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Delaware Court of Chancery Upholds High/Low Vote Structure Based on Stockholder Identity

In *Colon v. Bumble, Inc. et al.*, the Delaware Court of Chancery held that a provision in the charter of a Delaware corporation granting the company's founder and financial sponsor high voting power within the same class of stock also issued to the public shareholders was valid under the Delaware General Corporation Law (DGCL). The provision, which, in simplified terms, provided that a share carried ten votes if held by the founder or sponsor (or anyone else party to a particular stockholder agreement), but only one vote if held by others, was consistent with longstanding Delaware precedent enforcing charter provisions providing for formula-based allocations of voting power. Because the DGCL permits voting rights to be made dependent upon "facts ascertainable" outside of the charter, such "identity-based voting" is permissible under Delaware law. This decision validates a structure that may be of particular interest to those companies seeking to go public with a high/low vote structure, as it allows the maintenance of voting control with only one class of registered, liquid shares, without the need for an illiquid second class of stock.

Background

Bumble Inc.'s founder and its financial sponsor took the company public in 2021 using a relatively new structure that combined the benefits of an "Up-C" structure and a dual-class, high vote/low vote structure. In simplified terms, the company's charter contemplated that each share of common stock would carry one vote, unless the share is owned by a "Principal Stockholder," which under the definition included the company's founder and its financial sponsor. The plaintiff argued that this sort of "identity-based voting" violated the DGCL, and the parties made cross motions for summary judgment.

Court's Reasoning

In an opinion by Vice Chancellor Laster, the court held in favor of the company, founder and financial sponsor, reasoning that the voting structure complied with the DGCL under Delaware precedent enforcing charter provisions that allocated voting power using a formula or procedure.¹ Specifically, as required by Sections 102(a)(4) and 151(a) of the DGCL, the charter's voting formula applied to all the shares in the class and specified how it is calculated. Moreover, as authorized by Section 151(a), the formula made the "quantum of voting power" of a share dependent on "facts ascertainable outside of the certificate of incorporation," namely the identity of the owner.

The court also specifically addressed and rejected various of plaintiff's arguments that the voting structure at issue was invalid:

¹ These included: *Providence & Worcester Co. v. Baker*, 378 A.2d 121 (Del. 1977) (upholding a scaled voting structure in which the number of votes appurtenant to a share varied depending upon the total number of shares that the owner held); *Williams v. Geier*, 1987 WL 11285 (Del. Ch. May 20, 1987) (dismissing a challenge to tenured voting); *Sagusa v. Magellan Petroleum Corp.*, 1993 WL 512487 (Del. Ch. Dec. 1, 1993), *aff'd*, 650 A.2d 1306 (Del. 1994) (TABLE) (dismissing a challenge to a per capita voting provision where each stockholder received one vote regardless of how many shares of stock owned).

- First, the plaintiff argued that the company’s voting structure was impermissible under Section 212(a) of the DGCL and the Delaware Supreme Court’s opinion in *Providence & Worcester v. Baker*, which relied on Section 212(a) to uphold a scaled voting structure in which the number of votes a share received varied depending on the number of shares that the owner held. Among other things, the *Providence* court distinguished between permissible “limitations upon the voting rights of the stockholder” and impermissible “variations in the voting powers of the stock *per se*,” and the plaintiff in *Bumble* argued that the company’s voting structure fell into the latter category. The *Bumble* court rejected this argument, noting that the distinction lacked substance in various ways, including that the same scaled voting mechanism that was upheld in *Providence* as a limitation on the voting rights of the stockholder could be reframed as a variation in voting power of the stock. Even if the distinction between voting rights of the stockholders and voting powers of the stock were meaningful, the court noted that there was “no meaningful linguistic distinction” between the *Providence* voting structure (which the Delaware Supreme Court upheld) and the structure at issue in *Bumble*.
- Second, the plaintiff posited that if a voting formula does not create the same outcome for each share, it creates *de facto* subclasses in violation of Section 151(a) of the DGCL. However, the court denied this argument, pointing out that Delaware courts had rejected this argument and “upheld formulas that applied identically across all shares but generated different outcomes for particular shares.”² Going further, the plaintiff argued that even if the formula can generate different results for different shares, the formula must give any holder an opportunity to gain the benefits of the superior voting rights, which the court did not find persuasive, as nothing in Section 151(a) prohibits a provision that creates a closed set of holders who can exercise certain rights.

The *Bumble* opinion therefore continues the line of Delaware decisions that make clear that a Delaware corporation can have a share structure that gives certain holders higher voting power.

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² The court cited *Providence*, 378 A.2d 121, *Williams*, 1987 WL 11285, and *Sagusa*, 1993 WL 512487, each as upholding formulas that applied identically across all shares, but generating different outcomes for particular shares.

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