

May 4, 2020

Delaware Court of Chancery Clarifies When Minority, Rollover Stockholders Become Controllers in a Take-Private Transaction

In *Gilbert v. Perlman*, the Delaware Court of Chancery held that two minority stockholders of Connecture, Inc. did not effectively become controllers of Connecture merely by agreeing to roll over their shares in a going-private merger by Connecture's majority stockholder. In so holding, the court explained that two conditions must be met for a minority stockholder to be found to have joined a control group (and therefore owe fiduciary duties to the minority stockholders): (i) the stockholders must be connected in some legally significant way, such as by contract, common ownership or other arrangement, towards a shared goal (this being a prerequisite for the formation of any control group under Delaware law), and also (ii) "the controller must perceive a need to include the minority holders to accomplish the goal" and cede "some material attribute of its control to achieve their assistance."

In *Gilbert*, the plaintiffs alleged two minority stockholders, an entity holding an 11% interest in Connecture and the company's chairman (who was also affiliated with the 11% stockholder), were part of a control group with the company's 56% majority stockholder. Plaintiffs pointed to various factors indicating the existence of a control group, including that (i) SEC rules defined the minority and majority stockholders as "affiliates" and they filed a Schedule 13E-3 stating, among other things, whether they believed the merger was fair to the company's unaffiliated security holders, (ii) the 11% stockholder entered into a voting agreement with the controller requiring it to vote its shares in favor of the merger, and (iii) the minority stockholders previously participated in two private placements alongside the controller. In his opinion, Vice Chancellor Glasscock acknowledged that these allegations were sufficient to satisfy the first prong of the control group test, finding the allegations supported an inference that there was a legally significant connection among the stockholders beyond mere parallel interests in supporting the merger. However, the court reasoned that the second prong was not satisfied because the majority stockholder could approve the merger "entirely on its own" without minority participation, and plaintiffs did not allege anywhere in the complaint that the controller's "sharing or material self-limiting of its control powers" to obtain participation of the minority stockholders for its "perceived self-advantage." The court stated that the complaint "points to neither *quid* nor *quo*—it describes nothing [the controller] needed or ceded to the [minority stockholders], other than the bare right to roll over shares." The mere fact that the controlling stockholder agreed to dilute its proportionate stake in the post-transaction company to permit the minority rollover was not enough to satisfy this second prong.

The *Gilbert* opinion provides helpful guidance to transaction planners by making clear that minority stockholders may participate with controlling stockholders in a transaction without automatically assuming the fiduciary duties of the controller. For the court's opinion, click [here](#).

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