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MERGERS AND ACQUISITIONS

Delaware Court Finds Material Adverse Effect Allowing Buyer to Terminate Merger Agreement

The Delaware Court of Chancery's opinion in Akorn, Inc. v. Fresenius Kabi AG *constitutes what is believed to be the first decision of a Delaware court permitting a buyer to terminate a merger agreement due to the occurrence of a material adverse effect. While the headline holding is significant in and of itself, the Court's analysis is ground in existing Delaware precedent and it must be viewed in light of the extensive factual record Corporations and practitioners are cautioned, however, that the decision has been appealed to the Delaware Supreme Court.*

By John Mark Zeberkiewicz and Robert Greco

In *Akorn, Inc. v. Fresenius Kabi AG*,[1] the Delaware Court of Chancery issued what is believed to be the first decision of a Delaware court permitting a buyer to terminate a merger agreement due to the occurrence of a material adverse effect. The opinion is significant not only for its headline holding, but also for the substantial gloss it provides on the interpretation and construction of many other provisions customarily found in M&A agreements. Corporations and practitioners are cautioned, however, that the Court's decision has been appealed to the Delaware Supreme Court and that the matters addressed in the opinion are accordingly subject to further development.

Background

In February 2016, Akorn's board decided to commence a review of strategic alternatives.[2] After being contacted by Akorn's financial advisor, Fresenius began to evaluate the potential opportunity to acquire Akorn.[3] At that time, Fresenius noted the potential advantages, including Akorn's product portfolio and pipeline of Abbreviated New Drug Applications (ANDAs), as well as the potential risks, including certain regulatory issues with respect to its ephedrine new drug application.[4]

As the parties engaged in negotiations, Akorn granted Fresenius access to its data room, and Fresenius commenced its due diligence.[5] While the diligence process was underway, Akorn announced positive earnings results and that it had received FDA approval for a new ephedrine product. Fresenius

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continued its diligence, identifying a few issues in the regulatory area, but concluding there were no "'deal breakers.'"[6]

After completing due diligence and engaging in further negotiations, Fresenius entered into a merger agreement with Akorn pursuant to which Fresenius would acquire Akorn for a total of $4.75 billion, consisting of $4.3 billion in cash and the assumption of roughly $450 million in debt. Given the regulatory environment in which Akorn operates, including the strict requirements of its primary regulator, the FDA, Fresenius negotiated for extensive representations and warranties from Akorn regarding its compliance with FDA regulations, including "compliance with . . . all applicable Laws" (defined broadly) and compliance with good manufacturing processes, as well as representations and warranties to the effect that Akorn had not made untrue or fraudulent statements to the FDA and that all of its ANDAs were true, complete and correct—all subject to a general "Material Adverse Effect" qualifier.[7] In addition, during the interim period between signing and closing, Akorn agreed to use its commercially reasonable efforts to carry out its business in the ordinary course in all material respects and to grant Fresenius and its representatives "reasonable access" to information regarding Akorn and its business.[8]

Akorn agreed to use its commercially reasonable efforts to carry out its business in the ordinary course in all material respects.

The merger was subject to various closing conditions and included specified termination triggers.[9] First, Fresenius was not required to consummate the merger unless Akorn's representations were true and correct at signing and closing, except where the failure to be true and correct would not reasonably be expected to have a Material Adverse Effect. If this condition was not satisfied (and was incurable) by the outside date (which was initially set at April 24, 2018, but would extend automatically to July 24, 2018, if antitrust approval was the only condition remaining at the initial outside date),[10] Fresenius would be entitled to terminate the merger agreement, so long as it was not then in material breach of its own obligations. Second, Fresenius was not required to close if Akorn failed to comply in all material respects with its contractual covenants, which included the covenant to operate in the ordinary course during the interim period. If this condition was not met (and was incurable) by the outside date, Fresenius would be entitled to terminate the merger agreement—again, provided it was not in breach of its own obligations. Finally, Fresenius was not required to close if Akorn suffered a Material Adverse Effect. Although the occurrence of a Material Adverse Effect did not provide Fresenius an independent right to terminate the merger agreement, it did allow either party to terminate the merger agreement after the outside date, so long as the terminating party's breach of the merger agreement had not been a principal cause of the failure to close the merger.[11]

Soon after the agreement was reached, Akorn's business performance declined dramatically.[12] Shortly after the stockholder vote to adopt the merger agreement, Akorn previewed its 2017 second-quarter earnings, announcing relatively steep declines in revenues compared to the business plan, and attributing a portion of the decline to competition in the ephedrine space. At the same time, Akorn lowered its revenue forecast for the year.[13] In its public announcement of its second-quarter results, Akorn announced a 29 percent decline in revenues over the prior year, an 84 percent decline in its operating earnings from the prior year, and a 96 percent decline in year-over-year earnings per share.[14] Akorn attributed the declines largely to increased market competition, including new entrants in the ephedrine space.

As Fresenius began considering its legal options, Akorn's downward trend continued. The 2017

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third-quarter results looked similar to those of the second quarter, with year-over-year earnings and operating income declining by 29 percent and 89 percent, respectively, and a reported loss of $0.02 per share.[15] Akorn also missed targets on its product launches, and the products that it did launch yielded sales below expectations.[16] Despite its internal review of its legal options, Fresenius nonetheless "maintained a positive outlook" regarding the merger in communications with its investors and declined to revise its expectations for Akorn's performance, explaining that Akorn's relatively poor performance could be attributed to additional competition, disruptions in supply and delays in product launches.[17]

On October 5, 2017, an anonymous whistleblower sent Fresenius a letter containing allegations regarding Akorn's product development processes.[18] Approximately one month later, Fresenius received a longer letter that included more detailed allegations about flaws in Akorn's quality control processes. Fresenius's senior executives then met to address the complaints.[19] By that time, the Court concluded that Fresenius "did not want to proceed" with the Akorn acquisition, having "regarded Akorn's disastrous performance as falling within a businessperson's understanding of what should qualify as a material adverse effect."[20] Although their legal advisors were not as confident that Fresenius would be able to satisfy the high threshold for proving the occurrence of a material adverse effect under Delaware law, the whistleblower letters provided Fresenius a basis to investigate Akorn's compliance with its representations and warranties. Fresenius notified Akorn of the whistleblower letters and, relying on its contractual inspection rights, stated that it was seeking documents and information, as well as access to knowledgeable parties, regarding the allegations in the whistleblower letters.

Akorn shared the whistleblower letters with its board. One of its directors with FDA experience described them as "'very worrisome'" and indicated that an extensive investigation likely would ensue if they were to reach the FDA.[21] Akorn engaged its deal counsel to assist with an internal investigation designed principally to facilitate Fresenius's investigation.[22] Fresenius, by contrast, retained a firm with experience in FDA enforcement and compliance.[23] Fresenius's attorneys reviewed the materials in Akorn's data room in connection with their investigation. While these materials were subject to a confidentiality agreement between Akorn and Fresenius, Fresenius's counsel determined that they were entitled to receive such information as "Representatives" of Fresenius and that their use of the confidential information for this purpose was permitted because the investigation constituted part of "executing" the transaction.[24]

Fresenius's investigation identified "serious data integrity concerns."[25] The investigations yielded facts indicating, among other things, issues regarding the integrity of certain information submitted to the FDA as well as issues regarding the manner in which data were logged and stored.[26] During this period, Akorn's revenues, operating income and earnings continued to decline. After presenting its supervisory board with a presentation regarding Akorn's declining performance and the expected costs of remediating the regulatory issues, Fresenius notified Akorn of its view that Akorn had breached its representations and warranties regarding regulatory compliance and offered to extend the outside date. After Akorn declined the offer, Fresenius terminated the agreement two days before the outside date, citing Akorn's breach of its representations and warranties, including those related to its regulatory compliance, and Akorn's failure to comply with its covenants, including its covenant to use "commercially reasonable efforts to carry on its business in all material respects in the ordinary course of business."[27] Fresenius further asserted that Akorn had experienced a Material Adverse Effect, which would ripen into a termination right once the outside date occurred.

Akorn filed suit the next day, seeking specific performance of Fresenius's obligation to close the agreement. While the litigation was underway, Akorn's financial performance continued its

downward trend, and additional facts regarding its data integrity deficiencies continued to emerge.[28]

Legal Analysis

The Court's analysis focused on three key issues: (1) whether Akorn's representations and warranties were true and correct at signing and closing except as would not reasonably be expected to have a Material Adverse Effect; (2) whether Akorn complied in all material respects with its covenants; and (3) whether Akorn experienced a Material Adverse Effect.[29] The analysis of those issues, the Court noted, would dictate whether Akorn was entitled to specifically enforce the merger agreement, or whether Fresenius had validly terminated the merger agreement and could refuse to close.[30]

General Construction of Material Adverse Effect Provisions

The Court upheld the validity of Fresenius's termination of the merger agreement and its refusal to close on several bases. First, the Court addressed whether Akorn had experienced a Material Adverse Effect. In connection with its analysis, the Court observed that, as a general matter, material adverse effect provisions address four categories of risk, consisting of: (1) systematic risks, generally described as those outside of the control of all parties and affecting firms beyond the parties; (2) indicator risks, which are those that may signal the occurrence of a material adverse effect, such as a drop in stock price, but are not material adverse effects in and of themselves; (3) agreement risks, which generally are described as those relating to the announcement of the merger and the performance of obligations relating thereto; and (4) business risks, which generally are described as those relating to the party's operation of its business and as to which it has control.[31] The Court then stated that, in general, "the seller retains the business risk," while "[t]he buyer assumes the other risks."[32]

Hewing closely to the Delaware precedent on material adverse effect provisions, the Court noted that "'[a] buyer faces a heavy burden when it attempts to invoke a material adverse effect clause to avoid its obligation to close.'"[33] As the Court observed, "short-term hiccups" will not constitute a material adverse effect.[34] Rather, given that reasonable acquirors are expected to have a long-term strategy, the effect must have an adverse effect over a significant duration—one "measured in years rather than months."[35] Applying these basic principles, the Court proceeded to find that Akorn's financial performance, measured by its revenues, operating income and earnings per share, dropped precipitously, commencing with the second quarter of 2017 and continuing through the first quarter of 2018.[36] The Court also found that over a five-year span commencing in 2012, Akorn's performance had grown under a variety of financial metrics, but witnessed a steep decline by those metrics commencing in 2017.[37]

Akorn argued that the declines should not be measured against Akorn as a standalone entity but should instead be evaluated in light of Akorn's value to Fresenius, taking into account any deal synergies. The Court declined the invitation to do so, finding no support for the position in the plain language of the merger agreement, which, the Court noted, would have made reference to an effect on the surviving corporation if the parties had intended to adopt such an approach.[38] The Court also rejected Akorn's argument that no Material Adverse Effect could be found to have occurred if Fresenius could still profit from the transaction, noting that this position would require the introduction of a new contractual standard not apparent from the language of the merger agreement. The Court next analyzed whether any of the carve-outs included in the definition of Material Adverse Effect applied. The Court found that, despite Akorn's arguments seeking to attribute its decline to "industry headwinds," Akorn's "dismal performance" was in fact attributable to issues unique to it, including new market entrants gaining a larger market share in Akorn's top products as well as Akorn's loss of a key contract.[39] In other words, even if the effects were industry-wide, they disproportionately affected Akorn.[40]

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In analyzing whether a Material Adverse Effect had occurred, the Court rejected Akorn's argument that Fresenius was not entitled to rely on risks as to which it was on notice following its due diligence review or other risks as to which it was on notice due to industry knowledge.[41] In rejecting the argument, the Court reaffirmed Delaware's strong public policy in favor of freedom of contract, noting that the parties "could have . . . excluded 'certain specific matters that [the seller] believes will, or are likely to, occur during the anticipated pendency of the agreement,' or matters disclosed during due diligence, or even risks identified in public filings," or "could have defined [Material Adverse Effect] as including only unforeseeable effects, changes, events, or occurrences."[42] The Court nevertheless found that even if material adverse effect clauses were construed generally to guard only against unknown risks, Fresenius did not know of the events leading to Akorn's "collapse."[43]

Ultimately, the Court found that Fresenius carried the "heavy burden" to show that Akorn had experienced a Material Adverse Effect due to a durationally significant decline in performance arising from unforeseen company-specific problems. Although the merger agreement did not provide Fresenius with a separate right to terminate the agreement upon a general Material Adverse Effect, it did entitle Fresenius to refuse to close the merger on that basis.

Breach of Representations and Warranties

The Court then addressed whether Akorn had breached its representations and warranties relating to regulatory compliance.[44] The Court noted that Fresenius would be required to show that the deviation between Akorn's actual condition with regard to regulatory compliance would have to deviate from its condition on that front as represented in the merger agreement such that it "would *reasonably be expected* to result in a Material Adverse Effect."[45] Construing the provision, the Court noted that the "reasonably be expected to" qualifier sets forth an objective standard that allows for future occurrences to have a material adverse effect, such that a Material Adverse Effect could occur without the concomitant effects then being experienced. The Court noted that "mere risks" would not suffice to establish a Material Adverse Effect; rather, the party asserting the Material Adverse Effect must establish a basis in law and fact for the severe consequences being forecast.[46] To this end, the Court must address the question from a qualitative and a quantitative lens.[47] On the qualitative front, the Court found overwhelming evidence of pervasive regulatory non-compliance issues at Akorn and indicated that the problems worsened post-signing.[48] On the quantitative front, the Court determined that Akorn's regulatory compliance issues—expected to take at least three to four years to remedy—were durationally significant and gave rise to estimated remediation costs of approximately 20 percent of Akorn's standalone value.[49] With regard to these metrics, the Court found that Akorn had breached its representations and warranties and that the breach would reasonably be expected to have a Material Adverse Effect. As the Court found that Akorn's breaches were not susceptible to cure, it held that Fresenius was entitled to terminate for the reasons it asserted.

Breach of Ordinary Course Covenant

Finally, the Court found that Akorn, in failing to take appropriate action in response to the regulatory compliance issues detailed in the opinion, failed (incurably) to satisfy its interim covenant to use "commercially reasonable efforts to carry on its business in all material respects in the ordinary course of business,"[50] thereby giving Fresenius additional grounds to terminate the merger agreement.[51] At the outset, the Court settled the debate over the construction of the "in all material respects" qualifier, finding that it is less onerous than the common law doctrine of material breach (where a breach is material if it goes to the essence of the parties agreement or touches upon its fundamental purpose), but is one that builds upon the principles of materiality in the disclosure context

(where the phrase requires a showing that the fact of breach would be viewed by a reasonable investor as altering the total mix of information). Thus, the Court construed the phrase as limiting the operation of the covenant, as so qualified, to issues "that are significant in the context of the parties' contract, even if the breaches are not severe enough to excuse a counterparty's performance under a common law analysis."[52]

The Court then addressed the construction of the "commercially reasonable efforts" qualifier in the ordinary course covenant. The Court noted that "practitioners have a general sense of a hierarchy of efforts clauses"—starting with "best efforts" as setting forth the most rigorous standard and cascading downward through "reasonable best efforts," "commercially reasonable efforts" and "good faith efforts."[53] The Court, however, found little support in the case law for the fine distinctions among the standards. In fact, the Court noted that the Delaware Supreme Court, in *Williams Cos. v. Energy Transfer Equity, L.P.*,[54] had interpreted the terms "commercially reasonable efforts" and "reasonable best efforts" as effectively imposing requirements to "take all reasonable steps," and did not make a distinction between the two formulations.[55] Even "best efforts," the Court noted, would be construed under existing precedent to incorporate a reasonableness component.[56]

Concluding that Akorn's obligation to use commercially reasonable best efforts implied an obligation "to 'take all reasonable steps' to maintain its operations in the ordinary course of business," the Court found that Akorn had fallen short in multiple respects.[57] The Court found that after entering into the merger agreement, Akorn took various actions that would be outside the course of business for a company operating in the generic pharmaceutical space, including cancelling regular audits in favor of less rigorous "verification audits," and cancelling inspections from outside consultants that had been scheduled to occur before the execution of the merger agreement. Moreover, the Court found that Akorn did not maintain the type of data integrity system that a company operating in the generic pharmaceutical company is obligated to maintain, nor did it devote adequate resources to data integrity or adequately address data integrity issues as they arose.[58]

The Court further found that Akorn's submission of "fabricated data" to the FDA was outside the ordinary course of business.[59] The Court also found that Akorn's failure to conduct what it referred to as a "'responsive and credible'" investigation in response to the whistleblower letters likewise was a departure from ordinary course operations.[60] These failings, according to the Court, were "material" in that, among other things, no reasonable acquirer would have agreed to acquire Akorn if it understood that Akorn would cease to conduct regular audits or cease to engage in ordinary quality control and data integrity activities.[61] Taking into account that Akorn was in the early stages of remediation efforts on its data integrity and other issues, the Court found the breaches of the ordinary course covenant were not curable by the outside date.

The Court's finding that Akorn had breached the ordinary course covenant, however, did not end the inquiry into whether Fresenius had validly terminated on that basis. As noted above, Fresenius could only terminate on that basis if it was not then in material breach of its own obligations. To that end, Akorn argued that Fresenius had breached its obligation to seek antitrust approval.[62] The Court observed that Fresenius was subject to a "flat obligation to take 'all actions necessary' to secure antitrust approval," but also noted that this covenant was "[s]omewhat in tension" with the other provisions of the merger agreement vesting Fresenius with "sole control over the strategy for securing antitrust approval."[63] The parties did not dispute whether Fresenius, in the six months following the execution of the merger agreement, diligently sought antitrust approval.[64] But, the Court found, in February 2017, while Akorn's performance was in its continued decline and the investigations were yielding troubling facts, "Fresenius contemplated a path that could have constituted a material

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breach of the Hell-or-High-Water Covenant had Fresenius continued to pursue it."[65] Indeed, the Court found that Fresenius had sought a course that would have constituted a technical breach of its obligations; however, Fresenius changed course in approximately one week and effectively cured its non-compliance, leading the Court to conclude that the breach was not material. Accordingly, as Fresenius had not materially breached its contractual covenants, it was not precluded from exercising its termination right triggered upon Akorn's breach of the ordinary course covenant.

Observations and Practical Implications

Material Adverse Effect Provisions

No per se rule, but. The *Akorn* Court was careful to caution against the inference that it was making any *per se* rule, and warned readers not to "fixate on a particular percentage as establishing a bright-line test" or construe its "decision as suggesting that there is one set of percentages for revenue and profitability metrics and another for liabilities."[66] Nevertheless, the opinion indicates that events giving rise to a 20 percent decrease in a target's value, when considered with other factors, could constitute a material adverse effect.

Allocation of known or knowable risks. The Court indicated that, in most cases, a seller will not be able to overcome the finding that a material adverse effect had occurred on the basis that the buyer, through its due diligence efforts or its industry knowledge, should have known about the risks. As noted above, the Court indicated that parties may allocate these risks by contract. Thus, sellers seeking to prevent buyers from claiming a material adverse effect on the basis of known or reasonably knowable risks should seek to include express provisions preventing the invocation of a material adverse effect provision under those circumstances (just as buyers should resist the inclusion of such carve-outs).

Factors that are reasonably expected to result in a material adverse effect. Practitioners should take care to observe the distinction throughout any acquisition agreement between actions or factors causing a material adverse effect, on the one hand, and actions or factors that could "reasonably be expected to" cause a material adverse effect, on the other. As noted above, while the Court in *Akorn* made clear that the latter formulation is not satisfied through the "mere risk" of a material adverse effect, it did note that the formulation would allow for "'future occurrences [to] qualify as [a] material adverse effect'" such that a material adverse effect "'can have occurred without the effect on the target's business being felt yet.'"[67]

Carve-outs and carve-outs to carve-outs. The *Akorn* Court established a general framework for material adverse effect provisions, identifying four categories of risks, consisting of systematic risks, indicator risks, agreement risks and company-specific risks, and finding that, in general, the seller will retain only the company-specific risks. Buyers and sellers should take care in drafting the carve-outs to the material adverse effect provisions (and the exceptions to the carve-outs) to ensure that, in cases where they are deviating from this general framework, they are doing so deliberately and with an eye toward the manner in which the risks of specific facts, circumstances or events will operate.

Representations and Warranties

Materiality qualifiers. As noted above, the *Akorn* Court observed that representations couched with a material adverse effect qualifier are more forgiving (from the standpoint of the seller) than those requiring that the representation be true in "all material respects." That is, a representation, warranty or covenant subject to a material adverse effect qualifier will not be breached unless it gives rise to material and durationally significant qualitative and quantitative damage to the seller. By contrast, the "all material respects" qualifier in a representation, warranty or covenant operates in a manner similar to the test used to determine materiality under disclosure law and looks to whether a reasonable buyer

would have considered the issue significant in the context of the parties' agreement.

A note on sandbagging. Without directly addressing the issue, the *Akorn* Court articulated a number of policy arguments that could be read to support the position that Delaware law is "pro-sandbagging."[68] The Court's statements should be viewed, however, in light of the Delaware Supreme Court's recent decision in *Eagle Force Holdings, LLC v. Campbell*, in which it declined to affirmatively decide the issue, but questioned the view that Delaware was pro-sandbagging.[69]

Covenants

The hierarchy of efforts standards. The Court found scant support in the case law for the careful hierarchy and fine distinctions among various efforts standards. Transaction parties should be aware that drafting disputes over "reasonable best efforts" and "commercially reasonable efforts" may have little practical effect—and transaction parties should be aware that even though they are required to use commercially reasonable efforts (rather than reasonable best efforts), they likely will be expected to "take all reasonable steps"[70] to perform the applicable obligation.

Hell-or-high-water covenants. The *Akorn* Court found that Fresenius had breached the merger agreement's "hell-or-high-water" covenant (albeit immaterially) in seeking antitrust approval of the merger, but its analysis on this issue was colored by the fact that the merger agreement vested Fresenius with the right to control the strategy for obtaining antitrust approval. To avoid potential dilution of the strength of a hell-or-high-water provision, sellers negotiating for such provisions should seek to obtain some level of input on antitrust strategy or limit the buyer's discretion to formulate antitrust strategy in a way that could delay antitrust approval.

Access to Information

Inspection rights. As the regulatory issues underlying Fresenius's termination rights were largely uncovered through its own independent investigation, the *Akorn* opinion underscores the importance of the buyer's contractual information rights. Buyers should strive to secure the type of information rights secured by Fresenius, which gave Fresenius reasonable access to Akorn's "officers, employees, agents, properties, books, [c]ontracts, and records.'"[71]

Confidentiality agreements. The *Akorn* Court found that outside counsel engaged by Fresenius to investigate Akorn's alleged regulatory violations was entitled to use the information originally furnished to Fresenius in connection with its due diligence. Although the confidentiality agreement between the two parties provided that such information "could be used 'solely for the purpose of evaluating, negotiating, and executing' a transaction,"[72] the Court determined that the outside counsel's investigation formed part of the process of executing the transaction.

Termination

Defining the scope of a breach that precludes termination. The merger agreement at issue in *Akorn* did not allow Fresenius to exercise either of the termination rights it ultimately relied upon if it was in material breach of any of its own obligations under the merger agreement. It is not uncommon for a merger agreement to only limit a party's termination right to the extent that such party's breach was the cause of the conditions giving rise to the termination right. If Fresenius's unrelated breach of the merger agreement had been found to be material, the merger agreement's use of the former approach could have been significant.

Conclusion

While the *Akorn* opinion is significant in that it represents the first instance in which a Delaware court found that a buyer was entitled to terminate a merger agreement on the basis of a material adverse effect, the Court's analysis does not represent a material departure from established Delaware law in the space, and, given the factual record summarized in the opinion, the outcome should come as no surprise. Nevertheless, given the

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Court's extensive analysis of the merger agreement, the opinion provides M&A practitioners and their clients substantial guidance in drafting and negotiating merger agreements, along with determining whether and when they may (or may not) be entitled to terminate the agreement.

Notes

1. 2018 WL 4719347 (Del. Ch. Oct. 1, 2018).
2. Id. at *14.
3. Id.
4. Id.
5. Id. at *16.
6. Id.
7. Id. at *18.
8. Id.
9. Id. at *44–46.
10. Id. at *1.
11. Id. at *45.
12. Id. at *21.
13. Id.
14. Id. at *54.
15. Id. at *24.
16. Id.
17. Id. The Court stated its impression that Fresenius's chairman, in making the pronouncements, "knew that the expectations would have to be lowered" but "did not have numbers that he trusted" and would not have them until after Fresenius had obtained control of Akorn. Id.
18. Id. at *26.
19. Id.
20. Id.
21. Id. at *27.
22. Id. at *27–28, *30.
23. Id. at *28.
24. Id. at *29.
25. Id. at *30.
26. Id. at *31.
27. Id. at *39, *46.
28. Id. at *43–44.
29. Id. at *44–45.
30. Id. The Court noted that Akorn's failure to bring down its representations and warranties would allow Fresenius to terminate only if the breach was incapable of cure by the outside date. Id. at *45. The Court also noted that Fresenius would not be entitled to terminate on the basis that Akorn had not complied with its covenants if Fresenius itself was then in material breach of its own representations, warranties and covenants. Id. Finally, the Court noted that the occurrence of a general Material Adverse Effect did not provide Fresenius with an independent termination right but would instead allow it to refuse to close. Id.
31. Id. at *49–50.
32. Id. at *50. The definition of "Material Adverse Effect" in the merger agreement at issue largely followed the Court's construction of material adverse effect provisions generally, starting with a customary statement regarding what would constitute a material adverse effect and then specifically carving out most systematic risks (other than, in certain cases, to the extent they would disproportionately affect Akorn), various indictor risks (but clarifying that the underlying event would not be carved out) and agreement risks. Id. at *51–52.
33. Id. at *53 (quoting Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, at 738 (Del. Ch. 2008)).
34. Id.
35. Hexion, 965 A.2d at 738.
36. Akorn, 2018 WL 4719347, at *54.
37. Id. at *55.
38. Id. at *56.
39. Id. at *58.
40. Id.
41. Id. at *60.
42. Id. at *61 (footnote omitted).
43. Id. at *62.
44. Id.
45. Id. at *65 (emphasis added).
46. Id.
47. Id.
48. Id. at *66.
49. Id. at *73.
50. Id. at *18.
51. Id. at *91.
52. Id. at *86.
53. Id. at *86–87.

54. 159 A.3d 264, 272 (Del. 2017).
55. Akorn, 2018 WL 4719347, at *87. The Akorn Court noted, however, that Chief Justice Strine, in a dissenting opinion in Williams, maintained a distinction between the two formulations, describing "best efforts" as requiring efforts that "can potentially lead to the party making the promise having to take extreme measures to fulfill it" and "commercially reasonable efforts" as imposing "a strong, but slightly more limited, alternative." Id. at *87 n.797 (citing Williams Cos., 159 A.3d at 276 & n.45).
56. Id. at *87 (citing Alliance Data Sys. Corp. v. Blackstone Capital P'rs V L.P., 963 A.2d 746, 763 n.60 (Del. Ch. 2009)).
57. Id. at *88.
58. Id.
59. Id.
60. Id.
61. Id. at *89–90.
62. Id. at *91.
63. Id. at *97.
64. Id. at *98.
65. Id. at *99.
66. Id. at *74 n.740.
67. Id. at *65.
68. Id. at *60–61.
69. 187 A.3d 1209, 1236 n.185 (Del. 2018); id. at 1247 (Strine, C.J. & Vaughn, J., concurring in part and dissenting in part).
70. Akorn, 2018 WL 4719347, at *88.
71. Id. at *26.
72. Id. at *29.

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