# Del. Dispatch: 27.6% Stockholder Not A Controller

By **Gail Weinstein, Philip Richter and Steven Epstein** (July 19, 2024)

*This article is part of a monthly column that delves into the most significant corporate law cases emerging from Delaware and offers practice points arising from recent court decisions. In this installment, we examine the Delaware Court of Chancery's recent decision in Sciannella v. AstraZeneca.*



Gail Weinstein



Philip Richter



Steven Epstein

The Delaware Court of Chancery has taken a broader view in recent years of who may be deemed a controller. Significant consequences flow from a determination of control — including, for example, the imposition on the stockholder of fiduciary duties to the corporation and its other stockholders, and the application of entire fairness — Delaware's most stringent standard of review — to the transaction being challenged.

The court conducts a facts-intensive, holistic analysis that considers all potential sources of a minority stockholder's influence to determine whether the stockholder may control the company generally or controlled the transaction at issue. In some recent cases, including Voigt v. Metcalf and Tornetta v. Musk, the Court of Chancery has stated that a holding of around 20% in and of itself may be a strong factor indicating control, given that it provides a meaningful leg-up on stockholder votes, as not all stockholders vote, and provides for a significant voice in the boardroom.

In Sciannella v. AstraZeneca UK Ltd., issued on July 2, the court found that AstraZeneca UK, a 26.7% stockholder of Viela Bio Inc., was not a controller of Viela.

The plaintiff contended that AstraZeneca PLC's U.K. affiliate was a controller. AstraZeneca had created Viela, via a spinoff, to act as its research and development arm for biologics; had total control over Viela's day-to-day management through extensive support agreements; had effective blocking rights over corporate actions requiring a 75% stockholder vote; had designated directors on the board; and had appointed its own former executives to key management positions including CEO. Also, Viela had stated in its public filings that it was substantially reliant on AstraZeneca.

According to the plaintiff, AstraZeneca had controlled Viela's $3 billion sale to Horizon Therapeutics Inc., under a "rushed, single-bidder process," in order to facilitate AstraZeneca securing antitrust clearance for its pending $38 billion acquisition of Alexion Pharmaceuticals Inc., Viela's main competitor. The plaintiff asserted that AstraZeneca's proposal to Viela, during its sale process, to finalize expeditiously a termination of AstraZeneca's support agreements with Viela, was a threat to disrupt its operations, such that it was coerced into the quick sale.

The plaintiff's suit alleged breaches of fiduciary duties by AstraZeneca, and by certain Viela directors and officers who allegedly advanced AstraZeneca's interests and/or provided

inadequate disclosure to the stockholders.

The court, at the pleading stage, dismissed the claims, holding that (1) AstraZeneca was not a controller, and therefore owed no fiduciary duties; and (2) the disclosure to the stockholders was adequate, therefore any fiduciary breaches by Viela's directors and officers were cleansed under the Delaware Supreme Court's 2015 decision in Corwin v. KKR Financial Holdings LLC, which accords business judgment deference to transactions approved by stockholders in a fully informed vote.

**Key Points**

***The court's focus in a control inquiry is on whether the stockholder had control over the company's board — either generally or with respect to the challenged transaction.***

The court found that AstraZeneca's effective blocking rights related mostly to stockholder actions rather than board actions, that it had designated just two directors on the eight-person board, and that its control over management did not indicate control over the board.

***Overall context matters.***

In addition to the foregoing, the court seemed to view AstraZeneca as not having acted like a controller — it had never exercised its blocking rights, and neither it nor its director-designees had sought to dominate the board.

Further, the court did not consider AstraZeneca's proposal to Viela to cease to provide support services as a threat to coerce Viela into a quick sale, as the separation of the companies had been ongoing since Viela's initial public offering years earlier, and AstraZeneca's proposal included assurances that it would work with Viela to ensure a smooth transition.

We would note that the court was also likely influenced by the facts that the board that approved the sale was comprised primarily of independent directors, the sale process included outreach to and discussions with multiple potential bidders, the board's negotiations resulted in Horizon twice raising its offer price — from $44 per share initially to a final price of $53 per share — and the sale price reflected a 52.8% premium.

**Background**

In February 2018, AstraZeneca created Viela by spinning off its business. AstraZeneca placed five of its former executives in top management positions at the new company, selected two directors to join the eight-person board, and entered into a series of commercial agreements to support the company.

In May 2020, Viela did a follow-on offering, following which the three largest stockholders other than AstraZeneca each appointed a director to the board. In mid-June 2020, Viela was granted U.S. Food and Drug Administration approval for its primary drug in development, Uplizna, and in late June 2020, Uplizna launched commercially.

In early July 2020, Viela began discussing a potential collaboration with or acquisition by Horizon. The board's financial adviser then conducted outreach to other potentially interested parties, resulting in preliminary discussions with multiple parties. In December 2020, after Viela and Horizon had reached an agreement on price and exchanged merger

agreement drafts, Horizon put the deal on hold because it experienced supply chain problems that it had to deal with. Viela continued discussions with the other potentially interested parties.

Meanwhile, an antitrust review of the AstraZeneca-Alexion deal was underway. During this time, on Jan. 8, 2021 — following discussions between Viela's CEO, who was a former AstraZeneca executive, and one of AstraZeneca's designees on the board, who was simultaneously CEO of AstraZeneca PLC — AstraZeneca delivered a letter to Viela stating that it wanted to work with Viela "over the coming weeks to achieve the full separation of Viela from AstraZeneca as expeditiously as possible."

In mid-January 2021, Horizon told Viela that it had solved its supply chain issues and wanted to reengage on the deal. The sale to Horizon was unanimously approved by the board less than two weeks later, at the same price per share as had been agreed to before the deal was put on hold. In March 2021, 94% of Viela's outstanding shares were tendered to Horizon, and the merger closed.

The plaintiff brought suit in February 2023. At the pleading stage, Vice Chancellor Paul Fioravanti granted the defendants' motion to dismiss the case on July 2, 2024.

**General Control and Board Decisions**

AstraZeneca did not exert general control over Viela, as it did not have the ability to control board decisions.

***Blocking rights***

Based on its 26.7% equity stake, AstraZeneca had effective veto rights over (1) stockholder removal of directors for cause, because the charter provided that stockholders could remove directors only for cause and with a 75% vote; and (2) stockholder-proposed bylaw amendments opposed by the board — because a 75% vote was required for the stockholders to amend bylaws, but only majority stockholder approval was required if the board recommended in favor of such an amendment.

AstraZeneca had no ability to block board-proposed bylaw amendments because the charter authorized the board to amend the bylaws unilaterally.

The court found that these rights, while meaningful, were "not nearly as formidable as the blocking rights highlighted in other cases" where control was found on the basis that the stockholder "had the ability to block board decisions." The court also noted that AstraZeneca had never exercised its blocking rights.

***Designation of Directors***

The court emphasized that, even if AstraZeneca controlled its two director-designees, no facts were alleged supporting an inference that they, or AstraZeneca, controlled a majority of the board. The court also rejected the plaintiff's allegation that three directors, who had not been designated by AstraZeneca, "were 'particularly susceptible to AstraZeneca's pressure' because they were 'executives or founders of investment funds that were early investors in AstraZeneca's spin-off of Viela.'"

The court further noted that there were no allegations that, for example, these directors had "future investment opportunities that would be forfeited if the Board did not approve the

Merger."

***Appointment of Management***

The court noted that no facts were alleged supporting that "AstraZeneca's appointment of Viela's executives in 2018 translates to AstraZeneca exercising control over them in 2020."

***Support Agreements***

The court found that nothing alleged indicated that AstraZeneca "had the ability to dominate the Board's decision-making process as a result of the Support Agreements or Viela's operational dependence on AstraZeneca."

***Admissions in Public Filings***

Viela's disclosure — that it was substantially reliant on AstraZeneca, and would be significantly disadvantaged and face operational difficulties if its support were discontinued — was a "far cry from the outright admission" of control.

Public acknowledgments of a minority stockholder's influence bear on the control inquiry only "when coupled withother well-pled allegations of control," the court stated.

**Transaction-Specific Control**

AstraZeneca did not exert transaction-specific control over the sale of Viela.

The plaintiff contended that AstraZeneca delivered the Jan. 8 letter to pressure Viela into a rushed, single-bidder sale process. The plaintiff noted that the acquisition agreement for the AstraZeneca-Alexion deal contained a hell-or-high-water clause requiring AstraZeneca to take all actions necessary or appropriate to obtain antitrust clearance for that deal, and the plaintiff asserted that the letter "'loom[ed] large' over the Merger and amounted to 'coercion, domination and/or bullying' of Viela's Board."

The court, however, stressed that the process of separating Viela from AstraZeneca had been ongoing for years, AstraZeneca did not have the right to terminate certain of the support agreements immediately, the Jan. 8 letter did not say AstraZeneca would terminate the support agreements, Viela already was in discussions with Horizon before the letter was delivered, and Viela continued discussions with other potential buyers after the letter was delivered.

Moreover, the court did not view the letter as a threat to Viela, as it laid out AstraZeneca's "plan to collaborate with Viela to 'ensur[e] [its] business continuity' and put it in 'the best position' moving forward." The letter did not mention the possibility of AstraZeneca selling its block of Viela stock, and it did not indicate AstraZeneca was otherwise abandoning Viela. The letter was not coercive, as Viela was not left "in the position of having 'no other alternatives' other than to facilitate the Company's sale to Horizon."

The court also viewed the fact that Viela played no role in bringing Horizon back to the table after the deal was on hold as "undermin[ing] Plaintiff's entire theory that AstraZeneca exercised control to force Viela into the Merger."

**Prior Projections**

Viela's prior, more optimistic projections did not have to be disclosed.

The plaintiff contended that Viela's disclosure was inadequate, as the June 2020 projections — which were prepared by management in the ordinary course and were less optimistic than the October 2020 projections prepared during the sale process — were not disclosed.

The court disagreed, on the basis that the June 2020 projections were prepared before the FDA's approval of Uplizna and its launch, and before other changes that occurred due to the COVID-19 pandemic. The October 2020 projections, however, reflected Viela's most recent information, were reliably prepared by management, and were the projections relied on by the board and its financial adviser in connection with the sale.

Further, the court noted that, after receiving the October 2020 Projections, the board "proceeded to reject not one, but two offers from Horizon before agreeing to the $53.00 per share price."

The court distinguished other cases, where it had concluded that earlier financial projections were material and had to be disclosed, on the basis that in those cases there were "concerns about [the later projections'] reliability and materiality" — for example, where a CEO who was self-interested in the deal unilaterally slashed earlier projections prepared by management and vetted by the board.

**Practice Points**

***M&A parties should keep in mind the significant benefits of a good board process and good disclosure to stockholders.***

This case was dismissed at the pleading stage based on the court's findings that the minority stockholder did not control the board, and that the disclosure to stockholders was adequate.

Importantly, only two of the directors on the eight-person board had been designated by the alleged controller; the alleged controller did not act like a controller, in the court's view; the board's process included discussions with multiple potentially interested parties; the board achieved multiple price increases from the buyer; the deal represented a high premium; and the disclosure was adequate, as the updated projections that were disclosed reflected material, new information and were prepared reliably.

***Minority stockholders should keep in mind that a minority equity stake, when coupled with supermajority stockholder approval requirements — or possibly even standing alone — can indicate control.***

To determine control status, the court will consider all potential sources of a minority stockholder's influence, in their totality, as well as the particular factual context.

***A minority stockholder providing significant support to the company should consider carefully any proposal to sever ties with the company.***

In the context of a sale process, for example, such a proposal could be viewed as coercion of the board to sell the company or to sell it to a particular bidder. The risk of such a conclusion should be mitigated by making it clear in any such proposal that the stockholder

is not abandoning the company and will continue to assist it to ensure a smooth transition.

The stockholder should also maintain a record establishing the valid business reasons for making the proposal at that time.

***A company should carefully review the nature and scope of any disclosure it makes with respect to a nonmajority stockholder's control or influence.***

The court may view an outright admission that a minority stockholder controls the company as strong evidence of control, whereas it may not view a statement of significant reliance similarly, absent other strong indications of control.

***Updated projections should be prepared reliably, particularly during a sale process.***

Courts are typically skeptical of revisions of management projections during a sale process, particularly in alleged controller transactions. When they are necessary, the board should explore carefully — with management and the bankers — the rationale for the revisions, the process that was undertaken, and the reasons for a less optimistic view regarding the business.

Depending on the circumstances, to provide a fuller picture, the company could consider also disclosing the prior projections, with an explanation that they were not relied on by the board or its financial adviser, and the reasons the update was appropriate. Generally, revisions to projections should be made under a regular, deliberative process, rather than, for example, being made by or at the direction of a controller or a self-interested executive.

---

*Gail Weinstein is senior counsel at Fried Frank Harris Shriver & Jacobson LLP.*

*Philip Richter is a partner and co-head of the M&A practice at the firm.*

*Steven Epstein is a managing partner and co-head of the M&A and private equity practice at the firm.*

*Fried Frank partner and co-head of the private equity transactions practice Steven Steinman contributed to this article.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*