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When ESG Met Mickey Mouse: The Business Judgment Rule Saves Disney Officers and Directors in a Stockholder Records Action

July 18, 2023
Hinshaw Alert

Corporate activity related to ESG can have profound legal and market consequences. These consequences can be cut many ways. Although having taken a position on Florida legislation that resulted in negative business consequences, including political reprisal, stock price, and market positioning, Disney officers and directors prevailed in a stockholder action seeking books and records based upon an alleged breach of fiduciary duty.

On June 27, 2023, the Delaware Chancery Court held that the determination by Disney directors and officers to publicly oppose Florida's HB 1557 – a bill limiting instruction on sexual orientation or gender identity in Florida classrooms – did not constitute a breach of fiduciary duty. *Simeone v. The Walt Disney Company*.

Initially, Disney was silent on the bill, dubbed by many as the "Don't Say Gay" bill. After receiving criticism from employees and collaboration partners, however, the Disney board convened a special meeting at which it decided to criticize the bill publicly.

The court denied the stockholder's records demand, concluding he failed to establish a proper purpose and that the demand was overly broad. First, the court determined the purposes described in the records demand were not the plaintiff's own purposes but those of his legal counsel. Plaintiff had been solicited to submit the demand by an attorney from a public interest law firm noted to be advancing the litigation costs of the case. The court recognized that investigating potential wrongdoing, mismanagement, and breaches of fiduciary duties certainly may be a proper purpose. Yet, second—and perhaps more notably—the court found the plaintiff had failed to show "evidence to suggest a credible basis for wrongdoing" in the case. Also, the court noted that Disney had, in fact, provided some records to the stockholder, which the court deemed to be sufficient insofar as plaintiff wanted to know the persons responsible for making the decision to oppose the bill.

At its core, plaintiff's theory was that Disney's board and officers had breached their fiduciary duties when they decided to publicly oppose HB 1557. According to the court, deciding whether or not to speak publicly on policy issues is an ordinary business decision. Vice Chancellor Will stated:

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> Delaware law vests directors with significant discretion to guide corporate strategy—including on social and political issues. Given the diversity of viewpoints held by directors, management, stockholders, and other stakeholders, corporate speech on external policy matters brings both risks and opportunities. The board is empowered to weigh these competing considerations and decide whether it is in the corporation's best interest to act (or not act). This suit concerns such a business decision by the Disney board—a decision that cannot provide a credible basis to suspect potential mismanagement irrespective of its outcome. There is no indication that the directors suffered from disabling conflicts. Nor is there any evidence that the directors were grossly negligent or acted in bad faith. Rather, the board held a special meeting to discuss Disney's approach to the legislation and the employees' negative response. Disney's public rebuke of HB 1557 followed.

The court noted that a board's:

> consideration of employee concerns was not, as the plaintiff suggests, at the expense of stockholders. A board may conclude in the exercise of its business judgment that addressing interests of corporate stakeholders—such as the workforce that drives a company's profits—is 'rationally related' to building long-term value. Indeed, the plaintiff acknowledges that maintaining a positive relationship with employees and creative partners is crucial to Disney's success. It is not for this court to 'question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value."

The court went one step further, noting that, even if a board's defiance of a political threat could provide a credible basis to suspect wrongdoing, there was no factual support for that conclusion here as plaintiff failed to demonstrate that Disney was warned of financial repercussions or dissolution of Florida's Reedy Creek Improvement Act (which granted self-governance to Disney) before its public opposition of the bill.

As the court recognized, this case exemplifies:

> the challenges a corporation faces when addressing divisive topics—particularly ones external to its business. Individual investors have diverse interests—beyond their shared goal of corporate profitability—and viewpoints that may not align with the company's position on political, religious, or social matters. Yet stockholders invest with the understanding that the board is empowered to direct the corporation's affairs.

Indeed, companies are facing and can expect to face market, legal, and financial challenges in the ESG arena. Making missteps with ESG-related issues can be costly. Here, Disney stock fell from $145.70 to $86.75 per share during the relevant period. Companies are well-served by obtaining the guidance of counsel well-versed in ESG.

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