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Fiduciary Duties, Reverse Endorsements and Fundraising in 'Jeter'

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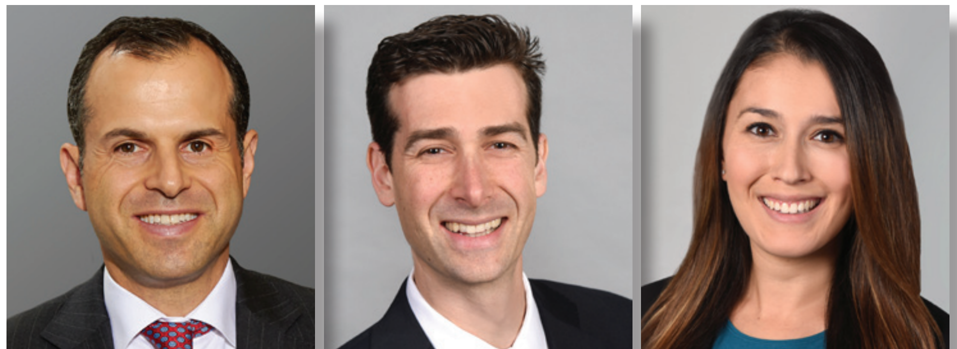

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Contracts between a corporation and a director can give rise to certain difficulties in managing expectations of a director's obligations and responsibilities. Such contracts may create obligations that extend beyond those fiduciary duties inherent to the director position. This extension of the director's role may increase the risk of a conflict between a director's contractual obligations and his fiduciary duties.

In *Jeter v. Revolutionwear*, C.A. No. 11706-VCG (Del. Ch. July 19, 2016), the Delaware Court of Chancery examined the relationship between a director's contractual obligations to promote his role with the corporation and particular brand of clothing, and his standard obligations as a fiduciary of the company. The case reveals the risks associated with "reverse endorsement," or the use of the director role as a marketing tool, particularly when the subject of such reverse endorsement, or the famous individual, is already party to an exclusive endorsement agreement.

Background

In 2009, Derek Jeter's representatives entered into discussions with RevolutionWear Inc. (RWI), makers of high-tech underwear, to engage the former professional baseball player under a strategy of "reverse-endorsement." The reverse-endorsement concept was developed by RWI in order to attract public figures or high-profile individuals as "significant owners, directors, advisers and founders." Instead of using the standard endorsement model popular with sports and fashion brands, RWI presumably thought Jeter's business involvement would appear "more sincere to the underpants-buying public."

Throughout the parties' discussions and Jeter's eventual role as a director of RWI, Jeter was under a sponsorship contract with Nike. According to RWI, in entering into the relationship it had relied on Jeter's agents' alleged representation that the proposed relationship between Jeter and RWI was "carved-out" from his Nike contract.

On March 23, 2011, Jeter and RWI executed a memorandum of agreement for service upon the board of directors (the director agreement). The director agreement included a provision allowing RWI to disclose Jeter as a director of the company, but requiring that all press releases first receive Jeter's approval. The director agreement also specifically excluded any endorsement or marketing obligation.

Following his appointment as a director, Jeter took care to ensure that he abided by his obligations to Nike. For example, he made efforts to shift the marketing strategy of the product, telling RWI that he would not publicly announce his role as a director unless RWI changed the product from a "sports undergarment" to a "fashion undergarment." Despite RWI's efforts to accommodate his requests, Jeter's agents informed RWI that he would not publicly disclose his position with the company and demanded that RWI stop issuing any press releases discussing Jeter's role. In an email to RWI in November 2013, Jeter's agent explained that due to his contract with Nike, there would be no mention of Jeter's "presence in the marketplace," leading RWI to claim that Jeter had

misrepresented the terms of his Nike contract.

Court's Analysis

Jeter filed a motion to dismiss RWI's counterclaim for breach of fiduciary duties. In considering the motion to dismiss, the court explained that in order for RWI's counterclaim to withstand the motion, the court must find that Jeter breached the fiduciary duty of loyalty (on account of the exculpatory clause in the company's certificate of incorporation, barring claims for monetary liability against directors for breaches of the duty of care). The court explained that the duty of loyalty encompasses the duty to act in good faith, and therefore applies to a director's actions taken in bad faith. Looking specifically at Jeter's representations to investors that he would publicly disclose his role with the company, the court found that RWI sufficiently pleaded a claim that Jeter had "acted with a purpose other than that of advancing the best interests of the company." RWI's claim boiled down to the fact that Jeter, while acting as a fiduciary, made statements that were knowingly false and caused investors to invest in the company. The court did not discuss the duty of disclosure (a derivative of the duties of care and loyalty), perhaps because the misstatements were made to investors before they were stockholders and not in solicitation of a stockholder action.

The court dismissed RWI's further allegations regarding Jeter's breach of fiduciary duty. The court acknowledged that while Jeter's actions (such as attempting to alter the marketing strategy for the product) may have constituted a breach of contract under the director agreement, his fiduciary duties must be considered separately from the contract. The company's expectations of Jeter extended beyond the scope of his fiduciary duties, and thus any actions in conflict with those expectations were not inherently in conflict with his duties as a director. Out of the seven manners in which RWI alleged Jeter to have acted in bad faith in violation of his duty of loyalty, the court found only one viable claim.

Takeaways

The court observed that this case "illustrates the potential difficulties in the fiduciary context when a corporation expects its directors to perform acts outside of their traditional fiduciary role." In the *Jeter* case, the corporation entered into a director contract with the intention that the individual's role be that of promoter, in addition to that of director. Arguably, the corporation here wanted a famous face more than it wanted an active member of its board. The court's conclusion, however, makes clear that the court will interpret a director's fiduciary duties as separate from those established by the contract if those duties, like publicity or promotion, extend beyond the scope of established fiduciary principles.

The *Jeter* case highlights the challenges associated with creating contractual obligations for a director beyond those associated with standard fiduciary duties. If a director's actions conflict with his contractual obligations, such actions do not also conflict with his fiduciary duties merely by virtue of he or she being a director. Before entering into director agreements, corporations should remember that while a director with a famous face may contribute marketing value, he or she remains a director and will not necessarily have a fiduciary duty to fulfill distinct obligations provided for in any additional contract.

Directors and officers of corporations should also take note. The *Jeter* case signals a willingness to allow breach of fiduciary duty claims in the context of statements made by directors or officers during fundraising activities. While the *Jeter* case examined statements made to potential investors as related to an underlying director agreement, the court's analysis suggests that even without such external agreement, corporations may be able to bring breach of fiduciary duty claims against directors or officers relating to their allegedly false or misleading statements made during fundraising activities. Given the reasoning applied in the *Jeter* case, directors and officers would be wise to act solely with the purpose of advancing the best interests of the corporation during such fundraising. •

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