



H.S. Grace & Company, Inc.

## Executive Compensation and Termination Issues

Executive compensation issues are becoming increasingly common in litigation today with recent SEC proposals and changes under Dodd-Frank relating to say-on-pay, compensation committee and compensation consultant independence, and compensation clawback policy. The recent negative vote on Citigroup, Inc. CEO Vikram Pandit's executive compensation package by Citigroup, Inc. shareholders highlights the heightened attention being paid by shareholders and others to executive compensation matters. H.S. Grace & Company Inc.'s (HSG) experience as the consulting expert for the carrier in the *Disney/Michael Ovitz* case and in other executive compensation cases offers valuable insights into corporate governance and other business process and decision-making issues in these types of cases. The following HSG case demonstrates the types of corporate governance and business process and decision-making issues that may arise in litigation involving executive compensation and termination.

### Allegations

Plaintiff corporation (HSG client) sued defendant, the former CEO of the company, asserting that he was not entitled to any compensation under his employment agreement with the company either because he had been terminated for cause, or, alternatively, because he was a faithless servant, who had committed numerous breaches of his fiduciary duties to the company. Defendant former CEO countered contending that he had resigned for "good reason" under the agreement because the company had changed his duties and responsibilities or, alternatively, that he was terminated for a reason other than "for cause." The corporation had terminated the CEO shortly after he was indicted for a crime, which the CEO contended was unrelated to his employment with the company, and during an investigation of the defendant for possible crimes committed involving the company. Defendant was ultimately convicted of committing the crime which defendant contended was unrelated, but was not convicted of the alleged crimes directly involving the company. Because of an unusual provision in his employment agreement, termination for cause required intentional participation in illegal conduct, which was demonstrably and materially injurious to the company. Defendant CEO had essentially drafted or controlled the drafting of his employment agreement through his involvement with the Compensation Committee, the compensation consultant, and the company's outside counsel. Defendant's claim for payments allegedly due under the employment agreement was a nine figure sum.

### Analysis

Drawing on their extensive board and executive experience in corporate governance and compensation issues, including extensive knowledge of the terms and provisions of executive employment agreements and the termination of such agreements, the HSG team evaluated the detailed actions and business decisions of the CEO over a number of years. HSG's analysis showed that the CEO's conduct did not conform with normal and customary business conduct and standards and that he had violated numerous provisions of the company's Code of Ethics and NYSE Corporate Governance Standards. In reaching these conclusions HSG evaluated numerous complex executive compensation issues, including issues involving restricted stock units (RSU's), complex life insurance policies provided by the company, and the CEO's personal use of company property. HSG also evaluated several conflict situations, which had not been disclosed by the CEO. Finally, HSG reviewed numerous actions taken by the CEO to

cement his control over the company. These actions included driving off board members who disagreed with him and terminating and not replacing the company's General Counsel. The CEO's actions demonstrated that he had placed his own interests above those of the company to the company's detriment on numerous occasions resulting in violations of the company's Code of Ethics and other corporate governance standards.

## Results

After extensive discovery, the case was resolved on very favorable terms for the company.

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*H.S. Grace & Company, Inc. is a team of senior executives who diagnose and resolve critical corporate problems in business governance, operations, finance and control. With more than 1,000 years of experience, our goal is to help companies enhance shareholder value, protect reputation and their long-term ability to succeed, avoid and manage litigation, and navigate major changes such as mergers and acquisitions or bankruptcies. We often serve as consulting and testifying experts, identifying and analyzing critical business issues.*

## Representative Issues Examined

- Lender Liability
- D&O
- Corporate Split-off
- Family Trust
- Health Care
- Professional Services
- Intellectual Property
- International Structured Finance Transaction
- Fraud
- Pension Fund Investments
- SEC White Collar Defense
- Stock Option Backdating
- Oil & Gas
- Real Estate
- Fiduciary Issues
- Contract Dispute
- Fund Management
- Market Timing Allegations
- Financial Derivatives
- Portfolio Management
- Special Purpose Corporation

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