

October 27, 2020

Delaware Reaffirms Director Independence Principle in Founder-Led Company

The Delaware Court of Chancery yesterday dismissed a derivative lawsuit against the directors of Facebook. [*United Food & Commercial Workers Union v. Zuckerberg*, C.A. No. 2018-0671-JTL \(Del. Ch. Oct. 26, 2020\)](#). The decision is a notable application of Delaware’s presumption of director independence.

In 2016, Facebook’s board decided not to pursue a stock reclassification proposal that had been negotiated between a special committee of the board and the company’s founder and majority stockholder. A class action challenging the proposal on behalf of minority stockholders was dismissed as moot, and the Court awarded a negotiated fee to the plaintiffs’ lawyers. A stockholder then filed this follow-on derivative lawsuit against the company’s directors, alleging that they had wrongfully caused the company to incur expenses—by considering the proposal and defending themselves in the ensuing litigation. The directors moved to dismiss the complaint on the ground that a majority of the board was capable of independently determining whether the company should bring the claims asserted.

In granting the motion, the Court of Chancery rejected allegations attacking director independence that have become increasingly common, especially in complaints directed at technology companies. Most notably, the Court declined to credit the allegation that some directors lacked independence from Facebook’s founder because they had themselves founded companies or supported founder control. Held the Court: “a director could believe in good faith that it is generally optimal for companies to be controlled by their founders and that this governance structure is value-maximizing for the corporation and its stockholders over the long-term.” Where directors believe it is “better for the corporation to have the founder remain in control,” they “may make decisions to achieve that goal.”

The Court also rejected broad-brush allegations that directors affiliated with venture capital or other investment firms lacked independence because they relied on “deal flow” from the founder. More generally, the Court declined to adopt plaintiff’s theory that members of the “Silicon Valley aristocracy” should be denied the presumption of director independence.

The decision is a welcome confirmation that Delaware’s presumption that directors independently exercise their business judgment holds good—even for founder-led companies in highly networked industries.

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