

GIBSON DUNN



Securities Litigation Update

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In a Decision of First Impression, the Court of Chancery Applies Amended Section 144's "Heightened" Director Exchange-Based Independence Presumption

The decision provides meaningful guidance on the interaction between Section 144's new "heightened" presumption—that directors deemed independent under applicable national securities exchange rules are also presumed to be disinterested under Section 144—and Court of Chancery Rule 23.1's well-established demand-futility standard.

On June 15, 2026, Vice Chancellor Lori W. Will issued a decision in *Ayers v. Foley*, --- A.3d ---, 2026 WL 1723538 (Del. Ch. June 15, 2026), concerning a director-disinterestedness presumption added to 8 *Del. C.* § 144 last year by Senate Bill 21 (2025). The case was filed in June 2025, after the S.B. 21 amendments were adopted by the Delaware legislature. As we discussed in this [Client Alert](#), Section 144(d)(2) established a presumption of disinterestedness for directors of publicly listed companies not party to an act or transaction if the board determines that such director satisfies applicable stock exchange criteria for independence from the company and, if applicable, the controlling stockholder. As the Court observed, Delaware courts had "yet to interpret" the provision. *Ayers*, 2026 WL 1723538, at *9. Vice Chancellor Will's decision provides meaningful guidance on the interaction between Section 144's new "heightened" presumption—that directors deemed independent under applicable national securities exchange rules are also presumed to be disinterested under Section 144—and Court of Chancery Rule 23.1's well-established demand-futility standard.

Takeaways:

- *Ayers* clarifies the scope of Section 144(d)(2): a board's exchange-based independence determinations now carry statutory weight not only within Section 144's transactional safe harbors but also at the Rule 23.1 demand-futility stage. This gives boards and advisors clarity regarding director independence and makes it more difficult for a stockholder plaintiff to plead around a disinterested board majority, where those directors have been determined to be independent under stock exchange rules.
- To rebut the heightened presumption, a plaintiff must plead facts of genuine qualitative significance. The Court determined that "substantial" in the statute's requirement of "substantial and particularized facts" means "significant enough to evidence a disabling conflict." This is a higher, more director-friendly standard than the one that preceded S.B. 21.
- A defensible decision-making process and structure offer substantial protections against a legal challenge. The directors in *Ayers* qualified for the Section 144(a)(1) safe harbor and prevented a challenged grant from being aggregated with the directors' own compensation by referring the proposed grant to a separate committee of disinterested directors—the Related Person Transaction (RPT) Committee—that met on its own, retained its own compensation and legal advisors, and reached its own decision. The Court praised the referral as "sound corporate governance" even though it was not strictly required.
- The "interlocking protections" of (i) the Section 144(a)(1) safe harbor and (ii) a Section 102(b)(7) charter provision exculpating directors for breaching the duty of care require a plaintiff to plead "particularized facts supporting a reasonable inference that they acted [in] bad faith" to establish a substantial likelihood of liability for the approving disinterested directors—a "high hurdle" the complaint here did not clear. The committees' reliance on independent compensation and legal advisors cut strongly against any inference of bad faith.

Background

Nominal Defendant Fidelity National Financial, Inc. (FNF) is a provider of title insurance, mortgage loan servicing, and other real estate services. Plaintiff, an FNF stockholder, asserted derivative claims for, among other things, breach of fiduciary duty against FNF's founder and Non-Executive Chairman, William P. Foley, and the company's nine non-employee directors (NEDs), challenging (i) a special equity grant approved for Foley in 2024 by the Compensation Committee and the separate RPT Committee (the Equity Grant), and (ii) the directors' 2022–2024 annual compensation, set by the Compensation Committee (the NED Compensation). The Equity Grant resulted from an arm's length negotiation: Foley initially requested a \$60 million grant of restricted shares, which the committees, after seeking and reviewing market research from a third-party consultant, negotiated down to a \$50 million equity grant vesting over three years, subject to Foley's continued service. *Ayers*, 2026 WL 1723538, at *4.

Distinct Transactions

The Court rejected plaintiff's effort to treat the Equity Grant and the NED Compensation as a single board act. The record reflected two discrete decisions made through separate processes and on different timelines. The Compensation Committee approved the NED Compensation on October 14, 2024. As to the Equity Grant, the Compensation Committee conditioned it on approval by a separate RPT Committee, which met on its own, obtained its own compensation and legal advice, and approved the grant roughly two weeks later. Because the NED Compensation had already been approved by the time the RPT Committee considered Foley's award, that review could not "call into question" the committee members' own pay. *Id.* at *7–8. The plain text of 8 *Del. C.* § 144(a)(1) reinforced the distinction: treating the two transactions as one "would mean that a conflict in one action could disable the safe harbor for another action" even if the other action was "driven by different motivations and governed by an independent process." *Id.* at *8. Such a result would be contrary to the General Assembly's intent that a single "act or transaction" approved under the safe harbor be shielded from equitable relief or damages. *Id.*

The Equity Grant: Amended Section 144(d)(2) Defeats Demand Futility

Applying the three-pronged demand-futility test of *United Food & Commercial Workers Union & Participating Food Industry Employers Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034 (Del. 2021), the Court held that plaintiff failed to plead that a majority of FNF's eleven-member board could not impartially consider a demand to pursue claims regarding the Equity Grant. *Ayers*, 2026 WL 1723538, at *6.

Under the first prong of *Zuckerberg*, the Court found that Foley was disabled. Plaintiff did not allege, however, that any of the nine NEDs profited from the grant, and therefore failed to show that any NED "received a material personal benefit from the alleged misconduct that is the subject of the litigation demand." *Id.* at *8 (quoting *Zuckerberg*, 262 A.3d at 1059). Demand therefore was not excused under the first *Zuckerberg* prong.

The Court also concluded that demand was not futile under *Zuckerberg's* third prong, which asks whether "the director lacks independence from someone who received a material personal benefit from the alleged misconduct . . . or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand." *Id.* at *9 (quoting *Zuckerberg*, 262 A.3d at 1059). At the center of the Court's analysis was amended Section 144(d)(2), which provides that a director of an exchange-listed corporation is "presumed to be a disinterested director" as to a transaction to which the director is not a party if the board has determined that the director satisfies the applicable exchange's independence criteria—a presumption that is "heightened" and "may only be rebutted by substantial and particularized facts" of a material interest or material relationship. *Id.* at *9 (quoting 8 *Del. C.* § 144(d)(2)). Having already held that the Equity Grant was a transaction distinct from the NED Compensation, the Court found that the NEDs were not parties to it and could therefore invoke the presumption as to that grant—disposing of plaintiff's contention that the presumption was unavailable because the NEDs were parties to their own compensation packages. Because no Delaware court had construed Section 144(d)(2), the Court applied settled principles of statutory interpretation and reached several conclusions of first impression.

First, the Court concluded Section 144's heightened presumption applies whenever director interest is assessed, including for demand futility under Rule 23.1. *Id.* at *10. The Court reasoned that, unlike other parts of Section 144 that expressly limit their reach—like Section 144(d)(7) and the definitions in Section 144(e)—Section 144(d)(2) contains no such limiting language. *Id.* Reading the presumption to apply only within Section 144 also would illogically result in a lighter burden on plaintiffs to plead director interest under Rule 23.1 than under Rule 12(b)(6). *Id.* at *10 n.124.

Second, the Court construed the standard for rebutting the statute's independence presumption. *Id.* at *10–11. The Court determined that “particularized” carries the meaning Delaware courts have long given that term under Rule 23.1—namely “specific, non-conclusory facts.” *Id.* The Court then interpreted the added requirement that the facts be “substantial” as a qualitative directive: the pleaded facts must be “significant enough to evidence a disabling conflict.” *Id.* at *11. As the Court put it, “a collection of trivial facts will not satisfy” the heightened standard by sheer accumulation. *Id.*

Measured against that standard, the Court concluded plaintiff's allegations fell short. The directors' overlapping service with Foley on the boards of Foley-affiliated companies was insufficient, consistent with the settled rule that overlapping board service, standing alone, does not compromise independence. Plaintiff's aggregation of the fees those directors had earned from that service likewise failed, absent particularized facts that the fees were personally material to the directors. The directors' indirect co-investments alongside Foley in professional sports franchises—which FNF's proxy statement described as a “small non-voting minority interest”—fared no better. The Court held that plaintiff pleaded no facts about the investments' terms, voting rights, or financial exposure, did not allege that the investments gave Foley any authority over the directors or rendered them beholden to him, and overlooked that the board had already weighed those co-investments in making its independence determination. A director's employment at a firm that transacted with Foley-affiliated entities, and another director's limited partnership interest in an entity Foley chairs, foundered on the same lack of materiality, because some financial ties between an interested party and a director, without more, are not disqualifying. Underlying each conclusion was the absence of any allegation that Foley could deprive the directors of material wealth; allegations of mere friendship or ordinary business relationships do not, without more, raise a reasonable doubt as to independence, particularly under the heightened standard required under 8 *Del. C.* § 144(d)(2). *Id.* at *12–13.

Finally, as to *Zuckerberg's* second prong, the Court found that plaintiff failed to plead a “substantial likelihood of liability” theory due to two interlocking protections: (i) the Section 144(a)(1) safe harbor foreclosed relief because the material facts of any conflict were disclosed or known and a majority of disinterested directors approved the grant in good faith and without gross negligence; and (ii) FNF's Section 102(b)(7) charter provision exculpated the directors for any breach of the duty of care. *Id.* at *14. Together, these provisions meant plaintiff could establish a substantial likelihood of liability for the approving disinterested directors only by pleading “particularized facts supporting a reasonable inference that they acted [in] bad faith”—a “high hurdle” the complaint did not clear. *Id.* at *14–15.

Because plaintiff failed to allege a lack of independence as to three of the five challenged directors, plaintiff lacked a conflicted board majority, and demand was not excused for the Equity Grant claims.

Director Self-Compensation: Section 144(a)(3) Fairness Tracks Common-Law Entire Fairness

The Court went on to conclude that, although plaintiff did not adequately plead a claim against the non-Compensation Committee member directors for the NED Compensation decision, the circumstances of this case and plaintiff's allegations prevented dismissal of the claims against the Compensation Committee members under Section 144(a)(3). Section 144(a)(3), which insulates an interested-director transaction shown to be "fair as to the corporation and the corporation's stockholders," requires a plaintiff to plead facts supporting a reasonable inference of both unfair dealing and unfair price. *Id.* at *17. The Court concluded that plaintiff's allegations regarding performance metrics that were different than those used by the Compensation Committee when setting compensation "present[ed] a factual dispute inappropriate for resolution on a motion to dismiss." *Id.* at *18.

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