COMMENT

BREHM v. EISNER, OR SOME REFLECTIONS ABOUT THE *DISNEY* CASE

ABSTRACT

This article analyzes the decision of the Delaware Supreme Court in Brehm v. Eisner. *The author first discusses the different approaches taken by the court of chancery and the supreme court. Next, the author highlights the reasons advanced by the supreme court for permitting the plaintiffs to file an amended complaint. Finally, the author argues that this case represents an admonishment that lucrative executive compensation packages must be given appropriate consideration by boards of directors, and that shareholders bear some responsibility in encouraging appropriate corporate governance.*

I. INTRODUCTION

On February 9, 2000, the Delaware Supreme Court rendered its decision on Disney's widely publicized termination of Michael Ovitz's employment, which resulted in Ovitz receiving an extraordinarily large severance package after working for the company for just over one year.[1] Part II of this article briefly recounts the factual and procedural history of the *Disney* case. It contains an analysis of the Delaware Court of Chancery's decision, which determined that the shareholder plaintiffs failed to satisfy the demand futility test of *Aronson*[2] and dismissed their claims with prejudice.[3] Part III examines the ruling of the Delaware Supreme Court in *Brehm v. Eisner*.[4]

In Part IV of the article, the reasons for the supreme court's unusual action in the *Disney* case are contemplated. Based upon the history and status of Delaware case law, it was expected that the supreme court affirm the court of chancery decision. Instead, although the supreme court agreed with the court of chancery's decision, it gave the plaintiffs an opportunity to pursue the case by permitting them to file an amended complaint relating to

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[1]*See* Brehm v. Eisner, 746 A.2d 244 (Del. 2000); *see also In re* Walt Disney Co. Derivative Litig., 731 A.2d 342 (Del. Ch. 1998).

[2]Aronson v. Lewis, 473 A.2d 805 (Del. 1984).

[3]*In re* Walt Disney Co. Derivative Litig., 731 A.2d 342 (Del. Ch. 1998).

[4]*See* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

the second prong of the *Aronson* test. The court appeared to be dissatisfied with the approval and termination process the directors employed for Ovitz's employment agreement. It seems the court wanted to emphasize that in the context of dealing with expensive compensation packages to executives, the exercise of due care requires additional attention from directors. Moreover, it is reasonable to conclude that the case did not pass the Delaware Supreme Court's "smell test," which was an important factor contributing to the court's decision to grant the plaintiffs another opportunity to re-plead their allegations.

Part V analyzes possible effects of the decision in *Brehm* on Delaware corporate law. Despite the uncommon action taken by the court, the current status of law regarding executive compensation does not appear to be undergoing significant changes. Although the court criticized the decision-making processes employed by the Disney directors, it acknowledged that "the aspirational goals of ideal corporate governance practices" that go beyond the minimal standards of corporate law are preferable, but not legally required.[5]

The conclusion assesses the probability of the plaintiffs' success in satisfying the demand futility test if they decide to file their amended complaint. There are few reasons to doubt that there were any substantial defects in the decision-making process of the Disney directors. Moreover, the company's certificate of incorporation contains a provision under Section 102(b)(7) of the Delaware General Corporation Law barring directors' liability for claims based on a breach of the duty of care.

II. BACKGROUND

A. *The Pertinent Facts*

In September of 1995, Michael D. Eisner (Eisner), chairman of the board of directors and the CEO of Walt Disney Company (Disney), convinced his long-time friend, Michael S. Ovitz (Ovitz), to leave his position as the head of Creative Artists Agency and serve as Disney's president.[6] At the time, Ovitz was an important talent broker, referred to by some as the "Most Powerful Man in Hollywood."[7] On October 1, 1995, Ovitz and Eisner signed a five-year employment contract (the Employment Agreement), which was subsequently submitted for approval to the Disney

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[5]*See* Brehm v. Eisner, 746 A.2d 244, 156 (Del. 2000).

[6]*In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 352.

[7]*Id.* at 350.

board of directors (the old board).[8] In connection with its decision to approve the Employment Agreement, the board had been advised by a corporate compensation expert, Graef Crystal.[9] After determining that Ovitz would be a valuable asset as Disney president, members of the old board unanimously approved the agreement.[10]

Pursuant to the Employment Agreement, Ovitz was to receive an annual salary of $1 million, a discretionary bonus, and two sets of stock options—the "A" options and the "B" options which would enable Ovitz to purchase two and three million shares of Disney common stock respectively.[11] The Employment Agreement provided three possible ways by which Ovitz's employment might end: (1) termination by Disney after the expiration of his five-year term; (2) termination by Disney for "good cause" before the end of the initial term; and (3) non-fault termination.[12] Except in the case of termination for "good cause," the end of his employment entitled Ovitz to receive a lump sum severance payment of $10 million.[13] Moreover, in the case of non-fault termination, Ovitz would also be entitled to the present value of his remaining salary through September 30, 2000; additional payments of $7.5 million for each fiscal year remaining under the Employment Agreement; and the immediate vesting of the "A" stock options.[14]

"Ovitz's employment with Disney did not work out well, and it was widely known that Ovitz began seeking alternative employment."[15] In September 1996, Ovitz apparently sent Eisner a letter expressing his dissatisfaction with his job and "stat[ed] his desire to leave the company."[16] On December 11, 1996, Eisner agreed to the termination of the Employment Agreement on a non-fault basis.[17] Thereafter, the Disney board of directors (the "new board") approved Ovitz's non-fault termination, and Ovitz received his agreed upon contractual benefits.[18]

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[8] *Id.* at 352.

[9] *Id.* at 361.

[10] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 352.

[11] *Id.*

[12] *Id.* According to the Employment Agreement, the Disney board could terminate Ovitz only if he committed gross negligence, malfeasance, or resigned voluntarily. Non-fault termination could only result without "good cause" or by Ovitz's resignation with the consent of the company.

[13] *Id.*

[14] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 352.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 352.

Certain shareholders of Disney filed this derivative action on behalf of Disney in the Delaware Court of Chancery.[19] Plaintiffs alleged, *inter alia*, that the director defendants breached their fiduciary duties of loyalty, good faith, and due care, and committed waste, first by entering into the Employment Agreement with Ovitz and then by awarding him a non-fault termination.[20] The defendants moved to dismiss, arguing, first, "that the complaint fail[ed] to comply with Court of Chancery Rule 23.1, which requires plaintiffs either to make a demand on a [corporation's] board of directors or to allege particularized facts that excuse such demand."[21] The defendants' second argument was "that all of the plaintiffs' allegations fail[ed] to state a claim against them, as Disney's certificate of incorporation bar[red] liability for claims based on a breach of the duty of care, pursuant to Section 102(b)(7) of the Delaware General Corporation Law."[22]

B. *The Ruling of the Court of Chancery*

In assessing whether the derivative claims brought by plaintiffs on behalf of Disney could survive the defendants' motion to dismiss, the court of chancery addressed the issue of whether the plaintiffs were excused from making a demand on the Disney Board before filing the lawsuit. The court applied the demand futility test outlined in *Aronson*, under which a demand is considered futile, and therefore excused, only if the particularized facts alleged in the complaint create a reasonable doubt that (1) the directors are disinterested and independent or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.[23]

With respect to the first prong of the *Aronson* test, the plaintiffs offered several grounds for asserting that the members of Disney's old and new boards were not disinterested and independent. Their central allegations were that Eisner was interested in approving the Employment Agreement and in granting Ovitz a non-fault termination and that he dominated and controlled both boards.[24] In particular, plaintiffs alleged that at least twelve of the fifteen members of the Disney board "had such strong ties to Eisner that they would not have been able to make an impartial decision with respect to any demand [p]laintiffs may have made."[25]

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[19] *Id.* at 351.
[20] *Id.* at 353.
[21] *Id.* at 353.
[22] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 353.
[23] *See Aronson*, 473 A.2d at 814.
[24] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 355.
[25] *Id.*

After considering plaintiffs' arguments regarding Eisner's alleged personal interest in Ovitz's compensation, the court of chancery found the allegations unsupported by Delaware law because they did not overcome the presumption of independence traditionally afforded to directors.[26] Accordingly, it stated that "no reasonable doubt can exist as to Eisner's disinterest in the approval of the Employment Agreement, as a matter of law," and, similarly, that plaintiffs "have not demonstrated a reasonable doubt that Eisner was disinterested in granting Ovitz a Non-Fault Termination."[27] The court of chancery then proceeded to analyze the independence of each of the Disney directors whom plaintiffs alleged were under Eisner's control.[28] After that analysis, the court concluded that the plaintiffs had not raised a reasonable doubt as to the independence of any of the directors in approving or honoring the Employment Agreement.[29] Accordingly, the court held that demand was not excused under the first prong of *Aronson* and moved to analyze plaintiffs' allegations with respect to the second prong of the test.[30]

First, the court addressed plaintiffs' allegations that in approving Ovitz's Employment Agreement the old board breached its duty of care.[31] The plaintiffs' primary contention was that the directors did not avail themselves of all material information reasonably available in approving the Employment Agreement, evidenced by the fact that they did not know the value of the compensation package offered to Ovitz.[32] The court of chancery concluded that because Crystal, the financial expert who advised the board on the Employment Agreement, had not quantified Ovitz's potential severance benefits in the event of his non-fault termination, this did not create a reasonable inference that the board failed to contemplate those benefits itself.[33] The court continued that "even if the Board did fail to calculate the potential cost to Disney . . . this allegation fails to create a reasonable doubt that the former Board exercised due care."[34] It further explained that since the board was fully informed about the manner in which the amount of severance would be calculated, the board's reliance on Crystal and his decision not to fully calculate that amount lacked the egregiousness

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[26] *Id.*
[27] *Id.* at 356.
[28] *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 356-60.
[29] *Id.* at 361.
[30] *Id.*
[31] *Id.*
[32] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 361.
[33] *Id.* at 361-62.
[34] *Id.* at 362.

necessary to lose the protection of the business judgment rule.[35] The court emphasized that "[a] board is not required to be informed of every fact, but rather is required to be reasonably informed."[36] Accordingly, the court stated that the plaintiffs did not plead sufficient facts that give rise to a reasonable doubt that Disney's old board was reasonably informed in approving the Employment Agreement.[37]

The court of chancery then rejected the plaintiffs' allegations that the old board's approval of the Employment Agreement constituted waste.[38] It first noted that the board determined Ovitz would be very valuable for the company and in order to attract him to Disney it had to offer Ovitz an expensive compensation package.[39] The court then rejected the plaintiffs' averments that the terms of the Employment Agreement were structured to provide Ovitz with a disincentive to remain at Disney reasoning that leaving three million shares (the "B" options) "on the table" provided a "substantial disincentive" for Ovitz to depart the company.[40] It further concluded that the plaintiffs' allegations failed to meet the requirements of the waste test, i.e., to show "an exchange [that is] so one-sided that no businessperson of ordinary, sound judgment could conclude that Disney received adequate consideration."[41]

Finally, the court of chancery considered the plaintiffs' contentions that by granting Ovitz a non-fault termination Disney's new board committed waste and breached its fiduciary duties because the directors "had good cause to terminate Ovitz or at least dispute the payments under the severance provisions of the [employment] [a]greement."[42] From the outset, the court pointed out that the "terms of the [e]mployment [a]greement limited 'good cause' for terminating Ovitz's employment to gross negligence or malfeasance, or a voluntary resignation without the consent of the Company."[43] After reviewing the plaintiffs' allegations, the court concluded that the complaint did not set forth particularized facts that his conduct amounted to gross negligence or malfeasance or that he resigned voluntarily.[44] As to the plaintiffs' contentions that the new board committed waste by agreeing to the very lucrative payout under the non-fault

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[35] *Id.*

[36] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 362.

[37] *Id.* at 363.

[38] *Id.*

[39] *Id.*

[40] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 363.

[41] *Id.* (quoting Glazer v. Zapata Corp., 658 A.2d 176, 183 (Del Ch. 1993)).

[42] *Id.*

[43] *Id.*

[44] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 363.

termination provision, the court noted that the board had several options in deciding how to handle the situation.[45] After considering those options, the court stated it was the board's business decision to grant Ovitz a termination on a non-fault basis and that the plaintiffs' mere disagreement with the board's course of action was insufficient to create a reasonable doubt that the board's decision was the product of an exercise of business judgment.[46] Accordingly, the court concluded that a demand on the Disney board was not excused under the second prong of *Aronson* and the court, therefore, dismissed plaintiffs' claims.[47]

III. THE DECISION OF THE DELAWARE SUPREME COURT

On appeal, the Delaware Supreme Court agreed with the court of chancery decision but granted the plaintiffs another opportunity to pursue the case by filing an amended complaint setting forth particularized facts relating to the second prong of the *Aronson* test.[48] After dismissing with prejudice the plaintiffs' complaint relating to the first prong of *Aronson*, the court employed a somewhat different analysis than the court of chancery regarding the second prong of the *Aronson* test.

In discussing the plaintiffs' contention that members of Disney's old board breached their fiduciary duties of loyalty, good faith, and due care, and committed waste by entering into the Employment Agreement with Ovitz, the court criticized the court of chancery's formulation of the due care test as "too cryptically stated to be a helpful precedent for future cases."[49] Although the acknowledgment of the lower court's conclusion that the board of directors is "not required to be informed of every fact, but rather is required to be reasonably informed" is consistent with the traditional formulation, the supreme court applied its own analytical framework to the complaint.[50] The court stated that pre-suit demand will be excused only where a court concludes that "the particularized facts in the complaint create a reasonable doubt that the informational component of the directors' decisionmaking process, *measured by concepts of gross negligence*, included consideration of all material information reasonably available."[51]

After determining that the dollar amount of the payout to Ovitz under the non-fault termination scenario was both material and reasonably

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[45] *Id.* at 364.
[46] *Id.*
[47] *Id.* at 365.
[48] *Brehm*, 746 A.2d at 248.
[49] *Id.* at 259.
[50] *Id.* at 258 (quoting *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 361-62).
[51] *Id.*

available,[52] the supreme court disagreed with the court of chancery's interpretation of the complaint. It concluded that the complaint charged that neither Crystal nor the members of the old board calculated the potential severance benefits to Ovitz in the case of his non-fault termination.[53] It further pointed out that the old board was entitled under Section 141(e) of the Delaware General Corporation Law to the presumption that it relied in good faith on Crystal's expert competence.[54] In light of this statutory provision the supreme court found the analysis of the court of chancery to be incomplete because it tried to tie the reliance issue to a lack of egregiousness rather than to the statute.[55] Nevertheless, the supreme court found that the plaintiffs did not rebut the presumption that the old board relied on Crystal's expertise in good faith and consequently held that the complaint failed to create a reasonable doubt that the old board's decision in approving the Employment Agreement was protected by the business judgment rule.[56]

The court then rejected the plaintiffs' contention that the old board violated substantive due care requirements and committed waste *ab initio* when it approved the Employment Agreement.[57] It agreed with the court of chancery's holding that the plaintiffs' theory failed to satisfy the requirements of the waste test[58] and its analysis that the amount and structure of executive compensation are inherently matters of the business judgment of a corporation's board of directors.[59] The court noted, however, that "there are outer limits, but they are confined to unconscionable cases where directors irrationally squander or give away corporate assets."[60]

Finally, the supreme court turned its attention to the plaintiffs' allegation that because Ovitz resigned *de facto*, or that he could have been fired for cause, the new board of Disney committed waste in its decision to terminate his Employment Agreement on a non-fault basis. The supreme court concluded that there were no "particularized allegations that [Ovitz] resigned, either actually or constructively,"[61] and that none of the plaintiffs' contentions demonstrated that Ovitz was grossly negligent or committed malfeasance so as to be fired for cause.[62]

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[52]*See Brehm*, 746 A.2d at 259-60.
[53]*Id.* at 260.
[54]*Id.*
[55]*Brehm*, 746 A.2d at 261 n.54.
[56]*Id.* at 262.
[57]*Id.* at 262-64.
[58]*Id.* at 263.
[59]*Brehm*, 746 A.2d at 263.
[60]*See id.*
[61]*See id.* at 264.
[62]*Id.* at 265.

IV. REFLECTIONS BEHIND THE SCENES

Undoubtedly, the *Disney* case stands out in light of the enormous amount of Ovitz's severance package. Indeed, the court of chancery was influenced by the amount of the payout that Ovitz received noting that the severance payments were "larger than almost anyone anywhere will receive in the lifetime of any of the parties, and perhaps larger than any ever paid."[63] Moreover, the court acknowledged that "the sheer magnitude of the severance package . . . sparked [the] litigation"[64] making the case "noteworthy" and "exceptional."[65] Nevertheless, from the outset of its opinion the court of chancery emphasized: "[l]egal rules that govern corporate boards, as well as the managers of day-to-day operations, are resilient, irrespective of context."[66] The court then drew a vivid comparison:

> Just as the 85,000-ton cruise ships *Disney Magic* and *Disney Wonder* are forced by science to obey the same laws of buoyancy as Disneyland's significantly smaller *Jungle Cruise* ships, so is a corporate board's extraordinary decision to award a $140 million severance package governed by the same corporate law principles as its everyday decision to authorize a loan. . . . Nature does not sink a ship merely because of its size, and neither do courts overrule a board's decision to approve and later honor a severance package, merely because of *its* size.[67]

Accordingly, despite the magnitude of the compensation and severance packages awarded to Ovitz, the court of chancery was unwilling to scrutinize the substance of the boards' decisions. The court, however, did analyze the circumstances surrounding the decisions and was ultimately comfortable with those circumstances because it dismissed the plaintiffs' complaint with prejudice. The supreme court affirmed the court of chancery's dismissal of plaintiffs' complaint. Given the history and status of Delaware case law, this was obviously a result that everyone conversant with Delaware law and the business judgment rule must have expected. The decisions of the old board to approve Ovitz's Employment Agreement and of the new board to terminate Ovitz on a non-fault basis, were clearly their business decisions

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[63] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 350.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 350.

and consequently were protected by the business judgment rule. The court generally does not second-guess such decisions unless the party challenging the decision properly rebuts the presumption of protection of the business judgment rule.[68] The plaintiffs in *Brehm* did not make such a rebuttal and failed to meet the requirements of the *Aronson* two-prong demand futility test.[69] Nevertheless, the supreme court reversed the court of chancery, providing that one aspect of the dismissal shall be without prejudice, thereby giving the plaintiffs another opportunity to amend their complaint and satisfy the *Aronson* test.

It is important to note that the action taken by the supreme court was not typical. By making the decision not to affirm the lower court's decision, the court implicitly indicated that something in the process of reviewing this matter was troubling. According to the court, the motivation for its decision was "the unusual nature" of the case;[70] an unclear explanation that has left the corporate world with uncertainty.

Perhaps it was the amount of compensation and termination payout to Ovitz that made the case unusual. It is unclear from the decision if this speculation is true. On the one hand, the court seemed concerned with the amount of payments to Ovitz, noting that they appeared to be "exceedingly lucrative, if not luxurious."[71] On the other hand, it agreed with the analysis of the court of chancery that the size and structure of executive compensation packages are inherently matters of the board's judgment and further approved the lower court's finding that the Employment Agreement did not amount to waste.[72]

Perhaps instead it was the decision-making process of the old board in approving the Employment Agreement and of the new board in terminating Ovitz on a non-fault basis that made the case unusual. Here, a positive answer appears to be closer to the truth. Several times throughout its decision the court criticized the processes of the boards in the approval and termination of the agreement, referring to them as "casual, if not sloppy and perfunctory."[73]

The supreme court seemed to be especially dissatisfied with the old board's method for gathering material information when they approved the Employment Agreement. The court determined that in light of the large amount of the payoffs, the economic exposure of Disney in the case of

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[68]*See Aronson*, 473 A.2d at 812.
[69]*Id.* at 816-17.
[70]*Brehm*, 746 A.2d at 267.
[71]*See id.* at 249.
[72]*Id.* at 266.
[73]*Id.* at 249.

Ovitz's non-fault termination was material for the old board's decision-making process.[74] Moreover, the court pointed out that since Crystal or the board could have calculated the size of the termination packages, this material information was also reasonably available.[75] It then stated that the plaintiffs' complaint charged that neither the expert nor the directors themselves made the calculations,[76] although it conceded that under the statute the directors were entitled to the presumption that they properly relied on the expert;[77] a presumption which the plaintiffs could not successfully rebut. However, notwithstanding the dismissal of the complaint, the court manifested its condemnation of the process the board employed to deal with the approval of the Employment Agreement, indicating that it was not consistent with "ideal corporate governance practices."[78]

The court proceeded to outline how the complaint should have been crafted in order to survive a motion to dismiss in a beach of due care action where an expert has advised a corporation's board of directors in the decision-making process.[79] In light of the courts' general dislike of tedious and poorly drafted complaints similar to the plaintiff's complaint, which the court depicted as "a pastiche of prolix invective"[80] and "blunderbuss of a mostly conclusory pleading,"[81] the court's action demonstrates its repugnance towards the conduct of Disney's directors in approving the Ovitz Employment Agreement. In sum, it seems that the supreme court wanted to show that the exercise of due care in the context of approving executive compensation packages, especially those involving large amounts of money, requires something more than what is required for simply approving an ordinary corporate transaction.

It appears the court was not comfortable with the totality of the circumstances surrounding Ovitz's employment at Disney. In particular the court was concerned with the very short time of Ovitz's service to Disney, his ostensible lack of commitment to the company, and that after all this conflict, he walked away with a sizeable fortune. The court noted that "[o]ne can understand why Disney stockholders would be upset with such an extraordinarily lucrative compensation agreement and termination payout awarded [to] a company president who served for only a little over a year

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[74]*Brehm*, 746 A.2d at 259.
[75]*Id.* at 260.
[76]*Id.*
[77]*Id.* at 261.
[78]*Brehm*, 746 A.2d at 256.
[79]*Id.* at 262.
[80]*Id.* at 249.
[81]*Id.* at 267.

and who underperformed to the extent alleged."[82] Although the court could not determine that the plaintiffs satisfied the *Aronson* test of demand futility, its transparent sympathy towards the shareholder plaintiffs emerged throughout the decision. In conclusion, the case did not pass the supreme court's "smell test," which ultimately seemed to be an important determinant that led the court to place this case in the category of "unusual" and "potentially very troubling."

V. EVALUATION AND PREDICTION

The decision of the supreme court in *Brehm* once again turns our attention to the issue of executive compensation. Without a doubt the supreme court was troubled with the circumstances of the case and, as a result, granted the shareholder plaintiffs another opportunity to pursue their claim. In spite of the unusual action taken by the court, no fundamental changes in the Delaware corporate law should be expected. What may at first glance appear to be a source of concern, upon closer inspection reveals only the court's moral admonishment of the Disney directors.

On the one hand, the supreme court acknowledges the concern about the decision-making processes the directors employed in approving and terminating the Employment Agreement. It explicitly criticizes the board, stating that the processes employed were "hardly paradigms of good corporate governance practices."[83] On the other hand, the opinion also makes it clear that the court cannot decide the case in the plaintiffs' favor simply because the directors failed to establish and carry out "ideal corporate governance practices."[84] The supreme court articulated that the "law of corporate fiduciary duties and remedies for violation of those duties are distinct from the aspirational goals of ideal corporate governance practices."[85] It explained that although the latter are "highly desirable . . . [yet] are not required by the corporation law and do not define standards of liability."[86]

The supreme court made it clear that, absent bad faith or some "irrational" action constituting waste, the courts shall not engage in a substantive evaluation of decisions by disinterested and independent directors. Courts must only determine whether the directors were grossly negligent in the process of gathering and considering reasonably available

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[82] *Id.*
[83] *Brehm*, 746 A.2d at 249.
[84] *Id.* at 256.
[85] *Id.*
[86] *Id.*

material information.[87] Even with respect to the most remarkable aspect of the court's disappointment — the decision-making process of the old board when approving the Employment Agreement — there seems to be few reasons to believe there were any material defects in that process. Of course, one could assume the Employment Agreement was not drafted as simply as the supreme court described it in its opinion. Consequently, it would have been very difficult for a ordinary person after having read that agreement to calculate the total amount of Ovitz's compensation in the event of his termination on a non-fault basis. But let us take a brief look at the members of the old board who participated in the approval of the Employment Agreement: former and current chairmen of the board and CEOs of Disney, former executive vice-president and CFO of Disney, officers of the company, attorneys, the president of the Georgetown University, a U.S. Senator, an architect, and an elementary school principal. One would think that the intelligence level of most, if not all, of these people would certainly have allowed them to deduce the potential severance costs in the case of Ovitz's non-fault termination. Moreover, the fact that a compensation expert advised the board in connection with its decision makes it clear that the directors possessed the information necessary to calculate those costs.

The only segment of the severance package that probably had not been computed by the members of the board was the cost of the "A" options. Although the supreme court hinted that it is "highly desirable" for the value of the stock options to have been calculated before directors were able to grant these options, it does not seem that the court was implying that this kind of a calculation is legally required. Moreover, the directors reliance on the expert, who was fully aware of at least the approximate cost of those options, makes it even less likely that the directors would be held liable for the absence of such a calculation.

VI. CONCLUSION

"In the end, the line between a process failure — a failure to gather material information — and a substantive failure — a failure to appreciate the significance of the information at hand — starts to blur."[88] It can always be said that directors who neglected to calculate a potential cost or benefit have in the first place failed to gather the necessary information.[89] But on the other hand, it would also be fair to say that the directors in such

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[87]Lawrence A. Hamermesh, *With* Disney *Decision, Delaware Supreme Court Maintains Unchanging Hand on Direction of Corporate Law*, 3 DEL. LAW WEEKLY 7, 7 (2000).

[88]*Id.* at 8.

[89]*Id.*

circumstances simply have neglected to assess the significance of the information in their possession.[90] It is, therefore, reasonable to suppose that the essence of the plaintiffs' suit against the Disney directors may simply be reduced to an issue of whether "they made a justifiable judgment when they decided to give Ovitz such a lavish contract."[91] Without taking into consideration the inclusion of section 102(b)(7) in the certificate of incorporation, this kind of substantive challenge to the directors' judgment seems to be beyond the boundaries of judicial review.[92]

The Delaware Supreme Court clearly indicated that its judgment in favor of the Disney directors should not be viewed as judicial support of the processes the directors employed in approving and terminating Ovitz's Employment Agreement.[93] The court also acknowledged, however, that ideal corporate governance practices would have to come from the shareholders themselves in "voting for directors, urging other stockholders to reform or oust the board, or in making individual buy-sell decisions" involving their stock.[94] In this situation, what courts can most valuably bring to this process is exactly what the supreme court's opinion in *Brehm* appears to represent — a moral admonishment to the directors that is likely to result not in their actual personal liability but rather in their reputation and, consequently, in a reputation of the company they manage.[95]

Vladimir S. Korolev

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[90] *Id.*

[91] Hamermesh, *supra* note 87, at 8.

[92] *Id.*

[93] *Id.*

[94] *Id.* (quoting *Brehm*, 746 A.2d at 256).

[95] Hamermesh, *supra* note 87, at 8.