ROPES & GRAY

MERGERS & ACQUISITIONS LAW NEWS

THE ROPES RECAP

Q4 2018

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WELCOME TO THE ROPES RECAP OF THE FOURTH QUARTER OF 2018

AS IT TURNS OUT, the most notable case of the fourth quarter of 2018, was reported in our third quarter report. *Akorn v. Fresenius* actually came down on the first day of the fourth quarter, which allowed us time to report on it in our third quarter Ropes Recap, available here. Later in the fourth quarter, the Delaware Supreme Court upheld the decision, but no other court decision has been issued that has been as groundbreaking. That said, as interesting and noteworthy as *Akorn v. Fresenius* is, its direct impact on deal-making is somewhat limited, given the highly fact-intensive analysis the court went through. However, during the fourth quarter of 2018, there actually were a handful of cases that we believe can and will have a more lasting impact on M&A deals generally, and those cases are what we've highlighted in our final Ropes Recap for 2018.

Specifically, in *Post Holdings v. NPE Seller Rep*, we saw the Delaware Court of Chancery hold that a prior material breach of contract may not relieve performance by a counterparty to that contract if the counterparty retains the benefits of the contract. Further, in that matter, the court held that unliquidated damages (e.g., those alleged in an indemnification claim) may not be appropriately set off from amounts otherwise properly owed under a contract. Both holdings relate to fact patterns that deal makers regularly advise clients on, and will likely result in tighter drafting in M&A agreements. We also saw the Court of Chancery cast doubt on fraud carveouts in *Great Hill Equity v. SIG Growth Equity Fund*. In that matter, while the contract provisions appeared to carve out fraud, the court applied certain contractual limitations on fraud claims made against seller stockholders—again focusing practitioners on tighter drafting around such carveouts to make sure the parties' intent is clear. In *Manti Holdings v. Authentix Acquisition Co.*, the Court of Chancery unequivocally upheld a waiver of statutory appraisal rights by common stockholders in a stockholders' agreement. This is the first Delaware court to arrive at such a holding, which upholds a provision that many practitioners have routinely placed in drag-along provisions. Finally, in *Flood v. Synutra*, the Delaware Supreme Court further clarified the applicability of the *"ab initio"* standard set forth in *Kahn v. M&F Worldwide*, whereby controllers could preserve application of the business judgment rule to M&A transactions.

Outside of Delaware, we saw a New York appellate court hold that the trial court had incorrectly applied the entire fairness standard in a case seeking to enjoin the acquisition of Xerox by Fujifilm. The appellate court dissolved the injunctions granted by the trial court. While interesting, it is important to note that the M&A transaction has been abandoned and is the subject of numerous ongoing disputes that we are monitoring. In addition, we saw the California Court of Appeals uphold the enforceability of a Delaware forum selection clause in the bylaws of a corporation that had been adopted without stockholder consent. That holding made it only the second appellate court in the nation (outside of Delaware) to uphold such a provision.

As you will see towards the end of this report, the Ropes & Gray dealmakers themselves had an active fourth quarter. With over $30 billion in deals done this past quarter, the R&G dealmakers finished the year with a strong showing. 2018 in general proved to be a banner year for M&A, and we are looking forward to continuing that trend in 2019. As always, we encourage you to reach out to any member of your R&G team, with any questions about any of the matters or topics discussed in the Ropes Recap, or any other M&A legal developments that may interest you. We look forward to the conversation.

Thank you.
Ropes Recap Editors

Party Seeking Indemnification is Obligated to Continue Performance Even in the Event of a Material Breach

IN *POST HOLDINGS, INC. V. NPE SELLER REP LLC*, the Delaware Court of Chancery found that the prior material breach of a contract by a counterparty does not excuse performance if a party seeks indemnification under the contract and that, absent language to the contrary, indemnification claims cannot be set off against other claims made by the indemnifying party.

The case examined a dispute that arose under an October 2016 stock purchase agreement for the sale of National Pasteurized Eggs to Post Holdings for approximately $94 million. About one year after the acquisition, Post Holdings initiated a claim against the sellers for material breach of certain representations and warranties and sought indemnification under the stock purchase agreement. The sellers counterclaimed for the return of certain post-closing tax and insurance refunds from the pre-closing period that were owed to them under the agreement. Post Holdings argued that it was not obligated to pay the sellers these refunds because of the sellers' prior material breach of certain representations and warranties under the agreement.

> **Parties seeking** contractual remedies for material breaches by counterparties should remain compliant and abide by their own obligations under the agreement.

The Court of Chancery rejected this argument, holding that while a party may be "excused from performance under a contract if the other party is in material breach thereof," performance is not excused if the non-breaching

Delaware Supreme Court Affirms Court of Chancery's *Akorn* Decision

On December 7, 2018, the Delaware Supreme Court, sitting *en banc*, affirmed the Delaware Court of Chancery's decision in *Akorn, Inc. v. Fresenius Kabi AG*, which we previously discussed in last quarter's *Ropes Recap* (available here). In *Akorn*, the Court of Chancery had approved the buyer's (Fresenius) termination of the merger agreement, based on its findings that Akorn (1) suffered a material adverse effect, (2) breached certain representations, and (3) failed to operate in the normal course of business. Two days after oral argument of an expedited appeal, the Delaware Supreme Court issued a three-page order, stating that the "factual record adequately support[ed]" the Court of Chancery's determination that Akorn, based on its application of precedent such as *In re IBP, Inc. Shareholders Litigation* and *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, had suffered a material adverse effect. In addition, the Supreme Court concluded that the record adequately supported the Court of Chancery's declaration that Fresenius properly terminated the merger agreement. Having thus affirmed the dismissal of Akorn's claims, the Supreme Court refrained from also addressing whether Akorn had breached its covenant to operate in the ordinary course of business.

While the facts of the *Akorn* case, including an unusual year-long anticipated delay between signing and closing, may limit its precedential utility in predicting the outcome of future disputes in which a party seeks to avoid consummating a merger based on disappointing pre-closing financial performance, *Akorn* remains an important decision for deal practitioners because it is the first case in which the Delaware Court of Chancery has found a material adverse effect to have occurred.

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

Xerox-Fujifilm Merger Update

On October 16, 2018, a New York appellate court reversed the precedent-setting injunction granted by the Commercial Division of the New York Supreme Court enjoining consummation of a transaction in which Fujifilm Holdings Corp. was to acquire a majority of the stock of Xerox Corp. (previously covered in our Q2 2018 Ropes Recap issue available here). The trial court had applied the entire fairness standard of review, as opposed to the business judgment standard of review, after finding that the CEO of Xerox, Jeff Jacobson, was "hopelessly conflicted" during the negotiation of a strategic transaction that would have resulted in his becoming the CEO of the combined company, and that a majority of Xerox's directors were personally interested in the transaction. The trial court concluded that the proposed transaction failed to meet the fair dealing and fair price prongs of the entire fairness test.

In applying New York law in its reversal of the injunction "on the law and the facts," the New York appellate court held that the trial court should have applied the business judgment rule. In addition to reversing the trial court on a number of its findings with respect to deficiencies of process, the appellate court held that the possibility of a continuing role as a director of the combined company was not a material benefit such that it was a disabling interest.

In May 2018, Xerox terminated the merger agreement with Fujifilm, citing contractual rights unrelated to the shareholder litigation. In June 2018, Fujifilm sued Xerox for breach of contract in abandoning the transaction; the breach of contract claim is still pending in the Southern District of New York. It remains uncertain whether the parties will continue to pursue the transaction.

Deason v. Fujifilm Holdings Corp., 86 N.Y.S.3d 28 (N.Y. App. Div. Oct. 16, 2018).

party retains the benefits of the contract. Specifically, the court found that Post Holdings' attempt to enforce the indemnification provisions of the stock purchase agreement and to seek release of a related escrow after the alleged material breach indicated Post Holdings' intention to continue the contract. As a result, the court concluded that Post Holdings remained bound by the terms of the stock purchase agreement regardless of any prior breach by the sellers.

The court also reinforced a general rule with respect to set-off rights: "a contingent or unmatured obligation which is not presently enforceable cannot be the subject of set-off." More specifically, the court found that Post Holdings' indemnification claims for an as-of-yet undetermined amount (i.e., an unliquidated claim) could not be offset against the sellers' claims for specific amounts of post-closing refunds owed under the stock purchase agreement (i.e., a liquidated claim). The court, however, stressed that this limitation on set-offs only applies in the absence of contrary contractual language permitting such set-offs.

The case highlights the need for parties seeking contractual remedies for material breaches by counterparties to remain compliant and abide by the parties' own obligations under the agreement, and for parties to expressly state whether claims of different types (i.e., liquidated and unliquidated) should be permitted to be set off against one another.

Post Holdings, Inc. v. NPE Seller Rep LLC, C.A. No. 2017-0772-AGB (Del. Ch. Oct. 29, 2018).

Delaware Supreme Court Allows Business Judgment Review if Procedural Protections are in Place before the Start of Economic Negotiations

ON OCTOBER 9, 2018, the Delaware Supreme Court held that a controlling stockholder pursuing a merger of the controlled company will have the benefit of business judgment review if the procedural protections required under *Kahn v. M&F Worldwide Corp.* (*MFW*) are in place before the start of substantive economic negotiations with the target. This case resolves an issue left open after *MFW* regarding the timing of when such procedural protections need to be put into place.

In *MFW*, the Delaware Supreme Court held that the deferential business judgment rule, rather than a more stringent entire fairness standard, applied to a merger proposed by a controlling stockholder if it was conditioned *ab initio* (Latin for "from the beginning") on two procedural protections: (1) the approval of an independent, adequately empowered special committee that fulfills its duty of care; and (2) the uncoerced, informed vote of a majority of the minority stockholders.

In *Flood v. Synutra International, Inc.*, Synutra was a publicly-traded company controlled by Liang Zhang and entities related to him. In January 2016, Zhang sent a letter to the board proposing to take Synutra private, but did not include the two *MFW* procedural conditions in that letter. One week later, the board met and appointed a special committee to evaluate the proposal, and one week after that, Zhang sent a second letter to the special committee which included both *MFW* procedural protections—before the special committee had met and before any negotiations had taken place. Price negotiations did not begin until seven months later, after the special committee had engaged its own financial and legal advisors and those advisors had conducted due diligence, produced financial projections and contacted 25 other possible buyers.

The plaintiff argued that "*ab initio*" under *MFW* implied a bright line test and that the *MFW* procedural protections needed to be in place at the time of the "first offer" in order for the business judgment rule to apply. Under such a test, a controller would have only one chance to take advantage of *MFW*. The court rejected this argument and chose to apply the more flexible standard expressed in *Swomley v. Schlecht*, explaining that the *MFW* requirements would be satisfied *ab initio* if the procedural protections are in place before any substantive economic negotiations began. Thus, even if a controller does not include the *MFW* procedural protections in its "first offer," it may still get the benefit of business judgment review if such protections are added later but before substantive economic negotiations begin. The court reasoned that the *ab initio* requirement is meant to prevent the *MFW* protections from being used as a bargaining chip when negotiating economic terms, and that *Swomley*'s standard still fulfills that purpose.

> **Even if a controller** does not include MFW procedural protections in its "first offer", the controller may still get the benefit of business judgment review if such protections are added later but before substantive economic negotiations begin.

The *Synutra* decision appears to allow controllers to preserve business judgment review for a transaction even if early communications omit, intentionally or otherwise, the *MFW* procedural protections. However, by rejecting a bright line test proposed by the plaintiff, the court made clear that assessments will be based on the facts and circumstances of the particular case, which may not be as clear-cut in other transactions. As a practical matter, it remains prudent for a controller to include the *MFW* procedural protections as early as possible in its communications to maximize the likelihood of effectively preserving business judgment review for a transaction.

Flood v. Synutra Int'l, Inc., No. 101, 2018 (Del. Oct. 9, 2018).

OTHER **KEY DECISIONS** *(continued from page 4)*

Delaware Court of Chancery Finds that Contractual Waivers of Common Stockholders' Statutory Appraisal Rights are Enforceable

ON OCTOBER 1, 2018, Vice Chancellor Glasscock of the Delaware Court of Chancery held that a contractual waiver of stockholder appraisal rights contained in a stockholders agreement was enforceable, notwithstanding the stockholders' statutory right to appraisal under Section 262 of the Delaware General Corporation Law (DGCL). Although the Court of Chancery previously ruled that such waivers are enforceable against holders of preferred stock, the question of their enforceability against holders of common stock was previously unanswered.

> ***Authentix* provides** comfort to investors that common stockholders can effectively waive statutory appraisal rights by contract.

This case arose from the sale by merger of Authentix Acquisition Co. Distribution of the proceeds of the sale was governed by the waterfall provision in the Authentix certificate of incorporation, whereby holders of the company's common stock were due little or none of the cash consideration. A group of common stockholders sought to invoke their statutory right to appraisal of the fair value of their shares under Section 262 of the DGCL. Authentix responded by seeking to enforce the stockholders agreement under which the stockholders agreed to consent to any sale of the company and to "refrain from the exercise" of any appraisal rights.

The plaintiffs' chief argument was that their obligation to "refrain" from exercising appraisal rights was a temporary suspension, rather than a permanent waiver, of their rights. Plainitiffs noted that the stockholders agreement was due to "terminate upon the…consummation of a Company Sale" and was not binding after closing. The plaintiffs emphasized that the stockholders agreement could have used, but did not use, words such as "waive" or "void," and that "refrain" implied an extant right, which plaintiffs were free to assert after closing. The court was unpersuaded and held that the stockholders agreement language unambiguously prohibited the plaintiffs' exercise of appraisal rights. The court noted that appraisal rights could not have been exercised before closing and that the plaintiffs' reading would, therefore, render the provision a nullity.

The plaintiffs also argued that the appraisal right waiver was unenforceable because the stockholders agreement violated Section 151(a) of the DGCL, which requires any limitations on classes of stock to be set forth in the corporate charter. They contended that because the appraisal waiver was included in the stockholders agreement rather than the company's charter, the provision constituted an unenforceable contractual waiver of statutory rights that was void as a matter of public policy. The court disagreed, declaring that the waiver provision of the stockholders agreement was not the equivalent of imposing restrictions on a class of stock under Section 151(a). Rather, the stockholders agreement represented a valid agreement by the stockholders to take on contractual obligations in return for consideration, and enforcement of the obligations pursuant to the stockholders agreement did not contravene the DGCL or public policy under the facts of the case.

Moving forward, the case provides comfort to investors that common stockholders can effectively waive statutory appraisal rights by contract. However, the court's analysis emphasizes the importance of drafting such waiver provisions clearly.

Manti Holdings, LLC v. Authentix Acquisition Co., C.A. No. 2017-0887-SG (Del. Ch. Oct. 1, 2018).

Delaware Court of Chancery Applies Limitation of Liability Despite CEO Fraud

FOLLOWING A 10-DAY TRIAL, the Delaware Court of Chancery ruled in *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, that the CEO of an e-commerce payment processing company committed fraud in connection with the sale of the company, while rejecting all fraud-based claims against the other defendants. The court interpreted a fraud exception to the indemnification provision in the merger agreement to apply only to the CEO and not to the other defendants who were innocent of the fraud and thus not liable for any indemnification obligations in excess of the limitation of liability.

The case stemmed from Great Hill's 2011 private equity acquisition of Plimus—an e-commerce "reseller" in the business of arranging credit card transactions between online vendors and purchasers—from SIG Growth Equity Fund. Following the acquisition, Great Hill brought claims alleging, *inter alia*: (a) fraud and fraudulent inducement against Plimus' CEO, Plimus' VP of Financial Strategy and Payment Solutions, and two managing directors of SIG's management company; (b) aiding and abetting fraud against SIG, its management company, and Plimus' founders; and (c) civil conspiracy against all of Plimus' principals and shareholders. Great Hill sought indemnification for the defendants' breaches of representations and warranties in the merger agreement. Great Hill also argued that because of the alleged fraud, the merger agreement's indemnification limitation should not apply to limit the defendants' indemnification obligations, regardless of the defendants' culpability in the alleged fraud.

On the merits of Great Hill's substantive claims, the court found only Plimus' CEO liable for one count of fraud based on the CEO's failure to disclose a fine imposed on Plimus by a payment processor and its threat to terminate its payment processing agreement with Plimus. While Plimus' VP of Financial Strategy and Payment Solutions had knowledge of the fine and threatened termination, the court found that she could not be liable for fraud because she relied on the CEO's promise to disclose these facts to Great Hill. Relatedly, the court found that all defendants breached the merger agreement's representations and warranties that Plimus was in compliance with credit card association rules and had not received any notices from payment processors of an intent to terminate the applicable processing agreement.

The court interpreted a fraud exception to the indemnification provision in the merger agreement to apply only to the CEO and not to the other defendants who were innocent of the fraud and thus not liable for any indemnification obligations in excess of the limitation of liability.

Turning to the question of liability allocation, the court parsed the exclusive remedy language of the merger agreement, which stated in relevant part that Article 10 of the merger agreement contained the sole and exclusive remedy for breaches of the merger agreement, "except in the case of fraud or intentional misrepresentation (for which no limitations set forth herein shall be applicable)." Great Hill argued that this exception should be interpreted to impose uncapped liability on *all* the defendants due to the CEO's fraud; "that is, *even upon those parties both innocent and ignorant of any fraud*" (emphasis in original). Great Hill claimed that the defendants bargained for the possibility of "unlimited liability for the frauds of others" in the merger agreement, and should be held to that bargain. While noting that the agreement's language was somewhat ambiguous about whose fraud triggered the exception, the court was ultimately not persuaded by this line of argument, concluding that "it is clear that the language quoted exempts *fraudsters* from the benefits of the negotiated limits on liability" (emphasis in original), rather than subjecting non-fraudster defendants to

uncapped liability. The court further noted that the merger agreement's limitation of liability and pro rata liability mechanisms were designed specifically to protect the selling shareholders for breaches of representations and warranties by Plimus' management. Accordingly, the court deemed Great Hill free to pursue additional remedies against the CEO, while holding the limitation of liability in place as to the other defendants.

Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, C.A. No. 7906-VCG (Del. Ch. Dec. 3, 2018).

California Court of Appeal Upholds Delaware Forum Selection Bylaw

ON DECEMBER 21, 2018, a California Court of Appeal affirmed a trial court's decision to enforce a forum selection bylaw that designated Delaware as the exclusive litigation forum for intra-corporate disputes. While Delaware law clearly authorizes the use of such forum selection bylaws, the California Court of Appeal's ruling is welcome confirmation that these provisions will also be enforced in California.

This case arose from a putative class action brought against 1st Century Bancshares, Inc., a Delaware corporation headquartered in California. In March 2016, 1st Century and Midland Financial Co. announced plans to merge. When 1st Century's board approved the merger agreement with Midland, it also adopted a bylaw that designated Delaware as "the sole and exclusive forum" for intra-corporate disputes, including any action asserting a breach of fiduciary duty claim. The plaintiff, a California resident and 1st Century shareholder, filed his complaint in California state court, alleging that 1st Century's directors had breached their fiduciary duties in connection with their approval of the merger agreement. After settlement efforts between the parties failed, 1st Century moved to dismiss the case, arguing that its forum selection bylaw required the plaintiff's claims to be litigated in Delaware. The trial court declined to dismiss the case, but stayed the action, and the plaintiff appealed.

On appeal, the plaintiff argued that the forum selection bylaw was not enforceable because it conflicted with California law and public policy. The court rejected this argument, holding that the portion of the Corporations Code on which the plaintiff attempted to rely "does not deprive a [California] court of the discretion to decline to exercise its jurisdiction over an action involving the internal affairs of a foreign corporation where that action would be more appropriately and justly tried elsewhere."

> ***1st Century*** confirms that Delaware exclusive forum selection bylaws are valid and enforceable in California.

In addition, the court rejected the plaintiff's argument that the bylaw should not be enforced because the 1st Century board had adopted the bylaw in connection with the challenged merger. Instead, the court agreed with the trial court's assessment that there is no unfairness in a requirement that claims against a Delaware corporation under Delaware law be brought in a Delaware court. The court also acknowledged that forum selection bylaws have the effect of consolidating deal litigation into a single forum, thereby reducing litigation expenses and avoiding duplication of effort, which is beneficial to corporations and their shareholders alike.

1st Century thus confirms that Delaware exclusive forum selection bylaws are valid and enforceable in California.

Drulias v. 1st Century Bancshares, Inc., C.A. No. H045049 (Cal. Ct. App. 6th Dist. Dec. 21, 2018).

Delaware Court of Chancery Rules that Companies Cannot Require Litigation of Securities Act of 1933 Claims in Federal Court

ON DECEMBER 19, 2018, the Delaware Court of Chancery ruled in *Sciabacucchi v. Blue Apron Holdings*, that a company cannot, by way of a forum selection provision in its certificate of incorporation, require claims under the Securities Act of 1933, as amended (the "1933 Act"), to be brought only in federal courts.

As background, in May 2018, the U.S. Supreme Court held in *Cyan, Inc. v. Beaver County Employees Retirement Fund* that shareholders may pursue securities class actions under the 1933 Act in either state or federal court. In doing so, the Supreme Court resolved a split among the federal courts of appeal, in which some circuits (including the Ninth Circuit) had held that 1933 Act claims are not removable to federal court, while other circuits reached the opposite conclusion. Prior to *Cyan*, state court 1933 Act actions had been filed regularly in certain jurisdictions, particularly in California.

Even before the Supreme Court's ruling in *Cyan*, three companies that conducted initial public offerings in 2017—Blue Apron Holdings, Inc., Roku, Inc. and Stitch Fix, Inc.—sought to eliminate the prospect of 1933 Act state court litigation by including a provision in their certificates of incorporation that would require any claim under the 1933 Act to be brought in federal court. A shareholder plaintiff sued each of these companies in the Delaware Court of Chancery, seeking a declaratory judgment that their federal forum selection provisions were unenforceable.

Vice Chancellor Laster invalidated the federal forum selection provisions. His ruling relied heavily upon two earlier decisions addressing exclusive forum selection bylaws under Section 109(b) of the DGCL: *Boilermakers Local 154 Ret. Fund v. Chevron Corp.* and *Deutscher Tennis Bund v. ATP Tour, Inc.* The *Boilermakers* court upheld an exclusive forum bylaw provision for breach of fiduciary duty and other corporate claims as a valid exercise of the internal affairs doctrine. In dicta, the *Boilermakers* court suggested that, by contrast, corporations could not use exclusive forum bylaws to dictate the forum for claims that are external to the corporation, such as tort or contract claims. The Delaware Legislature subsequently enacted Section 115 of the DGCL to codify the holding of *Boilermakers*. Section 115 provides, in relevant part, that a certificate of incorporation or a corporation's bylaws "may require . . . that any or all *internal corporate claims* shall be brought solely and exclusively in any or all of the courts in this State . . . ." (emphasis added).

> ***Blue Apron*** rejects federal forum selection provisions as a tool available to public companies seeking to protect themselves from being hauled into state court on a federal securities claim.

In *Blue Apron*, however, Vice Chancellor Laster held that 1933 Act claims are not internal corporate claims, but rather are external claims for which a corporation lacks the power to dictate a forum in its certificate of incorporation or bylaws. In reaching this conclusion, the court cited several factors. The court first observed that 1933 Act claims arise under federal law, and typically are based on allegations that a registration statement or prospectus contains a material misstatement or omission. The court then emphasized that plaintiffs may sue parties under the 1933 Act who do not have any internal role at the corporation (for example, underwriters). The court also found that the 1933 Act defines "security" so broadly that there is no necessary

KEY DECISIONS (cont.from page 8)

connection between a 1933 Act claim and the shares of a Delaware corporation. Finally, the court reasoned that because a 1933 Act plaintiff does not need to be a current shareholder and can sue even after selling the shares, the claim does not arise out of or relate to the ownership of the corporation's shares. In summing up its reasoning, the court emphasized that a corporation "cannot assert authority over other types of claims based on the corporate contract, because the claims do not arise out of internal corporate relationships, and the fact of incorporation is not a sufficient nexus to support applying the chartering state's law to external claims."

Following the U.S. Supreme Court's ruling in *Cyan*, plaintiffs increasingly have brought 1933 Act claims in state courts, in an attempt to avoid the procedural obstacles that so-called "reform" legislation has imposed on federal securities class actions. The consequences of a dual system for 1933 Act claims are troubling, particularly in circumstances where shareholder plaintiffs file competing actions in state and federal court arising from the same offering. The *Blue Apron* decision rejects federal forum selection provisions as a tool available to public companies seeking to protect themselves from being hauled into state court on a federal securities claim. At the time of this writing, the defendants have filed a notice of appeal to the Delaware Supreme Court, which is pending.

Sciabacucchi v. Blue Apron Holdings, Inc., C.A. No. 2017-0931-JTL (Del. Ch. Dec. 19, 2018).

THE ROPES RECAP

IMPORTANT M&A DEVELOPMENTS

Federal Court Orders First-Ever Divestiture in Private Antitrust Suit

ON OCTOBER 5, 2018, a Federal Court ordered divesture of a doorskin facility to remedy a violation of Section 7 of the Clayton Act in what the court described as "the first privately brought action under . . . the Clayton Act to have gone to verdict and, in which, a private party has sought divestiture." In *Steves and Sons, Inc. v. JELD-WEN, Inc.*, the United States District Court for the Eastern District of Virginia ordered JELD-WEN, a vertically integrated interior door manufacturer, to divest one of its doorskin factories in order to restore competition to the market for doorskins. The case is notable not only because Steves and Sons persuaded the court to impose the drastic remedy of divestiture six years after the transaction closed, but also because it succeeded, notwithstanding two separate investigations (pre- and post-consummation) by the Department of Justice's Antitrust Division of JELD-WEN's acquisition of the doorskin factory at issue.

The case involved the 2012 acquisition by JELD-WEN of a distressed doorskin manufacturer, CraftMaster Manufacturing, Inc. Doorskins are products used to give the decorative appearance of a solid wood door at a considerably lower cost, and are an integral part of the finished door products sold by both JELD-WEN and Steves and Sons, an interior door manufacturer that does not produce doorskins internally. The acquisition of CraftMaster by JELD-WEN, which had already produced and sold doorskins to Steves and Sons before the acquisition, reduced the number of doorskin manufacturers from three to two in the United States. According to Steves and Sons, following the merger, JELD-WEN breached a long-term supply agreement for doorskins between the parties, which had been negotiated before the CraftMaster acquisition, and intentionally and illegally stifled competition, which was aided by a decision by the only other significant U.S. doorskin manufacturer to stop selling doorskins to third parties. In its claim, brought four years after the CraftMaster acquisition, Steves and Sons sought not only monetary damages, but also equitable

relief sufficient to restore competition in the doorskin market to its pre-acquisition state (*i.e.*, before JELD-WEN acquired CraftMaster).

On February 15, 2018, a jury unanimously found that JELD-WEN's acquisition of CraftMaster violated the antitrust laws and awarded Steves and Sons a total of $58.6 million in damages, which, when trebled, resulted in an antitrust damages award of $175.9 million. Following the verdict, the parties litigated over Steves and Sons' request to restore, through divestiture, the independence of certain parts of the CraftMaster doorskin business.

> **Although all mergers,** even those that require a Hart-Scott-Rodino filing, are potentially subject to post-consummation challenges, whether from federal authorities, state attorneys general, or private litigants, such challenges are rare and unlikely to be successful absent unusual circumstances.

The October 5, 2018 opinion addressed Steves and Sons' request for equitable relief, which primarily sought a court order requiring JELD-WEN to divest a doorskin manufacturing facility in Towanda, Pennsylvania, acquired as part of the CraftMaster merger. In an extensive opinion ordering divestiture, the judge noted that the Towanda facility is the second-largest doorskin manufacturing facility in the world and that the merger effectively reduced the market for doorskin manufacturers from three to two, which harmed independent companies like Steves and Sons that were not vertically integrated. In addition, the court found that JELD-WEN "bullied" independent door manufacturers with aggressive price increases designed to "kill off some of the independent door makers that were its doorskin customers." In evaluating the impact and feasibility of divestiture, the court found that the Towanda facility itself could be a profitable competitor in the doorskin market (if acquired by a third party), and that JELD-WEN provided insufficient evidence that it could not operate profitably without the facility.

Following the October order, JELD-WEN released a statement calling the court's decision unprecedented and fundamentally incorrect as a matter of law, and declaring its intent to appeal the decision all the way to the U.S. Supreme Court, if necessary. Although all mergers, even those that require a Hart-Scott-Rodino filing, are potentially subject to post-consummation challenges, whether from federal authorities, state attorneys general, or private litigants, such challenges are rare and unlikely to be successful absent unusual circumstances. Post-consummation challenges are rare for a variety of reasons, the most important of which is the complexity and potential unfeasibility of successfully unwinding corporate assets to create a viable independent competitor. Indeed, that was a substantial rationale for implementation of the pre-merger filing regime more than forty years ago and it remains true to this day. The JELD-WEN litigation, however, is a cautionary reminder that long-tail outcomes exist and may need to be taken into account in negotiating, closing, and integrating acquisitions, as well as in acquirers' post-consummation interactions with their customers.

Steves and Sons, Inc. v. JELD-WEN, Inc., C.A. No. 3:16-cv-545 (E.D. Va. Oct. 5, 2018).

THE ROPES RECAP

SIGNIFICANT **TRANSACTIONS**

Represented CVie Therapeutics Company Limited in its partial acquisition by Windtree Therapeutics, Inc.

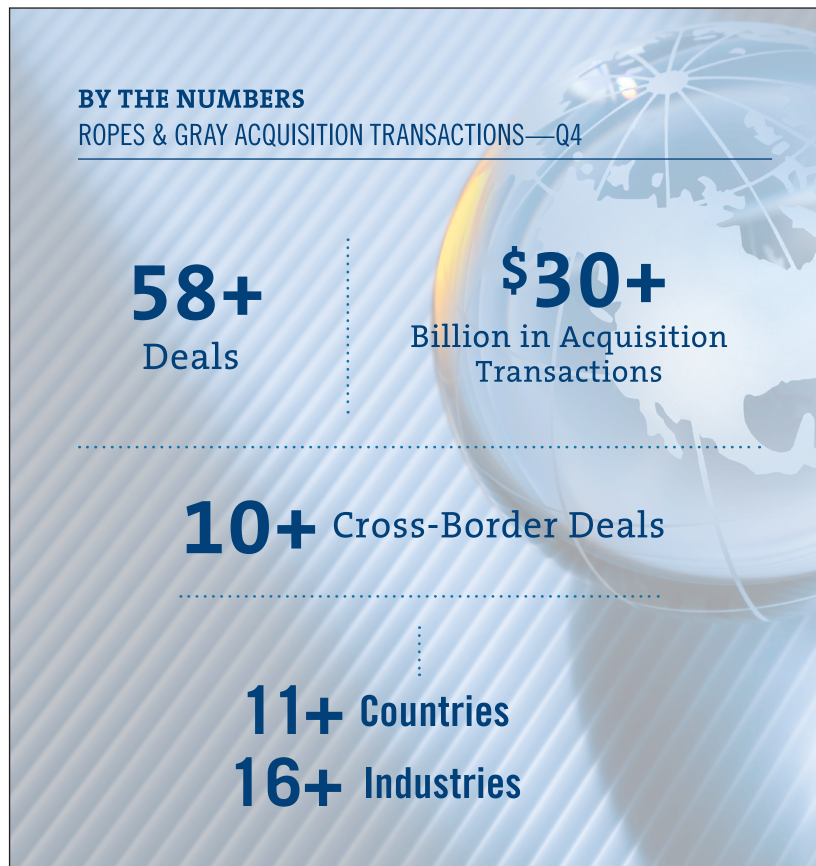
Represented the Hero Group in its sale of Signature Brands

Represented ASM Pacific Technology Limited in its acquisition of Tel NEXX Inc.

Represented Columbia Care in its merger with Canaccord Genuity Growth Corp

Representing Alibaba Group to bring the retail offerings of YOOX Net-A-Porter Group to Chinese consumers

Represented Badger Sportswear, a CCMP Capital Advisors portfolio company, in its acquisition of Teamwork Athletic Apparel



BY THE NUMBERS

ROPES & GRAY ACQUISITION TRANSACTIONS—Q4

58+ Deals

$30+ Billion in Acquisition Transactions

10+ Cross-Border Deals

11+ Countries

16+ Industries

Represented Cambrex Corporation in its $252 million acquisition of Avista Pharma Solutions

Represented ACProducts, a portfolio company of AIP, in connection with its acquisition of Elkay Wood Products Company

Represented Bain Capital and Pfizer in the creation of Cerevel Therapeutics

Represented Deustche Bank as financial advisor to CommScope in its acquisition of ARRIS International

Represented Eze Software, a TPG Capital portfolio company, in its $1.45 billion sale

Represented Numotion, an Audax Group portfolio company, in its sale

Represented Vantage Specialty Chemicals, an H.I.G. Capital portfolio company, in its acquisition of LEUNA-Tenside GmbH

Represented Castanea Partners in its sale of Fitness Anywhere

Represented GHO Capital in its acquisition of Validant

Represented General Catalyst in the joint-venture acquisition of Intersections

THE ROPES RECAP

SIGNIFICANT **TRANSACTIONS**

Represented Deutsche Bank as financial advisor to Cohu, Inc. in its $800 million acquisition of Xcerra Corporation

Represented Movie Tavern in its $126 million sale to The Marcus Corporation

Represented Hearthside Food Solutions, Charlesbank Capital Partners and Partners Group in the acquisition of Greencore USA

Represented The Hillman Group in its acquisition of Big Time Products

Represented TPH & Co. and Morgan Stanley as financial advisors to Wildhorse Resource Development Corporation in its sale

Represented TESARO in its sale to GSK plc

Represented Beaver-Vistec International, a TPG Capital portfolio company, in its acquisition of PhysIOL

Represented ZirMed in its acquisition of the transaction services technology business of Ovation Revenue Cycle Services

Represented Vantage Specialty Chemicals, an H.I.G. Capital portfolio company, in its acquisition of The Armana Company

Represented Hugel, a Bain Capital portfolio company, in its acquisition of Croma-Pharma

Represented Convey Health Solutions, a New Mountain Capital portfolio company, in Convey's merger with HealthScape Advisors

BY THE NUMBERS

ROPES & GRAY ACQUISITION TRANSACTIONS—2018

225+ Deals

$134+ Billion in Acquisition Transactions

45+ Cross-Border Deals

20+ Countries

30+ Industries

Represented Deutsche Bank Securities as financial advisor to noosa yoghurt in its merger with Sovos Brands

Represented CIVC Partners, in its investment in Magna Legal Services

Represented Advent International Corporation in the acquisition of the mattress manufacturing business of Serta China

Represented Silver Lake in its strategic growth investment in GoodRx

Represented Veronis Suhler Stevenson in its minority investment in GreenSlate

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