

June 21, 2021

Delaware Court of Chancery Holds 35.3% Stockholder Was Not a Controller

Largest Shareholder Did Not Owe Fiduciary Duties Absent Domination Over Independent Special Committee's Merger Negotiations

SUMMARY

On May 25, 2021, in *In re GGP, Inc. Stockholder Litigation*,¹ the Delaware Court of Chancery dismissed a putative class action brought by GGP, Inc. ("GGP") stockholders against various GGP directors and officers and Brookfield Property Partners, L.P. (together with its subsidiaries and affiliates, "Brookfield") in connection with Brookfield's 2018 acquisition of GGP. With the benefit of GGP books and records obtained under 8 Del. C. § 220, Plaintiffs alleged that Brookfield, holder of 35.3% of GGP's common stock at the time of the acquisition, controlled GGP and therefore owed fiduciary duties to GGP's stockholders. Vice Chancellor Slight disagreed, holding that Plaintiffs failed to plead minority control, and that under *Corwin v. KKR Financial Holdings*,² the informed, uncoerced vote of the majority of disinterested GGP stockholders entitled defendants to dismissal under the business judgment rule.

GGP represents a standard application of Delaware's traditional case law on minority control, which requires plaintiffs to meet the substantial burden of pleading that a minority stockholder exercised actual control over the company or the transaction before the court exercises heightened judicial scrutiny under the entire fairness standard. *GGP* thus stands in contrast with other recent Delaware cases that have taken a more plaintiff-friendly approach to minority control.

BACKGROUND

GGP was a publicly traded real estate investment trust incorporated in Delaware and headquartered in Chicago, Illinois.³ In 2010, GGP emerged from bankruptcy and executed an investment agreement (the

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“Investment Agreement”) with Brookfield, a commercial real estate company.⁴ Under that agreement, Brookfield was entitled to designate three nominees to GGP’s Board so long as Brookfield owned at least 20% of GGP’s stock.⁵ Brookfield and GGP also entered a standstill agreement (the “Standstill Agreement”) that prevented Brookfield from voting more than “10% of the outstanding shares of GGP, for or against any nominee to the GGP Board not designated by Brookfield.”⁶ The Standstill Agreement further required that any transaction between Brookfield and GGP “be approved by a majority of GGP’s stockholders not affiliated with Brookfield.”⁷

In 2016, GGP’s CEO, Sandeep Mathrani, expressed in various public statements that he believed GGP’s stock price was undervalued and did not reflect the underlying asset price of GGP’s real estate properties.⁸ In November 2017, Brookfield extended an unsolicited offer to acquire the balance of GGP’s shares.⁹ The following day, GGP established a Special Committee composed of five of GGP’s nine directors to negotiate with Brookfield and potential topping bidders.¹⁰ The Brookfield designees and Mathrani were all excluded from the Special Committee.¹¹ The day after establishing the Special Committee, Brookfield and GGP publicly disclosed Brookfield’s offer.¹²

The Special Committee negotiated several price increases from Brookfield, and met with legal and financial advisors at least a dozen times to discuss the terms of a combination with Brookfield.¹³ GGP was not subject to an exclusivity agreement with Brookfield, but no competing bidders emerged.¹⁴ On March 26, 2018, the Special Committee unanimously recommended that the Board accept Brookfield’s final offer.¹⁵ GGP’s full Board then unanimously approved the merger with Brookfield (the “Merger”).¹⁶ Although the three Brookfield designees remained recused, Mathrani voted to approve the Merger along with the rest of the Board.¹⁷

On July 26, 2018, holders of approximately 94% of voting shares unaffiliated with Brookfield voted in favor of the Merger.¹⁸

THE COURT OF CHANCERY DECISION

Plaintiffs alleged that Brookfield controlled GGP and owed fiduciary duties to GGP’s stockholders, and that the entire fairness standard, the highest level of judicial scrutiny, therefore applied.¹⁹ In the alternative, Plaintiffs argued that even if Brookfield was not a controller, Plaintiffs could nevertheless recover because the stockholder vote ratifying the Merger was not informed and uncoerced as required by *Corwin*, and the Merger was thus not cleansed of potential breaches of fiduciary duty.²⁰

The court rejected both theories.²¹ The court reiterated that since Brookfield owned less than 50% of GGP’s outstanding stock, it owed fiduciary duties as a controller only if it exercised actual control over GGP either by dominating GGP during the negotiation of the Merger or exercising general control over GGP’s business.²²

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With respect to Brookfield's degree of control over the Merger, the court held that Plaintiffs were required to plead that Brookfield dominated the Special Committee.²³ In particular, the court held that Plaintiffs failed to show that a majority of Special Committee members were beholden to Brookfield.²⁴

With respect to Brookfield's overall control over GGP's business, the court held that "there [was] no pled basis to infer that Brookfield exerted any influence over GGP fiduciaries such that they would 'defer to [Brookfield] because of its position as a significant stockholder.'"²⁵ The court also credited Brookfield's contractual standstill arrangements with GGP, which blunted the amount of influence that Brookfield could bring to bear.²⁶

And as Brookfield did not control GGP, the court reasoned that, "to avoid the application of the business judgment presumption . . . , a plaintiff must well-plead that the stockholder vote approving a transaction was either coerced or uninformed."²⁷

The court then rejected each of Plaintiffs' allegations of coercion and inadequate disclosures.²⁸ Notably, Plaintiffs alleged, among other things, that Mathrani's public statements about the value of GGP's real estate properties evinced his support for an asset sale instead of a whole-company transaction, and that Mathrani was compromised by an offer of post-Merger employment from Brookfield.²⁹ None of this, Plaintiffs argued, was disclosed in the Proxy.³⁰ The court disagreed, holding that no GGP Director was alleged to have changed views on the merits of the Merger, and that "the gap between GGP's private and public valuation was no secret."³¹ Furthermore, the court pointed out that Mathrani did not participate in negotiating the Merger, and that even though he voted in favor of the Merger, he was entitled under 8 Del. C. § 141(e) to rely on the good-faith recommendation of the Special Committee.³²

Plaintiffs also argued that the deal was structured to defeat dissenting stockholders' right to an appraisal because most of the merger consideration was paid to stockholders through a pre-merger dividend.³³ The court rejected this argument, too, reasoning that in an appraisal it has the power to take into account "all relevant factors," so Plaintiffs would still have the right to argue that the entire merger consideration, including the pre-merger dividend, was insufficient.³⁴ In fact, the court pointed out that this deal structure was advantageous to stockholders.³⁵ Usually, stockholders must forego all merger consideration to perfect an appraisal challenge. But here, stockholders who intended to reject the Merger and the post-dividend consideration component would still receive the dividend.³⁶

Having concluded that the Merger was approved by an informed and uncoerced stockholder vote, the court dismissed the plaintiffs' claims.³⁷

IMPLICATIONS

Established Delaware law holds that a minority stockholder does not owe fiduciary duties as a controller unless plaintiffs can show that it exercised actual control over either the transaction or the company generally. *GGP* confirms the traditional view that the actual control test is difficult to satisfy even when the

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stockholder in question owned 35% of the target. *GGP* also reaffirms that where a transaction is negotiated by a fully independent Special Committee, a plaintiff cannot plead actual control without establishing that a majority of the Special Committee is beholden to the putative controller.

Nevertheless, the conclusion regarding minority stockholder control remains a situation-specific inquiry. In contrast to *GGP*, another recent court of Chancery pleading-stage decision permitted a minority control claim to advance to discovery despite a far smaller stock holding than in *GGP*, and a sales process run by what the court admitted was an “undisputedly disinterested and independent special committee that recognized and nominally managed conflicts, proceeded with advice from an unconflicted banker and counsel, and conducted a lengthy process attracting tens of suitors that the special committee pressed for value.”³⁸

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ENDNOTES

- 1 2021 WL 2102326 (Del. Ch. May 25, 2021). Sullivan & Cromwell LLP represented Defendant
Sandeep Mathrani, CEO and Director of GGP.
- 2 125 A.3d 304 (Del. 2015).
- 3 *GGP*, 2021 WL 2102326, at *5.
- 4 *Id.*; see also Complaint ¶ 27, *GGP*, 2021 WL 2102326 (No. 2018-0267).
- 5 *GGP*, 2021 WL 2102326, at *5.
- 6 *Id.*
- 7 *Id.* at *6.
- 8 *Id.*
- 9 *Id.*
- 10 *Id.* at *7, *13 n.170.
- 11 *Id.*
- 12 *Id.* at *7.
- 13 *Id.* at *8.
- 14 *Id.*
- 15 *Id.*
- 16 *Id.*
- 17 *Id.* at *8, *29.
- 18 *Id.* at *9.
- 19 *Id.* at *3 (citing *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014)).
- 20 *Id.* at *24.
- 21 *Id.*
- 22 *Id.* at *13.
- 23 *Id.* at *15.
- 24 *Id.* at *15–18.
- 25 *Id.* at *21 (quoting *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1114 (Del. 1994)).
- 26 *Id.* at *22.
- 27 *Id.* at *24 (quoting *In re Rouse Props., Inc.*, 2018 WL 1226015, at *21 (Del. Ch. Mar. 9, 2018)).
- 28 *Id.* at *24–33.
- 29 *GGP*, 2021 WL 2102326, at *27–28.
- 30 *Id.*
- 31 *Id.* at *29.
- 32 *Id.* at *14, *28 & n.173.
- 33 *Id.* at *31, *34.
- 34 *Id.* at *31.

ENDNOTES (CONTINUED)

35 *Id.* at *32.

36 *Id.*

37 *Id.* at *34–35.

38 *In re Pattern Energy Grp. Inc. S'holders Litig.*, 2021 WL 1812674, at *1 (Del. Ch. May 6, 2021).

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