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Delaware Court Holds That Corporate Speech on Public Policy Issues Falls Within Purview of Business Judgment

On June 27, 2023, the Delaware Court of Chancery in *Simeone v. The Walt Disney Company* held that a stockholder's disagreement with a corporation's decision to speak on public policy did not constitute a "proper purpose" for making a books and records demand under Delaware law. Although referring to the burden for demonstrating a "proper purpose" as "the lowest standard of proof" in Delaware law, Vice Chancellor Will stated that a stockholder must nevertheless present evidence suggesting a credible basis for wrongdoing and that "choosing to speak (or not speak) on public policy issues"—even divisive ones—is an exercise of business judgment rather than evidence of wrongdoing.

This decision stems from public statements made at Disney's 2022 annual stockholder meeting by its then-CEO, Robert Chapek, expressing the company's opposition to Florida House Bill 1557 ("HB 1557") and its support of the LGBTQ+ community. Following those statements, a Disney stockholder made a books and records demand under Section 220 of the Delaware General Corporation Law, purportedly to investigate potential wrongdoing and breaches of fiduciary duties by Disney's directors and officers. After Disney produced traditional board materials in response to the demand, the stockholder filed suit seeking additional information, such as emails between Chapek and Disney's directors.

As the polarization of environmental, social and governance (ESG) matters intensifies and states continue to propose and enact ESG-related laws, the *Simeone* decision outlines helpful procedural considerations for boards and management when facing pressure from stakeholders to take public positions on significant ESG issues. For example, in finding a lack of evidence of wrongdoing, the court favorably noted the involvement of the board of directors in Disney's response to the legislation. Specifically, the opinion highlighted board meetings where the directors discussed Disney's "communication plan, philosophy and approach" regarding HB 1557. The court found that the board "did not abdicate its duties or allow

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management’s personal views to dictate Disney’s response” but held these were “the sort of deliberations that a board should undertake when the corporation’s voice is used on matters of social significance.”

Although the Disney board was involved directly in advance of the statements opposing the Florida legislation made at the stockholder meeting, such direct involvement should not be a prerequisite. A board may delegate implementation of corporate policy to management, and periodic discussions with management, the establishing of a framework or after-the-fact oversight of corporate speech all should serve as appropriate corporate governance depending upon the circumstances.

In terms of the factors considered by the board, Vice Chancellor Will disagreed with plaintiff’s suggestion that Disney improperly considered employee reactions. Instead, the court reiterated that it could be reasonable business judgement to conclude that addressing stakeholder interests is “rationally related” to building long-term corporate value. The court also rejected plaintiff’s argument that the board lacked impartiality because of board member involvements with non-profit organizations that opposed the Florida legislation.

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