IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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

NON-OVITZ DEFENDANTS' POST-TRIAL ANSWERING BRIEF

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PRELIMINARY STATEMENT

In denying the motion to dismiss the Second Amended Consolidated Derivative Complaint (the "Complaint"), the Court held that "a more complete factual record is necessary" to determine if—as alleged by plaintiffs—"the defendant directors *consciously and intentionally disregarded their responsibilities*, adopting a 'we don't care about the risks' attitude concerning a material corporate decision." *In re The Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 278, 289 (Del. Ch. 2003) (emphasis in original). After 37 days of trial, that "more complete factual record" has now been developed and it allows only one conclusion: there is no liability as to any defendant.

Plaintiffs staked out a case that rested on two over-arching allegations: that Michael Eisner put his personal friendship with Michael Ovitz above his fiduciary duties and that no business judgment was exercised in connection with either the hiring or termination of Ovitz. *Disney*, 825 A.2d at 278. As predicates for their "going in" case, plaintiffs asserted that "Eisner decided unilaterally to hire Ovitz"; "neither the Old Board nor the compensation committee . . . ever discussed hiring Ovitz as president of Disney" before his hiring was publicly announced; members of the Compensation Committee considered the terms of the proposed Ovitz Employment Agreement ("OEA") only briefly and without expert assistance, and did not prepare a spreadsheet showing the potential costs of the OEA; the Compensation Committee never reported to the Board; and the "final version of Ovitz's employment agreement differed significantly from the drafts summarized to the Compensation Committee on September 26, 1995." *Id.* at 275, 279, 282. As predicates for their "going out" case, plaintiffs alleged that "Ovitz wanted to leave Disney"; "Eisner and Ovitz worked together as close personal friends to have Ovitz receive a non-fault termination"; and neither the Board nor the Compensation Committee "had been consulted" concerning the non-fault termination ("NFT"). *Id.* at 283-84; Compl. ¶ 13.

These key allegations, upon which the Court sustained the Complaint, have now been tested against the evidence. None were proven; in fact, the evidence was precisely to the contrary. The undisputed testimony established as to the hiring of Ovitz that: Eisner did not decide "unilaterally," but instead consulted with all directors before signing the Ovitz letter agreement ("OLA"); Irwin Russell and Raymond Watson, advised by compensation expert Graef "Bud" Crystal (who was in fact retained to assist the Company regarding Ovitz's hiring), considered spreadsheets prepared by Watson and carefully analyzed the proposed terms of Ovitz's employment before the signing of the OLA, after which the full Compensation Committee reviewed those terms in detail; and the Board was informed of the Compensation Committee's review of the proposed terms before it elected Ovitz as President, by which time there was an overwhelmingly positive response to the hiring of Ovitz by the financial community, the entertainment industry and the press—all confirming the directors' belief that the hiring of Ovitz was a great coup for Disney. And, as this Court has already held, there were "[n]o material changes to the compensation structure, severance or NFT benefits, or the definition of 'good cause' between September 23, 1995 and December 12, 1995." *In re The Walt Disney Co. Deriv. Litig.*, 2004 WL 2050138, at *5 (Del. Ch. Sept. 10, 2004).

Plaintiffs also failed to prove their allegations about Ovitz's termination. Ovitz, at trial, could not have been clearer – he did not want to leave. Eisner was equally clear – he concluded Ovitz had to leave. Eisner and other directors received and relied upon unequivocal legal advice from Sanford Litvack that there was no basis to terminate Ovitz for cause. The evidence showed that Eisner consulted with directors both at Board meetings and informally about the termination of Ovitz. There was no formal meeting of the Board to vote on Ovitz's termination because no

one, including Litvack, believed a meeting was necessary. In the end, despite his many face-saving requests, Ovitz received nothing more than Disney was legally obligated to pay him.

Plaintiffs' Opening Brief largely ignores the trial record, only underscoring their failure of proof. Plaintiffs heavily rely on deposition testimony (and on the inadmissible PTE 147) to the exclusion of trial testimony, revealingly failing even to allude to "inconvenient" evidence such as the trial testimony of seven witnesses about the November 25, 1996 meeting of directors in the glass-enclosed conference room regarding the termination of Ovitz. Beyond their failure to deal with the facts actually proven at trial, plaintiffs attempt to alter the legal standards which govern this case by interlacing the discussion of case law with the opinions of Professor DeMott on supposedly ideal corporate governance practices of the very type the Supreme Court has already said "do not define standards of liability." *Brehm v. Eisner*, 746 A.2d 244, 255-56 (Del. 2000). Defendants offer below a counter-statement of facts based on the trial record, which exposes the many inaccuracies in plaintiffs' brief, and then apply the controlling law (and not aspirational ideals applied with 20-20 hindsight) to the facts established at trial.

The Court has now had the opportunity to hear and assess the testimony of the witnesses and to consider the full trial record. The testimony shows that all of the director defendants took seriously their fiduciary duties, cared very much about Disney and its shareholders and tried to further shareholder interests. In short, these defendants acted with due care and in good faith. The "complete factual record" now having been made, there is no basis to impose monetary damages against any of these defendants.

STATEMENT OF FACTS[1]

A. The Hiring of Michael Ovitz.

1. Initial Overtures.

In 1984, Eisner and Frank Wells were hired to serve as the Chairman/Chief Executive Officer and President/Chief Operating Officer, respectively, of the Company. Under their leadership, the Company experienced ten years of outstanding creative and financial success. 839; 943-45; 953; 4131-33. Wells died in an accident in April 1994. That loss, followed shortly by Eisner's heart bypass surgery, heightened the need for a possible successor for Eisner. 2314; 4150-52. Over the next year, Eisner and the other members of the Board had periodic discussions about the subject, *see, e.g.*, 3665-76; 3997-99; *see also* 4700; 5581; 5913-14; 7125; 7628-29; 8142, which intensified after the CapCities/ABC merger was announced in mid-July 1995. 2414; 4190-91; 4193-94. There were no suitable candidates for promotion from within Disney. Although the possibility of having Ovitz come to the Company was discussed with directors from time to time, 4159-60; 4175; 4211-13, the subject received renewed attention in the spring of 1995, when it was learned that Ovitz was in negotiations with MCA/Universal. 2314-15; 3679-80; 4174. After consulting with the Company's largest individual shareholders (Sid Bass and Roy Disney) in May 1995 about trying to hire Ovitz and receiving their support, Eisner approached Ovitz. 2344-45; 4000-01; 4175; 4177-79.[2]

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[1] The trial transcript is referenced as "####." Deposition transcripts are referenced as "[Deponent] ####." Trial Exhibits are referenced as "PTE ###" or "DTE ###." Plaintiffs' post-trial opening brief is referenced as "OB ##." Attached to this Brief as Exhibit A is a chart of page numbers for witness trial testimony.

[2] Bass opposed any arrangement whereby Eisner and Ovitz would have equal power, PTE 778, but agreed to hiring Ovitz as the "number two" executive. Eisner told *The Hollywood Reporter* on August 14, 1995 that Sid Bass had given a "thumbs up" to the hiring of Ovitz. 4233; DTE 91 at DD384. Shown the article at his deposition, Bass replied: "As I said, in the end I agreed." Bass 74-75. Had Bass (Continued)

Eisner recruited Ovitz because he felt Ovitz could effectively serve as President and lessen Eisner's workload. 4234; 4246-49; 4856-57. Further, Eisner did not want to face the prospect of having Ovitz work for a competitor. 4174-75. Knowing Ovitz, Eisner believed he could trust and rely on him; he felt they could function as an effective team (as Eisner did with Wells and earlier with Barry Diller) and continue the Company's success. 4234; 4247.

Eisner knew that Disney could not match what MCA/Universal was offering Ovitz. 2632; 4176-77. Nonetheless, Eisner asked Russell, a director and chairman of Disney's Compensation Committee, to keep in touch with Ovitz, or his advisor Bob Goldman, in case a hitch developed in the MCA/Universal negotiations. 2319. Between mid-May and late July, Russell had numerous conversations with Goldman. 2346-52; 2363-78; 2407-15. Based upon those discussions, Russell understood that Ovitz was making $20-$25 million per year from CAA and owned 55% of CAA. DTE 52; 2362-63; 2602; 2760. During the same period, Russell considered various components of a possible compensation package and secured Black Scholes calculations.[3]

Eisner and Russell wanted to make sure that Ovitz understood what would be necessary to transition from a private to a public company. 2411-12; 4234-36. Russell had conversations with Goldman and Ovitz about what Ovitz would need to do to make the transition. *See* 2411-12; 2701-03. Contrary to plaintiffs' suggestion that Russell had unresolved doubts about Ovitz's ability to function in a public company, OB 8, Russell (as well as Eisner) believed by the time of the signing of the OLA that Ovitz could make the transition. 2769-72; 2929; 4234-36; 4249-51.

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opposed the hiring of Ovitz, the idea of doing so would have been a "nonstarter." 4179; 7076; PTE 80 (reflecting report by Eisner on call with Bass).

[3] Schultz 108-110; 2367-75; 2396-99; DTE 41, 48, 49, 51; PTE 102, 103. Contrary to plaintiffs' suggestion that it was designed to set out the parameters of a deal, OB 4, the case study authored by (Continued)

Both Eisner and Russell were familiar with precedents for agents making such a successful transition. 2315; 4235.

In the parties' discussions about a possible compensation package for Ovitz, it was agreed that Ovitz's annual salary would be $1 million, and that he would have a performance-based discretionary bonus that complied with the new regulations under I.R.C. § 162(m). 2503.[4] Thus, the continuing discussions related primarily to the stock options, with the number, strike prices, vesting schedules and possible downside protection all under heavy negotiation. 4195-96. On a split-adjusted basis, Eisner had received options on 8 million shares under his then-existing contract, and Ovitz asked for the same. PTE 386; 2391; 2408; 2415; 4195-96. Eisner and Russell believed that Ovitz should not be offered options on 8 million, or even 5 million, shares for the first five years of his contract. PTE 343; 2415-21; 4204-06. Instead, they agreed that Eisner should propose a contract for a five-year term with options on 3 million shares vesting one third at the end of each of the third, fourth and fifth years. 2439; 4203-06. In doing so, they considered the fact that the most recent precedent for a similar, but not entirely comparable, position was the last contract Wells had signed, under which he had received options on 3 million shares (on a split-adjusted basis) for a five-year contract extension. DTE 40, 44; 2339; 2381-84; 2391-92; 2439.

Ovitz was not willing to give up his 55% controlling equity ownership interest in and income from CAA without downside protection. 1099; 1305-06; 2175-76; 2337-38; 2394-95.[5]

Russell (DTE 88; PTE 64), was a discussion piece for communicating with Goldman and Ovitz about the issues under consideration. 2399-2400; Russell 135-43.

[4] Plaintiffs claim that there was a "side deal" about the amount of Ovitz's annual bonus for the first two years. OB 22. In fact, Ovitz received no bonus for the only year he worked at the Company. PTE 53; PTE 93.

[5] Plaintiffs suggest incorrectly that Ovitz only became interested in negotiating back-end protection as a consequence of the August 13, 1995 meeting at Eisner's house. OB 29. In fact, Ovitz testified that it was his "standard operating procedure" from thirty years of negotiating deals to "always (Continued)

On the other hand, Eisner and Russell refused (consistent with Company practice) to offer a signing bonus. 4208-09. Instead, the parties initially agreed that if the options on the three million shares had not appreciated by $50 million by the end of the five-year term, the Company would pay Ovitz the difference. 2337-38.

2. Compensation Committee and Expert Analysis.

Russell asked Watson to help him analyze the package, and Crystal was retained to provide his input. 2426-30.[6] The three spent all day on Thursday, August 10, 1995 analyzing the possible terms—a meeting plaintiffs entirely ignore in their brief despite extensive testimony on the subject. PTE 218; 2431-35; 3267-76; 7827-31. In preparation for the meeting, Crystal had loaded an extensive database of executive compensation survey information into his laptop computer, which also had Crystal's own program for performing Black Scholes calculations. 3268-69; 3275-76. They discussed various inputs, primarily involving the number and vesting schedule of the options, and reviewed together the results generated by Crystal's programs, as well as Crystal's information on comparables. 2766; 3269-75. Independently, Watson had generated his own spreadsheets showing the possible proceeds of option exercises at various times and different stock prices, which he shared with the others. DTE 12, 28, 32, 56; 2454-57;

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protect[] the opposite end of the deal, the down side."1277-78; 1326; 2175-77. Plaintiffs' further claim that Ovitz "knew even before he executed the OEA that he could not complete a five-year term" (OB 28 n.29) is also untrue. Ovitz testified unambiguously that he expected the relationship to work until the day he was terminated. 1305.

[6] Plaintiffs erroneously assert that "Eisner unilaterally selected Graef Crystal" and infer that Crystal was not qualified since at the time of his retention he was not advising other corporate clients (OB 10). From the start, Russell and Eisner intended that they would engage Crystal to provide advice to the Company on the proposed compensation package, once it became sufficiently concrete. PTE 193; 2379. Crystal, who previously headed the Towers Perrin compensation practice for many years, had been providing advice to the Company on compensation issues since before Eisner had come to the Company. 2714-15; 3253; 3257-60. Moreover, far from being retired or out of touch, Crystal (as he displayed at trial) was in every sense the dean of the compensation consulting field with vast experience in the entertainment industry, and was actively engaged in both teaching and publishing in the field. 3243-3252; 3424.

7827-31; 7838-46; Russell 351-53. Crystal described the work of Russell and Watson as "tremendous" and said that they "rolled up their sleeves . . . [and] really, really worked very hard." 3325-3326. It was agreed Crystal would prepare a letter containing his analysis and views and fax it to the other two. 2434; 2441.

On Saturday afternoon of August 12, Crystal faxed a draft of his letter analyzing the proposed Ovitz contract. PTE 365; 2441; 3280. Crystal concluded that the combined salary, bonus, option and guarantee provisions had an approximate value of $23.6 million per year for the five-year contract, and $23.9 million per year if the contract was renewed for an additional two years. Crystal noted that those figures approximated what he understood Ovitz was earning at CAA.[7] He also applauded what he viewed as the benefits of using a guarantee feature rather than a signing bonus and recognized the need to provide the guarantee in light of the considerable value of the business Ovitz was leaving. PTE 365. That evening, Russell, Watson and Crystal had an hour long conversation to discuss Crystal's draft letter,[8] during which Russell asked Crystal to revise his letter to set forth more accurately some of the deal points that had been negotiated by the parties. PTE 199; 2444-45; 2452.[9]

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[7] Crystal's letter noted that he received that information from Eisner; Russell had gotten this information from Goldman and, based on his own knowledge of the industry and prior dealings with Goldman, Russell believed the information was true. PTE 215; 2320-22; 2363; 2402; 2755. Ovitz's accountant testified that the information was true. M. Dreyer 128; *see also* PTE 200.

[8] Plaintiffs seem to question whether this conversation took place (OB 11), despite the confirming testimony, *e.g.*, 2444-45; 2452; 2476-77, the handwritten notes Russell made on the phone bill reflecting the call, DTE 120 at WD7502, and his memo of August 18 memorializing the events of that week. PTE 215.

[9] Rather than sending Russell the revised letter he had requested, on August 15 Crystal sent Russell a letter expressing his concern about his understanding of how the guarantee would work. PTE 59. Russell called Crystal and cleared up the misunderstanding. PTE 214; 2458-60; 3289-90. With that false alarm resolved, Crystal revised his first August 12 letter and replaced it with a second version of the letter, which he faxed to Russell on August 17. 2460-61. In the definitive letter, he stated that the total package would have a value of approximately $23.6 million per year for the first five years and $24.1 million per year if the contract was renewed for the additional two years. PTE 366. On August 18, Russell sent a memorandum to Eisner, summarizing the events of the past several days, the factors considered and the conversations with Crystal, Watson, Poitier and Lozano. PTE 215; 2467-76.

Before the OLA was executed, Poitier and Lozano were informed of the proposed contract and reacted positively. PTE 215 at DD1636. Russell discussed the subject in two telephone calls to Poitier. 2445-47; 2450-51. Poitier knew from his own vast entertainment industry experience of several successful transitions from one area of the business to another. 7125-29. Watson discussed the matter in a long telephone conversation with Lozano. 7637-38; 7833-34; 8082-83. Lozano also felt, based on his own experience, that Ovitz could make such a transition. 7631-32.[10]

3. The Handshake Deal.

On Saturday, August 12, Eisner, after conferring with Russell, gave Ovitz a take-it-or-leave it offer. This offer was based on the research of Russell, Watson and Crystal and on Eisner's knowledge of the marketplace in the entertainment industry. PTE 215; Eisner 254; 4194-97. Ovitz accepted the terms. Eisner told Ovitz that he would not be offered the title of chief operating officer, and Ovitz agreed that he would just be President. 4195-97.[11]

Far from striking "a private deal with Ovitz" (OB 7), Eisner called each of the directors before the press release went out and described to the directors Ovitz's qualifications, background and their friendship. *See, e.g.*, DTE 413; 3704; 5388; 4216-18; 5582-83; 5802; 7658; 8142; *see also* Stern 53-60 (discussing with Eisner the upsides and downsides of hiring Ovitz and concluding that it would work). He also summarized the proposed deal terms in

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[10] Plaintiffs claim that the call between Lozano and Watson did not occur until mid-September. OB 9. That argument is based on testimony by Lozano that he did not recall when the call occurred, as opposed to Watson's testimony, 7832-33, and the contemporaneous statement in Russell's August 18 memo that "[a]ll the members of the Compensation Committee heartily endorse this pay package. Watson had a long discussion with Ignacio Lozano and I had two long conversations with Sidney Poitier in which all of the details were reviewed and discussed before the deal was signed." PTE 215 at DD1636.

[11] That night, the Eisners, Ovitzes and Basses had a celebratory dinner. 1119; 4440. Citing the Bass deposition, plaintiffs assert that Bass, at Eisner's request, spoke to Ovitz about business ethics in a public company. OB 8. This did not occur in August 1995, but occurred if at all in September 1996 in (Continued)

varying detail during these calls with the directors. *See* 3692-93; 4216-18; 5964; 8145. All directors viewed the hiring as a great coup for Disney. *See, e.g.*, 4005-06; 6054. Ovitz was well known to the directors of Disney, and they had always reacted positively to the consideration of hiring him. 3687-89; 5276-77.

On August 13, Eisner hosted Ovitz, Bollenbach, Litvack, and Russell at his home. 2810.[12] Litvack and Bollenbach—while holding positive opinions about Ovitz—were not happy to see a new executive join Disney's management at a level above them, because they believed the current management team worked well together. 2423-24; 5270-72; 5276; 6041; 6046-47. Bollenbach and then Litvack made clear to Ovitz that they would not report to him.[13] Eisner and Ovitz caucused, and Ovitz agreed to the reporting relationships. 2151-52; 6050. On August 14, Eisner and Ovitz signed the OLA, which outlined the basic terms of Ovitz's proposed compensation. The OLA was subject to the approval of the Compensation Committee (contract terms) and the Board of Directors (election as President). PTE 60.

The public reaction to the announcement of Ovitz's proposed hiring vindicated the decision that Ovitz was the right choice. The financial community and the press, which anticipated the magnitude of Ovitz's compensation, praised his hiring. DTE 92; DTE 428 at 6. Disney's stock increased 4.4%, raising the market capitalization of the Company $1 billion in a single day. DTE 428; 7290.

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connection with an ethics conference sponsored by Disney for its executives. 4440-41. *See also* n.23 below with respect to Bass' recall of events.

[12] Bollenbach was only a director on the Board at the time of Ovitz's election as President. Also, Fr. O'Donovan and Tom Murphy were only directors at the time of Ovitz's termination.

[13] Plaintiffs suggest that it was a secret that Litvack and Bollenbach would not report to Ovitz. OB 16. Actually, the fact was widely reported. *See* DTE 91 at DD404 (front page of *The Wall Street Journal*); *see also* PTE 3.

Subsequently, Joseph Santaniello, the compensation expert within the Disney legal department, took charge of reviewing the proposed terms and drafting the employment contract. 2481-82; 6055-56.[14] After conferring with outside tax counsel, Santaniello and Russell concluded that the application of I.R.C. § 162(m) to the guarantee could have a negative impact on deductibility and that the guarantee would need to be eliminated. Santaniello 50; 2484. Russell consulted with Eisner, Santaniello, Watson and Crystal about what to propose to Ovitz in exchange for the elimination of the guarantee. 2486.[15] Russell had separate conversations with Crystal and Watson to discuss the possible consequences of the proposed changes, which included extended exercisability of the options. 2485-502; Russell 633-34. Crystal and Russell discussed Black Scholes calculations related to the extended exercisability features, while Watson generated and discussed with Russell a spreadsheet that analyzed the possible impact of extended exercisability of the options. PTE 345, 348, 387, 373; DTE 12, 14, 15, 17; 7836-46.[16]

4. The Compensation Committee Meets to Consider the OEA.

On September 26, the Compensation Committee met to consider the proposed terms of Ovitz's contract. PTE 39. Although Crystal did not attend, he was available by telephone to respond to questions if needed. 2518; 3601-02. The members of the Committee—already

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[14] Simultaneously, after checking with the Company, Russell and Goldman agreed on the details of Ovitz's perquisites, which generally were to be the same as those enjoyed by Eisner. PTE 146; 2479-81; 6058-59.

[15] Plaintiffs' assertions that Crystal's work effectively terminated on August 17 (OB 10, 12) and that his input was intertwined with advice concerning Eisner's contract (OB 10) are wrong. As confirmed both by his testimony and contemporaneous documents, Crystal's work continued through September 22, 1995, including extensive advice concerning the termination package which replaced the back-end guarantee. PTE 348, 349; 3266; 3313; 3321-23. Crystal was clear that he did no substantial work on Eisner's contract in 1995. 3266; 3279; 3594. There was no linkage between the terms of Ovitz's contract and the 1996 Eisner contract. 3293-3304; *infra* note 49.

[16] It was concluded that stockholder approval of the amendment to the option plan was necessary. Santaniello 78-80; 2515-16. Because a stockholder vote would not occur until January 1996, the parties agreed that they would grant the options in October 1995 and—in the event that stockholder approval was not obtained—the parties would negotiate in good faith about alternative compensation to be provided in the event of a termination without cause. *See, e.g.*, PTE 373; 2557-58.

informed of the proposed deal terms from prior discussions—had in front of them a term sheet prepared by Santaniello that Russell went through in detail. PTE 39 at WD1186-88; 2513-14; 2517-29; 4238-39.[17] Russell and Watson discussed the process they had followed over the prior several weeks, the information they had received, and their consultations with Crystal.[18] They also discussed the factors that had been considered in setting the proposed option size, with reference to the historical Eisner and Wells option grants as the most relevant comparables. 2522-23; 2527-28; 7638; 8029-30. Watson shared the information generated through his spreadsheet analysis. 2519-30; 7132-36; 7668; 7848-49; 8046-47.

Poitier and Lozano, who had a high opinion of Russell's and Watson's abilities, believed they had received sufficient information and that approval of the proposed terms of the contract was in the Company's best interests. 7136-37; 7636; 7639-40. At the conclusion of the discussions, the Committee members voted to approve the terms of the OEA.[19]

At the Board meeting which immediately followed, the Board first met in executive session and heard about the reporting structure and received a presentation about the key terms of the OEA. Watson explained his spreadsheet analyses, and he and Russell responded to questions from other members of the Board. 2537-40; 3733-34; 4875-76; 4877-80; 5920-22;

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[17] Plaintiffs do not explain why there should be any doubt that Russell reviewed the terms of the Ovitz agreement "in great detail," OB 21, simply because Russell suggested that those words be added to the minutes at a time fourteen months before this litigation was filed.

[18] Plaintiffs' claim that the letter from Crystal was not "discussed" and that its contents were withheld from Poitier and Lozano (OB 12, 68) ignores the record. Russell told the Compensation Committee of the meetings that he and Watson had with Crystal, as well as Crystal's Black Scholes calculations and evaluation of Ovitz's proposed compensation package, and that as a result, Russell and Watson "felt that this grant of options was ... a fair and ... appropriate amount, you know, considering all the circumstance[s]." 2522-23.

[19] After observing the considerable amount of time Russell had been devoting to the discussions about the Ovitz compensation package, the Compensation Committee (Russell abstaining) also voted to recommend to the Board that Russell be paid $250,000 for his efforts. 7849-50; 8125.

5921-24; 7851-52; 8046-47. Plaintiffs' suggestion that Ovitz's employment terms were not discussed during the executive session (OB 25) ignores this extensive testimony. [20]

Once the meeting resumed in regular session, and after further discussion, the members of the Board unanimously elected Ovitz as President. PTE 29. As of the September 26 meeting, Eisner had the same enthusiasm for hiring Ovitz that he had prior to August 14, and, accordingly, did not have any "second thoughts" to report to the Board before it elected Ovitz as President. 4237. As Gold recalled about Eisner prior to the election of Ovitz: "He was thrilled. He was delighted. This was the—this was his dream candidate. He was sure this was going to work. There [were] no second thoughts." 3728. [21]

The Compensation Committee met again on October 16. It reviewed and approved the new and amended stock option plans, reviewed and approved the updated OEA term sheet, and granted the Ovitz stock options.[22] The Board subsequently acted by written consent to approve the new plan and amendments and the stockholders followed suit on January 4, 1996. PTE 265; Russell 532.

B. Ovitz's Performance.

1. Initial Attempts to Help Ovitz Make the Transition.

Upon becoming President on October 1, Ovitz had all operating divisions other than animation directly reporting to him, later including ABC. PTE 3. Eisner expected Ovitz to be

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[20] Consistent with usual practice, no minutes were taken on this issue because there was no vote on Ovitz taken in executive session. 2744; 4876-77; *see* 3664; 3732.

[21] Similarly, contrary to plaintiffs' suggestion, Litvack and Bollenbach had no concerns about the hiring—their concerns about the impact his hiring would have on their reporting relationship with Eisner had been resolved on August 13. 6050-52 (Litvack); 5275-76 (Bollenbach).

[22] Plaintiffs claim that "the Old Board did not know that if Ovitz were terminated without cause in his second year, he would have *six* years to exercise his options." OB 27 (emphasis in original). The members of the Compensation Committee, who had the responsibility of approving the terms of the OEA, reviewed and discussed a term sheet that noted that in the event of a non-fault termination at any time in (Continued)

involved in all operations and viewed Ovitz as his "natural successor." 4246-48. Eisner offered Ovitz guidance on the mission and the culture of the Company and tried to meld Ovitz into the Disney management team. PTE 267 (Eisner's October 10 letter which Ovitz called "incredibly helpful and supportive to" him, Ovitz 211-12); PTE 313, 316; 4248-60.

Throughout Ovitz's tenure, Eisner maintained a continuing dialogue with members of the Board updating them on Ovitz's performance and his efforts to transition him to the Company culture. 3746-47. His early reports to the Board were glowing, especially relating to Ovitz's initial trip as Disney President to visit Disney's European operations. PTE 313; 3746-51; 4265-66. Eisner also shared with his biographer in early November 1995 his contemporaneous view that Ovitz was the "right choice." PTE 316; 4273-74.

Eisner remained optimistic about Ovitz's future at Disney throughout 1995, a period when Ovitz performed well in his foreign travels and importantly suggested a different arrangement for the entrance gate of the new California Adventure theme park. 4278-80; 5591-93. However, Eisner started to have concerns about Ovitz beginning in January 1996, which concerns intensified in May 1996 and by the end of September 1996 led to a decision to seek Ovitz's departure from the Company. 4294-95; 4297-4302; 4307-08; 4345-52.

2. Ovitz Fails to Perform at the Company.

Ovitz did not adapt to the Disney culture. 4281-82; 5292-93; 5926-27; 6973-76; 7145-46; 7640-41; 8147-48; 8153-54. In January 1996, Ovitz alienated many of his fellow senior officers during a management retreat. 4281-82; 5292-93. In May, as Eisner recalled it, Ovitz "was aggravating many employees," 4305, and "the senior management started to come to a halt." 4307. Rather than easing Eisner's workload, Ovitz had himself become a burden. 4305

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the first five years, "[e]xerciseability of the 3 million share option shall extend until September 30, 2002." (Continued)

("Every day was trying to manage Michael Ovitz. I almost did nothing else."). Litvack told Eisner that he planned to resign out of frustration from working with Ovitz, and Iger also revealed to Eisner his own difficulties with Ovitz. 4295-4304; PTE 67. Eisner came to believe that Ovitz "didn't want to do the mundane work of operating the company" and "didn't want to do anything" in which Eisner was not involved. 4308; 5214-15.

During 1996, Eisner discussed the growing problems with Ovitz's performance at, or in connection with, board meetings. 3890-93; 5927-28. Eisner also had conversations with individual directors. 2567-71; 3087-88; 3762-66; 3746-47; 3751-55; 3889-92; 4021-22; 5469-70; 5593-94; 5809-10; 5851-55; 6095-99; 6836-37; 6969-72; 7141; 7241-43; 7640-41; 7854-57; 8146-47. For example, Eisner told Gold in late January 1996 of his initial concerns with Ovitz, and Gold urged Eisner to redouble his efforts to make the relationship work. 3751-55; 3889; *see* DTE 72. Eisner and Gold continued to discuss Ovitz's performance over the course of the year. 3758-59; 3818. By no later than the summer of 1996, Eisner was sharing his concerns with the other directors, as well as with Bass. 2567-71; 3087-88; 4021-22; 4294-96; 5593-94; 5725; 5809-10; 6834-38; 6969-72; 7241-43; 7246; 7854-57; 8146-47.[23]

PTE 41 at WD142.

[23] Notwithstanding deposition testimony of Bass, no decision to terminate Ovitz's employment was made before the Fall of 1996 and no serious discussions of firing Ovitz occurred before May 1996. It was in May or June 1996 when Bass recommended to Eisner that he terminate Ovitz's employment and when Eisner expressed concern that Ovitz was speaking of the suicide of Admiral Boorda. Eisner's recollection of the timing and circumstances of his discussion with Bass about a concern for suicide were Ovitz's employment to be terminated is corroborated by his contemporaneous communications with Bass (PTE 67); by Eisner's positive communications about Ovitz's performance of October 20, 1995 and November 10, 1995, respectively, to the Board, the Basses and Jane (PTE 313) and his biographer (PTE 316); and by the date of the news reports of Admiral Boorda's suicide. DTE 242 (May 17, 1996). Bass' deposition reveals the imprecision of his recollection. He had not a single document in his possession responsive to plaintiffs' subpoena and, thus, had no documents available to refresh his recollection. Bass 24. He admitted that he knew he met with Ovitz in August 1995 only because someone had mentioned it to Bass the day before. Bass 40 ("Speaking to someone yesterday my memory was refreshed, and I'm lucky to even know it's August."). Bass did not know when Ovitz started work at Disney more specifically than "Fall '95" without a representation of the date by plaintiffs' counsel. Bass 76. Bass first testified emphatically that he did not discuss with Eisner the terms of hiring Ovitz because "[i]t wasn't my (Continued)

By the early fall of 1996, Ovitz's poor performance was well known: his struggles were extensively reported in the media; directors who had contact with Disney's operating executives learned of the problems directly; and Eisner was speaking more frequently to directors about Ovitz's performance. PTE 21, 22; 4346-50; 4368; 5810; 7552; 8146-48; 8153. Simply put, Ovitz failed to adapt to the Disney culture; failed to adapt to being the "number two" executive; failed to ease Eisner's burden; failed to function as part of a team; distracted and alienated other executives who threatened to resign; failed to motivate other executives; failed to appreciate the economic differences between the sell side and the buy side of the entertainment business; excessively explored deals while failing to focus on operations; and lost the trust and respect of Eisner and other executives. Roth 29-30; 3759-63; 3811-14; 4081-82; 4280-91; 4299-308; 4318-19; 5304-05; 5593-94; 6087-88; 6094-95; 6972-74; 7552; 7555-56; 7640-41; 8147-48; 8153-54. Ovitz was always "agenting" people, making it impossible to decipher good from better or best. 4436-39; 6098-99; 6374. Because of these problems, it was not feasible to simply transfer Ovitz to a different position within Disney. 5785-86; 6844; 7643; 7858. In any event, such a transfer would have entitled Ovitz to all the benefits of a non-fault termination under paragraph 12 of the OEA. PTE 7, ¶ 12(b).

C. Attempts to Get Ovitz to Leave Voluntarily.

In September, Litvack, with the approval of Eisner, had two meetings with Ovitz at which he informed him that the relationship was not working out and encouraged Ovitz to think about leaving the Company. 4354-55; 6101-03; 6562. These efforts failed.

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business." Bass 61. Yet later, Bass admitted he was "wrong, because I remember Michael was very proud that he got Ovitz for less than Universal had agreed to give Ovitz." Bass 65. The credible and corroborated testimony of Eisner should be accepted over the easily impeached deposition testimony of Bass. *Cf. Sumner Sports, Inc. v. Remington Arms Co., Inc.*, 1993 WL 67202, at *5 (Del. Ch. Mar. 4, 1993) ("Deposition testimony,... is a poor substitute for live testimony.").

In a further attempt to remove Ovitz at no cost to the Company, Eisner attempted (in Gold's term) to "trade" Ovitz to Sony. 3766-67; 4351-62; 7859. Ovitz was reluctant to pursue employment with Sony and agreed to do so only if he was provided with written permission to speak to Sony. PTE 18; 4359-60; 6105-06. After receiving written permission from Eisner, Ovitz entered into negotiations with Sony, but those discussions were unsuccessful. PTE 19; 4361. When Ovitz's discussions with Sony did not lead to new employment for him, he announced his firm intention to stay at the Company. PTE 19 at WD404. At no time did Ovitz desire to leave. 2572; 3769; 3830; 6187; 7868. In fact, he refused to listen to and accept the message that he should leave Disney, threatening instead to chain himself to his desk. 4368-70; 4374-75; *see also* PTE 325.[24]

D. Litvack Advises That There is No Basis to Terminate Ovitz for Cause.

In connection with the Sony negotiations, Eisner first asked Litvack whether there was any basis to terminate Ovitz for cause under the OEA in order to avoid the non-fault termination payments. 4380-81; 6110-11. Both men had an incentive to conclude that there was cause because they did not want the Company to have to pay anything to Ovitz. 4380-81; 6111; 6115-18; 6127-28; 6414.[25]

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[24] Plaintiffs argue that PTE 19 shows "special treatment" for Ovitz and explains why the December 12, 1996 press release did not say Ovitz was being terminated. OB 33, 40. PTE 19 does not show that there was "special treatment" for Ovitz. It shows that Eisner was trying to trade Ovitz to Sony at no cost to Disney—a "win-win situation." As Eisner explained, the December 12, 1996 press release reflected his agreement with Ovitz to avoid negative publicity for either side because Eisner did not want the termination of Ovitz to adversely affect the financial momentum Disney was enjoying. Eisner 571; 5241. Even plaintiffs do not contend that it is unusual or unprecedented for a company to agree to treat a terminated senior executive kindly from a public relations point of view.

[25] It is undisputed that Ovitz and Litvack did not like each other, with Ovitz going so far as to assert that Litvack walked behind him with a knife. 1349.

Litvack carefully considered the question of whether there was cause.[26] He began by reviewing the OEA and refreshing his recollection about the meaning of the terms "gross negligence" and "malfeasance". 6113-14. He then considered all of the events involving Ovitz over the last thirteen or fourteen months. 6114-15. Litvack believed that he had a complete understanding of the facts which were relevant in determining whether the termination of Ovitz should be with or without cause. 4296; 6116. He not only had the opportunity personally to observe Ovitz (since their offices were on the same floor), but he was also fully familiar with Eisner's experiences with Ovitz. 3761; 6086. Finally, as the head of human resources, Litvack had received and reviewed complaints from other Disney employees about Ovitz. 4419-20. Based on all of that, he concluded that there was no basis under the OEA to terminate Ovitz for cause. 6113-15; 6187; 6693.

Litvack testified that the decision was not a close one. 6115; 6129; 6134. Many of the improper things Ovitz was thought to have done turned out simply not to be true. For example, Ovitz did, in fact, report the gifts he received and did pay for the party at the House of Blues. 6139-40; 6146. No one could identify any meaningful misstatement by Ovitz, and certainly none that harmed the Company. 6131-32.[27] Rather than engaging in conduct which constituted gross negligence or malfeasance, Ovitz had simply failed to perform. 6100-01; 6115; 6134-35. Both Litvack and Ovitz testified that Ovitz worked long hours and tried to succeed at the job. 6087; 6094; 1126-27. But, as Litvack put it, Ovitz "was a square peg in a round hole." 6088.

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[26] Litvack, a member of the California bar, had more than thirty years of experience as a trial lawyer at the Department of Justice, Donovan Leisure Newton & Irvine, and Dewey Ballantine. 6015-19; 6022. He was a Fellow of the American College of Trial Lawyers and a former Assistant Attorney General of the United States, as well. With this background, and as general counsel and head of human resources at Disney, he was more than knowledgeable about employment contracts and the standard needed to terminate employment for cause. 6115; 6129.

[27] *See also* 2622; 3763; 4107; 5307; 5541; 5594; 5809; 6724; 6847; 7148; 7552-53; 7469; 7867.

Nonetheless, and even though he thought it was not a close question, Litvack consulted with Val Cohen, a member of the California bar and the co-head of Disney's litigation department, and with Santaniello. 6119-21. Both Cohen and Santaniello agreed with Litvack that there was no basis to terminate Ovitz for cause. 6120-21.[28] While plaintiffs criticize the absence of a formal factual investigation (OB 43), there was nothing for Litvack to investigate. He was already well aware of Ovitz's performance and understandably concerned about the breach of confidentiality which would occur if others were involved. 6115-16.

Litvack was also convinced that, absent any credible grounds for cause, Disney, which had hundreds of contracts, had to honor the OEA. 6193. Although he considered for a moment attempting to bluff, in the hope of getting a better deal, on reflection Litvack concluded that it was a bad idea to advance what would be obviously contrived grounds for cause. 6118-19. Ovitz was being terminated because he had failed to perform adequately. Litvack knew that and given that fact it would clearly have been improper and unethical to pretend otherwise. 6602.

In November 1996, Litvack advised Eisner that it was his legal opinion that Ovitz could not be terminated for cause. 4379-80; 4419-21; 6117. Eisner did not like the answer and repeatedly asked if there were some way that the Company could terminate Ovitz without making the NFT payments. 4419-21; 6117. Each time Litvack, who also wanted to avoid the payments, confirmed his legal opinion that there was no basis to terminate Ovitz for cause. 4419-21; 6117. Litvack also shared his legal opinion with other directors such as Gold, Russell and Watson. 2575-76; 3218-19; 3774-75.

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[28] Litvack also recalled consulting with Morton Pierce from Dewey Ballantine, Disney's regular outside counsel. 6121. Litvack told Pierce that neither Eisner nor he wanted to pay Ovitz the non-fault termination benefits and asked for Pierce's opinion as to whether there was cause. 6126. Litvack recalled that Pierce came to the same conclusion. 6125-26; 6415-16. At his deposition eight years later, Pierce (Continued)

Eisner accepted a non-fault termination for Ovitz because he was advised there were no valid grounds for cause and—that being so—Eisner "wanted to honor our commitments," even if he did not like it. 4380-81. Eisner did not agree to the non-fault termination due to any friendship then existing between him and Ovitz, and Eisner and Ovitz never negotiated a non-fault termination for Ovitz. 4449-50; 4455.

E. Eisner Keeps the Board Informed.

At the September 1996 Board meeting and retreat in Orlando, Eisner advised the directors that he was no longer attempting to rehabilitate Ovitz but was trying to arrange for Ovitz to leave Disney. Eisner 543; 4345-4350; 4728-29; 4761-62; 5595-96. The need for Ovitz to be terminated was further discussed in connection with the Board meeting on November 25. 3772-77; 3906-18; 4376-79; 4426; 4551-52; 5930-31; 5950-52; 8155-58; 8176-81; 8193-94. Prior to the Board meeting, Eisner and Gary Wilson met, and Wilson agreed to talk to Ovitz about leaving the Company. 4369-70; 4377; 6838-39. Eisner informed Wilson that he had been advised by Litvack that the Company had no choice but to pay the non-fault termination benefits, 4382, and he explained the cost to the Company of a non-fault termination. 4377; 4424-26. During a discussion that was held in a glass enclosed conference room at Walt Disney Imagineering, immediately following a regular Board meeting, 4425, Eisner informed the Board that it was still his belief that Ovitz had to go and that Wilson was going to try to convince Ovitz to leave. 3772-75 (Gold); 4376-4379, 4514, 4551-52 (Eisner); 5931-32, 5950-52 (Bowers); 7859-62 (Watson); 8155-58 (Stern).[29] Knowing that a non-fault termination would be expensive,

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did not recall the conversations, but his billing records reflected two lengthy conversations with Litvack regarding Ovitz in early December 1996. PTE 391, 392.

[29] Nunis and Mitchell, who did not attend, were told about this discussion. 5597; 5758-59; 5782; 5854-55. Plaintiffs completely ignore the testimony of these seven witnesses who established that the termination of Ovitz was discussed among directors at the conclusion of the November 1996 meeting. OB (Continued)

Gold asked whether the termination was going to be with or without cause. 3773-74. In response, Eisner advised those present that it would be a non-fault termination because he had consulted with Litvack and had been advised that there were no grounds for cause. *Id.*; 4477. No director objected to the need to terminate Ovitz. 3774.[30]

F. Disney Terminates Ovitz Without Cause and Honors Its Obligations.

On December 1, 1996, Wilson reported to Eisner that Ovitz had come to understand that he was being terminated.[31] On December 3, Eisner and Ovitz met to discuss Ovitz's departure. 4395-96. Ovitz wanted the termination to happen quickly and he said, specifically, he did not want to deal with Litvack (to whom he had not been speaking for a period of time). 4396. In order to save face, Ovitz requested several concessions. PTE 326; 4395-4400. Eisner did not reject those requests immediately; instead, he asked Russell to discuss those issues with Ovitz's representatives. PTE 326; 4395-97. Eisner ultimately rejected the concessions sought by Ovitz. 4397-4401. The Company did not pay Ovitz anything more than was required by the OEA. 2578-80; 4397-4401. There were never any negotiations with Ovitz or his representatives about Ovitz receiving an NFT. 4421; 4455; 4525.

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35 (saying the minutes reflect no executive session). Witnesses were able to clearly recall the meeting when reminded of the glass enclosed conference room. 4376-77; 4514; 7859-62; 7914-15; 8155-58; 8176-81; 8193-94. Plaintiffs complain that the minutes of this meeting were produced late (OB 35 n.31), and at trial even inaccurately represented that—due to a supposed late production—they were denied the opportunity to examine Eisner at his deposition about this meeting. 4506-7. As shown in Eisner's redirect, he was in fact questioned at his deposition and gave testimony about this November discussion. 5234-39.

[30] Gold and Stern recalled that after the session ended, Litvack came into the room. 3775; 6167, 6345; 8157-58. Eisner told Gold to ask Litvack the same question that he asked at the executive session. 3775; 6167; 6345. Gold asked Litvack whether Ovitz could be terminated for cause and Litvack replied that the Company had no choice and that as much as he would like to pay him nothing, it was his opinion that there were no grounds to terminate Ovitz's employment for cause. 3775; 6345.

[31] Eisner's notes of that call include a reference confirming the substance of the November 25 board meeting, noting that Ovitz was "[o]ut of denial–Board meeting started it." PTE 25; 4383-84; 4395.

On December 10, the Executive Performance Plan Committee ("EPPC") met to consider annual bonuses for Disney's most highly-compensated executive officers. 2580-83; 3779; 3783-85; 4426-27; 6153-55. Directors Gold, Russell, Poitier, Lozano, Litvack, Watson, and Eisner attended. PTE 51. The directors discussed the fact that Ovitz was being terminated. 2582; 3784-85; 4429-30. Russell informed the participants about the status of the conversations with Ovitz. Russell's contemporaneous December 11 memorandum reflects that he:

> conferred at length with members of the [EPPC] in our meeting yesterday, since disclosure of the entire situation was pertinent to approval of the 1996 Fiscal Year bonus, which was made at the meeting.

DTE 163; 2584-85 (clarifying that his reference in the memo to the Compensation Committee should have been to the EPPC); 3785-86. During this meeting, Russell recommended that Ovitz be awarded a bonus of $7.5 million based on the Company's success and Ovitz's hard work. 2582-2583. The other members of the EPPC understood Russell's comments to mean that Ovitz was contractually entitled to the bonus if the Company satisfied certain financial benchmarks, PTE 93, 384; 3788; 7752-7753, and thus voted to approve the bonus for Ovitz. 3788-89.

On December 11, Eisner and Ovitz met to discuss the language of a press release announcing Ovitz's termination and the possibility of a consulting arrangement. 4402-03. The next day, Eisner called each of the Board members and told them that Ovitz's tenure with Disney was over. DTE 413; 3802; 4404-06; 5810-11; 5932-33; 7556-57; 7642-43; 8158-60. None of the directors opposed the decision to terminate Ovitz. 4406; *see, e.g.*, PTE 68.

Ovitz's termination was memorialized in a letter dated December 12. PTE 13. Later that day, the Company issued a press release announcing the termination. PTE 9. Both parties understood that Ovitz was not voluntarily resigning, but was being terminated by the Company.

2573; 4584. On that same day, copies of the press release and a letter from Eisner were sent to each of the directors. PTE 9; DTE 167, 168; 4406-4408.

No one from Disney's legal department advised that formal board action was required to terminate Ovitz or to determine whether to honor his contract. 4423-24. Litvack did not believe that a Board meeting was legally required because Litvack believed that Eisner had the power and authority to terminate the employment of the President. 6149; 6151. The Company had amended its by-laws to provide that the President reported to the Chairman of the Board and not to the Board itself. PTE 498. Furthermore, Litvack could not recall an instance during his tenure at Disney when the Board was asked to decide whether to terminate an officer. 6150. The directors also believed that Eisner plainly had the authority to terminate his subordinate, Ovitz. *E.g.*, 2586-87, 2889-91; 5733-34; 6149-50; 6339-41; 6720-21, 6785-86; 7561. Accordingly, the Board did not hold a formal meeting in December 1996 to vote on the termination of Ovitz.

Although a bonus for Ovitz had been approved at the December 10 EPPC meeting, PTE 51, that bonus was later rescinded. PTE 53; 3789-92; 3932; 4426-29. On December 20, a special meeting of the EPPC was held, attended by Gold, Lozano, Russell, Watson, Eisner and Litvack. PTE 53. At that meeting, Russell clarified that there was no contractual obligation and the EPPC unanimously decided to rescind the bonus to Ovitz and no bonus was ever paid to him. PTE 53; PTE 93. During the meeting, Gold pressed Litvack about his opinion that Ovitz could not be terminated for cause. 3795-96; 6167-68. Litvack reiterated his opinion at this meeting that there was no legitimate basis for terminating Ovitz's employment for cause and that it had to be a non-fault termination. 3795-96; 6168.

The parties superseded the December 12 letter by letter dated December 27. PTE 14. Ovitz's tenure as a director and officer ended on that date. To accommodate Ovitz's tax

considerations and expedite Ovitz's departure, the Company agreed to make the NFT payments promptly, which had no adverse impact on the Company. 2592-93; 4667. The December 27, 1996 letter reflects the lump sum cash payment of $38,888,230.77 due under the contract, the stock option grant, and a $1 million holdback, pending a review of Ovitz's expense reports.[32] In addition, Ovitz executed a general release of all claims against Disney. PTE 69; 6180.

The next regularly scheduled board meeting was set for January 27, 1997. At that meeting, as Litvack testified, he repeated his earlier advice (6182):

> It was my view that cause, which was specified in the contract, had not been satisfied or achieved. There was no gross negligence, there was no malfeasance; and that we had, in my judgment, again, been required to honor our contract, that we had no choice.

In the end, Ovitz received no more than the OEA required.

[32] Of the $1 million withheld by the Company, $860,816 was ultimately returned to Ovitz. PTE 385. Of the $139,184 retained by Disney, $68,972 represented unamortized portions of capital improvements for a screening room and security system at Ovitz's home. 6174-76. That number could not be computed until after Ovitz was terminated. 6175. The remaining $70,212 represented expense account items which lacked full documentation. DTE 178 at WD4969; 6174. There was never any finding, or a basis for any finding, that Ovitz intentionally violated any Disney policy. 6175; 6178; 6275; 6604; 6691-92.

ARGUMENT

I. PLAINTIFFS HAVE NOT ESTABLISHED LIABILITY WITH RESPECT TO EITHER OVITZ'S ELECTION AS PRESIDENT OR HIS COMPENSATION.

Plaintiffs have failed to rebut the strong presumption of the business judgment rule with regard to the Board's decision to elect Ovitz as President and the Compensation Committee's decision to approve the proposed terms of the OEA. The business judgment rule is based on a reluctance of Delaware courts to second-guess business decisions that, by their very nature, involve risk. *Solash v. Telex Corp.*, 1988 WL 3587, at *8 (Del. Ch. Jan. 19, 1988). It is "a presumption that in making a business decision the directors . . . acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation." *Brehm*, 746 A.2d at 264 n.66 (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). The business judgment rule also applies to decisions made by officers acting within the scope of their authority. *Kelly v. Bell*, 254 A.2d 62, 75 (Del. Ch. 1969), *aff'd*, 266 A.2d 878 (Del. 1970); *Stanziale v. Nachtomi*, 2004 WL 878469, at *5 (D. Del. Apr. 20, 2004). The burden is on plaintiffs to rebut the rule's presumptions. *Aronson*, 473 A.2d at 812.

Liability for a breach of the duty of due care is predicated on concepts of gross, not simple, negligence. *Aronson*, 473 A.2d at 812. Delaware law has defined "gross negligence" as involving "reckless indifference" to or "deliberate disregard" of the stockholders, or actions outside the bounds of reason. *Tomczak v. Morton Thiokol, Inc.*, 1990 WL 42607, at *13 (Del. Ch. Apr. 5, 1990).

A. Any Duty of Loyalty Claim Has Been Conceded by Plaintiffs and Is Barred.

Plaintiffs appear to continue their attack on defendants' loyalties. *See, e.g.*, OB 1. This they cannot do. During oral argument on Ovitz's motion for summary judgment plaintiffs

themselves represented to the Court that, "We are not saying here that Eisner lacked or breached a duty of loyalty in dealing with Ovitz." Ovitz SJ at 48. During trial, plaintiffs repeated this concession. 2731. Yet now, once again, plaintiffs argue that Eisner's friendship with Ovitz, or concerns about his own contract, affected his loyalty. These theories have no more support than they did the first time around. There is no reason for the Court to reach them, because this Court's dismissal of them has become law of the case.[33]

B. Eisner is Entitled to the Protections of the Business Judgment Rule in Connection with His Role in the Hiring of Ovitz.

Plaintiffs argue, contrary to the record evidence, that Eisner made the decision to hire Ovitz "on his own." OB 57. Even plaintiffs agree that the push to identify and elect a new President and potential successor to Eisner originated in at least significant part with the Board. OB 2 (citing PTE 266). When the opportunity arose to recruit Ovitz during the summer of 1995, Eisner moved promptly. Eisner, with Russell's assistance, acted appropriately in assuming responsibility for negotiations of the most basic terms of Ovitz's compensation. *Grobow v. Perot*, 526 A.2d 914, 926 (Del. Ch. 1987), *aff'd*, 539 A.2d 180 (Del. 1988). Before the OLA was signed, Eisner knew that each member of the Compensation Committee had been briefed on, and agreed with, the proposed terms of employment. DTE 413; Eisner 191, 255, 377; 4214-15; *see also* PTE 218. Eisner knew about the work done by the Compensation Committee with Crystal on the proposed terms of the OEA, and he relied in good faith upon it. PTE 218; 4214-15.

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[33] On the first motion to dismiss, this Court considered and rejected plaintiffs' arguments that the Board was interested and lacked independence. *In re The Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 354-61 (Del. Ch. 1998). The Court held that Eisner's personal and business ties to Ovitz did not overcome his presumption of independence and, after an exhaustive analysis, that a majority of the Board (at least) was independent of Eisner. *Id.* In *Brehm*, the Supreme Court addressed the issue, affirming. 746 A.2d at 256-58 & n.41. The Court rejected plaintiffs' argument that Eisner was interested "in the nature of the old maxim that a 'high tide floats all boats'" and noted this Court's "meticulous[]" analysis as to the other Board members. *Id.* at 258. The Supreme Court then specifically held that "[t]his issue is not one that plaintiffs shall be permitted to relitigate. . . ." *Id.* at 258 n.42.

Consistent with his standard practice of keeping directors informed, Eisner also made sure that every member of the Board knew of and concurred in Ovitz's hiring before any public announcement was made, DTE 413; Eisner 191, 390; 4141-44; 4215-24; 5574-75; 7817-18, and that the work of the Compensation Committee, Ovitz's qualifications and the terms of Ovitz's employment were presented to the Board prior to Ovitz's election as President on September 26, 1995. DTE 29; 4240-42.

Plaintiffs repeatedly rely on one sentence from Eisner's unsent November 11, 1996 letter (OB 8, 29, 60, 73 quoting PTE 24, "By Labor Day I was wondering what it would cost in dollars and embarrassment to end our corporate partnership right away") and argue that Eisner "failed to mention his own doubts" to the Board on September 26, 1995. OB 60; *see also* OB 94. There are four answers to this argument, each based on evidence plaintiffs fail to address. *First*, Eisner testified without qualification at trial that between August 14 and September 26, 1995 he remained enthusiastic about the hiring of Ovitz, 4237; he had no "doubts" to disclose to the Board. *Second*, Eisner testified that this sentence in the unsent letter was not accurate. 4373. In November 1996, Eisner tried to draft a letter which would convince Ovitz to accept being terminated, but the draft was never sent because it contained much that was exaggeration, hyperbole and not accurate. 4372-73. *Third*, the contemporaneous documents which Eisner wrote in 1995 corroborate his trial testimony about his continuing optimism at the time of the Board meeting about the Ovitz presidency. On October 20, 1995, Eisner wrote to the Board, the Basses and Jane and reported that the hiring of Ovitz was a "great coup" for Disney and was a source of great excitement throughout the Company. PTE 313. Eisner, at trial, confirmed the accuracy of this contemporaneous document. 4266. Similarly, on November 10, 1995, Eisner wrote to his biographer that "Michael Ovitz is the right choice." PTE 316. Eisner also confirmed

the accuracy of this contemporaneous document. 4273-74; *see also* PTE 331. *Fourth*, plaintiffs allege conduct that is wholly at variance with Eisner's standard practices for communicating with the Board. As Eisner put it, he felt an obligation to constantly fill the Board in on what was going on at the Company, 4141, and other witnesses confirmed that Eisner was always candid and forthright with the Board. 2568 ("no surprises" philosophy in dealing with the Board); 6691 ("totally leveled with the board.") 7817 ("tells everything including the warts"); *see also* 5264-65; 5574-75; 7627-28. The totality of the record proves that whatever frustrations and second-guessing Eisner experienced in the fall of 1996 about Ovitz's poor performance and refusal to leave are entirely distinct from his actual state of mind on September 26, 1995 about the hiring of Ovitz. Eisner, acting in good faith, recommended the hiring of Ovitz to the Board without qualification on September 26, 1995, a judgment which is entitled to business judgment rule deference. *Brehm*, 746 A.2d at 264 n.66.[34]

[34] This dichotomy between Eisner's actual views concerning Ovitz in the fall of 1995 and his hindsight expressions in the fall of 1996 about those views is best illustrated by PTE 79. Shortly after Ovitz made a "giant scene" at the funeral for Eisner's mother (4323), Eisner began writing this letter to Watson and Russell to let them know that Ovitz should not be made CEO or left as President with a figurehead CEO in the event Eisner was "hit by a truck." PTE 79 at DD 2623. In an obvious moment of emotion, Eisner blamed himself for the hiring of Ovitz and said, looking back from 1996 to 1995, that maybe he knew in 1995 that he was making a mistake (PTE 79 at DD 2624)—when in fact in 1995 he "overwhelmingly thought it was the right decision." 4327. Eisner, in passing, noted that only his sister and his son had concerns about hiring Ovitz, which shows that Eisner received no opposition from Bass. PTE 79 at DD 2624; *see also supra* note 2.

C. The Compensation Committee Members Are Entitled to the Protections of the Business Judgment Rule in Connection With Their Decision to Approve the Terms of the OEA.[35]

The basic terms of the OEA were negotiated between May and August 1995. Eisner called upon Russell—a lawyer with extensive experience in entertainment industry contracts—to aid in negotiations.[36] Not only was Russell eminently well-qualified for the job; Eisner believed that he should not ask any of Disney's senior managers (such as Litvack) to negotiate the hiring of an officer who would outrank them. 2320-21. Directors were aware of Russell's legal services for Eisner and had full confidence that Russell had Disney's best interests at heart. 4003; 5590-91; 5832-33; 6832; 7639; 7269.

Russell engaged in telephone and in-person conversations with Ovitz and Goldman during which he learned about the general parameters of the terms under negotiation between Ovitz and Bronfman and was advised by Goldman that Ovitz was making $20-$25 million a year and that he owned 55% of CAA. 2363 (Russell); 1371 (Ovitz) ("I gave up $25 million a year.") DTE 52; 1099; 2760. The parties heavily negotiated issues relating to the option grant and whether he would get a signing bonus (he did not). 3336-37 (Crystal) (describing the "vigorous arm's length negotiation"). The fact of these vigorous and adversarial negotiations evidence the

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[35] Plaintiffs' overbroad use of *Telxon Corp. v. Meyerson*, 802 A.2d 257 (Del. 2002) and reference to this Court's citation to *Telxon* in regard to *Ovitz's* motion to dismiss, 825 A.2d at 290, is puzzling. OB 54. *Telxon* concerned directors' "self-compensation" decisions (regarding, *e.g.*, annual retainers and fees for meetings) as "interested transaction[s]." 802 A.2d at 262, 265. This case concerns executive, not directorial, compensation and *Telxon* is thus wholly inapposite. Employee compensation decisions made by persons not interested in the transaction are entitled to business judgment rule protection. *Litt v. Wycoff*, 2003 WL 1794724, at *6 (Del. Ch. Mar. 28, 2003).

[36] Russell has an undergraduate degree from the Wharton School of Finance and Commerce and a law degree from Harvard Law School. 2269-71. From his experience representing clients in all aspects of the entertainment business and service as a labor arbitrator, he had expertise drafting and interpreting employment contracts. 2277-84; 2289-94. He had also worked as an executive at production companies, gaining considerable information about industry compensation practices. 2281-82; 2285; 2288; 2294-95; 2333-36. From his service on the Compensation Committee, he was familiar with the Company's compensation philosophy. 2329-33.

arm's-length nature of the bargaining, *e.g.*, *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 938 (Del. 1985), and was known to the Compensation Committee.

Russell's strong view was to include a provision in the OEA fixing the payment to Ovitz in the event he might be terminated without cause. 2511-12. This liquidated damage provision was modeled on provisions contained in every senior Disney executive's contract, including Eisner's contract. 2511; 2938. It was designed to protect the Company from potential lawsuits and large damage claims in the future. 2511-12; 2530.

The Compensation Committee had all material information about the terms of the OEA before approving it. Board committees typically operate with one or more members taking a lead role, and other members relying in part on their efforts. 5266-67. The Disney Compensation Committee was no different. Two of the four Committee members, Russell and Watson, of course, had a great deal of information about these terms from prior discussions between themselves and with Crystal. Russell placed two lengthy telephone calls to Poitier, and Watson had a long telephone conversation with Lozano to bring them up to date on the proposal and discussions with Crystal. PTE 215 at DD1636; 7125-27; 7130-31; 7833-34. Poitier and Lozano concurred in the approach and conclusions reached by Russell and Watson. PTE 215 at DD1636; 7125-27.

On September 26, 1995, the Compensation Committee met to discuss and approve the proposed terms of Ovitz's compensation. Poitier and Lozano knew from their telephone conversations that Crystal was advising the Compensation Committee, 7168; 7668, and although Crystal did not attend the meeting, he was available by telephone in the event that Poitier or Lozano had any questions for him that Watson and Russell could not answer. 2518; 3601-02. The members of the Committee had in front of them a detailed written summary of the terms of

the proposed OEA prepared by Santaniello. PTE 39, Ex. C. This summary included an explanation of the payments Ovitz would receive if he were terminated not for cause. *Id.* As Watson explained, the summary was much more helpful to a compensation committee composed largely of non-lawyers than the draft OEA itself would have been. 7847 ("I don't look at the contracts themselves. I mean, that I leave to my lawyer, because I'm going to misinterpret it. But I do look at the basic terms. That's what was presented here."). This was the practice of all the compensation committees on which Watson had served, including Disney. 2905-07; 6067-68; 7848; *see also* 2530-31.

At the meeting, close attention was paid to the proposed terms of Ovitz's compensation. 2519-21; 7846-47 (Watson) (recalling that Russell went over each category in the summary). Russell and Watson discussed with Poitier and Lozano the process that they had followed over the prior weeks and months and the calculations concerning Ovitz's options generated through Watson's spreadsheet analysis. 2519-30; 7848-49. In its review of the proposed terms of the OEA, the Compensation Committee considered the unlikely possibility that Ovitz's tenure at the Company might not work out and discussed the possible economic consequences if he was terminated by the Company without cause. Watson prepared spreadsheets evidencing different scenarios and calculations regarding the value of a proposed contract at different intervals. For instance, he calculated the consequence of Ovitz's termination without cause after only one year. 7842-43 (examining DTE 12); Crystal 257 ("And then secondly, Ray Watson himself prepared an exhibit which eerily forecasted exactly what the options were going to be in the money one year [later]. One of his lines has a $28 stock price. I can't remember exactly and that was about 41 million and that is almost precisely what happened."); *see also* 2455-56 (reviewing DTE 32's calculation of option profits on normal vesting schedule). Those spreadsheets and their

consequences were discussed several times among Russell, Watson, and Crystal. DTE 17; 2499-2500; 3268-3272. Those spreadsheets were also discussed with all members at the Compensation Committee meeting. 2529-30; 7848-49.

Following Russell's and Watson's presentation and discussion by Committee members, the Compensation Committee approved the proposed terms of Ovitz's contract. PTE 39 at 4. Poitier and Lozano appropriately relied on the work of Russell and Watson, their fellow committee members, in analyzing the terms of Ovitz's proposed compensation, overseeing the drafting of the OEA, soliciting Crystal's views, and informing them of this work. *See* 8 *Del. C.* § 141(e); Model Bus. Corp. Act § 8.30(e) cmt. (1984) ("Recognition in the statute of the right of one director to rely on the expertise and experience of another director, in the context of board or committee deliberations, is unnecessary, for the group's reliance on shared experience and wisdom is an implicit underpinning of director conduct."); Principles of Corp. Gov. § 4.02 (1994) (also recognizing the rights of directors to rely on other directors). By the time the Compensation Committee voted to approve the terms of the OEA, Poitier and Lozano were informed of all of its material terms and had discussed those terms to their satisfaction. 2863; 7136-37; 7635-37.

Plaintiffs have failed to prove that the Compensation Committee's extensive negotiation and consideration of the terms of the OEA were negligent in any way, let alone grossly negligent, and thus the Committee's actions are protected by the business judgment rule. *Aronson*, 473 A.2d at 812.

D. The Board Members Are Entitled to the Protections of the Business Judgment Rule in Connection With the Decision to Elect Ovitz.

When the Board voted to elect Ovitz as President, the directors had the information they needed to conclude that it was the right decision for the Company. Plaintiffs seek to turn the fact

that directors received information from Eisner prior to formal Board meetings into a newly-contrived corporate governance violation (OB 2, 55), but the fact is that the entire Board came to the September 26 meeting fully aware of the Company's needs and of Ovitz's qualifications to address them. The Board was aware of and had discussed the need for a "number two" executive and a possible successor to Eisner, and had discussed several candidates. 2311-14; 3661-76; 3997-99; 5581-82; 5913-14; 7125; 7628-29; 8142. The directors believed that the election of Ovitz would fill at least three important niches for the Company: (i) Ovitz could help Disney build better talent relationships, (ii) the Company wanted to expand its international initiatives, and (iii) it was necessary to ease Eisner's burden especially in light of the CapCities acquisition. Bollenbach 124; 3665-67; 3677-78; 5581; 5803; 5913-17; 8143.

On September 26th, following the Compensation Committee meeting, the Board met, first in executive session with Eisner. PTE 29. Even though Ovitz's compensation had been appropriately delegated to the Compensation Committee, the Committee was responsible for reporting its approval of Ovitz's compensation to the Board. The Committee did so, describing the key terms of the package. 2537-40; 3733-34; 4874-84; 7851-52. The Board was entitled to rely upon the Compensation Committee's report as one component of its judgment to elect Ovitz as President. 8 *Del. C.* § 141(e) (reliance on committees). Eisner reiterated Ovitz's professional qualifications for the position (although everyone was already aware of Ovitz's qualifications). PTE 29 at 3. The directors also knew that the public response to Ovitz's hiring had been overwhelmingly positive, adding a billion dollars to Disney's market cap. DTE 91, 92, 93; PTE 34; 3708-17; 6054; 7290. The Board discussed the recommendation and unanimously voted to elect Ovitz as President. PTE 29 at 3. The directors, in good faith, made an informed decision to

elect Ovitz, which decision is protected by the business judgment rule. *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1356 (Del. 1985).[37]

E. There Was No Requirement That the Board Approve the Terms of the OEA.

Delaware law recognizes that, in order to function, boards of directors must enlist the aid of others in managing the company and in making decisions:

> Of course, given the large, complex organizations through which modern, multi-function business corporations often operate, the law recognizes that corporate boards, comprised as they traditionally have been of persons dedicating less than all of their attention to that role, cannot themselves manage the operations of the firm, but may satisfy their obligations by thoughtfully appointing officers, establishing or approving goals and plans and monitoring performance.

Grimes v. Donald, 1995 WL 54441, at *8 (Del. Ch. Jan. 11, 1995); *see also* 8 *Del. C.* § 141(a) (provides that the business and affairs of every corporation "shall be managed by *or under* the direction of a board of directors," not "supervise[d] *and* manage[d]" as plaintiffs misrepresent, OB 49) (emphases added). Thus, in the course of its duties, a board of directors "may delegate such powers to the officers of the company as in the board's good faith, informed judgment are appropriate." *Grimes*, 1995 WL 54441, at *9.

Plaintiffs erroneously argue that the Compensation Committee's charter lacked any "general delegation of authority" that would allow the Compensation Committee to approve Ovitz's employment contract. OB 59-60, n.48. This argument ignores the specific delegation of authority in the Compensation Committee's charter granting the Compensation Committee the power "to approve the salaries of those persons who report directly to the Chief Executive Officer" and the employment agreements of officers making more than $250,000 per year. PTE

[37] Plaintiffs argue that the process of hiring Ovitz "radically departed" from the process of hiring Eisner and Wells (OB 24, n.25), but any differences in process are easily explained: in 1984 the Company was hiring a new CEO in addition to a new President, both of whom would report to the Board.

465, ¶¶ 2, 5(a), 5(c).[38] Plaintiffs' argument that this does not apply to Ovitz's contract simply has no basis in reality.[39] This delegation of authority was unquestionably valid under Delaware law. 8 *Del. C.* § 141(c); *Michelson v. Duncan*, 386 A.2d 1144, 1155 (Del. Ch. 1978), *aff'd in relevant part*, 407 A.2d 211 (Del. 1979). Because of this delegation, the non-Compensation Committee directors did not participate in the decision to approve the OEA and therefore cannot be liable for it. *See Emerald Partners v. Berlin*, 2003 WL 21003437, at *42 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003) (holding that a director did not breach his fiduciary duties with regard to board decisions in which he did not participate); *Citron v. E.I. DuPont de Nemours & Co.*, 584 A.2d 490, 494, 499 (Del. Ch. 1990) (same); *Propp v. Sadacca*, 175 A.2d 33, 39 (Del. Ch. 1961) (same), *rev'd in part on other grounds, Bennett v. Propp*, 187 A.2d 405 (Del. 1962).

F. The Election of Ovitz and Approval of the OEA Were Entirely Fair.

The OEA was justifiable to achieve the goal, unanimously supported by the Board, of bringing Ovitz to Disney. The directors—and then the media, the industry, the analysts, and the market—all agreed that the hiring of Ovitz was a great coup for Disney. *E.g.*, DTE 91 at DD399; DTE 428 at 3-9 (Dunbar Event Study).[40] But that cost a lot. As put by Crystal: "It's what you're

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[38] The Company's operative bylaws gave the Board the power to delegate its power and authority to committees such as the Compensation Committee. PTE 497, Art. III, § 9.

[39] Plaintiffs also contend that several documents reference the Board's responsibility to make this decision. OB 55-56. However, the examples plaintiffs cite reference the Board's requisite approval of Ovitz's election as President, not the terms of his employment. *See, e.g.*, DTE 33 (Russell's notes referring to Ovitz's term starting on October 1, 1995 as being subject to Board approval); 2437-38; *see also* PTE 33 (OLA, which when read in context means that the OEA was subject to Compensation Committee approval, and Ovitz's election as President was subject to full Board approval); PTE 497, Art. IV, § 1. (bylaws stating the Board must approve hiring of officers).

[40] Plaintiffs argue (OB 83-84) that Ovitz was not "well suited and appropriate" for the position of Disney President, but this is a hindsight view at odds with what the world thought in 1995.

going to have to do if you want to land a fish this big." 3559.[41] Indeed, the financial markets were readily able to anticipate both the structure and the value of Ovitz's compensation arrangements. DTE 92; DTE 428. As Gold testified: "It was going to be big, large, expensive, but if this fellow was the right guy, it was worth it to the company. I thought I was doing the shareholders a great service by being part of the team that brought him over." 3717.[42] This was especially true in light of the fact that Disney had just doubled in size and had been transformed overnight into a different enterprise, one requiring much greater involvement with and management of talent.[43]

At the time of the hiring, it was understood that Ovitz was receiving $20-25 million per year from CAA *in cash* (as opposed to a number including a Black Scholes calculation of unvested stock options) and that CAA was a thriving business owned 55% by Ovitz. To lure him to Disney, it was necessary to offer him comparable value plus downside protection for the risk of giving up his business to come to Disney. 2401-02; 3283-84; 3286; 3587 (Crystal); *see also* 871-72 (K. Murphy).[44]

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[41] Plaintiffs three times include a quote from Crystal saying "it is an excessive package by the standards of all the other companies in America, but this is Hollywood. This is what passes for compensation down in La-La land." OB 13 n.16, 27, 65. This quote confirms what the Supreme Court observed in *Brehm*—that the entertainment industry is unique. 746 A.2d at 259, n.49.

[42] Gold was in favor of the Ovitz compensation package because it was performance based and aligned Ovitz's interest with those of the shareholders. Gold 110-11.

[43] As Eisner noted, the cost of the OEA should be considered against the expectation that Ovitz would help make the $19 billion acquisition of ABC work. 4196.

[44] Plaintiffs challenge the premise that Ovitz gave up a lot to leave CAA for Disney, but that challenge fails. First, plaintiffs note that Goldman told Russell that Ovitz made between $20-25 million at CAA and argue that "Russell made no effort to verify that information." OB 6, n.7. Russell, however, testified that he knew Goldman before the negotiations, 2320-22, which gave him a basis to believe Goldman. 2755. The visible success of CAA, emblematized by its I.M. Pei building, and the amounts CAA earned on Disney projects led Eisner to know that CAA's lead partner derived substantial compensation. 4164-65; Eisner 252. And what Goldman told Russell proved to be correct: Ovitz confirmed at trial that he "gave up $25 million a year to take a million." 1371; *see also* M. Dreyer 128. PTE 200, the W-2 for 1995, covered only the first nine months of the year. Plaintiffs emphasized that Ovitz had reported earnings of $17 million for that period, OB 6 n.7, which is $20-25 million once annualized; *see also* Ovitz 126; 2756.
(Continued)

The terms of the OEA were the product of arms' length negotiations. *Infra.* I.C. Ovitz came away with far less than he wanted. Ovitz was given no signing bonus, despite repeated requests for one. The OEA only guaranteed Ovitz a salary of $1 million per year; everything else was structured as a pay-for-performance package—a discretionary bonus (which yielded nothing for the one year Ovitz worked) and stock options. The architecture of the OEA mirrored that of the Eisner and Wells contracts—a structure that had given them enormous incentive to increase Disney's shareholder value. Ovitz sought parity with Eisner on stock options, but—compared to the (split-adjusted) options on 8 million shares granted to Eisner under his 1984 and 1989 contracts—the OEA provided only options on 3 million shares during its five-year term (comparable to Wells' 1989 contract). The option-heavy structure meant that Ovitz could end up with nothing beyond the base compensation unless Disney shareholders experienced a substantial increase in their personal wealth.

Crystal wrote in a 1997 article that the termination provisions had many features common to senior executive contracts: base salary and an imputed bonus for the balance of the contract term, and an acceleration of the options. DTE 175 at 3. Crystal further noted in this article that there were three non-standard terms: a $10 million termination payment, an extended exerciseability of the 3 million options (although Crystal testified at trial that some corporations allow a terminated executive the balance of a full ten-year term, 3320; 3529), and a forfeiture of

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Second, plaintiffs argue that Ovitz continued to receive a share of "booked commissions" from his CAA interest after he came to Disney. The amount Ovitz ultimately realized through 1999 from these booked commissions is irrelevant, for that amount was compensation for past, rather than future, work and in all events could not have been known by the Compensation Committee. In 1995, it was known that Ovitz would receive payments from these booked commissions only if CAA, without its founding partners, continued in existence and met its operating expenses. 1450-52 (Ovitz); 2351-52 (Russell); 2760-61 (Russell). Michael Rubel, attorney for the new CAA, testified that as of 1995 there was great uncertainty about "the long-term viability" of new CAA let alone what it would collect on booked commissions. Rubel 171-74. Similarly, Ovitz's accountant said that, even after Ovitz left and new CAA (Continued)

the conditional options—a trio of terms which Crystal thought were comparable in value to the deleted option guarantee that Ovitz had originally been offered as backend protection. 3321-22.

Two factors combined to create a sort of economic "perfect storm" with respect to the OEA. First, Ovitz, who was at the peak of his career and whom everyone expected to succeed masterfully as President, failed within less than a year. Second, not only did the Company's stock price not react negatively to Ovitz's failure, it rose 25%. As Crystal explained at trial:

> And, you know, if someone had said to the compensation committee here's the [probability of that cell in the matrix occurring] that in 15 months with a 25 percent appreciation, why this guy is going to get this enormous sum, they'd say "get out of here." I mean, you realize how unlikely that is to occur. And, of course, that's what occurred.

3340; 3329-34; 3540 (estimating "a probability of less than one percent on that scenario actually materializing"). As our courts have repeatedly held, hindsight cannot form the basis for director liability. *Emerald Partners v. Berlin*, 2001 WL 115340, at *24 (Del. Ch. Feb. 7, 2001), *aff'd*, 840 A.2d 641 (Del. 2003); *White v. Panic*, 783 A.2d 543, 554 (Del. 2001) (noting that a court considering claim of corporate waste may not rely on hindsight in evaluating the appropriateness of board's actions); *Cheff v. Matthes*, 199 A.2d 548, 554 (Del. 1964) (holding that "if the actions of the board were motivated by a sincere belief that the buying out of the dissident stockholder was necessary to maintain what the board believed to be proper business practices, the board will not be held liable for such decision, even though hindsight indicates the decision was not the wisest course.").[45]

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had survived for two years, he still could not estimate with any reasonable degree of certainty how much Ovitz would receive from booked commissions. M. Dreyer 129-32, 138-40.

[45] Plaintiffs rely on the expert testimony of Prof. Murphy, but his opinion on the compensation level of the OEA was extremely limited: "that Mr. Ovitz's compensation was clearly excessive and unreasonable when measured relative to" a survey group of executives. PTE 426 at 1. On cross examination, Prof. Murphy had to concede that he had no opinion on what Ovitz should have been paid and by how much exactly his compensation was "excessive"; that many executives in his compensation survey were not qualified to be potential successors to Eisner; that he did not weigh what Ovitz was (Continued)