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Quick Chancery Appeal Sought For Rocky $4.8B Akorn Merger

By **Jeff Montgomery**

Law360 (October 16, 2018, 10:54 PM EDT) -- Warring pharmaceutical companies Akorn Inc. and Fresenius Kabi AG asked Delaware's Chancery Court late Monday to clear the way for an immediate Akorn appeal from a recent ruling that Fresnius could terminate a $4.8 billion merger, putting off for now litigation over Fresenius' damage claims.

In a letter to Vice Chancellor J. Travis Laster, the two firms requested a partial final judgment in their case to permit an Akorn appeal of the court's Oct. 1 finding of a material adverse effect, or MAE, breach by Akorn that would permit Fresenius to terminate the deal. The decision also found another MAE justifying Fresenius' refusal to close the deal until the deal expired.

Akron already has declared its intent to appeal the Chancery Court decision.

In the balance is a $4.8 billion Fresenius agreement to buy a company that saw its value plunge after Fresenius agreed to buy the company, with Akorn share prices falling even further after the Vice Chancellor found walk-away rights for Fresenius. The partial final order would set up a Supreme Court review of the termination right, with the outcome in turn determining whether or not Fresenius can seek damages.

"Plaintiff wishes to pursue an immediate appeal from the opinion's denial of plaintiff's claims for specific performance and declaratory judgement," the letter said. "All parties agree that defendant's damages claim should be considered after the Delaware Supreme Court has ruled on plaintiff's appeal."

The court ruled Oct. 1 that Fresenius, a global drug and health care company, had a right to refuse closing based on a drastic post-signing, pre-closing nosedive in Akorn's financial performance and condition after the two companies agreed to merge. The change was found to violate contract contingency assurances that Akorn would operate "in the ordinary course," without drastic changes in financial condition or violations, pending the tie-up.

Adding to the appeal stakes are provisions in the agreement that, according to Fresenius, bar Akorn from seeking damages for itself, even under a wrongful termination claim.

Akorn, which disputed Fresnius' right to damages, also sought a court ruling allowing it to include in its final judgment a letter from the U.S. Food and Drug Administration approving an abbreviated new drug application for eye medication.

The approval, which Akorn said could be used to support its position in its appeal and in damage litigation, "embodies a formal conclusion by the FDA that 'adequate information has been presented to demonstrate that the drug is safe and effective for use as recommended.'"

Akorn argued that the approval was material evidence because it disproves a Fresenius' expert's prediction that the FDA would **reject** Akorn's ANDAs.

Fresenius countered that the approval "cannot be considered without additional context," and that it does not "materially change the record showing that Akorn has not received the approvals it expected

for 14 other ANDAs.

Vice Chancellor Laster found a termination right based on false or inaccurate representations by Akorn about the conduct of its business and its regulatory compliance in connection with product testing and development efforts.

Those concerns came to Fresenius' attention in part through a whistleblower letter, the Vice Chancellor said in his opinion, that eventually led to findings of "serious and pervasive data integrity problems" severe enough to qualify as a "material adverse event" justifying termination.

The closely watched case and Vice Chancellor Laster's decision — the first court ruling to scuttle a merger based on an MAE — created an immediate stir among investors and merger and acquisition attorneys.

Samuel C. Thompson Jr., Arthur Weiss Distinguished Faculty Scholar at Pennsylvania State University's Dickinson College of Law, said he discussed the decision Tuesday in one of his classes, focusing mainly on the vice chancellor's summary rather than the entire 246-page opinion.

"I think the Vice Chancellor got it right in knowing that this decision was going to cause a lot of discussion," Thompson said of the opinion's depth and scope.

Vice Chancellor Laster distinguished the Akorn decision from similar cases, Thompson said, particularly In re: IBP Inc. Shareholders Litigation. In IBP, he said, then-Vice Chancellor Leo E. Strine Jr., now Delaware's Chief Justice, ruled in 2001 that Tysons Foods Inc. was unable to use a merger prospect's drop in performance, caused by a broad industry downturn, to escape its deal.

Although IBP and Akorn both were described as close decisions by their respective jurists, Thompson said, Akorn stands out because its decline "was specific to Akorn, so I don't see this case being overturned in any way."

Akorn had been trading above $33 per share when a merger agreement worth $34 per share to its investors was signed in April 2017, with an outside closing date of April 24, 2018. By early 2018, however, the company's shares began a long dive, falling to $6.20 per share on Tuesday.

Akorn is represented by William M. Lafferty, Thomas W. Briggs, John P. DiTomo and Richard Li of Morris Nichols Arsht & Tunnell LLP, and Robert H. Baron, Daniel Slifkin, Michael A. Paskin and Justin C. Clarke of Cravath Swaine & Moore LLP.

Fresenius and its affiliates are represented by Stephen P. Lamb, Daniel A. Mason, Brendan W. Sullivan, Lewis R. Clayton, Andrew G. Gordon, Susanna M. Buergel, Jonathan H. Hurwitz, Daniel H. Levi and Paul A. Paterson of Paul Weiss Rifkind & Garrison LLP, and Donald J. Wolfe Jr., Michael A. Pittenger, T. Brad Davey, Matthew F. Davis and Jacob R. Kirkham of Potter Anderson & Corroon LLP.

The case is Akorn Inc. v. Fresenius Kabi AG et al., case number 2018-0300, in the Court of Chancery of the State of Delaware.

--Additional reporting by Vince Sullivan. Editing by Adam LoBelia.