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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE THE WALT DISNEY COMPANY DERIVATIVE LITIGATION,	No. 411, 2005
William Brehm and Geraldine Brehm, as Trustees and Custodians; Michael Grening; Richard Kaplan and David Kaplan, as Trustees; Thomas M. Malloy; Richard J. Kager and Carol R. Kager, as Joint Tenants; Michael Caesar, as Trustee for Howard Gunty, Inc. Profit Sharing Plan; Robert S. Goldberg, I.R.A.; Michael Shore; Michele DeBendictis; Peter Lawrence, I.R.A.; Melvin Zupnick; Judith B. Wohl, I.R.A.; James C. Hays; and Barnett Stepak,	Court Below: Court of Chancery of the State of Delaware in and for New Castle County Cons. C.A. No. 15452-N
Plaintiffs Below, Appellants,	Chancellor William B. Chandler III
vs.	
Michael D. Eisner, Michael S. Ovitz, Stephen F. Bollenbach, Sanford M. Litvack, Irwin Russell, Roy E. Disney, Stanley P. Gold, Richard A. Nunis, Sidney Poitier, Robert A.M. Stern, E. Cardon Walker, Raymond L. Watson, Gary L. Wilson, Reveta F. Bowers, Ignacio E. Lozano Jr., George J. Mitchell, Leo J. O'Donovan, Thomas S. Murphy and The Walt Disney Company,	
Defendants Below, Appellees.	

APPELLANTS' OPENING BRIEF

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> *appropriate judgment*, he or she should be deemed to satisfy fully the duty of attention.[426]

With respect to liability for director inaction, Chancellor Allen wrote that in order for the inaction to be so great as to constitute a breach of the director's duty of care, a plaintiff must show a "lack of good faith as evidenced by sustained or systematic failure of a director to exercise reasonable oversight."[427] The Chancellor rationalized this extremely high standard of liability for violations of the duty of care through inaction by concluding that:

> [A] demanding test of liability in the oversight context is probably beneficial to corporate shareholders as a class, as it is in the board decision context, since it makes board service by qualified persons more likely, while continuing to act as a stimulus to *good faith performance of duty* by such directors.[428]

In the duty of care context with respect to corporate fiduciaries, gross negligence has been defined as a "'reckless indifference to or a deliberate disregard of the whole body of stockholders' or actions which are 'without the bounds of reason.'"[429] Because duty of care violations are actionable

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[426] *Id.* at 967-68 (internal citations and footnotes omitted, emphasis in original).

[427] *Id.* at 971.

[428] *Id.* (emphasis in original).

[429] *Tomczak v. Morton Thiokol, Inc.*, 1990 WL 42607, at *12 (Del. Ch. Apr. 5, 1990) (quoting *Allaun v. Consol. Oil Co.*, 147 A. 257, 261 (Del. Ch. 1929), and citing *Gimbel v. Signal Cos., Inc.*, 316 A.2d 599, 615 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974)). For example, on a motion to dismiss, in order for a plaintiff to successfully plead that the directors acted with gross negligence (as opposed to regular negligence), the plaintiff

only if the directors acted with gross negligence,[430] and because in most instances money damages are unavailable to a plaintiff who could theoretically prove a duty of care violation,[431] duty of care violations are rarely found.

D. The Fiduciary Duty of Loyalty

The fiduciary duty of loyalty was described in the seminal case of *Guth v. Loft, Inc.*, in these strict and unyielding terms:

> Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests.... A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there be no conflict between duty and self-interest.[432]

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should articulate "facts that suggest a *wide* disparity between the process the directors used . . . and that which would have been rational." *Guttman v. Huang*, 823 A.2d 492, 507 n.39 (Del. Ch. 2003) (emphasis in original).

[430] *Brehm*, 746 A.2d at 259.

[431] *See* 8 *Del. C.* § 102(b)(7).

[432] 5 A.2d 503, 510 (Del. 1939).

More recently, the Delaware Supreme Court stated that there is no safe-harbor for divided loyalties in Delaware,[433] and that the duty of loyalty, in essence, "mandates that the best interest of the corporation and its shareholders take[] precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally."[434] The classic example that implicates the duty of loyalty is when a fiduciary either appears on both sides of a transaction or receives a personal benefit not shared by all shareholders.[435]

In the specific context at issue here with respect to a classic duty of loyalty claim, Ovitz, as a fiduciary of Disney, was required to act in an "adversarial and arms-length manner" when negotiating his termination and not abuse or manipulate the corporate process by which that termination was granted.[436] He was obligated to act in good faith and "not advantage himself at the expense of the Disney shareholders."[437]

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[433] *Weinberger*, 457 A.2d at 710.

[434] *Cede III*, 634 A.2d at 361 (citing *Pogostin v. Rice*, 480 A.2d 619, 624 (Del. 1984)).

[435] *Id.* at 362 (citing *Nixon v. Blackwell*, 626 A.2d 1366, 1375 (Del. 1993)).

[436] *In re The Walt Disney Co. Derivative Litig.* (*"Disney II"*), 825 A.2d 275, 290 (Del. Ch. 2003); *Disney III*, 2004 WL 2050138, at *7.

[437] *Disney II*, 825 A.2d at 290; *see IHS*, 2004 WL 1949290, at *16.

E. Section 102(b)(7)

Following the Delaware Supreme Court's landmark decision in *Van Gorkom*,[438] the Delaware General Assembly acted swiftly to enact 8 *Del. C.* § 102(b)(7).[439] Section 102(b)(7) states that a corporation may include in its certificate of incorporation:

> (7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer (x) to a member of the governing body of a corporation which is not authorized to issue capital stock, and (y) to such other person or persons, if any, who, pursuant to a provision of the certificate of incorporation in accordance with § 141(a) of this title, exercise or perform any of the powers or duties otherwise conferred or imposed upon the board of directors by this title.

The purpose of Section 102(b)(7) was explained by the Delaware Supreme Court in this manner:

> The purpose of Section 102(b)(7) was to *permit shareholders*—who are entitled to rely upon directors to discharge their

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[438] 488 A.2d 858.

[439] 65 DEL. LAWS, c. 289 (1986).

> fiduciary duties at all times—to adopt a provision in the certificate of incorporation to exculpate directors from any personal liability for the payment of monetary damages for breaches of their duty of care, but not for duty of loyalty violations, good faith violations and certain other conduct.[440]

Recently, Vice Chancellor Strine wrote that, "[o]ne of the primary purposes of § 102(b)(7) is to encourage directors to undertake risky, but potentially value-maximizing, business strategies, so long as they do so in good faith."[441] Or in other words, § 102(b)(7) is most useful "when, despite the directors' good intentions, [the challenged transaction] did not generate financial success and . . . the possibility of hindsight bias about the directors' prior ability to foresee that their business plans would not pan out" could improperly influence a *post hoc* judicial evaluation of the directors' actions.[442]

The vast majority of Delaware corporations have a provision in their certificate of incorporation that permits exculpation to the extent provided for by § 102(b)(7). This provision prohibits recovery of monetary damages from directors for a successful shareholder claim, either direct or derivative, that is exclusively based upon establishing a violation of the duty of due

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[440] *Emerald Partners*, 787 A.2d at 90 (emphasis in original); *see Malpiede*, 780 A.2d at 1095.

[441] *Prod. Res. Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 777 (Del. Ch. 2004).

[442] *Id.*

care.[443] The existence of an exculpation provision authorized by § 102(b)(7) does not, however, eliminate a director's fiduciary duty of care, because a court may still grant injunctive relief for violations of that duty.[444]

An exculpation provision such as that authorized by § 102(b)(7) is in the nature of an affirmative defense.[445] As a result, it is the burden of the director defendants to demonstrate that they are entitled to the protections of the relevant charter provision.[446]

F. Acting in Good Faith

Decisions from the Delaware Supreme Court and the Court of Chancery are far from clear with respect to whether there is a separate fiduciary duty of good faith.[447] Good faith has been said to require an

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[443] *Emerald Partners*, 787 A.2d at 91.

[444] *Malpiede*, 780 A.2d at 1095; E. Norman Veasey, et al., *Delaware Supports Directors With a Three-Legged Stool of Limited Liability, Indemnification, and Insurance*, 42 BUS. LAW. 399, 403 (1987) ("[S]ection 102(b)(7) does not eliminate the duty of care that is properly imposed upon directors. Directors continue to be charged under Delaware law with a duty of care in the decisionmaking process and in their oversight responsibilities. The duty of care continues to have vitality in remedial contexts as opposed to actions for personal monetary damages against directors as individuals."). *Cf. Strassburger v. Earley*, 752 A.2d 557, 581 (Del. Ch. 2000) (holding that rescissory damages, although an equitable remedy, is not appropriate for breaches solely of the duty of care).

[445] *Emerald Partners*, 787 A.2d at 91-92.

[446] *See id.*; *Emerging Communications*, 2004 WL 1305745, at *42.

[447] It does no service to our law's clarity to continue to separate the duty of loyalty from its essence; nor does the recognition that good faith is essential to loyalty demean or subordinate that essential requirement. There 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

"honesty of purpose," and a genuine care for the fiduciary's constituents,[448] but, at least in the corporate fiduciary context, it is probably easier to define bad faith rather than good faith.[449] This may be so because Delaware law presumes that directors act in good faith when making business judgments.[450] Bad faith has been defined as authorizing a transaction "for some purpose *other than* a genuine attempt to advance corporate welfare or [when the transaction] is *known to constitute* a violation of applicable positive law."[451] In other words, an action taken with the intent to harm the

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> in subjective bad faith towards the corporation and act loyally. . . . For example, one cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey.

Guttman, 823 A.2d at 506 n.34. *See In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 475 n.41 (Del. Ch. 2000); *In re ML/EQ Real Estate P'ship Litig.*, 1999 WL 1271885, at *4 n.20 (Del. Ch. Dec. 21, 1999); *Barkan v. Amsted Indus. Inc.*, 567 A.2d 1279, 1286 (Del. 1989); *Blasius Indus. Inc. v. Atlas Corp.*, 564 A.2d 651, 663 (Del. 1988) (holding that because the acts taken by the directors thwarted the shareholder franchise, even if the directors acted in good faith, those actions "constituted an unintended violation of the duty of loyalty that the board owed to the shareholders."); *cf. IHS*, 2004 WL 1949290, at *9 (analyzing good faith claims under the rubrics of care and loyalty, as appropriate, instead of as a separate duty).

[448] E. Norman Veasey, *Reflections on Key Issues of the Professional Responsibilities of Corporate Lawyers in the Twenty-First Century*, 12 WASH. U. J. L. & POL'Y 1, 9 (2003).

[449] Despite the existence of significant jurisprudence with respect to good faith in the contractual context of the covenant of good faith and fair dealing, *see, e.g., Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199 (Del. 1993), Delaware decisions have shown a reluctance to importing these contractual standards into the corporate fiduciary realm.

[450] *See Allaun*, 147 A. 257; *Van Gorkom*, 488 A.2d at 873.

[451] *Gagliardi*, 683 A.2d at 1051 n.2 (citing *Miller v. AT&T*, 507 F.2d 759 (3d Cir. 1974), emphasis in original). Chancellor Allen then explained that "[t]here can be no personal liability of a director for losses arising from 'illegal' transactions if a director were financially disinterested, acted in good faith, and relied on advice of counsel

corporation is a disloyal act in bad faith. A similar definition was used seven years earlier, when Chancellor Allen wrote that bad faith (or lack of good faith) is when a director acts in a manner "unrelated to a pursuit of the corporation's best interests."[452] It makes no difference the reason why the director intentionally fails to pursue the best interests of the corporation.[453]

Bad faith can be the result of "any emotion [that] may cause a director to [intentionally] place his own interests, preferences or appetites before the welfare of the corporation," including greed, "hatred, lust, envy, revenge, . . .

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reasonably selected in authorizing a transaction." *Id.* In *Cinerama, Inc. v. Technicolor, Inc.*, 1991 WL 111134, at *15 (Del. Ch. June 24, 1991), Chancellor Allen to a certain extent equated good faith with loyalty when he stated that there was "persuasive evidence" of bad faith on the part of one of the Technicolor directors (Sullivan) because he had met and cooperated with the acquiror before the acquiror had met with the CEO. Sullivan also received a $150,000 "finder's fee" for his assistance from the post-merger Technicolor. *Id.* at *7. This portion of the decision was not appealed because Cinerama abandoned its claims that the directors acted in bad faith. *Cede III*, 634 A.2d at 359. *See also* Veasey, *infra* n.457 at 448 (noting that intentional violations of law implicate good faith by stating that "the utter failure to follow the minimum expectations of Sarbanes-Oxley, or the NYSE or NASDAQ Rules . . . might . . . raise a good faith issue").

[452] *In re RJR Nabisco, Inc. S'holder Litig.*, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989); *cf. Strassburger*, 752 A.2d at 581 (holding that certain directors breached their duty of loyalty by "indifference to their duty to protect the interests of the corporation and its minority shareholders," because their primary loyalty was instead given to the interests of their employer).

[453] *See Guttman* 823 A.2d at 506 n.34 ("The reason for the disloyalty (the faithlessness) is irrelevant, the underlying motive (be it venal, familial, collegial, or nihilistic) for conscious actions not in the corporation's best interest does not make it faithful, as opposed to faithless."); *Nagy v. Bistricer*, 770 A.2d 43, 48 n.2 (Del. Ch. 2000) (The duty of good faith, "[i]f it is useful at all as an independent concept, [good faith's] utility may rest in its constant reminder . . . that, regardless of his motive, a director who consciously disregards his duties to the corporation and its stockholders may suffer a personal judgment for monetary damages for any harm he causes," even if for a reason "other than personal pecuniary interest.") *Emerging Communications*, 2004 WL 1305745, at *38 (holding that certain defendants violated their duty of "loyalty and/or good faith" because of the uncertainty in defining those terms).

shame or pride."[454] Sloth could certainly be an appropriate addition to that incomplete list if it constitutes a systematic or sustained shirking of duty.[455] Ignorance, in and of itself, probably does not belong on the list, but ignorance attributable to any of the moral failings previously listed could constitute bad faith. It is unclear, based upon existing jurisprudence, whether motive is a necessary element for a successful claim that a director has acted in bad faith,[456] and, if so, whether that motive must be shown explicitly or whether it can be inferred from the directors' conduct.[457]

Shrouded in the fog of this hazy jurisprudence, the defendants' motion to dismiss this action was denied because I concluded that the complaint, together with all reasonable inferences drawn from the well-plead allegations contained therein, could be held to state a non-exculpated breach of fiduciary duty claim, insofar as it alleged that Disney's directors

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[454] *Guttman*, 823 A.2d at 506 n.34; *cf. Malpiede*, 780 A.2d at 1085 n.29 (holding that plaintiffs did not adequately allege a breach of the "duty of loyalty and good faith" merely by pleading conclusory statements that the target's board rejected an offer based upon "(1) the interested director's desire to consummate [the deal proposed by the other bidder], (2) a desire to benefit [the majority shareholders] with a quick deal, (3) 'dislike' of [the spurned bidder], or (4) a personal desire to complete the sale process.").

[455] *See* Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, 488-91 (2004) (advocating application of federal scienter standards from the Rule 10b-5 context to an analysis of whether directors have satisfied their duty of acting in good faith when the allegations stem from directors' deliberate indifference).

[456] *Compare Van Gorkom*, 488 A.2d at 873, *with Zirn v. VLI Corp.*, 681 A.2d 1050, 1061-62 (Del. 1996) (discussing good faith motives with respect to proxy disclosures) *and Johnson v. Shapiro*, 2002 WL 31438477 (Del. Ch. Oct. 18, 2002) (same).

[457] *See* E. Norman Veasey, *State-Federal Tension in Corporate Governance and the Professional Responsibilities of Advisors*, 28 J. CORP. L. 441, 447 (2003).

"*consciously and intentionally disregarded their responsibilities*, adopting a 'we don't care about the risks' attitude concerning a material corporate decision."[458]

Upon long and careful consideration, I am of the opinion that the concept of *intentional dereliction of duty*, a *conscious disregard for one's responsibilities*, is an appropriate (although not the only) standard for determining whether fiduciaries have acted in good faith.[459] Deliberate indifference and inaction *in the face of a duty to act* is, in my mind, conduct that is clearly disloyal to the corporation.[460] It is the epitome of faithless conduct.

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[458] *Disney II*, 825 A.2d at 289 (emphasis in original); *see Gagliardi*, 683 A.2d at 1051 ("[I]n the absence of facts showing self-dealing or improper motive, a corporate officer or director is not legally responsible to the corporation for losses that may be suffered as a result of a decision that an officer made or that directors authorized in good faith.").

[459] Indeed, § 102(b)(7) on its face seems to equate bad faith with intentional misconduct. *See* 8 Del. C. § 102(b)(7)(ii).

[460] This is, in my opinion, what the Supreme Court was trying to communicate in *Van Gorkom* when it wrote:

> In the specific context of a proposed merger of domestic corporations, *a director has a duty under* 8 Del. C. § 251(b), along with his fellow directors, to act in an informed manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders. *Certainly in the merger context, a director may not abdicate that duty* by leaving to the shareholders alone the decision to approve or disapprove the agreement. Only an agreement of merger satisfying th requirements of 8 *Del. C.* § 251(b) may be submitted to the shareholders under § 251(c).
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> *It is against those standards that the conduct of the directors of Trans Union must be tested*, as a matter of law and as a matter of fact, regarding their exercise of an informed business judgment in voting to approve the Pritzker proposal.

To act in good faith, a director must act at all times with an honesty of purpose and in the best interests and welfare of the corporation. The presumption of the business judgment rule creates a presumption that a director acted in good faith. In order to overcome that presumption, a plaintiff must prove an act of bad faith by a preponderance of the evidence. To create a definitive and categorical definition of the universe of acts that would constitute bad faith would be difficult, if not impossible. And it would misconceive how, in my judgment, the concept of good faith operates in our common law of corporations. Fundamentally, the duties traditionally analyzed as belonging to corporate fiduciaries, loyalty and care, are but constituent elements of the overarching concepts of allegiance, devotion and faithfulness that must guide the conduct of every fiduciary. The good faith required of a corporate fiduciary includes not simply the duties of care and loyalty, in the narrow sense that I have discussed them above, but all actions required by a true faithfulness and devotion to the interests of the corporation and its shareholders. A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose

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488 A.2d at 873 (citations and footnotes omitted; emphases added). In other words, in *Van Gorkom*, the directors were under a statutory duty to act. That duty, by law, could not be abdicated to the shareholders, much less to the officers of the corporation.

other than that of advancing the best interests of the corporation,[461] where the fiduciary acts with the intent to violate applicable positive law,[462] or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.[463] There may be other examples of bad faith yet to be proven or alleged,[464] but these three are

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[461] *Gagliardi*, 683 A.2d at 1051 n.2.

[462] *Id.*

[463] *Disney II*, 825 A.2d at 289-90; *see Allaun*, 147 A. at 261 (further judicial scrutiny is warranted if the transaction is a result of directors' "reckless indifference to or a deliberate disregard of the interests of the whole body of stockholders."); *Gimbel*, 316 A.2d at 604 (motion for a preliminary injunction denied, *inter alia*, because there was "[n]othing in the record [that] would justify a finding ... that the directors acted ... out of improper motive or *intentional disregard of shareholder interests*.") (emphasis added); *see also Caremark*, 698 A.2d at 289-90 (where the fiduciaries' failure to act was allegedly "sustained or systematic"). The first two of these examples seem to sound in the fiduciary duty of loyalty, whereas the last appears to be an extension, or rather, an example of, severe violations of the fiduciary duty of care. In the end, so long as the role of good faith is understood, it makes no difference whether the words "fiduciary duty of" are placed in front of "good faith," because acts not in good faith (regardless of whether they might fall under the loyalty or care aspects of good faith) are in any event non-exculpable because they are disloyal to the corporation. *See* 8 *Del. C.* § 102(b)(7).

[464] Another example of how the concept of good faith may operate in a situation where ensuring director compliance with the fiduciary duties of care and loyalty (as we have traditionally defined those duties) may be insufficient to protect shareholders' interests, is found in 8 *Del. C.* § 144(a). Under § 144(a), a transaction between a corporation and its directors or officers will be deemed valid if approved by a majority of the independent directors, assuming three criteria are met: 1) the approving directors were aware of the conflict inherent in the transaction; 2) the approving directors were aware of all facts material to the transaction; and 3) the approving directors acted in good faith. In other words, the inside transaction is valid where the independent and disinterested (loyal) directors understood that the transaction would benefit a colleague (factor 1), but they considered the transaction in light of the material facts (factor 2—due care) mindful of their duty to act in the interests of the corporation, unswayed by loyalty to the interests of their colleagues or cronies (factor 3—good faith). On the other hand, where the evidence shows that a majority of the independent directors were aware of the conflict and all material facts, in satisfaction of factors 1 and 2 (as well as the duties of loyalty and care), but acted to reward

the most salient. As evidenced by previous rulings in this case both from this Court and the Delaware Supreme Court, issues of the Disney directors' good faith (or lack thereof) are central to the outcome of this action. With this background, I now turn to applying the appropriate standards to defendants' conduct.

III. ANALYSIS

Stripped of the presumptions in their favor that have carried them to trial,[465] plaintiffs must now rely on the evidence presented at trial to demonstrate by a preponderance of the evidence that the defendants violated their fiduciary duties and/or committed waste. More specifically, in the area of director action, plaintiffs must prove by a preponderance of the evidence that the presumption of the business judgment rule does not apply either because the directors breached their fiduciary duties, acted in bad faith or that the directors made an "unintelligent or unadvised judgment,"[466] by

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a colleague rather than for the benefit of the shareholders, the Court will find that the directors failed to act in good faith and, thus, that the transaction is voidable. In such a case, the duties of care and loyalty, as traditionally defined, might be insufficient to protect the equitable interests of the shareholders, and the matter would turn on the good faith of the directors.

[465] *See Disney II*, 825 A.2d at 279; *Disney III*, 2004 WL 2050138, at *3.

[466] *Mitchell*, 167 A. at 833; *Van Gorkom*, 488 A.2d at 872.

failing to inform themselves of all material information reasonably available to them before making a business decision.[467]

If plaintiffs cannot rebut the presumption of the business judgment rule, the defendants will prevail. If plaintiffs succeed in rebutting the presumption of the business judgment rule, the burden then shifts to the defendants to prove by a preponderance of the evidence that the challenged transactions were entirely fair to the corporation.[468]

As it relates to director inaction, plaintiffs will prevail upon proving by a preponderance of the evidence that the defendants breached their fiduciary duties by not acting. In order to invoke the protections of the provision in the Company's certificate of incorporation authorized by 8 Del. C. §102(b)(7), the defendants must prove by a preponderance of the evidence that they are entitled to the protections of that provision.[469]

A. Ovitz Did Not Breach His Duty of Loyalty

As previously mentioned, the only issue remaining in this case with respect to the traditional duty of loyalty (aside from whether there is an overlap between loyalty and good faith) is whether Ovitz breached his

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[467] *Brehm*, 746 A.2d at 259; *Van Gorkom*, 488 A.2d at 872; *Kaplan v. Centex Corp.*, 284 A.2d 119, 124 (Del. 1971).

[468] *Cede III*, 663 A.2d at 1162; *Emerald Partners*, 787 A.2d at 91.

[469] *Emerald Partners*, 787 A.2d at 95.

fiduciary duty of loyalty in the course of his termination.[470] Before trial, Ovitz moved for summary judgment on this claim, a motion I denied on the ground that genuine issues of material fact existed which prevented entry of summary judgment in favor of Ovitz at that time.[471] More specifically, I recognized:

> . . . *if* Ovitz received a[n] NFT, [then] he had a contractual right to receive the payout he did receive. But Ovitz did not have a contractual right to receive a[n] NFT. . . . Instead, Ovitz's receipt of a[n] NFT was conditioned upon a one-time determination (to be made by [the Company]) that was not guaranteed by his contract, and Ovitz appears to have actively engaged in negotiations and decisionmaking that affected [the Company]'s determination to grant the NFT.
>
> Ovitz negotiated his exit from [the Company] with Eisner, Russell, and others. He made a conscious decision not to resign and to seek the benefits that his contract made available to him only under certain prescribed circumstances. Ovitz allegedly colluded with those on the other side of the bargaining table . . . in bringing about the circumstances that would entitle him to his NFT benefits. In so doing, he allegedly manipulated corporate processes and thereby violated his fiduciary duties to [the Company].[472]

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[470] The Court notes that plaintiffs' statement of issues of law and fact to be litigated contained in the Pre-Trial Stipulation and Order repeatedly uses the phrase "fiduciary duties of due care, good faith, and/or loyalty" regardless of the challenged conduct. To the extent plaintiffs are still pursuing pure duty of loyalty claims other than this claim related to Ovitz's actions in receiving his NFT, as to those claims, plaintiffs have failed to demonstrate by a preponderance of the evidence that the defendants breached their fiduciary duty of loyalty.

[471] *Disney III*, 2004 WL 2050138, at *6-8.

[472] *Id.* at *7.

Now, upon consideration of the evidence presented at trial, and based upon the findings of fact made above, it is clear that plaintiffs have failed to demonstrate by a preponderance of the evidence that Ovitz breached his duty of loyalty.

Ovitz did not breach his fiduciary duty of loyalty by receiving the NFT payment because he played no part in the decisions:[473] (1) to be terminated and (2) that the termination would not be for cause under the OEA.[474] Ovitz did possess fiduciary duties as a director and officer while these decisions were made, but by not improperly interjecting himself into the corporation's decisionmaking process nor manipulating that process, he did not breach the fiduciary duties he possessed in that unique circumstance. Furthermore, Ovitz did not "engage" in a transaction with the corporation— rather, the corporation imposed an unwanted transaction upon him.[475]

Once Ovitz was terminated without cause (as a result of decisions made entirely without input or influence from Ovitz), he was contractually

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[473] I ignore the subtlety that at the moment Ovitz received the monetary payout for the NFT he was no longer a fiduciary, his directorship and status as an officer having ended in no event later than December 27, 1996. *See* PTE 14.

[474] *See supra* text "Ovitz's Bonus and His Termination" at 80.

[475] For this reason, a discussion of the application of 8 Del. C. § 144 is not necessary. Such discussion was appropriate, however, at the summary judgment stage when I inferred (to plaintiffs' benefit) that Ovitz involved himself in the Company's decision ("manipulated corporate processes") to grant him an NFT. *See Disney III*, 2004 WL 2050138, at *7.

entitled, without any negotiation or action on his part, to receive the benefits provided by the OEA for a termination without cause, benefits for which he negotiated at arms-length *before* becoming a fiduciary.[476] No reasonably prudent fiduciary in Ovitz's position would have unilaterally determined to call a board meeting to force the corporation's chief executive officer to reconsider his termination and the terms thereof,[477] with that reconsideration for the benefit of shareholders and potentially to Ovitz's detriment.[478]

Furthermore, having just been terminated, no reasonably prudent fiduciary in Ovitz's shoes would have insisted on a board meeting to discuss and ratify his termination after being terminated by the corporation's *chief executive officer* (with guidance and assistance from the Company's general counsel). Just as Delaware law does not require directors-to-be to comply with their fiduciary duties,[479] former directors owe no fiduciary duties, and after December 27, 1996, Ovitz could not breach a duty he no longer had.

Having found that Ovitz did not play a part in the decision to terminate himself, and that ordinary officers and directors of reasonable

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[476] *See Disney III*, 2004 WL 2050138, at *3-6.

[477] Ovitz, as President, did have the authority to call a special board meeting by himself. *See* PTE 498 at Article III, Section 5.

[478] Indeed, if Ovitz had called a special meeting of the board in order to force Eisner to reconsider the issues regarding his termination, that act would, in my mind, raise greater issues relating to a potential breach of Ovitz's duty of loyalty than not calling a meeting.

[479] *Disney III*, 2004 WL 2050138, at *3-4.

prudence in the same position would not have acted with more care, I conclude that Ovitz did not breach his fiduciary duty of loyalty in connection with his termination.

B. Defendants Did Not Commit Waste

Plaintiffs pursued a claim for waste at trial and argued in their briefs that they have proven this claim.[480] As stated above, the standard for waste is a very high one that is difficult to meet.[481] Plaintiffs refer to Professor Murphy's opinion that the OEA improperly incentivized Ovitz to leave the Company and receive an NFT, rather than complete the term of the OEA, to support their argument for waste.[482] Of course, Professor Murphy's opinion relies on the assumptions that either Ovitz would be able to procure for himself an NFT, or that Eisner had agreed to terminate him even before Ovitz was hired.

The record does not support these assertions in any conceivable way. Apart from his job performance, Ovitz was never in a position to determine if he would be terminated, and if so, whether it would be with or without cause. As it relates to job performance, I find it patently unreasonable to

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[480] Ovitz had moved for summary judgment on the waste claim, but neither party addressed it in the summary judgment briefing or at oral argument, and the motion for summary judgment was therefore denied. *Disney III*, 2004 WL 2050138, at *6.

[481] *See supra* notes 419-420 and accompanying text.

[482] PTE 426 at 22-23.

assume that Ovitz intended to perform just poorly enough to be fired quickly, but not so poorly that he could be terminated for cause. First, based upon my personal observations of Ovitz, he possesses such an ego, and enjoyed such a towering reputation before his employment at the Company, that he is not the type of person that would intentionally perform poorly. Ovitz did not build Hollywood's premier talent agency by performing poorly. Second, nothing in the trial record indicates to me that Ovitz intended to bring anything less than his best efforts to the Company. Additionally, I have found and concluded above that Eisner believed Ovitz would be an excellent addition to the company throughout 1995,[483] a far cry from plaintiffs' accusations of deciding to hire him for the purpose of firing him shortly thereafter with a spectacular severance payoff.

More importantly, however, I conclude that given his performance, Ovitz could not have been fired for cause under the OEA. Any early termination of his employment, therefore, had to be in the form of an NFT. In reaching this conclusion, I rely on the expert reports of both Feldman and Fox, whose factual assumptions are generally consonant with my factual findings above. Nevertheless, by applying the myriad of definitions for gross negligence and malfeasance discussed by Donohue, Feldman and Fox,

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[483] *See supra* text "Ovitz's Early Performance" at 32.

I also independently conclude, based upon the facts as I have found them, that Ovitz did not commit gross negligence or malfeasance while serving as the Company's President.

As a result, terminating Ovitz and paying the NFT did not constitute waste because he could not be terminated for cause and because many of the defendants gave credible testimony that the Company would be better off without Ovitz,[484] meaning that it would be impossible for me to conclude that the termination and receipt of NFT benefits resulted in "an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration,"[485] or a situation where the defendants have "irrationally squander[ed] or give[n] away corporate assets."[486] In other words, defendants did not commit waste.

C. The Old Board's Decision to Hire Ovitz and the Compensation Committee's Approval of the OEA Was Not Grossly Negligent and Not in Bad Faith

The members of the "Old Board" (Eisner, Bollenbach, Litvack, Russell, Roy Disney, Gold, Nunis, Poitier, Stern, Walker, Watson, Wilson, Bowers, Lozano and Mitchell) were required to comply with their fiduciary

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[484] *See supra* note 326.

[485] *Brehm*, 746 A.2d at 263; *Disney I*, 731 A.2d at 362 (quoting *Glazer*, 658 A.2d at 183.)

[486] *Brehm*, 746 A.2d at 263.