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DELAWARE COURT ADDRESSES DUTIES OF DIRECTORS OF PUBLIC COMPANIES

AN EURO-AMERICAN LAWYERS GROUP BRIEFING ARTICLE

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On August 9, 2005, the Delaware Court of Chancery issued its long awaited decision in the highly-publicized case of *In re Walt Disney Company Derivative Litigation*. The case involves shareholder claims of breaches of fiduciary duties of the Board of Directors of The Walt Disney Company (“Disney”) regarding the hiring and subsequent termination of Michael Ovitz as Disney’s President. As explained below, the Court held that the Disney Directors did not violate their fiduciary duties or commit waste by the hiring of and subsequent termination of Mr. Ovitz.

In October 1995, the Disney Board approved the hiring of Michael Ovitz to serve as Disney’s President and Chief Operating Officer. After only fourteen months as President, Mr. Michael Eisner (CEO of Disney) terminated Mr. Ovitz’s employment. The terms of the termination provided Mr. Ovitz with a cash payment of approximately \$38 million and provided for the immediate vesting of approximately 3 million of his Disney shares (making the severance package worth an estimated \$140 million). Shareholders of Disney then brought suit alleging a breach by the Disney Directors of their fiduciary duties and corporate waste. After a lengthy series of pre-trial motions, the trial finally began on October 20, 2004 and concluded on January 19, 2005.

In holding in favor of the Directors, the Court stated in its decision, that “fiduciaries who act faithfully and honestly on behalf of those whose interests they represent are indeed granted wide latitude in their efforts to maximize shareholders’ investments”. The Court emphasized that the law in Delaware is that a court will not second-guess a decision made by an independent board made in good faith, even if the decision goes “awry, spectacularly or otherwise”.

In the wake of the directors of Enron and WorldCom having to pay millions of their own dollars to settle lawsuits with plaintiff shareholders, directors of public companies have understandably been concerned about the interpretation and potential liability of their actions. The decision in this case should give directors some sense of comfort, as it appears Delaware courts will continue to support directors’ decisions if they are made faithfully and honestly on behalf of their shareholders, regardless of the outcome of such decisions.



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The Court also continued the recent trend of Delaware Courts examining director liability on a director-by-director basis by individually examining each Director's role and actions in the hiring and termination of Mr. Ovitz. Therefore, it may be concluded that Delaware Courts in future breach of fiduciary cases will likely examine the directors' conduct on an individual basis rather than as an entire Board.

The Plaintiffs' attorneys have indicated that they intend to appeal this decision.

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