



It is increasingly difficult for companies to steer clear of contentious social or political issues on which their shareholders may have passionately conflicting opinions. The Delaware Chancery Court recently highlighted the steps that a board can take to protect its decisions on potentially divisive issues, re-affirming the board's "significant discretion to guide corporate strategy—including on social and political issues."

### **The Case**

Recently, [\*Simeone v. The Walt Disney Company\*](#) addressed a books and records demand under Section 220 of the Delaware General Corporation Law. A Disney stockholder sought evidence that Disney officers and directors had breached their fiduciary duties to stockholders by publicly opposing Florida House Bill 1557,

which prohibits or restricts teachers from discussing sexual orientation and gender identity matters in public schools. In response to Disney's public opposition to HB 1557, the Florida legislature voted to dissolve the special improvement district that had allowed Disney to self-govern the properties on which the Walt Disney World Resort was built. Disney's stock price subsequently fell.

Section 220 allows stockholders to access a company's books and records if the stockholder has a "proper purpose"; namely, one that is "reasonably related to [the stockholder's] interest as a stockholder." Simeone sought to investigate "potential wrongdoing, mismanagement and breaches of fiduciary duties" by the Disney board and executives because they had opposed HB 1557, allegedly knowing that their opposition would harm the company. Simeone asserted that Disney directors and officers had "placed their own political views ahead of their duties to act in the best interests of Disney and its stockholders."

Disney responded that these were not proper purposes because Simeone had not identified any credible basis for wrongdoing but nevertheless negotiated with Simeone and ultimately produced redacted versions of all "formal Board documents—specifically, minutes—concerning HB 1557." Disney declined to produce director independence questionnaires and three years of email communications among Disney directors and executives.

Simeone sued to compel an inspection of the books and records and sought to depose a Disney corporate representative to testify on the materials provided. Disney deposed Simeone and learned that he had been solicited by counsel aligned with a public interest law firm to make his demand for books and records, and that his sole reason for doing so was to "know the ... persons who were responsible" for deciding to oppose HB 1557. Simeone confirmed that he had no other purpose in making the demand, including any of the purposes which his lawyer had listed in the demand.

After a trial, the Delaware Chancery Court held for Disney, finding that the business purposes for the demand were "pretextual" and lawyer-driven. Per the Court, the suit involved a business decision by the Disney board with which the plaintiff disagreed, but that disagreement was "not evidence of wrongdoing." Simeone had not provided any "credible basis to suspect potential mismanagement" by the board and executives, and there was no evidence that the directors had disabling conflicts, were grossly negligent or acted in bad faith. Instead, Simeone disagreed with a business decision made by Disney's board, but such disagreement with a business decision is not a "proper purpose" sufficient to support a Section 220 demand.

## **The Lessons Learned**

The Chancery Court looked closely at the actions of the Disney board that were reflected in the records produced to Simeone. Its opinion provides guidance for other boards facing issues of social and political significance.

1. **Directors should treat decisions regarding controversial social and political issues as they would any other significant business decision—in accordance with director duties of care and loyalty.** Disney management initially responded to HB 1557 by circulating an internal memorandum to Disney employees expressing support for the LGBTQ+ community but did not make any public statement. After Disney employees and creative partners expressed disappointment in this response, and prior to the company's annual shareholders meeting, the Disney board held a special meeting to focus on Disney's "Political Engagement and Communications."

- At the special meeting, Disney's CEO and its then-Chief Corporate Affairs Officer led a board discussion of the company's philosophy, its approach to HB 1557 and the reactions of employees and partners to its public silence in response to HB 1557.
- It was only after this special meeting and board discussion that the CEO publicly announced that Disney opposed the Florida legislation.
- The board treated the matter with the utmost seriousness and gave it focused attention and adequate time

for full discussion—exercising its business judgment as it would have for any other consequential corporate decision.

- 2. It is appropriate for the board to consider the views and inputs of employees and other constituents of the company in addressing social and political issues.** Though Simeone argued that the Disney board's consideration of such inputs came at the expense of shareholder interests, the Chancery Court found that addressing the interests of constituencies "such as the workforce that drives the company's profits" is within the exercise of a board's business judgment so long as it "is 'rationally related' to building long-term value."

- In considering issues such as employment policies and charitable or political contributions that implicate social or political issues, it is appropriate to identify those constituencies that may be affected by the board's decision.

- Directors should then weigh those interests against the totality of the relevant information available to determine what is in the long-term best interests of the company.

- 3. Negative impacts following a controversial decision on a social or political issue do not, alone, indicate wrongdoing by the board.** The Court noted that, when the Disney board voted to publicly oppose HB 1557, it had not been warned of a possible action by the Florida government to dissolve Disney's special improvement district. Instead, the board weighed the consequences of opposing the legislation against the harm to the company from remaining silent, which included the damage to relationships with its employees and the creative partners who are critical to the success of its entertainment business.

The Court even implied that outright "defiance of a political threat" would not constitute evidence of wrongdoing if the board were appropriately balancing the consequences of that defiance against the alternatives for the company.

- Board members should fully explore all the ramifications of a controversial decision.

- Board members should not be subject to hindsight judgments based on subsequent events that could not have been foreseen at the time of the decision.

- 4. The board can act impartially, despite the external social or political activities of individual board members and directors' individual views on such issues, provided that it acts in the best interests of stockholders.** Simeone identified Disney board members who he asserted were aligned with organizations opposed to HB 1557 to argue that the entire board was conflicted on matters related to the legislation.

- The Court looked to the record, which did not reflect that any directors had allowed their personal beliefs to cause them to act other than in the best interests of stockholders.

- Thus, whatever a director's personal beliefs, a director's touchstone must always be to reach the decision that is in the best long-term interests of the company's stockholders.

- 5. Minutes, minutes, minutes.** Pervading the Court's decision is the importance of timely, accurate and sufficiently detailed minutes of Disney's board meetings. Those minutes were sufficient to reflect "the sort of deliberations that a board should undertake when the corporation's voice is used on matters of social significance." The minutes indicated that the board "discussed the communications plan, philosophy and approach regarding Florida legislation and employee response" before the company took a public position. Most importantly, production of the formal minutes was sufficient to respond to Simeone's request, even if it had been for a proper purpose.

- Directors should carefully review minutes of board meetings to ensure that they constitute a record of the key matters discussed by the board and are sufficiently substantive to establish that the board met its fiduciary duties in considering those matters.
  - This does not mean that the minutes should constitute a "he said, then she said..." script of the meeting, but nor should they merely say: "A discussion was held...."
6. **Consider voluntarily producing relevant excerpts of minutes while continuing to oppose a Section 220 demand.** Disney provided its relevant board minutes, with appropriate redactions to delete material non-responsive to the demand and to protect attorney-client privileged information, as agreed to between Disney and Simeone's counsel.
- Those board minutes were sufficient to establish that, as a preliminary matter, Simeone had not established any basis for asserting that there was wrongdoing by the board that gave him a "proper purpose" to make the demand.
  - More importantly, the decision to produce relevant meeting minute excerpts makes it less likely that the stockholder can summon sufficient evidence to support a derivative suit that would survive a motion to dismiss.
  - Consequently, if the company has done its job with respect to the minutes, providing them voluntarily in response to a Section 220 demand could save costly litigation further down the line.

## Authors



### [Evelyn Cruz Sroufe](#)

Of Counsel

[ESroufe@perkinscoie.com](mailto:ESroufe@perkinscoie.com)   [206.359.8502](tel:206.359.8502)

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