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# Litigators of the Week: In Bet-the-Company Delaware Merger Trial, a Win for Desktop Metal

**By Ross Todd**
March 28, 2025

Delaware Chancellor Kathaleen McCormick called the facts "stark" and the timeline "damning."

A boardroom shake-up at Israel's Nano Dimension last year led to new leadership that was skeptical of the company's deal to purchase Desktop Metal, a cash-strapped maker of industrial 3D printers.

Given Desktop Metal's role in producing specialized parts for nuclear, missile and satellite systems, the parties knew it would be complicated to get signoff on the deal from the Committee on Foreign Investment in the United States—the regulatory agency that scrutinizes deals resulting in foreign control of U.S. businesses and the potential to impact national security.

Concern was so high on the Desktop Metal side of the deal that they negotiated a "hell or high water" provision, requiring Nano to take all action necessary for CFIUS approval.

This week, McCormick found that Nano's new management violated that provision, at one point going "radio silent" with CFIUS for 38 days during the approval process. The judge granted Desktop Metal its request for specific performance.

Photos: courtesy/Carmen Natale/ALM

**(l-r) William Burck, Christopher Kercher, and Peter Fountain of Quinn Emanuel.**

Our Litigators of the Week are Desktop Metal's lawyers at **Quinn Emanuel Urquhart & Sullivan**, led by **William Burck**, **Christopher Kercher** and **Peter Fountain**.

**Who is your client and what is at stake here?**

Chris Kercher: Our client is Desktop Metal, a pioneering industrial 3D printing company that uses cutting-edge additive manufacturing technology to create specialized parts for aerospace, defense and nuclear applications. At stake was a $300 million deal to be acquired by Nano Dimension that would secure Desktop Metal's future and enable it to continue its critical work

supporting commercial and national security priorities. This was truly a bet-the-company case for Desktop—without the capital infusion and strategic partnership, the company faced a real risk of bankruptcy given its cash burn rate. Over 700 families who work at Desktop were counting on this deal to preserve their livelihoods.

**How did this matter come to you and the firm?**

Bill Burck: When Nano got cold feet and tried to renege on the deal after activist investor Murchinson grabbed control of the board, members of Desktop's board thought we would be a natural choice to hold Nano's feet to the fire. Quinn Emanuel is renowned for thriving in these kinds of expedited, high-stakes M&A disputes. We specialize in handling seemingly impossible cases on accelerated timelines. Desktop knew we would be fearless in taking on this fight. And we actually learned at trial that Nano had considered hiring us for this case too.

**Who all is on the team and how have you divided the work?**

Kercher: This was an all-hands-on-deck effort that showcased the incredible talent and grit of Quinn Emanuel's next generation of up-and-coming litigators. I'm especially proud that we went to trial with a team primarily composed of partners elevated in the last few years and rising associate stars. When the trial date shifted due to the court's schedule, two of our most senior M&A litigation partners, **Mike Carlinsky** and **Andrew Rossman**, developed conflicts. But that didn't faze us one bit because we knew the caliber of the team waiting in the wings. Along with Peter Fountain and Bill Burck, our partner **Jesse Bernstein** was a core member of the "brain trust" that we depended on to quickly come up with strategic calls each day. Jesse also delivered a masterful cross-examination of Nano's key expert. He methodically dismantled the expert's opinions on Desktop's supposed covenant breaches—it was a thing of beauty to watch. Of counsels **Heather Christenson** and **Jon Feder** took lead roles in our trial preparation and witness examinations, and both of them developed close relationships of trust with our clients. **JJ Ye**, **Sam Cleveland** and **Yehuda Goor**, three of our talented associates, were the masters of the record, having reviewed practically every document and deposition transcript. I was proud that Heather, Jon, JJ and Sam all were able to examine a witness at trial—it showed again that at Quinn Emanuel, those opportunities are not reserved for our partners. The way this young team rose to the occasion and owned every facet of this case speaks volumes about the depth of talent we have at Quinn Emanuel and the trust we place in young lawyers to take on major responsibilities.

I'm especially proud of how we pioneered cutting-edge AI to supercharge our efforts on this expedited schedule. We used an advanced language model for all sorts of critical tasks—analyzing the merger agreement, generating ideas for arguments and even brainstorming case strategy. The ability to engage in substantive legal reasoning was game-changing. We also deployed Syllo's agentic AI system to turbocharge document review using an ensemble of language models to divide and conquer document analysis, applying nuanced issue tags at scale. It was a quantum leap over traditional tools. From what I have heard, we were likely the first major trial team to harness AI's game-changing potential at this scale and level of sophistication from start to finish. For our young stars to blaze this trail

and achieve such a remarkable result exemplifies QE's culture of relentless innovation. We're empowering the next generation to redefine what's possible in the courtroom by responsibly wielding AI in creative, high-impact ways. It's an exhilarating frontier.

**Chancellor McCormick references the "Herculean discovery efforts" that preceded the expedited trial here. What all did that entail? And what did it surface that helped make Desktop Metal's case?**

Peter Fountain: We had less than three months from the filing of the complaint to be ready for a trial with the company's future on the line. In that compressed timeframe, we produced some 50,000 documents and took and defended more than 20 depositions—all while engaging in heavy motion practice and trial preparations. This required mobilizing a small army and working around the clock, and none of it would have been possible without the extraordinary commitment from Desktop Metal's team—Ric Fulop, Larry O'Connell, Jason Cole, Tom Nogueira and Michael Jordan—who worked alongside us through countless late nights.

Our discovery efforts paid off, exposing what the chancellor would later describe as a "damning" timeline of obstruction by Nano. The most incriminating evidence came when we obtained internal Nano communications where directors bluntly stated their priorities: "1. Minimize the board. 2. Suspend [the CEO] and the deal," with other directors responding with a telling "all agreed." Other communications revealed Murchinson's cynical strategy to scoop up Desktop's assets in bankruptcy at a steep discount—precisely what they had suggested at Nano's board meeting when the merger was first approved.

These smoking guns proved what Desktop had believed all along: Nano's failure to progress the CFIUS process was not a good-faith regulatory concern but a calculated scheme to get out of the deal—directly contradicting the narrative they desperately tried to construct in court. Chancellor McCormick ultimately found that Nano "attempted to obstruct CFIUS approval through a pattern of delay and backtracking"—exactly what our discovery efforts had revealed.

**The CFIUS approval process plays a pivotal role in this decision. How did you make the case that Nano hadn't lived up to the "hell or high water" provision in this deal regarding CFIUS approval?**

Burck: A key part of our case was showing how drastically Nano's behavior changed practically overnight when the Murchinson nominees seized control of the board. In the months leading up to the proxy fight, Nano had been working hand-in-glove with Desktop to secure CFIUS approval, with both sides anticipating the process would require significant mitigation terms given the sensitive nature of Desktop's technology. Together the parties accepted draft mitigation terms from CFIUS and were on track to sign a final agreement within days.

Then Murchinson's slate won the board vote and everything changed. The new directors went radio silent with CFIUS for 38 days—an eternity when time was of the essence. When they finally reengaged, Nano started manufacturing all kinds of new objections and demands, insisting CFIUS delete mitigation terms they had already accepted weeks earlier. We used Nano's own documents to show this was a calculated effort to stall the process and create a pretext for terminating the deal, not a good-faith

negotiation. Between the lengthy delays and ever-shifting positions, we demonstrated Nano had materially breached its obligation to take "all action necessary" to obtain CFIUS clearance on a reasonable timeline.

**The chancellor said the "evidence is quite close—almost equipoise" regarding whether Desktop violated the "No Bankruptcy" condition of the deal. What can other cash-strapped acquisition targets take from your client's experience here?**

Fountain: This really illustrates the razor's edge that distressed companies can be forced to walk in the period between signing and closing a deal. As Desktop's cash position became increasingly precarious leading up to closing, they continued to take steps to manage liquidity and stretch vendor payments. Nano tried to point to emails about unpaid invoices as "admissions" that Desktop was unable to pay its debts, but we proved those reflected ordinary course payment negotiations, not an actual admission of insolvency.

Given Chancellor McCormick's acknowledgment that the evidence was "quite close—almost equipoise," there were two critical components that made the difference. First, the specific contractual language underscores that for distressed acquisition targets, there is a critical importance of negotiating bankruptcy provisions with precision rather than accepting broad, ambiguous language. Second, we prepared extensively with our witnesses, ensuring that Desktop's CFO Jason Cole and COO Tom Nogueira could withstand intense cross-examination about the company's financial condition. Their credible, consistent testimony was pivotal in convincing the chancellor that Nano had not met its burden of proof.

Perhaps most importantly, we established that even if there had been a failure of the "No Bankruptcy" condition, it was excused due to Nano's prior material breach. As Chancellor McCormick put it, "If Desktop did experience a Bankruptcy after December, Nano materially contributed to that circumstance by intentionally slow rolling the CFIUS approval process to delay closing." This really drove home a powerful principle that buyers can't rely on a target's distress to get out of a deal if the buyer's own bad faith conduct is exacerbating the liquidity crunch. The decision reaffirms a crucial safeguard for distressed companies: a buyer cannot deliberately run out the clock on a distressed target and then claim bankruptcy as an escape hatch.

**What's the message to acquiring companies in this decision—especially ones like Nano, who have a change in leadership midstream on a signed deal?**

Kercher: The clear message is that Delaware takes commitments to use "best efforts" to complete a deal extremely seriously, and if a change of control or change of heart causes leadership to get cold feet, the courts will hold them to their bargained-for obligations. Here, Nano promised to take "all action necessary" to obtain CFIUS approval and close the deal as quickly as possible. The court found Nano's post-takeover attempts to obstruct the CFIUS process breached this unambiguous obligation, even if it was motivated by the new board majority's personal desires not to do the deal. Nano tried to argue its behavior was justified because Desktop hadn't moved fast enough to negotiate a bridge loan to address its liquidity issues. But the merger agreement didn't obligate Desktop to draw on the bridge facility, so Nano couldn't use that as an excuse not to honor

its own covenants. The law simply doesn't permit a party to renege on a validly signed merger agreement just because new management has buyer's remorse. And where there are "hell or high water" regulatory provisions, the buyer bears the risk of things like activist changes in control. Leadership must understand they're inheriting these binding contractual obligations.

**What's the latest? Is the deal moving forward? Is Nano pursuing an appeal?**

Burck: The parties were able to finalize the mitigation agreement on the aggressive timeline ordered by the court. Chancellor McCormick gave Nano just 48 hours after the ruling came down to sign the final NSA, and they did. While Nano made some initial noises about a potential appeal, between the chancellor's extremely detailed opinion and the signed NSA, there is really no path for Nano to unwind the deal. We are pleased that they've restarted the integration efforts with our clients. We fully expect the deal to close shortly, enabling Desktop to finally realize the benefits of this merger.

**What will you remember most about getting this result?**

Burck: This case exemplifies why we practice law at Quinn Emanuel—to handle the highest-stakes matters where clients need not just legal expertise but strategic thinking and absolute commitment to achieving their goals under the most challenging circumstances.

Kercher: For me, the most indelible memory is the way this case showcased the exceptional talent of our next generation of QE partners and associates. Watching lawyers like Jesse Bernstein and Heather Christenson—who weren't even in high school when Mike Carlinsky and Andrew Rossman were already trying landmark deal cases—just completely own the courtroom and deliver this win was extraordinary. Over and over, I found myself thinking, "Clients are in great hands with this cohort." They are the future of our firm and based on their performance here, that future is blindingly bright.

Fountain: What I'll remember most about this case is the extraordinary team effort under immense time pressure to protect a client facing existential risk. With Desktop rapidly running out of cash and 700 jobs hanging in the balance, it took a special group—both at QE and at our client—to obtain this victory.

**Bill, this is not the only bet-the-company matter you worked on this week. How did you come to represent Paul Weiss in the firm's dealings with the Trump Administration?**

Burck: We have a lot of respect for Paul Weiss and we believe the feeling is mutual. We wanted to find a way to help them in incredibly difficult circumstances.

**That representation ultimately led to negotiation rather than litigation. Would Quinn Emanuel go to court against the administration if hired again by a law firm facing similar circumstances that decided to litigate?**

Burck: We are a litigation firm and we do our best to advise clients on the best course forward in a dispute. Sometimes that's fighting, sometimes that's negotiating a resolution. It depends entirely on the circumstances. We don't shy away from lawsuits, and if a law firm wanted to litigate and we had a meeting of the minds on strategy, we would litigate.