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Delaware Chancery Court Rejects Books/Records Suit Against Disney Relating to "Don't Say Gay" Legislation

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The Delaware Court of Chancery rejected a lawsuit by a Walt Disney Company stockholder to compel inspection of Disney's books and records relating to the company's opposition to Florida's "don't say gay" law – a stance that allegedly caused the Governor and legislature to retaliate against Disney. The decision in *Simeone v. The Walt Disney Company* (Del. Ch. June 27, 2023) holds that inspection of corporate books and records is not available under Delaware law unless the requesting stockholder – not his or her attorneys, who might have their own agenda – has stated a proper purpose for making such a demand. It also emphasizes the role that a corporation's board of directors must play in making business decisions about controversial social and political issues. In addition, the ruling confirms that a board may exercise its business judgment to consider the interests of "corporate stakeholders" – such as "the workforce that drives a company's profits" – when making decisions related to building the enterprise's long-term value.

Background

Disney has operated in Florida since 1967 under a local governing jurisdiction called the Reedy Creek Improvement District (the "RCID"). Disney is one of Florida's largest taxpayers and employers. During the first half of 2022, the RCID held public hearings and approved a comprehensive development plan for the District.

In March 2022, Florida's Legislature passed the Parental Rights in Education Act, colloquially known as "don't say gay." The law imposes restrictions on public schools' discussions of sexual orientation or gender identity and prohibits adoption of procedures that prevent parents from learning about students' disclosures of gender identity or sexual orientation.

During the legislative process, Disney initially took no public position on the legislation, although it internally expressed support for “the LGBTQ+ community.” But after Disney’s public silence “was met with pervasive disappointment and frustration from Disney employees and creative partners,” the company spoke out against the law in a public statement and in communications with Governor Ron DeSantis.

Allegedly in retaliation for Disney’s opposition to the law, the Florida Legislature first voted to dissolve the RCID and then voted to give near-complete control of it to the Governor. Disney and Florida have been embroiled since then in litigation relating to the RCID.

In the middle of this turmoil, a Disney stockholder made a demand to inspect Disney’s books and records under § 220 of the Delaware General Corporation Law. Disney produced documents responding to two of the stockholder’s four requested categories: corporate policies concerning charitable or political contributions, and formal Board-level documents (minutes) relating to the Florida law and Disney’s response to it. Disney declined to produce documents responsive to the other two categories: director-independence questionnaires and email communications. The stockholder then sued in the Delaware Court of Chancery. After a trial on a paper record, the court declined to grant further inspection of Disney’s books and records.

The Court’s Decision

The court based its decision on three grounds: (*i*) the stated purpose for the inspection request was not the stockholder’s own purpose, (*ii*) the stockholder had not established a proper purpose for inspection based on allegations of possible wrongdoing or mismanagement, and (*iii*) the stockholder had not been denied essential books and records in any event.

The Stated Purpose Was Not the Stockholder’s Purpose

The court first held that the stockholder had not established a proper purpose for his inspection demand because the stated purpose belonged to the stockholder's counsel, rather than to the stockholder himself. The stockholder testified that he had not considered pursuing litigation or seeking documents after learning about the Florida legislation and Disney's statements. Instead, he had been solicited to make an inspection demand and had been put in touch with the Thomas More Society, a "public interest law firm championing Life, Family, and Freedom." He also testified that his only purpose in requesting inspection was to "know the person or persons who were responsible for making th[e] political decision at Disney to publicly oppose" the law.

Based on this record, the court held that the inspection demand's stated purpose – to investigate possible breaches of fiduciary duty at Disney – was not the *stockholder's* purpose. The stockholder did not need additional documents to learn who had made the "political decision at Disney." He had already received that information from the corporate minutes, which showed how the decision had been made. The stockholder's lawyers' apparent political agenda in investigating "wrongdoing" and "mismanagement" was not "designed to address the plaintiff's own interests as a stockholder," and a § 220 demand was "not the vehicle to address them."

No Proper Purpose for the Inspection Demand

The court next held that the inspection demand's stated purpose – "[t]o investigate potential wrongdoing, mismanagement and breaches of fiduciary duties . . . in connection with the Company's decision to publicly oppose the Parental Rights Act" – was not a proper corporate purpose. "The plaintiff is not describing potential wrongdoing. He is critiquing a business decision. A stockholder cannot obtain books and records simply because the stockholder disagrees with a board decision, even if the decision turned out poorly in hindsight."

The court explained that a corporation's "choosing to speak (or not speak) on public policy issues is an ordinary business decision," even if the topic is a "divisive" one, and even if it is "external to [the company's] business." That business decision belongs to the board of directors. The board "bears ultimate responsibility for establishing corporate policy," which includes deciding what public positions the corporation should and should not take. The trial record here showed that Disney's Board had fulfilled its responsibility: it had "actively engaged in setting the tone for Disney's response to" the Florida law, and it had not "abdicate[d] its duties or allow[ed] management's personal views to dictate Disney's response to the legislation."

The court also rejected the contention that the Board's "consideration of employee concerns" was "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. . . . It is not for this court to question rational judgments about how promoting nonstockholder 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 concluded: "At bottom, the plaintiff disagrees with Disney's opposition to [the Florida law]. He has every right to do so. But disagreement with [a] business judgment is not evidence of wrongdoing warranting a Section 220 inspection."

No Need for Additional Documents in Any Event

Finally, the court held that, even if the plaintiff had demonstrated a proper purpose, further inspection was not warranted because the plaintiff had not shown that the additional documents were *essential* to his purported purpose. "Formal board-level documents are often the beginning and end of a Section 220 production where a plaintiff aims to investigate" potential mismanagement, and Disney had already produced those formal documents. Further production of informal documents such as emails is not warranted where "traditional board-level materials, such as minutes," suffice.

Implications

The *Simeone* decision is interesting for a number of different reasons.

First, it focuses on the stockholder's – not his or her lawyers' – alleged purpose in seeking to inspect corporate books and records. In the current politically divided era of ESG and anti-ESG advocates, litigants might attempt to weaponize inspection demands and lawsuits relating to corporations' handling of ESG-related issues. The *Simeone* case serves as a reminder to evaluate whether a plaintiff is seeking to advance a legitimate stockholder interest or whether lawyers are trying to promote a political agenda.

Second, the decision emphasizes that a purportedly bad business decision is not necessarily – and might not ever be – the kind of alleged wrongdoing or mismanagement that rises to the level of a breach of fiduciary duty. Delaware courts have frequently emphasized that allegedly misguided business decisions that do not involve violations of law generally do not constitute breaches of fiduciary duty, and some courts and commentators have questioned whether such decisions can *ever* constitute breaches of fiduciary duty if they do not involve a violation of law. Moreover, because allegations about "mere" bad business decisions generally do not, and might never, implicate breaches of fiduciary duty, a shareholder asserting such a claim could have difficulty establishing a proper purpose for demanding inspection of corporate books and records.

Third, the *Simeone* opinion stresses the importance of having the *board* make decisions about key matters of corporate policy, such as whether and when to speak out on matters of public policy, whether and when to make political contributions, etc. The board might choose to delegate implementation to management, but the board "alone bears the ultimate responsibility for establishing corporate policy." The court cited an article by former Delaware Chief Justice Leo E. Strine, Jr., on this point. Elsewhere in that article, Chief Justice Strine went further and opined that, if a company engages in political spending (which he said it ideally would not do), it should require a supermajority vote of shareholders to approve a plan that allows only for contributions consistent with the company's stated values.

Fourth, *Simeone* will likely be cited for its clear statement that a board's consideration of "stakeholder" interests – such as the interests of the company's workforce – can come within the realm of a proper exercise of business judgment if the board concludes that those interests are "rationally related" to building long-term corporate value. A corporation therefore need not be a "public-benefit corporation" to enable the board to consider stakeholder interests. Those interests can be rationally related even to a traditional, for-profit corporation board's deliberations about how to build long-term value and best promote the company's interests.

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