Harvard Law School Forum on Corporate Governance

Court of Chancery Confirms Common Law Standards for Actual Control Regarding Challenged Transactions

Posted by Yolanda C. Garcia and Vincent J. Margiotta, Sidley Austin LLP, on Wednesday, November 19, 2025

Editor's note: Yolanda C. Garcia is a Partner and Vincent J. Margiotta is a Senior Managing Associate at Sidley Austin LLP. This post is based on their Sidley memorandum, and is part of the Delaware law series; links to other posts in the series are available here.

Recently, in Witmer v. Armistice Capital, LLC, Delaware's Court of Chancery dismissed a stockholder plaintiff's derivative suit against Armistice Capital, LLC, a large investor in Aytu Biopharma, Inc., for, among other things, purported breaches of fiduciary duty and aiding and abetting fiduciary breaches, in connection with two transactions for which the plaintiff alleged Aytu overpaid, the investor improperly benefited, and the investor exercised control.

Our blog occasionally highlights developments in Delaware jurisprudence regarding alleged controller transactions (see, for example, our posts here and here). It is important to note that, in March 2025, Section 144 of the Delaware General Corporation Law was amended to—among other things—create statutory definitions of "controlling stockholder" and "control group." See 8 Del. C. § 144. It further provides that "[n]o person shall be deemed a controlling stockholder unless such person satisfies" this criteria (and provides similarly concerning a "control group"). More broadly, Section 144 creates statutory safe harbors that, if satisfied, can eliminate the possibility of obtaining equitable relief or damages against fiduciaries for certain transactions (including controlling stockholder transactions). But these amendments do not apply to litigation that was already pending on or before February 17, 2025. Witmer (and this article) consequently address Delaware's pre-amendment controlling stockholder jurisprudence.

Pleading facts that raise a reasonable inference of transaction-specific control by a minority stockholder is not easy; the facts must support a sufficient inference that the investor "exercised actual control over the board of directors during the course of a particular transaction." In re Oracle Corp. Deriv. Litig., 339 A.3d 1, 20 (Del. 2025). A "potential ability to exercise control is not sufficient." Williamson v. Cox Commc'ns, Inc., 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006).

For corporations, their boards and investors, and securities practitioners, Witmer serves as an important reminder of the standards to allege "actual control" by minority investors in transactions in which companies participate, and it reiterates that ownership blocks and designated board seats do not, without more, amount to control. Witmer further underscores that mere passive awareness of information does not constitute the “knowing participation” that a plaintiff must plead to sustain an aiding and abetting claim.

Background

Hedge fund Armistice held investments in Aytu, a public Delaware pharmaceutical company, from 2017 to 2020. Steven Boyd, Armistice’s founder, chief investment officer, and managing partner, sat as Armistice’s designee on Aytu’s seven-member board from April 2019 to August 2021. When Boyd joined, Armistice held a 41.1% stake in Aytu. At that time, Aytu disclosed in its annual Form 10-K filing that Armistice “could” exert significant control over Aytu given the size of its investment and Boyd’s board seat.

The Innovus Transaction. In late 2019, Aytu acquired Innovus Pharmaceuticals Inc., an Armistice portfolio company in which Armistice held a 10% stake. During negotiations in summer 2019, a two-member “review committee” that included Boyd assessed the potential transaction. Aytu’s full board, however, was not informed of Innovus’s ongoing financial distress and did not review financial reports or obtain a fairness opinion. The board nonetheless approved the transaction, with Boyd recusing from the final vote, whereby Aytu agreed to pay $8 million to Innovus stockholders, provide $1.4 million in bridge financing, retire $1.1 million in warrants largely held by Armistice, assume $3.5 million in debt, and offer contingent earn-outs. Just before the stockholder vote to approve the transaction, the full board learned of Innovus’s deteriorating finances but did not disclose those developments to stockholders, who approved the transaction in February 2020.

The Cerecor Transaction. Also in late 2019, Aytu considered buying six pharmaceutical products from Cerecor Inc., a portfolio company in which Armistice held a 64.3% stake, while Boyd sat on Cerecor’s board. The Aytu board reviewed limited revenue materials that did not disclose that one of the products had been discontinued and that most of the others had been recently acquired for nominal consideration. The board did not conduct any additional diligence or obtain a fairness opinion, and Boyd did not recuse himself from the approval process. Aytu paid $4.5 million in cash, issued $12.5 million in convertible preferred stock, and assumed related obligations. The asset purchase closed in November 2019, and Aytu recorded $19.5 million in “goodwill”—intangible assets representing the premium Aytu purportedly paid above the fair value of identifiable net assets—for the Cerecor transaction. But in 2021, Aytu disclosed material weaknesses in internal controls and ultimately wrote off all goodwill from the transaction.

The Partial Settlement. In addition to his claims against Armistice, the plaintiff also pursued claims against Aytu’s directors (including Boyd) and officers, which were settled earlier this year. Aytu agreed to remain neutral regarding the plaintiff’s derivative claims against Armistice, the sole remaining defendant.

The Decision

No Transaction-Specific "Actual" Control. In support of his claim that Armistice breached fiduciary duties by causing Aytu to consummate transactions that benefited Armistice and were not in Aytu's or its other stockholders' best interests, the plaintiff pointed to (i) Armistice's 41% stake in Aytu; (ii) its ownership in Innovus and Cerecor; (iii) Boyd's membership on Aytu's board and the review committee that preliminarily analyzed the Innovus transaction; (iv) the process surrounding the challenged transactions; (v) Boyd's frequent, and private, consultations with Aytu's CEO about Aytu's financial position and business strategy; and (vi) Aytu's disclosure that Armistice "could" exert significant control over Aytu.

The Court of Chancery was not convinced. It first noted that Armistice's large but sub-majority stake in Aytu did not, standing alone, establish control. Nor did Armistice's economic interests in Innovus and Cerecor supply the missing element, as one could not infer from those facts that Armistice exercised dominion over Aytu's board with respect to the transactions. The court reiterated that Delaware precedents do not apply a sliding scale in which larger ownership interests automatically establish control. Instead, the plaintiff had to connect more dots to allege that Armistice possessed the ability to pull levers on the board's decision to effectuate the transactions.

The Court of Chancery also confirmed that Boyd's presence on Aytu's seven-member board, without any allegations that he slanted discussion or "cowed" other directors, did not support an inference of control. Moreover, Boyd's service on a two-director "review committee" likewise did not suggest actual control, as the committee merely previewed the terms of the Innovus transaction and lacked the authority to negotiate, recommend, or approve it. Moreover, the court confirmed that other alleged defects in the board's process—no bankers or fairness opinions, limited materials, and failure to conduct additional analyses—might impugn the board's competence, but these flaws did not transform Armistice, a significant stockholder, into a controller. Crucially absent, stated the court, were allegations that Armistice steered negotiations or dominated deliberations, crafted the board record, or threatened the board.

Similarly deficient were the plaintiff's allegations regarding a lack of independence of Aytu's CEO. Even accepting that he and Boyd had a close working relationship, the CEO was only one of seven directors, and the plaintiff failed to plead facts credibly to suggest that a majority of the board was beholden to Armistice.

Finally, the Court of Chancery concluded that Aytu's disclosure that Armistice "could" exert significant control did not substitute for well-pled facts of actual control. The court distinguished cases in which an issuer effectively admitted control; here, there was no "outright admission," and Boyd was not running the business—he was a designee, not an executive or consultant with deep involvement in Aytu's day-to-day management. Weighing all factors, the pleaded "constellation" of facts described a large, minority investor with a board designee—not an investor who controlled the board, dictated its decision-making, or compelled the challenged transactions. Accordingly, the plaintiff's breach of fiduciary duty claim, predicated on controller status, failed.

No Knowing Participation in Fiduciary Duty Breach. The Court of Chancery then analyzed the plaintiff's aiding and abetting claim, based on allegations that Armistice knowingly participated in and facilitated breaches of fiduciary duty by Aytu's board. Specifically, the plaintiff alleged that, by virtue of Armistice's investments in the transactions, and Boyd's position on the Cerecor board, Armistice knew of but withheld from Aytu's board material information about those companies.

There are four elements to an aiding and abetting claim under Delaware law: (i) the existence of a fiduciary relationship; (ii) a breach of the fiduciary's duty; (iii) knowing participation in that breach by the defendant; and (iv) damages proximately caused by the breach. Here, the court reached only the "knowing participation" element, which requires a showing of scienter and, as the court noted, is "among the most difficult to prove." Specifically, the "knowledge" component requires a plaintiff to allege the defendant knew that (i) the primary party's conduct constituted a breach and (ii) its own conduct regarding that breach was improper. As to the "participation" prong, a plaintiff must allege "substantial assistance" by the defendant in the purported breach.

The Court of Chancery found the plaintiff's allegations unpersuasive. The court acknowledged that, where a director's affiliate is charged with aiding and abetting, the complaint must plead participation by that affiliate. The Delaware Supreme Court has held that such participation must be "knowing" and "active"; "passive awareness" is insufficient. In re Mindbody, Inc., S'holder Litig., 332 A.3d 349, 393, 399 (Del. 2024). Here, even assuming a predicate breach by Aytu's board, the plaintiff did not plead that Armistice steered negotiations, crafted board materials, created an informational vacuum, or misled the board. Allegations that Armistice knew more about Innovus and Cerecor, yet remained silent, amounted to passive awareness, not "affirmative assistance" in the board's decision-making process. Moreover, the plaintiff neither pleaded nor argued that Boyd's alleged conduct can or should have been imputed to Armistice.

Conclusion

Witmer illustrates an exacting application of control jurisprudence in pre-amendment litigation regarding controller transactions, and reminds that knowing participation requires action, not mere passive knowledge. For litigators and clients, the case also offers helpful reminders that allegations of transaction-specific control must be precise and well supported, and the partition between board designees and their affiliates must be observed and respected when allegations of purported breaches of fiduciary duty are predicated on control theory liability. It further reminds that inquiries regarding actual control and the prospect of fiduciary duty ownership are fact-specific, and that it is important to avoid scenarios in which challenged conduct can create the appearance of unfair benefit, influence, and exploitation. In all, Witmer serves as both a helpful roadmap and a caution sign for derivative litigation arising out of investor-influenced transactions.