IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE THE WALT DISNEY COMPANY DERIVATIVE LITIGATION	))	Consolidated C.A. No. 15452

POST-TRIAL BRIEF OF DEFENDANT MICHAEL OVITZ

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I. INTRODUCTION

Plaintiffs have been living on borrowed time for quite a while.

Plaintiffs overcame Ovitz's motion to dismiss by concocting grandiose proclamations of his participation in an illicit conspiracy, hatched in the proverbial smoke-filled room. They promised to deliver proof that Ovitz "*wanted* to leave Disney,"[1] and that he and Eisner "colluded with each other in causing the Non-Fault Termination to be granted" under the Ovitz Employment Agreement ("OEA").[2] Plaintiffs also trumpeted allegations that Ovitz's performance at Disney was so deficient as to constitute gross negligence or malfeasance under the OEA.[3] Last summer, plaintiffs stridently asserted that Ovitz "wanted to get out" of Disney,[4] and that "throughout October, November and December of 1996, Ovitz and Eisner [] work[ed] out a private deal to engineer Ovitz's departure within the framework of an NFT."[5] And they tossed around claims of gross negligence and malfeasance with reckless abandon.

The day of reckoning has finally arrived. Forced at last to substantiate their well-publicized attacks, plaintiffs have delivered *nothing*. Far from proving a clandestine conspiracy between Ovitz and others to engineer his own departure, the evidence shows that Ovitz was fired. And far from proving gross negligence or malfeasance, the evidence shows a corporate atmosphere in which Ovitz's ideas were thwarted at every turn.

Unable to prove that Ovitz left Disney voluntarily, or that he wanted to leave at all, plaintiffs again resort to character assassination, claiming loudly that Ovitz could be fired because he was an habitual liar. What is so amazing, though, is that after full discovery and a lengthy trial, when asked to state even one specific material lie Ovitz told while at Disney, plaintiffs are silent.

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[1] *See* Pl. Opp'n Ovitz Mot. Dismiss, D.I. 75, at 2 (emphasis in original).

[2] *See* 2nd Amd. Consol. Deriv. Compl., D.I. 66 at ¶119, (hereafter "Compl.).

[3] *See* Compl. at ¶¶69-76, 94, 106F.

[4] *See* Mot. Summ. J. Hr'g. Tr., D.I. 119, at 63.

[5] *See* Pl. Opp'n Ovitz Mot. Summ. J., D.I. 467, at 68.

Perhaps recognizing that when required to present proof, they do not have much to say about Ovitz, plaintiffs devote surprisingly little space to him in their post-trial brief. Instead, much as they did at the summary judgment stage, plaintiffs simply lump Ovitz together with the other defendants and again make sweeping generalized accusations of wrongdoing. Legally, however, such a tactic does not wash. For plaintiffs to obtain a judgment against Ovitz, they must prove that *he* breached a fiduciary duty. And that they cannot do.

So where does that leave us? Simply put, Ovitz gave up his secure position at CAA to come to Disney, and he bargained for contractual protections in the event things did not work out. And they did not. Disney elected to honor its contract, and Ovitz did as well. He is entitled to judgment.

II. STATEMENT OF FACTS

A. Before Going To Disney, Michael Ovitz Was An Established Executive In The Entertainment Industry As The Head And Majority Owner Of The Dominant Talent Agency In Hollywood, CAA.

In 1995, Michael Ovitz was not just another talent agent. Rather, he had transformed the entire entertainment industry through his hard work, creativity, willingness to take risks, and intense drive to succeed. Ovitz and his partners started CAA from nothing in 1974. Tr. 1091-98. In less than a decade, they made it one of the top agencies in the business. By 1995, CAA had surpassed all of its competitors, with an incredible roster of roughly 1,400 of the top actors, directors, writers, and musicians generating approximately $150 million in annual revenues. Tr. 1098-99. As a 55% shareholder in CAA, Ovitz's share of this revenue provided him an annual income of about $20 million. Tr. 1099; M. Dreyer Depo. at 128.

By 1995, Ovitz was looking for new challenges. In May, Ovitz and his partners negotiated with MCA for Ovitz to become MCA's chairman/CEO and his partners to take other high positions. MCA offered them ten percent of the company (in addition to cash compensation) to come over, but Ovitz declined the offer because he did not believe he would get the financial and operational support he would need to turn MCA around. Tr. 1273-75,

1279-81, 1869-72, 1876-77; P.Ex. 793; D.Ex. 75, 79;[6] Meyer Depo at 10-11. A month later, his partner Ron Meyer, who ran CAA's day-to-day operations, unexpectedly took the number two job at MCA. Tr. 1283-87. This stunned Ovitz, and led him to revisit the repeated offers of his longtime friend Michael Eisner to come to Disney. Tr. 1256-59.

B. Eisner Presented His Old Friend With A Rosy Picture Of What Running The Disney Company Together Could Be Like.

Disney entered 1995 with a serious management problem. It had tragically lost its President, Frank Wells, to a helicopter crash in April 1994, leaving Disney without a viable successor to Eisner. Tr. 4149-50. Shortly thereafter, Eisner underwent emergency heart surgery. And the purchase of ABC—announced in July 1995—nearly doubled Disney in both size and complexity, Tr. 3999, 4190-91, 4193-94, making the succession issue a hot topic of the Board and press, Tr. 2314, 4170-71, 5912-14. Eisner needed to act. But in his eyes there was only one qualified candidate available for the job: Michael Ovitz.[7] Tr. 4162-64, 4167-68.

Eisner and Ovitz had been close friends for 25 years. Professionally, the two interacted innumerable times. Tr. 1392-93. Personally, the men and their families shared such moments as holidays, births, illnesses, and deaths. Tr. 1107, 1127, 1291, 1373, 1392-94, 4155-57.

Although Eisner had pursued Ovitz for over a decade, Tr. 1105-06, Eisner's interest in hiring him soared after Wells' death. Eisner even counseled Ovitz against going to MCA, Tr. 1275-76, concerned that Ovitz would become a competitor, Tr. 4175. After Meyer left CAA, Eisner felt the time was right to strike a deal. Tr. 4185-86, 4696-97.

The two spoke frequently throughout July and early August regarding Ovitz coming to Disney. During this time, Ovitz believed that he and Eisner reached a shared understanding on his future role. Although Ovitz knew he would formally report to Eisner, he understood that in practice they would run Disney as partners—with Eisner as the senior partner—in the same way that several other famous duos had led their companies. Tr. 1116-17. Eisner intended to shake

[6] All defense trial exhibits are abbreviated "D.Ex.," and plaintiffs' trial exhibits are abbreviated "P.Ex."

[7] Although Eisner believed Diller would be a fitting replacement for him, he knew that Diller would be unwilling to play second fiddle. Tr. 4685-86, 4818-21.

up and reinvent Disney, Tr. 1108, 1113-14, 1118; *see also* P.Ex. 316, and led Ovitz to believe that he, Ovitz, could help shape Disney's future, Tr. 1118, 1257. In particular, Ovitz understood that his special skills, interests, and connections ideally suited him to lead an initiative to improve upon two traditional Disney weaknesses: poor talent relationships and stagnant foreign growth. Tr. 1108-13, 1126, 1182-83, 1217. This shared vision—and Eisner's promised support in realizing it—allayed Ovitz's concerns about executive infighting, and he accepted Disney's presidency. Tr. 1114, 1290-92, 1335-36.

The hiring was announced on August 14, 1995. P.Ex. 3. Everyone believed Eisner had scored a great coup by hiring Ovitz. Tr. 4230, 4242-43. Disney's market capitalization soared by a $1,000,000,000 upon the announcement. *Id.*; D.Ex. 428 at 7-8, Tr. 7287-91; P.Ex. 822.

C. Ovitz And Disney Approved A Contract That Reflected The Anticipated Value Of Ovitz's Services And The Opportunities That Ovitz Sacrificed To Come To Disney.

Ovitz's employment at Disney was governed by a written contract, the OEA. P.Ex. 7. The OEA provided for a salary, a discretionary bonus, and two tranches of options—3,000,000 to vest during the contract term ("A") and 2,000,000 to vest if Disney and Ovitz opted to renew the contract ("B"). It had a fixed term of five years, during which neither party could terminate it (absent contractually-defined cause) without penalty. If Disney terminated Ovitz's employment other than for gross negligence or malfeasance (the same standard as in Eisner's and Wells' contracts, D.Ex. 67; Tr. 6080-81), it would have to pay him a non-fault termination ("NFT") payment consisting of his remaining salary, $7.5 million in lieu of a bonus for each remaining year of the contract, and $10 million in lieu of his B options.[8] In addition, Ovitz's A options would vest immediately. Conversely, if Ovitz quit other than for a contractually-specified good reason, P.Ex. 7 at ¶12, he would forfeit all of his remaining OEA benefits and, critically, Disney could enjoin him from working for a competitor, *id.*, at ¶9.

[8] This was roughly equivalent to the compensation Wells would have received on termination, *see* D.Ex. 67 at ¶12 of Wells Agr.

In order to come to Disney, Ovitz had to leave CAA. Tr. 1326-27. The partners could not readily sell it, so they transferred the business to nine CAA agents for a promise that Ovitz and his former partners would collectively be paid 75% of the next four years of collections on deals consummated before Ovitz left. P.Ex. 204. They received no upfront cash payment. And even the future payments were expressly contingent on CAA first attaining a substantial level of profitability.[9] *Id.* While it turns out that CAA was indeed profitable,[10] at the time it was uncertain at best whether CAA would even survive, let alone generate sufficient profits to trigger any payment obligation. *See* Tr. 1274, 1534-37; Rubel Depo at 113, 118-20.

D. From The Moment Ovitz Committed Himself To Disney, Eisner Undermined His Chances To Succeed By Depriving Him Of Any Real Authority.

It is clear in retrospect that Eisner always intended a radically different relationship from the partnership Ovitz thought he was joining. In Eisner's vision, Ovitz was to play a limited role, with no control over areas of critical operations including finance, legal, human resources, and animation. Consequently, when, at the August 13 meeting at Eisner's home, CFO Bollenbach and CCO Litvack rudely refused to report to Ovitz, Eisner merely stood back and let it happen.[11] Tr. 1120-25, 1335-36, 4844-50, 5274-75, 6047-50. While Eisner privately assured Ovitz that matters would be worked out,[12] Tr. 1120-25, 1335-36, he took no action when Roy Disney

[9] This arrangement was disclosed to Disney and Disney established a procedure to avoid conflicts of interest. P.Ex. 148, 314; Tr. 1298-99, 1610-13, 6455-57, 6459-64.

[10] Over the period the agreement was in effect, Ovitz and his partners collectively received approximately $180 million, of which Ovitz received 55%. Tr. 1296.

[11] Eisner testified Ovitz knew that Disney was contractually required to permit Bollenbach to report to Eisner, Tr. 4846-47, but Ovitz testified that he had not heard this until later, Tr. 1990-91. (It turns out that Bollenbach had no such right, although certain restricted stock vested early if he did not report directly to the CEO. *See* P.Ex. 803 at ¶4.) Eisner does not claim that he had warned Ovitz that Litvack would demand similar reporting rights.

[12] By that time, it was too late for Ovitz to back out of the deal. He had already informed a number of the top agents at CAA that he was going to Disney, and, having reversed already himself once on a plan to leave with MCA, he could not credibly go back to the well a second time. Tr. 1293-94, 1296-97.

circulated an embarrassing newsletter to the animation department stating that there, too, Ovitz would have no authority.[13] *See* P.Ex. 434; Tr. 1229-31.

Things did not improve after Ovitz arrived at Disney. For example, Ovitz had no ability to fire or transfer underperforming executives. Nor could he authorize any significant ventures or expenditures, so certain opportunities that could have proved extremely profitable for Disney, such as the chance to acquire a major stake in Yahoo! and to settle Jeffrey Katzenberg's claims against Disney before suit was filed, fell by the wayside.[14]

Ovitz's lack of authority plagued him wherever he turned. It quickly became evident that having a micromanaging superior with a fundamentally different business philosophy rendered Ovitz largely irrelevant.[15] In the largest areas of Disney's operations—the studios, ABC, and theme parks—Ovitz was relegated to the sidelines. Any decisions that the division heads could not make themselves had to be made by Eisner. Still, Ovitz tried to be helpful. He aided Roth in handling talent and helped to recruit executives such as Nickelodeon founder Geraldine Laybourne.[16] Tr. 1208-10, 1215-17, 1235-38. Ovitz also proved particularly successful in helping Disney retain certain key animators and executives. Tr. 1230-31; D.Ex. 194. Ovitz further offered new ideas that proved beneficial, such as changing the entrance to Disney's new California Adventure and restructuring ABC's Saturday television morning line-up. Tr. 1203-08, 1233-34. Ultimately, however, his ability to improve these divisions was severely

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[13] Here again Eisner claims that Ovitz knew before August 12 that animation would not report to him. But even if one credits Eisner's testimony, Eisner himself concedes that the way in which the matter was handled unnecessarily embarrassed Ovitz mere days after his hiring was announced. Tr. 4911-12.

[14] Ovitz testified that he could have reached a settlement with Katzenberg prior to litigation for approximately $90 million. Tr. 1159-60. While this Court excluded direct evidence of the amount Disney paid to settle those claims, Tr. 3824-29, the evidence suggests that Disney ultimately paid approximately $270 million in settlement, Tr. 1160. That potential $180 million savings alone (had Eisner and Litvack not failed to seize the opportunity) was worth more than Ovitz's entire NFT payment.

[15] Eisner's micromanaging extended deep into the corporate hierarchy, intruding on decisions normally made by division management. At one point, Eisner even demanded direct responsibility for making all series and pilot decisions for ABC. *See* P.Ex. 322; *see also* Tr. 3812-13.

[16] Ovitz's aid to Roth primarily involved individuals who were not then under contract with Disney. *See* P.Ex. 749; Tr. 1209-13. But in at least one instance, Ovitz helped smooth over a disagreement with star Tim Allen that had led Mr. Allen to walk off the set of Disney hit show *Home Improvement*. Tr. 1250-55.

circumscribed. Worse, Eisner chronically undermined Ovitz by telling Ovitz's ostensible direct reports that they could, and should, freely circumvent Ovitz's authority and should not perform Ovitz's directives without Eisner's prior approval. Ovitz Depo at 535-37; *see also* P.Ex. 67 (telling Iger to report directly to Eisner rather than going through Ovitz).

Even in the areas where Eisner granted Ovitz primary responsibility—Hollywood Records, Disney Interactive, and publishing—Ovitz was given neither the authority nor the time needed to clean up the existing problems.[17] Both Hollywood Records and the publishing outfit were low revenue operations without any major names, and Hollywood Records had never even turned a profit. *See* Tr. 5096; D.Ex. 207; P.Ex. 638. As Litvack put it, "Hollywood Records was, by any measure—I don't mean to overstate it—a spectacular failure to that time . . ." Tr. 6146-47; *cf.* P.Ex. 638.

Ovitz had three strategies to revive Disney's moribund records and publishing operations. First, he explored opportunities to purchase (or joint venture with) other companies that could give Disney a viable presence in those markets, such as EMI and Sony for the music business and Putnam Publishing for the publishing business. Tr. 1134-36, 1139-41, 1161-63. These proposals died, however, due to Eisner's refusal to allow Disney to make additional expenditures and his desire to grow these businesses internally. Tr. 1147, 1163-64; *see also* P.Ex. 312, 322. Second, Ovitz explored opportunities to sign big-name stars such as Janet Jackson, Tom Clancy, and Michael Crichton to the record and publishing labels as a means to attract other artists to sign with them. Tr. 1137-39, 1161-62. Eisner again rejected Ovitz's proposals. Tr. 1139, 1163-64. Third, Ovitz sought to further Eisner's wishes to shake Disney up by bringing in new executives and removing underperforming ones. Tr. 1148-50. Here again, he was stymied by Eisner's directives. Tr. 1150. Eisner's decisions left Ovitz with a nearly impossible mandate: fix the problem divisions *without* making any major changes.

[17] Notably, Eisner tasked Ovitz with all of the underperforming areas of Disney, while reserving his own primary involvement for the highly successful movie studio, animation, and theme parks divisions, as well as the newly-acquired operations of ABC.

Eisner similarly undermined Ovitz's ability to reshape Disney Interactive and European operations. In those areas, the key problem was enormous overhead, due to too many employees at Disney Interactive and a fragmented and inefficient reporting structure in Europe. Tr. 1172, 1180-81, 1197-1200. So Ovitz sought to consolidate the European operations and to offload some of the Disney Interactive overhead to Sony via a joint venture. Tr. 1165-68, 1197-1200, 1356-58. He also brought Disney other opportunities, such as a chance to buy twenty-five to fifty percent of Yahoo! as an alternative to Disney's home-grown portal Go.com. Tr. 1176-80. Again Eisner prevented Ovitz from pursuing his business strategies. Tr. 1181-82.

Eisner viewed Ovitz's numerous attempts to generate opportunities for these divisions as indicating a lack of focus, an excessive emphasis on deal-making versus operations, and a fixation on uneconomical talent and projects. Tr. 4284-85; P.Ex. 79, 322. But to Ovitz, these bold proposals were the means by which he had succeeded at CAA and reflected his understanding of how success could be attained in the entertainment industry. This was the job he thought he had been hired to do. But he was never able to convince Eisner that he was right in his approach.

Eisner also denied Ovitz the time needed for Ovitz's longer-range efforts to bear fruit. For example, Ovitz testified at length about the complex nature of doing business in Asia and the need to develop relationships there over time in order to succeed. Ovitz started this work with a major trip to China and numerous trips to Japan (among other countries), Tr. 1183-85, 1187-93, but had too little time for his efforts to show results before he was forced out.

E. A Clash In Operating And Communicating Styles Exacerbated The Problems.

While the criticisms that have been levied against Ovitz's performance at Disney have mostly been unfair, it is undeniable that Ovitz's transition into Disney was difficult. Moving from a small, flexible organization like CAA to a large corporate environment with layers of bureaucracy was a shock to say the least. Ovitz recognized early that he would have a lot to learn about operating in a large public company, Tr. 1114-15, so he tried to get help where

needed, such as with his expense reimbursement, Tr. 1315-18; P.Ex. 318. But Ovitz found Disney's turf battles often limited or discouraged what he considered to be good business.

Ovitz was also castigated due to his personal communication style. Indeed, as plaintiffs so often state, Ovitz was occasionally characterized in Eisner's writings as being a liar and untrustworthy. On the stand, however, neither Eisner nor Litvack (nor any other witness) testified that Ovitz had lied to them. Tr. 4434-39, 6133-35. Rather, they claimed Ovitz tried to "agent" or handle them. *Id.*; Tr. 6373-74. But Ovitz was a consummate negotiator and salesman. His speech is replete with superlatives, and he uses language to persuade. (Indeed, lacking any real authority, all Ovitz *could* do was attempt to persuade others to his point of view.) Such language may not have been typical at Disney, and it apparently exacerbated the problem of having an outsider brought into an entrenched corporate bureaucracy.

F. By September 1996, Eisner's Chief Goal Was To Force Ovitz To Leave Disney.

By early Fall 1996 at the latest, Eisner concluded that hiring Ovitz had been a mistake and that Ovitz must leave Disney. P.Ex. 18; Tr. 4354-55. At about the same time, press reports fueled by internal leaks at Disney were harshly critical of Ovitz, and there was open speculation that Ovitz's tenure was in doubt. P.Ex. 21, 22.

In mid-September, Litvack walked into Ovitz's office and told him that Eisner wanted him to leave. Tr. 1350-52, 4354-55, 4731-32, 6100-03, 6561-62. Ovitz refused, responding that if Eisner felt that way, Eisner should say so directly. Tr. 1351-53. Litvack left, with Ovitz still determined to stay at Disney and work as hard as necessary to turn things around. *Id.* Ovitz even went to Eisner and, after addressing in great detail his history at Disney, the efforts he had made, and their past relationship, pleaded with Eisner to help him "make it work." Tr. 1353-56. But Eisner was no longer interested. *Id.*

By late September, Eisner believed he had come upon a perfect solution. Eisner learned that Sony, with whom Ovitz had numerous dealings, was interested in hiring Ovitz to oversee its U.S. operations. Tr. 1356-59, 4319-20. Eisner hoped a deal could be reached that would let

Ovitz work for Sony in a way that would save face for everybody. Tr. 4319-20, 4351-53, 4804. He further hoped to extract additional benefits from Sony in exchange for letting Ovitz leave. Tr. 4353-54, 4356-58, 5140-42; P.Ex. 19. So, to create negotiating leverage, Eisner told Noboyuki Idei, Sony's Chairman, that he really did *not* want Ovitz to leave Disney. Tr. 4357-58, 4804; P.Ex. 19; D.Ex. 160, 161. Meanwhile, at Eisner's urging, and with his express permission, Tr. 1358-62, 4354-56; P.Ex. 18, 19, Ovitz negotiated with Sony, Tr. 1359.[18] But Ovitz had no great interest in moving to Sony and quickly decided that his goal was to succeed at Disney. Tr. 1363-66. On November 1, he so informed Eisner, vowing to "recommit" himself to Disney. P.Ex. 19; Tr. 4363-64.

The failure of the Sony opportunity to materialize and Ovitz's unwavering determination to stay combined to frustrate an increasingly irritated Eisner. Tr. 1371-72, 4368-70. As he had done before, Eisner chose to vent his frustration in writing, on this occasion in the form of a letter—never sent—to Ovitz. P.Ex. 24. His nearly stream-of-consciousness diatribe included a host of alleged (and sometimes imagined) ills in an attempt to convince Ovitz that the situation was hopeless.[19] Tr. 4371-72. For example, Eisner erroneously blamed Ovitz for allegedly using improper tactics to hire Jamie Tarses despite the fact that Ovitz received approval from Litvack to approach her and that ABC President Iger made the decision to hire her. Tr. 1699-1701, 1705, 6136-38; Iger Depo at 97-98. Similarly, Eisner mistakenly accused Ovitz of failing to pay the costs of his daughter's Bat Mitzvah and of failing to turn in gifts when the facts show that Litvack or Russell had investigated both issues and found Ovitz in compliance with Company policy in each. Tr. 5024, 6139-41, 6145-46. At trial, even Eisner admitted that parts of P.Ex. 24 were simply untrue and that he was really just trying to blame Ovitz for everything in the hope of convincing Ovitz that he had to leave. Tr. 5027-28, 5194; *cf.* Tr. 6146-48. But one statement in

[18] Eisner's efforts here were less than fully helpful. Rather than encourage Ovitz, a skilled negotiator, to arrange the best deal he could, Eisner told Ovitz that he had to negotiate something extra for Disney to avoid the "Disney and MDE embarrassment equation." P.Ex. 19. As it turns out, the Sony negotiations went nowhere, and that requirement proved irrelevant.

[19] Eisner claims to have talked through some of the issues with Ovitz a couple of days later in another unsuccessful attempt to convince Ovitz to leave. Tr. 4371-72, 4374-75, 5196; P.Ex. 23.

that letter *was* true: although Ovitz wanted to "continue under the management structure at Disney," Eisner had concluded that they "really cannot." P.Ex. 24.

G. Eisner Prepared And Implemented A Non-Fault Termination Of Ovitz In November And December 1996.

In November, Eisner prepared to oust Ovitz. As an initial matter, Eisner asked Litvack whether there was any way Disney could terminate Ovitz for cause. Tr. 4379-81, 4419-20, 6110-13. Although terminating Ovitz for cause would have made Litvack "the happiest man alive," Tr. 6414; *see also* Tr. 6115 ("I would have loved not to pay him"), Litvack determined Disney had no basis to do so, and that the question was not even close. Tr. 6113-15, 6133-34, 6388-89, 6415. Although Eisner disliked that answer and directed Litvack to re-think it, Litvack could find no lawful way to deny Ovitz the NFT benefits set forth in the OEA. Tr. 4445-46, 6117. Just to be sure, however, Litvack spoke with two Disney lawyers and an outside lawyer who all agreed with his conclusion. Tr. 4482, 6119-22, 6397-402, 6415-16.

Eisner enlisted the aid of Gary Wilson, a Board member and friend of Ovitz, to convince Ovitz that the choice of whether or not to stay was no longer his to make. Wilson agreed to use an upcoming Thanksgiving boat trip with Ovitz to deliver the news. Tr. 4551-52.

Concurrently, Eisner updated the Board on his decision to fire Ovitz. Eisner testified that, at an informal executive session following the regularly-scheduled November 25, 1996 Board meeting, he told Disney's outside directors that a non-fault termination of Ovitz was imminent and informed them of his plan to use Wilson to break the news. Tr. 3773-74, 4376-79, 5224-25, 8156-58. No one objected. Tr. 4377-78. Eisner also testified that he drove to the Board meeting with Ovitz and, during the ride, told Ovitz that he intended to discuss Ovitz's situation with the Board. Tr. 4376-79. Eisner further said that Ovitz, although physically out of the room during the executive session, was able to view (but not hear) at least a portion of it through a glass panel. Tr. 4377-78.[20]

[20] Although Ovitz does not now recall knowing that the Board discussed his situation, Tr. at 2052-53, the notes Eisner took of Wilson's later conversations with Ovitz suggests that Ovitz was aware of such a board discussion, *see* P.Ex. 25 at DD002542 (indicating the Board meeting had started the process of overcoming Ovitz's denial of the need for him to leave Disney).

As Eisner and Wilson had planned, Ovitz joined Wilson on their boat over Thanksgiving. During that weekend, Wilson told Ovitz that he could not stay at Disney. Ovitz was extremely distraught, telling Wilson of his frustration at not being given a fair chance to succeed. P.Ex. 25; Tr. 2049-51, 7027-28; *see also* Tr. 4556. Even so, Wilson was ultimately successful where Eisner had failed. Although torn and still wanting to stay, by the end of that weekend, Ovitz was at least willing to discuss his departure from Disney. Tr. 1373-75.

A couple of days later—on December 3—Ovitz and Eisner met to discuss Ovitz's termination. *Id.*, *see also* Tr. 4560-75. Eisner never mentioned to Ovitz—at this or any other time—that he had explored the possibility of terminating Ovitz for cause. Tr. 1378, 4455. (And no one else from Disney did either. Tr. 1386 (Ovitz), 2640-41 (Russell), 6186-87 (Litvack); Olson Depo at 88-89.) During this conversation, Ovitz asked Eisner to consider certain issues such as allowing him to stay on as a director, consult for Disney, or to repurchase the car and plane he had sold to Disney when he arrived. Tr. 1379-80, 2061-62, 4566. Ovitz also asked that he not be forced to deal personally with Litvack during the negotiations. P.Ex. 326; Tr. 2060-61.

In the conversations with Russell following the December 3 meeting, Ovitz asked again for another chance to succeed at Disney. Tr. 2576-78. That request was denied. *Id.* Over the course of the next week or so, Disney rejected every other request Ovitz made, insisting instead that it would honor the OEA and do no more. *See* Tr. 1379-80, 3228-29; P.Ex. 163 (board seat); Tr. 1379, 1382, 2098, 3227 (consulting arrangement), 3224 (continued use of office and staff), 2063-64, 3225 (repurchase of plane), 6178-79; D.Ex. 245 (repurchase of car).

On December 10, Disney's Executive Performance Plan Committee ("EPPC")—consisting of Directors Gold, Russell, Lozano, and Poitier (and with Watson present)—awarded Ovitz a $7.5 million bonus for 1995-1996. Ovitz was so informed. *See* P.Ex. 175; *see also* P.Ex. 51 at WD01225, 1229. On the night of December 11, Ovitz met with Eisner in New York. Tr. 4591-93. The next day, Litvack signed the letter confirming Ovitz's departure. Disney released the news to the press. P.Ex. 13, 390. Although the effective date of Ovitz's departure was January 31, 1997, P.Ex. 13, a devastated Ovitz never returned to Disney, Tr. 1382-83.

Having announced Ovitz's departure, Disney proceeded to take back his bonus. Although Goldman and Olson protested this decision to both Russell and Litvack, Tr. 2634-40; P.Ex. 184, 247, 248, on December 20, 1996, the EPPC rescinded Ovitz's bonus, P.Ex. 53.

At about the same time, Disney and Ovitz accelerated his final departure, making it effective as of December 27, 1996. P.Ex. 14. As a condition to Disney honoring its contractual obligations, Litvack insisted that Ovitz sign a general release and agree to allow it to withhold $1 million from the NFT payment pending a final accounting.[21] With the end of the year looming and his departure from Disney having already been announced, Ovitz had no choice but to agree to Disney's strong-arm tactics. On December 27, after receiving the release, Disney paid Ovitz the amount it calculated that it owed him under his contract (less the $1 million holdback) and vested his A stock options. A few days later, plaintiffs filed the instant action.

III. ARGUMENT

A. Section 144 Does Not Apply To Ovitz Because The Transaction At Issue—The Non Fault Termination—Was A Unilateral Determination Imposed Upon Ovitz By Disney Without His Consent.

Plaintiffs virtually ignore § 144 in their brief, relegating it to a footnote on page 96. That decision is puzzling indeed, as that was the reason the Court denied Ovitz's summary judgment motion. *In re The Walt Disney Co. Deriv. Litig.*, 2004 WL 2050138, at *7 (Del. Ch. Sept. 10. 2004) (hereafter "*Disney II*").

Perhaps plaintiffs' abandonment of § 144 is grounded in a (well-founded) conclusion that the evidence adduced at trial simply does not support the well-publicized pronouncements of collusion and self-dealing in their complaint and summary judgment opposition.[22] There,

[21] The accounting was concluded a few months later, with Ovitz receiving approximately $860,000. Of the remaining $140,000, half related to capital expenditures for which Disney had no right to reimbursement but kept the money anyway, and half related to personal expenses or gifts for which Disney concluded Ovitz had provided inadequate documentation. Tr. 6174-76.

[22] It is also possible that plaintiffs ignore § 144 because voiding the transaction would yield them nothing. Were the NFT rescinded, Ovitz would be in the same position he is in now, for the contractual compensation he would have received but for the termination is equal to the NFT benefits he in fact received.

plaintiffs promised to prove that Ovitz simply resigned—that he maneuvered behind the scenes to leave Disney voluntarily yet take his NFT benefits with him. As this Court recognized, Ovitz had no right to insist that he be terminated—that choice was Disney's alone. *Id.* Faced with plaintiffs' assertion that Ovitz was the architect of his own departure, this Court found that, as depicted by plaintiffs, Ovitz's alleged voluntary decision to leave might be subject to § 144.

But as shown below, the evidence proves overwhelmingly that Ovitz did *not* engineer his own termination in some secret deal with Eisner. He was fired and did nothing more than accept his contractual benefits. As such, § 144 does not apply.

1. Section 144 Applies Only To Bilateral Transactions Between The Company And Its Fiduciaries.

The early common law, drawing by analogy from the law of trusts, provided that any self-dealing transaction between a corporation and its director was void. In time, this rule became unworkable, and the doctrine was liberalized, both by statute and under the common law. *See Stegemeier v. Magness*, 728 A.2d 557, 562 (Del. 1999); *Vredenburgh v. Jones*, 349 A.2d 22, 33 (Del. Ch. 1975). Section 144 expressly provides that "no contract or transaction between the corporation or one or more of its directors or officers...shall be void or voidable solely for this reason..." 8 *Del. C.* § 144. The common law also evolved to develop the entire fairness standard, which applies to self-dealing transactions. *See, e.g., Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971); *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 112-15 (Del. Ch. 1999). The fundamental characteristic of such self-dealing transactions is that the fiduciary "stands on both sides" of the transaction, which is to say that the fiduciary—or those affiliated with the fiduciary—control the corporate decision being made.

Delaware cases capture this straightforward proposition. *See, e.g. Cinerama, Inc. v. Technicolor Inc.*, 663 A.2d 1156, 1169 (Del. 1995) (citing *Sinclair*, 280 A.2d at 720); *Stegemeir v. Magness*, 1996 Del. Ch. LEXIS 122, at *13 (Del. Ch. Sept. 20, 1996) ("To be found culpable of self-dealing, a defendant fiduciary must have had the ability to cause the challenged transaction to occur."); *Gilbert v. The El Paso Co.*, 1988 Del. Ch. LEXIS 150, at *23 (Del. Ch.

Nov. 21, 1988); *see also* Ward, Welch & Turezyn, *Folk on the Delaware General Corporation Law* § 144.3 at GCL-IV-203 (§ 144 applies to self-dealing transactions that occur when the fiduciary is on both sides); *Odyssey Partners, L.P. v. Fleming Cos.*, 735 A.2d 386 (Del. Ch. 1999) (rejecting application of § 144 "entire fairness" standard where transaction was unilateral, even where the fiduciary held the unilateral control.)

One component of control that is nearly always present in a self-dealing transaction, but is uniquely and critically absent in this case, is the fiduciary's ability to decline to enter into the transaction. Self-dealing *simply cannot exist where the corporation compels the fiduciary to undertake the transaction against the fiduciary's will.* In this case, that critical element is missing because Ovitz did not have the option to decline being terminated.

The drafters of the Model Business Corporation Act focused upon this critical element of self-dealing in the commentary to the MBCA section that mirrors DGCL § 144. The commentary to that section states as follows:

> ...[T]he subchapter is applicable only when there is a "transaction" by or with the corporation. For purposes of subchapter F, "transaction" generally connotes negotiation or a *consensual bilateral arrangement* between the corporation and another party or parties that concern their respective and differing economic rights and interests—*not simply a unilateral action by the corporation but rather a deal.*

MBCA, Subchapter F, Directors' Conflicting Interest Transaction, Commentary at 8-373 (emphasis added). *See also* 1 Cox & Hazen, *On Corporations*, § 10.14 at 526-27.

The antithesis of such control is a fiduciary who cannot even decide whether he or she will enter into the transaction. In such a case, there is no bilateral negotiation between the fiduciary and the corporation. Rather, there is—as the MBCA commentary puts it—only unilateral action by the corporation. Such unilateral action does not constitute self-dealing to which either the entire fairness doctrine or § 144 applies.

There are multiple reasons—doctrinal and equitable—that support this common sense proposition. From a doctrinal perspective, the imposition of a duty to demonstrate entire fairness in a unilateral transaction would be inconsistent with the policy underlying the creation of

fiduciary duties—which is to place legal constraints on the *discretion* of a person *controlling* the assets of another. *In re USA Cafes, L.P. Litig.*, 600 A.2d 43, 48 (Del. Ch. 1991). Even plaintiffs' own corporate governance expert, Professor DeMott, correctly asserts that "the constraint of a good faith obligation—like that of fiduciary obligation—applies *only* to situations in which a person [the fiduciary] may exercise discretion." DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 Duke L.J. 879, 896 (1988) (emphasis added). "If the relationship, as the parties structure it, does not confer 'discretion' upon the fiduciary, then his actions are *not* subject to fiduciary constraint." *Id.* at 901 (emphasis added).

There is also an equitable underpinning to the rule. It is the height of inequity for a corporation to compel a fiduciary to undertake a transaction (especially, as here, one that the fiduciary does not wish to pursue), and then for the same corporation to demand that the fiduciary prove the fairness of the transaction or face having to disgorge all of the benefits years later, after the fiduciary has irreversibly been forced to change his or her position. It is absurd and unfair to think that the law now demands that Ovitz take on the legal burden of defending a decision foisted on him and with which he expressed repeated and vociferous disagreement.

2. The Decision To Terminate Ovitz Was Made Unilaterally By Disney.

The linchpin of plaintiffs' case has always been their claim that Ovitz wanted to leave Disney and secretly colluded with his best friend Eisner to secure a sweetheart package to which he was not entitled. There is a wide gulf between what they alleged and what they proved.

Every witness with personal knowledge of the events has confirmed Ovitz's unilateral termination by Disney in credible and colorful detail. Ovitz testified he had "chained himself to his desk." Tr. 1352. Eisner testified that Ovitz "refused to quit. He refused to quit 25 times," Eisner Depo at 559, and that he "couldn't fire [Ovitz] because he wouldn't accept being fired. I mean, I know that sounds ridiculous but he just would not hear it," *id.* at 610. *See also* Tr. 5248. Russell recounted the emotional call he received from Ovitz after December 3, where Ovitz pleaded to stay with "tears in his voice." Tr. 2576-78. And Litvack testified that Ovitz "told me

he was never leaving," and that Litvack "was absolutely certain there was no way on God's green earth that he was going to leave short of being fired . . . ." Tr. 6187.[23]

The contemporaneous documents—upon which plaintiffs' expert places such great, albeit selective, weight—support the same conclusion. Eisner's unsent November 1996 letter to Ovitz starts by reciting: "I am responding to your challenge to let you know whether we can continue under the management structure at Disney we are presently under. The answer[:] we really cannot." P.Ex. 24.[24] Eisner's notes of the Wilson Thanksgiving conversations with Ovitz also unambiguously reflect Ovitz's desire to stay: "Feels he can do the job and he has not been given a fair chance. . . . Still came back and wants to stay. . . ." P.Ex. 25; *see also* Tr. 4553-55, 7030.

In the face of this mountain of evidence, plaintiffs point only to innocuous face-saving language in the official press release and termination letters. P.Ex. 13, 14, 390. But the parties' attempts to present a more positive public spin on the events—successful for a day or two at best—cannot alter the fact that Disney terminated Ovitz against his will and granted him an NFT only because it was legally bound to do so.[25] This was a unilateral action.

3. A Fiduciary's Enforcement Of A Pre-Existing Legal Right Is Not A Transaction Subject To Section 144.

Even assuming that there were some bilateral element in the decision to grant Ovitz an NFT, § 144 is still not applicable to Ovitz. As set forth above, § 144 applies only to "contracts" or "transactions" between an officer or director and the Company. The enforcement of a preexisting legal right is neither.

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[23] The other individuals who were involved similarly testified that Ovitz was terminated and did not leave Disney voluntarily. *See* Tr. 3830-31 (Gold), 6847, 7076-77 (Wilson), 7646 (Lozano), 7861, 7868 (Watson); Adler Depo. at 38-39, Olson Depo. at 85-86, 88-89, Santaniello Depo. at 159-60.

[24] While almost all of P.Ex. 24 is hearsay as against Ovitz, this statement, reflecting a prior statement by Ovitz and proffered by plaintiffs, is not. DRE 801(d)(2).

[25] Plaintiffs also cite to the letter Eisner wrote giving Ovitz permission to negotiate with Sony, which contains Eisner's assurance that he would handle the press to ensure the transfer would be a "win-win" situation but demanding that Ovitz negotiate something extra for Disney to deal with the "Disney and Eisner embarrassment equation." P.Ex. 19. These comments were made in the context of a potential move to Sony—an alternative to the looming termination. Plaintiffs' attempt to turn that note into evidence of a secret plot is a gross misreading of the evidence.

Longstanding Delaware case law confirms that merely enforcing an existing legal right between a fiduciary and a corporation in and of itself violates no duty. *See Cinerama, Inc. v. Technicolor, Inc.*, 1991 Del. Ch. LEXIS 105, at *11 (Del. Ch. June 21, 1991) (no liability where controlling fiduciary did nothing more than consummate merger pursuant to the terms of a preexisting contract); *Sinclair Oil*, 280 A.2d at 720; *Odyssey Partners*, 735 A.2d at 412-14 (no liability where fiduciary exercised rights held under a preexisting contract); *Haft v. Dart Group Corp.*, 1994 Del. Ch. LEXIS 200, at *8 (Del. Ch. Nov. 14, 1994) (fiduciary's attempt to enforce rights obtained in an arms-length employment contract not subject to fiduciary standards); *Hills Stores Co. v. Bozic*, 769 A.2d 88, 110 (Del. Ch. 2000); *Sanders v. Wang*, 1999 Del. Ch. LEXIS 203, at *21-25 (Del. Ch. Nov. 8, 1999).

This common sense rule finds its roots in the common law. As discussed above, § 144 was enacted to liberalize the old common law rule prohibiting a fiduciary from entering into *any* transaction with the company. But it was never forbidden for a fiduciary to enforce an existing legal right against the company. Indeed, an officer is employed pursuant to a contract; the enforcement of rights under that contract could not be improper.

Plaintiffs may nonetheless argue that § 144 or entire fairness scrutiny is applicable where the legal right being asserted is unclear or ambiguous. However, that approach is unprecedented. Ovitz is not aware of a single Delaware decision so holding. And the cases cited above, which concern the administration or enforcement of pre-existing legal rights, do not apply entire fairness scrutiny to the resolution of contractual ambiguities or interpretation. To trigger such heightened scrutiny, the burden remains with plaintiffs to prove that the fiduciary obtained something beyond the contract.[26]

Further, applying § 144 to the resolution of contractual issues is both inequitable and unworkable as a matter of public policy. It is inequitable because it fails to accord appropriate respect to the fiduciary's good faith ability to enforce the pre-existing rights. In effect, the

[26] This is not to say that any time a contract is involved in a case, § 144 is inapplicable. For example, had plaintiffs been able to prove that Ovitz voluntarily resigned from Disney and yet bargained to keep his NFT benefits, § 144 could arguably apply.

fiduciary would be required to go to the board or surrender every contractual right about which any issue could be raised, but the corporation would be free to assert the most aggressive position possible under the contract, no matter how dubious.

It is unworkable because it would require that every issue of contract interpretation be subject to board or stockholder approval in order to avoid after-the-fact judicial scrutiny for entire fairness. Corporations have countless contracts with officers and directors, including complex retirement plans, benefit plans, and various forms of executive compensation. Such contracts routinely give rise to numerous issues of interpretation and administration. It is absolutely unworkable to suggest that every such issue must come before the board or stockholders for resolution.

Indeed, there is support for the proposition that even *creating* a new legal right is not subject to § 144 when the right arises from an arms'-length negotiation of employment between an officer and his corporation and therefore does not involve self-dealing. In denying Ovitz's motion to dismiss, this Court acknowledged case law that "an officer may negotiate his or her own employment agreement *as long as the process involves negotiations performed in an adversarial and arms-length manner*," and may "seek the best employment agreement possible for himself." *In re The Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 290 (Del. Ch. 2003) (hereafter "*Disney I*") (emphasis in original); *see also Official Comm. of Unsecured Creditors of Integrated Health Services, Inc. v. Elkins*, 2004 WL 1949290, at *16 (Del. Ch. Aug. 24, 2004) (same). (This Court need not decide that issue, for, as set forth above, the decision at issue was both unilateral and involved only a preexisting legal right, not the creation of any new right.)

Of course, conduct does not escape judicial scrutiny solely because it falls outside of § 144. Even the enforcement of a preexisting right is subject to an entire fairness analysis if the fiduciary stands on both sides of the issue. *See, e.g., Sinclair Oil*, 280 A.2d at 720 (entire fairness standard applies when a fiduciary engages in self-dealing, *i.e.*, when it "is on both sides of a transaction" and the contract is breached). But there was no self-dealing here. As set forth above, far from Ovitz standing on both sides of the cause/no cause decision, Disney made that

decision unilaterally. Further, even to the extent Ovitz discussed the implementation of the NFT, he did so at arms'-length with Eisner, Russell, and—through Goldman and Olson—Litvack. This is precisely the type of adversarial bargaining plaintiffs alleged did *not* exist in order to defeat Ovitz's prior motions. But allegations are not evidence. Plaintiffs' self-dealing claims fail.

Since neither § 144 nor entire fairness scrutiny apply to Ovitz's termination, Ovitz does not bear the burden of proving that his unwanted termination was entirely fair to Disney. Rather, it is plaintiffs' burden to prove that Ovitz breached a fiduciary duty in connection with his termination. As next demonstrated, plaintiffs have failed to do so.

B. Ovitz Breached No Fiduciary Duty.

Having dispatched the issue plaintiffs opted not to raise, Ovitz turns to the issues plaintiffs do raise, for even if § 144 and entire fairness do not apply, Ovitz remains subject to his traditional fiduciary duties.

Directors and officers have a triad of duties: care, loyalty and good faith. But plaintiffs do not allege a lack of care by Ovitz because he was not the decision-maker for Disney. And breaching the duty of loyalty requires that a fiduciary self-deal with the corporation, something, as shown above, Ovitz did not do. Thus, the analysis of Ovitz's conduct rests upon whether he acted in "bad faith."[27]

To the extent one can tell from their brief, plaintiffs allege that Ovitz breached his duty of good faith by accepting his NFT benefits without ensuring that the Board first approved that action by formal resolution. Relatedly, they seem to assert that Ovitz improperly interfered in the decision-making process by excluding Litvack and bargaining for the best deal he could get. Pl. Br. at 96; *cf.* Pl. Br. at 70-72, 78-79. These bad faith claims fail on a variety of fronts.

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[27] Plaintiffs do not allege a breach of the duty of candor as to Ovitz, for they do not claim that there was information he knew that Disney's representatives did not know relating to the termination. And, of course, plaintiffs have not alleged aiding and abetting liability, and it is too late for them to do so now. *See Disney II*, at *1 n.1.

1. Ovitz Breached No Duty Relating To The Board's Involvement.

Plaintiffs assert repeatedly that *only* the Board of Directors (presumably acting by formal resolution) could fire Ovitz—so Ovitz must have been acting in bad faith by not so ensuring. Pl. Br. at 54-55, 69-72, 96. Initially, this argument lacks rudimentary logic. Even if only the Board could fire Ovitz, plaintiffs do not complain of *that* decision. They complain of the *terms* of the termination, not the termination itself.

Equally fundamentally, plaintiffs misread Disney's bylaws. The bylaws state that corporate officers:

> shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time *solely* by the Board of Directors...; and all officers of the Corporation shall hold office until their successors are chosen and qualified or until their earlier resignation or removal. Any officer elected by the Board of Directors may be removed at any time by the Board of Directors with or without cause. Any vacancy occurring in any office of the Corporation may be filled *only* by the Board of Directors.

P.Ex. 498 at Art. IV, §2 (emphasis added).[28] As the foregoing language makes plain, the bylaws' drafters knew how to grant the Board exclusive power. They simply used terms such as "solely" and "only." In contrast to provisions vesting exclusive power in the Board, the power to remove an officer is not made exclusive. There are good reasons for that difference. Disney has scores of corporate officers. Tr. 6150. It would be poor corporate governance to require that *only* the full Board of Directors can fire any of them. Nor was it Disney's practice to do so. *Id.* And, not surprisingly, the evidence here confirms the non-exclusive nature of the Board's removal power. Eisner, Litvack, and a litany of other directors testified that, consistent with the bylaw giving the CEO supervisory authority over subordinate officers, P.Ex. 498, Eisner could fire a subordinate officer such as Ovitz without formal Board approval. *See* Tr. 2889-91 (Russell), 4920-23 (Eisner), 6149 (Litvack), 6789-90 (O'Donovan), 7067-68 (Wilson), 7227 (Poitier), 7561 (T. Murphy), 7646-47 (Lozano). Even more tellingly, Disney's General Counsel, whose job it was

[28] Disney's charter contains similar language. D.Ex. 185 Part 10. The resolution electing Ovitz as President states that he is to serve "at the pleasure of this Board of Directors." P.Ex. 29.

to ensure Board compliance with the bylaws, testified that he had considered whether a formal board meeting was required. Tr. 6151. Because "each of the board members in fact knew and agreed with and had discussed the firing of Michael Ovitz," Litvack concluded that a Board meeting was not required. *Id.*

Even were the bylaws ambiguous on this point, Ovitz cannot be found to have acted in bad faith simply by failing to realize and correct the erroneous understanding of others. *Fletcher's Cyclopedia on the Law of Private Corporations* § 419, on which plaintiffs rely, is not to the contrary. While it may well be that an officer is presumed to know a corporation's bylaws, no case or treatise has held that it constitutes bad faith for an officer *not* to guess the eventual interpretation correctly.

Moreover, even if only the Board could fire Ovitz, and even if Ovitz were charged with knowledge, it would be of no moment. The law does not require Ovitz to engage in futile acts.[29] Ovitz was well aware of Eisner's practice of keeping the Board informed of important events, something Ovitz believed, and Eisner confirmed, occurred here. Tr. 1380-81, 2062-63, 4376-79; *see also* Ovitz Depo at 513-18. Ovitz knew that even his closest confidante on the Board, Gary Wilson, had concluded that Ovitz could not stay at Disney. And, of course, Ovitz knew that Litvack and Russell supported Eisner on this point. Taking the termination decision to the Board would have been nothing more than an embarrassing waste of time. (And then plaintiffs would no doubt brandish such an effort as a *violation of*, not compliance with, Ovitz's fiduciary duties.)

Recognizing that they get nowhere by insisting that the Board make the termination decision, plaintiffs repeatedly conflate the termination itself with the cause/no cause determination. That convenient blur does not withstand scrutiny. At the outset, nothing in the

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[29] *See McMullin v. Beran*, 765 A.2d 910, 919 (Del. 2000) (board of directors of majority owned corporation has no fiduciary duty to engage in a futile exercise when it did not have the ability to effectuate an alternative to a proposed sale); *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987) (directors had no duty to engage in futility of auction when majority stockholder had the power to thwart such efforts); *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 986 (Del. Ch. 2000) (if majority stockholder opposes efforts to auction company, any effort by the board to undertake auction would be futile and board has no fiduciary duty to do so).

bylaws, or any other corporate document, requires the Board to decide the issue of cause. Thus, plaintiffs' logic lacks even a textual basis. Nor does it make sense to require the Board to make that decision. The OEA had a narrow definition of cause. It was not left to the Board's discretion. Once the termination decision was made, the OEA gave Ovitz a legal *right* to his NFT benefits, absent gross negligence or malfeasance. Eisner, after consulting with Litvack, appropriately determined that Disney had no lawful basis to withhold those benefits.

Stymied by the evidence and logic, plaintiffs attempt to short circuit the entire issue. They claim that the Board's duty to decide the cause question is "law of the case." Pl. Br. at 52. Again, plaintiffs err. The Supreme Court in *Brehm v. Eisner* did not hold that, as a matter of law, the cause issue was reserved solely to the Board. 746 A.2d 244 (Del. 2000). Its opinion, rendered in the context of reviewing a judgment on the pleadings, simply said that the economics of the termination was material for purposes of the directors' decision-making process. *Id.* at 249.[30]

Alternatively, plaintiffs claim that (at least as to the options) only the Compensation Committee could make the cause/no-cause decision. Plaintiffs' basis for suggesting that such approval was required is the 1990 Stock Option Plan. The rules for that plan, which plaintiffs cite out of context, state that:

> For purposes hereof, the Committee shall have the sole power to make all determinations regarding the termination of any participant's employment, including, but not limited to, the effective time thereof for the purposes of this Plan, the cause(s) therefor, and the consequences thereof.

P.Ex. 41 at WD125. Plaintiffs, however, ignore the fact that the Committee's power is expressly "subject to the terms of the Stock Option Agreement," P.Ex. 41 at WD134, which in this case

[30] Plaintiffs also claim that statements made by counsel for the defendants other than Ovitz constitute a jural admission. Pl. Br. at 71-72. Those statements are no such thing. First, Ovitz did not make the statements, so he is not bound by them. Second, the statements were made in the context of a complaint that *alleged* that Board action was in fact taken. As such, defendants are no more estopped by having conformed their motion to the complaint than are plaintiffs, who made the offending allegation in the first place. Third, whatever lawyer statements might have been made before discovery and before the Supreme Court's remand, it is the evidence that controls now.

unambiguously sets forth the consequences for Ovitz's stock options in case of a termination, *see* P.Ex. 339 at WD238. Second, the OEA expressly supercedes the Option Plan rules. P.Ex. 7 at ¶5(e). The OEA states that the "Company," *not* the Compensation Committee, determines issues relating to a for-cause termination of Ovitz. *See id.* at ¶11(a)(iii). This was the reason why Litvack did not believe a committee meeting to decide Ovitz's eligibility for an NFT was needed. Tr. 6126-27, 6658-64.

But even if committee action were required, Ovitz had ample reason to believe it had been taken, and was therefore not acting in bad faith. First, he and his representatives spoke numerous times with Compensation Committee Chairman Russell. Tr. 2062-63, 2576-78, 2583-85, 3227-29; P.Ex. 382 at DD 3330-32; *see also* D.Ex. 6, 163, 165; P.Ex. 179, 184, 234, 248, 379, 383 at DD1575. Ovitz further knew that the EPPC, which was closely related to the Compensation Committee, Tr. 7983-84, met to award him his bonus on December 10, *see* P.Ex. 175, and later to rescind it on December 20, *see* P.Ex. 184. As a faithful fiduciary, Ovitz properly did not attend a meeting where his compensation was to be discussed, P.Ex. 51, so he had no way to know what decisions the Committee made or what was discussed. He could only assume that a committee chaired by the person negotiating his departure would act appropriately, and he should not be penalized for this assumption. *See In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 969 (Del. Ch. 1996) (a fiduciary may assume the integrity and honesty of corporate directors and officers absent any grounds to suspect improper conduct). Finally, Ovitz was fully entitled to rely on Litvack's assertion in the termination letters that the promises set forth therein were made on Disney's behalf and binding on Disney, presumably in accord with all legal requirements.[31]

[31] Plaintiffs imply in a footnote that Ovitz cannot rely on Disney's General Counsel for that assurance because Litvack never formally advised the Board that no meeting was required. Pl. Br. at 78 n.60. That argument makes no sense, for by allowing matters to proceed as they did, Litvack implicitly did so advise. In any event, whatever force that argument might have as to others, it has no application to Ovitz, who was excluded from the process.

2. Ovitz Did Not Interfere In Disney's Decision-Making Process.

Plaintiffs also claim that Ovitz improperly influenced Disney's decision-making process. Specifically, they assert that Ovitz cut Litvack out of the loop and then obtained "the very best deal he could possibly get for himself." Pl. Br. at 96. In fact, however, Litvack was in the loop and Ovitz got no deal at all.

Once again, plaintiffs confuse the facts. As set forth in Part III.A.2, Ovitz took no part at all in Disney's decision to terminate him or its decision that there was no cause to do so. The negotiation (if one could call it that) in which Ovitz participated related solely to how the NFT would be implemented and what, if anything, he could receive in addition to the NFT. Tr. 2883, 4422, 4561-64, 4566; P.Ex. 174 at DD1592, 178, 239, 326, 379; D.Ex. 8, 163. Indeed, Ovitz believed there were no grounds for a for-cause termination, and no one at Disney ever suggested the contrary to him.

As to these issues, Ovitz sought to influence Disney's handling of his departure in only one way: Ovitz did not want to communicate personally and directly with Litvack, as the two men disliked and distrusted each other. Tr. 1349, 2060-61. But Ovitz knew Litvack would be consulted and involved, as indeed he was. Tr. 2060-61. Specifically, Litvack was deeply involved in the decision to rescind Ovitz's 1995-1996 bonus. Tr. 6154-57, 6159-61, 6166-68. He also participated in a number of calls regarding Ovitz's benefits (including at least two with Ovitz's representatives)—Tr. 2592, 2637-39, 6159-61, 6429, 6690; Adler Depo at 38-40, 46-48; P.Ex. 184, 242, 247, 248; D.Ex. 413 at WD7140 (reflecting a December 12, 1996 call between Litvack ("SL"), Eisner ("MDE"), Russell ("IR"), Ron Olson ("R"), Bob Adler ("B") and Ovitz ("MSO"))—and he signed both termination letters, P.Ex. 13, 14.

Finally, far from obtaining the "very best deal he could possible get" (something he had every right to try and do anyway), Ovitz obtained no deal at all. Even plaintiffs do not contend that Ovitz received a penny more than the OEA's NFT benefits. Nor could they, for every single

request Ovitz made was rejected. Tr. 4654. Even Ovitz's offer to provide consulting services for Disney for no additional compensation was rejected.[32] Tr. 1382, 4398-99, 4566-67.

C. Even If An Entire Fairness Analysis Is Applied To The Claims Against Ovitz, The Facts Show That Ovitz's Receipt Of An NFT Was Entirely Fair To Disney.

As set forth above, Ovitz breached no duty to Disney, and Disney's decision to terminate him without cause is not subject to § 144 or to entire fairness scrutiny. This Court need go no further. But even were this Court to find that the NFT payment were subject to entire fairness scrutiny, Ovitz would still prevail.

Entire fairness is a two prong test including an inquiry as to fair dealing and fair price. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983). The standard, however, is a unitary one; a finding of *either* fair dealing *or* fair price makes the inquiry on the other prong far less searching.[33] Here both tests are met.

1. In Conducting His Departure From Disney, Ovitz Dealt Fairly With Disney In All Respects.

Ovitz discussed above why the unilateral process in which Disney engaged was fair from Ovitz's perspective. No more need be said save to make one point.

Plaintiffs and their expert excuse their lack of evidence and attempt to shift the burden of proof by complaining that defendants should have initiated a contemporaneous investigation into the question. Whatever the strength of that claim as against those making the termination

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[32] Eisner testified that the consulting agreement lasted for a day. Tr. 4600-01. In fact, that agreement was never in force. Although the draft termination letter included such a provision, the actual termination letter excluded it. *Compare* P.Ex. 242 *with* P.Ex. 13. Similarly, Olson, Ovitz, and Russell all testified that the consulting agreement was off the table before Ovitz's termination was announced, and thus the Press Release (which was drafted the night before) was in error. Tr. 1382, 2085-87, 3227; Olson Depo at 72-73. In either case, there is no doubt that by the time Ovitz's actual employment ceased on December 27, everyone understood that there would be no consulting arrangement.

[33] *Cf. In re The Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 290 (Del. Ch. 2003) (allowing officer to seek best possible compensation package so long as negotiations are arms' length and adversarial); *Official Comm. of Unsecured Creditors of Integrated Health Services, Inc. v. Elkins*, 2004 WL 1949290, at *16 (Del. Ch. Aug. 24, 2004) (same); *Emerald Partners v. Berlin*, 2003 WL 23019210 (Del. 2003) (holding that merger was entirely fair despite numerous procedural flaws because evidence supported that price was nevertheless fair).

decision, it has no force as against Ovitz, for there was nothing for Ovitz to investigate. Moreover, rather than running for the door as soon as he learned Eisner wanted him out, Ovitz "chained himself to his desk" for almost three months, giving Disney more than ample time to conduct any investigation it thought appropriate. Had Disney wanted to conduct an inquiry, there was nothing to stop it.

Plaintiffs' investigation criticism fails for a second reason. There is no requirement for an outside investigation where the decision-making party has "a full complement of information" from which to decide. *See Oberly v. Kirby*, 592 A.2d 445, 472 (Del. 1991). Eisner and Litvack knew all they needed to know. Tr. 6115-17. Litvack's conclusion that there was no cause and that the issue was not even close was well informed (and correct).

2. Ovitz's Receipt Of The Non-Fault Termination Payments Was Entirely Fair To Disney.

Ovitz's receipt of an NFT was a fair price for Disney to pay to force him out. This conclusion is mandated by either of two independent (but equally legitimate) analyses. First, if upon his termination Ovitz was legally entitled to an NFT because Disney had no grounds to terminate him for cause—which he was—then as a matter of law it was entirely fair for Disney to honor the contract.[34] Second, if Disney had decided to terminate Ovitz for cause despite the facts, the costs of doing so would have been substantially greater than the amount it actually paid, making that lesser amount entirely fair to Disney.

a. Once Terminated, Ovitz Was Legally Entitled To An NFT.

If Ovitz had a legal right to the contract payments he received, there can be no liability. Plaintiffs have now had more than an ample opportunity to explore the litany of ills they have long contended—both here and in the press—could have constituted cause. Their complaints against Ovitz fall into three broad categories: (1) lying; (2) failing to follow Eisner's directives; and (3) violating various Disney corporate policies. Pl. Br. at 44-48, 90-92. None of the

[34] This is true even if Disney in theory could have coerced Ovitz into accepting a lesser sum.

evidence plaintiffs offer in support of their complaints, either individually or collectively, comes even close to meeting the high standard of gross negligence or malfeasance set forth in the OEA.

(1) Plaintiffs' Claim That Ovitz Was An "Habitual Liar" Lacks Even A Shred Of Real Proof.

It is stunning that at this late stage plaintiffs and their expert place still such great weight on allegations that Ovitz was an habitual liar. Pl. Br at 44-47; Tr. 318-19, 384-85. (Professor Donohue went so far as to state that lying was the *only* wrongdoing that by itself provided Disney grounds to terminate Ovitz for cause. Tr. 419-20.) If this is the *strongest* argument plaintiffs can muster, then they have all but conceded that, once Disney decided to terminate Ovitz, it was legally obligated to grant Ovitz the NFT upon his termination.

Despite repeated challenges for years to do so, plaintiffs have been completely unable to articulate even a single specific, material lie that Ovitz made to anyone in the course of his duties as Disney's President. Not one. And it is not as if plaintiffs have lacked the motive or opportunity to acquire such evidence. In the course of this litigation plaintiffs received more than 26,000 pages of documents, served more than 50 interrogatories, conducted 51 days of deposition—including the depositions of third parties—and engaged in lengthy cross-examinations during a trial that lasted 37 days. Yet with all of that, there is still no lie.

Unable to specify even one material falsehood, plaintiffs fall back on tired claims that Ovitz must have lied because everyone says so. But when one examines the proof of that broad statement, the fact is that "everyone" means Eisner, and even Eisner says he didn't mean it.

It comes as no shock that plaintiffs' tent pole evidence consists of three memos Eisner wrote—none of which were shown to Ovitz. Pl. Br. at 44-45 (citing P.Ex. 24, 67, 79). Of course, none of these memos purport to specify a single material lie. Rather, they include general hearsay statements that Eisner supposedly heard from others to the effect that Ovitz had lied. Usually, these others remain nameless. But to the extent these sources are identified, their testimony is at odds with Eisner's claims. For example, Eisner claims that Litvack, Iger, and Roth all complained that Ovitz habitually lied, but they all testified to the contrary. Tr. 6133-35

(Litvack unaware of any lies); Iger Depo at 128, 130 (unaware of any ethical issues); Roth Depo at 118-19 (unaware of any unethical conduct); *see also* Tr. 3755-56, 4012-13, 5307-08, 5809 (Gold, R. Disney, Bollenbach, and Nunis unaware of any lies); J. Dreyer Depo at 40-41 (unaware of any ethical issues); Santaniello Depo at 133 (unaware of any lies).[35]

Eisner's testimony explains this seeming inconsistency. Eisner testified that his memoranda were meant to convey that Ovitz "pressed" too hard and spoke in superlatives. Tr. 4436-39. Eisner testified that P.Ex. 79, his memorandum to directors Russell and Watson, consisted of "hyperbole." Tr. 4327-38. Indeed, Eisner candidly testified that Ovitz "was not lying," and that he wrote parts of this exhibit because "it sounded literate or something." *Id.* Eisner was even more blunt in discussing P.Ex. 24, the letter he never sent. Eisner admitted that it was "not accurate, way exaggerated, silly, hyperbole, insensitive." Tr. 4372. But whether Eisner's notes are angry stream of consciousness rantings, an attempt to take and deny responsibility at the same time, or a classic attempt to "blame the victim" for Eisner's own shortcomings as a leader, one thing is plain: These missives, riddled as they are with hyperbole, inaccuracies, and exaggerations, cannot be taken at face value.[36]

Plaintiffs also cite Bass's testimony early and often to show that Ovitz was untruthful. But to the extent Bass purports to testify as to Ovitz's veracity as Disney's President, Bass is merely repeating what he claims Eisner told him. Bass Depo at 46, 79, 102-03; *see also* Tr. 621. That hearsay should be given no weight.

Plaintiffs further assert that Ovitz misrepresented his financial relationship with CAA to Disney. In fact, Ovitz did no such thing. In his disclosure statement, P.Ex. 127, Ovitz succinctly and accurately described the CAA relationship:

> I beneficially own a majority interest in my prior employer . . . . The talent agency business of the Prior Employer is being

[35] At deposition, Litvack did say he recounted some examples of lies to Eisner, although tellingly he could not recall what any of them were. Litvack Depo at 719-20.

[36] Gold testified that P.Ex. 79 is Eisner's attempt to find someone else to blame. Tr. 3817-20. And Litvack testified that, upon reviewing P.Ex. 24, the statements Eisner made blaming Ovitz "absolutely were not" "fair or accurate recounts of [the] facts" and he identified several examples. Tr. 6144-48.

> continued by [new CAA], in which I have no direct or indirect ownership interest. The Prior Employer will continue to receive commissions from contracts entered into by its former talent agency clients on or before September 30, 1995 and will also lease out certain real and personal property to [new] CAA.

Plaintiffs critique this disclosure in three ways. First, they say that Ovitz did not disclose that he would receive a majority of the sums paid to his Prior Employer. Pl. Br. at 45. Plaintiffs must not have read (for they do not quote) the portion of the disclosure where Ovitz said he owned "a majority interest in my prior employer." Second, plaintiffs claim Ovitz did not disclose that the earn-out rights applied to oral contracts based on a "secret" list that could "change and expand over time." *Id.* Plaintiffs misrepresent the record. Ovitz's disclosure referred to "contracts," and as anyone in the entertainment industry knows, many talent contracts are oral. Ovitz Depo at 561-62. And the rest of the disclosure is accurate as well. To be sure, the booked commission list was not public, but no one ever assumed that it was. And the definition of a booked commission never changed. It was always commissions from "contracts entered into . . . on or before September 30, 1995." Third, plaintiffs incorrectly assert that Ovitz had an undisclosed ownership interest in CAA, citing a financing statement creating a security interest. Pl. Br. at 45. A security interest is a form of debt, not equity, interest.[37]

Finally, plaintiffs suggest that Ovitz misled Disney concerning his income at CAA. Pl. Br. at 45, 83. Their sole basis is Ovitz's 1995 W-2 from CAA reflecting $17.8 million in wages for the nine month period ending September 30, 1995.[38] That document, however, is not inconsistent with Russell's understanding that Ovitz earned a total of $20 to $25 million a year at

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[37] Plaintiffs also imply that Ovitz did not tell Disney what the value of the CAA arrangement would yield. That claim is also demonstrably false. Goldman accurately estimated for Russell (who wrote it down) the anticipated amount of booked commissions. *Cf.* Tr. 2394-95; D.Ex. 86.

[38] Plaintiffs ignore the contradiction in contending that Ovitz's CAA income was lower than $20-25 million and simultaneously decrying the $27 million Mr. Ovitz indisputably received from new CAA in 1996, which, by contract, was *less than 75%* of what he would have received if he had stayed at CAA. *See* Pl. Br. at 6-7, 63; P.Ex. 203, 369.

CAA.[39] Tr. 2352, 2362-63, 2465-66. And both Ovitz and his accountant testified that Ovitz's income was in the $20 to $25 million range. Tr. 1099; M. Dreyer Depo at 128.[40]

Plaintiffs attempt to sidestep their glaring lack of evidence by relying on Donahue, but his testimony should be rejected out of hand. Donohue bases his "opinion" that Ovitz lied on his biased "weighing" of the evidence. Tr. 635-37, 647-48, 702-04. This Court does not need outside assistance to make credibility determinations, especially from one who neither heard nor read the trial testimony of a single fact. Tr. 8626. Further, Donohue's knowledge of California law is suspect. He is not licensed to practice there, and he lacks even rudimentary knowledge of California's judicial system. In his report, for example, Donohue relies on an unpublished California decision, P.Ex. 404 at 22, 34, even though in California unpublished decisions are expressly uncitable. Cal. R. Ct. 977. Then, in his testimony, he minimized the import of an unfavorable (to his point of view) California appellate decision because it was decided by a panel outside of Los Angeles. Tr. 9318. Donohue was later asked what precedential value such a decision had. He "assumed" that it would be persuasive, not precedential. Tr. 9336-37. He guessed wrong. *Freeman & Mills, Inc. v. Bekker Oil Co.*, 11 Cal. 4th 85, 92-93 (1995).

Donohue's testimony concerning alleged improprieties in Ovitz's expenses fares no better. Virtually the entirety of his opinion was based on P.Ex. 147—the draft Price Waterhouse Report—which this Court has excluded as hearsay and Donohue admitted he did not understand. Tr. 605-07.

Finally, how a person trained in the law can claim in open Court *under oath* that another has lied without even being able to state what the lie supposedly was (let alone prove it) is nothing short of astounding. Tr. at 651-58. Donohue's irresponsible opinions are so ill-conceived and ill-founded that they are entitled to no weight whatsoever.

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[39] Any estimate Ovitz gave in Summer 1995 as to his 1995 total income would be just that: an estimate.

[40] Plaintiffs also claim that no one got along with or trusted Ovitz. Again, that assertion came principally from Eisner's hearsay statements. And again, the actual evidence is to the contrary. Tr. 1345-49.

(2) The Evidence Conclusively Establishes That Ovitz Worked Hard, Attended To The Duties He Had Been Assigned, And Did Not Violate Directives From Eisner.

Plaintiffs maintain that Ovitz could be fired for cause because he supposedly did not follow Eisner's directions. Pl. Br. at 47-49, 90. But Plaintiffs' own expert admits that they cannot simply seek to prove that Ovitz failed to perform or did not get along with other executives because that would not constitute gross negligence or malfeasance under the OEA. Tr. 504-05. Instead, plaintiffs must prove that Eisner "specifically directed" Ovitz to do (or not to do) some particular action, and that Ovitz willfully violated that directive. *See* Tr. 506-07.

Plaintiffs first claim that Eisner told Ovitz not to pursue acquisitions but that Ovitz did so anyway. Pl. Br. at 48. This assertion, however, fails of its premise. In the October 10, 1995 letter to Ovitz, upon which plaintiffs rely, Eisner told Ovitz that "[a]cquisitions are something we *should* look at and almost never do . . . ." P.Ex. 267 (emphasis added); *see also* Tr. 1951-52, 5098-99. That Ovitz brought potential (and, with hindsight, likely profitable) acquisitions to Disney was not insubordination; it was proactive management. Moreover, the only specific example of insubordination that plaintiffs identify—relating to the NFL—is especially weak. The NFL talks began before Ovitz arrived, D.Ex. 188, had significant potential value to Disney, Tr. 1128-34, 1883-89, 5161-62, were done with Eisner's full knowledge and permission, P.Ex. 631; Tr. 1131-32, 5160, and ended when Eisner called them off, Tr. 1133-34, 5503-04.

Plaintiffs also claim that Eisner directed Ovitz to focus on Hollywood Records and Disney Interactive, but that Ovitz did not do so.[41] As discussed above, however, Ovitz made numerous efforts to address the problems encountering those two divisions. *See supra* at II.D.

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[41] Although plaintiffs do not claim Ovitz violated any Eisner directives in other sectors of Disney operations, they seek to tarnish him with inaccurate or unfair claims of poor performance. Notably, they try to blame Ovitz for the "disasters" that Eisner perceived at Disney Studios and ABC. Pl. Br. at 48, 90. But the Eisner note relating to the studios indicates that Eisner found Roth—who had been at Disney longer than the six months Ovitz had—primarily responsible for the objectionable spending, not Ovitz. P.Ex. 755; *see also* P.Ex. 67. And the Eisner note to Iger regarding ABC was written in March 1996, barely a month after the Disney/ABC merger closed. P.Ex. 550. Eisner was not faulting Ovitz for ABC's performance, he simply was telling Iger that Iger had to get ABC's financial condition under control.

And Ovitz's work files reflect this fact. *See* P.Ex. 586 at WD10758-60, 606, 622, 629, 768; D.Ex. 190 (Hollywood Records); P.Ex. 571, 574, 736, 741, 742, 743 (Disney Interactive).

Finally, plaintiffs claim that Ovitz disobeyed an Eisner directive in the fall of 1995 to meet with Bollenbach to orient himself to the company. But Eisner never ordered Ovitz to attend the meetings; at most, he *suggested* it. Tr. 4248. Further, the concern underlying this complaint is whether Ovitz worked diligently to learn how Disney operated. On that point, there is no real dispute. Tr. 1352, 3756, 5316-17, 5591-93, 6093-94, 6841; Eisner Depo at 311-12. Ovitz received numerous documents (as reflected by his work files) and met with dozens of Disney personnel in an effort to learn about the Company's operations. Tr. 1125-27, 1182-84, 1197-1200, 1214, 1220-21, 1255-56, 4248-49, 4278-79; P.Ex. 545, 575, 737, 741, 742, 744; D.Ex. 189, 190. Even Bollenbach accepted that Ovitz learned in a different style than he did and dismissed the idea that attending the sessions was a "necessity" for Ovitz. Tr. 5300-01.

(3) Plaintiffs Offer No Evidence Beyond Hearsay And Speculation For Their Contentions That Ovitz Violated Company Guidelines And Policies.

Plaintiffs have spent an inordinate amount of time in this litigation, both before and during trial, in attempting to prove that Ovitz violated Disney policies on expense reimbursement, gifts, and conflicts of interest. Their efforts, focusing on such minutiae as gifts of Disney stuffed animals, how many times Ovitz ordered flowers when he entertained, and which magazines Ovitz read, have been in vain.

Most notably, plaintiffs rely on the draft PriceWaterhouse report, P.Ex. 147, as evidence that Ovitz improperly sought reimbursement for certain claims. Pl. Br. at 46, 47, 91. Ovitz does not understand plaintiffs' continued reliance on this hearsay document, which this Court expressly excluded from evidence in its February 4, 2005 Order. The only fact plaintiffs can even try to spin in their favor on the expense issue is that $140,000 was ultimately withheld from Ovitz's termination payments. Pl. Br. at 47, 91. But that hardly constitutes evidence of gross

negligence or malfeasance.[42] Indeed, Litvack admitted Ovitz's only error was at most a failure to submit sufficient documentation to justify $70,000 in expenses. *See* Tr. 6174-76. Such a failure is a far cry from contractual cause, let alone the "theft" plaintiffs assert in their sound-bite laden brief.

Plaintiffs also point to a few notes in which Eisner expressed concern that Ovitz *might* not be complying with Disney's gift policies. *See* Pl. Br. at 47; P.Ex. 17, 24. This evidence, standing alone, is hearsay. But even if it were not, the evidence is that Ovitz complied with Disney policies on giving and receiving gifts. Both Eisner and Litvack approved Ovitz's practice of giving gifts to talent, and they even did it to a lesser extent. Tr. 5035-37, 6518-20. And when Ovitz wanted to give gifts to Disney employees, he generally sought approval from either Eisner or Litvack, Tr. 2208-09, 5037-38, 6441-46; P.Ex. 636, even though Disney's policies did not actually prohibit such gifts, P.Ex. 483 at 33-35.[43] Also, Litvack investigated whether Ovitz was in compliance with Disney's policy on reporting gifts and found that he was. *See* Tr. 5024, 5028, 6139-41, 6146.[44]

Finally, plaintiffs offer speculation to suggest that Ovitz breached his duties due to a conflict of interest concerning CAA. *See* Pl. Br. at 45-46 n.39. The short answer, however, is that there is *no* evidence that any conflict ever arose or that the policy Disney put in place to address potential conflicts was ineffective.

b. If Disney Had Purported To Terminate Ovitz For Cause, It Would Have Faced Far Greater Costs And Exposure.

For purposes of evaluating the fairness of Disney's payments to Ovitz, it is reasonable to compare the NFT termination payment with the potential costs and exposure Disney would have incurred had it purported to fire Ovitz for cause. *See Oberly v. Kirby*, 592 A.2d 445, 471 (Del.

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[42] In fact, if there was any "malfeasance," it was committed by Disney not Ovitz, as Litvack admitted under oath that Disney had no right to keep half of the $140,000. Tr. 6174-76.

[43] At trial, Litvack said he would have approved the gifts that he had not been told about. Tr. 6441-46.

[44] Plaintiffs claim Russell testified Ovitz was *not* in compliance. Pl. Br. at 75. In fact, Russell testified that he did not know whether or not Ovitz was in compliance. Tr. 2882-85.

1991) ("[T]he most economically meaningful way of judging fairness is to compare the price paid with the price that was likely to be available in alternative transactions.").

Breach of Contract: Plaintiffs attempt an end run around the OEA's gross negligence or malfeasance standard by shamelessly relying on *Cotran v. Rollins Hudig Hall Int'l Inc.*, 946 P.2d 412 (Cal. 1998), to claim that a jury in a wrongful termination case would decide only whether the no-cause decision was made in good faith. Pl. Br. at 92. Plaintiffs know that *Cotran* applies only to implied contracts, not to terminations governed by express contracts. That point is made in the opinion's very first sentence: "[w]hen an employee hired under an *implied* agreement not to be dismissed without good cause..." *Id.* at 414 (emphasis in original). In the first footnote, the court notes that "[w]rongful termination claims founded on an *explicit* promise that termination will not occur except for good or just cause, may call for a different standard, depending on the precise terms of the contract." *Id.* (emphasis in original). And Justice Mosk wrote a concurring opinion, in part, to observe that the *Cotran* "majority's definition of 'good cause' is a 'default' definition that applies only in the absence of more specific contractual provisions," in which case, "the jury's good cause termination would be shaped by this contractual definition."[45] *Id.* at 423-24.

Little more time need be spent on this topic. Plaintiffs' inability to meet the gross negligence or malfeasance standard has been demonstrated above, and this Court heard lengthy expert testimony on the cause issue. Suffice it to say that, as Feldman and Fox testified, Disney would not have prevailed on this claim.[46] As such, it would have had to pay (in addition to the cash Ovitz actually received) Ovitz's attorney's fees, the cash value of the options (which according to Murphy would have been substantially more than Ovitz realized), prejudgment interest at ten percent per annum, and, possibly, the $7.5 million rescinded 1995-1996 bonus.

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[45] Ironically, even if plaintiffs' good-faith standard was correct, there is no way Disney could have met it as Litvack himself did not believe there were grounds to terminate Ovitz for cause.

[46] Even if one would assume, for the purposes of argument, that some action by Ovitz constituted grounds to terminate him for cause, Ovitz would still have at least an arguable right to receive notice of that conduct and be given an opportunity to cure it. P.Ex. 7 at ¶11(a)(iii).

Fraudulent Inducement: At trial, Feldman laid out the basis for a fraudulent inducement claim. Tr. 8403-08. Specifically, Ovitz could have claimed that Eisner had doubts concerning his employment and hid them from him to induce Ovitz to leave CAA,[47] and promised him that he would be President in fact—not just in name until he had proven himself worthy.[48] Had that information been conveyed to Ovitz, he never would have left his secure and profitable position at CAA to come to Disney.

To be sure, there was some dispute at trial about the strength of this claim. Feldman testified that he had sufficient confidence in it that he would have been willing to pursue it on a contingency basis. Tr. 8448-49. Fox, the other defendants' expert, thought the claim would likely survive summary judgment, Tr. 9225-27, but that it was weak and would only have settled for 10 to 20 cents on the dollar, Tr. 9230. Donohue also minimized the strength of the claim. But even at Fox's valuation, the exposure is substantial, for Feldman estimated damages at $320 million (the value of what Ovitz gave up at CAA). D.Ex. 408 at 45. Thus, under Fox's view, the claim was worth in the range of $30 to $60 million dollars.

Defamation: If Disney had fired Ovitz for cause when it in fact did not believe there was good cause, it would have defamed Ovitz. Tr. 8408-11, 8948-49. Plaintiffs try to muddy the waters by raising various issues, such as the requirements for malice and publication. Tr. 8457-58, 8463-65, 9316-20. But none of those defenses have merit. First, even assuming proof of malice were required under *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), it could be shown here. Litvack, for example, was quite clear that he did not believe Disney could terminate Ovitz for cause. Doing so anyway would be an intentional lie that would establish malice and

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[47] Feldman referred to P.Ex. 24 (where Eisner wrote "By Labor Day [1995] I was wondering what it would cost in dollars and embarrassment to end our corporate partnership right away"), P.Ex. 79 (where Eisner admits that his "basic instinct [was] that I was making a mistake [in hiring Ovitz, and] I was the only one who knew it"), and a *New Yorker* article (where Eisner is reported telling his biographer immediately after Ovitz verbally accepted the Disney presidency that Eisner had made the "biggest mistake of my career"). Tr. at 8405-06, 8576-77.

[48] In a telling bit of testimony, Eisner essentially admitted that Ovitz never received the authority of the real presidency. In particular, he testified that after Ovitz left, Litvack could have expected Disney to bring in a new president and that that "new person would have real—get the full job." Tr. 4489.

negate any *Sullivan* privilege. *See* Tr. 8409-10. Further, Ovitz could play for the jury Eisner's statements on *Larry King Live* to show that (to the extent one credits Eisner's public statements) there were no issues of gross negligence or malfeasance at least as of late September. Similarly, Ovitz could have read to the jury transcripts of Eisner's conversations praising Ovitz to Sony Chairman Idei in October 1996.[49] D.Ex. 160. While Eisner could certainly have told the jury that he was lying to Larry King and to Idei, such testimony would substantially weaken Disney's position in a defamation or breach of contract lawsuit, would undermine Eisner's credibility in general, and could inflame the jury.

Nor could Disney avoid making a defamatory statement by limiting itself to a mere "Ovitz has left the company" press release. As a practical matter, Disney could not have avoided disclosing that it was asserting cause in statements to the press, to investors, and to regulators. Moreover, California law makes originators of defamation liable for its self-publication by a defamed party who is "operating under a strong compulsion to republish the defamatory statement and the circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicates it to the person defamed." *McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 797-98 (1980); *see also* Tr. 9211; *Live Oak Publishing Co. v. Cohagan*, 234 Cal. App. 3d 1277, 1284-85 (1991). Since Disney knew Ovitz would both have to sue publicly for the funds it had denied him and explain his departure to future business partners, it would be liable under this rule even if one were to accept the implausible assumption that Disney would or could remain totally silent. Given the reputational damages Ovitz would be able to prove in such a case, and the punitive damages that could well result in California from such an intentional lie, Tr. 9244-45, Disney's exposure was significant.

[49] In the context of the instant case, where Ovitz was not fired for cause, Eisner's statements are benign and understandable. But in the context of a case where Disney was trying to prove that Ovitz was grossly negligent or malfeasant, Eisner's statements would take on a more sinister cast.

Intangible Costs: Setting aside the financial risks, Disney would have borne other costs from purporting to terminate Ovitz for cause, including substantial negative publicity,[50] difficulty recruiting new executive talent (due to a perceived pattern of refusing to honor contracts), and the general distraction of executive resources inherent in litigation. *See* Tr. 5933-35.

D. Disney Committed No Waste In Hiring Or Firing Ovitz.

Delaware law sets an extremely high bar for waste. The Supreme Court has found waste to apply only to "exchange[s] of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000). Plaintiffs have not cleared that bar.

First, the overall OEA was not wasteful. Disney believed, with good reason, that Ovitz would add tremendous value and, uniquely, provide Disney with a suitable successor to Eisner should anything happen. The general perception at the time was that hiring Ovitz was a huge coup for Disney, resulting in a billion dollar increase in Disney's market capitalization. D.Ex. 428 at 7-8; Tr. 7287-91; P.Ex. 822; *see also* Tr. 4230. Whether or not one believes in hindsight that the compensation package was a good deal, it was not "so disproportionately small" (especially in light of what Ovitz gave up at CAA) to constitute waste.[51]

Plaintiffs focus on the OEA's NFT provisions, which they say created an incentive for Ovitz to leave Disney as soon as possible. This argument is incorrect for many reasons. First, the law does not suggest, let alone require, that this Court determine waste by looking at a single set of provisions on a stand-alone basis rather than evaluating the contract as an integrated whole. Second, plaintiffs conveniently forget that the OEA barred Ovitz from leaving Disney to accept a better position at a competitor. Not only would doing so without permission result in a forfeiture of the NFT benefits, but Disney could enjoin Ovitz from accepting such a position.

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[50] While it is true that Disney received substantial negative publicity by terminating Ovitz *without* cause, at least by taking this approach, Disney could rightly claim to be honoring the contract it had signed.

[51] And even were plaintiffs able to show waste, equity demands that before Ovitz be made to return to Disney the consideration he received, Disney should make Ovitz whole by compensating him for what he gave up to come to Disney, that is, the value of CAA less the earn-out. Disney would come out the loser in that exchange.

Locking up Ovitz's services for five years in return for a promise to pay him for that period absent gross negligence or malfeasance is not waste. Third, plaintiffs just dismiss the B options, which provided Ovitz with a powerful incentive to stay at Disney. P.Ex. 215 at DD1635; Tr. 4880. Fourth, plaintiffs insultingly and irrationally assume that Ovitz would strive to get himself fired as quickly as possible, performing poorly enough to force Disney to throw him out, but not so poorly as to be grossly negligent. Ovitz did *not* want to "take the money and run." He instead fought to stay and left only when Disney gave him no other choice. *See supra*, Section III.A.2.

Nor was there any waste in Disney's no-cause decision. As set forth above, honoring the contract was entirely fair to Disney. As such, it was the polar opposite of waste.

E. Plaintiffs' Damages Calculation Is Badly Bloated.

With essentially no analysis, plaintiffs assume that if Ovitz violated any duty, he must repay all of the NFT. But there is no logic in such a claim. As demonstrated above, the NFT payment was entirely fair to Disney. As such, even if Ovitz breached some duty (and he did not), the damages are nominal.

Beyond that, plaintiffs rely uncritically on Murphy's stock option valuation. Dunbar effectively rebutted that valuation, pointing out that the Black-Scholes model was a poor one here. D.Ex. 428 at 9-20. Further, to the extent Disney was harmed by the options (a dubious proposition at best), the harm was in the nature of stock dilution occurring upon exercise. And even equating dilution with injury, Ovitz realized $70 million from the options, not the over $90 million plaintiffs allege, since Disney suffered no loss, and Ovitz obtained no gain, as to the unexercised options. P.Ex. 426 at 28-9. But even that figure is overstated, as this $70 million was deductible from Disney's income, yielding a tax benefit.

Finally, plaintiffs' request for interest is ill-founded at least as to the options. Prejudgment interest compensates for the loss of the use of money prior to judgment. *Trans World Airlines, Inc. v. Summa Corp.*, 1987 WL 5778, at *1 (Del. Ch. Jan. 21, 1987). As such, there can be no prejudgment interest relating to the options. Prior to their exercise, Disney had

lost nothing. And even after their exercise, Disney did not lose the use of its money; instead it gained the use of the additional funds used to purchase the stock.

IV. CONCLUSION

When they filed their complaint, and throughout this litigation, plaintiffs spun a tall and seductive tale of backroom deals among friends, collusive agreements, and nefarious misconduct. But, it turns out, a tall tale is all they had. For the evidence shows that Ovitz worked as hard as he could, but in the end simply could not function well in a corporate culture that was fundamentally opposed to his ideas and in which he was given no real authority. Then, he was unilaterally fired. Disney acted within its contractual rights to fire Ovitz, and Ovitz acted within his contractual rights by accepting the NFT payments. There was no collusion, no secret deal. These guys were not even friends anymore. There was just a tragically failed relationship governed by an agreement that both parties honored. That is no tort. That's life.

For these, and all of the foregoing reasons, Ovitz respectfully requests that he receive a judgment in his favor.

Respectfully submitted,

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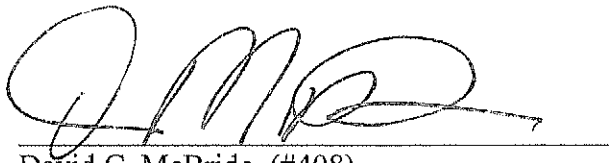

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