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Akorn falls as Fresenius backs away

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Akorn says it intends to sue Fresenius to force the close of its $4.3bn acquisition after the German group called the deal off yesterday. Good luck. Fresenius has been investigating Akorn since February, and has now concluded that "material breaches" of FDA data integrity standards have occurred. Akorn's investors, realising that Fresenius would not take this drastic step without very good evidence, departed in droves, sending its shares down 34% in early trading today.

As well as retaining its $4.3bn Fresenius is in line for another financial boost. Fresenius Medical Care, the dialysis-focused group part-owned by Fresenius, has sold its hospital services unit, Sound Physicians, for $2.2bn in yet another medtech private equity deal.

The precise nature of the claims being cited by Fresenius are unknown, but they would need to be substantial for it to believe that it can break the Akorn deal. Akorn argues that the investigation has not found anything that should serve as a basis to terminate the transaction.

Mac attack

The takeover of the generics and OTC player Akorn was struck a year ago, but the time is less important than the place. It was contracted under Delaware law, which has extremely stringent standards that must be met for a deal to be terminated by a buyer. The purchaser must prove that a material adverse change or Mac has occurred, and so damaged the target company that it is no longer worth anything like the takeover price.

This can be hard to pull off. Abbott, for example, unsuccessfully invoked a Mac clause to extricate itself from its disastrous Delaware-based bid for the diagnostics group Alere, despite that company's history of lurching from one disaster to another (*Can Abbott kill the Alere deal?*, *December 8, 2016*).

It is possible that Fresenius can win out despite the challenges. It previously offered to delay its decision to allow Akorn to perform its own investigation and present evidence in its defence. This offer was rebuffed, suggesting that the findings of Fresenius's investigation were not open to dispute.

Analysts from Bernstein call the deal "unsalvageable", and this seems to be the view of Akorn's shareholders, too. Akorn's shares have been stuck at the $18-19 mark since Fresenius's investigation was made public late in February, well below the $34 takeover price. They opened today at just $12.83.

As an aside, if Fresenius succeeds in walking away, the annual total for biopharma M&A deals announced in 2017 will fall to a woeful $77.3bn – the lowest total since 2012.

M&A totals, 2012-17

Announcement date	Total value ($bn)	Deal count
2017	81.6	196
2017 without Fresenius-Akorn	77.3	195
2016	110.9	219
2015	191.2	309
2014	221.0	241
2013	79.7	213
2012	48.3	205

Source: EvaluatePharma.

A Sound deal?

Fresenius Medical Care, the medical technology company 30%-owned by Fresenius, has also reversed a takeover decision – sort of. The group bought a majority stake in Sound Physicians, a physician organisation providing services across emergency medicine, critical care, hospital medicine and other areas, for $600m in 2014, its first move into non-dialysis territory.

On Saturday FMC said it was selling its stake in Sound to a consortium led by the private equity shop Summit Partners for a healthy $2.2bn.

Berenburg analysts write that selling Sound makes FMC “cleaner, more focused and more comprehensible”. It is also a smart move from a financial perspective: FMC expects to make an €800m book gain from the divestment, and will likely get a reasonable cash return too.

The proceeds might well be invested in another company FMC has bought: Nxstage Medical (*Fresenius aims to take home dialysis to the Nxstage, August 7, 2017*). Home dialysis systems are becoming big business – the US pharmacy benefit manager CVS said this month that it would develop its own home dialysis technology – and this would be a sensible place for FMC to deploy its cash.

It is too early for FMC and Fresenius to congratulate themselves on a successful weekend of deal-making and unmaking respectively. After all, it is not completely certain that Fresenius will prevail if Akorn makes good on its threat to sue. But the groundwork has been laid, and with luck the two companies might soon find themselves both richer and wiser.

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