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### Delaware Supreme Court Affirms Landmark MAE Findings

The Delaware Supreme Court, sitting *en banc*, unanimously affirmed the Court of Chancery’s opinion in *Akorn, Inc. v. Fresenius Kabi AG* holding that target Akorn, Inc. experienced two material adverse effects (“MAEs”), justifying buyer Fresenius Kabi AG’s<sup>1</sup> decision not to close and to terminate the parties’ merger agreement. The landmark case represents the first finding of an MAE in the M&A context in Delaware. While the core principle that an MAE must “substantially threaten the overall earnings potential of the target in a durationally-significant manner” has not changed, the decision provides significant guidance concerning the MAE analysis. For the Supreme Court opinion, click [here](#). For the Court of Chancery opinion, click [here](#).

### Delaware Supreme Court Clarifies that “ab initio” for MFW Purposes Means before the Start of Substantive Economic Negotiations

In *Flood v. Synutra International, Inc.*, the Delaware Supreme Court, in a majority opinion written by Chief Justice Strine, affirmed the Court of Chancery’s holding that the controlling stockholder satisfied MFW’s “ab initio” requirement by conditioning the deal on the required procedural protections before substantive economic negotiations had begun, even if that was not until his second offer letter. Therefore, the business judgment rule applied to the transaction, leading to the dismissal of plaintiff’s claims. Justice Valihura dissented, stating that a bright line test requiring MFW conditions to be in the controlling stockholder’s initial, formal written proposal would be preferable. For more, click [here](#).

### Delaware Court of Chancery Finds that Activist Stockholder Aided and Abetted Breaches of Fiduciary Duty, but No Damages

In *In re PLX Technology Inc. Stockholders Litigation*, the Delaware Court of Chancery, in an opinion by Vice Chancellor Laster, held that an activist stockholder of PLX Technology Inc., acting through a principal of the activist who served on the PLX board, aided and abetted breaches of fiduciary duties by the PLX directors in connection with the sale of the company to Avago Technologies Wireless (U.S.A.) Manufacturing Inc. Although claims against the PLX directors were either dismissed or settled before trial, the court found that the board breached its fiduciary duties by engaging in a sale process without knowing critical information about Avago’s communications with PLX’s financial advisor, as well as by failing to disclose such communications to stockholders and inaccurately depicting certain projections as having been

<sup>1</sup> Paul, Weiss served as litigation counsel to Fresenius in this matter.

prepared in the ordinary course of business. The activist stockholder aided and abetted these breaches through its principal, who suffered from a “dual fiduciary” conflict, by failing to disclose the communications with the banker (of which the principal was aware) to the other directors. Despite these findings, however, the court found that plaintiffs did not prove any causally related damages. For the opinion, click [here](#).

### **Directors Denied *Corwin* Protection Due to “Information Vacuum”**

The Delaware Court of Chancery recently held in *In re Tangoe, Inc. Stockholders Litigation* that directors who approved a sale of the company were not entitled to business judgment protection under *Corwin v. KKR Financial Holdings LLC* because company stockholders were not adequately informed when tendering into the transaction. This was due to the “information vacuum” created by, among other things, the lack of audited financials, even though neither federal securities nor Delaware law mandates disclosure of audited financials in this context *per se*. The court explained, however, in an opinion by Vice Chancellor Slights, that directors facing difficult decisions amid a “regulatory storm” (such as a restatement of financials) may still receive business judgment protection if they carefully and thoroughly explain all material aspects of a proposed transaction and remain focused on the best interests of stockholders. For more, click [here](#).

### **Delaware Court of Chancery Declines to Dismiss Claims against Conflicted CEO**

Recently in *In re Xura, Inc. Stockholder Litigation*, the Delaware Court of Chancery denied a motion to dismiss fiduciary duty claims against the CEO of Xura, Inc. for his actions in negotiating a sale of the company. The court, in an opinion by Vice Chancellor Slights, concluded that business judgment review did not apply under *Corwin* because stockholders were not fully informed about aspects of the negotiations when they approved the deal. Moreover, the court held that plaintiff pled a viable claim that, in negotiating the transaction, the CEO favored his own interests—which included securing continued employment—over those of the stockholders and may therefore be personally liable for an unexculpated breach of his duty of loyalty. The case reminds executives and boards about the dos and don’ts of how to conduct an appropriate sale process under Delaware law. For more, click [here](#).

### **Delaware Court of Chancery Invalidates Federal Forum Selection Provisions Applicable to 1933 Act Claims**

Recently in *Sciabacucchi v. Salzberg*, the Delaware Court of Chancery invalidated forum selection charter provisions that required claims brought under the Securities Act of 1933 to be filed in federal court (the “Federal Forum Provisions”). In an opinion by Vice Chancellor Laster, the court concluded that the Federal Forum Provisions were invalid because such claims are “external claims,” not claims related to the internal affairs of the corporation that can be regulated by a corporation’s charter or bylaws under Delaware law. The case is noteworthy insofar as it further delineates the permissible reach of forum selection provisions in Delaware. For more, click [here](#).

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### **M&A Markets**

The following issues of *M&A at a Glance*, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

➤ [October 2018](#)

➤ [November 2018](#)

➤ [December 2018](#)

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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