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Case Law

In re The Walt Disney Company Derivative Litigation, Consol. C.A. No. 15452, 2005 Del. Ch. LEXIS 113 (Del. Ch. Aug. 9, 2005).

Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 1986 Del. LEXIS 1053 (Del. 1986)

Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 1985 Del. LEXIS 482 (Del. 1985)

Unitrin, Inc. v. American Gen. Corp. (In re Unitrin, Inc.), 651 A.2d 1361, 1995 Del. LEXIS 13 (Del. 1995)

Weinberger v. UOP, Inc., 457 A.2d 701, 1983 Del. LEXIS 371 (Del. 1983)

Smith v. Van Gorkom, 488 A.2d 858, 1985 Del. LEXIS 421, Fed. Sec. L. Rep. (CCH) P91921, 46 A.L.R.4th 821 (Del. 1985)

Blasius Industries, Inc. v. Atlas Corp., 564 A.2d 651, 1988 Del. Ch. LEXIS 103 (Del. Ch. 1988)

Other Reference Materials

- Sarbanes Oxley Act of 2002
- The Combined Code from the UK
- The NYSE Requirements for Corporate Governance
- Sources for Corporate Governance Abroad
- International Corporate Governance Codes
- Sources for Board Minutes and Directors' Notes