, to postpone the closing, as in the case of 1-800-Flowers, to mutually terminate the deals, as in the case of Hexcel and Woodward, or even to unilaterally walk away from them (which we have not publicly seen yet), parties must carefully read and consider the transaction agreement's specific language, the applicable evolving business forecast, as well as applicable case law.

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## ENDNOTES

- <sup>1</sup> See Verified Complaint seeking specific performance to compel the closing of a particular transaction, filed in *Bed Bath & Beyond Inc. v. 1-800-Flowers.com, Inc.*, C.A. No. 2020-0245- (Del. Ch.) (“Compl.”).
- <sup>2</sup> See Compl. ¶¶ 3, 8; Compl., Exs. 4-5.
- <sup>3</sup> In response to 1-800-Flowers’ unilateral postponement of the closing, BB&B offered to be flexible with respect to transitional services to ease the burden on 1-800-Flowers. Moreover, leading up to March 30, 2020, BB&B made repeated efforts to set up meetings or calls with 1-800-Flowers, but 1-800-Flowers failed to respond until March 30, 2020, and offered only to speak the following day. See Compl. ¶¶ 8, 10-12; Compl., Exs. 5, 7, 10.
- <sup>4</sup> See Compl. ¶¶ 1, 8, 11; Compl., Exs. 6, 8, 10. BB&B purports to have attempted to proceed with the closing as scheduled by delivering its remaining closing documents. Compl. ¶ 11; Compl., Ex. 10.
- <sup>5</sup> Compl., Ex. 1. § 6.1(c).
- <sup>6</sup> Compl., Exs. 4, 6, 8.
- <sup>7</sup> Compl. ¶¶ 5-6.
- <sup>8</sup> Compl. ¶ 13.
- <sup>9</sup> *Akorn, Inc. v. Fresenius Kabi AG et al.*, No. 2018-0300-JTL, at \*60 (Del. Ch. Oct. 1, 2018), *aff’d*, 198 A.3d 724 (Del. 2018) (quoting *In re IBP, Inc. S’holders Litig.*, 789 A.2d 14, 68 (Del. Ch. 2001) (emphasis added)); see *Channel Medsystems, Inc. v. Bos. Sci. Corp.*, No. CV 2018-0673-AGB, at \*24 (Del. Ch. Dec. 18, 2019).
- <sup>10</sup> Compl., Ex. 1. § 1.1.
- <sup>11</sup> See Hexcel Corporation, “Woodward and Hexcel Announce Mutual Termination of Merger Agreement,” (Apr. 6, 2020), <https://investors.hexcel.com/investor-news/news-details/2020/Woodward-and-Hexcel-Announce-Mutual-Termination-of-Merger-Agreement/default.aspx>; Woodward, Inc., “Woodward and Hexcel Announce Mutual Termination of Merger Agreement,” (Apr. 6, 2020), <https://newsroom.woodward.com/news/press-release-details/2020/Woodward-and-Hexcel-Announce-Mutual-Termination-of-Merger-Agreement/default.aspx>.
- <sup>12</sup> See Reuters, “Boeing Suppliers Hexcel and Woodward to Merge in \$6.4 Billion Deal,” (Jan. 12, 2020), <https://www.reuters.com/article/us-hexcel-m-a-woodward/boeing-suppliers-hexcel-and-woodward-to-merge-in-6-4-billion-deal-idUSKBN1ZB0NY>.
- <sup>13</sup> See Hexcel Corporation, “Woodward and Hexcel Announce Merger of Equals to Create a Premier Integrated Systems Provider Propelling the Future of Flight and Energy Efficiency,” (Jan. 12, 2020), <https://investors.hexcel.com/investor-news/news-details/2020/Woodward-and-Hexcel-Announce-Merger-of-Equals-to-Create-a-Premier-Integrated-Systems-Provider-Propelling-the-Future-of-Flight-and-Energy-Efficiency/default.aspx>; Woodward, Inc., “Woodward and Hexcel Announce Merger of Equals to Create a Premier Integrated Systems Provider Propelling the Future of Flight and Energy Efficiency,” (Jan. 12, 2020), <https://newsroom.woodward.com/news/press-release-details/2020/Woodward-and-Hexcel-Announce-Merger-of-Equals-to-Create-a-Premier-Integrated-Systems-Provider-Propelling-the-Future-of-Flight-and-Energy-Efficiency/default.aspx>.
- <sup>14</sup> See Hexcel Corporation, “Hexcel Provides Business Update Related to COVID-19 Pandemic,” (Apr. 6, 2020), <https://investors.hexcel.com/investor-news/news-details/2020/Hexcel-Provides-Business-Update-Related-to-COVID-19-Pandemic/default.aspx>; Woodward, Inc., “Woodward Implements Actions in Response to the Economic Impact of COVID-19 and Adopts Stockholder Rights Plan,” (Apr. 6, 2020), <https://newsroom.woodward.com/news/press-release-details/2020/Woodward-Implements-Actions-in-Response-to-the-Economic-Impact-of-COVID-19-and-Adopts-Stockholder-Rights-Plan/default.aspx>.

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