DELAWARE'S ROLE IN HANDLING THE RISE OF DUAL-, MULTI-, AND ZERO-CLASS VOTING STRUCTURES

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I. BRIEF HISTORY OF VOTING SHARES

The concept of "one share-one vote" has been the gold standard of corporate governance around the globe since approximately the mid-nineteenth century.[1] Three systems of corporate voting rights began to emerge in common law, but the idea of "one share-one vote" was adopted by very few business charters.[2] The preference was for either (1) each shareholder to receive "one vote regardless of the number of shares he owned,"[3] or (2) the voting shares of large shareholders be limited.[4] During the middle of the 19th century, many states began enacting statutes that

[1]Simon C.Y. Wong, *Rethinking "One Share, One Vote"*, HARV. BUS. REV. (Jan. 29, 2013), https://hbr.org/2013/01/rethinking-one-share-one-vote; Stephen Bainbridge, *Understanding Dual Class Stock Part I: An Historical Perspective*, PROFESSOR BAINBRIDGE (Sept. 9, 2017), https://www.professorbainbridge.com/professorbainbridgecom/2017/09/understanding-dual-class-stock-part-i-an-historical-perspective.html

[2]Wong, *supra* note 1; Bainbridge, *supra* note 1.

[3]Providence & Worcester Co. v. Baker, 378 A.2d 121, 123 (Del. 1997) (citing David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote"*, 56 CORNELL L. REV. 1 (1970)). Legislative fear of concentrating economic power in the few was at least part of the reason early corporate law limited the votes of large majority shareholders.

[4]Bainbridge, *supra* note 1; *see* David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote*," 56 CORNELL L. REV. 1, 5 (1970) ("[W]hile large shareholders were almost always entitled to more votes than small shareholders, there was '[n]evertheless, almost universally, in order to prevent the concentration of control … a relatively low maximum number of votes that any one proprietor might cast.'").

made "one share-one vote" the designated standard.[5] By the turn of the century, the majority of United States corporations maintained one vote per share.[6]

As states began enacting these statutes, the vast majority did not force corporations to alter their voting structures. In many states, including Delaware,[7] statutes were enacted that merely established "one share-one vote" as a default rule if no other rule was chosen by the corporation.[8] With corporations having the leeway to deviate from the standard statutory scheme of "one share-one vote," two diversions began to occur.[9] The first eliminated the voting rights of preferred stock, while the second saw the development of common stock with no voting rights ("zero-class shares").[10] Beginning in 1918, common practice for corporations was to issue two classes of common stock: (1) a "one share-one vote" stock, and (2) a zero-class share.[11]

In 1926 the New York Stock Exchange ("NYSE") disallowed firms with zero-class shares to be listed on the stock market following public backlash against the corporate schemes that called for differential voting structures among shareholders.[12] This sudden shift in policy caused "one share-one vote" corporate bylaws to make a reappearance, with very few firms issuing inferior voting stock.[13] However, multi-class shares (for purposes of this paper, multi-class shares will be defined as those shares that offer owners different voting rights, not those shares that only offer different rights that do not involve shareholder voting) began to make a

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[5]*See* Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity,* 30 CARDOZO L. REV. 445, 446-47 (2008) (suggesting that the idea of one-share, one-vote has its roots in the American Constitutional mandate of "one-person, one-vote").

[6]Wong, *supra* note 1. There is evidence that large shareholders placed pressure on corporations to do away with voting charters that allowed for fewer votes than number of shares owned. In many cases when shareholders could not convince corporations to change restrictive voting rules, they would simply transfer some of their shares to strawmen who would vote as the true owner directed.

[7]*Baker*, 378 A.2d at 123; General Provisions Concerning Corporations, 10 Del. Laws, c. 147, § 18 (1883).

[8]Bainbridge, *supra* note 1.

[9]*Id.*

[10]*Id.*

[11]*Id.*

[12]Mike Burkart & Samuel Lee, *The One Share – One Vote Debate: A Theoretical Perspective* 1 (Eur. Corp. Governance Inst., Working Paper No. 176, 2007); *see* Bainbridge, *supra* note 1 ("[W]ithout at this time attempting to formulate a definite policy, attention should be drawn to the fact that in the future the [listing] committee, in considering applications for the listing of securities, will give careful thought to the matter of voting control.").

[13]Burkart & Lee, *supra* note 12.

revival in the latter half of the 20th Century.[14] Mounting pressure from the American Stock Exchange and NASDAQ caused the NYSE to reverse course in 1986, abandoning its "one share-one vote" requirement.[15]

Delaware, which has become the focal point of corporate law in the United States, underwent similar difficulty in determining how corporate voting rights should be legislated. In 1883, Delaware enacted its first corporation law stating, "every company may determine by its by-laws … what number of shares shall entitle the stockholders to one or more votes." However, in the absence of a provision stating otherwise, "each share of shock shall be entitled to one vote."[16] That law changed in the Delaware Constitution of 1897, providing that in elections for directors and managers, each shareholder would be guaranteed one vote for each share owned.[17] Shortly after its enactment, specific language from article nine, section six was stricken from the Delaware Constitution.[18] Simultaneously, the Delaware legislature amended the General Corporation Law to include section seventeen; this section essentially reinstated the 1883 rule where voters received one vote per share they owned unless that corporation's charter, certificate, or bylaws provided otherwise.[19] Since 1901, few changes have occurred to alter the Delaware corporate voting rights law.[20]

II. MODERN GROWTH OF MULTI-CLASS AND ZERO-CLASS SHARES

Though Delaware, and most other states, left open the possibility of dual-class voting shares, the number of technology corporations that had an initial public offering ("IPO") with dual-class voting shares only rose above ten percent four times in the years spanning 1986 to 2004.[21] From 2004 to 2017, the number of IPOs that contained dual-class shares rose above ten percent a total of nine times, with the last three years topping out over twenty percent.[22] Three year trends compiled by the Council of

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[14] *Id.*

[15] *Id.* Some exceptions existed to the rule against zero-stock shares. In 1956 the NYSE listed Ford Motor Company despite the fact that Ford had a dual-class structure.

[16] General Provisions Concerning Corporations, 10 Del. Laws, c. 147, § 18 (1883).

[17] Del. Const. art. IX, § 6 (1897).

[18] *Baker*, 378 A.2d at 123.

[19] *Id.*

[20] *See* 8 *Del. C.* § 212 (2019).

[21] *Dual-Class Shares: The Good, The Bad, and The Ugly*, CFA INST., https://www.cfainstitute.org/-/media/documents/survey/apac-dual-class-shares-survey-report.ashx.

[22] *Id.* In 2017, nearly half of the thirty tech companies that went public did so with dual-class voting shares.

Institutional Investors ("CII") showed that in the first half of 2019,[23] of the fifty-seven companies[24] that held an IPO, twenty-six percent of those companies had some form of a dual-class share (either including a sunset provision or not).[25] That number is more than double the amount of corporations that held IPOs in 2018 with dual-class shares.[26]

With dual-class shares, companies issue different tiers of shares that allow one group to have double, triple, even *two-hundred times* the votes compared to other shareholders.[27] As a result, founders and executives usually can own a small portion of a company's equity, yet hold a majority share of the voting power.[28]

In 2004, Google, Inc. (now Alphabet) held an IPO featuring dual-class shares.[29] Google offered two types of common stock: (1) Class A common stock with one vote per share, and (2) Class B common stock entitling holders ten votes per share.[30] Only the founders of Google were eligible to purchase the Class B stock though, ensuring they maintained control of the company even though they would not bear the burden of having majority economic ownership in the company.[31] Investors were not given any real power and were instead gambling on the belief that the Google founders could provide them with profitable returns.[32] In essence, Google's corporate governance opened up a world in which the founders were not beholden to anyone other than themselves; therefore, functioning more as a private company, needing public input only for the influx of

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[23] CII's data includes IPOs held from January 1, 2019 through June 30, 2019.

[24] There was a total of 101 IPOs held through June 2019; however, seventeen were foreign private investors, twenty-four were special purpose acquisition, and three were real estate investment trusts, leaving fifty-seven IPOs.

[25] *Dual-Class IPO Snapshot: 2017–2019 Statistics*, Council of Institutional Investors (2019), https://www.cii.org/files/issues_and_advocacy/DualClassStock/2019%20Dual%20Class%20Update%20for%20Website%20FINAL.pdf (one corporation also included zero-class shares).

[26] *Id.* In 2018, only eleven percent of corporate IPOs included dual class shares.

[27] *Shareholder Democracy v. Dual-Class Shares*, OPENINVEST (Jan. 3, 2019), https://www.openinvest.co/blog/shareholder-democracy-vs-dual-class-shares/ [hereinafter "Shareholder Democracy"].

[28] *Id.*

[29] *See* Google S-1 Form, SEC, https://www.sec.gov/Archives/edgar/data/1288776/000119312504073639/ds1.htm#toc16167_3.

[30] *Id.*

[31] Emily Chasan, *Google's Multi-Class Stock Structure Made Alphabet Move Unique*, WALL ST. J. (Aug. 12, 2015), https://blogs.wsj.com/cfo/2015/08/12/googles-multi-class-stock-structure-made-alphabet-move-unique/.

[32] Rob Asghar, *The Inexorable Evil of Google's Governance Structure,* FORBES (Jan. 11, 2019), https://www.forbes.com/sites/robasghar/2019/01/11/the-inexorable-evil-of-googles-governing-structure/#645ffd977457.

monetary investments.[33] In 2014, Google founders' Sergey Brin and Larry Page found their voting majority down to only 55.7 percent.[34] Due to this development, the company decided to issue a new class of shares with zero voting rights.[35] The new class of shares allowed Google's founders to issue as much of that stock as they desired, gaining much needed capital, while leaving its voting majority undiluted.[36] While Google may have opened the flood gates to what many believe is a trend among technology companies, the majority of which are incorporated in Delaware, Google was far from the last company to offer these dual-class and zero-class shares to the public.[37] The following chart displays major Delaware incorporated technology companies that have all gone public since 2012 and offered either dual-class or zero-class shares during their IPO.[38]

A. *Table 1*

Company	**Class A (votes per Share)**	**Class B (votes per Share)**	**Class C (votes per Share)**	**IPO year**
Lyft	1	20		2019
Pinterest	1	20		2019 (expected)
Snap	0	1	10	2017

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[33]*See id.*; *see also* Google IPO Founder's Letter, https://abc.xyz/investor/founders-letters/2004-ipo-letter/ ("[T]he main effect of this structure is likely to leave our team, especially Sergey and me, with increasingly significant control over the company's decisions and fate, as Google shares change hands.").

[34]Nick Summers, *Why Google Is Issuing a New Kind of Toothless Stock*, BLOOMBERG BUS. (Apr. 3, 2014), https://www.bloomberg.com/news/articles/2014-04-03/why-google-is-issuing-c-shares-a-new-kind-of-powerless-stock.

[35]*Id.*

[36]*See id.*; *see also* Benjamin Robertson & Andrea Tan, *Dual-Class Shares*, WASH. POST (Jan. 14, 2019), https://www.washingtonpost.com/business/dual-class-shares/2019/01/14/a6158f3a-186d-11e9-b8e6-567190c2fd08_story.html.

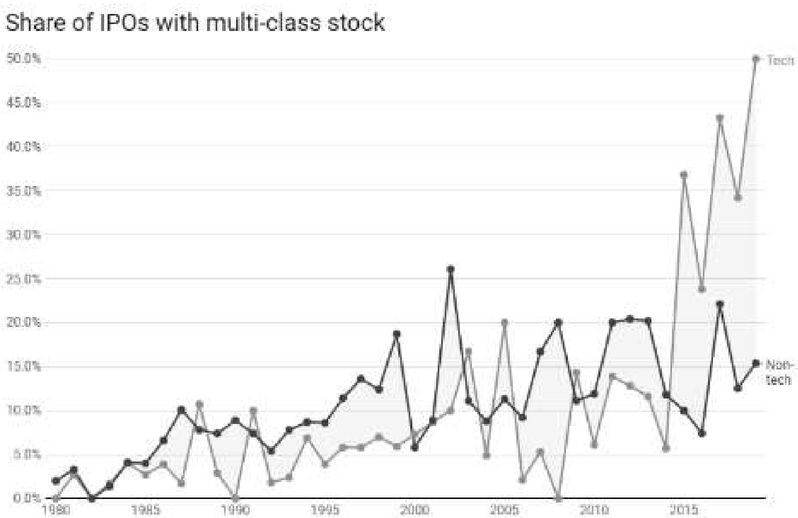
[37]*See* Robertson & Tan, *supra* note 36; *see also* Delaware Division of Corporations, ABOUT THE DIVISIONS OF CORP., https://corp.delaware.gov/aboutagency/ (More than sixty-six percent of the Fortune 500 companies are incorporated in Delaware).

[38]Alison Griswold, *Uber is bucking the biggest trend in startup IPOs this decade*, QUARTZ (Apr. 12, 2019), https://qz.com/1593342/uber-is-going-public-with-one-share-one-vote/.

Facebook	1	10		2012

While it is fair to say that other companies outside of the technology world have introduced dual-class shares, they are more frequent in technology corporations.[39] Since 2004, technology giants such as LinkedIn, Yelp, Groupon, and Facebook have all held IPOs in which dual-class shares were offered.[40] Then in 2017, Snap, Inc. held a highly unusual IPO in which it offered shares with no voting interests.[41]

B. *Figure 1*



Source: Jay Ritter[42]

[39]Kosmas Papadopoulos, *Dual-Class Shares: Governance Risks and Company Performance*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (June 28, 2019), https://corpgov.law.harvard.edu/2019/06/28/dual-class-shares-governance-risks-and-company-performance/; *see generally Dual-Class Shares: The Good, The Bad, and The Ugly*, CFA INST., https://www.cfainstitute.org/-/media/documents/survey/apac-dual-class-shares-survey-report.ashx.

[40]*See* Griswold, *supra* note 38.

[41]*See id.*

[42]Rani Molla, *More tech companies are selling stock that keeps their founders in power*, VOX (Apr. 11, 2019), https://www.vox.com/2019/4/11/18302102/ipo-voting-multi-dual-stock-lyft-pinterest.

Facebook's May 2012 IPO offered dual-class shares similar to Google's.[43] Facebook offered Class A and B shares; however, only the Class A shares, which carried one vote per share, were offered to the public.[44] The Class B shares, which carried ten votes per share, were only available to Facebook founder and CEO, Mark Zuckerberg, as well as select company insiders.[45] Zuckerberg owned approximately twenty-eight percent of Facebook's equity, but maintained approximately sixty percent of the voting power due to his ownership of class B stock.[46] In 2016, Facebook further mimicked Google when it sought to introduce a third class of non-voting stock.[47] At the time of the proposal, Zuckerberg's equity in Facebook had dropped to sixteen percent but his voting power remained at approximately sixty percent.[48] The move to add non-voting stock would have allowed Zuckerberg to offload $74 billion USD of his shares, reducing his equity in Facebook to approximately three percent, while still maintaining his sixty percent voting control.[49] Shareholders were understandably uneasy with this proposal, sparking the suggestion that it may lead to future litigation.[50] Ultimately, due to pressure from shareholders, the idea was disregarded and Facebook never proceeded with a zero-class stock.[51]

Although shareholders won in the case of Facebook, the opposite is true in the case of Snap, Inc., the parent company of the social media application Snapchat, which made an unprecedented move during its IPO in 2017.[52] Snap offered three classes of stock: (1) Class A shares with no

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https://www.vox.com/2019/4/11/18302102/ipo-voting-multi-dual-stock-lyft-pinterest; Jay Ritter, *Initial Public Offerings: Updated Statistics*, U. OF FLORIDA (June 24, 2020), https://site.warrington.ufl.edu/ritter/files/IPOs2019Statistics.pdf.

[43] Emily Chasan, *Facebook to Join Ranks of Dual-Class Listings*, WALL ST. J. (Feb. 8, 2012), https://blogs.wsj.com/cfo/2012/02/08/the-big-number-20/.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Ben Popper, *As Facebook's profits soar, Zuckerberg moves to consolidate his power*, THE VERGE (Apr. 27, 2016), https://www.theverge.com/2016/4/27/11521438/facebook-q1-2016-earnings--new-class-c-shares-zuckerberg.

[48] *Facebook and the meaning of share ownership*, THE ECONOMIST (Sept. 30, 2017), https://www.economist.com/business/2017/09/30/facebook-and-the-meaning-of-share-ownership.

[49] *Id.*

[50] *Id.* (referencing two large investors in Facebook who filed suit against Zuckerberg for breach of fiduciary duty).

[51] *Id.* ("[Zuckerberg] also probably wanted to avoid an extra fight amid controversy over Russians using Facebook to meddle in America's presidential election.").

[52] Charles M. Elson & Craig Ferrere, *SNAP Judgment: Unequal Voting and the Business Judgment Rule* 1-3 (Jan. 18, 2019),

voting rights, (2) Class B shares with one vote per share, and (3) Class C shares with ten votes per share.[53] Snap's founders thus possess lifetime control over the company through this voting structure.[54] Snap founders do not face the same concerns as Google and Facebook founders because of their introduction of zero-class shares in the IPO; therefore, their voting control is not in danger of dilution when an influx of public capital is required.[55] Snap has completely disenfranchised it shareholders. Conversely, public shareholders of Google[56] and Facebook stock at least have the opportunity, however slight it may be, to influence the founders through the use of their votes. Without the ability to vote, Snap provides no additional outlet for shareholders to express their discontent with decisions made by both the board of directors and the corporation's founders.

III. ROLE OF THE DELAWARE LEGISLATURE

With the rise of dual-class shares in technology companies, a debate has begun among commentators as to whether companies with dual-class structures should be allowed to exist at all.[57]

As of 2017, twelve percent of S&P500 companies have a dual-class structure, including many high-profile technology companies, such as Facebook and Snap.[58]

Critics of dual-class structures, such as the CII, are concerned that despite technically holding a minority of the shares, the owners of strong voting shares can have an authoritarian stronghold on how a company operates.[59] These powerful, minority shareholders consequently benefit from the capital provided by the majority of shareholders who have little

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3315548; *see* Snap Inc. Form S-1, SEC, https://www.sec.gov/Archives/edgar/data/1564408/000119312517029199/d270216ds1.htm ("[Founders] . . . have the ability to control the outcome of all matters submitted to our stockholders for approval." Further, "[a]lthough other U.S based companies have publicly traded classes of non-voting stock, to our knowledge, no other company has completed and [IPO] of non-voting stock on a U.S. stock exchange.").

[53] *See* Snap, Inc. Form S-1, *supra* note 52.

[54] Snap's founders control eighty-nine percent of the company's voting power despite only holding forty-four percent of the company's equity.

[55] *See* Elson & Ferrere, *supra* note 52.

[56] *See generally* Google IPO Founder's Letter, *supra* note 33. At least those Google shareholders who own Class B stock with one vote per share.

[57] Vijay Govindarajan, Shivaram Rajgopal, Anup Srivastava & Luminita Enache, *Should Dual-Class Shares Be Banned?*, HARV. BUS. REV. (Dec. 3, 2018), https://hbr.org/2018/12/should-dual-class-shares-be-banned.

[58] *See* Shareholder Democracy, *supra* note 27; *see also supra* Section II.

[59] *See* Shareholder Democracy, *supra* note 27.

to no voice in how the company functions, including the appointment of a Board of Directors.[60]

Supporters, such as many of the companies mentioned above, suggest that the dual-class system works because it shields the company from short-term investors who are only worried about quick financial gains.[61] The dual-class system allows founders and early insiders, who have a better understanding of the long-term interests of the company, to avoid the pressures of answering to shareholders who are less likely to take risks in the interest of the company's future growth.[62]

The CII, which endorses a system of "one share-one vote," does not suggest that the market should totally rid itself of dual-class structures.[63] Instead, in 2018, the CII proposed that the major stock exchanges, including NASDAQ and the NYSE, require companies that deviate from the "one share-one vote" norm be required to contain a sunset clause in order to be publicly listed.[64] The stock exchanges, facing the pressures of a prisoner's dilemma situation (either being the only one to amend their rules and risk losing out on high dollar listings versus allowing the status-quo to continue) have not yet required companies to have sunset provisions on dual-classes.[65] In fact, exchanges in Hong Kong and Singapore have recently reversed course after initially refusing to list companies with unequal voting structures.[66]

Since the major stock exchanges have not required sunset provisions, the CII has petitioned the Delaware Legislature to amend the Delaware General Corporation Law to include a sunset provision requirement on dual-class shares.[67] The provision calls for unequal voting shares to revert to "one share-one vote" after a "reasonably limited period."[68] To avoid this, a company could keep its dual-class shares by holding a vote of each class of shareholders separately, on a "one share-

[60] *Id.* ("[T]hose lost voting rights have major consequences, since shareholder votes control everything from appointments to the board of directors to major changes in the company's strategy.").

[61] *Id.*

[62] *Id.*

[63] *See Shareholder Democracy, supra* note 27.

[64] *Id.*

[65] *Id.*

[66] *See* Govindarajan et al., *supra* note 57.

[67] Ken Bertsch & Jeff Mahoney, *Letter to Delaware State Bar Association: Limiting Multi-Class Voting Structures*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Sept. 24, 2019), https://corpgov.law.harvard.edu/2019/09/24/letter-to-delaware-state-bar-association-limiting-multi-class-voting-structures/#1.

[68] *Id.* (suggesting that these sunset provisions should kick in between five and seven years of the company's IPO).

one vote" basis within the separate classes.[69] If each class were to approve the structure, the company could continue operating using its dual-class structure for seven years or less, at which time another vote of each class would be necessary for continued use of the dual-class structure.[70]

Because of Delaware's unique position in the world of corporate law, the Delaware Legislature is in a unique position to change the face of corporate governance. All forty-nine other states look to Delaware as a guiding light on principles of corporate governance, as evidenced by the sheer number of companies incorporated within the state. As of June 2019, twenty-six percent of the IPOs have contained a dual-class structure.[71] Of that twenty-six percent of IPOs, only twenty percent have contained some form of sunset provisions.[72] While there are good reasons to allow dual-class structures to exist, those reasons must dissipate over time.[73] Requiring a dual-class structure to expire after a reasonable amount of time would still allow founders to make riskier moves that some shareholders would not approve of after the IPO in order to further the company's long-term growth.[74] While it is difficult to determine a one-size-fits-all time period in which a company is considered to have matured, and thus less likely to suffer the perils of short-terms investors, research has shown that the age-to-maturity has decreased over time to its current age of five years.[75] While some companies will inevitably age at varying rates, a time frame of seven years is likely going to encompass the time needed to mature for the majority of dual-class corporations.

It is also important that the legislature step in because without amending the current law, the Delaware Court of Chancery faces an uphill battle in determining how to scrutinize the transactions of dual-class corporations.[76]

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[69]*Id.*

[70]*Id.*

[71]*See* Summers, *supra* note 34.

[72]*See id.*

[73]*See* Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 606-07 (2017).

[74]*See* Govindarajan et al., *supra* note 57.

[75]*See id.*

[76]*See* Elson & Ferrere, s*upra* note 52, at 12.

IV. ROLE OF THE COURTS AND THE BUSINESS JUDGMENT RULE

A. *Understanding the Business Judgment Rule*

In Delaware, the "directors of [a corporation] … are clothed with [the] presumption, which the law accords to them, of being [motivated] in their conduct by a bone fide regard for the interests of the corporation whose affairs the stockholders have committed to their charge."[77] The business judgment rule has its roots in the Delaware General Corporation Law which states that the business affairs of a corporation are to be managed by its Board of Directors.[78] When a disinterested and independent Board of Directors acts in good faith with reasonable care, its decisions will be considered a business judgment of which the reviewing court will not interfere.[79] Furthermore, when the business judgment rule applies, the decisions of the directors will not be disturbed as long as they can be attributed to "any rational business purpose."[80]

The purpose of the business judgment rule is that reviewing judges should not serve as an additional measure of shareholder protection when directors and managers possess a superior business acumen.[81] Delaware courts have found that ordinarily, the markets and corporate democracy[82] provide enough protection for shareholders that judicial intervention is

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[77]Gimbel v. Signal Cos., 316 A.2d 599, 608 (Del. Ch. 1974).

[78]DEL. CODE ANN. tit. 8 § 141(a).

[79]*In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 747 (Del. Ch. 2005); *see also* Aronson v. Lewis*,* 473 A.2d 805, 812 (Del. 1984) ("[There is] a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."); *see generally* Corwin v. KKR Fin. Hldgs., LLC, 125 A.3d 304 (Del. 2015) (holding that a transaction approved by a fully informed, uncoerced vote of disinterested stockholders is subject to the business judgment rule).

[80]eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 40 (Del. Ch. 2010) (quoting Sinclair Oil Corp. v. Levien 280 A.2d 717, 720 (Del. 1971)); *see also* Benihana of Tokyo, Inc. v. Benihana, Inc., 906 A.2d 114, 120 (Del. 2006) ("[A]fter approval by disinterested directors, courts review the interested transaction under the business judgement rule, which is a presumption that in making a business decision the directors of a corporation acted on an informed basis, good faith, and in the honest belief that the action taken was in the best interest of the company.").

[81]*See* Elson & Ferrere, *supra* note 52, at 7-8; *see also* Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 823 (1982).

[82]Brehm v. Eisner, 746 A.2d 244, 256 (Del. 2000) ("[T]he inquiry here is not whether we would disdain the composition, behavior and decisions of" a board "if we were stockholders, . . . That decision is for the stockholders to make in voting for directors, urging other stockholders to reform or oust the board, or in making individual buy-sell decisions."); Hilton Hotels Corp. v. ITT Corp., 978 F. Supp. 1342, 1351 (D. Nev. 1997) ("[U]nhappy shareholders can always vote the directors out of office.").

unnecessary.[83] Therefore, allegations that directors made a poor choice or a bad decision will not rise to the level of court review.[84]

Generally, in order to rebut the business judgment rule presumption, a plaintiff must plead facts to show that the individual members of the board were either interested in the outcome of the transaction, or lacked independence to consider whether the transaction was in the best interest of the company.[85] However, the Delaware Supreme Court has held that "a shareholder owes a fiduciary duty *only if it owns a majority interest* in or *exercises control* over the business affairs of the corporation."[86] To show that a minority shareholder has exerted an exercise of control, "a plaintiff must allege domination by the minority shareholder through actual control of the corporation."[87] Furthermore, "the business judgment rule does not protect a board's decision . . . (*even where a majority of the directors are independent and disinterested*) where a controlling shareholder has a conflicting self-interest."[88]

In such cases, courts will employ the standard of entire fairness. When entire fairness is applied, a court must carefully examine two factors: "fair dealing and fair price."[89] Despite the two factors, entire fairness is not a bifurcated process. Both of the factors must be considered together in order to determine whether a transaction was entirely fair.[90] However, if a controller stands on both sides of a transaction, the informed approval of a majority of the minority shareholders shifts the burden of proving an unfair process to the plaintiff.[91] The approval of a majority of

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[83]*See* Elson & Ferrere, *supra* note 52 ("[B]ad management leads to poor company performance, which leads to depressed stock prices. Falling equity values hit executives hard, as today most of their pay and much of their assets are made up of stock and options.").

[84]Ash v. McCall, 2000 WL 1370341, at *10 (Del. Ch. Sept. 15, 2000) (covering "degrees of wrong extending through 'stupid' to 'egregious' or 'irrational.'"); *In re* Caremark Int'l, 698 A.2d 959, 967 (Del. Ch. 1996).

[85]Orman v. Cullman, 794 A.2d 5, 22 (Del. Ch. 2002).

[86]Kahn v. Lynch Communication Systems, Inc., 638 A.2d 1110, 1113 (Del. 1994) (quoting Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987) (emphasis added); *see* Quadrant Structured Prods. Co. Ltd. v. Vertin, 102 A.3d 155, 183-84 (Del. Ch. 2014).

[87]*Kahn*, 638 A.2d at 1114; *see generally* Carsano v. Bloodhound Tech., Inc., 65 A.3d 618, 659 (Del. Ch. 2013) (holding "[t]he requisite degree of control can be shown to exist generally or with regard to the particular transaction that is being challenged").

[88]*In re* LNR Prop. Corp. S'holders Litig., 896 A.2d 169, 177 (Del. Ch. 2005) (*emphasis added*).

[89]Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937 (Del. 1985); *accord* Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. Super. 1983); Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 110 (Del. Super. 1969).

[90]*See Weinberger*, 457 A.2d at 711.

[91]*Id.* at 710.

the minority shareholders simply mimics the market controls that serve as part of the basis for the business judgment rule.[92]

B. *Problems Dual-Class Voting Structures Present*

Although the question of the standard of review for dual-class structures in the eyes of the Delaware courts is unanswered, it remains on the horizon.[93] If the Legislature does not change the Delaware General Corporation Law, the courts must be prepared to deal with dual-class shares, or else invalidate the purpose behind the business judgment rule.[94]

Dual-class shares present an interesting conundrum to the business judgment rule – is the purpose of the rule simply to remove judges from reviewing the decisions of directors with the value of hindsight or is the rule in place because other factors play a role in protecting shareholders?[95] Naturally, in all corporations there will be minority shareholders that take issue with decisions made in a general direction of the corporation. However, in a "one share-one vote" corporation, the majority shareholder also holds the majority of the equity in the company. Therefore, theoretically, any bad decisions made by directors will hurt the majority stockholders' economic interests more than those of minority owners. In dual-class voting structures, that simply is not the case. Mark Zuckerberg controls sixty percent of the voting interests in Facebook while holding an approximately sixteen percent equity stake in the corporation,[96] Google founders Sergey Brin and Larry Page own a combined 55.7 percent voting stake but nowhere near that in equity,[97] and finally Snap founders Evan Spiegel and Robert Murphy own eighty-nine percent of the corporations voting rights but only forty-four percent of its equity.[98] In other words, the

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[92]*In re* MFW Shareholders Litigation, 67 A.3d 496, 535-36 (Del. Ch. 2013).

[93]Both Facebook and Google have been challenged or sued by minority shareholders concerning the structure of the corporations voting rights. *See* Jef Feeley, *Facebook Directors Sued Over Handling of Non-Voting Shares*, BLOOMBERG (Sept. 12, 2018), https://www.bloomberg.com/news/articles/2018-09-12/facebook-directors-sued-over-consideration-of-non-voting-shares; *see also* Tess Townsend, *Alphabet shareholders want more voting rights but Larry and Sergey don't want it that way,* Vox (June 13, 2017), https://www.vox.com/2017/6/13/15788892/alphabet-shareholder-proposals-fair-shares-counted-equally-no-supervote.

[94]Cydney Posner, *Will dual-class structures torpedo the business judgment rule*?, COOLEY PUBCO, https://cooleypubco.com/2017/06/14/will-dual-class-structures-torpedo-the-business-judgment-rule/.

[95]*See Newmark*, 16 A.3d at 40.

[96]*See* Robertson & Tan, *supra* note 36 (reporting that Zuckerberg owns less than one percent of the publicly traded stock).

[97]*See* Summers, *supra* note 34.

[98]*See* Elson & Ferrere, *supra* note 52.

owners of the majority voting rights in these companies are less concerned when riskier moves fail as compared to their counterparts at "one share-one vote" corporations.[99] Therefore, the protections that the marketplace provides to minority owners in "one share-one vote" companies are non-existent in these dual-class structures.

Another difference in corporations with dual-class structures is the fact that all public shareholders are minority shareholders.[100] The majority of the voting power lies in the hands of the founders or the very few company insiders. Unlike "one share-one vote" companies, the protections of corporate democracy also do not exist in dual-class structures.[101]

In most corporate governances, if the shareholders do not like the work being done by the directors, they can replace the board via a vote through convincing other shareholders that the board is inadequately fulfilling its obligations to shareholders.[102] In corporations with dual-class structures, especially the ones reviewed here, even if every public shareholder were to vote against the majority shareholder, they would still lose. The majority shareholder, in an autocrat position, can unilaterally determine the direction of the company, select the directors of his or her choosing, and also replace the directors at will.

The business judgment rule requires a disinterested and independent board of directors acting in good faith and with reasonable care.[103] When the majority voting power of a corporation is vested with a founder or CEO, who also presides on the Board of Directors, it is difficult to fathom that a Board could be considered "disinterested and independent" when that one individual maintains total control over the corporation. In *Basho Tech. Holdco B, LLC v. Georgetown Basho Inv'rs, LLC*, the Court of Chancery held that a company whose chairman sat on the Basho Board of Directors (1) owned stocks with certain blocking rights, (2) in fact used

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[99]*See Newmark*, 16 A.3d at 40.

[100]*See generally* Wong, *supra* note 1.

[101]*See generally* Lucian Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers,* 107 GEO. L. J. 1453 (2019) (discussing in depth the incidence of and problems with these "small-minority" controllers).

[102]Sean Ross, *How do a corporation's shareholders influence its Board of Directors?*, INVESTOPEDIA (Feb. 4, 2020) https://www.investopedia.com/ask/answers/072815/how-do-corporations-shareholders-influence-its-board-directors.asp.

[103]*In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 747 (Del. Ch. 2005); *see also* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (explaining that the business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."); *see generally Corwin* 125 A.3d 304 (holding that a transaction approved by a fully informed, uncoerced vote of disinterested stockholders is subject to the business judgment rule).

those rights on a number of occasions, and (3) displayed the requisite control over Basho to be considered a controlling or dominating shareholder – all despite the fact that they were a minority owner of shares.[104] As such, the Vice Chancellor determined that the standard of review for the transaction was entire fairness instead of the business judgment rule.[105] This finding is due to "the totality of the facts and circumstances, considered in the aggregate."[106] This is the closest any court in Delaware has come to determining that a minority shareholder of dual-class stocks, possessing a majority of the corporation's voting power, will not be afforded the protections of the business judgment rule. It is yet to be seen whether this will become the standard rule in Delaware as applied to all dual-class corporations.

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[104]Basho Tech. Holdco B, LLC, v. Georgetown Basho Inv'rs, LLC, C.A. No. 11802-VCL, 2018 WL 3326693, at *31 (Del. Ch. Jul. 6, 2018).

[105]*Id.*

[106]*Id.*