



Chancery Court Dismisses Derivative Challenge to The Trade Desk CEO's Compensation Award for Lack of Demand Futility

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In re The Trade Desk, Inc. Derivative Litigation demonstrates the careful analysis the courts will engage in when conducting a Rule 23.1 demand futility challenge to assess both director independence and the likelihood of liability for the claims against the directors. This litigation was filed in 2022, and therefore was not impacted by the amendment of DGCL Section 144 earlier this year, which provided new procedural safe harbors for acts or transactions involving corporations and their directors, officers, controlling stockholders, and control groups. As a result, the court's ruling and this post do not engage with the amended statute. Nevertheless, the court's methodical analysis of director independence is informative of the factors that the Court of Chancery has found, and may continue to find, relevant to independence analyses. This ruling was affirmed on November 6, 2025 by the Supreme Court of Delaware on the basis of and for the reasons stated in the Memorandum of Opinion.

The Trade Desk, Inc. (Trade Desk) is a leading technology company, specializing in digital advertising services, that has experienced significant growth since its IPO in 2016. The company's capital structure consists of two classes of common stock: Class A Common Stock (Class A) and Class B Common Stock (Class B). While the rights and privileges associated with each class are nearly identical, Class B shares carry 10 votes per share, compared to just one vote per share for Class A shares.

In October 2021, Jeffrey Green, Trade Desk's CEO and co-founder, who controls approximately 53% of the company's total voting power through his Class B Shares, was awarded a performance-based equity grant (the Award) valued at \$819 million by Trade Desk's board of directors. If fully realized, the Award would allow Green to acquire up to 4% of the company's outstanding stock — a structure designed to reward Green's performance and incentivize him to remain CEO. Although Trade Desk did not seek stockholder approval for the Award, the board granted Green the Award following a thorough process involving the use of independent legal counsel, outside compensation consultants, and a careful, iterative consideration of multiple compensation structures during numerous meetings.

Stockholder plaintiffs filed a derivative suit against Green — who, as the controlling stockholder, stood on both sides of the transaction — and other officer and director defendants alleging that the Award was excessive and constituted a breach of fiduciary duty.

Defendants in pre-Section 144 amendment cases that challenge a compensation decision for a controlling stockholder can obtain a pleadings-stage dismissal in one of two ways. First, a defendant can satisfy the MFW framework, under which the transaction must be negotiated by an independent and disinterested special committee and approved by a fully informed, uncoerced vote of the unaffiliated stockholders. *In re Match Gp., Inc. Deriv. Litig.*, 315 A.3d 446, 451 (Del. 2024). Second, a defendant can obtain dismissal under Rule 23.1 for failure to plead demand futility. *Id.* at 451-52. In their motion to dismiss, the defendants did not attempt to satisfy the MFW framework. Instead, they argued that demand was not excused.

As outlined in *United Food & Com. Workers Union v. Zuckerberg*, 262 A.3d 1034, 1059 (Del. 2021), demand is futile if at least half of the members of the board of directors are unable to consider a demand for one of three reasons: (1) the director received a material personal benefit from the alleged misconduct; (2) the director faced a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; or (3) the director lacked independence from someone who received a material personal benefit from the alleged misconduct.

At the time of the original complaint, Trade Desk's board of directors consisted of eight members. It was undisputed that Green would not be able to consider a demand regarding a suit challenging the Award because he was the beneficiary of the Award and thus an interested party, and plaintiffs did not challenge the independence from Green of three other directors. Plaintiffs alleged that demand would be futile because the remaining directors lacked independence from Green, faced a substantial likelihood of liability, or both.

Regarding director independence, the Court held that despite various business and professional relationships with Green, plaintiffs' allegations were insufficient to create reasonable doubt as to a majority of the directors' independence. Specifically, the Court found the following allegations insufficient to challenge the independence of three other directors:

Eric Paley: The Court found plaintiffs' allegations regarding Paley's business relationship with Green through Founder Collective — Paley's seed-stage venture capital fund that was one of the initial two investors in The Trade Desk in 2010 — Paley's positive public statements about Green, and Green's minority investments in Paley's funds, were not sufficiently particularized or material to create a reasonable doubt about Paley's ability to consider a demand impartially.

Lise Buyer: The Court found that Buyer's prior consulting work for the company, her listing of Trade Desk as a reference for future consulting jobs, and her director fees, were not sufficiently particularized to create a reasonable doubt about her ability to consider a demand impartially.

Kathryn Falberg: The Court found that Falberg's early investment and brief tenure at AdECN, Inc., her significant holdings of Trade Desk stock, and her director fees did not create a reasonable doubt as to her independence.

In contrast, the Court found sufficient allegations that David Pickles lacked independence because of his role as a highly compensated officer subordinate to Green and their long professional relationship dating back to their time together at Green's first entrepreneurial venture, AdECN, Inc., and as co-founders of The Trade Desk. This finding, however, did not alter the conclusion that the majority of the Board was independent and could consider a demand impartially.

Regarding plaintiffs' argument that the directors faced a substantial likelihood of liability, the Court held that, where there is no allegation that the defendants received a personal financial benefit or were otherwise interested in the transaction, plaintiffs can only establish a claim for breach of the duty of loyalty by alleging that the defendants' conduct amounted to bad faith, which requires a finding that the defendant acted with scienter. Although the plaintiffs criticized the board's process, the Court found that plaintiffs could not satisfy their pleading burden because the Award process involved "unconflicted fiduciaries who showed up and took steps to make a reasoned decision, [and] their decisions are entitled to considerable deference under our law...." In re The Trade Desk, Inc. Derivative Litigation, No. 2022-0461-PAF.

As a result of the above, the Court concluded demand futility had not been alleged and the case was dismissed in its entirety with prejudice.