Clients&FriendsMemo

The Delaware Court of Chancery Rejects Termination of Merger Agreement Based on Material Adverse Effect

January 8, 2020

In *Channel Medsystems, Inc. v. Boston Scientific Corporation*,[1] the Delaware Court of Chancery rejected an attempt by Boston Scientific to terminate and thus avoid consummating a merger agreement with Channel on the grounds that a material adverse effect as defined in the parties' agreement had occurred. In so holding, Chancellor Andre Bouchard signaled that last year's Court of Chancery decision in *Akorn, Inc. v. Fresenius Kabi AG*,[2] in which the Court of Chancery for the first time found the existence of a material adverse effect permitting merger agreement termination, was not necessarily a watershed moment that would make such findings more common. The decision also provides important guidance on merger agreement drafting and litigation strategy and pitfalls.

Background

Channel was a privately held medical technology company and developer of a single product, Cerene. Boston Scientific, a publicly traded medical technology company, agreed to acquire Channel pursuant to the merger agreement, dated November 1, 2017 ("Agreement"). Prior to that time, in 2013, Boston Scientific had acquired approximately 15% of Channel's equity and had an "observer" on Channel's board of directors. Upon executing the Agreement, this observer (Christopher Kaster, Boston Scientific's Vice President of Business Development and Venture Capital), became a "full board member." In this pre-merger agreement period, Boston Scientific received periodic updates about Channel from Kaster and from Channel itself.[3]

On June 22, 2017, Boston Scientific and Channel entered into a non-binding Letter of Intent, pursuant to which Boston Scientific contemplated purchasing the remaining outstanding equity of Channel for up to $275 million, conditioned on FDA approval of Cerene and subject to additional diligence. Thereafter, Boston Scientific "conducted detailed due diligence of Channel," and Boston Scientific acknowledged at trial that Channel "'placed no limitations on Boston Scientific's access to

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1 2019 WL 6896462 (Del. Ch. Dec. 18, 2019).

2 *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018); *see also* Jason Halper *et al.*, *M&A Update: Akorn Falls Far from the Tree: Delaware Chancery Court Finds a "Material Adverse Effect" for the First Time in Akorn, Inc. v. Fresenius Kabi AG, et al.*, Cadwalader, Wickersham & Taft LLP (Oct. 25, 2018), https://www.cadwalader.com/resources/clients-friends-memos/ma-update-akorn-falls-far-from-the-tree-delaware-chancery-court-finds-a-material-adverse-effect-for-the-first-time-in-akorn-inc-v-fresenius-kabi-ag-et-al.

3 *Channel*, 2019 WL 6896462, at *3-4.

its quality systems.'"[4] On November 1, 2017, the parties entered into the Agreement, pursuant to which Boston Scientific agreed to immediately increase its equity stake to 20% for a payment of $5.6 million and acquire Channel's remaining outstanding equity for up to $275 million under a "put-call structure," *i.e.*, Boston Scientific could "exercise a 'call' option at any time to acquire Channel and, after obtaining [pre-market approval, or "PMA"] for Cerene from the FDA, Channel could exercise a 'put' option to close the deal."[5]

On December 29, 2017, Channel senior management discovered that its Vice President of Quality, Dinesh Shankar, had stolen approximately $2.6 million from the company by submitting falsified expense reports and other documents, some of which were contained in Channel's submissions to the FDA seeking approval for Cerene. On January 2, 2018, Channel confronted Shankar, who admitted to his misconduct, and thereafter terminated his employment and referred him to the Department of Justice for potential prosecution. (Shankar pled guilty and is in prison). The Court found that "[p]romptly after discovering Shankar's fraud, Channel notified Boston Scientific and the FDA, and interacted with both of them in a fully transparent manner over the next few months as it thoroughly investigated and took actions to remediate the effects of Shankar's fraud."[6]

Upon becoming aware of Shankar's misconduct, Boston Scientific did not act in a manner that demonstrated a meaningful concern with respect to such actions; specifically: (i) after an initial January 25 meeting among senior Boston Scientific and Channel executives, for the "next three months, Boston Scientific never asked for any additional information relating to Shankar's conduct, Channel's remediation, or its communications with the FDA" but rather the companies' teams "pressed forward with their work on the integration of Channel without apparent regard for Shankar's fraud;" (ii) "[n]obody from Boston Scientific expressed any potential concerns about its acquisition of Channel" after a team visited Channel's headquarters in February 2018; and (iii) Boston Scientific never responded to Channel's suggestion to meet after Channel shared the Greenleaf Report (as defined below) or in response to Channel's offers to update Boston Scientific on Channel's meetings with the FDA.[7]

To assist in conducting that investigation, Channel retained Fenwick & West LLP and an outside forensic accounting firm, which uncovered that out of approximately 138 test reports submitted to the FDA, six reports contained information falsified by Shankar; and Shankar also falsified certain other reports not submitted to the FDA. Channel also retained Greenleaf Health, Inc. ("Greenleaf"), a healthcare regulatory and quality consulting firm, to conduct an independent assessment of and prepare a report regarding Shankar's activity. Greenleaf issued a report ("Greenleaf Report"), dated March 6, 2018, in which it concluded that "(i) Channel officials were 'thorough' and 'earnest[]' in their investigation, 'open and forthcoming with information[,] and placed no restrictions' on Greenleaf's access to information; (ii) Shankar 'act[ed] in isolation[;]'" and (iii) Shankar 'was not directly involved in the collecting and reporting of clinical data.' Critically, Greenleaf did not find evidence that Shankar's conduct 'affected the outcome of the clinical study or impacted safety and efficacy data

4 *Channel*, 2019 WL 6896462, at *4.

5 *Id.* at *5.

6 *Id.* at *1.

7 *Id.* at *12.

from the study.'"[8] Thereafter Channel prepared a "comprehensive Fraud Implication Assessment Quality Plan to identify and remediate the effect of Shankar's misconduct on Channel's quality system, which Channel implemented over much of 2018."[9]

On April 18, 2018, the FDA accepted Channel's remediation plan, which, the Court found, "strongly signaled that Shankar's fraud would not be the cause of any failure of the FDA to approve the Cerene device and which made the FDA's approval a distinct possibility."[10] Nonetheless, three days later Boston Scientific "for the first time" raised concerns about Shankar's fraud, claiming that the Greenleaf Report was "extremely troubling."[11] Boston Scientific never responded to Channel's subsequent request for an in-person meeting. On May 11, 2018, Boston Scientific sent Channel a notice purporting to terminate the Agreement based on Channel's alleged breach of various representations and warranties in the Agreement arising from Shankar's misconduct. The FDA granted Cerene PMA on March 28, 2019, consistent with the parties' expectations when they entered into the Agreement and six months prior to the September 30, 2019 contractual deadline in the Agreement.

Channel commenced its action in September 2018, asserting that Boston Scientific had breached its obligation in the Agreement to use commercially reasonable effects to consummate the transaction and requested specific performance. Channel also sought a declaration, among others, that no material adverse effect ("MAE") had occurred. One month later Boston Scientific asserted counterclaims, including for rescission of the Agreement based on Channel's alleged breaches of representations and warranties in the Agreement. The action was tried in April 2019, with post-trial argument and supplemental briefing occurring thereafter.

Relevant Merger Agreement Provisions

Channel asserted that Boston Scientific breached Section 6.3(b) of the Agreement, which required Boston Scientific to "take all further action that is necessary or desirable to carry out the purposes of this Agreement" and to "use its commercially reasonable efforts to take all such action and refrain from taking any actions which would be reasonably expected to frustrate the essential purposes of the transactions contemplated by the Agreement."[12]

Boston Scientific asserted that Channel breached three categories of representations in the Agreement, which representations related to (i) Channel's compliance with healthcare laws, including a provision entitled "Design Controls," at 21 CFR § 820.30, which required Channel to "establish and maintain procedures to control the design of the device in order to ensure that specified design requirements are met," (ii) the adequacy of the quality assurance procedures followed in connection with the clinical trials and (iii) the accuracy of Channel's submissions to the FDA with respect to Cerene. Each such representation contained an express materiality qualifier.[13] Boston Scientific

8 *Channel*, 2019 WL 6896462, at *12.

9 *Id.* at *8.

10 *Id.* at *12.

11 *Id.*

12 *Id.* at *15.

13 *Id.* at *20.

alleged that each of these representations were breached as of the date of the Agreement as a result of Shankar's misconduct.

Based on these alleged inaccuracies in Channel's representations, Boston Scientific asserted that it had the right to terminate the Agreement pursuant to Section 8.1(f), which permitted Boston Scientific to terminate "at any time prior to the Effective Time" if "any representation or warranty of [Channel] contained in this Agreement shall be inaccurate or shall have been breached as of the Agreement Date . . . such that the condition set forth in Section 7.2(b) would not be satisfied."[14]

Section 7.2(b), in turn, is titled "Conditions to the Obligation of [Boston Scientific] and Merger Sub," and provides that "the obligations of Boston Scientific to consummate the Merger . . . are subject to the satisfaction of" several conditions, including (in 7.1(b)(i)) that "[e]ach of the representations and warranties of [Channel] contained in this Agreement . . . shall have been true and correct at the time originally made . . . except to the extent the failure of any such representations and warranties to be true and correct does not have and would not reasonably be expected to have a Material Adverse Effect on [Channel]."[15]

"Material Adverse Effect" was defined in the Agreement to mean, subject to certain exceptions that are not at issue in this case, "with respect to [Channel], any change or effect occurring after the Agreement Date that, when taken individually or together with all other adverse changes or effects occurring after the Agreement Date, is materially adverse to the business, results of operations, assets or financial condition of [Channel]."[16]

Following a thorough analysis, the Court found that Boston Scientific had breached its obligation to use commercially reasonable efforts to consummate the transaction and that Boston Scientific was not entitled to terminate the Agreement based on Channel's breaches of representations and warranties because those breaches did not constitute a Material Adverse Effect. The Court granted specific performance requiring Boston Scientific to consummate the transaction.[17]

Takeaways

- **Materiality is not defined by bright-line quantitative measures.** The Court found Channel's representations to be inaccurate as of the date of the Agreement because Channel was not in material compliance with the applicable portion of FDA regulation Section 820.30. Specifically, the provision required Channel to establish and maintain procedures for design verification, design validation, and documentation and approval of design changes before implementation, the last of which had to be included in a file history. The Court agreed with Boston Scientific that Shankar's seven falsified test records that appeared in six reports impacted the verification and validation testing requirements, and Channel also failed to document certain changes to Cerene. In considering whether these inaccuracies were material, the Court reaffirmed the disclosure-based standard adopted in

[14] *Channel*, 2019 WL 6896462, at *24.

[15] *Id.* at *25-26. (emphasis added.)

[16] *Id.* at *24.

[17] *Id.* at *37-40.

Akorn and *Frontier Oil v. Holly Corp.*,[18] which provides that a breach would be considered material if there is a "substantial likelihood that the . . . fact [of breach] would have been viewed by the reasonable investor as having significantly altered the 'total mix of information." As to the lack of detail in the file, the Court observed that this fact alone would not be significant "in the context of the parties' agreement."[19] However, the Court found that Channel's non-compliance with the requirement to maintain an adequate design history was material when combined with the presence of falsified records. The Court rejected Channel's argument that "because the design history included numerous other records, the presence of only six test reports containing falsified documents was not material. The Court noted that, "for materiality purposes, the small percentage of affected test reports is not determinative," and even "a single test report generated from falsified content" may be sufficient to establish material non-compliance, even if the falsified documents did not alter the conclusions of the applicable studies.[20] This is because the "presence of falsified quality records could . . . be significant to a reasonable acquirer for other reasons – for example, as presenting a potential obstacle to obtaining FDA approval for the Cerene device."[21]

- **The Court applied different standards to assess materiality for purposes of a breach of a representation versus to determine whether an MAE had occurred.** The Court rejected the aforementioned disclosure-based standard for purposes of assessing whether Channel's inaccuracies "has or would reasonably be expected to have a Material Adverse Effect" on Channel, despite the fact that, as is customary, the definition of "Material Adverse Effect" itself contained a materiality standard. Instead, consistent with *Akorn*, the Court found that in the absence of a contractual definition for "material" for purposes of the MAE definition, in order for an MAE to be found, the "effect should 'substantially threaten the overall earnings potential of the target in a durationally-significant manner'" that "one would expect to be measured in years rather than months," after taking into account quantitative and qualitative factors.[22] The Court cautioned that while "unsubstantiated speculation" or a "'mere risk of an MAE cannot be enough,'" an MAE can occur "'without the effect on the target's business being felt yet.'"[23]

- **The time to assess whether an MAE could "reasonably be expected" in the future was the date Boston Scientific provided notice of termination.** The Court next considered the point in time as of which one should assess whether there was a "reasonable expectation" of an MAE occurring "at some point in the future."[24] Channel contended that the relevant date was May 11, 2018, when Boston Scientific provided notice of termination, a view Boston Scientific agreed with during post-trial argument. Boston Scientific subsequently changed its position to March 6, 2018, the date on which it "read the Greenleaf

[18] 2005 WL 1039027 (Del. Ch. Apr. 29, 2005).

[19] *Channel*, 2019 WL 6896462, at *17.

[20] *Id.* at *21.

[21] *Id.*

[22] *Id.* at *24.

[23] *Id.* at *25.

[24] *Id.* at *26.

Report and 'formed the expectations that led to termination.'"[25] The Court sided with Channel, finding that the "critical language" is that an MAE must "'reasonably be expected'"—an objective standard. As a matter of common sense, the logical time to test whether a party had an objective right to terminate under Section 8.1(f) is to examine the facts and circumstances when the party actually took action to terminate."[26] According to the Court, this approach also "provides precision by fixing a specific date to apply the terms of the contract."[27] To the extent transaction parties wish to deviate from this default interpretation of the provision, express language to such effect should be included in the definitive documentation.

- **To justify termination, the Court concluded that there had to be a reasonable expectation of an MAE occurring by the anticipated date to close the transaction.** The Court also addressed as of what point in time an MAE must reasonably be expected to occur in order to justify termination of the Agreement. Channel argued that Boston Scientific had to prove as of the termination notice that "any inaccuracies in Channel's representations were such that an MAE would reasonably be expected as of the time of the anticipated closing."[28] Boston Scientific did not address the precise time frame in the future for measuring an MAE, meaning the inquiry "would be open-ended."[29] The Court agreed with Channel and noted that under this construct, Boston Scientific could terminate "at any time prior to the Effective Time" so long as "there was an inaccurate representation that, as of termination, would reasonably be expected to have a Material Adverse Effect as of when the parties anticipated the merger would close."[30] To the extent transaction parties wish to deviate from this default interpretation of the provision, express language to such effect should be included in the definitive documentation.

- **Changing positions during the course of litigation, without an adequate explanation, is highly likely to negatively impact that party's overall credibility and is unlikely to be successful.** The Court characterized Boston Scientific's "flip of position" regarding the date for assessing whether an MAE could "reasonably be expected" (*i.e.*, from May 11, 2018 to March 6, 2018) as "odd" in light of its position at argument that this two-month difference was immaterial to its entitlement to terminate.[31] Perhaps not surprisingly, the Court found that Boston Scientific's "change of position appears to be a pretext to try to elide evidence unhelpful to its case (*i.e.*, the FDA's approval of Channel remediation plan in April 2018) even though Boston Scientific did not have the strength of its convictions to terminate the Agreement before Channel received that approval."[32] Likewise, the Court took note of another "flip of position": "Presumably because" Channel received FDA approval for

[25] *Channel*, 2019 WL 6896462, at *26.

[26] *Channel*, 2019 WL 6896462, at *26.

[27] *Id.*

[28] *Id.* at *27.

[29] *Id.*

[30] *Id.*

[31] *Id.* at *26.

[32] *Channel*, 2019 WL 6896462, at *26.

Cerene "a few weeks before trial," Boston Scientific did not "press at trial its initial explanation for a reasonably expected MAE, *i.e.*, that Shankar's fraud substantially threatened Channel's overall earnings potential by jeopardizing its chances of obtaining FDA approval."[33] Instead, Boston Scientific "shifted its strategy to argue that Shankar's fraud was reasonably expected" to have an MAE because it "would still need to remediate and retest the product before placing Cerene on the market."[34] The Court ultimately rejected this position as not supported by credible evidence, but Boston Scientific's shifting explanation as events unfolded no doubt undermined the strength of its argument.

- **Time should be of the essence for a terminating party in delivering its termination notice.** The FDA's ultimate approval of Cerene shortly prior to trial also highlights the fact that, while the determination as to whether an MAE is reasonably likely to occur is to be made as of the date a termination notice is delivered, the Court will have the benefit of hindsight in taking into account developments that occur following the delivery of a termination notice in making its ultimate decision. Thus, terminating parties would be prudent to act swiftly in delivering a termination notice upon its determination that an MAE has occurred. In doing so, the terminating party will reduce the amount of time available for subsequent developments to occur that would contradict their position that an MAE is reasonably likely to occur as of the anticipated closing date.

- **Litigation positions or arguments that are contrary to common sense or contradicted by contemporaneous documents or actions are likely to be rejected by the Court and will not suffice to demonstrate an MAE on a "qualitative" basis.** The Court concluded that Boston Scientific had not proven that, as of the termination notice date, the inaccurate representations would reasonably be expected to have an MAE at a future point in time. Boston Scientific argued in its June 19, 2018 letter to Channel that Channel's "submission of false information to regulators has placed the approval of Cerene in jeopardy, thereby substantially threatening Channel's overall earning potential."[35] The problem with this attempt to show an MAE "qualitatively," according to the Court, is that this assertion "flew in the face of many facts known to Boston Scientific when it terminated the Agreement several weeks earlier, on May 11, 2018—most significantly, the FDA's acceptance of Channel's remediation plan for premarket approval on April 18, 2018."[36] The FDA's approval "strongly signaled that Shankar's fraud would not be the cause of any failure of the FDA to provide premarket approval of the Cerene device and made receipt of premarket approval—the triggering event for Channel to exercise its put right under the Agreement to close the merger—a distinct possibility."[37]

  Similarly, while David Pierce, Boston Scientific's President of Medical/Surgery, testified at trial that he concluded based on the Greenleaf Report that it would need to remediate and retest Cerene "going all the way back to the beginning," that explanation flew in the face of

[33] *Id.* at *29.

[34] *Channel*, 2019 WL 6896462, at *29.

[35] *Id.* at *28.

[36] *Id.*

[37] *Id.* at *29.

common business sense, historical Boston Scientific practice and contemporaneous documents.[38] In fact, the Court found that Boston Scientific's "litigation position of the need to start from scratch to remediate Cerene is not objectively reasonable."[39] Rather, the evidence demonstrated that "FDA approval of Cerene, which appeared likely when Boston Scientific terminated the Agreement, undercuts Boston Scientific's assertion that it would need to keep Cerene off the market while it engages in its own remediation efforts." Boston Scientific's own quality expert at trial "could not identify any instance where Boston Scientific—or any other company—voluntarily rebuilt a quality system for a device from scratch and redid its clinical testing after receiving FDA approval."[40] And Boston Scientific offered "no fact testimony" of any such occurrence.[41]

- **A party seeking to claim an MAE should thoroughly evaluate the impact of the underlying event and clearly document its findings**. In finding against Boston Scientific, the Court noted that Pierce did not take "any number of actions one reasonably would have expected him to take before making such a consequential decision." Indeed, the Court found that there was not a "single scrap of paper" assessing the impact of Shankar's fraud on Channel's quality system after receipt of the Greenleaf Report and that "the lack of any such documentation not only casts doubt on the bona fides of the termination decision, it belies Pierce's representation to [Channel] in an April 22 email that Boston Scientific was 'thoroughly assessing the entire impact of Dinesh Shankar's actions on your quality systems.'"[42] Parties seeking to terminate an agreement on the basis of an MAE should take all reasonable action to evaluate the impact of the underlying events, which may include meetings and discussions with the target to fully understand and evaluate the underlying facts, engagement of outside consultants or advisors, independent research and analysis by internal experts and quantification of the costs and diminution in value resulting from such events. Furthermore, a terminating party should clearly document their findings and ensure that such findings satisfy the criteria for an MAE as set forth in *Akorn* and adopted in this case.

- **Parties having an obligation to use commercially reasonable efforts to consummate a transaction should meaningfully confer with the other side before terminating an agreement and consider potentially damaging evidence that the party had reasons unrelated to an MAE to seek to exit the transaction.** The Court next addressed Channel's claim that Boston Scientific could not terminate the Agreement because it breached its obligation as set forth in Section 6.3 to use "commercially reasonable efforts" to consummate the merger. In order to satisfy this standard, a merger party must "(i) have reasonable grounds to take the action it did and (ii) sought to address problems with its counter party." Here, the Court agreed with Channel that Boston Scientific violated this obligation in "purporting to terminate the Agreement for no valid basis with no meaningful

[38] *Id.*

[39] *Id.* at *31.

[40] *Channel*, 2019 WL 6896462, at *31.

[41] *Id.*

[42] *Id.*

consideration."[43] In addition to the evidence discussed above, the Court emphasized that Boston Scientific's failure to seek additional information or attempt to confer with Channel after receiving the Greenleaf Report or to accept Channel's invitation to meet following its initial expression of concern regarding the Greenleaf Report "'both constitutes a failure to use reasonable best efforts to consummate the merger and shows a lack of good faith.'"[44] Given an acquirer's affirmative obligation to seek to address problems that are brought to its attention, targets are generally well served by timely and full transparency with respect to issues that arise prior to closing, as Channel was in this case. On the other hand, acquirers should use reasonable efforts to address any problems raised by the target.

The Court's conclusion was further "corroborated by contemporaneous evidence that Boston Scientific was looking for a way out of its deal with Channel due to growing concerns that Cerene would be difficult to market and the proposed transaction was complicating a potential divestment of part of Boston Scientific's business."[45] Indeed, whereas there was no "scrap of paper" analyzing the potential impact of Shankar's fraud on Channel, there was contemporaneous written evidence that Boston Scientific wanted to exit the deal, including emails between senior Boston Scientific executives to that effect.[46] While Boston Scientific argued that "motive to avoid a deal does not demonstrate the lack of a contractual right to do so," the Court found that to be "beside the point."[47] Boston Scientific's motives "simply add[] credence to and corroborate other robust facts demonstrating that Boston Scientific did not fulfill its obligations to engage with Channel in a commercially reasonable manner to vet any concerns it may have had about the finding in the Greenleaf Report and to keep the transaction on track thereafter."[48]

- **While there is no rigid rule for demonstrating an MAE on a quantitative basis, sufficient evidence of a material adverse quantitative impact is required and, if such evidence is offered through an expert, the expert needs to present a credible analysis consistent with applicable legal principles utilizing assumptions that are reasonable.** The Court assessed the "quantitative significance" of Shankar's fraud and related inaccurate representations. The Court explained that there "is no bright-line test for determining an MAE based on quantitative considerations."[49] But here, Boston Scientific failed to demonstrate any material decline in Channel's value. To attempt to make its case, Boston Scientific relied on its expert, Tim Cummins, who assessed the impact of Shankar's activities on the value to Boston Scientific of Channel as of November 1, 2017. To do so, he estimated Channel's value to Boston Scientific based on information available at the time the Agreement was signed, and compared that value to his estimate of the value of Channel to Boston Scientific had it been aware of Shankar's action and been able to incorporate the expected costs and time delays necessary to remediate Channel's quality assurance system and perform new clinical trials for Cerene. Cummins estimated that Channel's value to

[43] *Id.* at *38.

[44] *Id.* at *38.

[45] *Channel*, 2019 WL 6896462, at *38.

[46] *Id.* at *30.

[47] *Id.* at *39.

[48] *Id.*

[49] *Id.* at *33.

Boston Scientific decreased by 24%-54% under various assumed scenarios for the time required to remediate and conduct new clinical trials.[50]

The Court did not credit Cummins' analysis. Cummins based his analysis on assumptions that Boston Scientific would need to "shelve Cerene for two to four years while it rebuilt Channel's quality systems and possibly undertakes a new clinical trial."[51] But there was no "persuasive evidence" to establish that this assumption was "objectively reasonable."[52] In addition, Cummins' analysis modeled the change in Channel's value to Boston Scientific, which incorporated merger synergies, instead of "analyzing any reduction in the standalone value of Channel. This decision flies in the face of this court's uniform approach to valuing a target on a standalone basis in determining whether an MAE has occurred."[53] Next, the Court appeared to put a heavy burden on Cummins to validate the assumptions that Boston Scientific instructed him to use, noting that he "uncritically accepted an assumption for remediation costs that Boston Scientific provided to him" and "made no effort to consider if" the estimate was valid.[54] As a result, Boston Scientific introduced no quantitative evidence of a MAE.

Please click here for the full opinion.

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[50] *Id.* at *34.

[51] *Channel*, 2019 WL 6896462, at *34.

[52] *Id.*

[53] *Channel*, 2019 WL 6896462, at *35.

[54] *Id.*