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QUESTIONS OR COMMENTS?

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Quarterly Corporate / M&A Decisions Update

Below is our Quarterly Corporate / M&A Decisions Update for decisions in Q4 2018 and selected others. This update is designed to highlight selected important M&A, corporate and commercial court decisions on a quarterly basis. Brief summaries of each decision appear below with links to more robust discussions. Please contact us with any questions.

*Please click **HERE** for discussion of key decisions from Q3 2018.*

Akorn, Inc. v. Fresenius Kabi AG,
No. 535, 2018, 2018 WL 6427137 (Del. Dec. 7, 2018)

Why is it important

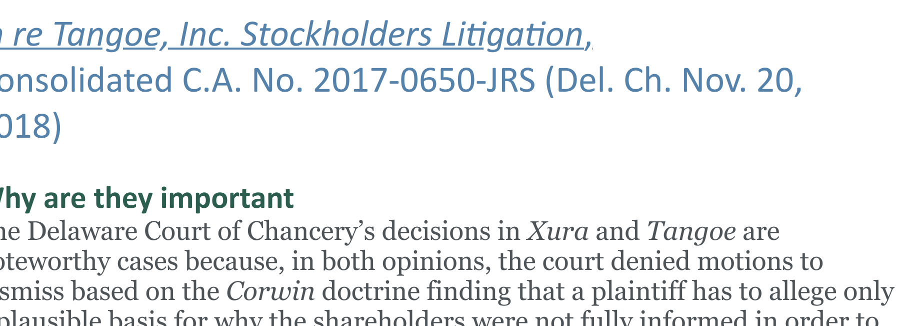
In *Akorn Inc. v. Fresenius Kabi AG*, the Delaware Supreme Court affirmed the Court of Chancery's decision to permit, for what is believed to be the first time under Delaware law, a buyer to terminate a merger agreement based on the occurrence of a material adverse effect ("MAE"). The Supreme Court's brief affirmance reinforces that although the burden to prove a MAE is high, it is not insurmountable.

Summary

In the lower court, the Court of Chancery found that Fresenius Kabi AG ("Fresenius") was excused from its obligation to close on the proposed merger with Akorn, Inc. ("Akorn") because Akorn's dramatic downturn in business performance, which was largely due to an unexpected increase in competition and the loss of a key contract, constituted a material adverse effect ("MAE"). The Court of Chancery also held that Fresenius properly terminated the merger agreement because Akorn's breach of its regulatory representations and warranties were severe enough to give rise to a MAE.

The Supreme Court, finding no need to "address every nuance of the complex record," simply held that the factual record supported the lower court's determination that Akorn suffered a MAE and that the misrepresentations concerning Akorn's regulatory compliance also gave rise to a MAE. Notably, however, the Court found it unnecessary to address whether the Court of Chancery erred in holding that Fresenius also could have terminated the merger agreement based on allegations that Akorn breached its obligation to continue operating in the ordinary course of business between signing and closing.

*Please click **HERE** for a detailed discussion of the significance of the Court of Chancery's 246-page opinion.*



In re Xura, Inc. Stockholder Litigation,
C.A. No. 12698-VCS (Del. Ch. Dec. 10, 2018)
and
In re Tangoe, Inc. Stockholders Litigation,
Consolidated C.A. No. 2017-0650-JRS (Del. Ch. Nov. 20, 2018)

Why are they important

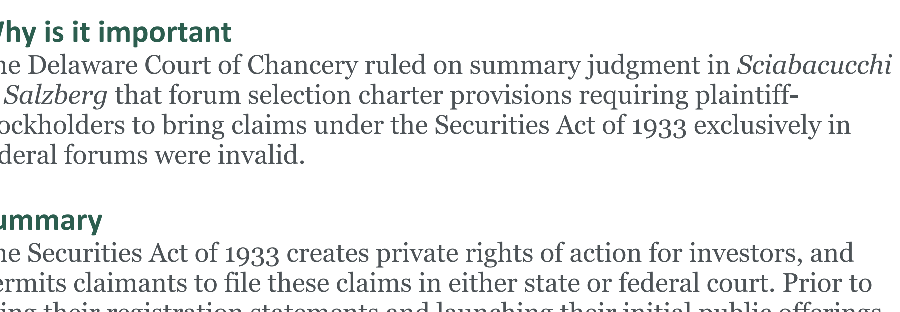
The Delaware Court of Chancery's decisions in *Xura* and *Tangoe* are noteworthy cases because, in both opinions, the court denied motions to dismiss based on the *Corwin* doctrine finding that a plaintiff has to allege only a plausible basis for why the shareholders were not fully informed in order to survive a motion to dismiss.

Summary

In *Xura*, a shareholder brought a breach of fiduciary duty action against a former CEO (the "defendant") and principals of Siris Capital Group LLC (the "Siris defendants"). The plaintiff alleged that the defendant had a number of secretive meetings with the Siris defendants during the sales process, favoring the Siris defendants over all others to the benefit of the defendant and detriment of the shareholders. The plaintiff also alleged an aiding and abetting claim against the Siris defendants. The defendants moved to dismiss, arguing, among other things, that the *Corwin* doctrine applied and, under the business judgment rule, the plaintiff's complaint should be dismissed. The court declined to apply the *Corwin* doctrine at the motion to dismiss stage and found that the plaintiff had pleaded a claim for breach of fiduciary duty against the defendant. The court granted the motion to dismiss as to the Siris defendants.

Tangoe addressed a putative class action brought by former shareholders against the board of directors. The case centers on an alleged breach of fiduciary duty arising out of a sale of Tangoe to a private equity investor. In light of a number of alleged financial and regulatory problems that Tangoe had at the time of the sale, the value of its shares allegedly was severely depreciated. The *Tangoe* plaintiffs alleged that the directors breached their fiduciary duties by failing to maximize shareholder value through the sale, as well as that the directors failed to disclose all material information, rendering the shareholder vote not fully informed. The court declined to apply the *Corwin* doctrine and denied the defendants' motion to dismiss.

*Please click **HERE** for a more detailed discussion of these cases.*



Sciabacucchi v. Salzberg,
No. CV 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018)

Why is it important

The Delaware Court of Chancery ruled on summary judgment in *Sciabacucchi v. Salzberg* that forum selection charter provisions requiring plaintiff-stockholders to bring claims under the Securities Act of 1933 exclusively in federal forums were invalid.

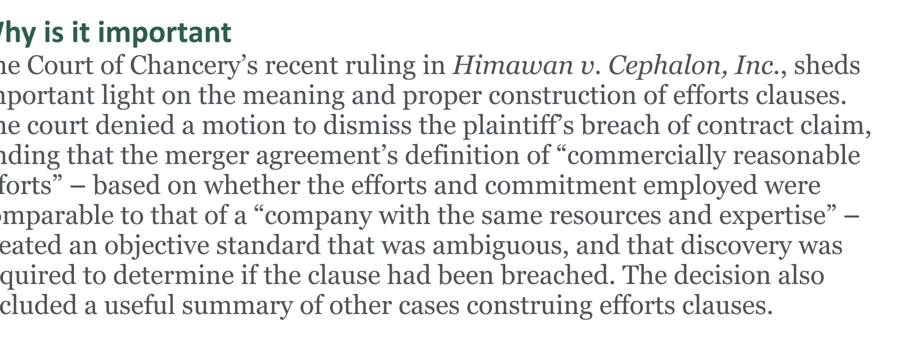
Summary

The Securities Act of 1933 creates private rights of action for investors, and permits claimants to file these claims in either state or federal court. Prior to filing their registration statements and launching their initial public offerings in 2017, the three nominal defendants – Blue Apron Holdings, Inc., Roku, Inc., and Stitch Fix, Inc. – each adopted charter-based forum selection provisions requiring Securities Act claims to be brought exclusively in federal forums.

Plaintiff Matthew Sciabacucchi purchased securities of each of the nominal defendants during or shortly after their IPOs, and had standing to assert Securities Act claims for material misstatements or omissions in the defendants' registration statements. Sciabacucchi brought suit in the Delaware Court of Chancery in December 2017, seeking a declaratory judgment that the forum selection provisions precluding state court actions under the Securities Act were invalid.

The court agreed with Sciabacucchi and struck down the forum selection provisions. As the court explained, a Delaware corporation's authority for self-regulation under the DGCL, as by adopting charter provisions or bylaws, is limited to its "internal affairs," which encompass the corporation's business, the conduct of its affairs, and the rights of its stockholders as stockholders. But where a plaintiff-stockholder asserts a right that is only incidental to or unrelated to their status as a stockholder – such as the federally created, statutory rights under the Securities Act – those rights are external to the "corporate contract" and beyond the corporation's ability to regulate.

*Please click **HERE** for a more detailed discussion of this case.*



Himawan v. Cephalon, Inc.,
C.A. No. 2018-0075-SG (Del. Ch. Dec. 28, 2018)

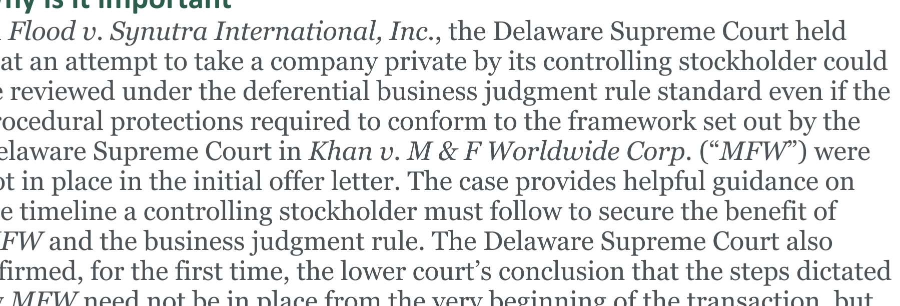
Why is it important

The Court of Chancery's recent ruling in *Himawan v. Cephalon, Inc.*, sheds important light on the meaning and proper construction of efforts clauses. The court denied a motion to dismiss the plaintiff's breach of contract claim, finding that the merger agreement's definition of "commercially reasonable efforts" – based on whether the efforts and commitment employed were comparable to that of a "company with the same resources and expertise" – created an objective standard that was ambiguous, and that discovery was required to determine if the clause had been breached. The decision also included a useful summary of other cases construing efforts clauses.

Summary

Ception, a company that owned the rights to an antibody, was acquired by Defendant Cephalon in February 2010. The merger agreement included earn-outs to be paid to the sellers by the buyer once the buyer met certain milestones pertaining to the approval of the antibody to treat two different conditions. The merger agreement required the buyer to use "commercially reasonable efforts" to achieve the milestones, and defined "commercially reasonable efforts" as "the exercise of such efforts and commitment of such resources by a company with substantially the same resources and expertise as [the buyer, Cephalon], with due regard to the nature of efforts and cost required for the undertaking at stake." Representatives of former Ception stockholders brought a breach of contract claim alleging that Cephalon failed to employ "commercially reasonable efforts" to meet the milestones. Finding that the contractual definition was ambiguous as to the nature of Cephalon's obligations, and noting that Plaintiffs had alleged that other similarly situated companies had made more progress than Cephalon towards similar goals, the Court denied the motion to dismiss the breach of contract claim.

*Please click **HERE** for a more detailed discussion of this case.*



Flood v. Synutra Int'l, Inc.,
195 A.3d 754 (Del. 2018)

Why is it important

In *Flood v. Synutra International, Inc.*, the Delaware Supreme Court held that an attempt to take a company private by its controlling stockholder could be reviewed under the deferential business judgment rule standard even if the procedural protections required to conform to the framework set out by the Delaware Supreme Court in *Khan v. M & F Worldwide Corp.* ("*MFW*") were not in place in the initial offer letter. The case provides helpful guidance on the timeline a controlling stockholder must follow to secure the benefit of *MFW* and the business judgment rule. The Delaware Supreme Court also affirmed, for the first time, the lower court's conclusion that the steps dictated by *MFW* need not be in place from the very beginning of the transaction, but only before economic negotiations began.

Summary

Liang Zhang, and entities related to him, owned 63.5 percent of the stock of Synutra International Inc. ("Synutra"). In January 2016, Zhang proposed to take the company private by purchasing the remainder of the stock he did not control. Zhang sent an initial offer letter proposing to purchase the remaining shares at US$5.91 per share, but did not include a requirement that the sale be conditioned on approval of a special committee and an affirmative vote of a majority of the minority stockholders – the two procedural protections required by *MFW*. The next week, Synutra's board of directors met and formed a special committee of independent directors to consider the proposal. A week after that, Zhang sent a second offer letter with the same price terms but conditioned on approval of the special committee and an affirmative vote of a majority of the minority stockholders. Over the next nine months, the special committee hired independent financial and legal advisers, met fifteen times to consider Zhang's proposal, negotiated an increase in the share price to US$6.05 a share, and ultimately approved the US$6.05 price unanimously. The US$6.05 price was then approved by a majority of Synutra minority stockholders.

Shortly thereafter, a stockholder brought claims against Synutra and Zhang, including for breach of fiduciary duty. Defendants successfully moved to dismiss the action, claiming the deal should be analyzed under the deferential business judgment rule because Zhang had structured the deal using *MFW*'s framework. The plaintiff appealed to the Delaware Supreme Court, arguing the Court of Chancery misapplied *MFW* and that the more stringent "entire fairness" rule should apply.

The Delaware Supreme Court found in favor of Synutra over a one-judge dissent, finding that *MFW*'s requirement that procedural protections be in place "from the beginning" of a transaction does not mean from the first offer, but rather before any economic negotiations take place. The court held that the *ab initio* requirement in *MFW* was meant to protect against the vote of the majority of the minority stockholders being used as a bargaining chip by the controlling party in negotiations over price with an independent special committee of the board. So long as the protections were in place before they could be used as leverage, the primary purpose of *MFW* was fulfilled. Additionally, the court disavowed dicta in *MFW* that suggested a plaintiff could survive a motion to dismiss by questioning whether a special committee had extracted a fair price.

The dissent focused only on the *ab initio* requirements, and argued that a controlling shareholder should be found to satisfy *MFW*'s *ab initio* requirement only if he or she includes the requisite procedural protections in the first offer letter.

*Please click **HERE** for a more detailed discussion of this case.*