

December 7, 2018

## Delaware Supreme Court Affirms *Akorn* MAE Clause Decision in 3-Paragraph Order

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### Court Finds that “Factual Record Adequately Supports” the Existence of an MAE Based on the Trial Court’s “Application of Precedent”

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#### SUMMARY

Earlier today, the Delaware Supreme Court affirmed the first post-trial opinion finding a defined “Material Adverse Effect” (“MAE”) on a merger target’s business. *Akorn, Inc. v. Fresenius Kabi AG et al.*, C.A. No. 2018-0300-JTL (Del. 2018) (Order). In the Court of Chancery opinion, Vice Chancellor Laster held that Fresenius was justified in terminating its \$4.3 billion acquisition of Akorn pursuant to an MAE clause because Akorn’s dramatic post-signing performance decline and alleged regulatory misbehavior could reasonably be expected to result in a an MAE on Akorn’s business.<sup>1</sup>

In a three-paragraph Order, the Supreme Court ruled that the “factual record adequately supports the Court of Chancery’s determination, based on its application of precedent such as *In re IBP, Inc. Shareholders Litigation* and *Hexion Speciality Chemicals, Inc. v. Huntsman Corp.*, that Akorn had suffered a material adverse effect.”<sup>2</sup> The Supreme Court noted that it had “no need to comment upon or address” much of the “extensive reasoning on all of the issues presented to” the Court of Chancery, and for this reason the Court declined to reach, among others, the question of whether Akorn breached its “Ordinary Course” covenant.<sup>3</sup> The Court of Chancery had held that Akorn materially breached its obligation to continue operating in the ordinary course of business between signing and closing.<sup>4</sup>

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ENDNOTES

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- <sup>1</sup> 2018 WL 4719347 (Del. Ch. Oct. 1, 2018).
- <sup>2</sup> C.A. No. 2018-0300-JTL, at \*1-2.
- <sup>3</sup> *Id.* at \*3 n.5.
- <sup>4</sup> 2018 WL 4719347, at \*3.

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