INSIGHTS

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DIRECTOR LIABILITY

Disney Directors Not Liable, But Questions Remain

The Delaware Chancery Court has found that the Disney directors did not breach their fiduciary duties to the Disney shareholders and did not commit corporate waste in connection with their decisions to hire and then terminate Michael Ovitz. However, the court did observe that the Disney board's practices were not state of the art and offered some lessons for directors today.

by Randall W. Bodner and Peter L. Welsh

On August 9, 2005, the Delaware Chancery Court issued its long-awaited post-trial opinion in the breach of fiduciary duty action against the Walt Disney Board of Directors arising out of the approximately $140 million severance package paid to former Disney President Michael Ovitz in 1995. After nearly nine years of litigation, two motions to dismiss, one appeal, extensive fact and expert discovery, a motion for summary judgment and a trial on the merits, the Chancery Court found that the Disney directors did not breach their fiduciary duties to the Disney shareholders and did not commit corporate waste in connection with their decisions to award and pay lucrative severance terms under Ovtiz's employment agreement. Those decisions, the court held, are protected by the business judgment rule.

Although the court reached what was clearly a sensible decision in this case, the entire course of the litigation calls into question the procedural protections that directors of Delaware corporations have come to rely on. The plaintiffs in the case had not made a single credible claim of any breach of the duty of loyalty by the Disney directors. Yet, the plaintiffs survived two motions to dismiss and a motion for summary judgment, and inflicted some nine years of expensive and time-consuming litigation on the Disney board of directors.[1] Despite the Chancery Court's decision on the merits, therefore, one is entitled to wonder whether the full scope of the protections traditionally afforded by the business judgment rule and by statutory exculpation have not been eroded in important respects. After all, those protections were supposed to protect directors of Delaware corporations not merely from personal liability but also from the risk of expensive, time-consuming and distracting litigation.

The Court's Factual Findings

The facts as found by the Chancery Court in its post trial decision on the merits may be summarized as follows. In the summer of 1995, Michael Eisner, then Chairman and Chief Executive Officer of Disney, sought to hire Michael Ovitz as the Company's new President. At the time, Ovitz was considered one of the most successful businessmen in Hollywood. He was widely-regarded as an "exceptional corporate executive" and a "highly successful and unique entrepreneur."[2] Ovitz was also being courted by MCA,

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a competitor of Disney, with rumors of a lucrative pay package awaiting Ovitz at MCA should he choose to accept.[3] Ovitz was, at the time, the founder, Chairman, Chief Executive and 55 percent shareholder of the top talent agency in Hollywood, Creative Artists Agency (CAA). He was reportedly earning some $20 to 25 million a year at CAA. Eisner and Disney wanted Ovitz to leave CAA and come to Disney. Yet, "Ovitz made it clear that he would not give up his 55 percent interest in CAA without downside protection."[4] Ovitz drove a hard-bargain, seeking upside potential, in the form of options on approximately five million shares of Disney stock, as well as downside protection, in the form of automatic acceleration of a substantial portion of those options in the event of a "no fault termination."[5] Eisner consulted with Sid Bass and Roy Disney, two of the largest individual shareholders of the company, who both supported hiring Ovitz.[6]

Eisner and Irwin Russell, the chairman of the compensation committee of the Disney Board, negotiated the terms of Ovitz's employment agreement and compensation, including Ovitz's severance in the event of a "no fault" termination, with Russell taking the "lead role" in the negotiations.[7] With the assistance of Raymond Watson, a member of the compensation committee, and with the advice of a compensation consultant, Russell conducted a financial analysis of Ovitz's pay package.

On August 13, 1995, Ovitz accepted Disney's offer to join the Company as its President. The next evening, Ovitz attended a dinner with Eisner and Disney Chief Financial Officer, Stephen Bollenbach, and Disney's General Counsel, Sanford Litvack. At the outset of the dinner, Bollenbach and Litvack pointedly informed Ovitz that they would not report to Ovitz and would continue to report to Eisner instead. This encounter, by all accounts, was the start of what would prove to be the rocky and ultimately unsuccessful integration of Ovitz into The Walt Disney Company.

The following day, Ovitz and Eisner executed Ovitz's employment agreement. The employment agreement specifically provided that it was subject to the approval of the compensation committee of the Disney board.[8] On the same day, Eisner contacted each of the remaining members of the compensation committee and full board of directors to inform them of the agreement with Ovitz. Each of the members of the compensation committee believed at the time that hiring Ovitz was a good idea and was in the best interest of the corporation and its shareholders. Also on the same day, Ovitz's hiring was publicly disclosed by Disney via a press release.[9] The Court noted that "[p]ublic reaction was extremely positive. Disney was applauded for the decision, and Disney's stock price increased 4.4 percent in a single day—increasing Disney's market capitalization by more than $1 billion."[10] On September 26, 1995, the compensation committee met for approximately one hour. Among other matters considered at the meeting was Ovitz's hiring and proposed compensation. Mr. Watson presented to the committee members concerning Ovitz's compensation.[11] Following the presentation, the committee approved the terms of Ovitz's agreement. At a meeting of the board of directors following the compensation committee's meeting, Watson presented to the full Board concerning Ovitz's compensation.[12] Following Watson's presentation, the Board of Directors voted unanimously to hire Ovitz. At a subsequent meeting held on October 16, 1995 and following a presentation by Mr. Litvack, the compensation committee approved the award, pricing and terms of Ovitz's stock options.[13]

Although Ovitz performed well at first, Ovitz's employment with Disney ultimately did not go well. Ovitz had difficulty integrating into the "egalitarian" culture at Disney.[14] The Court noted that Ovitz and Disney were a "mismatch of cultures and styles."[15] By mid 1996, "it became apparent that the difficulties Ovitz was having at the Company were less and less likely to be resolved."[16] "By the fall of 1996, directors began discussing that the disconnect between Ovitz and the Company was likely irreparable, and that Ovitz would have to be terminated."[17] In mid-September of 1996, Eisner asked Litvack to communicate to Ovitz that "Eisner no longer wanted Ovitz at Disney and that Ovitz should seriously consider other employment opportunities," including an opportunity that Eisner had cultivated for Ovitz at the Sony Corporation.[18]

By the fall of 1996, Eisner hoped to terminate Ovitz for cause and thereby avoid a "no fault termination" under Ovitz's employment agreement, and therewith the approximately $140 million severance package that would accrue to Ovitz. Eisner asked the Company's

General Counsel, Sanford Litvack, to analyze whether the Company had grounds to terminate Ovitz for cause.[19] Litvack initially concluded that Ovitz could not be terminated for cause and that a "no fault termination" was inevitable.[20] Eisner asked Litvack to look at the question again and more carefully. In response, Litvack reviewed Ovitz's employment agreement "and reviewed all of the facts concerning Ovitz's performance of which he was aware."[21] Litvack, who certainly had no allegiance to Ovitz (as demonstrated by his conduct at the dinner on the night Ovitz was hired),[22] concluded that "the question of whether Ovitz could be terminated for cause was not a close question and, in fact, Litvack described it as a 'no-brainer.'"[23] Eisner testified that, when Litvack informed him of this conclusion, Eisner "'checked with almost anybody that [he] could find that had a legal degree, and there was just no light in that possibility. It was a total dead end from day one.'"[24] On November 26, 1996, an executive session of the Disney Board was held, at which Ovitz's fate was sealed. On December 12, 1996, Disney issued a press release announcing Ovitz's termination.[25]

History of the Litigation

On January 3, 1997, shareholders filed a derivative action against the Disney directors. Thereafter, the Court heard two motions to dismiss the case. On October 7, 1998, the Chancery Court dismissed the plaintiffs' complaint with prejudice on the grounds that the plaintiffs had failed to make demand on the Disney Board and demand was not excused.[26] The Chancery Court held, in particular, that the plaintiffs had not alleged, with particularity, facts creating a reasonable doubt: (1) as to the independence of a majority of the Board; or (2) that the decisions in question were the product of a valid exercise of the directors' business judgment.[27]

On February 9, 2000, in a lengthy opinion that largely comported with the Chancery Court's opinion dismissing the case, the Delaware Supreme Court reversed the Chancery Court's dismissal of the complaint with prejudice and concluded simply that "[b]ecause of the unusual nature of this case and the rulings in this opinion, the interests of justice require that the dismissal ordered in paragraph 1 of the Order of the Court of Chancery shall be without prejudice."[28] The plaintiffs thereafter conducted limited "books and records" discovery,[29] and filed an amended complaint. On May 28, 2003, the Chancery Court denied the defendants' second motion to dismiss. The Chancery Court held, in particular, that the amended complaint sufficiently alleged breaches of the directors' fiduciary duties in connection with the hiring and termination of Ovitz. The defendants had argued in their motion that, at most, the plaintiffs had alleged a breach of the directors' fiduciary duty of care and that such was subject to dismissal under the exculpation provision in the Disney certificate of incorporation and Del. Gen. Laws. § 102(b)(7). The Chancery Court held that the plaintiffs had alleged more than merely a duty of care claim. The Court held that the allegations in the amended complaint stated a claim for breach of the directors' duty of good faith and that such claims were not subject to dismissal under Section 102(b)(7).[30] That decision paved the way for the eventual trial on the merits.

The Chancery Court's Post-Trial Decision

In order to find the defendants personally liable, the court would have had to find that the directors had breached one of the "triad" of fiduciary duties: (1) the duty of care, (2) the duty of loyalty or duty of good faith, or (3) committed waste.[31] While the court held, at the motion to dismiss stage, that the plaintiffs had sufficiently alleged a breach by the Disney directors of their duty of good faith, the court found in its post-trial decision that the Disney directors did not violate *any* of their fiduciary duties, including the duty of care. The court found, in particular, that the decision to hire Ovitz and dangle an exceptionally lucrative compensation (and potential severance) package was approved by the board and the compensation committee and was reasonable, under the circumstances:

> Viewed objectively, the compensation committee was asked to make a decision knowing that: (1) Ovitz was a third party with whom [director] Russell negotiated at arms-length; (2) regardless of whether Ovitz truly was "the most powerful man in Hollywood," he was a highly-regarded industry figure; (3) Ovitz was widely believed to possess the skills and experience that would be very valuable to the Company, especially in light of the Cap Cities/ABC acquisition, [former President and COO Frank] Wells' [unexpected]

The *Disney* Trial: A Perspective from Inside the Courtroom

by Jesse A. Finkelstein, Gregory P. Williams, Anne C. Foster, Lisa A. Schmidt, Evan O. Williford, and Michael R. Robinson

Held in Georgetown, DE, the *Disney* trial lasted 37 days between October 20, 2004 and January 19, 2005; the court heard from 24 witnesses. In its post-trial opinion, the court of Chancery held that no defendant had breached any fiduciary duty to Disney and dismissed all claims against all defendants. The many issues *Disney* implicates regarding the fiduciary duties of members of a board of directors of a Delaware corporation have been, and undoubtedly will be, much discussed. Aside from those legal issues, *Disney* presents many potential examples and lessons in trial practice, applicable to practitioners contemplating trying corporate cases in the Delaware Court of Chancery or elsewhere.

Logistics, Logistics, Logistics

Any case of the magnitude of *Disney*, with 18 individual defendants and all of its attendant publicity, would pose logistical challenges. Somewhat complicating matters was the fact that the *Disney* trial was not held in Wilmington, DE in New Castle County, the site of many prior Delaware corporate trials. Rather, because the Chancellor sits in Sussex County, the trial was held in Georgetown, DE, some 90 miles away. It became apparent that such accommodations as were available in Georgetown could not meet the anticipated needs of the defense witnesses and their counsel, so accommodations in Rehoboth Beach, a nearby resort town, were located and booked. The defendants also reserved facilities outside the courtroom in Georgetown to allow defense counsel and their staff to prepare and assist with witness presentation. Catering was booked. Transportation was arranged. Schedules were tight given that many of the defendant directors were only expected to testify for part of a day. Travel reservations and witness schedules had to be made, remade, and remade again to deal with unanticipated courtroom and personal events. Advance attention to logistics helped defense counsel focus their attention on witness preparation. Counsel facing trials in large cases such as *Disney* should give thorough advance thought to even the most mundane of logistical questions.

Flexibility in the Presentation of Evidence

The court allowed the parties significant leeway in crafting their cases. For example, to eliminate the need for defendant witnesses to be available twice, once for plaintiffs' case-in-chief and once for defendants', the defense first called each defendant and conducted a direct examination; plaintiffs then conducted an examination of each defendant that was not limited to the scope of the direct. Also, the court asked the parties to submit, post-trial, objections to exhibits and deposition designations and counter-designations, supported by short arguments supplied in a letter, a procedure which saved all involved from consuming time needed for trial. The Court then quickly ruled on the objections, allowing the parties to have the benefit of the ruling for the post-trial briefing. Because the Delaware Court of Chancery operates without a jury, the court could be more flexible in terms of presentation and admissibility of evidence than could a court in a jury trial.

Cameras in the Courtroom

On April 4, 2004, the Delaware Supreme Court adopted an administrative directive allowing, for a limited time, experimental electronic media coverage of certain Delaware trial court proceedings. The Sussex County Court of Chancery Courthouse in which the *Disney* trial was held had been recently constructed to facilitate electronic media coverage and use of electronic methods to present evidence. The court allowed an unobtrusive video record to be made of proceedings, which was then made available to the public or press on a four-hour time delay, to Delaware state residents for free and to out-of-state

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The authors practice law in Delaware with the firm of Richards, Layton & Finger, P.A. and represent 13 of the 18 director defendants in this litigation. Counsel for plaintiffs has stated that plaintiffs will appeal the result in Disney after trial. This discussion may not necessarily represent, in all instances, the views of Richards, Layton & Finger or its clients.

residents for a small fee. For a larger fee, a live feed was available, which greatly assisted defense counsel in viewing testimony while working outside the courtroom or in preparing witnesses in facilities near the courtroom. Moreover, members of the press frequently made use of the live feed available in an anteroom just outside the courtroom. While in any case of public interest reporters may be present, perhaps with subsequent access to transcripts of proceedings, counsel should consider in advance the particular impact of a video record of proceedings on the desired presentation and content of testimony.

Use of New Technology in the Presentation of Evidence

The court permitted use of new technology in the presentation of evidence, including: (1) the playing of videotapes of depositions to attempt to impeach witnesses; (2) the availability of real-time transcripts of testimony; and (3) the projection and electronic highlighting of trial exhibits. As with all presentation tools, the effectiveness and helpfulness of such devices varied greatly with the circumstances and the skill of the user.

Weight Given to Experts

In its post-trial opinion, the court discussed in detail each expert witness put on by either side but, to a large extent, gave the testimony of many of them little weight. For example, the court largely rejected the testimony of plaintiffs' witness, Professor of Law Deborah DeMott, who purported to testify on corporate governance custom and practice. It ruled that her testimony was essentially directed to whether defendants had breached their fiduciary duties under Delaware law—the ultimate legal question in the case—and was therefore largely unhelpful to the Court. [*In re The Walt Disney Co. Deriv. Litig.*, 2005 WL 1875804, at *28 (Del. Ch. Aug. 9, 2005).] Practitioners before the Delaware Court of Chancery should keep in mind that it is a highly-specialized court with a Chancellor and Vice-Chancellors who are experts on financial and corporate matters in their own rights and will not accept expert testimony uncritically. This is particularly true with regard to appraisal cases, but also with regard to financial and corporate matters such as were at issue in *Disney*. Practitioners should therefore carefully consider in detail the substance of any expert's planned testimony and whether the Court of Chancery is likely to prove receptive.

> death, and Eisner's medical problems; (4) in order to accept the Company's presidency, Ovitz was leaving and giving up his successful business, which would lead a reasonable person to believe that he would likely be highly successful in similar pursuits elsewhere in the industry; (5) the CEO and others in senior management were supporting the hiring; and (6) the potential compensation was not economically material to the Company.[32]

As for the grant to Ovitz of a "no fault termination," thereby triggering the automatic vesting of a significant portion of his stock options, the Court found:

> Eisner's actions in connection with [Ovitz's] termination are, for the most part, consistent with what is expected of a faithful fiduciary. Eisner unexpectedly found himself confronted with a situation that did not have an easy solution. He weighed the alternatives, received advice from counsel and then exercised his business judgment in the manner he thought best for the corporation. Eisner knew all the material information reasonably available when making a decision, he did not neglect an affirmative duty to act (or fail to cause the board to act) and he acted in what he believed were the best interests of the Company, taking into account the cost to the Company of the decision and the potential alternatives. Eisner was not personally interested in the transaction in any way that would make him incapable of exercising business judgment, and I conclude that plaintiffs have not demonstrated by a preponderance of the evidence that Eisner breached his fiduciary duties or acted in bad faith in connection with Ovitz's termination and receipt of the [no fault termination]."[33]

Each of these statements applies likewise to the directors who approved the "no-fault termination" of Ovitz.

While finding that Eisner and the board did not breach their fiduciary duties, the court repeatedly emphasized that the practices of the Disney directors and officers "fell significantly short of the best practices of ideal corporate governance" as judged by today's Post-*Enron* heightened standards.[34] Yet, the Court also repeatedly noted that,

> the common law cannot hold fiduciaries liable for a failure to comply with the aspirational ideal of best practices, any more than a common-law court deciding a medical malpractice dispute can impose a standard of liability based on ideal—rather than competent or standard—medical treatment practices, lest the average medical practitioner be found inevitably derelict.[35]

Instead, the court notes, the failure to live up to best practices must be judged by the marketplace: "The redress for failures that arise from faithful management must come from the markets, through the action of shareholders and the free flow of capital, and not from this Court."[36]

Whither the Business Judgment Rule and Section 102(b)(7)?

The Chancery Court's decision raises anew the question of how directors who discharge their fiduciary duties or, at worst, commit "honest mistakes of judgment" can avoid not only personal liability, but also protracted, expensive and time-consuming litigation.[37]

Section 102(b)(7) was intended to eliminate director liability for conduct that, at worst, involved mere breaches of the duty of care.

The question can be asked more pointedly as follows: How was the *Disney* case, *as alleged* and as it existed at the motion to dismiss stage, qualitatively different from the famous Trans Union case, *Smith* v. *Van Gorkom*.[38] *Van Gorkom* involved another allegedly hasty and ill-considered high dollar transaction—the sale of the Trans Union Corporation to the Pritzker family. *Van Gorkom*, like *Disney*, contained allegations that an imperious chief executive officer negotiated a transaction while providing little to no information to the company's board of directors.[39] The CEO then allegedly presented the transaction to the board of directors as a *fait accompli*.[40] The board allegedly considered the transaction during a relatively short meeting.[41] The Trans Union board did not retain a financial advisor to assist in assessing the Pritzkers' offer for the corporation.[42] The transaction was attacked as financially unwise. On these facts, the Chancery Court found that the directors had breached their fiduciary duty of care in approving the sale of Trans Union, and held the directors personally liable, as a consequence.[43] At the same time, the court held that the directors had not breached their fiduciary duties of loyalty or good faith.[44]

Following the court's decision in *Smith* v. *Van Gorkom*, and in reaction to it, the Delaware General Assembly enacted Del. Gen. Corp. Laws Section § 102(b)(7).[45] Section 102(b)(7) permits a corporation to include in its articles of incorporation a provision which states, in essence, that no director shall be liable in monetary damages for a breach of the director's duty of care. Section 102(b)(7) was intended to eliminate director liability for conduct that, at worst, involved mere breaches of the duty of care. Importantly, though, it was also intended to protect directors from protracted, expensive and time-consuming litigation. As the Chancery Court observed in another case:

> The effect of the exculpatory charter provision is to guarantee that the defendant directors do not suffer discovery or a trial simply because the plaintiffs have stated a non-cognizable claim for breach of the duty of care. To give the exculpatory charter provision any less substantial effect would be to strip away a large measure of the protection the [Delaware] General Assembly has accorded directors through its enactment of [section 102(b)(7)].[46]

The question remains, following the court's decision in *Disney*, whether Section 102(b)(7) continues to serve its purpose of preventing vexatious litigation against directors guilty of nothing worse than "honest mistakes of judgment."[47]

Section 102(b)(7) was meant to eliminate future *Smith v. Van Gorkom*s and, yet, the plaintiffs in *Disney* were able to proceed to trial on essentially the same theory as the plaintiffs in *Van Gorkom*. Indeed, in its decision, the Court explicitly compared the *Disney* case to *Smith* v. *Van Gorkom* and found that the *Disney* case, while similar in many "striking" respects, was actually *less* egregious in numerous important ways than the circumstances in *Van Gorkom*.[48] The Court found that the Disney Board was better informed, better prepared and engaged in more meaningful deliberations than the board of Trans Union.[49] Also, the transaction in *Disney* was less material, less sweeping, and involved far fewer dollars than the acquisition of the entire Trans Union Corporation by the Pritzkers.[50] Section 102(b)(7) was meant to render cases such as *Van Gorkom*—and *a fortiori*, those (like *Disney*) that involve less serious allegations of fiduciary duty breaches—nonactionable. The Disney certificate of incorporation had availed itself of the protections afforded by Section 102(b)(7). Yet, the Disney plaintiffs survived dismissal in spite of the charter provision.[51] So, why, after the passage of Section 102(b)(7), and in view of the broad protections traditionally provided by the business judgment rule,[52] was *In re The Walt Disney Co. Deriv. Litig.* permitted to go to trial? Why was the case not subject to dismissal at an early stage under Section 102(b)(7)?[53] And what will prevent plaintiffs from replicating the *Disney* litigation strategy in other contexts? These questions, critical to directors around the country, remain unanswered following the court's decision.[54]

Some Lessons from *Disney*

In its decision, the Chancery Court repeatedly observes that the Disney board's practices and processes were not state of the art. Whether or not "state of the art" procedures would have avoided the protracted litigation that ensued in the wake of Ovitz' departure, the following lessons may be taken away from the *Disney* decision:

- **Deliberate and Document.** It is imperative for directors dealing with a non-ordinary course decision (particularly one dealing with executive compensation) to collect all available information, deliberate on that information for an unrestricted amount of time and, just as importantly, document that process. The plaintiffs in *Disney* survived a motion to dismiss, in significant part, because minutes of the relevant board and committee meetings did not reflect the care with which the board truly did deliberate over Ovtiz's hiring and termination.[55] Indeed, in its post-trial decision, the Chancery Court observed: "It would have been extremely helpful to the Court if the minutes had indicated in any fashion that the discussion relating to the [Ovitz employment agreement] was longer and more substantial than the discussion relating to the myriad of other issues brought before the compensation committee [on the morning of September 26, 1995]."[56] While board and committee minutes need not air directors' "dirty laundry," the minutes should fully and accurately reflect the care with which a board decision is made, particularly in a situation in which litigation looms.
- **Consider Seeking Expert Advice.** While *Van Gorkom* held that a board need not obtain the advice of a financial advisor in considering a merger transaction, *Disney* demonstrates that this is not best practice. Although the Disney board did in fact obtain competent expert advice in connection with its assessment of Ovitz's employment agreement, the plaintiffs survived a motion to dismiss in significant part because they were able to allege that the board carelessly did not retain an expert.[57] In any matter of complexity and specialized knowledge, the board should, at the very least, deliberate over whether to retain an expert and document those deliberations. If an expert is not to be retained, there should be good reason(s) for that and the reason(s) should be documented. If an expert is consulted, the expert should be asked to document its conclusions and make a presentation of its analyses and conclusions to the committee and/or board.[58]
- **Beware the Imperial CEO.** The court notes at length that, although "not necessarily beholden to him in a legal sense," the Disney directors "were certainly more willing to accede to [Eisner's] wishes and support him unconditionally than truly independent directors."[59] Though Delaware Courts have recently made clear that social connections to the company's CEO are by themselves not sufficient to impugn a directors' independence,[60] *Disney* makes clear that such connections can nonetheless impair board deliberations.[61] The post-trial decision is a lesson in the risks associated with a board pervaded by such relationships. In addition, the court

criticized Eisner for his failure to keep the board informed of the negotiations with Ovitz.[62]

- **Communicate with Fellow Board Members.** With the adoption of other corporate governance reforms, separate meetings of non-management directors have become fashionable in recent years.[63] *Disney* explains why this may be quite important to good corporate governance: "[I]ndividualized one-on-one discussions with management and directors can lead to directors who are 'unequally or unevenly informed with regard to significant matters' and 'have the effect of vitiating, sapping the board's ability as an institution to function together collectively and collegially and deliberatively."[64] Meeting as outside directors, without the presence of the CEO or other management directors, should facilitate greater information sharing among directors, promote a better-informed board and help to avoid a "divide an conquer" approach by an imperial CEO.
- **Do Not Get "Locked In" to a Decision.** Both *Van Gorkom* and *Disney* included allegations that the CEO had made a decision, agreed to a course of action and "prematurely"—prior to the board's authorization or approval of the course of action—announced the decision publicly.[65] It is important that any decision that must, or will as a practical matter, be presented to the board for its approval not be made, let alone publicly announced, before the board has had a full opportunity to consider and decide the matter for itself. Outside directors should make clear to management that such tactics as the premature announcement of important corporate decisions will not be tolerated.

While it is unclear that these and other practices will avoid protracted litigation post-*Disney*, they should significantly reduce the risk of personal liability facing directors in this environment of heightened corporate governance standards.

NOTES

1. The nine years of litigation is, moreover, a cost that the Disney shareholders will be required to bear. *See* Del. Gen. Corp. Laws, § 145(c) (providing for mandatory indemnification for defense costs to the extent that a director is successful on the merits.)
2. *In re The Walt Disney Co. Deriv. Litig.*, No. CIV. 15452, 2005 WL 1875804 *6 (Del. Ch. Aug. 9, 2005) (herein *Walt Disney IV*).
3. *Id*. at *4. Although not addressed in the Chancery Court's decision, MCA had reportedly offered Ovitz a package valued at some $250 million. *See* David Leiberman, "The Wizard of Hollywood's Move to MCA Could Upend Tinsletown," *USA Today*, 1B (June 2, 1995).
4. *Walt Disney IV,* 2005 WL 1875804 at *5.
5. *Id*.
6. *Id*.
7. *Id*. at *5–6.
8. *Id*. at *44, n.522.
9. *Id*. at *9.
10. *Id*.
11. *Id*.
12. *Id*. at *10.
13. *Id*.
14. *Id*. at *11.
15. *Id*.
16. *Id*.
17. *Id*. at *12.
18. *Id*. at *17
19. *Id*. at *23.
20. *Id*.
21. *Id*. at *20.
22. *Id*. at *21, n. 269.
23. *Id*.
24. *Id*.
25. *Id*. at *24.
26. *In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342 (Del. Ch. 1998) (*Walt Disney I*).
27. *Walt Disney I*, 731 A. 2d at 364–365; s*ee also Aronson* v. *Lewis*, 473 A.2d 805, 814 (Del. 1984).
28. *Brehm* v. *Eisner*, 746 A.2d 244, 267 (Del. 2000).
29. *See* Del. Gen. Corp. Laws, § 220.
30. Much ink has been spilled over whether the duty of good faith is a separate fiduciary duty, apart from the duty of loyalty and duty of care. Vice Chancellor Chandler takes up this issue and avers that good faith is a subset of the duty of loyalty, not entirely encompassing the duty of loyalty but encompassed by it, that is, "[t]here might be situations when a director acts in subjective good faith and is yet not loyal (*e.g.,* if the director is interested in a transaction subject to the entire fairness standard and cannot prove financial fairness), but there is no case in which a director can act in subjective bad faith towards the corporation and act loyally." *Walt Disney IV*, 2005 WL 1875804 at *35, n. 447.
31. *Id*. at *37.
32. *Id*.
33. *Id*. at *51.
34. *Id*. at *1; *see also Brehm*, 746 A.2d at 256.
35. *Walt Disney IV*, 2005 WL 1875804 at *1; *see also id*. at *30. ("At the outset, the Court emphasizes that the best practices of corporate governance include compliance with fiduciary duties. Compliance with fiduciary duties, however, is not always enough to meet or to satisfy what is expected by the best practices of corporate governance.").
36. *Id*. at *2.

37. *See Cheff* v. *Mathes*, 199 A.2d 548, 555 (Del. Ch. 1964); *Johnson* v. *Trueblood*, 629 F.2d 287, 294 (3d Cir. 1980).
38. *Smith* v. *Van Gorkom*, 488 A.2d 858 (Del. Ch. 1985).
39. *Id*. at 874.
40. *Id*.
41. *Id*.
42. *Id*. at 876–877.
43. *Id*.
44. The Delaware Supreme Court in *Van Gorkom* held, in particular, that "there were no allegations of fraud, bad faith, or self-dealing, or proof thereof." *Id*. at 873.
45. *Emerald Partners* v. *Berlin*, 787 A.2d 85, 96 (Del. 2001) (describing Section 102(b)(7) as "a thoughtfully-crafted legislative response to our holding in *Van Gorkom*.").
46. *McMillan* v. *Intercargo Corp.*, 768 A.2d 492, 501 (Del. Ch. 2000) (emphasis added).
47. *Cheff*, 199 A.2d at 555.
48. *Walt Disney IV*, 2005 WL 1875804 at *44–45.
49. *Id*.
50. *Id*. at *44.
51. *See In re Walt Disney Deriv. Litig.*, 825 A.2d 275 (Del. Ch. 2003) (herein *Walt Disney III*).
52. *See, e.g., Gagliardi* v. *Trifoods Int'l, Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996).
53. Despite the similarities between *Disney* and *Van Gorkom*, in refusing to dismiss the amended complaint, the Chancery Court in *Disney* held, unlike in *Smith* v. *Van Gorkom*, which was treated purely as a duty of care case, *Van Gorkom*, 488 A.2d at 873, that *Disney* not only involved breaches of the duty of care, but also somehow implicated alleged breaches of the duty of good faith.
54. The Chancery Court has grappled with the significance of *Disney III* on more than one occasion since the decision was issued. *See, e.g., Off. Comm. of Unsecured Creditors of Integrated Health Servcs.* v. *Elkins*, No. Civ. A. 20228-NC, 2004 WL 1949290 (Del. Ch. Oct. 8, 2003).
55. *See Walt Disney III*, 825 A.2d at 287 ("Less than one and one-half pages of the fifteen pages of Old Board minutes were devoted to discussions of Ovitz's hiring as Disney's new president. Actually, most of that time appears to have been spent discussing compensation for director Russell. No presentations were made to the Old Board regarding the terms of the draft agreement. No questions were raised, at least so far as the minutes reflect. At the end of the meeting, the Old Board authorized Ovitz's hiring as Disney's president. No further review or approval of the employment agreement occurred. Throughout both meetings, no expert consultant was present to advise the compensation committee or the Old Board").
56. *Walt Disney IV*, 2005 WL 1875804 at *45, n. 539.
57. *Walt Disney III*, 825 A.2d at 287 ("Throughout both meetings, no expert consultant was present to advise the compensation committee or the Old Board.")
58. *Walt Disney IV,* 2005 WL 1875804 at *45 ("Nor is it necessary for an expert to make a formal presentation at the committee meeting in order for the board to rely on that expert's analysis, although that certainly would have been the better course of action.")
59. *Id*. at *40.
60. *Beam* v. *Stewart*, 845 A.2d 1041, 1052 (Del. 2004) ("Mere allegations that they move in the same business and social circles, or a characterization that they are close friends, is not enough to negate independence for demand excusal purposes.")
61. *Walt Disney IV*, 2005 WL 1875804 at *40, n. 488.
62. *Id*. at *40. ("A reasonably prudent CEO (that is to say, a reasonably prudent CEO with a board willing to think for itself and assert itself against the CEO when necessary) would not have acted in as unilateral a manner as did Eisner when essentially committing the corporation to hire a second-in-command, appoint that person to the board, and provide him with one of the largest and richest employment contracts ever enjoyed by a non-CEO.")
63. Korn/Ferry International, *31st Annual Board of Directors Survey*, p. 24 (2004) ("Once considered taboo, the practice of holding regular executive sessions sans the CEO now verges on being universally embraced by boards in the Americas. In 2004, 93 percent of responding directors' boards met in executive session without the chief executive. Support has grown quickly: The percentage of boards instituting this practice has more than doubled since 2002, when 41 percent of respondents indicated this was done."
64. *Walt Disney IV*, 2005 WL 1875804 at *28, n.373 (quoting expert testimony).
65. *Van Gorkom*, 488 A.2d at 884; *Walt Disney IV*, at *41; *see also id*. at *44, n.522.

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