

## Delaware Chancery Court: Directors Do Not Face a Substantial Likelihood of Liability for Failing to Disclose Information They Did Not Know

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On April 28, 2020, the Delaware Chancery Court held that a majority of the directors who considered the demand (the “demand board”) did not face a substantial likelihood of liability for allowing or failing to correct allegedly inaccurate management representations concerning the company’s ability to meet its revenue guidance, because management had “regularly advis[ed]” the directors that the company “was on track to . . . hit its revenue guidance.” *In re GoPro Stockholder Derivative Litigation*, 2020 WL 2036602 (Del. Ch. 2020) (Slights, V.C.). The court found that “[t]he Board was under no obligation to disclose what it did not know or did not believe to be true,” nor was it “obliged to doubt the information it was receiving from [the company’s] managers.” The court therefore dismissed with prejudice plaintiffs’ derivative action for failure to plead demand futility.

The court began its analysis by describing the complaint as “a model of . . . imprecision.” Plaintiffs alleged, on the one hand, that the directors “caused [the company] publicly to issue false statements regarding the status of its new product releases and the corresponding projections of revenue.” But plaintiffs also alleged, on the other hand, that the directors “failed to act when they consciously failed to monitor the information and reporting systems that could have prevented the same false statements.” The court noted that “when the plaintiff struggles consistently to characterize the nature of the underlying wrongful conduct that gives rise to his claims, this imprecision signals that he may not have pled such conduct *with particularity*.” *Id.* (emphasis in original).

As to the first theory of liability, the court recognized that “directors who knowingly make materially misleading statements to stockholders may be considered to be interested for the purposes of demand.” But the court found plaintiffs failed to allege any particularized facts supporting the inference that the directors “contributed to and approved [the company’s] revenue guidance while knowing it was impossible for the [c]ompany to achieve the projected results.” The court underscored that “Board *acquiescence* cannot support an inference of *affirmative* Board-level misconduct.” The court explained that “[e]ven if the Board were told by its management that the [c]ompany was not going to meet its revenue projections, and then did nothing as management publicly stood by its market guidance, that factual predicate would support a classic *Caremark* claim for failing to respond to red flags, not a claim against the Board for causing the [c]ompany to make false disclosures.”

The court also found it significant that plaintiffs failed to “offer a conceivable explanation of *why* a majority of the Demand Board would cause

the [c]ompany to release false statements to the market knowing full well” that the market would learn the truth “within a matter of weeks.” Given the lack of “a legally cognizable explanation for why the [d]emand [b]oard would lie so openly, especially when they were virtually certain to be caught in the lie,” the court determined that it was “unreasonable to infer bad faith malfeasance.”

As to the second theory of liability (the *Caremark* claim), the court found plaintiffs’ core allegation was that “a majority of the Demand Board *knew* there was no way [the company] would meet its revenue guidance and yet it failed to cause that guidance to be corrected or to prevent management from continuing to report that the guidance was unattainable.” The court rejected plaintiffs’ argument that the directors were required to access the company’s internal data and “extrapolate on [their] own that the [c]ompany” would have challenges meeting its revenue guidance. The court explained that “the duty to act in good faith to be informed cannot be thought to require directors to possess detailed information about all aspects of the operation of the enterprise.” The court also found no basis for inferring that “the Board *knew* the [c]ompany would miss its guidance or consciously disregarded risk.” The court emphasized that “[p]laintiffs cannot equate a bad outcome with bad faith.”

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