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Director Independence and the Duty of Loyalty: Race, Gender, Class, and the Disney-Ortiz Litigation

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DIRECTOR INDEPENDENCE AND THE DUTY OF LOYALTY: RACE, GENDER, CLASS, AND THE DISNEY-OVITZ LITIGATION

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INTRODUCTION

> 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. Legal rules that govern corporate boards, as well as the managers of day-to-day operations, are resilient, irrespective of context. When the laws of buoyancy are followed, the *Disney Magic* can stay afloat as well as the *Jungle Cruise* vessels. When the Delaware General Corporation Law is followed, a large severance package is just as valid as an authorization to borrow. 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.[1]

So begins the judicial response to the legal controversy generated by the saga of Michael Ovitz's short but lucrative tenure as president of the Walt Disney Company ("Disney"). The story of that saga is simple enough to relate, though the

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1 *In re* Walt Disney Co. Derivative Litig., 731 A.2d 342, 350 (Del. Ch. 1998), *aff'd in part, rev'd in part sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000), *cited with approval in* Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins, No. Civ.A. 20228-NC, 2004 WL 1949290, at *15 (Del. Ch. Aug. 24, 2004).

conclusions—especially the legal conclusions—to be drawn from it have been anything but simple.[2] In 1995, Michael Ovitz, then the head of Creative Artists Agency ("CAA"),[3] was induced by his friend Michael Eisner, Chairman of the Board of Directors and CEO of Disney, to accept employment as the new president of Disney.[4] The terms of Ovitz's engagement as president of Disney were memorialized in an employment agreement effective October 1, 1995,[5] and ultimately approved by the Disney board in 1995 ("the Employment Agreement").[6] As unanimously approved by the Disney board,[7] the Employment Agreement was to run for an initial term of five years.[8] It provided for a base annual salary of $1 million, a discretionary bonus, and two sets of stock options entitling Ovitz to purchase five million shares of Disney stock.[9] The Employment Agreement also contained a complicated set of termination provisions.[10] Should Disney refuse to renew the Employment Agreement after the expiration of its initial term, Disney was obligated to pay Ovitz a termination fee of $10 million.[11] Should Disney terminate the Employment Agreement for good cause,[12] Ovitz would receive nothing from the day of

[2] The narrative that follows is taken from *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 350–53 and Brehm v. Eisner, 746 A.2d 244, 249–53 (Del. 2000).

[3] He was "referred to by some as the 'Most Powerful Man in Hollywood.'" *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 350.

[4] *See id.* at 352.

[5] *In re* Walt Disney Co. Derivative Litig., No. Civ.A. 15452, 2004 WL 2050138, at *2 (Del. Ch. Sept. 10, 2004). The employment agreement was apparently negotiated between September and December 1995, though Ovitz started as president on or about October 1, 1995. *Id.* at *1–2.

[6] *Brehm*, 746 A.2d at 250–51 (noting that some initial board disapproval existed regarding Eisner's decision to hire Ovitz, even though the board's final vote approving his employment appeared to be unanimous).

[7] *Id.* at 251. The Board of Directors of Disney in 1995 consisted of the following people: Michael D. Eisner, Roy E. Disney, Stanley P. Gold, Sanford M. Litvack, Richard A. Nunis, Sidney Poitier, Irwin E. Russell, Robert A.M. Stern, E. Cardon Walker, Raymond L. Watson, Gary L. Wilson, Reveta F. Bowers, Ignacio E. Lozano Jr., Stephen F. Bollenbach, and George J. Mitchell. *Id.* at 252 n.11.

[8] *Id.* at 250.

[9] *Id.* One set of options was to vest in the last three years of the term of Ovitz's employment agreement ("the Employment Agreement"), and the other was to vest thereafter, assuming that the term of the employment agreement was extended beyond its initial five-year term. *Id.*

[10] *Id.*

[11] *Id.*

[12] Disney could invoke good cause termination only if Ovitz voluntarily resigned or otherwise committed gross negligence or malfeasance. *Id.*

termination.[13] In addition, if Disney were to terminate Ovitz without good cause, Ovitz would be entitled to a very large severance fee.[14]

Ovitz's tenure at Disney was apparently not a great success. By September 1996, Ovitz was alleged to have signaled to Eisner a desire to seek other employment, however Ovitz did not want to resign.[15] Instead, after some discussion with Eisner, Ovitz and the Disney board agreed to treat Ovitz's departure as a "non-fault termination."[16] This was memorialized in a letter dated December 27, 1996 (the "Termination Letter").[17] By 2004 it was still not clear to the Delaware courts whether the Termination Letter had been approved by the board or the members thereof.[18] As a consequence, Ovitz lost the right to the option to purchase two million shares of Disney stock but instead received approximately $39 million in cash and the right to exercise the option to purchase three million shares.[19]

Legal challenges to the validity of the Employment Agreement and the Termination Letter followed with a derivative action filed in January 1997, within days of the execution of the Termination Letter.[20] The litigation continued through 2005 when the lawsuit finally appeared ready for

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[13] *Id.*

[14] *Id.* The severance fee would be equal to the present value of any remaining salary payments through September 30, 2000, a $10 million severance payment, a payment of $7.5 million for each fiscal year remaining under the employment agreement, and the immediate vesting of three million share options. *Id.*

[15] *Id.* at 252.

[16] *Id.*

[17] *Id.* The board of Disney that existed at the time the termination letter was written in 1996 consisted of the same individuals that were on the board of Disney at the time the employment agreement was approved in 1995, excluding board member Stephen F. Bollenbach. The new board also included new members Leo J. O'Donovan and Thomas S. Murphy. *Id.* at 252 n.11.

[18] *See In re* Walt Disney Co. Derivative Litig., No. Civ.A. 15452, 2004 WL 2050138, at *3 (Del. Ch. Sept. 10, 2004). It appears that as late as November 1996, the Board of Directors had nominated Ovitz for an additional three-year term as director of Disney. *Id.* "Furthermore, it is unclear from the record whether a majority of any group of disinterested directors ever authorized the payment of Ovitz's severance payments." *Id.* at *7.

[19] *See Brehm*, 746 A.2d at 252–53. The initial complaint valued these options at about $101 million. *Id.*

[20] *See id.* at 248 n.1 (stating that the original complaint was filed on January 8, 1997, and an amended complaint, the subject of the action by the court of chancery, was filed on May 28, 1997).

resolution.[21] Trial commenced in October 2004[22] and continued into 2005. The decision of Chancellor Chandler ("the Chancellor"), rejecting all of plaintiffs' remaining claims of breach of fiduciary duty and waste, was issued on August 9, 2005.[23]

From the inception of the litigation, the parties focused on two related actions of the Disney Board of Directors: first, whether the members of the 1995 Disney Board of Directors were personally liable for their roles in the approval of the Employment Agreement, and second, whether the members of the 1996 Disney Board of Directors were personally liable for their role—or for their failure to act—in approving the Termination Letter.[24] By the time the case was tried in 2004–2005, the principle issues centered on the breach of the 1995 Disney board's duty of care in approving the Employment Agreement and the validity of the determination by officers and some directors to pay Ovitz under the Termination Letter in 1996.[25]

Thus framed, this litigation has been and will continue to be of interest to academics[26] and the bar[27] primarily for how it speaks to the limits of executive compensation under Delaware corporate law.[28] The cases have also been influential, at least in

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21 *See, e.g., In re* Walt Disney Co. Derivative Litig., No. Civ.A. 15452, 2005 WL 407220 (Del. Ch. Feb. 4, 2005).

22 *See* Greg Levine, *Eisner: Trial Begins Re Disney's Ovitz Compensation*, FORBES.COM, Oct. 20, 2004, http://www.forbes.com/facesinthenews/2004/10/20/1020autofacescan06.html.

23 *In re Walt Disney Co. Derivative Litig.*, 2005 WL 1875804, at *1.

24 *See Brehm*, 746 A.2d at 248–49.

25 *See In re Walt Disney Co. Derivative Litig.*, 2005 WL 1875804, at *1.

26 *See generally* Harvey L. Pitt, *The Changing Standards by Which Directors Will Be Judged*, 79 ST. JOHN'S L. REV. 1, 5–7 (2005) (reviewing the *Disney* litigation in light of the prevalent issue of executive compensation in corporate America); Charles M. Yablon, *Bonus Questions—Executive Compensation in the Era of Pay for Performance*, 75 NOTRE DAME L. REV. 271, 274 (2000) (examining the *Disney* cases as they relate to the growing problems with executive compensation in an "era of performance-based pay").

27 *See generally* E. Norman Veasey, *Counseling Directors in the New Corporate Culture*, 59 BUS. LAW. 1447 (2004) (discussing the duty of corporate directors to act in good faith when making business decisions and the recent *Disney* litigation as it relates to this obligation).

28 *See* Jonathan D. Glater, *Big Bucks May Stop Here; Ordeal of Disney's Board Could Herald Changes in Pay Perks*, N.Y. TIMES, Aug. 10, 2005, at C1 ("'The very fact that it went to trial had a significant impact on the types of conversations in general on compensation committees, and in particular about severance plans.'"

the academy, for what they have to say about shareholder demand in derivative litigation[29] and the limited value of allegations of breaches of "good faith" in breach of fiduciary duty cases.[30]

Virtually overlooked in the analysis—and in the commentary that followed this sprawling Hollywood movie-style melodrama of corporate governance—was a brief, though intense, effort early in the litigation to demonstrate demand futility[31] by alleging that the Disney Board of Directors was not independent.[32] In particular, the plaintiffs initially argued that demand on the board was excused with respect to the 1995 approval of the Employment Agreement and the approval of the 1996 Termination Letter because the board was unable to exercise business judgment independent of Michael Eisner since he was personally interested in obtaining approval of both, and he dominated a majority of the board of directors throughout this period.[33] The Delaware Court of Chancery produced an extensive

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(quoting executive compensation consultant Ira T. Kay)); Laura M. Holson, *Ruling Upholds Disney's Payment in Firing of Ovitz*, N.Y. TIMES, Aug. 10, 2005, at A1 (describing the cautionary impact of the decision on executive compensation issues for corporations even though the Chancellor Chandler ("the Chancellor") found for Disney).

[29] *See* Stephen A. Radin, *The New Stage of Corporate Governance Litigation: Section 220 Demands*, 26 CARDOZO L. REV. 1595, 1601 (2005) (commenting that the 2003 *Disney* case "illustrates a successful use of a Section 220 demand to obtain facts that could be pleaded to excuse demand in a derivative action").

[30] *See, e.g.*, C.G. Hintmann, *You Gotta Have Faith: Good Faith in the Context of Directorial Fiduciary Duties and the Future Impact on Corporate Culture*, 49 ST. LOUIS U. L.J. 571, 589–91 (2005); Veasey, *supra* note 27, at 1451–54.

[31] *See* Del. Ch. Ct. R. 23.1:

> In a derivative action brought by 1 or more shareholders . . . [t]he complaint shall . . . allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort.

Id. Demand may be excused in Delaware when a reasonable doubt is created as to whether the directors are disinterested and independent and whether the challenged transaction was otherwise the product of a valid exercise of business judgment. *See* Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984).

[32] This was the issue that occupied some of the attention of the Court of Chancery of Delaware in *In re Walt Disney Co. Derivative Litigation*, 731 A.2d 342, 354–61 (Del. Ch. 1998) (analyzing plaintiffs' independence claim under the first prong of *Aronson* and concluding that the majority of Disney directors acted independently and free of domination from Eisner), *aff'd in part, rev'd in part sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

[33] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 353–55 ("Plaintiffs concede that they failed to make a demand on the Board . . . but argue that such

analysis of the independence of the directors and the basis of any claim of domination and control by Eisner.[34] It determined that even if "Eisner was interested in the Employment Agreement—and, again, Plaintiffs have *not* shown a reasonable doubt as to Eisner's independence—Plaintiffs still come up short; ten of the fifteen directors who approved the Agreement and eleven of the sixteen who voted to honor the Agreement were independent."[35]

This conclusion was affirmed by the Delaware Supreme Court, but only on the basis of the insufficiency of factual allegations as to Eisner's interest in Ovitz's Employment Agreement.[36] The supreme court explained that "[b]ecause we hold that the Complaint fails to create a reasonable doubt that Eisner was disinterested in the Ovitz Employment Agreement, we need not reach or comment on the analysis of the Court of Chancery on the independence of the other directors for this purpose."[37] The supreme court, however, appeared to reach this result reluctantly.[38] The parties and the case then moved on to frame the issues for trial on other bases.

This Article takes up one of the aspects of the "interesting arguments" raised by the parties and confronted by the court of chancery with respect to the determination of director independence under Delaware law. The focus here is on the application of the independent director standard to one particular director: Reveta Bowers.[39] What makes Ms. Bowers especially interesting for understanding the normative underpinnings of the director independence standards of Delaware law is the very peculiar way in which the court of

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demand would have been futile and, therefore, is excused.").

[34] *Id.* at 355–61 (examining each board member with respect to alleged domination by Eisner).

[35] *Id.* at 361.

[36] *Brehm*, 746 A.2d at 258 (Del. 2000) ("Our affirmance of that dismissal is final and dispositive of the first prong of *Aronson*.").

[37] *Id.*

[38] "Thus, we need not address the very interesting arguments and recommendations of the *amicus* brief filed on behalf of the Council of Institutional Investors." *Id.* at n.40. "The Council of Institutional Investors is an organization of large public, labor and corporate pension funds which seeks to address investment issues that affect the size or security of plan assets. Its objectives are to encourage member funds, as major shareholders, to take an active role in protecting plan assets and to help members increase return on their investments as part of their fiduciary obligations." COUNCIL OF INSTITUTIONAL INVESTORS, ABOUT THE COUNCIL, *available at* http://www.cii.org/about/ (last visited Aug. 24, 2005).

[39] *See* discussion *infra* Part II.

chancery sought to apply that standard to her. Though she has attracted little attention among legal academics,[40] I argue here that Ms. Bowers illustrates the difficulties of director independence determinations, especially where seemingly neutral and efficiency-oriented corporate law principles are used to reinforce questionable social assumptions of race, gender, and class.

Neither the parties to the litigation nor the chancery court itself avoided the temptation to construct Ms. Bowers as a peculiar sort of director to whom the application of the independence rules of Delaware corporate law operated in a singular way. The plaintiffs sought to prove Bowers' domination by arguing that her economic and social position clearly suggested an inability to act independently. "Director Reveta F. Bowers is the principal of the elementary school that Eisner's children once attended. Plaintiffs suggest that because Bowers' salary as a teacher is low compared to her director's fees and stock options, 'only the most rigidly formalistic or myopic analysis' would view Bowers as not beholden to Eisner."[41]

The chancery court first rejected this argument on legal grounds. It asserted that "[p]laintiffs fail to recognize that the Delaware Supreme Court has held that 'such allegations [of payment of director's fees], without more, do not establish any financial interest.' To follow Plaintiffs' urging to discard 'formalistic notions of interest and independence in favor of a realistic approach' expressly would be to overrule the Delaware Supreme Court."[42]

A far more interesting concept, and the principal object of this Article, was the alternative basis for the chancery court's

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40 *See* SUSAN ESTRICH, SEX AND POWER 86–89 (2000) (describing Bowers' experience and its utility to the performance of the Disney board); Harvey Gelb, *Corporate Governance Guidelines—A Delaware Response*, 1 WYO. L. REV. 523, 545 (2001) (noting position taken by Council of Institutional Investors in its amicus brief as to Bowers and her relationship to Eisner).

41 *In re* Walt Disney Co. Derivative Litig., 731 A.2d 342, 359 (Del. Ch. 1998), *aff'd in part, rev'd in part sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (citations omitted).

42 *Id.* at 360 (citing Grobow v. Perot, 539 A.2d 180, 188 (Del. 1988) ("Plaintiffs plead no facts demonstrating a financial interest on the part of GM's directors. The only averment permitting such an inference is the allegation that all GM's directors are paid for their services as directors. However, such allegations, without more, do not establish any financial interest."), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000)).

conclusion:

> Furthermore, to do so would be to discourage the membership on corporate boards of people of less-than extraordinary means. Such "regular folks" would face allegations of being dominated by other board members, merely because of the relatively substantial compensation provided by the board membership compared to their outside salaries. I am especially unwilling to facilitate such a result. Without more, Plaintiffs have failed to allege facts that lead to a reasonable doubt as to the independence of Bowers.[43]

What makes this rationale extraordinary is the breadth and depth of meanings, contradictions, and socio-cultural assumptions packed so tightly within such a small space. Moreover, the chancery court refused to confront directly the issue raised by plaintiffs: that the great gulf in wealth, status, and position between Bowers' primary occupational and social status—working as the principal of a primary school servicing the children of the very rich—and that of a director of Disney—suggesting that the norm for the occupation of such status required great wealth, status, or position in society—necessarily made Bowers dependent on those who held the keys to the continuation of her role in the socially and economically superior position as a Disney director.[44] To maintain that position, plaintiffs suggested that Bowers would reasonably do anything to please Eisner, the person who made holding that position possible.[45] Instead, the chancery court effectively suggested that were plaintiffs' argument to be seriously considered, then "regular folks" would never be able to serve on a board of directors of corporations like Disney.[46] Since that could not possibly be the public policy underlying the director independence rules of Delaware corporate law, some sort of presumption against application of the director independence rules would have to apply when "regular people" are placed in positions of authority well beyond what would ordinarily be expected of people of their social and economic status.[47]

This rationale is extraordinary not only for what it seems to

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[43] *Id.*
[44] *Id.* at 359–60.
[45] *Id.* at 359.
[46] *Id.* at 360.
[47] *Id.*

suggest but also for what it implies but does not say. Having painted a picture of a school teacher of humble means, the chancery court's opinion then offers an approach that stresses the importance of class in the application of what had otherwise been a class-neutral analysis of independence.[48] But the real picture the court paints is significantly different, in critical respects, from that which the chancery court painted with so broad a brush. This school teacher—this African-American woman—is also the wife of a judge and mother of a Disney employee.[49] The analysis thus starkly evidences the way in which stereotype plays a substantial role in the development of facts—especially, it would seem, facts about racial minorities and people of purportedly humble economic status. Moreover, the analysis reveals how culturally crafted notions of reality affect the application of legal standards to these "facts." Just as courts used narrative to construct "ideal types" in the law to which "ideal standards" are applied in the regulation of sexual conduct,[50] so too have courts constructed "ideal types" against which social and cultural assumptions can be played out through an application of generally applicable legal standards.[51]

Part I starts with a brief description of the general standard applied when courts seek to determine the independence of directors and the application of that standard in the chancery court's assessments of the directors' ties to Eisner. What the Chancellor applies—and what traditional Delaware corporate

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48 *Id.*

49 California Community Foundation, Reveta Bowers, http://www.calfund.org/3/governors_3.4_bowers.php (last visited Oct. 8, 2005).

50 *See* Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529, 531 (1996) [hereinafter Backer, *Constructing a "Homosexual" for Constitutional Theory*] ("This Article explores the ways in which courts create images—archetypes—of sexual nonconformists to resist legal challenges to the regulation of sexual conduct through the criminal law."); Larry Catá Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDISC. L.J. 611, 641 (1998) [hereinafter Backer, *Tweaking Facts*] ("Judicial stories are derived from and confirm popular understandings of the sexual non-conformist . . . . [which in turn] shapes jurisprudential catechisms.").

51 For an argument that Delaware courts employ opinions to tell stories and a discussion of the importance of those stories to the application of the law by future courts, see Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997) ("[W]e come much closer to understanding the role of courts in corporate law if we think of judges more as preachers than as policemen.").

jurisprudence produces—is a narrow and segmented analysis that creates artificial types against which to apply legal standards. The results are idiosyncratic at best, cynically manipulative at worst—and always capable of tremendous "elasticity" in application.

Part II first unpacks the narrative of Reveta Bowers and adds layers of complexity to the picture painted by the chancery court. It then returns to the legal standard in the context of the richer picture painted. It does so based on the arguments urged by plaintiffs and ignored by the chancery court: applying a "realist" rather than "formalist" interest analysis in order to judge the nature of the relationship between Bowers and Eisner.[52] Such an analysis paints a truer picture of the litigant and liberates her from the status of fetish object of formalist stereotype. It also makes for a more dynamic and fairer assessment of independence. Ironically, in the case of Ms. Bowers, the application of a more realistic approach might better support a determination that she was independent than does the retreat to sloganeering provided by the chancery court.

The more realistic approach that plaintiffs urged on the Chancellor comes closer to providing a fair basis of assessment of independence. This approach begins to incorporate more effectively what Feminist and Critical Race theorists have been urging for some time—the importance of relational analysis in fact-dependent legal analysis in order to expose and give appropriate significance to all aspects realistically touching on actions or transactions subject to legal regulation.[53] Critical Race and Feminist theorizing offer a method of avoiding the arbitrariness and stereotypes of a bare formalist assessment by supplementing economic and financial understanding with a relational analysis grounded in an analysis of the power relationships between actors. A generation of Critical Race, Feminist, and outsider scholarship has already provided a foundation for a subordination analysis based on an acceptance of the assumption that race, gender, ethnicity, sexual preference,

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[52] *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 360.

[53] *See* CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2d ed. 2003); CROSS ROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995).

and perceived class status matter.[54] Even conservatives recognize the way the construction of any culturally significant difference can affect law and legal structure.[55] A subordination based relational analysis has significant utility in fact-sensitive determinations, such as director independence. It serves to expose the subtle ways in which class, gender, and race affect the application of standards in fact-driven contexts—like determinations of director independence—and may help courts and litigants strive for fairer and more realistic results.

Subordination based relational analysis also highlights the great tension in current Delaware jurisprudence about director independence—between a broad definition of independence and a narrow one. A lot is at stake. Director independence is increasingly the gateway through which much corporate action must pass. Demand futility for shareholder derivative litigation,[56] application of the business judgment rule,[57] determinations about executive compensation,[58] conflict of interest transactions,[59] termination of shareholder derivative litigation,[60] and uninvited takeover bids[61] are grounded in rules of judicial deference to decisions of independent members of the board of directors. Capital markets have embraced the notion.[62]

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54 Several collections of some of the foundational work in the legal academy on Critical Race Theory have now been published. *See* CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2d ed. 2003); CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995).

55 *See, e.g.*, RICHARD A. POSNER, SEX AND REASON 7 (1992) (stating that one of the author's aims in writing his book was to "demonstrate the inadequacy of conventional legal and moral reasoning in dealing with complex, emotion-laden social phenomena such as sexuality").

56 *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) and its progeny.

57 *See, e.g.*, Kaplan v. Centex Corp., 284 A.2d 119, 123 (Del. Ch. 1971).

58 *See, e.g.*, Lewis v. Vogelstein, 699 A.2d 327, 336–38 (Del. Ch. 1997); Steiner v. Meyerson, Civ. A. No. 13139, 1995 WL 441999, at *1–2 (Del. Ch. July 19, 1995). *But see* Charles M. Elson, *Director Compensation and the Management-Captured Board—The History of a Symptom and a Cure*, 50 S.M.U. L. REV. 127, 161–62 (1996).

59 *See, e.g.*, Orman v. Cullman, 794 A.2d 5, 14–15 (Del. Ch. 2002).

60 *See, e.g.*, Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981); Auerbach v. Bennett, 47 N.Y.2d 619, 623–24, 393 N.E.2d 994, 996, 419 N.Y.S.2d 920, 922 (1979).

61 *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985).

62 "Effective boards of directors exercise independent judgment in carrying out their responsibilities. Requiring a majority of independent directors will increase the quality of board oversight and lessen the possibility of damaging conflicts of

Federal regulation has increasingly turned to it as a foundation for governance.[63] Corporations have increasingly found the independent director a useful vehicle for effecting corporate business without shareholder interference. The broader the definition of independence, the easier it is for the corporation to amass directors to serve in that role. The Delaware courts have tended to craft a broad standard for determining independence based on a difficult to overcome presumption of independence and a rejection of the importance of non-economic relationships.[64] This has generated some criticism, especially after the corporate scandals of the early 21st century,[65] even by members of the Delaware judiciary.[66]

This Article adds to the criticism of the Delaware approach to independence analysis by suggesting that, beyond the psychology of independence,[67] other critical factors, often overlooked, also play a role that ought to be recognized in crafting an analytical standard for determining independence. A subordination based relational analysis of the type suggested here may make it more difficult for a corporation to produce an "independent" board. But that may not be a bad thing. The object of independence should not be to provide an easy vehicle to

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interest." N.Y.S.E. Listed Company Manual, Rule 303A.01 (Independent Directors), Commentary, *available at* http://www.nyse.com/Frameset.html?displayPage=/lcm/1078416930882.html?archive=no.

[63] *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745.

[64] Thus for example, the *Aronson* court explained early on that "[t]he requirement of director independence inhers in the conception and rationale of the business judgment rule. The presumption of propriety that flows from an exercise of business judgment is based in part on this unyielding precept." Aronson v. Lewis, 473 A.2d 805, 816 (Del. 1984). *See also* Gries Sports Enters., Inc. v. Cleveland Browns Football Co., Inc., 496 N.E.2d 959, 977–78 (Ohio 1986).

[65] *See* Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long Term Firm Performance*, 27 J. CORP. L. 231, 232–33 (2002); Laura Lin, *The Effectiveness of Outside Directors as a Corporate Governance Mechanism: Theories and Evidence*, 90 NW. U. L. REV. 898, 961–66 (1996).

[66] *See, e.g.*, Leo E. Strine, Jr., *Derivative Impact? Some Early Reflections on the Corporation Law Implications of the Enron Debacle*, 57 BUS. LAW. 1371 (2002). Vice Chancellor Strine was the author of the chancery court opinion in *In re* Oracle Corp. Derivative Litig., 824 A.2d 917, 938 (Del. Ch. 2003), *appeal denied*, Oracle Corp. *ex rel.* Special Litig. Comm. v. Barone, 829 A.2d 141 (Del. 2003), *summary judgment granted*, *In re* Oracle Corp., Derivative Litig., 867 A.2d 904 (Del. Ch. 2004), *aff'd*, 872 A.2d 960 (Del. 2005), discussed *infra* at notes 100–02.

[67] *See* James D. Cox and Harry L. Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 LAW & CONTEMP. PROBS. 83, 98–99 (1985).

authenticate board action. It should erect a higher wall between personal interest or obligation and corporate control.

In place of the current Delaware analysis, and in lieu of the structural bias analysis rejected by Delaware courts,[68] this Article then suggests an alternative approach to the determination of director independence. The touchstone of this approach should be subordination. Subordination would encompass all hierarchical and affective relationships. Subordination should serve as a substantive rule—subordination destroys all claims of independence. Subordination should also serve as a procedural rule—establishment of a relationship of subordination ought to shift the burden of proving independence from the plaintiff to the director seeking to establish independence for purposes of validating board of directors' actions. The point of subordination analysis is to unmask the relationship of power, not to hide it through the creation of artificial barriers to uncovering the nature of dependence in relationships between people. The Article ends by assessing the utility of the proposed subordination-relational standard. Application of the standard to the facts of the *Disney* litigation demonstrates the ways in which the alternative standard yields different results. Had the chancery court applied a subordination based relational standard it would have been far more likely that a greater number of directors might have been found not to be independent.

This Article does not mean to suggest that the law of director independence is a rush to judgment—for example, that it is "racist" or "gender biased" or "class driven." Those types of sloganeering conclusions are not particularly helpful in this context. *The point is that Critical Race and Feminist Theories have something important to add to any discussion of fiduciary duty and director independence*: that relationships matter and that analysis that does little to unearth relationships of power, race, gender, and social status will produce results with very little relation to the facts purportedly considered by a court. This Article focuses on a concrete application of a conundrum with which legal theory has been wrestling since the middle of the last century—the significance that ought to be accorded to differences

[68] *See* Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040 (Del. 2004), discussed *infra* at notes 101–02.

that retain cultural significance.[69]

The Chancellor's analysis, taken in the aggregate, begins to suggest the application of a set of presumptions with significant legal effect. These presumptions are not those the Chancellor sought to avoid—that is, presumptions relating to the consequences of particular economic and non-economic relationships between directors—but other, perhaps more problematic presumptions. These presumptions about the consequences of gender, race, and class for dependence should be quite troublesome. A consciousness of the subtle ways in which class, gender, and race affect the application of standards in fact-driven contexts, like determinations of director independence, may help courts and litigants strive for fairer and more realistic results. Reveta Bowers illustrates the way race, gender, and class can affect even the most neutral, economic-efficiency, policy-based provisions of corporate law. Substituting a subordination based relational analysis may increase the likelihood that more directors will not be able to show independence in a conflict of interest situation. But that result will strengthen the corporation: it can deepen the legitimacy of independent board of director decisions; it can broaden the application of principles of shareholder democracy for other decisions and reduce second guessing by courts in protected litigation.

I. THE TRADITIONAL STANDARDS OF DOMINATION AND CONTROL AND THE DISNEY LITIGATION

A. *A Brief Reminder of the Importance of Interest and Independence in Assessing Executive Compensation and Director Loyalty*

Executive compensation has long been an object of controversy, usually pitting directors and officers against individual shareholders. Since the middle of the last century, the American courts have refused to referee the battles over specific compensation schemes.[70] For several generations, American

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69 For a discussion on the dynamics of cultural significance in political and social ordering, especially as it concerns issues of race, see Larry Catá Backer, *Culturally Significant Speech: Law, Courts, Society, and Racial Equity*, 21 U. ARK. LITTLE ROCK L. REV. 845 (1999).

70 *See* Rogers v. Hill, 289 U.S. 582, 590 (1933) (upholding bonuses paid to

courts have embraced the idea that "[c]ourts are ill-equipped to solve or even grapple with these entangled economic problems . . . . Courts are concerned that corporations be honestly and fairly operated by its directors . . . but what is reasonable compensation for its officers is primarily for the stockholders."[71] But courts were willing to construct a judicial limit even to shareholder action. Shareholder action may be defeated, at "the protest of a shareholder, [if] used to justify payments of sums as salaries so large in substance and effect to amount to spoliation or waste of corporate property."[72] By the 1990s, at least in Delaware, executive compensation could be successfully challenged only if there was no "rational basis for directors to conclude that the amount and form of compensation is appropriate."[73] As a consequence, even when a court declined an invitation to dismiss a suit alleging waste in granting executive compensation, the great concern of state courts was the prevention of action that could constitute "an undue encouragement to strike suits."[74] The waste standard thus serves as a high barrier indeed to attacks on executive compensation schemes on substantive grounds.

Federal law has provided additional protection. Federal income tax rules have capped the amount of compensation that may be deducted by public corporations,[75] but the tax rules have not proven very effective in limiting the size of compensation packages of senior executives at public companies.[76] Federal securities laws provide additional protection, but the protection is effectively limited to disclosure. Federal disclosure rules, for example, focus on full disclosure of compensation,[77] but do not

executives of American Tobacco Company pursuant to a shareholder-approved bylaw adopted in 1912 absent proof of waste).

71 Heller v. Boylan, 29 N.Y.S.2d 653, 680 (N.Y. Sup. Ct. 1941), *aff'd mem.*, 263 App. Div. 815, 32 N.Y.S. 2d 131 (1st Dep't 1941).

72 *Rogers*, 289 U.S. at 591.

73 Steiner v. Meyerson, Civ. A. No. 13139, 1995 WL 441999, at *8 (Del. Ch. July 19, 1995).

74 Lewis v. Vogelstein, 699 A.2d 327, 339 (Del. Ch. 1997).

75 I.R.C. § 162(m) (2000). Thus, Ovitz's employment agreement was careful to specify a salary of $1 million. *See supra* note 9 and accompanying text.

76 *See* Edward M. Iacobucci, *The Effects of Disclosure on Executive Compensation*, 48 U. TORONTO L.J. 489 (1998); Ryan Miske, Note, *Can't Cap Corporate Greed: Unintended Consequences of Trying To Control Executive Compensation Through the Tax Code*, 88 MINN. L. REV. 1673 (2004).

77 *See, e.g.*, Item 402, Regulation S–K, 17 C.F.R. § 229.402 (2005); Schedule 14A, 17 C.F.R. § 240.14a-101 (2005) (requiring the provision of the information required

purport to regulate the substance of the compensation put for approval to the shareholders or otherwise approved by a disinterested board of directors. Even the Sarbanes-Oxley Act of 2002 did little to supplement state law regulation of the substance of executive compensation schemes.[78] These federal regulatory incursions have been criticized as being too limited to be effective.[79]

Courts have been more willing to entertain attacks on executive compensation when litigants assert a conflict of interest in approving such compensation.[80] The essence of this sort of interest analysis is the assertion that a corporate officer or director has misused power over the corporation in order to benefit himself rather than to advance the corporation.[81] It has been observed, however, that self-interest is not always present when the duty of loyalty has been breached.[82] Regardless of the director's motives or intentions, the "'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'" when he uses the corporation to advance himself or others.[83] "[W]here self-interest is or could be present, merely examining the substantive and procedural fairness of a self-interested transaction is insufficient."[84] In order for a director to be loyal, he or she must do more than guard against betraying or harming the corporation's interests; the director must act in a way that affirmatively furthers the corporation's interests.[85] The American Law Institute supports this principle and emphasizes the need to advance affirmatively the corporation's interest, in addition to pointing out that promoting the interest of a third

by Item 402, Regulation S–K in connection with the election of directors and the approval of compensation schemes).

[78] The principal addition was a limitation of corporate personal loans to executives. *See* 15 U.S.C. § 78m(k) (2000).

[79] For a criticism of both traditional state governance rules in general and the current framework for federal regulation, see J. Robert Brown, Jr., *The Irrelevance of State Corporate Law in the Governance of Public Companies*, 38 U. RICH. L. REV. 317 (2004).

[80] *See* Dexsil Corp. v. Comm'r, 147 F.3d 96, 100 (2d Cir. 1998); Rapco, Inc. v. Comm'r, 85 F.3d 950, 954 (2d Cir. 1996).

[81] *See* Lyman Johnson, *After* Enron*: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 34 (2003).

[82] *See id.* at 36.

[83] *Id.* (citing Nagy v. Bistricer, 770 A.2d 43, 49 n.2 (Del. Ch. 2000).

[84] *Id.* at 41.

[85] *Id.*

party ahead of the corporation is the equivalent of a director furthering his own interests.[86]

But, it is usually difficult to show that a majority of directors had a direct interest in board approval of executive compensation, and such a showing is necessary to rebut successfully the presumptions of the business judgment rule and permit judicial application of the entire fairness standard.[87] To succeed in a claim, a litigant would have to prove that a "majority of the director defendants have a financial interest in the transaction or were dominated or controlled by a materially interested director."[88] Director conflict of interest and independence are sometimes tested in the context of demand futility.[89] Either way, the courts apply the same analysis. As the court in *Brehm v. Eisner*[90] emphasized, at least one interested director is necessary to succeed on a claim, but a plaintiff will have to show that a majority of directors were interested or subject to the control of the interested director to succeed on a claim of breach of duty (or demand futility):

> Not all instances in which management stands on both sides of a corporate transaction trigger loyalty review. Even when management has a conflicting interest in a transaction, a board's motives can be seen as mixed or ambiguous if the transaction also offers special or unique value to the corporation because it is not available on the open market. Executive compensation, transactions between corporations with interlocking directorates, dismissal of derivative litigation, and corporate actions taken in the control context (such as takeover defenses) are examples of these transactions. In these cases, courts do not assume self-interested influence, and full-fledged loyalty review normally does not apply. Only if self-interest is proved—that is, only if a challenger shows that the interested person dominated or controlled the decision-making process—do

86 *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 170 cmt. q (1959), which states that it is improper for a trustee to act to benefit a third party rather than the trust estate).

87 *See* Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1168 (Del. 1995). When allegations of failure to disclose are made, it may not be necessary to demonstrate that a majority of the board was tainted by interest conflicts or lack of independence. *See* Orman v. Cullman, 794 A.2d 5, 22–23 (Del. Ch. 2002).

88 Crescent/Mach I Partners, L.P. v. Turner, 846 A.2d 963, 979 (Del. Ch. 2000) (citing Grobow v. Perot, 539 A.2d 180, 188 (Del. 1988); *see also Cinerama*, 663 A.2d at 1168.

89 *See* Radin, *supra* note 29, at 1602.

90 746 A.2d 244 (Del. 2000).

courts undertake a loyalty review.[91]

The state law standard has long been criticized as virtually ineffective in policing against managerial overreaching.[92]

When directorial independence is put at issue, the Delaware courts have looked to the transaction at issue and focused on the nature of the relationship between the interested director and the dominated director.[93] Delaware courts will apply the entire fairness standard only if the plaintiff is able to plead facts demonstrating that a majority of the board of directors that approved the transaction was interested or lacked independence.[94] Otherwise the court will "respect[] the business judgment of the board."[95] The determination of independence is wholly contextual,[96] but when the allegation involves a lack of independence, courts have demanded a showing that the person or group who dominates the board actually has a conflicting interest in the contested transaction.[97]

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[91] Alan R. Palmiter, *Reshaping the Corporate Fiduciary Model: A Director's Duty of Independence*, 67 TEX. L. REV. 1351, 1366 (1989) (footnotes omitted).

[92] *See, e.g.*, Lucian Arye Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 766–67 (2002).

[93] *See* Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1049–50 (Del. 2004).

[94] *See* Malpiede v. Townson, 780 A.2d 1075, 1084–85 (Del. 2001) (affirming the chancery court's determination that a majority of the board was disinterested upon the failure of the plaintiff to show that a majority of the board members who approved the transaction were dominated by the interested director).

[95] Orman v. Cullman, 794 A.2d 5, 23 (Del. Ch. 2002).

[96] The Delaware courts have been quite mindful of the implications of this approach:

> This contextual approach is a strength of our law, as even the best minds have yet to devise across-the-board definitions that capture all the circumstances in which the independence of directors might reasonably be questioned. By taking into account all circumstances, the Delaware approach undoubtedly results in some level of indeterminacy, but with the compensating benefit that independence determinations are tailored to the precise situation at issue.

In re Oracle Corp. Derivative Litig., 824 A.2d 917, 941 (Del. Ch. 2003), *appeal denied*, Oracle Corp. *ex rel.* Special Litig. Comm. v. Barone, 829 A.2d 141 (Del. 2003), *summary judgment granted*, *In re* Oracle Corp., Derivative Litig., 867 A.2d 904 (Del. Ch. 2004), *aff'd*, 872 A.2d 960 (Del. 2005).

[97] *See In re* Walt Disney Co. Derivative Litig., 731 A.2d 342, 355 (Del. Ch. 1998), *aff'd in part, rev'd in part sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000):

> In order to prove domination and control by Eisner, Plaintiffs must demonstrate first that Eisner was personally interested in obtaining the Board's approval of the Employment Agreement and, second, that a majority of the Board could not exercise business judgment independent of Eisner in deciding whether to approve the Employment Agreement.

On the separate question of independence, the *Aronson* Court stated that "[i]ndependence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." Such extraneous considerations or influences may exist when the challenged director is controlled by another. To raise a question concerning the independence of a particular board member, a plaintiff asserting the "control of one or more directors must allege particularized facts manifesting 'a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling.' The shorthand shibboleth of 'dominated and controlled directors' is insufficient." This lack of independence can be shown when a plaintiff pleads facts that establish "that the directors are 'beholden' to [the controlling person] or so under their influence that their discretion would be sterilized."[98]

The burden is on the plaintiff to "allege some facts showing a director is *beholden* to an interested director in order to show a lack of independence."[99] Those facts need not show a financial or economic basis for dependence on an interested director. The "question of independence turns on whether a director is, *for any substantial reason*, incapable of making a decision with only the best interests of the corporation in mind. That is, [the Supreme Court cases] ultimately 'focus[] on impartiality and objectivity.'"[100] However, the Delaware Supreme Court continues

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Id.; *see also* MODEL BUS. CORP. ACT § 8.62(d) (2002) (defining domination as "a familial, financial, professional, or employment relationship with a second director who does have a conflicting interest respecting the transaction").

98 *Orman*, 794 A.2d at 24 (footnotes omitted). For a similar statement of the standard , see Telxon Corp. v. Meyerson, 802 A.2d 257, 264 (Del. 2002):

> Theoretically, a director can be "controlled" by another, for purposes of determining whether the director lacked the independence necessary to consider the challenged transaction objectively. A controlled director is one who is dominated by another party, whether through close personal or familial relationship or through force of will. A director may also be deemed "controlled" if he or she is beholden to the allegedly controlling entity, as when the entity has the direct or indirect unilateral power to decide whether the director continues to receive a benefit upon which the director is so dependent or is of such subjective material importance that its threatened loss might create a reason to question whether the director is able to consider the corporate merits of the challenged transaction objectively.

Id. (citation omitted).

99 Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins, No. Civ.A. 20228-NC, 2004 WL 1949290, at *10 (Del. Ch. Aug. 24, 2004).

100 *In re* Oracle Corp. Derivative Litig., 824 A.2d 917, 938 (Del. Ch. 2003),

to reaffirm "that a showing of structural bias on a board of directors is insufficient to avoid the demand requirement,"[101] despite the occasional invitation of the chancery court to revisit this approach.[102] In determining lack of independence, Delaware courts look to evidence of *control.* To determine control, courts sometimes distinguish between directors who lack independence because they are *dominated* by another party and directors who are *beholden* to another party with an interest in the transaction.[103] Domination can result from close personal or

appeal denied, Oracle Corp. *ex rel.* Special Litig. Comm. v. Barone, 829 A.2d 141 (Del. 2003), *summary judgment granted, In re* Oracle Corp., Derivative Litig., 867 A.2d 904 (Del. Ch. 2004), *aff'd,* 872 A.2d 960 (Del. 2005). The court of chancery explained:

> Delaware law should not be based on a reductionist view of human nature that simplifies human motivations on the lines of the least sophisticated notions of the law and economics movement. *Homo sapiens* is not merely *homo economicus.* We may be thankful that an array of other motivations exist [sic] that influence human behavior; not all are any better than greed or avarice, think of envy, to name just one. But also think of motives like love, friendship, and collegiality, think of those among us who direct their behavior as best they can on a guiding creed or set of moral values.
>
> Nor should our law ignore the social nature of humans. To be direct, corporate directors are generally the sort of people deeply enmeshed in social institutions. Such institutions have norms, expectations that, explicitly and implicitly, influence and channel the behavior of those who participate in their operation.

Id. at 938.

[101] Mark J. Loewenstein, *Beam v. Stewart: Friendship is Not Enough,* 18(6) INSIGHTS 22 (2004) (discussing Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040 (Del. 2004)). *Beam* reaffirmed the traditional contextual and factual approach over the presumptive approach of any structural bias analysis. *Id.* at 1050-51.

[102] *See In re* Oracle Corp. Derivative Litig., 824 A.2d 917, 941 (Del. Ch. 2003), *appeal denied,* Oracle Corp. *ex rel.* Special Litig. Comm. v. Barone, 829 A.2d 141 (Del. 2003), *summary judgment granted, In re* Oracle Corp., Derivative Litig., 867 A.2d 904 (Del. Ch. 2004), *aff'd,* 872 A.2d 960 (Del. 2005). At the time of its decision, commentators thought that the case broke new ground, substantially broadening the grounds on which lack of independence could be successfully alleged. *See, e.g.,* Mark J. Loewenstein, *The Quiet Transformation of Corporate Law,* 57 S.M.U. L. REV. 353, 374-375 (2004). For a discussion of structural bias issues, see Julian Velasco, *Structural Bias and the Need for Substantive Review,* 82 WASH. U. L. Q. 821 (2004). However, in *Beam,* 845 A.2d 1040, the Delaware Supreme Court specifically distinguished and limited the potentially far-reaching analysis of Vice Chancellor Strine in *Oracle. See Beam,* 845 A.2d at 1054-56 (section entitled "A Word About the Oracle Case" distinguishing the analysis involving the independence of a shareholder litigation committee from that of demand futility without deciding "whether the substantive standard of independence in an SLC case differs from that in a presuit demand case." *Id.* at 1055 & n.45).

[103] *See, e.g., Telxon,* 802 A.2d at 264–65; *Orman,* 794 A.2d at 24, 25 n.50.

familial relationships or by assertion of strong personal will by the interested party.[104] A director who is beholden to another can also be controlled. A director is beholden to another "when the allegedly controlling entity has the unilateral power," be it directly or indirectly, "to decide whether the challenged director continues to receive a benefit, financial or otherwise, upon which the challenged director is so dependent or is of such subjective material importance to him that the threatened loss of that benefit" would create a question of that director's independence.[105]

Domination, as such, includes a materiality standard. To have legal effect in an independence analysis, the benefit must be significant enough "in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties to the . . . shareholders without being influenced by her overriding personal interest."[106] Thus, courts have sometimes appropriated the language of "board sterilization" to describe a standard for demonstrating lack of independence: "To establish lack of independence, [the shareholder] must show that the directors are 'beholden' to the [more powerful directors] or so under their influence that their discretion would be sterilized."[107] The analysis is meant to be highly contextual.[108]

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104 *See Orman*, 794 A.2d at 25 n.50.

105 *Id.*

106 *In re* Gen. Motors Class H S'holders Litig., 734 A.2d 611, 617 (Del. Ch. 1999).

107 Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993). *See also In re* EBAY, Inc. S'holders Litig., No. C.A. 19988-NC, 2004 WL 253521, at *3 (Del. Ch. Feb. 11, 2004) (finding that demand was excused and futility analysis turned on allegations that compensation to non-interested directors in the form of not-yet-vested stock options created a reasonable doubt of their independence for pleading purposes).

108 *See ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1049–50 (Del. 2004) ("Independence is a fact-specific determination made in the context of a particular case. The court must make that determination by answering the inquiries: independent from whom and independent for what purpose?"). Thus, for example, consider the explanation in support of domination in an early Delaware case:

> It was perfectly evident to me that Odlum dominated and controlled those members of Airfleets' board who decided to "reject" the offer to purchase the patents. I use "dominate and control" in the sense that, criminality aside, his wishes were their commands. My conclusion is drawn from the interplay of several circumstances; some tangible and others intangible: The two directors who voted to reject the offer are both, realistically speaking, beholden to Odlum; Odlum was and is Airfleets' president and a member of its board; the manner in which the corporate affairs were handled as

Courts have considered whether different types of relationships or interests affect the independence of directors. In every case, the courts have refused to create either a bright line rule or a presumption that any sort of relationship to the interested director without more proves lack of independence.[109]

1. Friendship, Outside Business Relationships, or Approval of Contested Transactions

"Our cases have determined that personal friendships, without more; outside business relationships, without more; *and approving of or acquiescing in the challenged transactions, without more*, are each insufficient to raise a reasonable doubt of a director's ability to exercise independent business judgment."[110] Thus, it is not enough to allege only that directors "moved in the same social circles, attended the same weddings, developed business relationships before joining the board, and described each other as 'friends.'"[111] However, some friendships, in context, might raise issues of independence.[112]

> among the board members showed that realistically this was a one-man board—an Odlum board. Nor is my conclusion affected by the subsequent director ratification. And I emphasize that my conclusion is based not merely on the manner in which the various director relationships were created but on the cumulative effect of the trial record.

Greene v. Allen, 114 A.2d 916, 920 (Del. Ch. 1955), *rev'd sub nom.* Johnston v. Greene, 121 A.2d 919 (Del. 1956).

[109] *See, e.g.*, Guilfoyle v. Brown, 88 P.2d 1082 (Kan. 1939) (finding no presumption of domination merely because the interested director could terminate the employment of the officer directors on the board). The court in this case expressed the policy thus:

> Plaintiff asks us to infer that the board did as Brown desired because the members of the board were all officers of the company and would have lost their jobs if they had not done as Brown directed. This is an inference the trial court was not entitled to draw and one which this court will not draw. In the first place there is no evidence in this record as to the salary of these officers and directors or any surrounding circumstances with reference to them. In the absence of some evidence we will not presume that the members of the board of directors were so venal as to allow such a consideration to sway their action and cause them not to do their duty under the above statutes.

Id. at 1084.

[110] Cal. Pub. Employees' Ret. Sys. v. Coulter, No. Civ.A. 19191, 2002 WL 31888343, at *9 (Del. Ch. Dec. 18, 2002) (emphasis added).

[111] Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1051 (Del. 2004).

[112] *Id.* at 1050 ("[S]ome professional or personal friendships, which may border on or even exceed familial loyalty and closeness, may raise a reasonable doubt whether a director can appropriately consider demand. This is particularly true

2. Employment and Personal Relationships with the Company or Interested Directors and Officers

An employment relationship with the company—even one where the interested director may have the power to terminate the employment of the director—is not, standing alone, enough to create a presumption of dependence.[113] In contrast, personal relationships, or fiduciary relationships are presumptively suspect.[114] Delaware courts have applied this rule to determine that brothers-in-law,[115] grandchildren,[116] and cousins[117] might not be impartial. However, some direct family relationships, including that between parent and child, might be insufficient to establish lack of independence.[118]

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when the allegations raise serious questions of either civil or criminal liability of such a close friend."). *See also supra* note 32 and accompanying text. The Supreme Court constructed a "risk of reputation" test for determining when allegations of friendship could raise questions of independence:

> To create a reasonable doubt about an outside director's independence, a plaintiff must plead facts that would support the inference that because of the nature of a relationship or additional circumstances other than the interested director's stock ownership or voting power, the non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director.

Beam, 845 A.2d at 1052.

113 *See* Telxon Corp. v. Meyerson, 802 A.2d 257 (Del. 2002) (reversing a grant of summary judgment where there was alleged domination of the board since the CEO was in a position to affect their livelihood); *Guilfoyle*, 88 P.2d at 1084 (rejecting plaintiff's inference that members of the board—all officers of the company—did as the interested director desired because the interested director was the president of the company and the board members feared they would lose their jobs if they did not).

114 Grimes v. Donald, 673 A.2d 1207, 1216 (Del. 1996). *See* MODEL BUS. CORP. ACT, *supra* note 97, § 8.60(3) (defining "related person") and its application to the definition of "conflicting interest," MODEL BUS. CORP. ACT § 8.60(1).

115 Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 889 (Del. Ch. 1999).

116 Mizel v. Connelly, No. Civ.A. 16638, 1999 WL 550369, at *4 (Del. Ch. Aug. 2, 1999).

117 Seibert v. Harper & Row Publishers, Inc., CIV. A. No. 6639, 1984 WL 21874, at *3 (Del. Ch. Dec . 5, 1984).

118 The general rule that family relationships can form a basis for lack of independence, *Grimes*, 673 A.2d at 1216, can be overcome under certain circumstances. *See In re* J.P. Morgan Chase & Co. Shareholder Litig., No. Civ.A. 531-N, 2005 WL 1076069 (Del. Ch. April 29, 2005). In that case, Vice Chancellor Lamb determined that a director could be independent even when the company employed his son.

> Family employment ties can give rise to concerns about the ability of directors to act independently of a company's management. For example, the NYSE rules governing director independence focus on this subject, holding that employment of a child as an executive officer of the

3. Appointment to the Board

The courts have sometimes refused to read a presumption of domination where a person owes his appointment to the board solely on account of the efforts or power of the interested director.[119]

> [T]he relevant inquiry is not how the director got his position, but rather how he comports himself in that position.
>
> Plaintiffs have not pled any facts that demonstrate that the unnamed directors did not exercise their own independent business judgment in decision-making or that they merely submitted to the will of [the majority shareholder].[120]

The Delaware Supreme Court in *Beam* reaffirmed this rule.[121]

> corporation may disqualify an outside director from serving as a disinterested member of the board. Delaware courts also recognize that familial ties to management can disqualify one from functioning disinterestedly. In this case, however, Bossidy's son is not an executive officer of JPMC, and the complaint does not allege that Bossidy and his son live in the same household. Under NYSE Corporate Governance rules, Bossidy was found to meet the criteria for certification as an outside, independent director. Moreover, the fact that Bossidy's son is employed by JPMC is duly disclosed in JPMC's proxy materials.

Id. at *10.

[119] *See* Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1051 (Del. 2004); Odyssey Partners, L.P. v. Fleming Cos., Inc., 735 A.2d 386, 407–12 (Del. Ch. 1999) (holding that the majority shareholder and corporate creditor did not dominate the board). Vice Chancellor Lamb stated, "My review of the record and observation of the character and demeanor of the witnesses at the trial convinces me that the majority of the board was not dominated or controlled by Fleming." *Id.* at 407. *But see* Stepak v. Dean, No. 6315, 1982 WL 8790, at *1 (Del. Ch. May 21, 1982) (charging domination of the board by the president in regard to self-serving transactions when the board consisted of three people: Dean, his personal representative, and a member that Dean had appointed to the board). The court explained that "Dean's power was blatantly exemplified when, as alleged herein, Dean manipulated the ascendance of defendant Rawlins to the Pioneer Board of Directors in order to facilitate the sale of PCM inventory to himself and then, shortly following the sale, returned himself to the Board." *Id.* at *2.

[120] Andreae v. Andreae, Civ. A. No. 11905, 1992 WL 43924, at *4 (Del. Ch. Mar. 3, 1992) (finding that the owner of the voting stock appointed the directors but did not dominate them). The appointment of directors is not enough to show domination. *Id.*

[121] "A stockholder's control of a corporation does not excuse presuit demand on the board without particularized allegations of relationships between the directors and the controlling stockholder demonstrating that the directors are beholden to the stockholder." *Beam*, 845 A.2d at 1054 ("As noted earlier, the relationships alleged by Beam do not lead to the inference that the directors were beholden to Stewart and, thus, unable independently to consider demand. Coupling those relationships with Stewart's overwhelming voting control of MSO does not close that gap.").

4. Contractual or Philanthropic Relationship with the Company

Courts have determined that a person's contractual relationship with a company on the board of which they serve may, but does not necessarily, suggest a lack of independence. When the contractual relationship is unaffected by the transaction at issue, the contractual relationship, without more, may be insufficient to raise an issue of independence.[122] On the other hand, courts have found a lack of independence when the fulfillment of the contract or its renewal is dependent on an interested director, and the contract is material to the director whose independence is at issue.[123] Likewise, "Delaware courts have previously recognized that philanthropic relationships with institutions may give rise to questions about a director's independence. But in those cases, the complaints had . . . particularized facts about the materiality of the relationship in question that would create a reasonable doubt about the independence of the directors."[124]

5. Serving as Outside Counsel to the Corporation

Courts have found that outside counsel sitting on the board of directors may be dominated.[125] An Ohio court perhaps put it best: "Berick [the director in question] was outside counsel for the [Cleveland] Browns and was, as the trial court found, a dominated director who did not act independently. Since 'it was Berick's job to do what [the president] requested,' it is obvious that he was dominated and controlled by [the president]."[126]

The issue of domination has been particularly troublesome for policymakers. The principal issue with the traditional standard exemplified by Delaware's approach has been the perceived uncertainty of the standard, suggesting too much

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[122] *See* Orman v. Cullman, 794 A.2d 5, 29–30 (Del. Ch. 2002).

[123] *See id.* at 30.

[124] *In re J.P. Morgan Chase & Co. Shareholder Litig.*, 2005 WL 1076069, at *10 & n.48 (citations omitted).

[125] Johnston v. Greene, 121 A.2d 919, 922 (Del. 1956). In *Johnston*, a business opportunity was presented to the board. *Id.* It rejected the proposal and the president took the opportunity himself. *Id.* Two directors worked in the law firm that handled matters for the company, while the other members of the board were employees of the company and were appointed to the board at the president's invitation. *Id.*

[126] Gries Sports Enters., Inc. v. Cleveland Browns Football Co., Inc., 496 N.E.2d 959, 968 (Ohio 1986).

discretion on the part of courts in its application and too little guidance for directors seeking to comply in good faith with reasonable rules of good corporate conduct.[127] Under the Revised Model Business Corporation Act, a more formalistic and narrow approach to director independence has been created, limited to certain financial interests.[128]

The drafters of the Revised Model Business Corporation Act, however, recognized that, outside of the grounds for determining conflicting interest transactions, "there is a penumbra of director interests, desires, goals, loyalties, and prejudices that may, in a particular context, run at odds with the best interests of the corporation."[129] With respect to those relationships typically the subject of an independence analysis under Delaware law, the Revised Model Business Corporation Act suggests that those types of relationships may produce liability, when challenged, if the director cannot show a reasonable belief that the transaction was in the best interests of the corporation.[130] "This standard is intended to be easier for the interested director or officer to satisfy than a pure-fairness standard but harder to satisfy than the business-judgment standard."[131]

Yet the Revised Model Business Corporation Act retains a broad and very flexible standard to determine the independence of directors who do not fall within the more narrow and formalistic rules. This flexible standard is particularly important in the context of approvals of "directors conflicting interest transactions" by disinterested board members.[132] Such

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[127] *See* MODEL BUS. CORP. ACT, *supra* note 97, § 8.61 official comment.

[128] *See id.* § 8.60.

[129] *Id.* § 8.61 official comment.

[130] *See id.* § 8.31; *see also* PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS & RECOMMENDATIONS § 502 (1992).

[131] Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 454 (1993). Professor Eisenberg suggests:

> The intermediate standard of review of self-interested transactions that have been properly approved by disinterested directors accommodates both the need to make self-interested transactions reviewable for fairness, on the one hand, and the value of institutional autonomy and the desirability of providing self-interested directors and officers with an incentive to seek early approval from disinterested directors, on the other.

Id.

[132] MODEL BUS. CORP. ACT, *supra* note 97, § 8.62(a) (providing a safe harbor for director conflicting interest transactions approved—after appropriate disclosure—by a majority of qualified directors).

disinterested or "qualified" directors include only those directors who do not have a conflicting interest in the transaction and are independent. The Model Business Corporation Act defines "independence" as the absence of "a familial, financial, professional, or employment relationship with a second director who does have a conflicting interest respecting the transaction, which relationship would, in the circumstances, reasonably be expected to exert an influence on the first director's judgment when voting on the transaction."[133] The Official Comment emphasizes the need to avoid formalistic analysis within the parameters of the definition of "qualified director." To determine whether there is a financial, employment, or professional relationship, courts should look to "the practicalities of the situation rather than formalistic circumstances."[134] So much for bright lines; this standard comes closest to that articulated by Delaware courts since *Aronson*.

Under either standard, then, courts will be confronted with the need to invest relationships with legal consequence beyond the actual relationship itself. Under neither standard can courts avoid a potential messy analysis of relationships. In these contexts, courts will inevitably have to weigh race, gender, and class in giving legal consequence to relationships purporting to affect the business transactions of corporations. But the way a judge approaches that analysis can significantly affect the character of the analysis and the likelihood that a particular conclusion will be reached. Messiness, for example, can be tidied by taking refuge in formal structural economic analysis. Analysis can also be simplified by taking refuge in stock stories and assumptions. It seems the court of chancery did both in the *Disney* litigation. Yet the *Disney* litigation ought to have provided a rich vehicle for the examination of reality, beyond formality and stock assumptions, of the intersection of race, gender, class, and the normative basis of director behavior. It is

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133 *Id.* § 8.62(d). The official comment suggests that this definition is meant to go "significantly beyond the persons specified in the subcategories of section 8.60(1)(ii) for purposes of the 'conflicting interest' definition—any director whose familial or financial relationship with [an interested director] or whose employment or professional relationship with [such director] would be likely to influence the director's vote on the transaction." *Id.* § 4 official comment.

134 *Id.* The Official Comment provides an example: "[A] director employed by a corporation controlled by [a director with a conflicting interest in a transaction] should be regarded as having an employment relationship with [that director]." *Id.*

to that case, then, that we turn next.

B. The Substance of the Employment Agreement: Waste in In re the Walt Disney Co. Derivative Litigation[135]

The court of chancery's approach to the application of fiduciary duty was both narrow and formalistic. Chancellor Chandler embraced an approach that rewarded conformity to the letter of the standard and avoided the need to assess the importance of actual factual relationships outside their formal context. This approach had the advantage of simplicity and ease of application. The opinion's approach suggests a fairly typical application of tools designed to separate what might be the minimum that is legally required from what might be good corporate practice. The Delaware Supreme Court stressed the distinctions between the two in this case.

> All good corporate governance practices include compliance with statutory law and case law establishing fiduciary duties. But the law of corporate fiduciary duties and remedies for violation of those duties are distinct from the aspirational goals of ideal corporate governance practices. Aspirational ideals of good corporate governance practices for boards of directors that go beyond the minimal legal requirements of the corporation law are highly desirable, often tend to benefit stockholders, sometimes reduce litigation and can usually help directors avoid liability. But they are not required by the corporation law and do not define standards of liability.[136]

Because the policy underlying Delaware corporate law does not appear to merge the two, any legal standard adopted would have to permit the attainment of aspirational goals without mandating them. Meeting this objective would require both the articulation of distinctions between statutory and moral minimums and the construction of standards to enforce one and perhaps encourage the other. The latter, according to the *Brehm*

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[135] 731 A.2d 342 (Del. Ch. 1998) *aff'd in part, rev'd in part sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

[136] *Brehm*, 746 A.2d at 256 (citing E. Norman Veasey, *An Economic Rationale for Judicial Decisionmaking in Corporate Law*, 53 BUS. LAW. 681, 699–700 (1998)). *But see* William W. Bratton, *Game Theory and the Restoration of Honor to Corporate Law's Duty of Loyalty*, *in* PROGRESSIVE CORPORATE LAW 139, 165–68 (Lawrence E. Mitchell ed., 1995). Bratton says that "[t]he very force of the contractarian drive to suppress the moral conception of fiduciary duty testifies to moralism's enduring power." *Id.* at 152.

court, at least, was at best a "good practice" issue and at worst an issue for the legislature rather than the courts.[137] An approach based on formal direct economic relationships, as applied by Chancellor Chandler, appears to meet all the requirements of Delaware law in this respect.

As we will see, however, the approach had a great disadvantage as well. By ignoring the reality of this litigation as a specific and unique occurrence played out against a dynamic set of powerful relationships, the court of chancery effectively rendered judgment over fantasy. This judicial approach and the nature of its expressions is hardly new and thus—standing alone—not very interesting for the additional insights it might provide about the judicial craft or the consequences of its application.[138] In the particular socio-cultural context of early twenty-first century America, however, Chancellor Chandler does provide a useful illustration of the way corporate fiduciary duty formalism is both grounded on and masks embedded notions of class, race, and gender.

A telling example of the approach adopted by the Chancellor was his analysis of the duty of care claims. Plaintiffs asserted that "the directors were not properly informed before they adopted the Employment Agreement because they did not know the value of the compensation package offered to Ovitz."[139] The plaintiffs based this assertion on statements of a Disney financial advisor.[140] This advisor had been quoted as suggesting that "'[n]obody quantified [the total cost of the severance package].'"[141] Consequently, plaintiffs suggested that the board approved the Employment Agreement without calculating its costs.[142] The

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137 *See Brehm*, 746 A.2d at 256 & n.30 (citing Williams v. Geier, 671 A.2d 1368, 1385 n.36 (Del. 1996)). The Supreme Court singled out the amicus brief filed by the Council of Institutional Investors for its discussion of corporate "best practice." *Id.* at 256 n.30.

138 For a discussion of a power theory of judicial decision making, see Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges*, 12 WM. & MARY BILL RTS. J. 117 (2003) (examining the nature and basis of western judicial authority in the context of historical priestly functions); Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Courts, Law and the Interpretive Process*, 20 B.C. THIRD WORLD L.J. 291, 291 (2000) (examining the "cultural basis of judicial authority").

139 *In re* Walt Disney Co. Derivative Litig., 731 A.2d 342, 361 (Del. Ch. 1998), *aff'd in part, rev'd in part sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

140 *See id.* at 361–62.

141 *See id.* at 361; *see also Brehm*, 746 A.2d at 251.

142 *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 361–62.

court of chancery rejected this argument. As long as the board of directors understood the manner in which the contract terms would be applied—as long as the terms of the Employment Agreement had been reviewed by them in whatever form the board deemed appropriate—the fact that the board chose not to inform itself of the cost of the application of those provisions was irrelevant, at least from a legal perspective.[143] The Chancellor applied a peculiar form of the *rule of reason*: a board is not required to be informed of every fact but just to be reasonably informed.[144] The court concluded that plaintiffs failed to plead facts giving rise to a reasonable doubt that the board, as a matter of law, was not reasonably informed of the issues relating to the Employment Agreement.[145]

By 2003 the court of chancery, reviewing a sufficiency challenge to the plaintiffs' second amended derivative complaint, concluded that, as amended, the "new allegations give rise to a cognizable question whether the defendant directors of the Walt Disney Company should be held personally liable to the corporation for a knowing or intentional lack of due care in the directors' decision-making process regarding" the Employment Agreement.[146] Despite Chancellor Chandler's reluctance to "second-guess the business judgment of a disinterested and independent board of directors,"[147] the Chancellor agreed that plaintiffs had alleged enough facts to suggest that "the Disney directors failed to exercise *any* business judgment and failed to make *any* good faith attempt to fulfill their fiduciary duties to Disney and its stockholders."[148] Interestingly, the Chancellor continued to assert that the Disney board was disinterested and independent. It is to these two issues that we now turn our attention.

C. *The Analytics of Director Independence in* In re Walt Disney Co. Derivative Litigation[149]

The narrow formalism employed by the Chancellor is

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[143] *See id.*

[144] *Id.*

[145] *Id.*

[146] *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 278 (Del. Ch. 2003).

[147] *Id.*

[148] *Id.*

[149] 731 A.2d 342 (Del. Ch. 1998), *aff'd in part, rev'd in part sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

nowhere better evidenced than in the analysis of Eisner's interest in the Employment Agreement and Eisner's domination and control of the Disney board. Chancellor Chandler began by stressing the need for neutral analysis.[150] When the Delaware General Corporation Law is followed, a large severance package is just as valid as a decision to authorize a loan, and courts do not overrule a board's decision to approve and honor a severance package merely because of its size.[151] The Chancellor stressed that Michael Ovitz "gave up his lucrative position at CAA to come to Disney and was rewarded handsomely for it, both in salary . . . and in potential severance."[152] After fourteen months, it became apparent that Ovitz was not working out as president so he left the company, at which time "the Board awarded him the significant amount of severance detailed in his employment agreement."[153] In determining if the board exceeded its authority in providing a severance package that is possibly larger than any ever paid,[154] the court would analyze the plaintiffs' claims using the same tools that it would use in any corporate law case: the requirement of demand or its excusal, the *Aronson v. Lewis*[155] test, the basic rules of disclosure, and the business judgment rule.[156]

The plaintiffs asserted four claims[157] in connection with the Employment Agreement.[158] The plaintiffs' first claim alleged that the board breached its duties of loyalty, good faith, and due care by entering into the Employment Agreement with Ovitz and

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[150] *Id.* at 350–51 (emphasizing that the exceptionally large dollar amount involved would not bias the court's application of conventional corporate governance laws).

[151] *See id.* at 350.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] 473 A.2d 805, 814 (Del. 1984), *overruled in part by* Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2000) ("In a Rule 23.1 determination of pleading sufficiency . . . our scope of review must be *de novo.* To the extent *Aronson* and its progeny contain dicta expressing or suggesting an abuse of discretion scope of review, that language is overruled.").

[156] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 350–51.

[157] Only the first two claims will be discussed in this Article. The third count was asserted against Ovitz for breaching the Agreement and the fourth count was asserted against the current directors for breach of fiduciary duty of disclosure. *Id.* at 353.

[158] *Id.*

then terminating him without cause.[159] Secondly, the plaintiffs' alleged waste stemming from the Employment Agreement.[160] The case first came to Chancellor Chandler[161] on the defendants' motion to dismiss the complaint,[162] arguing that the plaintiffs failed to make a demand on the board or to allege particularized facts that excuse such a demand.[163] Defendants also argued that plaintiffs' allegations failed to state a claim against them because Disney's certificate of incorporation bars liability for claims based on a breach of the duty of care.[164]

1. Eisner's Interest in the Transaction: The Basis of the Initial Breach of Fiduciary Duty and Waste Claims

The court of chancery first looks at whether the plaintiffs are excused from making a demand on the board before filing a lawsuit.[165] Under *Aronson*, demand is considered excused only if the facts alleged create a reasonable doubt that: "1) [at least half of] the directors are disinterested and independent; or 2) the challenged transaction was otherwise the product of a valid exercise of business judgment."[166] In order to create a reasonable

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159 *Id.*

160 *Id.*

161 According to the official web site maintained by the State of Delaware:

> The Honorable William B. Chandler III was appointed Chancellor of the Delaware Court of Chancery in 1997, where he had served as Vice Chancellor since 1989. He also served as Resident Judge of the Delaware Superior Court from 1985 to 1989. He received his law degrees from the University of South Carolina School of Law and the Yale Law School and his undergraduate degree from the University of Delaware.
>
> Before his appointment to the Court, Chancellor Chandler was an associate with Morris, Nichols, Arsht & Tunnell and he served as Legal Counsel to former Governor Pete duPont. The Chancellor taught commercial law, legislative process, and remedies for two years at the University of Alabama School of Law. He is presently a member of the American Law Institute and the Delaware Bar Association.

First State Judiciary, Court of Chancery Judges, http://courts.delaware.gov/Courts/Court%20of%20Chancery/?jud_off.htm (last visited Oct. 9, 2005).

162 *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 353. Under Delaware law, there are two ways to dismiss a motion. "Where under any set of facts consistent with the facts alleged in the complaint the plaintiff would not be entitled to judgment, the complaint may be dismissed as legally defective. . . . [W]here a plaintiff's allegations are merely conclusory . . . they are similarly insufficient to withstand a motion to dismiss." *Id.* (footnote omitted).

163 *See id.*

164 *Id. See* DEL. CODE ANN. tit. 8, § 102(b)(7) (Supp. 2004).

165 *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 353.

166 *Id.* at 354.

doubt that a director is disinterested, it must be demonstrated that "a director 'will receive a personal financial benefit from a transaction that is not equally shared by the stockholders' or . . . that 'a corporate decision will have a materially detrimental impact on a director, but not on the corporation and the stockholders.'"[167] A board member is considered disinterested if he does not stand to benefit financially or suffer materially from the decision.[168]

Relying on their reading of the standard in *Aronson,* plaintiffs offered several reasons to support their allegations of board domination. "Eisner was personally interested in obtaining the Board's approval of the . . . Agreement" and "a majority of the Board could not exercise business judgment independent of Eisner in deciding whether to approve the . . . Agreement."[169] Of the fifteen board members who would have reviewed the plaintiffs' demand, at least twelve of them "had such strong ties to Eisner that they would not have been able to make an impartial decision . . . ."[170] The plaintiffs suggested that Eisner's personal relationship with Ovitz caused Eisner to be interested in obtaining the board's approval of the Employment Agreement.[171] The Chancellor found no support for this theory under Delaware law:[172] "The fact that Eisner has long-standing personal and business ties to Ovitz cannot overcome the presumption of independence that all directors, including Eisner, are afforded."[173] Plaintiffs then alleged that Eisner had an interest in the Employment Agreement as a vehicle for maximizing his own income from Disney.[174] By setting a high baseline for compensation, plaintiffs suggested, Eisner would be able to negotiate a better package for himself.[175] The Chancellor rejected this argument,[176] inferring from the facts an opposite motivation: At the time of the negotiation of the Employment Agreement, Eisner owned several million options in

167 *Id.* (quoting Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993)).

168 *Id.*

169 *Id.* at 355.

170 *Id.*

171 *See id.*

172 *Id.*

173 *Id.*

174 *See id.*

175 *See id.*

176 *See id.*

Disney stock, so it would not have been in Eisner's economic interest potentially to affect the value of that interest negatively through the issuance of millions of additional options to Ovitz.[177]

2. The Chancery Court's Domination Analysis

Plaintiffs claimed that certain director's individual ties to Eisner "create[d] at least a reasonable doubt . . . that the Disney Board of Directors would have honestly considered a demand in connection with the approval of the Employment Agreement."[178] The court noted, however, that "'speculation on motives . . . [is] wholly insufficient to establish a case of demand dismissal.'"[179] While the court admitted that some of the issues were close calls, it held that most of the allegations did not survive under *Aronson*.[180] The court found that demand under the first prong of *Aronson* had not been met because a majority of the directors were either disinterested or not dominated by an interested person in reviewing and approving the Employment Agreement.[181] Had the plaintiffs been able to raise a reasonable doubt about the independence of a sufficient number of directors with respect to the board's consideration of Ovitz's compensation, then demand would have been excused.[182] In support of the court's conclusion, Chancellor Chandler provided a detailed analysis of the relationship between Eisner and twelve members of the Disney board that plaintiffs asserted lacked independence. Together, these twelve, along with Eisner, constituted a majority of the Disney board.

a. Roy E. Disney

The plaintiffs alleged that Roy Disney was unable to exercise independent judgment because he was an employee of Disney whose salary was determined by the board and, as an officer, he was accountable to and subject to termination by Eisner.[183] The court rejected the plaintiffs' argument, reasoning that Mr. Disney could exercise independent judgment because his compensation

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177 *See id.* at 355–56.
178 *Id.* at 356.
179 *Id.*
180 *See id.*
181 *See id.* at 361.
182 *See id.*
183 *Id.* at 356.

was significant, his compensation was set by the board and not solely by Eisner, and he and his family owned almost 8.4 million shares of stock.[184] The court inferred from these economic facts that Mr. Disney, as an "economically rational individual," would give priority to protecting the value of his own economic interests over those of Eisner and would not risk those interests "in order to placate Eisner."[185] Because Roy Disney was very wealthy and because he appeared to have a powerful and influential voice within Disney itself, he had no reason to fear Eisner and therefore could not be said to be dominated by Eisner.

b. Sanford M. Litvak and Richard A. Nunis

Plaintiffs argued that, like Roy Disney, both Nunis and Litvak were well-paid officers of Disney whose salaries were determined by the board of directors and whose jobs and careers were dependent on Eisner's good will. The court of chancery recited the general rule that neither lost his presumption of independence merely because he was an officer.[186] The court of chancery found no merit in the argument that either was interested in the Employment Agreement on the basis of a general desire to raise compensation levels throughout the company.[187] Neither was as wealthy as Roy Disney, nor was either as influential within the company as shareholders. Because they were poorer—in relative terms—and less well connected, they might be more dependent on their jobs—and the money and power it provided—and on that basis might be beholden to Eisner.[188] Because the court of chancery was reluctant to find that Eisner was interested in the Employment Agreement, however, neither Litvack's nor Nunis's dependence on Eisner had legal effect.

c. Stanley P. Gold

The plaintiffs argued that Gold was beholden to Roy Disney because he was Mr. Disney's personal attorney as well as the president and CEO of a company wholly-owned by Mr. Disney.[189]

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184 *Id.*
185 *Id.* at 356–57.
186 *See id.* at 357.
187 *Id.*
188 *See id.*
189 *Id.*

That relationship of domination was sufficient to call the Employment Agreement action into question only if Eisner, in turn, dominated Roy Disney.[190] The court of chancery was not persuaded. The chain of domination was too tenuous. In any case, the court of chancery was unconvinced that Disney was dominated by Eisner.[191]

d. Robert A.M. Stern

"Plaintiffs alleged that director Robert A.M. Stern's financial dealings . . . were sufficiently large to cast a reasonable doubt upon his ability to consider a demand disinterestedly."[192] Stern had been commissioned to design several buildings for Eisner and Disney for which his architectural firm had collected millions of dollars in fees.[193] The court of chancery agreed that this raised a reasonable doubt that Stern could exercise judgment independent of Eisner's influence.[194]

e. E. Cardon Walker

The plaintiffs asserted that Walker was not independent because he consulted for Disney, invested in Disney films, and received substantial sums for these investments.[195] Chancellor Chandler limited his analysis; the only facts relevant to an independence analysis in Walker's case related solely to the formal contractual arrangements between Walker and Eisner, of which there were none.[196] Because the consulting arrangement

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[190] *See id.*

[191] *See id.*

[192] *Id.*

[193] *Id.*

[194] The court of chancery explained:

> A number of factors affect my judgment. On the one hand, Plaintiffs admit that the fees that Stern's architectural firm have received are in decline, and that Eisner has gone on record stating that "Stern is unlikely to get new Disney contracts while on the Board." Nevertheless, fees have continued to flow from Disney to Stern's firm, and the fees received in the past, from both Disney and Eisner, have been quite substantial.

Id. at 357–58.

[195] *Id.* at 358. Disney's SEC filings, however, reveal that E. Cardon Walker had been a director since 1960, was president from 1971 to 1977, and Chairman of the Board and CEO from 1980 to 1983. From 1984 through 1989, he provided consulting and other services to the company. Walt Disney Co., Proxy Statement (Schedule 14A), at 6 (Jan. 9, 1997), *available at* http://sec.gov/Archives/edgar/data/1001039/0000898430-97-000058.txt.

[196] *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 358.

was between Walker and Disney rather than between Walker and Eisner, it provided no basis for finding a relationship of dependence between Walker and Eisner. Chancellor Chandler apparently gave no weight to the possibility that Eisner could affect Walker's compensation under the consulting agreement, without breaching its terms, by determining the amount of consulting Walker would do. Moreover, the court of chancery gave great weight to the fact that the contract itself pre-dated Eisner's tenure at Disney. On that basis, the Chancellor found that plaintiffs had not demonstrated Walker's lack of independence.[197]

f. Gary L. Wilson

Wilson is alleged to have lacked independence and was beholden to Eisner because Eisner rewarded Wilson when he retired from Disney and because Disney paid for a design done by Wilson's wife.[198] The court of chancery found that Wilson was independent. The Chancellor rejected gratitude for past largesse as a basis for finding lack of independence, at least in the absence of evidence of an expectation of additional compensation, the amount of which could be controlled by Eisner.[199] The only current payment alleged was in the form of compensation to the design firm of Wilson's wife for work performed. The amount of the compensation—$121,122—was deemed immaterial to Wilson who the Chancellor noted was a man "who received a bonus and stock options that, by Plaintiffs' own estimations, have resulted in over $70 million in income realized so far."[200] Thus, it seems the $70 million in payments to date was insufficient to raise a concern about gratitude—and control—but singularly important in defeating a claim that a current payment, very small by comparison, did not affect Wilson's independence.

g. Leo J. O'Donovan

It is alleged that O'Donovan, who at the time was the president of Georgetown University, was incapable of rendering independent business judgment because Georgetown University was the alma mater of one of Eisner's sons as well as the

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197 *See id.*
198 *Id.*
199 *See id.*
200 *Id.*

recipient of over $1 million in donations from Eisner since 1989.[201] To avoid a determination of control, the Chancellor had to distinguish *Lewis v. Fuqua*.[202] Chancellor Chandler accomplished this on two grounds. First, he suggested that in order for lack of independence to be shown under *Fuqua*, plaintiffs would have to show that there were substantial political and financial dealings between the dominating person (Eisner) and the beholden person (O'Donovan).[203] That element was missing in this case because Eisner and O'Donovan did not have substantial dealing outside of their relationship at Disney and Eisner's donations to Georgetown. Second, a critical element for a finding of dependence in these circumstances was the existence of a pattern of "interlocking directorship[s]."[204] That element was missing in this case because Eisner was not on the board of Georgetown. Even in the absence of the standards in *Fuqua*, the Chancellor was unconvinced that "Eisner exerted such an influence on O'Donovan that O'Donovan could not exercise independent judgment as a director."[205] First, O'Donovan could receive no personal benefit from Eisner.[206] That seemed to provide O'Donovan with additional insulation from allegations of susceptibility to influence. The Chancellor was unaffected, it seems, by the possibility that Eisner might be induced to make further donations to Georgetown or such other

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201 *Id.* at 359.

202 502 A.2d 962 (Del. Ch. 1985).

203 *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 359. In *Fuqua*, Sanford, the president of Duke, had received over $10 million in donations at a time when he had numerous political and financial dealings with the dominating board member. *Fuqua*, 502 A.2d at 966–67.

204 *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 359. Sanford and Fuqua served as directors together both on the board whose actions were being questioned as well as on the Board of Trustees of Duke University. *Fuqua*, 502 A.2d at 966–67.

205 *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 359.

206 The Chancellor tells us that O'Donovan, as a Jesuit and a priest, was forbidden from collecting the usual director's fees. *Id.* The company's SEC filings, however, suggest another version not considered by the Chancellor:

> Nonemployee directors may defer payment of all or part of their fees under the Company's Deferred Compensation Plan for Outside Directors. Such deferrals are generally until termination of the director's service with the Company or until he or she reaches a specified age. Ms. Bowers, Fr. O'Donovan and Mr. Murphy are currently participating in this plan.

Walt Disney Co., Proxy Statement (Schedule 14A), at 6 (Jan. 9, 1997), *available at* http://sec.gov/Archives/edgar/data/1001039/0000898430-97-000058.txt. It is possible, however, that O'Donovan would never have received the benefit directly.

worthy causes as might be dear to the heart of Father O'Donovan during the period in question or thereafter and that such amenability to donation might depend on Eisner's good will.

h. George W. Mitchell

George Mitchell was a well-known former United States Senator with wide personal interests.[207] The independence of Mitchell was questioned because of his relationship as special counsel to a law firm that Disney had engaged on several matters and to which Disney had paid fees of $122,764 in 1996.[208] Mitchell also served as a consultant to Disney for which Mitchell received $50,000 in 1996.[209] The Chancellor, however, found these relationships insufficient to create a relationship of domination between Eisner and Mitchell.[210] First, because Mitchell was "special counsel" rather than "partner" in the law firm in question, it was not clear that he shared in the profits generated by the fees paid by Disney.[211] Since he did not personally and directly benefit from the fees received by the law firm, the relationship between the firm and Disney was discounted. Second, the Chancellor thought the $50,000 in fees received was immaterial to Mitchell, "a nationally known legal and political figure."[212]

i. Irwin E. Russell

Russell served as Eisner's personal counsel and had a "long history of personal and business ties to Eisner."[213] Russell's office was listed as Eisner's primary residence.[214] Russell represented Eisner in connection with Eisner's Compensation Agreement.[215] In addition, plaintiffs asserted that a large portion of the total amount of fees received by Russell's firm originated with Eisner.[216] The court of chancery concluded that "[p]laintiffs

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207 *See* United States Congress, George John Mitchell—Biographical Information, http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000811 (last visited Oct. 10, 2005).

208 *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 360 (Del. Ch. 1998).

209 *Id.*

210 *See id.*

211 *Id.*

212 *Id.*

213 *Id.*

214 *Id.*

215 *Id.*

216 *Id.*

ha[d] raised a reasonable doubt as to Russell's independence of Eisner's influence for the purpose of considering a demand."[217]

j. Sidney Poitier

Sidney Poitier, a well-known actor,[218] was alleged to have been beholden to Ovitz (rather than Eisner).[219] The plaintiffs alleged that Poitier could not exercise independent business judgment with respect to the Employment Agreement because Poitier had been a long time client of both CAA and Ovitz through which he had earned millions of dollars.[220] Despite the fact that Poitier and Ovitz had a long-time personal and professional relationship, the court of chancery found no conflict.[221] First, Ovitz was no longer associated with CAA and, second, "it does not follow that Poitier is incapable of considering Ovitz's compensation package without bias."[222] The court of chancery would have found lack of independence only had plaintiffs been able to show that Poitier continued to receive material benefits from CAA while Ovitz was connected to CAA.[223]

k. Reveta Bowers[224]

Bowers was the principal of the elementary school that Eisner's children attended.[225] The plaintiffs argued that she was beholden to Eisner because of her low salary as an educator compared to the payments and stock options she received for her

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[217] *Id.*

[218] Sir Sidney Poitier, a Knight Commander of the British Empire, is an African-American actor born in Miami, Florida in 1927 and raised in the Bahamas. He received the Academy Award for Best Actor in 1963 for his role in Lilies of the Field, and received the Academy's Lifetime Achievement Award in 2002. He has served as the Bahamian Ambassador to Japan since 1997. In addition to a role in the feature film The Jackal (Universal Studios) in 1997, Sir Poitier engaged in several documentary projects in the 1990s. *See* PBS, American Masters: Sidney Poitier, http://www.pbs.org/wnet/americanmasters/database/poitier_s.html (last visited Oct. 10, 2005); *see also* The Internet Movie Database, Biography for Sidney Poitier, http://www.imdb.com/name/nm0001627/bio (last visited Oct. 10, 2005).

[219] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 360–61.

[220] *Id.*

[221] *See id.* at 361.

[222] *Id.*

[223] *See id.*

[224] For a detailed description of the chancery court's analysis, *see supra* notes 23–33 and accompanying text.

[225] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 359.

services as a director of Disney.[226] The court of chancery declined the plaintiffs' invitation to find Bowers dominated by Eisner.[227] Chancellor Chandler grounded this conclusion on one of two alternative bases. First, the Chancellor determined that all the plaintiffs had done was allege that Bowers was dominated because she received fees for her work as a director.[228] "[W]ithout more" this bare fact was insufficient to establish a financial interest, and any other conclusion "would [] overrule the Delaware Supreme Court."[229] The alternative basis for the Chancellor's determination rested on policy grounds.[230] Any decision that would apply a financial interest analysis where people of relatively modest means—what the Chancellor termed "regular folks"[231]—would effectively create a presumption that poor people are dominated by the richer people who helped elevate them to board membership.[232] The court of chancery was unwilling to reach that conclusion and use Bowers to facilitate the construction of a presumption of dependence of the poor.[233]

3. Contradictions in a Small Space: The Difficulties of Formalist Economic Analysis of Dependence

From the cases available, Chancellor Chandler distilled a number of rules that he attempted to use consistently in evaluating the various claims challenging the independence of the directors. It is not clear, though, what rules were actually distilled or that the Chancellor actually consistently applied the rules extracted from the cases. I will suggest here that the Chancellor attempted to frame the factual inquiry of dependence within a fairly narrow formalist economic framework.[234] The object was fairly straightforward as well—to avoid the creation of presumptions that particular forms of relationships between or

226 *Id.*
227 *See id.* at 360.
228 *See id.*
229 *Id.*
230 *See id.*
231 *Id.*
232 *See id.*
233 *See id.*
234 Chancellor Chandler explained: "Plaintiffs allege that the personal interrelationships among the directors somehow render the Director Defendants interested in the disputed transaction. Demand is not excused, however, just because directors would have to sue 'their friends, family and business associates.'" *Id.* at 354 n.18 (citing Abrams v. Koether, 766 F. Supp. 237, 256 (D.N.J. 1991)).

with directors, or otherwise between actors in a corporation, are hierarchical and therefore more likely to lead to domination.[235] This skepticism has an underlying policy basis: the preservation of the broad flexibility with respect to governance that has been the hallmark of Delaware law for several generations. It is from this presumption of independence that Chancellor Chandler began his analysis.[236] Assuming that Chancellor Chandler was correct—an assumption I challenge in the next section—we might profit from a close analysis of the rule and its application in *Disney*.

The standard for determining actionable domination and control is simple to articulate, and the Delaware courts have indulged in its articulation with some frequency. Chancellor Chandler articulated it as a form of a process standard: "Plaintiffs must demonstrate first that Eisner was personally interested in obtaining the Board's approval of the Employment Agreement and, second, that a majority of the Board could not exercise business judgment independent of Eisner in deciding whether to approve the Employment Agreement."[237] The Chancellor derived this version of the standard from two prior versions of the standard memorialized in prior Delaware Supreme Court opinions.[238]

Thus, the court of chancery begins with the initial and only permitted presumption in the context of domination analysis: Directors are presumed independent. To overcome that standard

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[235] Thus, Chancellor Chandler embraced a reading of "the Delaware rule that '[s]peculation on motives for undertaking corporate action are [sic] wholly insufficient to establish a case of demand dismissal.'" *Id.* at 356 (citing Grobow v. Perot, 539 A.2d 180, 188 (Del. 1988)).

[236] Thus, for example, as the *Aronson* court had explained: "The requirement of director independence inheres in the conception and rationale of the business judgment rule. The presumption of propriety that flows from an exercise of business judgment is based in part on this unyielding precept." Aronson v. Lewis, 473 A.2d 805, 816 (Del. 1984). *See, e.g.*, 1 RODMAN WARD, JR., EDWARD P. WELCH, & ANDREW J. TUREZYN, FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 141.2.2.1 (4th ed. 2005).

[237] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 355.

[238] *See id.* at 355 n.19. The first of these memorializations was from *Aronson*: "There must be coupled with the allegation of control such facts as would demonstrate that through personal or other relationships the directors are beholden to the controlling person." *Aronson*, 473 A.2d at 815. The second was from *Grobow*: "This would require plaintiffs to allege with particularity that the . . . directors were dominated or otherwise controlled by an individual or entity interested in the transaction." Grobow v. Perot, 539 A.2d 180, 189 (Del. 1988).

plaintiffs will have to "show a reasonable doubt as to the disinterest of at least half of the directors."[239] Twice, the Chancellor also cited to what he viewed as the basis of the character of the proof required: "Plaintiffs must overcome the Delaware rule that '[s]peculation on motives for undertaking corporate action are [sic] wholly insufficient to establish a case of demand dismissal.'"[240]

There were a number of other rules and presumptions cited by the Chancellor in his analysis of the proof submitted by plaintiffs with respect to the domination of the Disney Board of Directors. These rules, unlike the more general standard, appeared to apply only to individuals, or smaller sets of director defendants.

a. Disney/Litvack/Nunis

"I note at the outset the general Delaware rule that 'the fact that they hold positions with the company [controlled by Eisner] . . . is no more disqualifying than is the fact that he designated them as directors.'"[241] In addition, independence, or lack of independence, can be shown by an analysis of the difference between the sums earned that could be influenced by the dominating director and other wealth.[242]

b. Gold/Walker/Russell

The relationship between the dominated and dominating party must be direct in order to overcome the presumption.[243]

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239 *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 354 (citing Steiner v. Meyerson, Civ. A. No. 13139, 1995 WL 441999, at *21 (Del. Ch. July 19, 1995)).

240 *Id.* at 356 (citation omitted); *see also id.* at 357 n.26.

241 *Id.* at 356 (citation omitted).

242 Thus, the Chancellor determined that Roy Disney could not be dominated by Eisner. Roy Disney's salary, stock options, and director remuneration were very small compared to the very large share stake Roy Disney held in Disney, independent of the control of Eisner. By contrast, Litvack and Nunis might be dominated by Eisner. Their salaries at Disney, though set by the Board as a whole, were, to some extent, influenced by Eisner. Moreover, the men's other assets, as an overall proportion of their wealth, were more limited. Eisner's potential control of so large a source of the men's income might be enough to overcome the presumption of independence. *Id.* at 356–57.

243 Gold, as Roy Disney's attorney, could be dominated by Disney but not by Eisner absent a showing that Disney himself was dominated. In the case of Walker, the relationship between Walker and Disney was not determinative of a possibility of domination because the sums Walker received from Disney resulted from a contract established prior to Eisner's domination of the Disney Board. *Id.* at 357–58.

Serving as the attorney for the dominating person, rather than for the entity that is subject to the dominating person's will, strongly suggests domination.[244] But domination is still subject to an income test—the fees received in such service must be substantial.[245]

c. Stern / Wilson / Mitchell

The Chancellor rejected the "subject to a controlling influence that could reasonably be expected to affect the director's judgment" standard in favor of a standard requiring factual evidence of actual influence.[246] On the other hand, where an independent contractor continues to receive substantial fees from the company and had received substantial fees from the dominating person in the past, that payment may be sufficient to overcome the presumption of independence.[247] In order to

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[244] Russell was Eisner's personal attorney, and Russell's law office served as Eisner's official address. In addition, Russell was the registered agent for a number of Eisner entities, and Russell represented Eisner in the negotiation of Eisner's own compensation agreement. *Id.* at 360.

[245] Russell's firm derived a substantial part of its total income from Eisner. *Id.* Compare that to the fees received by either Wilson or Mitchell (insignificant) or Stern (material). *See* discussion *infra* notes 246–50, 259–61.

[246] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 357 n.28 (rejecting the approach of the Revised MODEL BUS. CORP. ACT § 7.44(c) (1996) and ALI PRINCIPLES OF CORP. GOVERNANCE § 1.23(1) (1994)). The Chancellor cited three cases in support of this approach. *Maldonado v. Flynn*, 597 F.2d 789, 794 (2d Cir. 1979), was cited for the proposition that the receipt of substantial legal fees is inadequate to establish domination absent facts showing a direct connection between the payment of the fees and the action of the dominated director. *Brickman v. Tyco Toys, Inc.*, 722 F. Supp. 1054, 1063–64 (S.D.N.Y. 1989), was cited for the proposition that the mere existence of an attorney client relationship is not sufficient to overcome the presumption of director independence. Lastly, *Tabas v. Mullane*, 608 F. Supp. 759, 768 (D.N.J. 1985), was cited to support a New Jersey court's interpretation of Delaware law to the effect that an attorney client relationship generating $4.6 million in fees, standing alone, was insufficient to demonstrate interest on the part of the attorney director without further proof of other improprieties. The Chancellor, however, did not appear to rely on Delaware cases for this proposition and did little to suggest why the standard suggested in the *Model Business Corporation Act* did not reflect Delaware law.

[247] *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 358. Both Stern and Wilson received payments from Disney, but Stern's firm also received payments from Eisner in the past in amounts the Chancellor determined to be substantial. The $121,122 fee paid to Wilson's wife's firm was deemed insubstantial by comparison to Wilson's $70 million total income, much of which had been paid by Disney. *See id.* Mitchell received fees directly from Disney for consulting work. *Id.* It is also likely that Disney and Eisner would have a say in the volume of future work. But the amount received for those services was $50,000, a sum the Chancellor found

determine whether sums received are substantial, the court will review the amounts received in light of the person's position in society.[248] Otherwise, the court will compare the size of the fees to the person's other income[249] or will look to whether the fees for work are continuing and otherwise substantial in comparison to the income of the firm with which a director may be associated.[250]

d. O'Donovan

Where the relationship between dominating and dominated parties is one involving charitable or other forms of donation, the presumption of independence can be overcome only when the plaintiff can show multiple political and financial dealings between the parties and where each serves as a director in the entity in which the other dominates.[251]

e. Bowers

Payments of director's fees "without more, do not establish any financial interest"[252] and great disparities between amounts earned as a director and other remuneration without more does not demonstrate lack of independence.[253]

f. Poitier

The strength of a prior business or personal relationship,

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insignificant. *Id.* at 360. The Chancellor discounted any likelihood that Eisner's potential influence on the rate of future consulting service assignments would influence Mitchell. Mitchell's firm also received fees for work done for Disney. Here again, the amount of the fees—about $122,764—was deemed immaterial for purposes of overcoming the presumption of Mitchell's independence. *See id.*

248 "Plaintiffs have not alleged that the $50,000 in consulting fees was even material to Mitchell, a nationally known legal and political figure." *Id.* at 360.

249 "The $121,122 payment to Wilson's wife's design firm for services performed is immaterial to Wilson, a man who received a bonus and stock options that . . . have resulted in over $70 million in income realized so far." *Id.* at 358.

250 The Chancellor viewed the statement that Disney would not award additional contracts to Stern as a fact supporting independence. On the other hand, the Chancellor found the fact that Stern's firm continued to receive substantial fees to be a strong negative. *See id.* at 357–58.

251 *See id.* at 359 (interpreting Lewis v. Fuqua, 502 A.2d 962 (Del. Ch. 1985)). In a sense this statement appears to be a contextualized version of the rule applied to Stern. *See supra* note 241. According to the Chancellor, actual misconduct proximately caused by the relationship of domination is required. Anything else serves to create a presumption of lack of independence based merely on status. *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 359.

252 *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 360.

253 *See id.*

without more, is insufficient to overcome the presumption of independence.[254] This rule is sometimes combined with the rule of direct relationship.[255] Personal relationships fall within the general rule of conjecture and speculation and thus may be ignored by the Chancellor in determining lack of independence.[256] But I also suspect the "Mitchell celebrity rule" might have been applied here as well.[257]

4. Series of Interconnected Rules of Limited Applicability

The Chancellor's episodic descriptions of the additional permutations of the ingredients of the legal standard for overcoming the presumption of director independence can be generalized as a series of interconnected rules that increase the burden on plaintiffs to prove that a director may be dominated and thus not independent.

a. The Rule of Against Reliance on Speculation

"Speculation on motives for undertaking corporate action are wholly insufficient to establish a case of demand excusal."[258] This is a rule of general applicability unless the director is well known, in which case it may not apply in the same way. Thus, for example, the Chancellor had no problem speculating that former Senator Mitchell's prominence made the receipt of $50,000 in fees, and control of the prospects of earning more fees immaterial to Mitchell.[259] Likewise, apparently little explanation was necessary to conclude that Poitier was able to consider

[254] *See id.* at 361. Poitier had been represented by CAA for years and earned millions of dollars through the efforts of that agency during the time it was headed by Ovitz. *See id.* at 360. The Chancellor then suggested that his "judgment might be otherwise if Poitier continued to receive material benefits from CAA and Ovitz was concurrently involved with that firm." *Id.* at 361.

[255] *See supra* note 242 and accompanying text. Thus, the Chancellor discounted that relationship, or the money it produced, on the grounds that while the relationship might continue to exist, by the time of the termination of the Employment Agreement, Ovitz was no longer head of CAA. *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 361. The Chancellor, however, does not explain how that affects the relationship at the time of the negotiation of the Employment Agreement, while Ovitz was still in transition from CAA to Disney. *See id.* at 360–61.

[256] "Such an assertion is based on conjecture, and Plaintiffs have not raised a reasonable doubt as to Poitier's independence." *Id.* at 361.

[257] *See supra* Part I.C.3.c. and accompanying footnotes.

[258] Grobow v. Perot, 539 A.2d 180, 189 (Del. 1988).

[259] *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 360.

Ovitz's "compensation package without bias."[260]

b. The Rule of Direct Relationship and Quid Pro Quo

Financial relationships that are indirect carry little weight in assessments of domination, even where the dominating person controls the entity with which the dominated person has a relationship. Thus, the court attached importance to the fact that, although Cardon Walker had a significant ongoing financial relationship with Disney, the arrangement was not personal to Eisner. Wilson's receipt of substantial amounts from Disney was discounted for failure to show a direct connection between the receipt of financial benefit and approval of the Employment Agreement.[261] Institutional "beholding" does not give rise to an inference of dependence. Likewise, the fact that Senator Mitchell's law firm—rather than Senator Mitchell himself—received fees, or the fact that Wilson's spouse's firm—rather than Wilson himself—received fees was important for determining independence.[262] The fact that Stern's architectural firm, rather than Stern himself, earned architectural fees, however, was not enough to insulate Stern from a suggestion of domination because the sums received were significant and their receipt ongoing.[263]

c. The Rule that Relative Size Matters

Roy Disney and his family have personal wealth measured in the billions of dollars.[264] Sanford Litvack and Richard Nunis do not. Disney is unlikely to be dominated even though he receives a substantial salary as a Disney officer. Litvack and Nunis may be dominated because they each receive a substantial salary as a Disney officer.[265] This rule is simple but subject to an important exception. A different rule applies when the disparity between pay from Disney and other sources of revenue are not directly connected. In that case, even substantial payments may be discounted as forming less of a connection between dominated

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260 *See id.* at 361.
261 *See id.* at 358.
262 *See id.* at 360.
263 *See id.* at 357.
264 Dominic Rushe, *The Red Raider; Business Focus*, SUNDAY TIMES (U.K.), May 15, 2005 (Business Section), *available at* http://www.timesonline.co.uk/article/0,,2095-1612284,00.html.
265 *See supra* Part I.C.2.b and accompanying footnotes.

and non-dominated individuals. On the other hand, the different rule may be related to the character of the financial connection to the corporation. The "size matters" rule may apply to salaries and fees for services as employees, such as Stern's compensation. But the rule may not apply to "special case" fees, such as for services as directors. Alternatively, the rule of financial materiality may not apply, especially to school principals and other "regular folks," such as Bowers.[266] This "regular folks" exception applies irrespective of any other relationship between the director and the dominating party.

d. The Rule of Intimate Relationship

Giving money to an organization headed by a director who is under challenge does not overcome the presumption of director independence from the donor. This is true even if the sums given are substantial, as in O'Donovan's case,[267] unless the relationship between donor and donee is intimate, extensive, and a breach of the rule of quid pro quo. In the absence of both a personal and professional interconnection, the rule of direct relationship seems to apply.

e. The Rule of Timeliness

For Delaware courts, the past, or even the recent past, can recede to legal insignificance, failing to give rise to an inference of continuing obligation or current disposition.[268] When combined with the rule of direct relationship, the rule becomes a virtual presumption that a past relationship, financial or otherwise, no matter how significant, is immaterial for purposes of determining domination. On the other hand, if fees received were substantial, as the court of chancery suggested they were to Stern, then the rule does not apply. On the other hand, this exception itself does not apply where substantial financial benefits were received by a famous person—Poitier—even where the object of influence is the person who was instrumental in attaining the past benefits for the challenged director.[269]

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[266] *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 360.

[267] *See id.* at 359.

[268] *See id.* at 354 & n.18, 355 & n.20 (describing Delaware precedent that receipt of customary payments and longstanding past relationships are insufficient to demonstrate conflict of interest).

[269] *See id.* at 361 (holding that there was not enough evidence to show that

f. The Rule that Celebrity Matters

Even the relatively poor may avoid the suggestion of domination when they are famous enough. Win an academy award,[270] or serve as a member of the United States Senate,[271] and the other rules may not apply. This applies to fees earned by firms with which one may be connected.[272] The celebrity rule also reduces the importance of business relationships between the celebrity and the corporation.[273] It also applies to business relationships with the former employer of the person whose contract is to be approved.[274] Of course, the courts have not been specific on the nature of the celebrity necessary for application of the presumptions of this rule. Clearly, movie stars and political figures come within its definition of celebrity. Business executives and school principals do not. But it is hard to reconcile this rule, as applied, with the theory advanced by the chancery court in justifying its conclusions of independence.

Taken together, the rules applied by the Chancellor are troublesome. They appear to be more useful for determining interest rather than influence. To use them to determine independence appears to amount to use of a standard with little relevance to the issue. Other rules are situational and thus less than useful for extracting rules for future application.[275] The rules, taken as a whole, do not seem to be predicated on the

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Sidney Poitier was impermissibly conflicted).

270 *See supra* note 218.

271 *See supra* note 207 and accompanying text.

272 *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 360.

273 *Id.* ($50,000 consulting fee not material to former Senator Mitchell).

274 *Id.* at 360-61 (Relationship between Poitier and CAA discounted because with the approval of the Employment Agreement, Ovitz would no longer be connected to CAA).

275 Although my analysis is limited to the Chancellor's *Disney* opinion, that opinion represents a thoughtful and well-executed application of Delaware law in this regard. For the contradictions of situational application of the rules binding the Chancellor, compare *Benerofe v. Cha*, No. 14614, 1998 WL 83081, at *3–4 (Del. Ch. Feb. 20, 1998) (explaining that a director's position as an officer may be sufficient to doubt his independence from controlling shareholder), with *Lewis v. Aronson*, No. 6919, 1985 WL 11553, at *3 (Del. Ch. May 1, 1985) (holding that the fact that directors are officers does not create a presumption of domination). For the same inconsistency with respect to the consequences of employment of a director as the company's outside counsel, compare *Steiner v. Meyerson*, Civ. A. No. 13139, 1995 WL 441999, at *10 (Del. Ch. July 18, 1995) (holding that status as outside counsel may overcome presumption of independence), with *Maldonado v. Flynn*, 597 F.2d 789, 794 (2d Cir. 1979) (ruling that no such presumption is created).

principles of predictability and consistency.

The difficulty of consistently applying the director independence rules as announced by Chancellor Chandler in *Disney* is particularly well illustrated when one attempts to apply them to Reveta Bowers. Indeed, a close analysis of the case suggests that Chancellor Chandler might have applied his own rules to very different effect in *Disney* or that the rules produce a system empowering courts to act arbitrarily by constructing rules that suit preferred outcomes.

Assume all that is known about Reveta Bowers is what is contained in the Chancellor's opinion in *Disney*: Bowers is the principal of an elementary school once attended by the children of Eisner, and, as a principal, her salary is low compared to her fees and the value of her stock options received for services as a director of Disney.[276] We can also assume that, but for the fact that his children attended the school where she was employed, Ms. Bowers might never have come to the attention of Eisner and, therefore, might never have been asked to serve on the Disney Board of Directors.

Reveta Bowers did not own or control a large number of shares of Disney stock.[277] In this respect she more resembled Sanford Litvack and Richard Nunis than Roy Disney. Reveta Bowers did not appear to be independently wealthy or even as wealthy as Litvack or Nunis, much less Disney.[278] Unlike Disney, Litvack, and Nunis, Bowers received no salary as an employee of Disney.[279] But like the three of them, she received fees and stock for her services as director.[280] Those fees are substantial in relation to her salary and have been made possible, and continued, only through the strength of her relationship with Eisner. If the rule of direct relationship and quid pro quo and the rule that relative size does matter were applied to Bowers as they were applied to Disney, Litvack, and Nunis, then, based on the Chancellor's own interpretation, there is a strong case that Bowers was not independent. Bowers' benefit from her association with Disney is greater than that of Litvack and Nunis, though the nature of that benefit—director

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[276] *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 359.
[277] *See id.*
[278] *See id.* at 356–57, 359.
[279] *Id.*
[280] *Id.*

fees versus employment compensation—is different. On the other hand, the relationship between Nunis, Litvach, and Eisner is more direct and ongoing. Eisner is Litvack's and Nunis' boss.[281] Eisner was at one time a consumer of services provided by the establishment that employed Bowers, though he is also critical of Bowers' longevity on the board. This last point might carry little weight if one applies the rule against speculation. Chancellor Chandler, however, also reminded us that while analysis must avoid speculation, it must engage the subjective. The allegations alone may very well establish the reasonable inference that Bowers' position on the board was subject to the will of Eisner and that retaining that position and its benefits was subjectively so important to Bowers that she might question whether she could "consider the corporate merits of the challenged transaction objectively."[282]

In any case, however, this analysis demonstrates the difficulties with the simplistic application of the presumption in *Grobow v. Perot*[283] that the receipt of directors' fees, without more, does not establish a financial interest. First, reliance on *Grobow* is entirely misplaced. No one had suggested that Bowers was interested in the transaction directly, so application of a rule of presumption with respect to interest analysis seems inappropriate.[284] The issue was domination, not interest. Second, even if one could export the *Grobow* presumption to the context of domination analysis, it provides little help to support a determination of independence. The issue was not the interest in the directors' fees but rather whether, under the circumstances of such payment, just as under the circumstances of the employment compensation to Litvack and Nunis, the connection between Bowers, Eisner, and the directors' fees would make it reasonable to believe that Bowers would vote based on Eisner's—rather than Disney's—interests.[285] The Chancellor thus appears to be weak on both the law and the facts.

A strong case can be made for the opposite result, however, by ignoring *Grobow* and the Chancellor's analysis of Litvack and Nunis and applying the analysis the Chancellor employed to test

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[281] *See id.* at 356.

[282] Orman v. Cullman, 794 A.2d 5, 25 n.50 (Del. Ch. 2002).

[283] 539 A.2d 180 (Del. 1988).

[284] On this point, see Chancellor Chandler's own analysis. *Id.* at 26–31.

[285] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 356.

the independence of Walker, O'Donovan, and Poitier.[286] Like Walker, O'Donovan, and Poitier, Bowers enjoys no current or direct connection with Eisner other than perhaps a personal one, though such speculation is subject to the rule against speculation.[287] The Eisner children no longer attended Bowers' elementary school, and there is no evidence that other Eisner children planned to attend the school at the time the Employment Agreement was reviewed by the board.[288] Bowers and Eisner did not enjoy numerous political and financial dealings, and, thus, there appears to be no quid pro quo. On the other hand, Cardon Walker and Poitier are each financially independent and hardly affected by either the receipt of director's fees or the threat of removal from the Disney board.[289] O'Donovan takes no fees and is prominent in the academic field as a president of major university.[290] In contrast, Disney board membership is probably both financially and socially much more important to Bowers. Perhaps Bowers is more like Wilson's wife or Stern, but that analogy would require the Chancellor to treat income from services for the company in the same way as fees received for performing duties as a board member.

The preceding analysis illustrates the difficulties of the formalist, economic approach, even when attempting to apply it on its own terms. The inherent contradictions of that analysis and the analysis' utter failure in the face of competing policy—often unwritten and not necessarily derived from legislative pronouncements—make clear that the standard is of limited value as the *sole* basis for dependency analysis in the context of the duty of loyalty. Chancellor Chandler remained frustrated, to some extent, by the consequences of this analytical framework. He could not resist a swipe at the independence of the board even as he held firmly to his original determination that the board was not legally beholden to Eisner. "Eisner stacked his (and I intentionally write 'his' as opposed to 'the Company's') board of directors with friends and other acquaintances who, though not necessarily beholden to him in a legal sense, were certainly more willing to accede to his wishes and support him unconditionally

[286] *See id.* at 358–61.
[287] *See id.* at 359.
[288] *See id.*
[289] *See id.* at 358, 360–61.
[290] *Id.* at 359.

than truly independent directors."[291] But he stuck to his guns on the domination issue suggesting that, though Eisner effectively handpicked the directors among his friends and acquaintances, and they might have been socially or morally beholden or more amenable to influence by him as a result of their relationships, Eisner's selections do not give rise to domination in a legal sense under Delaware law.[292] He grounded his view on the importation in the domination context of what the Delaware Supreme Court had suggested in the fiduciary duty context in deciding *Brehm*—namely, that there is a big difference between "best practice" or moral duty and the legal requirements of Delaware law.[293] Reality, in a sense, has less than optimal connections with legal consequence because legal consequence must be constructed from deductions realized within a much narrower framework of facts.

Yet, it seems that the Chancellor sacrificed a tremendous amount in his efforts, paralleling those of the Supreme Court, to implement somehow a moral-legal division in domination analysis. With consistency sacrificed for the necessities of policies, or to avoid the creation of particular presumptions, the "facts and circumstances" analysis of the formalist economic approach begins to resemble the sort of jurisprudence of personal values decried in other areas of law.[294] Rather than focusing on either facts or circumstances, the approach articulated and applied by the Chancellor might serve to construct a reality closer to common understanding.[295] This reality must necessarily embrace presumptions of race, gender, and class through which now more relevant facts can be sieved. Indeed, the analysis of the Chancellor, taken in the aggregate, begins to suggest the application of a set of presumptions with significant legal effect.

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[291] *In re* Walt Disney Co. Derivative Litig., No. Civ.A. 15452, 2005 WL 1875804, at *40 (Del. Ch., Aug. 9, 2005).

[292] *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 361.

[293] *See id.* at 361–62 (describing how the Disney board's duty of care was still satisfied under Delaware law despite the fact that the board did not have knowledge of the exact payout amount).

[294] *See, e.g.*, CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95–96 (1987) (Scalia, J., concurring) (discussing the dormant commerce power jurisprudence); Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (arguing that a constitution is not intended to protect a specific economic model).

[295] In another context, Judge Posner has raised similar concerns. He noted that "the 'facts and circumstances' of each case . . . is no standard at all, and makes the tax status of charitable organizations and their donors a matter of the whim of the IRS." United Cancer Council, Inc. v. Comm'r, 165 F.3d 1173, 1179 (7th Cir. 1999).

These presumptions are not those the Chancellor sought to avoid—that is, presumptions relating to the consequences of particular economic and non-economic relationships between directors. Rather, these presumptions center on the consequences of gender, race, and class for dependence. As applied to this case, these presumptions suggest a troubling aspect of any fact-based independence analysis in the form currently practiced by the courts.

II. A CLOSER LOOK AT REVETA BOWERS: THE "REGULAR FOLKS" EXCEPTION TO CHALLENGES TO INDEPENDENCE

Of all of the directors whose independence is challenged, only Bowers' independence is affected by the size of the fees she earned as a director. Her *relatively* modest circumstances make her unique among the directors. For Disney, Litvack, and Nunis, dependence was grounded in their salaries as officers of Disney.[296] For Gold, dependence was grounded in his employment relationship with Roy Disney.[297] For Stern, Mitchell, Walker, Poitier, and Wilson, dependence was predicated on the receipt of fees for personal consulting under contracts between them and Disney, Eisner, or Ovitz (or entities with which they were involved), or for fees generated by their firms or spouses for services to Eisner or Disney.[298] For O'Donovan, dependence was grounded in the power of donation to the institution he headed.[299] For Russell, the allegation of dependence was based on his personal employment by Eisner.[300]

But money is money; it should tend to corrupt the same way no matter what its source.[301] As such, the fact that the receipt of money derived from and was perhaps dependent on the continued good will of Eisner should support the application of

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[296] *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 357.

[297] *See id.*

[298] *See id.* at 357–58, 360–61.

[299] *See id.* at 359.

[300] *See id.* at 360.

[301] Some have argued that director compensation especially creates the sort of corrupting financial incentives that make independence impossible and might, in that sense, account for the scandals of the first few years of the twenty-first century. *See, e.g.*, Faith Stevelman Kahn, *Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud, and September 11, 2001*, 76 TUL. L. REV. 1579, 1605–07 (2002) (pointing out that director financial conflicts of interest arose from the size of the compensation packages offered to directors).

the "relative size matters" principle, especially when coupled with the significance of the social benefit to the Disney Board of Directors from Bowers' social position in Los Angeles had she not been a member of the Disney board—although this inference is subject to the limitation of the no-speculation rule.[302] In this sense, there should be nothing special about receiving funds when serving as a director which would insulate this transaction from other financial arrangements.

Yet there appears to be something special about being a director, especially when directorships mix with "regular folks."[303] In this context, the general or even the contextual rules of director independence are to be suspended. In their place, the Chancellor would impose a new presumption—the "regular folks" presumption of director independence, or the rule of ingratitude and personal disloyalty. People of modest means may not be presumed to be dependent on the people who made social, financial, or other great rises in status possible and can never be presumed to be beholden to such people, absent direct proof of a specific quid pro quo transaction. The financial formalism of the Chancellor's analysis, so rigorously applied to this point, evaporates in the midst of social engineering. Two rules emerge from the *Disney* analysis: One applies to the well off and the other to the rest of us. It is to the assumptions underlying this presumption and their consequences that we turn next.

A. *The Presumptions of the "Regular Folks" Standard and the Real Reveta Bowers*

The "regular folks" presumption suggests an exception to the notions of economic rationality that form the basis of much of Delaware corporate law. On the one hand, it might suggest that, at some level of income, people no longer articulate economic best interests or wealth maximization in the same way as people with greater wealth. In essence, "regular folks" are not subject to the same calculation sets as are the wealthier among us, and thus, the rules of fiduciary duty ought not to apply to them in the same way. But that cannot be right. It suggests that Delaware corporate law, and the policy underlying its interpretation, was developed to apply only to people of a certain socio-economic

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[302] *See supra* Part I.C.4.c.

[303] *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 360.

status. Its policies, presumptions, articulations, and implementations are based on a unique values set—unique, that is, to people occupying a certain socio-economic position—and meant solely to maximize those values.[304] Exceptions, then, have to be created for the odd circumstance of people who, in a position

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[304] For the view from popular culture, see THOMAS J. STANLEY, ACCORDING TO THE MILLIONAIRE MIND (2004). A popularizing presence on the Internet, Mark Skousen described the perspective underlying this idea in this way:

> Here are the results of [Thomas J. Stanley's] survey of over 1,000 super-millionaires (people who earn $1,000,000 a year or more):
>
> * They live far below their means, and have little or no debt. Most pay off their credit cards every month; 40% have no home mortgage at all.
> * Millionaires are frugal; they prepare shopping lists, resole their shoes, and save a lot of money; but they are not misers; they live balanced lives.
> * 97% are homeowners; they tend to live in fine homes in older neighborhoods. (Only 27% have ever built their "dreamhome.")
> * 92% are married; only 2% are currently divorced. Millionaire couples have less than one-third the divorce rate of non-millionaire couples. The typical couple in the millionaire group has been married for 28 years, and has three children. Nearly 50% of the wives of the super-rich do not work outside the home.
> * Most are one-generation millionaires who became wealthy as business owners or executives; most did not inherit their wealth.
> * Almost all are well educated; 90% are college graduates, and 52% hold advanced degrees; however, few graduated top of their class—most were "B" students. They learned two lessons from college: discipline and tenacity.
> * Most live balanced lives; they are not workaholics; 93% listed socialiazing [sic] with family members as their #1 activity; 45% play golf. (Stanley didn't survey whether they were avid book readers—too bad.)
> * 52% attend church at least once a month; 37% consider themselves very religious.
> * They share five basic ingredients to success: integrity, discipline, social skills, a supportive spouse, and hard work.
> * They contribute heavily to charity, church and community activities (64%).
> * Their #1 worry: taxes! Their average annual federal tax bill: $300,000. The top 1/10 of 1% of U.S. income earners pays 14.7% of all income taxes collected!
> * "Not one millionaire had anything nice to say about gambling." Okay, but his survey also showed that 33% played the lottery at least once during the year!
>
> Thus, we see how the super upper-income families of this nation are not the ones contributing to crime, welfare, divorce, child abuse, and a spendthrift society. But they are playing [sic] a lot of taxes and making a lot of contributions to solve these social problems.

Mark Skousen, Yes, The Rich Are Different—They're Better (March 2000), http://www.mskousen.com/Books/Articles/richbetter.html.

well above their social or economic station, occupy positions that the law treats as reserved for others. But the presumption implies that "regular folks" are more impervious to the influence of money than are the economically well off. That is, had Bowers been wealthier or in a higher status occupation, then she would have been much more tempted by money and much more subject to the influence of the person who made the money and status possible than she was as an elementary school principal. Perhaps lower socio-economic status makes one more virtuous in the face of temptation, but I doubt it. To shield the "regular folks" from the functioning of the standards of duty applicable to everyone else seems a bit strained as well as an oddity of Delaware law.

To get a sense of the way these presumptions work, we return to Reveta Bowers. To revert to Reveta Bowers, of course, is to reject, at least in part, the tendency of corporate law to engage in abstraction and stereotype. That rejection necessarily embraces an essentially feminist methodology.[305] And in what better circumstance to invoke a feminist methodology than in the context of an analysis of the construction of a woman in the corporate law area of director independence.

These presumptions and their operation, however, have more to do with Bowers as a construct of stereotype than as a living being. Who is Reveta Bowers? First, it helps to *see* the person beyond the abstraction of either the plaintiffs' argument or Chancellor Chandler's analysis.[306]

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[305] As Theresa Gabaldon has explained:

> As a practical matter, feminism's struggle with abstraction is unavoidable. First and foremost, the tendency toward abstraction inheres in human thought processes and attempts to communicate. To compound the difficulty, as relative newcomers, feminists must grapple with existing philosophies and social institutions, including the law. Accordingly, a significant part of the feminist endeavor is the attempt to relate women's experience to various bodies of thoughts and principles worn smooth through the passage of time.

Theresa A. Gabaldon, *Feminism, Fairness, and Fiduciary Duty in Corporate and Securities Law*, 5 TEX. J. WOMEN & L. 1, 5 (1995).

[306] Both Feminist and Critical Race Theories remind us that subordination and abstraction are possible, in part, because of the power to obliterate the narrative and image of "others." For a discussion, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1491–97 (2005). *See generally* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991). The litigation reduced Bowers to an economic abstraction, but that was only part of the picture. Bowers' position was

A native of Los Angeles, Reveta Franklin Bowers[307] has been the Head of School at the Center for Early Education since 1976.[308] In 2004, her compensation for this position was $231,525.[309] The Center for Early Education is an "independent coed day school" for pre-school through sixth grade students of differing ethnic and socioeconomic backgrounds.[310] It is also the same elementary school that Michael Eisner's children once attended.[311] "A recognized leader in her field, Ms. Bowers has served as President of the California Association of Independent Schools and Treasurer of the National Association of Independent Schools."[312] "The National Association of Independent Schools acts as the national voice of independent pre-collegiate education and as the center for collective action on behalf of its membership."[313] "It serves and strengthens its member schools and associations by articulating and promoting high standards of educational quality and ethical behavior by working to preserve their independence to serve the democratic society . . . and by advocating broad access for students in affirming the principles of equity and justice."[314] She is also a member of the Board of Trustees of the Educational Records Bureau, Inc.,[315] and a member of the Board of Governors of the Fulfillment Fund,[316] a not-for-profit organization dedicated to the

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also, to some extent, defined by both the way she was gendered and raced. Both played a significant role in defining the nature and limits of her relationships generally and on the Disney Board in general. *See* discussion *infra* Part II.B.

[307] For a picture of Ms. Bowers, see California Community Foundation, Board of Governors—Reveta Bowers, http://www.calfund.org/3/governors_3.4_bowers.php (last visited Oct. 10, 2005).

[308] Walt Disney Co., Proxy Statement (Schedule 14A), at 5 (Jan. 4, 2002), *available at* http://corporate.disney.go.com/investors/proxy/proxy_2002.pdf.

[309] Charity Navigator, Charity Navigator Rating—Center for Early Education, http://www.charitynavigator.org/index.cfm/bay/search.summary/orgid/7465.htm (last visited Oct. 10, 2005).

[310] *Id.*

[311] *See In re* Walt Disney Co. Derivative Litig., 731 A.2d 342, 359 (Del.Ch. 1998), *aff'd in part, rev'd in part sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

[312] California Community Foundation, *supra* note 307.

[313] National Association of Independent Schools, Mission Statement, http://www.nais.org/about/article.cfm?ItemNumber=146190 (last visited Oct. 10, 2005).

[314] *Id.*

[315] EDUC. RECORDS BUREAU, 2004–05 MEMBERSHIP DIRECTORY (2004), *available at* www.erbtest.org/media/2004-05%20Membership%20Directory%204-4-05.pdf.

[316] *See* Fulfillment Fund, Board of Governors, http://www.fulfillment.org/

education, support, and betterment of disadvantaged students.[317] Bowers is also "a director of several other not-for-profit educational organizations, including Independent Educational Services, a firm that assists independent schools in recruiting teachers and administrators."[318] She is also a trustee for the Council for Spiritual and Ethical Education.[319] "[The Council for Spiritual and Ethical Education] is a broad consortium of schools committed to [] education for moral leadership and ethical decision making[,] quality instruction about the world's religious traditions[, and] spiritual growth in a religiously diverse world."[320] In addition, she is a member of the Respect for All Project Advisory Board,[321] a media series designed to prevent prejudice and violence and promote an appreciation of diversity among elementary and middle school-age children.[322]

In addition, "[Bowers] has been a trustee at Harvard Westlake and Windward schools in Los Angeles, and is currently on the boards of the Fulfillment Fund, the National Council for Spiritual and Ethical Education, the Educational Records Bureau, and the Brentwood School."[323] "Ms. Bowers earned her undergraduate and Master's degrees from the University of Southern California, where she also completed three teaching credentials" prior to her involvement in various organizations.[324] "Additionally, she was a Klingenstein Fellow at Columbia University Teachers College in New York."[325] "She and her husband of more than 30 years, Superior Court Judge Bob S. Bowers, have two adult children."[326] One of her sons worked for

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aboutus/boardofgovernors/ (last visited Oct. 10, 2005).

317 *See* Fulfillment Fund, *History*, http://www.fulfillment.org/aboutus/history/ (last visited Oct. 10, 2005).

318 Walt Disney Co., Proxy Statement (Schedule 14A), at 5 (Jan. 4, 2002), *available at* http://corporate.disney.go.com/investors/proxy/proxy_2002.pdf.

319 *See* Matthew Hicks, *Programs and Services*, COUNCIL FOR SPIRITUAL & ETHICAL EDUC. (Council for Spiritual & Ethical Education, Athens, Ga.) *available at* http://www.csee.org/news/article.asp?artkey=113 (last visited Aug. 31, 2005).

320 Council for Spiritual and Ethical Education, http://www.csee.info/ (last visited Aug. 31, 2005).

321 Women's Educational Media, About The Respect for All Project, http://www.womedia.org/respectforall.htm (last visited Oct. 10, 2005).

322 *See id.*

323 California Community Foundation, *supra* note 307.

324 *Id.*

325 *Id.*

326 *Id.*

the internet group of the Walt Disney Company during a portion of 2001 and earned $81,863.[327] At the time of the Ovitz affair during 1995–1996, no other family member had been employed by Disney. Reveta Bowers, who was on the board until 2002, was not nominated for another term when her term expired in 2003.[328]

In 1996, a non-employee director of the Walt Disney Company received a retainer fee based upon an annualized amount of $30,000 together with a fee of $1,000 per board or committee meeting attended.[329] Non-employee directors had the option to defer payment of all or part of their fees under the Company's Deferred Compensation Plan for Outside Directors.[330] Such deferrals are generally until termination of the director's service with the company or until he or she reaches a specified age.[331] Ms. Bowers participated in that plan, and it was effective until she left the board.[332] In addition, each non-employee director receives an automatic grant on March 1 of each year of options to purchase shares of common stock.[333] Each option grant, vesting in equal installments over five years and having a ten-year term, permits the holder to purchase shares at their fair market value on the date of the grant.[334] From September 30, 1997 to April 30, 1998 each non-employee director received $30,000; after April, it was $35,000, plus a $1000 fee per board or committee meeting.[335] In 1998, each non-employee director received $35,000 plus a $1000 fee per board or committee meeting.[336] In 1999, each non-employee director received $35,000

[327] *See* Martin Arnold, *Disney Admits Employing Directors' Children*, SRIMEDIA, Aug. 13, 2002, *available at* http://www.srimedia.com/artman/publish/article_40.shtml. The employment of her son at Disney caused some trouble for Bowers in 2002. Disney had apparently failed to disclose that three of their independent directors—Reveta Bowers, Stanley Gold, and Raymond Watson—had children employed at Disney. Under New York Stock Exchange Rules, none of these directors could be considered independent. As a consequence, Reveta Bowers had to give up her posts on the audit and compensation committees. *See id.*

[328] *See* Walt Disney Co., Proxy Statement (Schedule 14A), at 7 (Jan. 28, 2003), *available at* http://corporate.disney.go.com/investors/proxy/proxy_2003.pdf.

[329] *See* Walt Disney Co., Proxy Statement (Schedule 14A), at 8 (Feb. 25, 1997).

[330] *Id.*

[331] *See id.*

[332] *See* Walt Disney Co., Proxy Statement (Schedule 14A), at 8 (Jan. 4, 2002).

[333] *See* Walt Disney Co., Proxy Statement (Schedule 14A), at 8 (Jan. 4, 1999).

[334] *See id.*

[335] *See* Walt Disney Co., Proxy Statement (Schedule 14A), at 7 (Feb. 24, 1998).

[336] *See* Walt Disney Co., Proxy Statement (Schedule 14A), at 8 (Feb. 23, 1999).

plus a $1000 fee per board or committee meeting.[337] In 2000, each non-employee director received $35,000, plus a $1000 fee per board or committee meeting.[338] In 2001, each non-employee director received $45,000, plus a $1000 fee per board or committee meeting.[339] In 2002, each director received $45,000, plus a $1000 fee per board or committee meeting.[340] Between 1996 and 2003, when she retired from the board, Bowers received over $250,000 plus an extra $1000 for each meeting that she attended.

What emerges is a very different—and far more complex—picture than that painted by the Chancellor. In place of the elementary school principal elevated well beyond her station in life by a leading member of the American social aristocracy, we confront a woman—an African-American woman—well-to-do and well-integrated into the higher reaches of the social and political hierarchies of Los Angeles, California. Michael Eisner himself described Bowers as "one of the nation's leaders in primary education [who] heads the Center for Early Education in Los Angeles, an independent school for kindergarten through sixth grade, which has been singled out as a model for its innovative curriculum. Reveta helps us keep on top of the ever-changing needs and interests of Disney's youngest fans."[341] Bowers is hardly one of the "regular folks" as the Chancellor suggested.

Now it is possible to construct a Bowers much more amendable to influence by Eisner. How is that possible? That construction can suggest greater rather than less independence—well paid, well connected, and married to a spouse within the legal elite of Southern California society. Yet it is this very connectivity that makes Bowers far more vulnerable to influence than had she been merely poor and dependent on her salary to make ends meet. Like musicians and painters in eighteenth

337 *See* Walt Disney Co., Proxy Statement (Schedule 14A), at 8 (Jan. 4, 1999), *available at* http://corporate.disney.go.com/investors/proxy/proxy_1999.pdf.

338 *See* Walt Disney Co., Proxy Statement (Schedule 14A), at 9 (Jan. 5, 2000), *available at* http://corporate.disney.go.com/investors/proxy/proxy_2000.pdf.

339 *See* Walt Disney Co., Proxy Statement (Schedule 14A), at 9 (Jan. 12, 2001), *available at* http://corporate.disney.go.com/investors/proxy/proxy_2001.pdf.

340 The Walt Disney Co., Proxy Statement (Schedule 14A), at 8 (Jan. 4, 2002), *available at* http://corporate.disney.go.com/investors/proxy/proxy_2002.pdf.

341 Michael Eisner, Chairman & CEO, Walt Disney Company, Speech delivered in Chicago, Illinois, (Mar. 2000), *available at* http://www.dlp.info/Guide/News-And-Rumours/Archive/2000/Specials/Eisner02.asp.

century Europe,[342] much of Bowers' success might be attributed to patronage—and to the right kind of patronage. But patronage comes at a price. To displease the patron, especially a powerful one, might make it much more difficult either to replace the patron or to operate in the social circle dominated by the patron or those dependent on him. Bowers had a lot to lose and little to gain by crossing Eisner or Ovitz. On the other hand, her very connectivity to the community, and at the highest social and economic levels, would make it possible for Bowers to retain her independence. Her connections to the web of non-governmental organizations and her spouse's connection to the legal community suggest that even were Eisner to retaliate against her by engaging in a concerted vendetta against her among the elite community in which she operates, Bowers would not necessarily be affected by any pressure that Eisner could bring to bear. There are many people at Eisner's level in Los Angeles. Several of these might be competing with Eisner for influence and status in the social world which they inhabit. Should Bowers displease Eisner, Bowers might easily find other patrons. Indeed, given the nature of her work, it behooves Bowers to avoid capture by any one patron. Thus, it is unlikely that Bowers would ever put herself in a position of domination by a single patron on which she and her organizational connections would be dependent.

But the opposite conclusion is possible when the analysis is translated into the language of the Chancellor's analysis in *Disney* using the framework to determine Father O'Donovan's independence. In order to demonstrate dependence, plaintiffs would have to show that Eisner either contributed to the organizations important to Bowers, caused Disney to make contributions to those organizations, or served on the board or in another important capacity in any of those organizations. This would serve as evidence of the "'numerous political and financial dealings'" that seem to be a prerequisite for dependence under Delaware law.[343] But, unlike O'Donovan, Bowers accepted the substantial fees and other benefits of Disney board

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[342] Encyclopedia.com, Patron, http://www.encyclopedia.com/html/p1/patron.asp (last visited Oct. 10, 2005).

[343] *In re* Walt Disney Co. Derivative Litig., 731 A.2d 342, 359 (Del. Ch. 1998), *aff'd in part, rev'd in part sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000); *see also* Lewis v. Fuqua, 502 A.2d 962 (Del. Ch. 1985).

membership,[344] and board membership might have provided Bowers with greater access to the sort of people essential for the work in which she was engaged.

Ironically, the greatest pressure that Eisner could bring to bear—the threat to ensure that Bowers was not re-nominated for a position on the Disney board and therefore denied the financial and other benefits of that position—brings us right back to the Chancellor's purely economic analysis.[345] Unless money and other financial benefits received by directors have a special character and effect that distinguish them from money and other benefits received by employees or agents for services rendered to the corporation, then it is difficult to escape the conclusion that the Disney director benefits are significant for Bowers. This should be dispositive, even if it cannot be shown that status as a director may also be of significant importance to Bowers given her other work. To treat Bowers differently than Stern, Litvack, or Nunis, without more, would be to engage in an unacceptably arbitrary analysis.

But the formalistic analysis, heavily weighted to a contextual economic analysis, should leave one unsatisfied. Every resort to that sort of analysis tends to eviscerate critical elements of the relationship between Eisner and Bowers and between Bowers, Eisner, and the communities in which they operate that contribute both to the artificiality and ultimately to the arbitrariness of any conclusions based on such analysis. Perversely, the social justice rhetoric behind which the Chancellor hid seems even more necessary to a determination of Bowers' independence. It is precisely because Bowers is neither just "regular folks" nor independently wealthy that a consideration of her economic and social class is so necessary to determine independence. But in a society in which actual, though not formal, authority is distributed on the basis of social and economic class—the rich are more influential, better able to protect themselves, and more independent than others—Bowers, and everybody like Bowers, is more likely to become dependent on Eisner than were she one of the poor. Bowers is engaged in work that is heavily dependent on the funding and the goodwill of people with large sums of wealth available for distribution to

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[344] *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 359, 360.

[345] *See id.* at 350–60.

"worthy causes." There is a strong link of dependency between donor and donee, despite the suggestion otherwise by the Chancellor in the analysis of O'Donovan's independence.[346] Moreover, as the head of an institution catering to the wealthy, she would be in no position to offend a leading member of elite society on whose patronage her institution is dependent. Bowers would have to calculate that any offense to Eisner would *not* translate into shunning by others in order to remain impervious to influence. In a very real and contextual way, Bowers remains beholden to Eisner by the fact of her place in Los Angeles society. In order to protect against this result, which merely applies the consequences of the realities of American social and economic organization, the Chancellor would have to create an exception to the normal rules. This exception incorporates notions of affirmative action into the corporate law of contextual action but avoids discussion of the basis for its necessity. The "regular folks" *legal* presumption is thus meant to overcome strong *cultural* and *economic* presumptions—that the less powerful are always beholden to the more powerful when they act in concert. There is no independence within systems of hierarchy. In an effort to do good, the Chancellor masks the justice element, constructs it as a form of unspeakable artifice, and appears to permit arbitrary results at odds to the basic policy of Delaware corporate law, to ensure fair decisions by directors in the best interests of the corporation and its shareholders.

Does the more "realistic approach" urged on the Chancellor[347] provide a better method for determining influence?

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[346] This dependence has been understood as a religious and cultural matter for centuries in the West. *See generally* Larry Catá Backer, *Medieval Poor Law in Twentieth Century America: Looking Back Towards a General Theory of Modern American Poor Relief*, 44 CASE W. RES. L. REV. 871 (1995) (addressing this issue).

[347] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 360. For purposes of this Article, I will use the arguments developed by the Council of Institutional Investors as set forth in their brief on appeal from the Delaware Court of Chancery to the Delaware Supreme Court dated December 18, 1998, and revised December 29, 1998. *See* Brief for the Council of Institutional Investors as Amicus Curiae Supporting Appellants, Brehm v. Eisner, 746 A.2d 244 (Del. 2000) [hereinafter "CII Amicus"]. The arguments parallel and apply the notions that would later find their way into Vice Chancellor Strine's opinion in *In re* Oracle Corp. Derivative Litig., 824 A.2d 917, 938 (Del. Ch. 2003), *appeal denied*, Oracle Corp. *ex rel.* Special Litig. Comm. v. Barone, 829 A.2d 141 (Del. 2003), *summary judgment granted*, *In re* Oracle Corp., Derivative Litig., 867 A.2d 904 (Del. Ch. 2004), *aff'd*, 872 A.2d 960 (Del. 2005), discussed *supra* notes 100–02. Both suggest the analysis later articulated by Professors Lynn Stout and Margaret Blair. *See* Lynn A. Stout, *In Praise of*

Perhaps a more realistic approach would make more sense. The CII, as amicus, argued that CEOs, as a rule, "wield substantial control over their corporations."[348] As such, a realistic approach should include a presumption of CEO control.[349] CII suggested that any business relationship between a corporation and an individual ought to create a presumption of domination by the CEO. This presumption ought to apply to a number of different sorts of relationships—from service as the company's outside counsel to those "affiliated with one of the company's suppliers or with a charitable organization that receives significant grants from the company,"[350] to those serving as employees of the company.[351]

> In sum, a director should be considered non-independent from the company and its CEO whenever he/she has a nontrivial connection to the company aside from his/her directorship. Anyone with a nontrivial connection to the company is necessarily beholden to the company and the CEO. To ignore this reality is to perpetuate a legal fiction—that the interests of the CEO and the corporation are somehow separable—that disserves stockholders by encouraging judicial deference to directors with conflicting interests.[352]

CII interposed a list of eight categories of relationships that might be characterized as nontrivial for purposes of the relational standard CII proposed.[353] Most of them systematize

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Procedure: An Economic and Behavioral Defense of Smith v. Van Gorkom *and the Business Judgment Rule,* 96 NW. U. L. REV. 675, 677-78 (2002); Margaret M. Blair and Lynn A. Stout, *Trust, Trustworthiness and the Behavioral Foundations of Corporate Law,* 149 U. PA. L. REV. 1735 (2001).

348 CII Amicus at 11.

349 "Of course, this is not the way corporations are supposed to work. Nonetheless it is the way most of them do work, and the courts must take that fact into account when considering the issue of director independence." *Id.*

350 *Id.* at 12.

351 *Id.*

352 *Id.*

353 The categories include the following:

> [1] where the director has been employed by the corporation or an affiliate in an executive capacity; [2] where the director is, or in the past two years has been, an employee or owner of a firm that is one of the corporation's or its affiliate's or the CEO's paid advisors or consultants; [3] where the director is employed by, or has a five percent or greater ownership interest in, a significant customer or supplier; [4] where the director is employed by, or has a five percent or greater ownership interest in, a debtor or creditor of the corporation if the amount owed exceeds 1% of the corporation's or the third party's assets; [5] where the director has, or in the past two years has

and broaden current juridical approaches. The difference is that while the existence of these relationships does not necessarily create a presumption of domination under current law, without quid pro quo evidence, under the CII version, each of them give rise to such a presumption of domination.

At first blush, it does not appear that Bowers' relationship with Eisner or Disney fits into any one of the relational categories that CII suggested merits a presumption of domination. CII, however, argued that Bowers ought to be found interested in any case. First, CII argued that it was not clear whether Eisner or Disney in fact had made significant contributions to non-profit organizations on which Bowers served as an officer or director.[354] In particular, CII alleged that given Eisner's usual behavior patterns and his wealth, it would be reasonable to suspect that he might have made significant contributions to the school where his children received their primary education.[355] More interesting, and odd, was CII's other argument: "Bowers lacks independence because her directors' fees and stock options represent a substantial portion of her income."[356] CII obliquely acknowledged that director fees were not included within CII's own definition of nontrivial relationships—but they appeared willing to make an exception in Bower's case: Even if directors' fees could not be considered for purposes of determining domination, "they should at least be considered as part of the mix of information that may lead to a finding of non-independence."[357]

With this argument, we appear to be back where Chancellor Chandler started. The standards—in this case, even CII's

> had, a personal services contract with the CEO, the corporation or one of its affiliates; [6] where the director is employed by, or serves as an officer or director of, a non-profit corporation, foundation, university or other organization that receives significant grants or endowments from the corporation or one of its affiliates; [7] where the director is a relative of an executive of the corporation or one of its affiliates; [8] where the director is part of an interlocking directorate in which the CEO or other executive officer of the corporation serves on the board of another corporation that employs the director.

Id. at 14–15.

[354] *Id.* at 30.

[355] *See id.* at 30 ("Eisner's personal ties to that school raise at least a spectre that such contributions, and potentially significant ones in light of Eisner's personal wealth, have been made.").

[356] *Id.* at 29.

[357] *Id.* at 29–30.

relational standards—do not seem to embrace the circumstances that "reality" suggests should be important in determining domination. The solution, CII would argue, requires throwing the "fact" of director compensation into the stream of facts flowing from Disney and the directors and seeing where these facts take us. If the result of that factual cocktail "sort of/kind of" looks like a nontrivial relationship—*even if it is not a nontrivial relationship*—then it ought to be treated as one and Bowers found dominated. Unfortunately, this approach seems to suffer from the very deficiencies—indeterminacy, arbitrariness, and unpredictability—that CII argued was at the foundation of the deficiencies of Delaware's more narrowly applied standard. CII was essentially attempting to fit the facts to a conclusion it wished to draw—proceeding from the end rather than from the beginning of its analytical framework, and modifying that standard to meet its ultimate goal.

CII's own arguments about the reasons that its standard ought to apply to Bowers, even though the standards are in fact inapplicable, suggest a broader problem—the standards themselves. CII sought to define domination by reference to relationship, but it limited its relationship analysis—and the standard derived thereby—to formal economic and financial relationships. Yet at the same time it recognized that at least other factors may be important for constructing that "mix of information" necessary to determine domination in fact![358] Chancellor Chandler's solution to this problem was to attempt the crafting of a "regular folks" presumption.[359] CII's solution was to propose a standard that appears to be flexible enough to be abandoned when inconvenient in favor of a system of "knowing" unconnected to any articulated standard.[360]

Like Chancellor Chandler, CII's relational and more realistic analysis is limited by a single-minded focus on economics and finance. Reframed as a sophisticated application of a "structural bias" analysis, it suffers from the deficiencies that the Delaware Supreme Court would find troubling in *Beam*: a presupposition that "the professional and social relationships that naturally develop among members of a board impede independent

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358 *See id.*

359 *See In re* Walt Disney Co. Derivative Litig., 731 A.2d 342, 360 (Del.Ch. 1998), *aff'd in part, rev'd in part sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

360 *See* CII Amicus at 29–30.

decisionmaking."[361] CII's reliance on that sort of normative basis for its standard results in an evisceration of critical elements of a relationship between Eisner and Bowers and between Bowers, Eisner, and the communities in which they operate that contributes both to the artificiality and ultimately to the arbitrariness of any conclusions based on such analysis. Perversely, the economic class arguments of CII essentially positing that Bowers is just not wealthy enough to resist the corruptive effects of a large director's salary, and that, indeed, no person of Bowers' economic class could resist such temptation[362] seems even more necessary to a determination of Bowers' domination than arguments based on relationships. To find that Bowers dominated, a status analysis must be substituted for a contextual relationship analysis. Again, Bowers would have to be reconstructed as a product of a narrow stereotype based on a limited and generalized set of facts that may, in reality, have little to do with Reveta Bowers as a living person. It seems that both the Chancellor and CII embraced the same pattern of thinking, employing different frameworks to reach opposite conclusions. In both cases, their respective constructions of Reveta Bowers served as a substitute for the facts and circumstances of Bowers' real lived experience. Again, we find ourselves in search of a fair and realistic standard to judge domination and to protect shareholders.

B. *What Do Race, Gender, and Class Have to Do With It?*

Under the Chancellor's "regular folks" presumption, Reveta Bowers remains an abstraction, substantially removed from her lived reality. CII's more realistic approach does a better job of getting to the aspects of the relationship between Bowers and Eisner that touch most materially on the question of domination and control by looking at the framework of formal relationships between them. But neither completely gets to the heart of an appropriate application of the independence standard. Under

[361] Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040 (Del. 2004). But CII goes farther, suggesting a structural bias analysis that encompasses all relationships that may find a nexus within the context of decisionmaking on the board of directors. At the same time, CII suggests that this structural bias is at its most potent in connection with economic relationships, a substantially more limited approach than that at issue in *Beam, Oracle,* or *J.P. Morgan.*

[362] *See* CII Amicus at 29–30.

both standards, the reality of Bowers and her relationship with Eisner gets lost in the construction of consequential facts from the presumptions built into legal standards.[363]

Chancellor Chandler's analysis serves as a powerful illustration of the problem with the Delaware approach—it starts from the presumption that no relationship with an interested person, on its own, taints independence and then crafts a series of exceptions to that rule based on presumptions relating to human nature in the face of financial temptation. But as Chancellor Chandler's difficulties with Bowers also demonstrated, this standard tends to work best in abstraction and does a court little good when faced with the realities of the power of relationships outside of the context of pure economics and finance.

CII starts from almost the opposite position: Every relationship with an interested person taints independence and then crafts a series of limiting principles based on presumptions relating to human nature in the face of financial temptation. But, as CII's own arguments in *Disney* highlight so well, this standard also tends to work best as abstraction and requires virtual abandonment when faced with the realities of the consequences of hierarchy and subordination in the United States.

The parallelism of the two approaches helps explain the ease with which CII could maintain that people who are economically or socially subordinate to others are necessarily dominated by their economic or social "superiors" as a matter of law[364] and the felt necessity on the part of Chancellor Chandler for the creation of a legal presumption against the application of this cultural understanding.[365] Faced with issues touching on domination, subordination, and hierarchy, neither standard was up to the task of realistically or fairly incorporating factual reality into legal analysis. Both standards are thus confounded by the

363 On the utility of this approach for the purpose of constructing a culturally significant fictive "factual" picture of an object to which the law is applied, without regard for the reality underlying the fiction created over generations of judicially constructed factual portraits, see Backer, *Tweaking Facts*, *supra* note 50.

364 This was essentially the core of CII's argument to the Delaware Supreme Court in *Brehm*. *See* CII Amicus at 29–30.

365 This was the essence of the foundation for the Chancellor's construction of a "regular folks" presumption, essentially denying legal effect to a socially accepted reality. *See id.* at 24.

realities of disparity—ostensibly just economic and social disparity—which American political theory tells us ought not to make a difference but which economic theory tells us makes all the difference in the world. At the same time, both approaches mask the realities of other disparities—Reveta Bowers is both woman and African American. Faced with a triple set of hierarchies and consequential domination, both standards ignored two and attempted to mask the third.[366]

All the same, the Chancellor's "regular folks" standard opens a very interesting door. Likewise, CII's factual mixture standard provides a procedural door to a fairer standard. It might make sense to explore what might lie on the other side of those openings. Chancellor Chandler tells us that the public policy of Delaware requires the corporate law, and particularly the law of fiduciary duty, to be developed in a manner that serves larger goals. His presumption is that social equality is a fundamental value to which the fiduciary duty law of Delaware must give way.[367] That presumption upends the traditional Delaware approach to fiduciary duty as developed in the cases.[368] It seems to place social and political issues over the more narrow issues of efficiency within the firm or to recognize Reveta Bowers as an individual with a unique relationship to Disney and Eisner precisely because she is Reveta Bowers and not an abstraction. CII may see Reveta Bowers as well but from another angle. But CII seeks to neutralize the uniqueness that brings Bowers to the Disney board and, by reducing her to an abstract representative of social class, reduce her individuality to insignificance.

Race and gender do play something of a role in the discussion of Bowers among the few academics that took the time to notice her. Susan Estrich[369] uses Bowers as an example of the difficulties African Americans face in trying to break into the American economic elite—a class that remains "overwhelmingly

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[366] As we have seen, it is not all that clear that Bowers was "regular folk" as most Americans would understand that term. *See supra* Part II.A.

[367] *See In re* Walt Disney Co. Derivative Litig., 731 A.2d 342, 360 (Del.Ch. 1998), *aff'd in part, rev'd in part sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000). ("[T]o do so would be to discourage the membership on corporate boards of people of less-than extraordinary means.").

[368] *See* Maldonado v. Flynn, 597 F.2d 789, 796 (2d Cir. 1979); Grobow v. Perot, 539 A.2d 180, 185 (Del. 1988); Steiner v. Meyerson, Civ. A. No. 13139, 1995 WL 441999, at *7 (Del. Ch. July 19, 1995).

[369] ESTRICH, *supra* note 40, at 86–89.

white, male, and Protestant, even though individual women, blacks, and Hispanics have gained entrée."[370] The analysis, however, does little more than provide anecdotal evidence of "how difficult it is for African-American women to get tapped to positions of power on corporate boards."[371] There is no purported connection between race, gender, and application of corporate legal standards. Should there be?

Science is only now beginning to understand what subordinated groups have understood implicitly:

> Recent social cognition research has provided stunning evidence of implicit bias against various social categories. In particular, it reveals that most of us have implicit biases against racial minorities notwithstanding sincere self-reports to the contrary. These implicit biases have real-world consequence—in how we interpret actions, perform on exams, interact with others, and even shoot a gun.[372]

Modern Critical Race and Feminist theorists, it seems, would have provided the Chancellor with greater insight regarding both the futility in, and consequences of, embracing the sort of neutral, formalistic, economics-only approach he desired.[373] Dominance and subordination analysis, which has been one of the great objects of study of modern Feminist and Critical Race scholars, has slowly begun to be applied to the study of the corporate law.[374] The collateral effects of corporate law norms on

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370 *Id.* at 81.

371 Andrea Giampetro-Meyer, Review Essay, *The Power Pyramid*, 24 BERKELEY J. EMP. & LAB. L. 203, 207 n.28 (2003) (reviewing ESTRICH, *supra* note 40). "She also praises the head of the independent school her children attend, Reveta Bowers, and points out that Bowers is the only African-American woman on Disney's board. . . . She points out that Michael Eisner's children attended the same school as Estrich's, and he, too, was impressed with Bowers." *Id.*

372 Kang, *supra* note 306, at 1490.

373 On the difficulty of communication between Critical Race and Feminist scholars on the one hand and the bench on the other, see Larry Catá Backer, *Defining, Measuring, and Judging Scholarly Productivity: Working Toward a Rigorous and Flexible Approach*, 52 J. LEGAL EDUC. 317, 322–25 (2002), suggesting that there are special problems with communication and recognition for fields of scholarship that have not been generally accepted within the legal academic community—particularly, Critical Race Theory and Feminist writings.

374 There have been myriad recent works in this area, touching on issues of corporate social responsibility, fiduciary duty, and discrimination. *See generally* Leonard M. Baynes, *Falling Through the Cracks: Race and Corporate Law Firms*, 77 ST. JOHN'S L. REV. 785 (2003) (discussing the problems that exist for minority associates working in corporate law firms and describing the implications of anti-discrimination laws on employment discrimination); Devon W. Carbado & Mitu

gender, race, and racial justice issues have also been explored.[375] "The law pertaining to corporations is not limited to the shareholder wealth principle or even to internal corporate governance rules, but also includes broader "noncorporate" laws, such as Title VII, that are expressly based on values other than shareholder wealth."[376]

Today, however, this sort of approach is not likely to garner substantial political support. "In the current political climate, there is a cost to openly embracing a racial justice agenda."[377] Chancellor Chandler may well have recognized this political context when masking the social justice agenda of the "regular guy" presumption within the discourse of shareholder maximization—specifically, within the concept of "economic rational actor," discourse traditional to the Delaware fiduciary duty cases. For feminists, this masking may be necessary to, and

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Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645 (2004) (analyzing the relationship between business law and Critical Race Theory with respect to the corporate advancement of different racial types); Theresa A. Gabaldon, *Corporate Conscience and the White Man's Burden*, 70 GEO. WASH. L. REV. 944 (2002) (opining on the subjects of race and sex and their respective relationships to corporate decision-making); Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025 (2003) (arguing that courts should use the doctrine of good faith in contract law to prohibit improper considerations of race in contract formation and should recognize good faith as a device for eliminating racial subordination in the workplace); Thomas W. Joo, *A Trip Through the Maze of "Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735 (2003) (exploring the intersection between race and corporate law—specifically, the lack of diversity in the ranks of corporate executives); Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. 127 (2000) (assessing the diversity initiatives of the leading edge of corporate America under Title VII of the Civil Rights Act of 1964); Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461 (2002) (examining persistent racial discrimination in large, publicly held corporations).

[375] *See* Larry Catá Backer, *The Duty to Monitor: Emerging Obligations of Outside Lawyers and Auditors To Detect and Report Corporate Wrongdoing Beyond the Federal Securities Laws*, 77 ST. JOHN'S L. REV. 919, 931–37 (2003) (discussing the amendments to federal securities laws mandating outside auditors and counsel to seek out and report corporate misconduct including violations of anti-discrimination laws). *See generally* Gabaldon, *supra* note 305 (indicating that Feminist Theory is, itself, shaped by experiences).

[376] Thomas W. Joo, *Race, Corporate Law, and Shareholder Value*, 54 J. LEGAL EDUC. 351, 363 (2004). Joo goes on to comment: "Rather than focusing on reconciling themselves to shareholder value discourse, commentators on race and corporate law should point out that it is not the only valid discourse, even in the corporate arena." *Id.*

[377] *Id.* at 364.

certainly does not change the character of, any action undertaken within its framework. As Claire Moore Dickerson has nicely explained:

> Those who have supported fiduciary duty track the three feminist approaches highlighted by Hilary Charlesworth: (1) we sound like liberal feminists when we strive for equality by discounting differences between those with power and those without it; (2) we sound like cultural feminists when we celebrate the different experiences and perspectives of the powerful and the vulnerable; (3) we sound like radical feminists when we assert that we must correct the power imbalances inherent in the existing structures.[378]

Thus, Chancellor Chandler's attempt to incorporate economic justice principles into Delaware fiduciary duty law is striking for its parallels to cultural feminist approaches.

This masking, however, is not cost free, nor is it free from dangers of its own. As we have seen, *Disney* well illustrates the trouble with cloaking diversity policy in the neutral language of economics.[379] In reducing Bowers to a socio-economic abstraction, the Chancellor stripped her of her gender and race. That stripping denied her the value of her socio-cultural uniqueness. It is the recognition of this bundle of unique characteristics that would have better served the Chancellor in weighing facts and circumstances for the purpose of determining the domination by, or independence from, Eisner. A gendered and raced Bowers might have been understood to interact with Eisner differently than a white person or male in the same economic or social circumstances. It is this framework that distinguishes a race- and gender-sensitive analysis from the ostensibly neutral, but unrealistic approach of a generalizing, formalist, economic analysis common to the law of fiduciary duty.

Ironically, in the context of the domination of Reveta Bowers, the insights of Critical Race theorists are perverse:

> Yet in America, even . . . after much heralded reforms, CEOs of publicly held companies get to pick their bosses—the board of directors. As I have previously demonstrated, in corporate America director elections resemble elections in Soviet Russia—

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378 Claire Moore Dickerson, *Feminism and Human Rights*, 22 WOMEN'S RTS. L. REP. 139, 142 (2001).

379 *See supra* Parts I.B–C (highlighting the problems and consequences of the Chancellor's handling of the relevant racial and gender issues).

> there is only one candidate to vote for because generally only management solicits proxies and SEC rules do not require the inclusion of candidates running against management's nominees. Given this power, it would be natural for a CEO to select a board of directors comprised of the CEO's clones. Certainly this would be a formula that would encourage maximum, even excessive, pay and benefits for the CEO. Instead, CEOs do the next best thing—they select their cultural and demographic clones. This . . . achieves the same outcome: CEO power over board selection leads to enhanced compensation of CEOs.[380]

This suggests that the better presumption would be that Bowers would had to have been dominated by Eisner. If Critical Race theory's homo-social selection hypothesis is right,[381] then Reveta Bowers was chosen more because she resembled Eisner than because she was different from him. It is hard to argue that the real Reveta Bowers more closely resembled, both culturally and demographically, Eisner than she did the stereotypical "anyone else."[382] Perhaps, then, the difference in socio-economic status between Eisner and Bowers was intended to ensure loyalty to the person doing the choosing.

Professor Ramirez, however, would suggest that this is not the case. He would argue that the cultural distinctiveness attaching to Bowers' racial assignment in American society, along with the cultural attachments of class suggested by Chancellor Chandler, would militate against cultural and

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[380] Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What To Do About It*, 61 WASH. & LEE L. REV. 1583, 1590–91 (2004) (citing James D. Westphal & Edward J. Zajac, *Who Shall Govern?: CEO/Board Power, Demographic Similarity, and New Director Selection*, 40 ADMIN. SCI. Q. 60, 77–79 (1995)).

[381] *See* Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 797 (2001) (indicating that invitations to be a board member are based largely on matters of compatibility and "fit"); Wade, *supra* note 374, at 1469–73 ("White men are hired more easily, promoted more frequently, and paid more than people of color and women because they are most similar to the white men who make these corporate decisions.").

[382] For a discussion of a related theme—namely, the power of group-mindedness, or a process whereby persons adjust their behavior in response to their impressions of other group members to account for bad behavior, even among independent members of a board of directors—see generally Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233 (2003).

demographic cloning in Bowers' case.[383] But difference, again, leads to perversity if the goal is to attain a policy objective of inclusion. If Bowers was culturally distinct from Eisner, thus adding value to Disney, there would appear to be a certain level of independence. Cultural independence, though, produced little more than business as usual on the board, at least in connection with CEO compensation. Ironically, Bowers helped contribute to a great enhancement of CEO compensation by first voting in favor of the Employment Agreement and then doing little else to limit the resort to the favorable termination provisions of the Employment Agreement. In this sense, the homo-sociability of Bowers appears more prominent than her cultural distinctiveness.

Either way, both Critical Race and Feminist approaches add an important element to any analysis of fiduciary duty, especially to an analysis of independence—namely, a relational element. This approach permits an "unpacking" of the social justice exceptionalism endorsed by Chancellor Chandler, as well as the social class exceptionalism of CII's realistic "relational" analysis. The "regular folks" presumption can be better understood for what it is—an attempt to extract and acknowledge the presence of social and economic forces in any analysis of the effect of relationships of dominance and independence. CII's presumption, in the other direction, attempts the same. Both ignore the flesh and blood people who are subject to their authority and the foundation on which their relationships are based. Both must do more. The "unpacking" must also extract the effects of race and gender. All three operate with some strength in defining the realities of the relationship between

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> Due to the cultural moorings of race, diverse board members bring enriched perspectives to the boardroom with no offsetting diminution of merit, defined in accordance with the institutional mission of the business. It is not skin color or other morphological features traditionally associated with race that gives rise to different and valuable experiences and insights; rather it is cultural diversity that leads to cognitive skills that can and do transcend race.

Ramirez, *supra* note 380, at 1588 (footnote omitted). Marleen O'Connor makes a similar point in the context of the Enron scandal: "To assure more directors have the 'will to act,' the second proposal seeks to increase diversity on corporate boards by appointing directors with 'outsider values.' By increasing diversity, this reform reduces the existing homogeneity that can lead to groupthink." O'Connor, *supra* note 382, at 1241.

Reveta Bowers and Michael Eisner. Race adds a layer of complexity to the analysis. Gender adds another. It is time to discuss both elements in a fact intensive legal context from which a determination of domination can easily be ascertained. As Cheryl Wade has reminded us, it is no longer enough to respond to race and, to some extent, gender and social class with calls for diversity or a resort to some other salve.[384] It is time to expose all presumptions and, in such exposure, directly confront the character of plaintiff or defendant, whether shareholder, director, or officer. It is the nature of these individuals' relationships with others that must be given significant legal effect.

Unlike Chancellor Chandler's social justice exceptionalism, or CII's relational economic class presumptions, this approach does not pre-judge the outcome of its analysis. The goal of this method, as mentioned earlier, is to "unpack" presumptions rather than build them up—an endeavor that must be pursued despite any "worthy" reason for presumption the builder might proffer. If we have gained nothing from the preceding analysis—if Feminist and Critical Race Theory can teach us nothing else—each can teach us this: presumptions tend to have unintended effects that work to undercut, rather than further, the policy goals they purport to advance.[385] The object must be to expose the limitations of, and avoid easy resort to, pre-conceived short cuts to conclusions about people or their actions.[386]

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[384] *See* Cheryl L. Wade, *"We Are an Equal Opportunity Employer": Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541, 1545–46 (2004) (compelling managers to affirmatively monitor compliance with anti-discrimination laws as opposed to merely "talking" about efforts to diversify).

[385] *See* Gregory Mitchell, *Case Studies, Counterfactuals, and Causal Explanations*, 152 U. PA. L. REV. 1517, 1583–86 (2004) (advising against reliance on presumptions and generalizations in order to assess data and predict results).

[386] Consequently, we must avoid making broad generalizations from a single, discrete factual occurrence. Although the intention is to seek a reliable explanation for, or prediction about, certain conduct, the risk of crossing the line into fiction or presumption is much too high. This is precisely the problem with what the Chancellor attempted through the creation of a "regular folks" presumption as a legal generalization of Bower's circumstances and with CII's attempt to do the same through a factual mixture exception to its relational standard. *See id.* Mitchell reminds us of the power of what Paul Meehl refers to as "fireside inductions," which he defines as "'common-sense empirical generalizations about human behavior which we accept on the culture's authority plus introspection plus anecdotal evidence from ordinary life.'" *Id.* at 1540 n.63 (citing PAUL E. MEEHL, *Law and the Fireside Inductions: Some Reflections of a Clinical Psychologist*, *in* SELECTED PHILOSOPHICAL AND METHODOLOGICAL PAPERS 440, 440 (C. Anthony Anderson & Keith Gunderson eds., 1991)).

Whether Reveta Bowers would be more or less likely to be deemed dominated under a more race/gender/social class relational analysis is hard to say. But, again, that is not the point. The construction of a standard heavily dependent on facts and circumstances ought not be built to prejudge those facts or factors. This is especially the case where those factors touch upon race, gender, or social class. Chancellor Chandler and CII both attempted to avoid pre-judgment but instead created or applied standards that could not help but assume the answers to their own questions. Both attempted to avoid race and gender by focusing on social and economic class within a standard that emphasizes wealth but not the social or economic consequences of its disparities. Within the body of Reveta Bowers, however, neither race nor gender can be avoided, nor should it have been in determining her domination by Eisner—a proposition so culturally loaded that, in this case, it could have cut both ways given Bowers' position. Furthermore, social class analysis was applied as an abstraction rather than a reality. The reality was that Bowers was a well-off, economically successful African-American woman whose work occurred at the higher levels of American social organization. A determination of her domination would require an analysis of the interaction between three hierarchies of subordination and control—economic, racial, and gender. In Bowers' case, it is not clear that the three all cut in the same direction, but an analysis based on the combined realities would have produced a better application of the rules protecting shareholders against the actions of directors with conflicts of interest. A more open, relational standard using insights developed while theorizing about the sensitive issues of subordination and fairness might produce fairer and more realistic results.[387]

C. A Suggested Approach to Independence/Domination Under Delaware Law

It is easy enough to tear an opinion apart. Criticism, especially academic criticism, carries little obligation, and no

[387] *Cf.* Kellye Y. Testy, *Capitalism and Freedom—For Whom?: Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS. 87, 100–07 (2004) (discussing how a focus on Feminist ideals such as nurturing connectedness, attending to context, and furthering equality and human flourishing could help a corporation's social progression).

consequence. This Article has suggested a different approach to an analysis of director domination. The touchstone of this approach should be subordination. Subordination would encompass all hierarchical and affective relationships—from economic relations (based on the power of one individual to affect the employment status of another), to class relationships (the power that relative wealth provides or denies), to race and gender subordination as actually demonstrable in any context of board of director action. Subordination should serve as a substantive rule—subordination destroys all claims of independence. Subordination should also serve as a procedural rule—establishment of a relationship of subordination ought to shift the burden of proving independence from the plaintiff to the director seeking to establish independence for purposes of validating board of directors' actions. That shifting of the burden of proving independence ought to be triggered both by a showing of a subordinate employee relationship with the dominating person, but also on a showing that contractual or other relationships may be affected by decisions made by the dominating party. Thus, for example, where the dominating party controls contractual arrangements affecting a person, whether or not with the company, ought to be sufficient to trigger the shift in the burden. Control triggering the shift in the burden should extend not only to contracts between the person whose independence is at issue, but also extend to contractual relationships between the dominating person and employers of that person, or the immediate family of that person, or companies in which the affected person has an interest. Control sufficient to shift the burden should also extend to contracts controlled by the dominating person whether or not with the company on whose board the dominated person sits.

The point of subordination analysis is to unmask the relationship of power, not to hide it through the creation of artificial barriers to uncovering the nature of dependence in relationships between people. As such, subordination analysis is not "structural bias" by another name, nor is it merely another way to apply Vice Chancellor Strine's *Oracle* analytic method. The critical difference between subordination analysis and the sort of approach of Vice Chancellor Strine in *Oracle*[388] that

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[388] *See* discussion *supra* note 96–102.

caused the Delaware Supreme Court such disquiet in *Beam*[389] is the focus of the analysis on the realities of the power relationships between the parties and the critical role of burden shifting in independence analysis under the subordination analysis.[390] Independence may not be a function of friendship or horizontal relationships—but it should be a function of power.

The object of a standard of independence based on the application of subordination principles ought to have as its object to ensure the legitimacy of board decisions by solidifying the authenticity of "independent" decisions of the board. The result might well be more cases in which there is insufficient board independence to validate a board action absent shareholder approval. But that, precisely should be the result. There is no point establishing a complicated structure of independence, vesting this structure with enormous power to validate corporate action, and then to gut the substance of independence. To the extent the courts have broadened the means by which the board can produce a sufficient number of nominally "independent" directors, they have facilitated board of directors action at the price of legitimacy. Fewer but more soundly legitimate independent decisions might produce fewer and less burdensome litigation.

The value of this subordination based relational approach might be measured, in part, by its utility in the sort of cases heard by the chancery court. What might happen if the approach I suggest—relational with a sensitivity to race, class, and gender, were applied in the *Disney* case that has served as the object of this Article? Could the Delaware courts, and corporate boards of directors in general, live with the consequences? Let's see:

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389 *See* discussion *supra* note 101.

390 Indeed, this burden shifting component was critical in the way the Supreme Court was able to distinguish the result and analysis in *In re* Oracle Corp. Derivative Litig., 824 A.2d 917, 938 (Del. Ch. 2003), *appeal denied*, Oracle Corp. *ex rel.* Special Litig. Comm. v. Barone, 829 A.2d 141 (Del. 2003), *summary judgment granted*, *In re* Oracle Corp., Derivative Litig., 867 A.2d 904 (Del. Ch. 2004), *aff'd*, 872 A.2d 960 (Del. 2005) (shareholder litigation committee context) from a demand futility context. Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1054-55 (Del. 2004). Under a subordination analysis, the burden shifting inherent in the shareholder litigation committee context would apply in all contexts in which director independence is an issue.

1. Michael Eisner

The chancery court focused on the economic value of the Ovitz Employment Agreement and its effect on Eisner's stock options.[391] Chancellor Chandler also rejected the legal effect of the very long friendship of Eisner and Ovitz.[392] But neither the chancellor nor the litigants thought to put the two ideas together. Ovitz's value to Eisner was based on their friendship and would increase the value of *Eisner's* interest in Disney. But it would be Eisner's interest in *control* of Disney rather than the short-term value of his economic interest in Disney that would benefit most from the arrangement. In this sense, subordination affects Eisner's interest in the transaction: he seeks to establish a relationship of subordination based on friendship and the establishment of a formal hierarchical relationship (for which the subordinated party would be well paid) for the purpose of advancing Eisner's control over Disney. Officers serve at the pleasure of the board of directors, not of one of the members of the board. To the extent that Eisner wanted to put someone under his control as President, Eisner was interested in the transaction for personal reasons. The fact that the arrangement never worked out should not be dispositive here. Class plays a role here. Eisner is looking for a member of the same social, cultural, and economic class to serve Eisner's interests in control without challenging the values of Eisner.

2. Roy Disney

The chancery court focused on Roy Disney's wealth. The Chancellor's decision was grounded, to a large degree, on the assumption that vast wealth insulates a person from corruption, at least with respect to smaller amounts of wealth. But, as the federal government successfully proved in the Martha Stewart litigation,[393] that assumption is not necessarily either a

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[391] *In re* Walt Disney Co. Derivative Litig., 731 A.2d 342, 355–56 (Del. Ch. 1998), *aff'd in part, rev'd in part sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

[392] *Id.* at 355.

[393] Martha Stewart was successfully prosecuted for securities fraud involving an amount somewhere between $40,000 to $45,000, a very small sum compared to Ms. Stewart's wealth. It is possible, then, these types of securities fraud cases suggest that even very wealthy people could be corrupted by relatively small sums. The opposite presumption of the Delaware courts appears to run counter to emerging federal practice. For a discussion of the Stewart case and a criticism of the federal

reasonable or necessary assumption. Labor relationships create a legally enforceable system of subordination for pay. Assuming both the necessity and value of this system,[394] the hierarchical relationship of employment ought to create a presumption of dominance where one person in a work relationship has authority over others. In such a case, the subordinate employee ought to be considered non-independent unless the subordinate employee can prove independence in fact.

However, in this case, Roy Disney might be able to show that his interests were adverse to Eisner's and that he could assert independent positions irrespective of his relationship of formal subordination to Eisner. Disney could show the absence of subordination in fact to Eisner by producing evidence that he could act independently of Eisner. In this case, evidence used by the chancery court to support its conclusion that Disney was independent is useful. Roy Disney, the founder's nephew, controlled a significant equity interest in the company. His position as a large shareholder, in this case, would suggest an interest independent of and potentially adverse from that of Eisner, an officer and director (and less significant shareholder) of the company. Relational analysis would serve to confirm rather than challenge the conclusion reached by the Chancellor, but would shift the burden of proof from the plaintiff to the defendant because of the subordination inherent in the relationship between Disney and Eisner as officers.

3. Sanford M. Litvak and Richard A. Nunis

Litvak and Nunis are not only directors, but also officers of Disney. They report to Eisner. The chancery court determined that no issue of independence was present because Eisner was not interested.[395] Relational analysis would not change the result but it would deepen the analysis. As with Roy Disney, the fact that a relationship of subordination existed between Eisner and Litvak and Nunis ought to be enough to establish a

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practice on gender and other grounds, see Joan McLeod Hemingway, *Save Martha Stewart? Observations About Equal Justice in U.S. Insider Trading Regulation*, 12 TEX. J. WOMEN & L. 247 (2003).

394 *But see*, in the American context of freed slaves of African descent, the essays in FROM CHATTEL SLAVES TO WAGE SLAVES: THE DYNAMICS OF LABOUR BARGAINING IN THE AMERICAS (Mary Turner, ed., 1995).

395 *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 357.

presumption of dominance. As a consequence, Nunis and Litvak ought to have been required to produce evidence of their independence, rather than requiring the plaintiffs to produce evidence of dependence. Here, a relational analysis based on notions of subordination would reverse the current Delaware approach to independence analysis.

4. Stanley P. Gold

The connection between Gold and Ovitz remains too tenuous, and relational analysis also changes the result reached by the chancery court.[396] It is true that Roy Disney, not Eisner, dominates Gold. The chancery court concluded that this domination has legal effect in connection with the Employment Agreement only if Eisner dominates Disney.[397] Even under a relational standard it is possible but unlikely that Roy Disney could not show his independence. Roy Disney may dominate Gold, but because Eisner does not dominate Disney, then Gold's domination has no legal effect. But a relational standard based on subordination should lead to a different result. Because Gold is dominated by Roy Disney, then any vote cast by Gold, whether or not based on a direct interest in the transaction is not independently cast. If Roy Disney's interest is adverse to Eisner, and he casts his vote on that basis as a director (solely in the best interest of the corporation) then Roy Disney has done his duty. But when Gold casts his vote, his intention is to serve the best interests of Roy Disney, rather than the company. That the Company's best interests are also served is incidental. Gold's vote, then, is tainted, precisely because he is dominated by Disney, and as such, is incapable of independently voting the interests of the corporation. He does not serve the body of shareholders[398] so much as he serves a single shareholder—Roy Disney. Relational analysis would treat this as a non-independent vote.

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[396] *Id.*

[397] *Id.*

[398] *See* MODEL BUS. CORP. ACT, *supra* note 97, § 8.30(a) ("Each member of the board of directors . . . shall act . . . in a manner the director reasonably believes to be in the best interests of the corporation."). The Official Comment explains that the term "corporation" "is a surrogate for the business enterprise as well as a frame of reference encompassing the shareholder body." *Id.* at Official Comment Part 1.

5. Robert A.M. Stern

The chancery court determined that Stern might not be independent because of his connection to an architectural firm that had collected millions of dollars in fees from Disney work controlled by Eisner. The possibility of future work and its magnitude played a critical role in that analysis.[399] Relational analysis would change the result. The relationship of dependence, plus its significance to Stern are sufficient to suggest a temptation to please the person who controlled access to work for the architectural firm. What relational analysis might add would be that the scope of dependence is deeper than the chancery court would concede. Eisner not only controlled access to Disney work for Stern and his company; Eisner also influenced Stern's access to other work. Eisner's influence, the weight of his recommendations, and the status that high profile projects gave to Stern's firm in seeking other work could make the nature of the dependence much more complex. It also would more firmly center that dependence on Eisner, rather than on the company.

6. E. Cardon Walker

The chancery court found that Walker was independent of Eisner.[400] Walker was Eisner's predecessor at Disney—its former president and chairman of the board of directors.[401] Walker had a consulting arrangement with Disney. Relational analysis would suggest that, to the extent that Eisner had power to determine the amount of consulting paid for, as well as the renewal of that contract, a relationship of subordination existed between Walker and Eisner. As such, the burden should have shifted to Walker to show independence. In this case that might have been possible. The CII Amicus admits that Eisner had little power to make determinations under the contracts, other than to cause Disney to breach them.[402] There was no indication that Walker was seeking additional investment in Disney films (had there been such attempts, it should be harder for Walker to demonstrate independence, especially if Eisner influenced such

399 *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 357.
400 *Id.* at 358.
401 *See supra* note 195.
402 CII Amicus at 27.

investment decisions).

7. Gary L. Wilson

The chancery court determined that Wilson was independent for lack of a direct financial relationship with Eisner and by discounting the significance of Disney work awarded to his wife's firm.[403] A relational analysis based on subordination principles might produce a different result. Wilson's web of contractual and business connections with Disney suggests the potential for domination, and is significant enough to trigger a shift in the burden of showing independence. In this case, Wilson himself might not be dependent on Eisner directly. But Wilson is married to a person who may be dependent on Eisner in significant ways. It is true that the value of the compensation to Wilson's wife was small in relation to Wilson's wealth,[404] but it may be true that this compensation was significant in relation to Wilson's wife's wealth, or her business's income, or her position in her firm. To that extent, what should drive the subordination analysis ought not to be the relationship of the spouse's dependence based on the husband's wealth, but the spouse's dependence based on her own position. Wilson may be dependent indirectly. The subordination of his wife to Eisner, that is Eisner's control over what may be a significant part of Wilson's spouse's income or career, may make Wilson dependent as well.

8. Leo J. O'Donovan

Father O'Donovan was deemed independent because he did not receive money directly from Eisner or Disney, because the chancellor could find no pattern of dealings between the two men, and because Eisner did not sit on the board of Georgetown, though Eisner did contribute heavily to Georgetown.[405] A relational analysis based on subordination might make this a much closer question.

On the one hand, one could argue that there was no subordination involved here—this was a relationship of equals and thus a narrow economic analysis was appropriate. Eisner

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[403] *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 358.
[404] *Id.*
[405] *Id.* at 359.

had what O'Donovan needed for the institution he headed—money. O'Donovan had what Eisner needed—conventional respectability to give legitimacy to Disney cultural products for sale on the market; O'Donovan presence could be said to serve as a religious endorsement, or at least a religious voice in Disney's activities, that was good for business. But horizontal relationships already can produce dependence with consequences under Delaware's independence standards.[406] What a subordination based relational analysis suggests in this case is that Chancellor Chandler drew the line too narrowly. At the least, the allegation of an arguably horizontal and mutually beneficial relationship between Eisner and O'Donovan ought to have shifted the burden of proving independence to O'Donovan. In this case, it might have been difficult for O'Donovan to show independence. Even in the absence of deep ties between them, the possibility of additional contributions from Eisner (a possibility that does not cease merely because Eisner's son graduated from the institution) might make O'Donovan cautious, at the very least, about appearing to offend or oppose Eisner. That caution suggests the possibility that, even if O'Donovan would not consciously pander to Eisner, O'Donovan might be willing to interpret facts in a way consistent with Eisner's interpretation. But that willingness, of course, goes to the heart of independence. Since the choice of interpretive methods might be made on the basis of considerations outside of those limited to the best interests of the corporation, that inclination (whether or not acted upon) might be sufficient to challenge independence (without suggesting a flaw in O'Donovan's character or motives).

On the other hand, the relationship between Eisner and O'Donovan might be hierarchical in a classic sense. O'Donovan owes his seat to the goodwill of Eisner and his fondness for Georgetown, the institution O'Donovan represents. That fondness produces donations to Georgetown. O'Donovan might be seen as a hostage to the need of Georgetown to maintain that fondness at appropriate levels. As such, the relationship between Eisner and O'Donovan is not horizontal, but vertical. Vertical relationships create a presumption of domination and shift the burden of proving independence to O'Donovan.

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[406] That was one of the points of Lewis v. Fuqua, 502 A.2d 962, 966-67 (Del. Ch. 1985) according to Chancellor Chandler. *See In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 359.

9. George W. Mitchell

The subordination based relational analysis abandons the chancery court's famous person rule of independence. It also reduces the importance of the contextual rule of corruption—that the stakes must be high to support a conclusion that temptation is reasonable. Both rules provided the basis for the chancery court's characterization of the independence of former Senator Mitchell.[407] A relational analysis grounded in subordination would frame the issue differently. Even former American Senators have to eat. And status, like a delicate plant, requires careful tending. Former Senator Mitchell is indeed famous, but he earns his money the way the rest of the world does—through income from investment and through payment for work done by him or by companies in which he may have an interest. In this case, Mitchell's relationship with Eisner is one of subordination in two respects—Eisner may control his consulting arrangement with Disney,[408] and Eisner may affect the income his firm receives from Disney.[409] At a minimum, that suggests that the burden ought to shift to Mitchell to show independence. This may be no easy task. Consider for example the issue of materiality. Materiality, in a relationship of subordination, should not be measured merely by a dray quantitative comparison of the actual funds historically at issue with the speculated wealth of the person whose income may be affected. In this case much more is at stake—future income on the basis of the consulting agreement, reputation and thus desirability for service on other boards, the nature of the relationship with the

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407 *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 360.

408 The CII Amicus correctly framed the issues in this respect:

> Although the Court of Chancery speculated that Mitchell would not consider his $50,000 in consulting fees material, there is no basis for that conclusion at this early stage of the proceedings, when Plaintiffs have been unable to take discovery from Mitchell. Moreover, Mitchell surely has an expectation of continuing his consulting relationship with Disney, and of increasing the income he receives through that relationship. Thus, Mitchell has a personal economic incentive not to defy Eisner, who has the power as CEO to affect the future of Mitchell's consulting arrangement with the company.

CII Amicus at 30–31.

409 Again, the CII Amicus better framed the issue: "As CEO of Disney, Eisner has the power to replace Mitchell's firm at any time. Thus, there is at least a reasonable doubt whether Mitchell would jeopardize his firm's continued relationship with Disney by defying Eisner." *Id.* at 31.

law firm. These qualitative considerations may significantly increase the value of even small sums of money to Senator Mitchell in the context in which the issue arises. It is thus not at all clear that Mitchell is independent of Eisner.

10. Irwin E. Russell

Relational analysis based on subordination analysis adds little to the chancery court's analysis of Russell. He is virtually the classic example of the case where domination is possible. Russell is Eisner's agent. That agency relationship is important to Russell. The possibility of domination is great. But Russell should be free to attempt to overcome the presumption. That effort, given the state of the record at the time of the litigation, might not have been successful.

11. Sidney Poitier

Sir Poitier presents a set of issues similar to those of former Senator Mitchell but directed to Poitier's relationship with Ovitz rather than a relationship with Eisner. The chancery court, applying a variant of the famous person rule of independence, determined that Poitier had not been shown to be dominated by Ovitz.[410] The CII Amicus concurred.[411] A subordination based relational analysis complicates the analysis, especially when the dynamics of race are added. The chancery court deems Poitier independent of Ovitz because Poitier is deemed capable of approving the Employment Agreement without bias.[412] But, it is as likely that the relationships between Poitier, Ovitz and CAA make Poitier incapable of avoiding bias. In this case, the question is the extent to which relational factors make it more or less likely that Poitier would feel compelled to give his relationship with Ovitz a significant role in the evaluation of the Employment Agreement. It is possible to characterize the relationship between Poitier and Ovitz as carrying significant elements of subordination. Ovitz and CAA were instrumental in Poitier's efforts to secure employment in films. Those efforts continued through the time the Employment Agreement was being considered.[413] Ovitz did not leave CAA in disgrace; he

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410 *See supra* notes 218–23 and accompanying text.

411 CII Amicus at 32–33.

412 *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 361.

413 *See supra* notes 254–55 and accompanying text.

retained significant connections with that agency. To the extent Poitier continued to employ CAA in his creative efforts, his relationship with Ovitz would continue to be important and yield large effects on the quality of Poitier's relationship with CAA. It might be reasonable to assume that Poitier did not wish to jeopardize those relationships, or risk jeopardizing those relationships by questioning the financial aspects of the Ovitz transaction. As an African-American actor, those concerns, or the significance of those risks might have appeared greater.[414] Indeed, Poitier's career was so successful, in part, because of his ability to carefully navigate the limitations of race and racialized pictures during the 1950s and 1960s.[415] The complicated webs of

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[414] This is reflected in some commentary about Poitier's 2002 Oscar speech. *See Inquiring Minds: Lewis Gordon On Minorities In The Film Industry*, GEORGE STREET JOURNAL, Nov. 8, 2005 (Mary Jo Curtis, Interview with Lewis Gordon), *available at* http://www.brown.edu/Administration/George_Street_Journal/vol26/26GSJ23d.html (last visited Nov. 12, 2005).

> All this is to say that the 2002 ceremony shows how long a road has been trod. That journey was best stated in Poitier's magnificent speech. He spoke of a community of people (from all racial backgrounds) who were committed to making a difference through the opportunities they offered him, and he exemplifies, with dignity and grace, what it means to rise to such an occasion.

Id. See also Kimberley Davis, *After Halle's Oscar: Why Black Actresses Still Can't Get Any Respect in Hollywood,* EBONY (MARCH, 2003), *available at* http://www.findarticles.com/p/articles/mi_m1077/is_5_58/ai_97874213 (last visited Nov. 12, 2005).

> One longtime Hollywood agent, who asked not to be named, says Hollywood executives don't live with and don't have significant relationships with African-Americans, and therefore don't—or won't—give many of them a shot. 'There are so many talented Blacks out there who will never get an opportunity because it's a closed shop. That's the reality,' says the agent, who has represented many Black actresses over the years. 'It's all about revenue. If they see an opportunity to make money off of [Blacks], we're in. Other than that, get back!'

Id.

[415] Consider this description of his early career from an internet tribute page:

> And he was careful to nurture his career by refusing to accept roles that detracted from his dignity as a human being, choosing his spots carefully, but taking advantage of the opportunities that arose beginning in the 1950s. His career grew rather slowly compared to careers of young actors today. . . . Until the 60s, his major film roles revolved around his race.

Classic Movies, *A Tribute to Sidney Poitier, available at* http://www.classicmovies.org/articles/aa022000a.htm ("Classic Movies is a major destination site for fans of classic Hollywood films and old, vintage movies, with hundreds of pages of content featuring tributes to classic movie stars, actors, actresses, directors, filmmakers, composers, and other movie people, news about celebrity deaths, and information about movies for sale . . . .") (last visited Nov. 12, relationships that contribute to a successful career, and in this case, that focused on the ongoing relationships between Poitier, an actor, CAA, an actor's representation business, and Ovitz, the former head of CAA and now negotiating terms for employment as President of Disney, among other things a studio, might make it seem a recipe for dependencies running in all sorts of directions. At a minimum, then, such complications might suggest, again, that the burden shift to Poitier to demonstrate his independence. That is possible. His age, his career plans at the time, his stature in the film industry, and the nature of his relationships with the other actors might indeed suggest that Poitier could consider the terms of the Employment Agreement apart from his relationship to Ovitz.

12. Reveta Bowers

At last we come to the inspiration for this analysis. It is appropriate to end this Article where we started: the independence of Reveta Bowers. This Article has suggested the ways in which both the chancery court's analysis and CII's alternative approach fail to engage important factual and policy aspects of independence. A subordination based relational approach is more sensitive to the realities of dependence and independence in the relationship between Bowers and Eisner. Unlike the CII approach, the focus should not be on the mathematical relation between Bowers' director fees and other income.[416] Unlike the chancery court approach, the focus should not be on insulation of "regular folks" from the application of an independence analysis[417]—such an approach does little to avoid subordination and disserves the shareholders on whose behalf the analysis is undertaken. A subordination analysis is far more complicated. Eisner had once employed the school at which Bowers was a principal for the education of his children. That should constitute direct dependence. But at the time the Employment Agreement was being considered that was no longer the case, and it was unlikely that Eisner would produce more children to send to the school. That militates against a determination of direct relation. What were left were the friendly ties resulting from that prior hire. But that friendship

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416 See CII Amicus at 29–30.

417 *In re Walt Disney Co. Derivative Litig.*, 731 A.2d at 360.

was not between equals. Eisner's friendship could produce lots of benefits—from further enrollment of children on Eisner's recommendation, to donations to the school by a parent with fond memories of the service he received, to entrée into the social circle frequented by Eisner to further the philanthropic and other work of Bowers. These relational connections would be important to Bowers—perhaps far more important than the money represented by the director fees that made a comfortable life somewhat more comfortable. These dependencies were complicated by race. If Eisner served as Bowers' patron and bridge into white philanthropic circles, the dependency deepened. If Eisner was merely one of a number of competing entry points into the world of white philanthropy, then the dependency lightened considerably. All of these factors might have an influence on Bowers' approach to the consideration of issues put forward by Eisner. On the other hand, none of it might matter. Bowers' race might insulate her from the pressures of performing for Eisner as readily as it might have made performance more important. Bowers' own social system, to the extent it did not depend on Eisner, liberated her from worrying about the effect of Eisner's pleasure or anger on the rest of Bowers' life. That would leave only the directorship of Disney as the one factor that Eisner might affect. But in Bowers' world of principle and philanthropy, independence might be more valuable than the Disney directorship.[418] The possibility of dependence, however, would, in Bowers' case, also shift the burden of proving independence from plaintiffs to Bowers. The substantive question would be a very close call on the basis of the facts available at the time of the litigation.

What result? Applying a subordination based relational analysis, the question of the board's independence becomes a much closer question. It is more likely that Eisner can be found to be interested in the transaction. It is also more likely that perhaps a majority of the board of directors will be found to be interested or dominated. But the standard does not guarantee a finding of domination. It is not meant to. A closer investigation of the relationships of board members, a tighter application of rules of independence, can produce board actions substantially more difficult to challenge in subsequent litigation. It may also

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[418] For a more detailed parsing of these factors, see *supra* notes 341–87.

result in more issues having to be approved by the shareholders where a requisite number of independent directors cannot be found. These are both good results. A standard that deepens the legitimacy of board of director decisions should be welcome by all participants in the governance of corporations. A standard that devolves more decisions affecting directors and officers to the shareholders furthers shareholder democracy and should be welcome by them. It also protects decisions from second-guessing by courts, after the fact, and increases the confidence of owners. Application of such a standard might have avoided the approval of the Employment Agreement as ultimately signed, the invocation of the termination provisions as ultimately approved, or the litigation over the Employment Agreement that sapped the resources of the corporation from 1997 through 2005. And the price to be paid would have been small enough: ensuring that directors actually approving the transactions could meet the more rigorous and legitimating standards of a subordination based relational approach to independence.

CONCLUSION

Joel Seligman has noted a relationship between the renewal of the Ovitz litigation and the corporate scandals of 2001 that led to the enactment of the Sarbanes-Oxley Act.[419]

> Only in 2003, after Enron and an amended complaint, did the Delaware Chancery Court revive the possibility of a trial on the merits of what was then styled *In re Walt Disney Co. Derivative Litigation*. These decisions coincided with a dramatic increase in the ratio of the compensation of the corporate CEO to that of the average corporate blue collar employee. In 1980, this ratio was 42 to 1; by 1990, it had grown to at least 120 to 1; by 2000, it was estimated to be at least 475 to 1.[420]

The Ovitz litigation, however, has had little effect on the construction of rules for the independence of directors. The Sarbanes-Oxley Act, Section 301, puts forth a definition of independence for purposes of audit committee membership that

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[419] Joel Seligman, *Corporate Accountability: Bolster the SEC and Litigation*, 3(4) NEW DEMOCRACY PROJECT NEWSL., Apr. 1, 2005.

[420] Joel Seligman, *Rethinking Private Securities Litigation*, 73 U. CIN. L. REV. 95, 114 (2004) (citing Susan J. Stabile, *One for A, Two for B, and Four Hundred for C: The Widening Gap in Pay Between Executives and Rank and File Employees*, 36 U. MICH. J.L. REFORM 115, 115–16, 116 n.2 (2002)).

takes only economic relationships into account.[421] State corporate law principles continue to exert a large influence on this issue. To the extent it continues to mask issues of race, gender and class, it will continue to be a troublesome source of legal standard setting.

The temptation at this point might be to dismiss the analysis as the failings of a single Chancellor in a single case in a matter with respect to which the Chancellor's determination was overturned—on other grounds—on appeal. Chancellor Chandler, however, is not to be faulted for his analysis in *Disney*. I believe that the Chancellor did an admirable job of setting out and applying the current standards for challenging director independence in Delaware.[422] Directors, however, tend to get lost in the presumptions of the standard. Narrowly drawn to value only economic and financial interactions, the standard tends to overlook the reality of the relationships between individuals. As the analyses put forth by both Chancellor Chandler and CII demonstrate, standards so narrowly constructed produce more frustration than fair results. But as Vice Chancellor Strine's analysis in *Oracle* also demonstrates, unbounded relational analyses may not be more helpful than the narrow approach of *Disney*. A more nuanced approach that examines relationships in the context of power, and specifically of the power relationships inherent in hierarchies of race, gender, and class offers a better chance at obtaining a fair evaluation of the total

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421 Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775–76. The Sarbanes-Oxley Act added section 10A(m) to the Securities Exchange Act of 1934, defining "independence" as follows:

> (3) Independence—
>
> > (A) In general.—Each member of the audit committee of the issuer shall be a member of the board of directors of the issuer, and shall otherwise be independent.
> >
> > (B) Criteria.—In order to be considered to be independent for purposes of this paragraph, a member of an audit committee of an issuer may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee—
> >
> > > (i) accept any consulting, advisory, or other compensatory fee from the issuer; or
> > >
> > > (ii) be an affiliated person of the issuer or any subsidiary thereof.

Id.

422 For an even more sophisticated application of the law of director independence by Chancellor Chandler, see *Orman v. Cullman*, 794 A.2d 5, 26–31 (Del. Ch. 2002), where the Chancellor assesses the independence of six different directors.

circumstances of key relationships. Both Critical Race and Feminist Theories provide the tools as well as the normative foundation for creating norms based upon these principles.

Fundamental to Critical Race and Feminist approaches is a simple goal that is easy to overlook in the search for certainty in the law: Determinations of the character of a relationship should not depend on prejudged factors but rather ought to be based on a realistic appraisal of the totality of the circumstances of the relationship. For that purpose, race, gender, and class matter just as much as direct financial or economic relationships. From this insight, it has been possible to develop the outlines of a subordination based relational standard and to demonstrate the way that standard could be applied in even the more difficult factual contexts, like those presented in the *Disney* litigation. Race, class, subordination, and relational analysis should hold few terrors for corporate governance in general and Delaware law in particular. Both, applied reasonably, can significantly further the great traditional goals of shareholder democracy and governance legitimacy. The difficulties of the *Disney* litigation suggested the broad outlines of the problem; the hope expressed here is for the production of the broad outlines of a solution.