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Washington Judge Dismisses Challenge to Starbucks Diversity Policies in Decisive Order Upholding Business Judgment Rule

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On September 11, 2023, the Chief Judge of the U.S. District Court for the Eastern District of Washington issued a strongly worded order confirming his August 11, 2023 dismissal of a stockholder derivative suit, *National Center for Public Policy Research v. Schultz et al.*, No. 2:22-cv-00267. The suit, brought by a conservative think tank as a derivative claim purportedly on behalf of Starbucks Corporation against certain of its officers and directors, sought declaratory judgment and injunctive relief on the grounds that some of Starbucks' diversity initiatives allegedly violated Section 1981 of the 1866 Civil Rights Act, Title VII of the Civil Rights Act of 1964, and state anti-discrimination laws, and further alleged that the policies constituted a breach of directors' fiduciary duties.

A. Allegations

In its August 30, 2022 complaint (which was removed to federal court on November 7), the National Center for Public Policy Research ("NCPPR") took aim at certain of Starbucks' diversity, equity, and inclusion ("DEI") policies, including (1) Starbucks' goal to "achiev[e] BIPOC representation of at least 30% at all corporate levels and at least 40% [of] all retail and manufacturing roles by 2025" and various initiatives aimed at achieving that goal (Compl. ¶ 51); (2) its commitment to increase its spending with diverse suppliers from $800 million "to $1.5 billion by 2030" (*id.* ¶ 53); (3) its goal of allocating 15% of Starbucks' 2022 advertising budget to minority-owned and targeted media companies (*id.*); and (4) its internal "Leadership Accelerator Program," which would initially only be open to certain racially and ethnically diverse employees, and which aimed to improve those employees' "capacity for self-promotion, advocacy and career navigation" and help them access "the leadership pipeline at Starbucks" (*id*).

According to NCPPR, these policies "facially violate § 1981" because they "expressly require the 'but-for' exclusion of individuals and businesses from contracts because of their race" (Compl. ¶ 88), and "facially violate Title VII" because they purport to make hiring, firing, compensation, and promotional decisions on the basis of race. *See id.* ¶ 98. The plaintiff also argued that the policies "expose Starbucks to potential litigation" and other liabilities (*id.* ¶ 110), and that implementing the policies breached Starbucks directors' fiduciary duties, as they "knew or should have known that the [p]olicies were illegal." *Id.* ¶ 127.

B. Opinion

Chief Judge Stanley A. Bastian granted Starbucks' and the individual defendants' motion to dismiss on August 11, 2023. Chief Judge Bastian indicated in an oral decision that a stockholder derivative suit was an improper forum for making political statements, and observed, "If the plaintiff doesn't want to be invested in 'woke' corporate America,

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perhaps it should seek other investment opportunities rather than wasting this court's time." He also stated that "[t]he plaintiffs have ignored the fundamental rules of corporate law, including the business judgment rule. Courts of law have no business involving themselves with legitimate and legal decisions made by the board of directors of public corporations."

The written order, issued on September 11, echoed these sentiments, noting that "Plaintiff is apparently unhappy with its investment decisions in so-called 'woke' corporations. This Court is uncertain what that term means but Plaintiff uses it repeatedly as somehow negative." Order at 8. The court disapproved of the political nature of the complaint, stating, "This Complaint has no business being before this Court and resembles nothing more than a political platform," and "[w]hether DEI and ESG initiatives are good for addressing long simmering inequalities in American society is up for the political branches to decide. If Plaintiff remains so concerned with Starbucks' DEI and ESG initiatives and programs, the American version of capitalism allows them to freely reallocate their capital elsewhere." *Id.* Notably, the court considered the context of NCPPR's overall mission, explaining that "Plaintiff has a clear goal of dismantling what it sees as destructive DEI and ESG initiatives in corporate America. Contempt for DEI and ESG programming and practices is clear in Plaintiff's publications and literature." *Id.* at 7. The court concluded that, "[b]ased on the briefing and nature of Plaintiff's self-described political interests, it is clear to the Court that Plaintiff did not file this action to enforce the interests of Starbucks, but to advance its own political and public policy agendas." *Id.*

In its opinion, the court found it "unnecessary" to address the adequacy of the plaintiff's factual and legal allegations under a Fed. R. Civ. P. 12(b)(6) standard (*id.* at 8), and instead analyzed "whether a derivative plaintiff fairly and adequately represents the interests of a corporation or its shareholders." *Id.* at 5. The court explained that "[i]n Washington corporate law [where Starbucks is incorporated], a corporation's board of directors have exclusive authority to make decisions concerning the management of the corporation's business" and that "[s]hareholder derivative lawsuits are disfavored and may be brought only in exceptional circumstances." *Id.* at 6 (citations and quotations omitted). Thus, the court declined to allow NCPPR to litigate these claims on behalf of Starbucks and its stockholders, adding, "It is clear Plaintiff is pursuing its personal interests rather than those of Starbucks." *Id.* The court further determined that, far from representing the interests of most Starbucks stockholders, the plaintiff "has shown obvious vindictiveness toward Starbucks," aimed to "cause significant harm to Starbucks and other investors," and "lacks the support of the vast majority of Starbucks shareholders." *Id.* at 6-7.

C. Implications

The Starbucks suit predated the Supreme Court's decision in *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, No. 20-1199 (U.S. Jun. 29, 2023) ("*SFFA*"), which struck down the use of affirmative action in college and university admissions. Nevertheless, this case has been closely watched by companies that have been affected by increasing scrutiny of corporate DEI post-*SFFA*. The *SFFA* decision incited a flurry of reverse-discrimination litigation and other challenges to corporate DEI policies, as well as a warning from a group of 13 Republican attorneys general to Fortune 100 companies, threatening "serious legal consequences" over certain DEI policies.

The opinion in *NCPPR* suggests that, despite increasing scrutiny of DEI policies, there will be substantial defenses to shareholder derivative litigation in this area, as courts tend to disfavor judicial meddling "with reasonable and legal decisions made by the board of directors of public corporations." Order, at 6. Indeed, two other recent high profile shareholder cases challenging corporate diversity initiatives or alleging failure to abide by those initiatives—including in Delaware, where many companies are incorporated—have not survived beyond the motion to dismiss stage.[1]

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[1] *See Simeone v. Walt Disney Co*., 2023 WL 4208481, at *1 (Del. Ch. Jun. 27, 2023) (in lawsuit where plaintiff requested records to determine whether Disney breached its fiduciary duties by failing to withdraw its public opposition to Florida's so-called "Don't Say Gay" bill, declining to grant books and records request on the grounds that Disney's "business decision" "cannot provide a credible basis to suspect potential mismanagement irrespective of its outcome"); *Lee v. Fisher et al*., 70 F.4th 1129 (9th Cir. 2023) (dismissing on procedural grounds a lawsuit alleging that Gap Inc. and its directors breached fiduciary duties by ignoring public promises to increase management-level diversity).

The following Gibson Dunn attorneys assisted in preparing this client update: Jason Schwartz, Jessica Brown, Brian Lutz, Elizabeth Ising, Ronald Mueller, Lori Zyskowski, and Anna Ziv.

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