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Pleading-Stage Dismissal via *Corwin* Denied to 34.8% Stockholder Alleged To Control Both Sides of Challenged Transaction

*Robert S. Reder**

*John K. Neal, Jr.***

**Professor of the Practice of Law at Vanderbilt University Law School. Professor Reder has been serving as a consulting attorney at Milbank LLP in New York City since his retirement as a partner in April 2011.*

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Well-pled allegations of a significant valuation gap and inadequate disclosure of advisor conflicts sufficient at pleading stage to defeat defendant claims that challenged transaction was entirely fair

INTRODUCTION

Under the Delaware Supreme Court's landmark ruling in *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015) ("*Corwin*"), a transaction "approved by a fully informed, uncoerced vote of the disinterested stockholders" will attract business judgment review, thereby paving the way to pleading-stage dismissal of stockholder challenges. In this manner, *Corwin* is said to effectively cleanse fiduciary breaches. Not surprisingly, *Corwin* has become a powerful defense for corporate fiduciaries seeking to defeat post-closing damages actions arising from a variety of commercial transactions.

The availability of the *Corwin* defense, however, is not without limits. *See, e.g.*, Robert S. Reder & Robert W. Dillard, *Chancery Court Declines to Apply* Corwin *at Pleading Stage to "Cleanse" Breach of Fiduciary Duty Claim Due to Material Non-Disclosures*, 73 VAND. L. REV. EN BANC 17 (2020); Robert S. Reder & Amanda M. Mitchell, *Chancery Court Refuses Pleading Stage Dismissal Under* Corwin *When Stockholders Not Fully Informed of Long-Overdue Financial Restatement*, 73 VAND. L. REV. EN BANC 35 (2020). For instance, *Corwin* cleansing is unavailable when a controlling stockholder "sits on both sides of the transaction, or is on only one side but 'competes with the common stockholders for consideration.'" *See In re Merge Healthcare Inc.*, No. 11388-VCG, 2017 WL 395981 (Del. Ch. Jan. 30, 2017), discussed in Robert S. Reder & Tiffany M. Burba, *Delaware Courts Confront Question Whether "Cleansing Effect" of* Corwin *Applies to Duty of Loyalty Claims*, 70 VAND. L. REV. EN BANC 187 (2017).

In recent years, the Delaware Court of Chancery ("*Chancery Court*") has tackled the question of whether a large minority blockholder is a controlling stockholder for purposes of *Corwin* in a series of decisions:

- In *In re Rouse Props., Inc.*, No. 12194-VCS, 2018 WL 1226015 (Del. Ch. Mar. 9, 2018), the Chancery Court *granted* defendant-directors' motion to dismiss, finding that a 33.5% stockholder engaged in a corporate buyout should not be deemed a controlling stockholder. *See* Robert S. Reder, *Chancery Court Finds* Corwin *Applicable to Merger Transaction Negotiated with 33.5% Stockholder*, 72 VAND. L. REV. EN BANC 51 (2018).

- Several days later, in *In re Tesla Motors S'holder Litig.*, No. 12711-VCS, 2018 WL 1560293 (Del. Ch. Mar. 28, 2018), the Chancery Court *denied* the defendant-directors' motion to dismiss, determining that CEO Elon Musk, though only a 22.1% stockholder, should be deemed to control Tesla. *See* Robert S. Reder, *Chancery Court Determines That 22.1% Stockholder Controls Corporation, Rendering* Corwin *Inapplicable*, 72 VAND. L. REV. EN BANC 61 (2018).
- In *In re Essendant, Inc. S'holder Litig.*, No. 2018-0789-JRS, 2019 WL 7290944 (Del. Ch. Dec. 30, 2019), the Chancery Court determined that an 11.6% stockholder, just the target company's third largest, controlled neither the target company nor its decision to agree to a buyout offer from that stockholder. *See* Robert S. Reder & Anna Choi, *Chancery Court Dismisses* Revlon *Claims Without Considering Directors' Potential* Corwin *Defense*, 74 VAND. L. REV. EN BANC 1 (2021).

Clearly, the particular facts and circumstances drive the calculation of whether a large minority stockholder controls a corporation. Like so many aspects of Delaware corporate litigation, there are no bright-line rules.

The most recent iteration in this series arose from an acquisition *via* merger engineered by private equity firm Clayton, Dubilier & Rice ("*CD&R*"). *See Voigt v. Metcalf*, No. 2018-0828-JTL, 2020 WL 614999 (Del. Ch. Feb. 10, 2020). CD&R, the largest minority stockholder of NCI Building Systems, Inc. ("*NCI*"), encouraged the merger between NCI and Ply Gem Parent, LLC ("*Ply Gem*"), a portfolio company recently acquired by CD&R. Vice Chancellor J. Travis Laster determined, for pleading-stage purposes, that CD&R controlled NCI. The Vice Chancellor's opinion demonstrates, once again, that a large, but albeit minority, blockholder may be found in control, thereby precluding *Corwin* cleansing and exposing the transaction to the heightened judicial scrutiny of an entire fairness review. And, in light of well-pled valuation and disclosure issues, the Vice Chancellor was not able to determine that the challenged transaction was entirely fair.

I. FACTUAL BACKGROUND

A. CD&R Invests in NCI

NCI "manufactures metal products for the North American commercial building industry." In serious need of financing following "the Great Recession," in 2009, NCI sold 250,000 shares of convertible preferred stock to CD&R, representing 68.4% of NCI's voting power. In

further consideration for its investment, CD&R obtained the right to appoint five members of NCI's board of directors ("*Board*"), providing CD&R with "the ability, subject to the fiduciary duties of the individual directors, to control the decisions of the Board." In addition, CD&R entered into a stockholders agreement with NCI ("*Stockholders Agreement*") granting CD&R "veto rights over a wide range of actions that the Board could otherwise take unilaterally" ("*Veto Rights*"). The Stockholders Agreement "counterbalanc[ed]" the Veto Rights with minority stockholder protections ("*Minority Protections*") requiring that at least two Board seats be occupied by so-called "Unaffiliated Shareholder Directors" who qualified as "independent" under New York Stock Exchange rules "without giving consideration to the individual's service on any board of a CD&R portfolio company."

Several years after its initial investment, CD&R began reducing its equity position. When CD&R's equity stake fell below 50% of the outstanding voting power, "the Board began to consider strategic alternatives." Although NCI "contacted several potential transaction partners," NCI's "valuation was not attractive, and the process ended." By the end of 2017, CD&R controlled only 34.8% of NCI's voting power. At that time, the Board consisted of "four CD&R insiders," another four directors with "relationships of varying significance" with CD&R, NCI's CEO, and three members qualifying as "Unaffiliated Shareholder Directors."

B. Precedent Transaction: CD&R Acquires Old Ply Gem

NCI was not CD&R's only foray into the construction industry. On April 12, 2018, CD&R completed a leveraged buyout of Ply Gem Holdings, Inc. ("*Old Ply Gem*"), "a leading North American manufacturer of products for the residential building industry." To fund the acquisition, CD&R caused Old Ply Gem to borrow approximately $2,453.7 million.

That same day, CD&R combined Old Ply Gem with Atrium Windows & Doors, Inc. ("*Atrium*"), a portfolio company of private equity firm Golden Gate Capital ("*Golden Gate*"), thereby creating Ply Gem ("*Precedent Transaction*"). The Precedent Transaction valued Old Ply Gem at $425.2 million and Atrium at $212.8 million, giving Ply Gem an initial value of $638 million. CD&R received 70% of the equity in Ply Gem, with the remainder going to Golden Gate. Ply Gem was highly leveraged, "carr[ying] approximately $3 billion in debt."

C. Challenged Transaction: NCI Acquires Ply Gem

On January 1, 2018, soon after CD&R announced the Precedent Transaction, two NCI directors suggested that the Board consider a merger between NCI and Ply Gem ("*Challenged Transaction*"). By May 1, the Board "reached a 'consensus . . . that a merger with Ply Gem was the most promising potential opportunity.' " In anticipation of this transaction, the Board created a special committee ("*Committee*") consisting of five Board members nominally unaffiliated with CD&R. The Committee was granted authority "to review and evaluate the Challenged Transaction," and ultimately to "veto" it, but was not authorized "to look at other possible transactions." Two days later, consistent with the recommendation of NCI's Chief Financial Officer, the Committee retained Evercore Group LLC ("*Evercore*") as NCI's financial advisor. Although the CFO "represented that Evercore had no conflicts of interest" in relation to CD&R or New Ply, in fact, at the time, "Evercore was working as a restructuring advisor for another CD&R portfolio company."

Evercore recommended that Ply Gem be valued at $638 million—the same valuation used in the recent Precedent Transaction. This valuation would provide NCI stockholders with "approximately two-thirds of the combined entity." Additionally, because Ply Gem's multiples had declined following the Precedent Transaction and CD&R would benefit from deleveraging Ply Gem, Evercore advised that CD&R should not require a premium for "flipping" Ply Gem so soon after the Precedent Transaction. Nevertheless, CD&R pushed for a $1.26 billion valuation for Ply Gem, representing a 97.5% premium over the Precedent Transaction. CD&R justified this valuation by asserting that the Challenged Transaction was "good for [NCI's] stockholders because it was 'highly unlikely' that [NCI] could 'find another well-positioned business of scale' and that '[t]his is realistically the ***only*** window for [NCI] and [Ply Gem] to come together.' "

On July 17, bowing to CD&R's will, the Committee approved the Challenged Transaction with a valuation for Ply Gem of $1.236 billion, representing a 94% premium over the valuation used in the Precedent Transaction just three months earlier. As a result, CD&R and Golden Gate received 50% of Ply Gem's equity with the former NCI stockholders sharing the remainder. Although Evercore opined that the valuation was "fair from a financial point of view," following announcement of the Challenged Transaction, NCI's stock price plummeted as "[a]nalysts questioned the valuation and the strategic

rationale." Over the next week, the stock price fell by "24% to $15.75 per share."

In connection with the Challenged Transaction, CD&R agreed to a new stockholders agreement that preserved the Veto Rights "but prevent[ed] CD&R from acquiring a majority of [NCI's] equity or from electing more directors than one less than half the Board." On the other hand, CD&R rejected the Committee's suggestion that the Challenged Transaction be conditioned on approval by holders of a majority of NCI shares not owned by CD&R ("*Majority-of-the-Minority Condition*").

NCI stockholders approved the Challenged Transaction at a meeting held in November. At the record date for the meeting, stockholders unaffiliated with CD&R owned 64.6% of the total shares outstanding. Of those shares, "55% . . . voted in favor." This vote did not stop the negative market reaction, however. By January 10, 2019, NCI's stock price "closed at $7.80 per share, a 62% decline."

D. Litigation Ensues

One day before the stockholder vote, an NCI stockholder ("*Plaintiff*") filed suit in Chancery Court, alleging that CD&R, "in its capacity as . . . controlling stockholder," and the members of the Board breached their fiduciary duties by causing NCI to pursue the Challenged Transaction. All defendants moved to dismiss, claiming protection under *Corwin* by virtue of the favorable NCI stockholder vote. Plaintiff countered that CD&R's status as a conflicted controller rendered *Corwin* inapplicable, thereby triggering an entire fairness review. In addition, seven directors argued that they had been "granted exculpation" from personal liability by virtue of a provision in NCI's certificate of incorporation adopted pursuant to Section 102(b)(7) of the Delaware General Corporation Law ("*Exculpation Provision*"), and four directors argued for dismissal because "they abstained from voting" on the Challenged Transaction.

II. VICE CHANCELLOR LASTER'S ANALYSIS

According to Vice Chancellor Laster, "[t]he headline issue . . . is whether the plaintiff has pled facts that make it reasonably conceivable that CD&R controlled" NCI. He observed, in fact, that "CD&R's status as a controller is potentially dispositive" due to its impact on the applicable standard of review: business judgment, *via* the *Corwin* defense, or entire fairness. In this connection, the Vice Chancellor focused on CD&R's various sources of control, as well as the significant

gap between the valuations attributed to Ply Gem in the Precedent Transaction and, just three months later, in the Challenged Transaction ("*Valuation Gap*"). Ultimately, the Vice Chancellor found it reasonably conceivable that CD&R controlled NCI, and the Valuation Gap, together with other factors, gave rise to an inference of unfairness.

On this basis, the Vice Chancellor denied CD&R's motion to dismiss. The defendant-directors, however, raised two defenses not available to CD&R: *exculpation* and *abstention*. The Vice Chancellor granted exculpation to the directors not alleged to have "longstanding" ties to CD&R but denied dismissal to the directors alleged to be more closely associated with CD&R. On the other hand, the Vice Chancellor found it premature to rule on abstention, which required a fact-intensive analysis ill-suited to pleading-stage dismissal. However, the Vice Chancellor did note that "cookie-cutter" steps such as recusal or abstention might not be sufficient in the face of actual participation in transaction discussions.

A. Controlling Stockholder Analysis

Consistent with Delaware law, there is no "magic formula" for determining whether a stockholder controls a corporation. To the contrary, "it is a highly fact specific inquiry." Traditionally, control is demonstrated through "the ability to exercise a majority of the corporation's voting power." Nevertheless, a minority stockholder may be found to be in control if the stockholder "as a practical matter, possesses a combination of stock voting power and managerial authority that enables him to control the corporation, if he so wishes." Control may be found to exist either generally, or "with regard to the particular transaction that is being challenged." The focus of the analysis is not whether the minority stockholder actually *exercises* control, but instead on the stockholder's *ability* to control.

In this connection, the Chancery Court may take into account "all of the possible sources of influence that could contribute to a finding of actual control," including "relationships with particular directors . . . [or] key managers or advisors," "contractual rights to channel the corporation into a particular outcome," and "commercial relationships that provide . . . leverage over the corporation, such as status as a key customer or supplier." Moreover, "[b]roader indicia of effective control also play a role," including size of a minority stockholder's equity stake, right or ability to designate directors, provisions in corporate charter documents "that enhance the power of a minority stockholder or board-level position," and "the ability to

exercise outsized influence . . . through high-status roles like CEO, Chairman, or founder."

B. CD&R's Control Status

With regard to CD&R, Vice Chancellor Laster focused on the aggregate sources of control, inasmuch as "[n]o one source of influence is dispositive. Collectively, they support a reasonable pleading-stage inference of control." Accordingly, the *Corwin* defense was unavailable.

1. Board Composition

- Not only did the Stockholders Agreement give CD&R "the right to nominate four of the Board's twelve directors," but CD&R had a "persistent and ongoing relationship" with two others and considerable influence over the ability of two more (including the CEO) to secure favorable positions with the post-merger company.
- According to the Vice Chancellor, the nature of these relationships, together "with other indicators of control, . . . support the necessary pleading-stage inference" of actual control.

2. Block Size

- Based on his analysis of the potential influence of various equity blocks at a typical stockholders meeting, the Vice Chancellor observed that "[b]ased on the math alone, large blocks at levels of 35% . . . carry significant influence," not to mention the "additional rhetorical cards to play in the boardroom, particularly if the owner can claim to have the most at stake."
- For instance, "if the holder of a 35% block favors a particular outcome at a meeting, then the blockholder will win as long as . . . 1-in-7 shares vote the same way. The opponents must garner over 90% of the unaffiliated shares to win."
- Therefore, CD&R's 34.8% voting block "contributes to a reasonably conceivable inference" of control.

3. Stockholders Agreement

- The Vice Chancellor recognized that the Stockholders Agreement's counter-balancing between the Veto Rights and the Minority Protections "cut in both directions." While "[s]ome of the provisions give CD&R greater rights than a stockholder that controlled a majority of the outstanding voting power would possess," others "limited CD&R's ability to exercise its voting power for purposes of electing directors."
- Plaintiff did not claim CD&R exercised the Veto Rights "to cut off other alternatives" or "threatened to do so." However, for the

Vice Chancellor, the Veto Rights "weigh in favor of an inference that CD&R exercised control over [NCI] generally by giving CD&R power . . . beyond what the holder of a mathematical majority of the voting power ordinarily would possess." Further, the Minority Protections "do not undermine the other factors that support a pleading-stage inference of control."

4. Relationship with Management and Advisors

- The Vice Chancellor concluded that "CD&R's relationships with management and the . . . advisors contribute to a reasonable inference that CD&R exercised actual control at the time of the Challenged Transaction." Such relationships with "key mangers or advisors who play a critical role in providing directors with alternatives, providing information about the available options, and making recommendations as to what course to follow" can lead to an inference of control. "In this case, the plead relationships are relatively weak, but they add to the overall picture."
- In particular, the Vice Chancellor pointed to CD&R's "existing relationship with Evercore," despite management assurances that Evercore had "no conflicts of interest vis-à-vis CD&R." While the plead relationships were "relatively weak," in the Vice Chancellor's view, "they add to the overall picture."

C. Challenged Transaction Fails Entire Fairness Review

With business judgment review unavailable at the pleading stage due to CD&R's (i) status as NCI's controlling stockholder and (ii) presence on both sides of the Challenged Transaction, Vice Chancellor Laster invoked the more intrusive entire fairness standard of review. To satisfy entire fairness, defendants were required to "establish 'to the *court's* satisfaction that the transaction was the product of both fair dealing *and* fair price.' "

1. Fair Price

- Simply stated, "[t]he valuation gap between the Challenged Transaction and the Precedent Transaction is sufficiently large, and the temporal gap sufficiently short, to support a pleading-stage inference of unfairness."

2. Fair Dealing

- Questions concerning (i) Evercore's independence from CD&R and (ii) NCI's failure to disclose to stockholders that CD&R acquired Ply Gem only months earlier, at a significantly lower valuation, raised a pleading-stage inference of unfair dealing.

> Although defendants argued that stockholders were provided with sufficient information concerning the Valuation Gap, the Vice Chancellor explained that "Delaware law requires that plainly material information be disclosed in a 'clear and transparent manner.' " Stockholders "should not have to go on a scavenger hunt."

On this basis, the Vice Chancellor concluded that "the Challenged Transaction was not entirely fair because of shortcomings in both price and process." Accordingly, he denied CD&R's motion to dismiss.

D. Claims Against Defendant-Directors

The NCI directors offered two defenses—neither of which was available to CD&R—in seeking dismissal of Plaintiff's claims: *exculpation* and *abstention*.

1. Exculpation

- Seven of the directors argued for dismissal on the basis of the Exculpation Provision, the existence of which required Plaintiff to "plead[ ] facts supporting a rational inference that the director harbored self-interest adverse to the stockholders' interest, acted to advance the self-interest of an interested party from whom they could not be presumed to act independently, or acted in bad faith." The Vice Chancellor added that, for purposes of this analysis, "[e]ach director has a right to be considered individually," and presence on a board of directors of a controlled corporation "does not automatically make that director not independent."
- The Vice Chancellor granted dismissal to the four directors not claimed by Plaintiff to have "compromising relationships or sources of influence" tied to CD&R. Simply voting for the Challenged Transaction, regardless of the Valuation Gap, did not offer a "basis to infer that these defendants acted disloyally or in bad faith."
- By contrast, the fact that two of the other three directors had "longstanding ties to CD&R," combined with the Valuation Gap, "support[ed] a pleading-stage inference that they potentially acted to serve CD&R's interest."
- The seventh director, NCI's CEO, was not covered by the Exculpation Provision in his capacity as a corporate officer.

2. Abstention

- Four directors argued for dismissal on the basis that "they recused themselves from participating as directors in the

discussion of the Challenged Transaction" and "also abstained from voting on the deal."

- While a director may avoid liability "by totally abstaining from any participation in the transaction," the Vice Chancellor found it "premature" to rule on such a fact-based issue at the preliminary pleading stage. For instance, a director who formally abstained from voting may nevertheless have liability "if the director was 'closely involved with the challenged [transaction] from the very beginning' and the transaction was rendered unfair 'based, in large part,' on the director's involvement." The "cookie-cutter step" of recusal is not itself sufficient to establish an abstention defense.
- This analysis was further "complicated," in light of CD&R's status as a control stockholder, by the directors' argument that they participated in discussions of the Challenged Transaction "as representatives of CD&R" rather than in their capacities as members of the Board, all the more reason for the Vice Chancellor to defer a decision on their abstention defense.

CONCLUSION

Vice Chancellor Laster's refusal to dismiss a fiduciary breach claim against CD&R, a large minority stockholder alleged to control both sides of a challenged transaction, demonstrates the risks dealmakers face in hoping to rely on a *Corwin* defense when a potential controlling stockholder is in the mix. This opened the door for the Vice Chancellor to conduct an entire fairness review, resulting in denial of pleading-stage dismissal not only to CD&R but also to several members of the Board as well.

As the Vice Chancellor pointed out, the result could have been different had CD&R employed the procedural protections provided by the so-called "*MFW* blueprint," including a Majority-of-the-Minority Condition. *See Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014). By adhering to the six-part *MFW* blueprint from the outset of discussions of the Challenged Transaction, CD&R would have had the opportunity to achieve business judgment review, as well as pleading-stage dismissal, in exchange for acceding to a Majority-of-the-Minority Condition. This ex ante approach could have provided a level of certainty not afforded by ex post reliance on *Corwin*. However, when it rejected the Committee's proposal for a Majority-of-the-Minority Condition, CD&R effectively guaranteed that, if it were found to control NCI, business judgment review would not be available to shield it from potential liability. For a discussion of a recent application of *MFW*, see

Robert S. Reder & Kirby W. Ammons, *Failure to Satisfy Four Prongs of* MFW *Framework Dooms Pleading-Stage Dismissal of Claims Arising from Controlling Stockholder-Led Redemption of Minority Shares*, 74 VAND. L. REV. EN BANC 47 (2021).