

Facebook Defends Its Director Compensation in Delaware Litigation

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Facebook is seeking to dismiss a lawsuit challenging the compensation paid to its non-executive directors, which we previously discussed [here](#).

Although a board's decision to grant compensation to its members generally falls outside the business judgment rule because board members are deemed personally interested in their compensation levels, if the board's decision is approved by a majority of independent, disinterested and informed stockholders, then the business judgment rule presumption applies rather than the entire fairness standard.

Facebook argues in its motion to dismiss that the director compensation at issue was approved by the necessary stockholder majority because the company's CEO and chairman, Mark Zuckerberg, beneficially owns approximately 17% of the company, and 55% of the voting power, as a result of its dual-class structure. As a board member, Mr. Zuckerberg participated in the board's deliberations about the non-executive directors' compensation, believing the program is necessary to assist Facebook in recruiting and retaining its directors. The company states that Mr. Zuckerberg's express ratification of the non-executive directors' compensation is also in his capacity as a majority stockholder.

According to the company, as Facebook's controlling stockholder, Mr. Zuckerberg is independent of Facebook's non-executive directors. The company argues that as its largest stockholder, no one else is more "properly incentivized" to prevent Facebook from overpaying its directors, and therefore he is capable of making the decision to approve the non-executive directors' compensation impartially and objectively. In addition, since Mr. Zuckerberg does not himself receive any compensation for serving as a director, he cannot be interested in the compensation at issue.

The company concludes that because the plaintiff cannot overcome the presumption of the business judgment rule where the company's independent, disinterested, and informed stockholder majority has approved the business judgment at issue, the court should grant summary judgment as to the breach of fiduciary duty claim. In addition, where the transaction is entitled to the protection of the business judgment rule, the plaintiff cannot prevail on a claim of unjust enrichment and finally, the plaintiff has failed to state a claim for waste.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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