Part II, Post-Trial Answering Brief

G. Defendants Are Not Liable for Damages Because the Board Acted in Good Faith in Electing Ovitz and the Compensation Committee Acted in Good Faith in Approving the OEA.

1. The Company's Charter Exculpates the Defendants from Liability Pursuant to 8 *Del. C.* § 102(b)(7) ("Section 102(b)(7)").

Even were plaintiffs to have proven gross negligence (which they have not), such conduct "does not automatically equate to disloyalty or bad faith." *In re Emerging Communications, Inc. S'holders Litig.*, 2004 WL 1305745, at *42 (Del. Ch. May 3, 2004). The Company's charter exculpates its directors from personal liability to the full extent permitted by Section 102(b)(7) of the General Corporation Law. The shareholders of the Company chose to provide the protections of Section 102(b)(7) to their directors in the Company's several charters. DTE 183 (paragraph 7); DTE 184 (Article ELEVENTH (B)); DTE 185 (same).

In order to hold defendants liable, the evidence must demonstrate that they "*consciously and intentionally disregarded their responsibilities*," acting with "[k]nowing or deliberate indifference" to their duties. *Disney*, 825 A.2d at 289 (emphasis in original). Bad faith is "not simply bad judgment or negligence, but . . . the conscious doing of a wrong because of dishonest purpose or moral obliquity . . . . [I]t contemplates a state of mind affirmatively operating with furtive design or ill will." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II,*

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earning at CAA or offered by MCA/Universal; that he did not compare the OEA to the contracts of Eisner and Wells; and that he did no cost-benefit analysis to see if the OEA was justifiable. 868; 871-74; 876; 878; 896. Even his narrow opinion revealed little (as plaintiffs admit, OB 83, n.63). Prof. Murphy's failure to address the real world question of how Ovitz could be enticed to come to Disney for less renders his views irrelevant.

Plaintiffs, nonetheless, continue to embrace the exaggerated comparisons made by Prof. Murphy in his report between the OEA and the S&P 500 (*e.g.*, OB 82 saying (with italics for emphasis) that Ovitz's total compensation was "*70 times higher*" than the median total pay). Prof. Murphy stacked the deck for plaintiffs and their counsel by inflating Ovitz's compensation (putting in compensation for 1995 all 5 million options which were to vest in a seven year period and including a $7.5 million bonus that Ovitz never received) and by understating what other similarly situated executives earned (including in his survey many smaller companies from outside the entertainment industry). 888-912. Prof. Murphy once more stacked the deck when he compared the multi-year-grant of 5 million options with what other executives received as single year grants. 936-39.

L.P., 624 A.2d 1199, 1208 n.16 (Del. 1993) (quoting Black's Law Dictionary 72 (5th ed. 1983)). Plaintiffs fail to make this showing.

Emerging is instructive as it applied a Section 102(b)(7) provision after trial. In *Emerging*, defendant Prosser, the controlling stockholder of Emerging Communications, Inc. ("ECM"), executed a going-private transaction at $10.25 per share. 2004 WL 1305745. The Court held certain directors liable because it found that they had acted with the intention of furthering Prosser's interests at the expense of the minority stockholders.[46] *Emerging*, 2004 WL 1305745, at *39-40. By contrast, *Emerging* exculpated certain members of ECM's special committee despite procedural flaws (it never met collectively) because there was no evidence that they "intentionally conspired with Prosser to engage in a process that would create the illusion, but avoid the reality, of arm's length bargaining to obscure the true purpose of benefiting Prosser at the expense of the minority stockholders." *Id.* at *42. The Court also exculpated a director not on the special committee because he played no role in negotiation of the merger terms, had no reason to suspect that the price was unfair, and relied upon the committee. *Id.* at *43.

Here, no monetary liability can be imposed because defendants did not act in bad faith or with actual knowledge of a violation of positive law. 8 *Del. C.* § 102(b)(7); *Emerald Partners*, 2001 WL 115340, at *21 ("The plaintiff's 'lead' claim is that the non-affiliated directors

[46] *Emerging* cautions that "[t]he liability of the directors must be determined on an individual basis because the nature of their breach of duty (if any), and whether they are exculpated from liability for that breach, can vary for each director." *Id.* at *38. *Emerging* did not, as plaintiffs would have it, hold one director liable "primarily by virtue of his background and experience." OB 94 n.68. Rather, *Emerging* found liability based on specific admissions during testimony that the transaction price was "at the low end of any kind of fair value you would put" and that the defendant had told the chairman that the committee might be able to get up to $20 per share but nonetheless voted for a price of $10.25 per share. *Emerging*, 2004 WL 1305745, at *40. Here, neither Gold, who was an inactive member of the bar and had not practiced law in a long time (3813-14), nor Mitchell nor Russell purported to give a legal opinion (Continued)

abdicated to Bear Stearns their statutory duty to fix the merger exchange ratio. If that claim is valid, it would constitute a violation of law, and if the violation were 'knowing,' then the defendants would not be exculpated from money damages liability.").[47]

2. Eisner Acted in Good Faith.

Notwithstanding plaintiffs' terse assertions to the contrary (OB 94-96), there is no question that Eisner acted in good faith with respect to his role in the hiring of Ovitz.[48] Ovitz was one of the few qualified and available potential candidates for President of Disney, and his candidacy was discussed with the Board members following Wells' death. Eisner's sincere belief in the merits of an Ovitz candidacy is evidenced by Eisner's mention of Ovitz as a possible successor immediately before Eisner's emergency heart surgery in July 1994. 4162-63. That background—not friendship—explains Eisner's prompt response to the opportunity to recruit Ovitz in mid-1995 when there was an opportunity to do so, although their friendship gave Eisner reason to believe that he could effectively work with Ovitz. 4332-33.

At that time, in light of Ovitz's personal success and the recent MCA/Universal offer, it was obvious that a very substantial compensation package would be necessary to land Ovitz. To protect Disney's interests, Eisner enlisted the help of the most experienced and knowledgeable

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with respect to the OEA or whether Ovitz could be terminated for cause. Instead they, as did the other directors, relied on the Company's general counsel and legal department. Russell 722-23; 3801; 5598.

[47] *See also Frank v. Arnelle*, 1998 WL 668649, at *10 (Del. Ch. Sept. 16, 1998) (holding that a disclosure violation could not create monetary liability unless the director defendants "knowingly or deliberately failed to disclose facts that *they knew were material*") (emphasis in original); *Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1051 n.2 (Del. Ch. 1996) ("By 'bad faith' is meant a transaction that is authorized for some purpose *other than* a genuine attempt to advance corporate welfare or is *known to constitute* a violation of applicable positive law. There can be no personal liability of a director for losses arising from 'illegal' transactions if a director were financially disinterested, acted in good faith, and relied on advice of counsel reasonably selected in authorizing a transaction.") (citations omitted) (emphasis in original).

[48] At the outset, plaintiffs can never show that Eisner was "indifferent" to his duties. Given his shareholdings and pay-for-performance contract, his interests were aligned with those of other shareholders. As Tom Murphy observed, the two things of greatest importance in Eisner's life are his (Continued)

person available to Disney in negotiating with Ovitz and his representatives. There is no evidence that Eisner's friendship with Ovitz or Russell's attorney-client relationship with Eisner had any adverse impact on the arms-length and substantial negotiations or the compensation analysis carried on by the Compensation Committee. 4207-09. Eisner and Russell discussed between themselves and with Ovitz the potential difficulties in transitioning to a public company, and both of them were satisfied with Ovitz's willingness and ability to make that change. 2411-12; 2929; 4234-36; 4249-51. And although Bollenbach and Litvack initially resisted the hiring of Ovitz, the record is clear that their resistance was not to Ovitz, but to the entry of any new President into the executive suite that would displace their relationship with Eisner. Bollenbach 128-31; 4833-34; 5271-72; 5281; 6046-47. Nothing in the initial encounter of these executives with Ovitz on August 13, 1995 suggests "bad faith" on anyone's part, and once the reporting relationships were ironed out, as publicly reported, Eisner had no reason to be concerned about the successful Ovitz presidency he was anticipating. And, as of September 26, 1995, Eisner had no "second thoughts". *See* Argument I.B.[49]

3. Litvack and Bollenbach Acted in Good Faith.

Plaintiffs' assertion that Bollenbach and Litvack acted in bad faith by failing to disclose to other directors their purported initial opposition to the hiring of Ovitz, OB 14-15, 94, is simply

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children and Disney. 7557. And it was well known that Eisner was frugal with Disney's money. 7557; 8161.

[49] Plaintiffs suggest an inappropriate linkage between the negotiations over Ovitz's contract and the upcoming negotiations over Eisner's new contract, OB 3-4, but the evidence refutes this claim. The Company's acquisition of CapCities/ABC necessitated the restructuring of Eisner's contractual bonus formula. 2554-55. Crystal began preliminary work in August 1995 on a possible formula that might work for the Company. 3266. Once negotiations over Ovitz's contract began in earnest, however, further discussion of Eisner's contract was tabled. 4446-48. Eisner did not want to have Ovitz negotiating against a new Eisner contract. Eisner 259. In fact, the Compensation Committee postponed discussions regarding Eisner's contract for over a year. 3266; 3279; 3594. When one looks at the terms of Eisner's new contract it is quickly apparent that there was no linkage in fact. Eisner's 1996 contract maintained (Continued)

baseless. Both men testified that their concern, prior to August 13, was not related to Ovitz or his qualifications, but rather that hiring a new President (Ovitz *or anyone else*) might disrupt the current management team (*i.e.*, Eisner, Litvack, and Bollenbach), which had worked well together. 5270-72; 6041; 6046-47. That concern was addressed and resolved at the August 13 meeting. Once that issue was put to rest, both Bollenbach and Litvack supported the hiring of Ovitz. 5275-76; 6050-52. In fact, Litvack, who had previously proposed hiring Ovitz as President of ABC, recognized that the hiring was a "tremendous deal" for Disney, and Bollenbach believed Ovitz was an "excellent choice." 5276; 5287; 6034-36; 6051. There is *no* evidence to the contrary.

4. The Compensation Committee Members Acted in Good Faith.

The Compensation Committee also acted in good faith in approving the OEA. First, Russell and Watson worked diligently in setting the proposed terms of Ovitz's compensation. They knew that only a very substantial compensation package would lure Ovitz to the Company in light of his past successes. 2337-38; 7820-21. Watson and Lozano were pleased that Eisner's friendship with Ovitz meant that the two were not strangers to each other. Watson 182-83; 7639. Moreover, Eisner was a "shrewd and tough negotiator" who prided himself on striking the toughest deal he could with Ovitz. Russell 77-78; 2468. In all events, the Compensation Committee retained the final power to approve or disapprove the OEA. Russell looked to the most appropriate template available—the prior contracts of Eisner and Wells. 2329-33; 2339-41.[50]

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his salary at the same level as it had been since 1984, and his stock option grant was consistent with his 1984 and 1989 contracts. PTE 825; 3293-97.

[50] As these contracts were publicly available, Ovitz, himself, would have known their terms in negotiating for his own contract.

Once the basic terms of the OEA were negotiated, Russell and Watson brought them to the full Compensation Committee on September 26, 1995 for their review and approval. At the meeting, Russell reviewed those terms in great detail. All members of the Committee asked questions about the contract and all basic terms of the contract were discussed. 7635-37; 7789-90. Watson presented and reviewed his spreadsheets examining the options' potential values under different scenarios. 2529; 7848-49. Lozano and Poitier were satisfied with the information they received and that the matter had been given proper attention. 7136-37; 7637. As a result, it was appropriate for Lozano and Poitier to rely in good faith on Russell to participate in negotiations regarding the OEA (which was not a Compensation Committee function) and on Russell and Watson to inform them of the negotiated terms. *See* 8 *Del. C.* § 141(e) (members of committees are "fully protected in relying in good faith upon the records of the corporation and upon such information . . . presented . . . by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.").

5. The Remaining Directors Acted in Good Faith.

As the trial record shows in great detail, the directors believed that electing Ovitz as the Company's President would benefit the Company and did not consciously or intentionally disregard their responsibilities. (*See* Facts A.1.). The Board understood that Eisner needed someone to assist him in running the Company, and the Board was supportive of this need. Plaintiffs' attacks on the actions of the directors flow from the 20-20 vision of hindsight, which this Court has rejected as having any relevance to the good faith inquiry. *See Emerald Partners*, 2001 WL 115340, at *24.

The Board believed that Ovitz could best serve as the President of the Company. Ovitz was widely known and was highly regarded as an expert in the entertainment business, as he managed the largest and most successful talent agency and represented some of the biggest names in Hollywood. 3687-89; 5277-79; 5583-84; 5803; 5915-16. Given Ovitz's abilities and industry knowledge, Gold felt that Ovitz could fill Wells' role. 3665-67; 3680-82; *see also* Stern 229-30 (hiring "promised a kind of second golden age"). The directors' conclusions were only confirmed by public reaction to the announcement of Ovitz's hire, which news reports described as "seismic." 3708-09.

The directors were well aware of the friendship between Eisner and Ovitz. 3676; 4001; 5589; 5914; 7638-39. They believed that this friendship would allow the two to work as a more effective team. 3682-83. Historically, the friendship between Eisner and Wells had resulted in their successful partnership at Disney. 5804; 5914-15. The fact that they were friends was seen as an asset rather than a liability. 6831; *see also* 7638-39.

Given Ovitz's success and reputation, the Board had no reason at the time to believe that he could not make the transition to a public company. Other agents had made a similar transition. 2315; 4235; 7128-29. The directors understood that, although there was strong and unanimous support for Ovitz's hire, the Board had the right, if reservations had been expressed, to take other action if it so chose. 3708; 4041; 5280; 5584-85; 5663; 5966; 6827; 7131.

Furthermore, the directors had no reason to believe that the Compensation Committee had not done its job. The directors knew of Russell's experience in connection with his responsibilities. "Irwin had been a vital part of the negotiations that brought Michael [Eisner] and Frank [Wells] into the company in the first place, and I knew, too, that that was essentially his field of expertise." 4002 (R. Disney). They also knew that Watson was involved in

negotiations regarding the contracts of Wells and Eisner in 1984. 3650-51; 4003. The basic terms of the OEA were presented to the Board at its meeting. 2537-40; 3733-34; 4875-76; 5585-86; 5674-75; 5920-24; 7851-52; 8132-33. Most importantly, the directors knew that the OEA was heavily weighted to performance-based compensation, where Ovitz benefited only if the shareholders also benefited. Gold 110-11; 3693-94; 4016; 5805-06; 7133-34. The directors were also briefed at the Board meeting regarding Ovitz's substantial prior income at CAA, which had to be taken into account in determining what would lure Ovitz to the Company. 5675-76; 5680; 5921-22.

Given the information provided to them, there is simply no basis to conclude that any of the Board members not involved in the negotiations acted with insufficient information. Moreover, contrary to the testimony of Eisner, Litvack, Bollenbach and Russell, plaintiffs allege that each of these individuals harbored doubts about the hiring of Ovitz at the time he was elected President. OB 62. Plaintiffs state that these alleged reservations (and the alleged reservations of Bass) were not shared with the remaining directors. *Id.*. Delaware law recognizes that "[d]irectors do not breach their duty of attention where, through no fault of their own, relevant information is withheld from them by others." *Boyer v. Wilmington Materials, Inc.*, 1997 WL 382979, at *5 (Del. Ch. June 27, 1997); *Emerging*, 2004 WL 1305745, at *41. Accordingly, if the decision to hire Ovitz or approve the terms of his OEA were found by the Court not to have been well-informed because this information was withheld from certain directors, liability cannot be imposed upon those from whom such information was withheld.

II. DEFENDANTS ARE NOT LIABLE WITH RESPECT TO THE TERMINATION OF OVITZ OR HIS RECEIPT OF NFT BENEFITS.

The latter half of plaintiffs' case implicates two distinct decisions—whether to terminate Ovitz and, if he was to be terminated, whether he was entitled to the termination benefits

provided in his contract. *E.g.*, OB 79 (alleging failure to make an informed decision as to (i) "whether" and (ii) "on what terms" "Ovitz was to be terminated"). With respect to the first decision, Eisner decided to terminate Ovitz, an officer who reported to him. Based on Eisner's continual reports (*see* Argument § II.D), the directors fully agreed (as do plaintiffs) with Eisner's decision that Ovitz had to be terminated. There is no dispute and hence no claim with respect to that decision.

Second, Ovitz had a contractual right to his NFT benefits unless he had engaged in conduct so egregious as to constitute gross negligence or malfeasance under his contract. This was a legal judgment appropriately made by Litvack, and payment of the NFT benefits was a necessary result of that judgment.

A. Eisner's Actions in Connection With Ovitz's Termination Are Protected by the Business Judgment Rule.

There is no serious dispute that Eisner's decision to terminate Ovitz—made after numerous discussions with the directors (*infra* II. D.) and based on full knowledge of Ovitz's performance—is protected by the business judgment rule. Plaintiffs do not criticize that decision. Once that was decided, Eisner sought legal advice from Litvack on whether there were grounds to terminate Ovitz for cause. Eisner believed that Litvack—with whom he discussed Ovitz on a daily basis—knew as much as, if not more, than Eisner himself about Ovitz's performance (as Litvack confirmed at trial). 4419-22; 6143-44; 6351-52. Litvack opined that no cause existed, and later told Eisner that outside counsel had confirmed such advice. 4420; 4482; 5231. Because Eisner did not want Ovitz to receive the NFT payments, he repeatedly pressed Litvack on the issue of cause and also "checked with almost anyone [he] could find that had a legal degree." 4380-82; *see also* Eisner 641. No one with whom Eisner spoke said cause existed. On the contrary, Litvack (who was no friend of Ovitz) advised that cause did not exist

and that the Company should honor its contractual obligations, and Eisner relied on that advice. 4420-21; 4476; 4479; 5232; 6110-14; 6117-18; 6127-28. Eisner further testified that he also relied on Litvack to advise him when a decision required a Board meeting or resolution. 4423; 4671. Litvack never told Eisner—and Litvack did not believe—that a Board vote was required to determine whether to honor the Company's obligations under the contract. 6149-51; 6339-41. The record establishes an ongoing discussion of Ovitz's performance at the Board level, a clear consensus that it was in the Company's best interests to terminate Ovitz, and consistent legal advice to Eisner that Ovitz was entitled to the NFT payout under the OEA. Plaintiffs fell far short of proving gross negligence as to Eisner—*i.e.*, reckless indifference to or deliberate disregard of the stockholders. *Tomczak*, 1990 WL 42607, at *12.

B. The Board Was Not Required to Vote to Terminate Ovitz.

Practically and legally, the Board was not required to vote to terminate Ovitz's employment. By the time of Ovitz's Thanksgiving trip with Wilson, and as Eisner told the Board, efforts were underway to persuade Ovitz to leave the Company. PTE 25; 4369-70; 6838-40. It cannot have been an abdication of the Board's duties to fail to take an action which the Board knew was already taking place. Plaintiffs themselves do not disagree with Eisner's decision to terminate Ovitz nor do they allege the disagreement of a single director.

Legally, the Bylaws and other corporate sources of authority gave Eisner full authority to terminate his "number two". Eisner as Chairman and Chief Executive Officer had "general and active management, direction, and supervision over the business of the Corporation and *over its officers*." PTE 498 (emphasis added). Ovitz was one of the "officers" of the Company over whom Eisner had supervision; that was the arrangement Ovitz accepted when he came into the Company and it is memorialized in the Bylaws. *See id.* ("The President shall report and be responsible to the Chairman of the Board."). Plaintiffs concede that. OB 51. The various

provisions to which plaintiffs refer in their brief, OB 70, unremarkably gave the Board the non-exclusive power to terminate Ovitz, not the exclusive power. *See* DTE 185 at 9 (providing that officer's positions were "subject to the *right* of the Board of Directors to remove any officer or officers") (emphasis added); PTE 498 at WD7100 ("Any officer elected by the Board of Directors *may* be removed at any time by the Board of Directors with or without cause.") (emphasis added); PTE 29 at WD1196. Indeed, what would be remarkable (and completely contrary to Litvack's knowledge of past Company practice, 6150) would be the Board having the rigid obligation to vote to terminate all Senior Vice Presidents, all Executive Vice Presidents, indeed all officers of the Company, PTE 498 at WD7101-02, leaving the Chairman and CEO with no power to terminate any officer under his supervision. That would make no sense. The Company's legal department believed in good faith that a meeting was not required and the directors, including Eisner, relied in good faith on them to make this determination. *Infra* Part II.F.3.

C. Neither the Compensation Committee Nor the Board Were Required to Vote on Whether the Company Should Pay Ovitz the NFT Benefits.

In addition to asserting erroneously that the Disney Board had the "*sole authority*" to terminate Disney officers (such as Ovitz), plaintiffs erroneously contend that the Compensation Committee had "the *sole power* to make all determinations regarding the termination" of the thousands of Disney employees with stock options. OB 69-71 (emphasis added).[51] In support of their argument, plaintiffs rely exclusively on Section 4 of the Amended and Restated 1990 Stock

[51] Based on plaintiffs' strained argument, no employee who received Disney options could be terminated without the approval of the Compensation Committee, which would transform that Committee into human resource managers required to evaluate the termination of any Disney employee with options. Plaintiffs have offered no evidence to support their interpretation of the option plan, and have not identified one instance in which the Compensation Committee considered the termination of a Disney employee.

Incentive Plan (the "Option Plan"). PTE 41 at WD134-35. Section 4, which is titled "Conditions to Exercise of Options," contains certain restrictions on the exercise of Disney options in the event that an employee is terminated, and provides that, "[f]or purposes hereof" [*i.e.*, the option exercise provisions in Section 4], the Compensation Committee shall have the sole power to make determinations regarding the termination of any participant's employment, including, "the cause(s) therefor and the consequences thereof." *Id.*[52]

As Litvack explained at trial, plaintiffs' argument ignores the language of the OEA, which provides that Ovitz's options shall be subject to the terms of the Option Plan, "*except as expressly provided*" in the OEA. PTE 7, ¶ 5(e) (emphasis added); 6658-64. The OEA expressly addresses the possible causes for a fault termination and the consequences thereof. (PTE 7, ¶ 11). Moreover, Section 11 of the OEA provides that "the Company" (defined as the "The Walt Disney Company") shall determine if cause exists for a termination, and does not purport to grant sole authority to the Compensation Committee to make such a determination. (*Id.*; 6662-64).

Significantly, Litvack and Santaniello reviewed the Option Plan at the end of November or the beginning of December in connection with Ovitz's termination and determined that, for the reasons set forth above, the Compensation Committee was not required to approve the termination. 6126-27; 6659-61. Plaintiffs can argue about the legal conclusion reached by Litvack and Santaniello, but they have offered no facts which begin to establish that Litvack "*knew* [he was] making material decisions without adequate information and without adequate deliberation, and that [he] simply did not care if the decisions caused the corporation and its

[52] Section 4 of the Option Plan is expressly limited by the language "or as otherwise may be provided by the [Compensation] Committee." PTE 41 at WD134. The Compensation Committee approved the OEA, which contained its own termination provisions and standards.

stockholders to suffer injury or loss." *Disney*, 825 A.2d at 289 (emphasis in original).[53] The members of the Compensation Committee appropriately relied on the Company's lawyers (who could have raised any such issues at the December 10 EPPC meeting, at which Ovitz's termination was discussed, 2582; 3785; 4429-30) to make that determination. The directors are protected in their reliance on Disney's legal department. 8 *Del. C.* § 141(e).

Plaintiffs also assert that the full Board was required to vote on the NFT issue, arguing that it is law of the case under *Brehm* that the decision of whether to pay Ovitz the termination benefits required by his contract was material. OB 52. Plaintiffs misread *Brehm*. *Brehm* did not address the question of whether a meeting of the full Board was required to grant or deny Ovitz the payments called for by the OEA. The passage from *Brehm* referenced above comes from a section of the opinion addressing the argument that the Board had violated its duty of care in "*Approving* the Ovitz Employment Agreement." *Brehm*, 746 A.2d at 259 (emphasis added). There is no discussion therein of the need for a meeting of the full Board to determine whether to pay NFT benefits.[54]

Indeed, if anything, *Brehm* is instructive as to why the administration of Ovitz's contract upon termination was not so material to the Company as to require action by the full Board. In a

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[53] *Sanders v. Wang*, 1999 WL 1044880 (Del. Ch. Nov. 10, 1999), cited by plaintiffs, did not (as plaintiffs would have it) hold that any violation of an option plan was a violation of directors' fiduciary duties. OB 71. The opinion in *Sanders* was decided on a motion for judgment on the pleadings and involved an award of 20.25 million shares when the clear language of the plan authorized only six million. *Cf. Landy v. D'Alessandro*, 316 F. Supp. 2d 49, 64-66 (D. Mass. 2004) (applying Delaware law and distinguishing *Sanders* because it concerned a clear and unambiguous violation).

[54] *Brehm* also did not address the question of whether a Board meeting to approve the OEA was required. Rather, *Brehm* addressed (in dicta) the question of whether, having already scheduled a meeting to approve the OEA, the Compensation Committee ought to consider the payout scenarios of the Ovitz contract in "carrying out [its] fiduciary duty of care in decisionmaking." 746 A.2d at 260 n.49. Plaintiffs also rely upon *Solstice Capital II, Ltd. P'ship v. Ritz*, 2004 WL 765939 (Del. Ch. Apr. 6, 2004). OB 50. *Solstice* involved a purported termination of the Company's CEO by certain directors, not the termination by the CEO of an officer reporting to him. Defendants do not take issue with the holding of *Solstice*, that (Continued)

footnote to the very same passage plaintiffs quote, *Brehm* gives this significant caution about materiality:

> One must also keep in mind that the size of executive compensation for a large public company in the current environment often involves huge numbers. This is particularly true in the entertainment industry where the enormous revenues from one "hit" movie or enormous losses from a "flop" place in perspective the compensation of executives whose genius or misjudgment, as the case may be, may have contributed substantially to the "hit" or "flop."

Id. at 260 n.49. Two defendant directors, each former CFOs of the Company, testified that the OEA was not in fact material, in a monetary sense, to the Company. *See* 5284 (Bollenbach) ("Walt Disney Company is such a huge company, and even though that's a lot of money, [Ovitz's contract] was totally, totally immaterial."); 6829 (Wilson) (commenting that the Ovitz compensation package was not 5 percent of the Company's assets, the rule of materiality for accounting). The board of directors of a Company the size of Disney cannot consider every $100 million contract or issue. *See* 6829 (Wilson) ("Oh, absolutely not. . . . When you get into contracts for production of motion pictures and television shows, there is [sic] lots of contracts that go much higher than that."). Questions of financial materiality aside, once the decision to terminate Ovitz had been made, the only question left for the Company was one of contract administration—whether the Company was legally required to make the NFT payment. That question was properly addressed by Litvack.[55]

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a Board vote purportedly taken by written consent is not valid when it is not unanimous, but that is not this case. *Id.* at *1.

[55] Plaintiffs highlight statements made to the Court in the context of defendants' motion to dismiss plaintiffs' first amended complaint. OB 71-72. As defendants have explained before, Mot. Dis. II RB at 34 n.22, defendants were required on the motion to dismiss to accept the allegations contained in the operative complaint, which at that time alleged that Board action had occurred as to the NFT benefits. *See, e.g.*, Am. Compl. I ¶ 1 n.1, 9 (alleging that the Board acted "by approving the payment of Ovitz's full severance package"), 245 (alleging that O'Donovan, "voted in favor of or ratified the payment of the excessive severance benefits bestowed on Ovitz"). Had defendants contradicted plaintiffs' allegation or sought to substitute facts outside the complaint for allegations, plaintiffs could have moved to convert the motion to dismiss into one for summary judgment. *Byrne v. Lord*, 1995 WL 347782, at *2 (Del. Ch. June (Continued)

D. There Was Substantial Director Involvement in the Decisions to Terminate Ovitz and Not to Contest Ovitz's NFT Benefits.

Eisner and Litvack appropriately handled the matters of Ovitz's termination and compliance with the OEA. Nevertheless, there was substantial director involvement in both decisions. During the summer and fall of 1996, Ovitz's difficulties were in the media and were the topic of discussion among Board members both inside and outside meetings. PTE 21, 22; 5810; 8146-47; 8153-54. *See also* Facts B.2. Eisner updated the directors via telephone conversations of his issues with Ovitz. 5593-94; 5809-10; 7856-58; *see also* Facts B.2. At the September 1996 Board meeting and retreat, Eisner informed the directors that Ovitz was not working out. 4346-50; 4732-34; 5593-96.

Following the November 1996 Board meeting, Eisner told a group of directors of his decision to terminate Ovitz. 3770-74; 4425-26; 4376-78; 5929-32; 7859-62; 8155-57; *see also* 5596-97. Eisner reported that he had asked Wilson to try to convince Ovitz to accept being terminated. 4369; 4377-78; 5931-33; 6839-40; 7860-61.[56] While the Board was, of course, disappointed that Ovitz's presidency did not work out, it supported Eisner's ultimate decision to resolve the situation by terminating Ovitz. 7861-62. *See* Facts F.

5, 1995). To the extent that plaintiffs' argument consists of an explicit (or implicit) accusation that defendants' counsel intentionally misled the Court, there is (and could be) no evidence to support that contention. *See Gagliardi v. Bennett*, 1998 WL 544954, at *4 (E.D. Pa. Aug. 21, 1998) ("Thus, the doctrine of judicial estoppel does not apply when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court. An inconsistent argument sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing."). Finally, as plaintiffs seem to agree, OB 72 n.54, the better view is that their judicial estoppel argument requires reliance. *Salomon Bros. Inc. v. Interstate Brands Corp.*, 1991 WL 131866, at *2 (Del. Ch. July 12, 1991) (requiring success to establish judicial estoppel); *see also Manon v. Solis*, 142 S.W.3d 380, 386 (Tex. Ct. App. 2004) (party making the allegedly erroneous statement must have achieved final success after appeal). Plaintiffs' claims were not ultimately dismissed with prejudice as a result of any statements made by defendants and plaintiffs obviously had full knowledge of the facts prior to trial of their claims.

[56] Before the meeting, Eisner told Wilson about the Company's cash obligation to Ovitz upon a non-fault termination as well as the number of options involved. 4424-25; 7031-32.

During this discussion, Eisner made it plain to the directors that the Company would have to pay Ovitz his non-fault termination benefits. 4426 ("I just know that I told the board what it was going to cost."). Gold recalls Eisner explaining that Litvack had advised that there was no cause to terminate Ovitz's employment. 3773-74 (recalling that he asked Eisner, "Is this going to be for cause or is this a non-fault?" and that Eisner responded, "Stanley, it's non-fault. We don't have grounds for cause. I've checked with Sandy, and Sandy has assured me that's the only possible way to do it."). Shortly after the meeting, Litvack came into the room and personally gave this advice to Gold. 3774-75; 6166-67; 8157-58.

The Ovitz termination was again discussed at the December 10 and December 20 EPPC meetings. *See supra* Facts F. In addition, before the issuance of the press release announcing Ovitz's departure from the Company, Eisner called the other directors to let them know that the termination would be taking place. DTE 413; 4403-06; 3802; 5810; 5932-33. *See also* 5964. Bowers recalls that in a phone call to her Eisner said that Ovitz "was not going to be going for cause, I do remember that, and that we were going to need to honor the terms of the contract." 5933. Litvack personally advised the Board at the January 1997 Board meeting that there was no cause to terminate Ovitz under the OEA. PTE 799; 2599-600; 4444-46; 5936-39; 6181-82; 7896; 8009. In short, the absence of a formal board meeting is explained by the fact that no one, including the Company's legal department, thought it was necessary, and not as the result of anyone's conscious disregard of his or her fiduciary obligations.

Finally, Litvack's advice on the cause issue was emphatic; he believed there was no case to assert cause while there were compelling business and ethical reasons for Disney to honor its contracts. Given the strength of Litvack's opinion, there is no evidence to suggest that had a

formal vote been taken, the directors would have disregarded Litvack's advice and not voted to honor the OEA.

E. The Firing of Ovitz Under the Terms of His Contract Was Entirely Fair.

The Company did not have grounds to deny Ovitz his contractual payment under the OEA by terminating him for "good cause." Thus, even assuming plaintiffs had carried their burden of proving a breach of fiduciary duty and the inapplicability of any affirmative defenses, defendants cannot be held liable where the decision to terminate Ovitz on a "non-fault" basis would have commended itself to informed directors acting in good faith. *See, e.g., Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257, 267-68, 276 (Del. Ch. 1989) (holding, after trial of the action, that there was no liability where directors "rushed" to make a decision and did not ask about alternatives because, "whether adequately considered or not," the transaction was fair); *Emerald Partners v. Berlin*, 2003 WL 23019210, at *1 (Del. Dec. 23, 2003) (no liability for damages despite directors' "we don't care about the risks" attitude where transaction was fair).[57]

[57] Section 144, referenced in this Court's summary judgment opinion, *Disney*, 2004 WL 2050138, at *7, should have no bearing upon this or any other issue before the Court. The purpose of Section 144, adopted in the 1967 amendments to the General Corporation Law, was to eliminate the need for boilerplate charter provisions by removing as a matter of statute the specter of voidability from corporate transactions arising from the common law rule that a director who had an interest in a "contract or transaction" could neither vote nor be counted for quorum purposes with respect to that transaction. Drexler, Black & Sparks, *Delaware Corporation Law and Practice*, § 15.05[2] at 15-20 (2004). Long before Section 144 was adopted, the common law had already established that a fair transaction was not void solely because it was with a director or officer. *See Marciano v. Nakash*, 535 A.2d 400, 404 (Del. 1987). The section has no applicability to a resolution of the dispute here for a number of reasons. First, as this Court observed in its summary judgment decision, no party has claimed that the decision to grant Ovitz an NFT was void. *Disney*, 2004 WL 2050138, at *7 n.65. Second, since upon termination Ovitz received nothing beyond the non-fault benefits specified in the OEA, the only "contract or transaction" between the Company and Ovitz was their initial agreement to the OEA, which did not implicate Section 144 since the terms of the OEA were approved by the Compensation Committee before Ovitz became a director or officer. *Cf. Bird v. Lida, Inc.*, 681 A.2d 399, 406 (Del. Ch. 1996) (distinguishing between the making of a contract with a corporate officer and the subsequent receipt of benefits thereunder). Third, even if the Company's decision that Ovitz was entitled to an NFT under his preexisting contract were considered a "transaction" within the meaning of Section 144, Ovitz did not participate in or vote as a director to approve it, such that the core issue which Section 144 was adopted to address (self-interested director participation in board action) does not arise in this case.

The "good cause" standard of the OEA set a high bar for the Company to meet in order to avoid making the non-fault termination payments under the OEA: "gross negligence" or "malfeasance."[58] Ovitz did not commit acts rising to the level of gross negligence or malfeasance.

1. The Company Terminated Ovitz for Reasons That Did Not Meet the OEA Standard for "Good Cause".

Ovitz was terminated because he failed in his performance as President. *See*, *supra*, Facts B.2. Defendants' expert, John C. Fox, testified that none of Ovitz's failings rose to the level of gross negligence or malfeasance. 8827-29. Moreover, Fox agreed with Litvack's assessment that it would have been a bad idea for the Company to try to cover up the "real reasons" for the termination by asserting some pretextual basis. 8827; 8862-63.[59] Significantly, the OEA required the Company to articulate its reason for terminating Ovitz in *writing* at the time of the "good cause" termination. PTE 7, §§ 11(a)(iii), 21.[60]

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[58] All three employment law experts testified that the Black's Law Dictionary definitions of gross negligence and malfeasance were good working definitions of those terms, and require harmful conduct significantly greater than a failure to perform. 258-61; 504-05; 8329-33; 8745-47.

[59] The experience of both Fox and Ovitz's expert, Larry Feldman, is that the easiest way for a terminated employee to win a wrongful termination lawsuit in California is to demonstrate that the company's articulated reason for terminating the employee was not management's actual or "real reason" for the termination. 8339-41; 8827; 8862-63.

[60] Relying on *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 948 P.2d 412 (Cal. 1998), plaintiffs claim that a jury in an "Ovitz v. Disney" lawsuit would not be permitted to "second guess" the decision of the Board. OB 92. That case—decided well after the events in this case—limits a jury's determination in an action for breach of an employment contract to whether the company made its decision in good faith and whether it had "reasonable grounds" for making that decision. *Id.* at 423. However, the trial record here establishes that Litvack and the Board did not in fact have a good faith belief that Ovitz could be fired for cause. Also, *Cotran* did not address the merits of the claim, and certainly did not address any potential tort claims a terminated employee might have against his employer, such as fraud and defamation. Nor does it require any specific type of formal investigation. Finally, plaintiffs' claim that *Cotran* prohibits a jury from determining the "real reasons" for the termination simply ignores the requirement that the decision must be made honestly and in good faith.

2. The Claims of Misconduct Asserted by Plaintiffs Did Not Provide the Company with a Basis to Terminate Ovitz for "Good Cause".

None of plaintiffs' claims regarding Ovitz's alleged misconduct justified terminating Ovitz for good cause under the OEA. The crux of plaintiffs' claim that Ovitz could have been terminated for good cause is the testimony of their expert, John Donohue,[61] that Ovitz engaged in "repeated instances of untruthful behavior" which rose to the level of gross negligence and malfeasance. PTE 404 at 4. Donohue relied heavily on conclusory character assessments of Ovitz's honesty set forth in writings by Eisner that were never sent to Ovitz. Donohue also relied on the deposition testimony of shareholder Bass, whose knowledge was limited to information he learned second-hand from Eisner and his writings. Bass 110-11.[62]

In order to meet the good cause standard, Fox explained that the Company would have had to show that Ovitz made a material dishonest statement that impacted the Company with conscious or reckless disregard of the consequences. 8764-65; 8767-68. When challenged at trial, however, Donohue and plaintiffs were unable to cite—in Eisner's memoranda, in Bass' testimony, or anywhere else—a single material misstatement Ovitz made while he was President of the Company. 655-58. Fox testified that he reviewed the testimony of the witnesses and thousands of pages of documents in the discovery record, but could not find a single dishonest statement materially harmful to the Company made with reckless or conscious disregard of the consequences to the Company. 8766-69.

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[61] Donohue's testimony should be afforded little weight since he is not a California lawyer, has never tried a case, has limited knowledge about California evidence law, and has never counseled a client regarding the risks and rewards of wrongful termination litigation. 234; 443-44; 474. In contrast, both defense experts have extensive experience litigating and advising clients on California employment issues. DTE 408 at 1-2, 430 at Ex. A; 8293-8302; 8714-17.

[62] Fox testified that in an "Ovitz vs. Disney" lawsuit, the testimony of Bass regarding what Eisner told him would be inadmissible hearsay. 8765-66.

Donohue relied on the tenuous assumption that had the Company conducted some type of further investigation prior to the termination, it might have uncovered and documented otherwise unrecorded concrete instances of "untruthful behavior" by Ovitz. 361-62; 624. This is not a safe assumption given the trial record. When presented with a memorandum he had written questioning Ovitz's honesty, PTE 79, Eisner testified that he felt Ovitz was too much of a salesman, prone to speaking in superlatives and hyperbole: "Everybody is brilliant and everybody is wonderful and everybody is fantastic . . . he weaves a very attractive picture." 4437-39 (explaining his statements in PTE 79).[63] Litvack similarly testified about Ovitz's tendency to use overstatement to "handle" him. 6098-99; 6131-33. Litvack was aware of Eisner's criticisms of Ovitz's "veracity," but recognized that none of it related to the Company's business. 6133-35. To his knowledge, Ovitz never lied about a material aspect of the Company's business or operations. *Id.* Donohue conveniently chose not to consider the trial testimony of these or any other fact witnesses; he only reviewed the employment law experts' testimony. 9267-68.[64]

In addition to the issue of Ovitz's "veracity," Donohue raised a number of additional allegations that he claims "buttressed" his conclusion that the Company had sufficient grounds to

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[63] Eisner explained that his November 11, 1996 draft letter criticizing Ovitz (PTE 24) was an effort to "conjure up every argument, every issue exaggerated to the point of extreme nature so that he could see how deadly serious I was . . . forcing him to have a conversation with me to argue down these points." 4372. In fact, Eisner never sent the memo to Ovitz because it was "not accurate, way . . . exaggerated, silly, hyperbole, insensitive." *Id.* Noticeably absent from this seven-page memo, despite Eisner's stated intent, was any specific untruthful behavior that might have risen to the level of gross negligence or malfeasance. Donohue's assumption that some type of further investigation would have revealed such conduct is nothing more than speculation.

Eisner's characterization of Ovitz as a salesman prone to using superlatives was consistent with Ovitz's tendency to use similar language during his trial testimony. At trial, he made extensive use of superlatives: amazing (14), enormous (31), extraordinary and extraordinarily (24), fantastic (15), greatest (10), geometric and geometrically (10), and incredibly (25), among others.

terminate Ovitz for good cause.[65] He admitted at trial, however, that Ovitz's alleged "veracity" problem was the only basis that would be sufficient, without more, to justify a good cause termination. 419-20; *see also* PTE 404 at 4. Significantly, Donohue made no judgment whether any of the other allegations of misconduct he cited would independently rise to the level of gross negligence or malfeasance. *Id.*

Nevertheless, plaintiffs assert in their brief that Ovitz disregarded Eisner's directions. They mischaracterize PTE 267 as a directive from Eisner "not to pursue acquisitions," (OB 48) but that document merely states Eisner's philosophy that the Company should "look at" but rarely make acquisitions. PTE 267 at DD2290. There is no evidence in the record, including the cited testimony, showing that Ovitz pursued any project after being directed not to do so by Eisner. OB 48-49. Plaintiffs also accuse Ovitz of failing to manage Hollywood Records or Disney Interactive. OB 48-49. However, Fox testified that Ovitz's working files contained numerous documents relating to his work on those divisions. DTE 248 at 2-4; 9070-73; 9077-78; *see also* 6146-47 (unfair to blame Ovitz for Hollywood Records, which had been a "spectacular failure" for years prior to Ovitz's arrival).

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[64] Eisner complained in PTE 24 that Ovitz was not forthcoming about the specifics of his financial discussions with Sony Corp. These discussions related to Eisner's attempt to "trade" Ovitz to Sony, not to the Company's business operations.

[65] Plaintiffs consumed a great deal of time at trial on these additional claims of misconduct, such as Ovitz's office reconstruction, the Tarses hiring, and the movie Kundun. While plaintiffs make passing reference to Ovitz's alleged receipt and giving of gifts and his expense reports, it is clear that they cannot rely on those claims as grounds for cause. OB 74-76. These claims were demonstrated at trial to be inaccurate. Ovitz complied with the gift receipt policy. PTE 406; 6139-41. Ovitz's expense reports were appropriately approved, and gifts he made on behalf of the Company were either approved or would have been approved. DTE 59; 6519-21; 6523-24; 6526-28; 6533. Plaintiffs' repeated reliance on PTE 147, the Price Waterhouse document (*see, e.g.* O.B. 46-47, 92), for the truth of its contents is misplaced since the Court has ruled that this document is inadmissible. Moreover, Fox testified that none of these claims would have provided a basis for a good cause termination. 8792; 8796-97; 8816; *see also* DTE 430 at 14-26.

In sum, there were no grounds for good cause. Had the Company asked Fox to advise the Board, he would have advised that there was no good cause to terminate Ovitz. 8949-51.

3. The Company Faced Significant Risks If It Claimed It Was Terminating Ovitz for "Good Cause".

Under Section 14 of the OEA, the non-fault termination payment was Ovitz's sole remedy in the event of a non-fault termination. PTE 7, § 14. That protection would not have been available to the Company had it terminated Ovitz for "good cause."

Fox and Feldman both opined that had the Company terminated Ovitz for "good cause" it would have faced a claim for breach of contract in addition to various tort claims. DTE 430 at 27-29; DTE 408 at 4-6. If hired as outside counsel for the Company, Fox would have advised that it would lose the contract claim.[66] 8949-51. As a result, the contractual non-fault termination payment would have been a *floor* for potential liability and the starting point for any settlement negotiation with Ovitz. 9056. Ovitz would have also brought tort claims for fraud in the inducement and defamation which both Fox and Feldman testified would have survived motions to dismiss and summary judgment. DTE 430 at 27-29; DTE 408 at 4-7; 8407-08; 9055-56; 9226-27. These claims would have settlement value in addition to Ovitz' contract claims. 9056. Fox also noted the Company's legitimate concerns of seeking to avoid distracting senior managers with years of wrongful termination litigation and the bad publicity and trouble with future employees and other parties by failing to honor its contract. 8866-67; *see also*, 6239-40; Eisner 648 ("that is the ethical way The Walt Disney Company does business.").

[66] The contract claim would have entitled Ovitz to prejudgment interest at a rate of 10% per annum pursuant to California Code of Civil Procedure § 3289(b), and attorney's fees and costs under Section 20(f) of the OEA. DTE 430 at 28-29; 8837-38.

Rather than face these risks, the Company did the prudent (and ethical) thing and terminated Ovitz on a non-fault basis. That decision commended itself to informed directors acting in good faith and should not give rise to liability. *See Shamrock*, 559 A.2d at 267-68, 276.

F. The Defendants Acted in Good Faith in Connection With Ovitz's Termination.

1. Eisner Acted in Good Faith.

Plaintiffs contend that Eisner acted in bad faith supposedly by withholding material information from the Board and from Litvack concerning misconduct by Ovitz that amounted to cause for termination. OB 72-74, 94. This contention is not only untrue; it also makes no sense. Eisner did not want to pay Ovitz; he repeatedly pressed Litvack to find a basis to terminate Ovitz for cause. 4421; 6111-13.[67] Eisner knew—as Litvack confirmed—that Litvack certainly did not want to see Ovitz receive a NFT. 4421; 6115. Eisner had no reason to withhold information from Litvack. And the record demonstrates that Litvack independently had ample sources of information on Ovitz's performance. 4419-22; 6143-44; 6351-52; 6378-80. Whether or not Eisner gave Litvack copies of PTE 24, 67 or 79, it is clear that Eisner and Litvack pooled their information, but Litvack nevertheless concluded there was not a case for cause. 4421-22; 6133-35. Similarly, Eisner had no reason to withhold from the Board material information to support a for-cause termination.

Plaintiffs' contention is wrong for a second reason: Eisner did keep directors informed about Ovitz's performance and shared with them all material information about the *actual* reasons why Ovitz would be terminated as amply demonstrated by the trial testimony of other directors. *E.g.*, 3759-61; 3818; 5593-94; 5926; 6974-76. Contrary to plaintiffs' litany of

[67] Plaintiffs choose to disregard the trial record in order to proclaim, wrongly, that "Eisner Pays Off His Friend." OB 36.

assertions (OB 73), Eisner did report to the directors Ovitz's alienation of top executives and other failures in performance. *See, supra,* Facts B.2. Even if Eisner did not distribute PTE 24 and 79 to all directors, he kept the board informed about Ovitz and, thereby, acted in good faith. Plaintiffs' contention fails for yet a third reason: plaintiffs failed to prove the existence of any ground for cause—leaving no material information to withhold. *See, supra,* Argument E.[68]

There is no evidence that Eisner acted in bad faith regarding Ovitz's termination. As already stated, Eisner began to discuss Ovitz's disappointing performance with directors beginning in January 1996, culminating in a discussion with directors on November 25, 1996 when Eisner informed them that he would be terminating Ovitz's tenure with the Company. The problems being reported by Eisner during 1996 are echoed in the record from a variety of other sources and witnesses. 3760-61; 5808-5810; 5926; 6972-77; 7552; 7555-56. Not even plaintiffs disagree with the merits of that fundamental decision and, not surprisingly, the directors were able to testify as to their own reasons for concurring in Eisner's proposed course of action. This is not a case of "no judgment" or "conscious indifference" to the stockholders' interest. This is a case of "constant updating" and "clear consensus" as to a course of action believed to be in the stockholders' interest.

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[68] Plaintiffs cannot prove bad faith based on the limited distribution of Eisner's memos. For example, PTE 79 was written so that some directors would know Eisner's thoughts about Ovitz should Eisner be "hit by a truck." PTE 79 at DD2623. When he wrote this letter, Eisner still held a hope that Ovitz might work out (*id.* at DD2626), so it is understandable why the letter was sent to a small group. Because PTE 24 was never sent to Ovitz in November 1996 and because of the reasons it was never sent, 4371-73, it is also understandable why Eisner did not give the draft letter to all directors. And, as plaintiffs themselves note (OB 41), Eisner testified that PTE 20 was sent to Disney's communication chief in anger over Ovitz's betrayal of an oral understanding not to spin the press. DTE 243; 4430-33; 4619-22; 5239-51. Litvack testified that, given all he knew, nothing in these documents would change his view that no cause existed. 6143-44; 6693. Similarly, the makeweight duty of disclosure claim against Watson and Russell (OB 74-76) must also fail since there was no cause to terminate Ovitz and the information contained in PTE 79 was not material.

With respect to the NFT payment, Eisner made a concerted effort to avoid paying Ovitz by attempting to trade him to Sony. 2571-72; 3766-67; 4319-21; 4350-54; 4421; 4729-30; 5131-32; 6104-05; 7855-59. When that effort failed, Eisner pressed Litvack to see if there was any basis to avoid the NFT payment. Eisner did not allow Ovitz to receive a NFT as a result of any friendship they then had. 4422; 4449-51. These are not the actions of a director who is "consciously indifferent" to the consequences of Ovitz's termination. These are the actions of a director who wanted to avoid triggering the NFT provisions, but was nevertheless convinced that the stockholders' interests were best served by Ovitz's termination even accepting the NFT provisions.[69]

Finally, plaintiffs suggest that Eisner is not entitled to the protection of Section 102(b)(7) by asserting that "those provisions are protective only of acts taken by a director in his capacity as a director, not an officer." OB 94. However, Eisner was both Chairman of the Board and CEO of Disney. Eisner's status as CEO was inextricably woven into his role as Board Chairman. The relevant Disney Bylaws required that the Chairman of the Board be a director and that the Chairman "shall be the Chief Executive Officer of the Corporation." PTE 2; PTE 468. Under such circumstances, it would certainly be an anomaly for Eisner's personal liability for the very same conduct to be judged based upon two different standards of review when he was CEO only by virtue of being the director who holds the office of Chairman. None of plaintiffs' complaints nor the Pre-Trial Order identify any separate cause of action against him for breach of his CEO duties as distinct from his duties as Chairman. Indeed, none of plaintiffs'

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[69] Plaintiffs suggest that Eisner agreed to an NFT because Wilson told Eisner on December 1, 1996, after the Wilson/Ovitz boat trip, that Ovitz was a "wounded animal in a corner" and "loyal friend, devastating enemy." OB 35-36. That suggestion is demonstrably wrong. Eisner had informed the Board before December 1 that Disney needed to terminate Ovitz and that Litvack had advised that an NFT could not be avoided. *See* 3772-74; 4477-79; 5995-96; *see also* 8155-58; II.D, above.

briefing opposing defendants' motion on the pleadings or motion to dismiss, nor the decisions of this Court or the Supreme Court even mention a distinct claim against Eisner separately identifying a breach of his CEO duties as such.

The Court, in denying the motion to dismiss the present Complaint, identified the good faith standard of Section 102(b)(7) as governing this case. *Disney,* 825 A.2d at 286, 290, 291. Plaintiffs have simply failed to ever specify a separable claim not subject to that standard. *See Arnold v. Society for Savings Bancorp, Inc.*, 650 A.2d 1270, 1288 (Del. 1994) (holding that actions by CEO, who was also a director, did not fall outside the protection of Section 102(b)(7) because plaintiffs failed to highlight any specific actions taken by the CEO as an officer as opposed to as a director); *Goodwin v. Live Entertainment, Inc.*, 1999 WL 64265, *6, n. 3. (Del. Ch. Jan. 25, 1999), *aff'd*, 741 A.2d 16 (Del. 1999) (rejecting plaintiff's attempt to avoid Section 102(b)(7) by claiming to sue CEO-Chairman and Vice President-CFO-Director as corporate officers, holding that other than cursorily asserting that those defendants negotiated transactions as officers and not directors, plaintiff failed to allege that the defendants took improper actions as officers as opposed to directors and pointing out that plaintiff served the defendants only as directors under 10 *Del.C.* §3114); *THC Holdings Corp. v. Chinn*, 1998 WL 50202 (S.D.N.Y. Feb. 6, 1998) (failure to highlight specific actions as taken in capacity as secretary of corporation was fatal to plaintiff's efforts to avoid exculpatory provision of Section 102(b)(7)).

2. Litvack Determined in Good Faith That Ovitz Could Not Be Terminated for Cause.[70]

As already stated, Eisner asked Litvack for his legal opinion as to whether Disney could terminate Ovitz for cause and thereby avoid paying Ovitz's contractual termination benefits. 6110-11.[71] Litvack was very familiar with Ovitz's performance, the reasons for his termination, the relevant terms of the OEA, and the costs of granting a Non-Fault Termination. *See supra* Facts D. Moreover, Litvack did not like Ovitz, believed that he had been a failure as Disney's President, and did not want to pay him a dime. 6113-19.

After considering the OEA and Ovitz's conduct, however, Litvack concluded that Disney did not have a basis to terminate Ovitz's employment for cause, and that it should comply with its contractual obligations. 6113-19.[72] Simply put, Ovitz's employment was being terminated for his failure to perform adequately as President, and that did not constitute either gross negligence or malfeasance. 6115. The decision whether Ovitz's employment could be terminated for cause was not even a close call, and it would have been both unethical and harmful to Disney to attempt to assert cause. 6118-20. *See* Facts D (regarding Litvack's discussions with other lawyers on the subject).[73]

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[70] For the first time in this case plaintiffs purport to assert claims against Litvack for violating his fiduciary duties as an officer of Disney. OB 96. No such claims against Litvack were asserted in the Complaint or the Pre-Trial order. This Court should not now consider plaintiffs' last minute claims against Litvack in his capacity as an officer, especially because plaintiffs served Litvack in his capacity as a *director* pursuant to 10 *Del. C.* § 3114 as it existed in 1997.

[71] Prior to Ovitz's termination, Litvack tried to convince Ovitz to resign, and Litvack supported Eisner's attempt to "trade" him to Sony so as to avoid the termination payments. 6100-07.

[72] Given his extensive experience and knowledge of the relevant facts, Litvack reasonably believed that he did not have to conduct additional research before providing his opinion, and plaintiffs have not cited any cases that would have changed Litvack's conclusion. 6114-15. To the contrary, plaintiffs concede that there are no California decisions that interpret gross negligence or malfeasance in the context of an employment agreement. OB 89. None of the cases cited by plaintiffs' expert (Donohue) support the conclusion that Disney could terminate Ovitz for cause, *and several of the cited cases were decided after December 1996.*

[73] Litvack reasonably determined not to obtain a written legal opinion from an outside law firm to support his conclusion. 6115-20. Gold recalled that Litvack said he conferred with outside counsel. (Continued)

Litvack possessed and considered the available information relating to Ovitz's performance as President of Disney and, based on that information, determined that Disney did not have a legal basis to terminate Ovitz for cause. Plaintiffs may disagree with Litvack's decision, but they have offered no facts to establish that Litvack "*knew* [he was] making material decisions without adequate information and without adequate deliberation, and that [he] simply did not care if the decisions caused the corporation and its stockholders to suffer injury or loss." *Disney*, 825 A.2d at 289 (emphasis in original). To the contrary, Litvack cared a great deal. He did not want to grant a Non-Fault Termination to Ovitz, but he determined that the Company simply did not have a legal basis to terminate Ovitz for cause and to falsely assert there was cause would be both unethical and harmful to Disney. 6127-30.

Interestingly, plaintiffs do not contend that Disney could have terminated Ovitz for cause based on his failure of performance—which was, in fact, the reason Ovitz was terminated. Rather, plaintiffs argue that Disney should have tried to conjure up additional "reasons" (*i.e.*, a pretext) for the termination, to support a claim of "cause". There is no authority—nor should there be—to support the notion that it is the duty of directors to search for a pretext for a firing to avoid a contractual obligation.

Finally, Litvack did not breach his duty of good faith by failing to propose a special Board meeting to approve Ovitz's termination. Litvack reasonably believed that a special Board meeting was not required for two reasons:

> One is I believed, and continue to believe, that Michael Eisner, as the CEO, had the power and the authority to fire him by himself. Two, I understood and believed, and still believe, that each of the board members in fact knew and agreed with and had discussed the firing of Michael Ovitz. And so I did not believe that a formal board meeting was necessary.

3795-96. Russell also understood outside counsel was being consulted. 2576; 3118. In addition, Santaniello reviewed the NFT issue with lawyers at Dewey Ballantine. Santaniello 161-65.

6151. In fact, Litvack could not recall one instance in which the Disney board formally approved the termination of an officer. 6149-50.[74] Plaintiffs may disagree with Litvack's judgment, but they cannot demonstrate a "knowing or intentional lack of due care" in his decision-making process relating to Ovitz's termination. *Disney*, 825 A.2d at 278.

3. The Other Director Defendants Acted in Good Faith in Reliance on Eisner and Litvack.

Although formal board action was not necessary, all of the other directors agreed with the decision to terminate Ovitz, in good faith reliance on the information given to them by Eisner and Litvack. Murphy, for example, at the time had $70 million in Disney stock representing his life's work building up Capital Cities/ABC and, therefore, had every reason to oppose Ovitz's termination if it was bad for the stockholders. 7559-60. To the contrary, he contemporaneously wrote to Eisner in his capacities "[a]s a stockholder and director" that the day Ovitz was terminated was a "good day for Disney." PTE 68. As a 20-year head of her own school organization, Bowers believed that when someone in management is not perceived as working effectively with others, "it's best to let that individual go their own way and move on." 5934. Nunis, 50% of whose wealth at the time was in Disney stock, understood that continued management turmoil would "eventually permeate down through the entire organization and have a very detrimental effect on our company, which would affect the stockholders, obviously, because it would affect the price of the stock." 5811; 5815. Nunis had "a lot of confidence that Michael was going to make the right decision." 5813. Press speculation about Ovitz was "having a negative impact on the good reputation and work of The Walt Disney Company" at a time when it was occupied with integrating itself with ABC. 8158-

59 (Stern); 3778 (Gold) ("So if he was absolutely sure, after having given it every effort, that it wasn't going to work, we needed to face up to it."); 4026 (Disney) ("At that time it seemed pretty clear, from this sort of gathering storm, that the right thing to do would be to sever this relationship."); 6720 (O'Donovan) ("Because, as I said earlier, it was clearly not working between the CEO and the president, and in my view, and I think in the best interests of the Disney Company, it's imperative that the top officers work very well together, indeed, and be in complete harmony."); 7643 (Lozano) ("[I]t was really a problem that had no solution, and that it would be in the best interests of everyone, including Disney employees and shareholders, that Michael Ovitz leave.").[75]

The directors believed in good faith that Eisner had full authority to terminate the employment of an officer who reported to him. *See* 2890-91; 5598; 6151; 6341. Because Eisner was Chairman and CEO and did not have full confidence in his President, "he had not only the right, but, in effect, the obligation to make that decision." 6720-21 (O'Donovan); 6785-86 (O'Donovan) ("I testified earlier that Mr. Eisner, as the CEO, had the authority and, as the

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[74] None of the lawyers in Disney's legal department or Dewey Ballantine ever suggested that the termination had to be formally approved by the Board. 6149-50.

[75] At trial, the Court inquired whether it was an option to put Ovitz in another position rather than terminate him. 5785. Various directors address that in their testimony, noting the cost to the Company of keeping Ovitz (in lost management productivity, negative press coverage, and employee speculation) far outweighed paying his non-fault termination benefits. 7643 (Lozano); 8160 (Stern). Even if it could be done without violating the OEA and triggering the NFT (which it could not), somehow shunting Ovitz aside and putting him in a token position would never have worked. 6844 (Wilson) ("It would not be in the best interests of The Walt Disney Company to have a very high profile executive like Mr. Ovitz sitting in a corner office doing nothing . . . If we wanted to hire a new president, it would have been almost impossible to do with Mr. Ovitz hanging around."); 7858 (Watson) ("That is not healthy for the company, and it is not good for the company, and [Ovitz] would never accept it, anyway."); 5785-86 (Mitchell); 5812 (Nunis) ("Well, when you reach the level of presidents of company, there's really only one way you can go and that's up to replace the CEO or go to another company."); 7644 (Lozano) ("Well, he was hired as president, and to relegate him into some minor role in the company just to have him hang around for another three and a half or four years, it never occurred to me that that was a viable alternative."); 7145 (Poitier) (It would not be possible because of "too deep a mismatch." Such a solution would also have been a violation of Ovitz's contract and resulted in his receipt of the same NFT benefits (Continued)

situation developed, I thought the—almost the obligation to do that. I believe that was his proper authority."); 7561 (T. Murphy) ("Well, it was quite obvious to everybody that it wasn't working and something had to be done. And it was Michael's decision to finally cut the cord."); 7646-47 (Lozano) ("I think the CEO had the authority to terminate [Ovitz] . . . . I don't think we could shove Mr. Ovitz down Mr. Eisner's throat. I think the board concurred in the decision that he be terminated, but I think it would have been -- there was no opposition expressed by any member of the board that he be kept on, that he not be terminated.").

The other directors also relied in good faith on the Company's legal department to tell them if a meeting was required. *See* Litvack 825-26 ("I think the board recognized that I was the general counsel and that's -- they looked to me to fulfill that role [with respect to what matters legally had to go to the Board]."); 6149 (Litvack) ("It would be reasonable that they would rely upon the legal department and the general counsel [on this issue]."); 6721 (O'Donovan); 2587 (Russell); 5733 (Mitchell) ("There was no necessity or basis or reason to convene such a meeting. That's -- we relied upon our counsel."); 7561 (T. Murphy) ("Well, that would be determined by the inside counsel, Sandy Litvack."); 8233 (Stern). Litvack believed that Eisner had full authority to terminate Ovitz's employment and no member of the legal department ever told any director otherwise. *See* 6151. Even if the directors and Litvack were wrong and a Board meeting was required, the other directors cannot be held liable, as monetary liability cannot be imposed for two reasons. First, the other directors acted in the good faith belief that no meeting was required, and, second, there is no evidence that any of them had actual knowledge that a meeting was required. 8 *Del. C.* § 102(b)(7), *Emerald Partners*, 2001 WL 115340, at *21.

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at issue. PTE 7 ¶ 12(b) (providing Ovitz the right to termination when assigned duties "materially inconsistent with his position as President").

Finally, the other directors relied in good faith on management to determine if there was a way the Company could avoid paying Ovitz the termination benefits provided for in his contract.[76] *See* 6782 (O'Donovan) ("As a director, I relied on the counsel of the corporation to consider matters such as that."); *see also* 5734-36. The other directors knew that Eisner was actively handling Ovitz's termination. *See* 5813 (Nunis) ("I really thought that, knowing Michael Eisner and, frankly, Sandy Litvack -- Michael is a tough negotiator. Sandy Litvack is an outstanding attorney. And if there was any way to make that happen, I'm sure they would have."). They knew that Eisner was "tight with the money" and that "he wouldn't have given [Ovitz] a dollar . . . unless he had to." 7557 (T. Murphy); 8161 (Stern) ("Eisner is famously tough with the buck. In fact, famously cheap would be the way best to put it."); 8158 (Stern) ("Litvack, not a friend of Mr. Ovitz's, I believe everyone now knows that, said he looked at it every which way, and he felt there was no other way to go."); 5597-98 (Mitchell) (speaking with regard to reliance on counsel as to this question).[77]

In fact, the directors were entitled to rely on Litvack's advice that the Company had no grounds to terminate Ovitz for cause, as well as Eisner's reports on Ovitz's performance and statements regarding Litvack's advice. *See* 8 *Del. C.* § 141(e) (permitting a director to rely on

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[76] Plaintiffs' baseless and conclusory assertion that Russell, Gold, Roy Disney, and Bollenbach were aware of material information they withheld from the board (OB 94) is wrong. They were not aware of any grounds for termination that met the stringent definition of Ovitz's contract. *See* 2574-75 (Russell) ("I did not, you know, consider that the company would be -- would have any chance of success in claiming that there was cause to terminate him and to be successful in defending such an action if it were brought."); 3776 (Gold); 4107 (R. Disney) (was not aware of any specific examples of Ovitz lying); 5317-18 (Bollenbach). Further, neither Roy Disney, Gold, nor Russell had significant one-on-one contact with Ovitz while he was working at the Company. 2567; 3755; 4010-11.

[77] Evidencing the good faith of the members of the EPPC, following the December 10 meeting at which a bonus for Ovitz was approved, a special meeting of the EPPC was held on December 20. During that meeting Litvack confirmed his view that Ovitz could not be terminated for cause and the members of the EPPC unanimously voted to rescind any bonus to Ovitz. PTE 53; 3795-96; 6167-68; 6287; Litvack 817-18. The affirmative action of those directors to save the Company the $7.5 million bonus is (Continued)

statements by an officer or any person on a matter within their professional competence); 3219 (Russell); 3773-75 (Gold) ("Sandy Litvack, said to me, 'We have no choice here. It is my opinion we have no grounds to fire him for cause.'"); 3795-96; Gold 175-76, 180-82, 202-04, 295-96, 298-300, 347-49; 4106 (R. Disney) (relying on Gold's report of Litvack's advice); 5932-33 (Bowers) (recalling that Eisner told her in a telephone call that the Company was going to need to honor the terms of the contract); 7648 (Lozano) ("Sandy Litvack did express his opinion that there was not cause for termination."); 8009-10 (Watson) ("I remember Sandy talking about it in the months leading up to this or in the time leading up to his termination. I can't tell you where and when, but he's the one I relied upon because he was the legal counsel for the company."). As the directors knew, Litvack and Eisner were both very familiar with Ovitz's tenure at the Company and any facts relevant to that issue. *See* 6116 (Litvack) ("I knew the facts. I had lived with the facts."); 5938-39 (Bowers) ("I had no reason to doubt that [Litvack] knew what he was talking about."); 3761 (Gold) ("Ovitz, Eisner, Litvack worked on the same floor, worked on the same matters, went to the same meetings . . . . These were the three executives that were running the company with the CFO, and they all knew what each other was doing.").

Applying the standard framed by this Court in this case to adjudicate bad faith, these facts obviate any claim that the grant of the NFT without a formal board meeting was the product of any director not caring or consciously and intentionally disregarding his or her responsibilities. *Disney*, 825 A.2d at 278, 289.

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completely inconsistent with any conclusion that "they simply did not care if the decisions caused the corporation and its stockholders to suffer injury or loss." *Disney*, 825 A.2d at 289.

III. PLAINTIFFS HAVE NOT PROVEN WASTE.

As this Court has repeatedly recognized, the standard for supporting a waste claim is extreme and is rarely satisfied in Delaware. *Official Committee of Unsecured Creditors of Integrated Health Services, Inc. v. Elkins*, 2004 WL 1949290, at *17 (Del. Ch. Aug. 24, 2004); *Telxon Corp. v. Bogomolny*, 792 A.2d 964, 975 (Del. Ch. 2001) (citing Chancellor Allen's comments in *Steiner v. Meyerson*, 1995 WL 441999, at *5 (Del. Ch. July 19, 1995)) ("There surely are cases of fraud; of unfair self-dealing and, much more rarely negligence. But rarest of all—and indeed, like Nessie, possibly non-existent—would be the case of disinterested business people making non-fraudulent deals (non-negligently) that meet the legal standard of waste!"). Directors will only be held liable for waste when they "authorize an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." *Disney*, 731 A.2d at 362. A claim of waste will usually only succeed where there is a "transfer of corporate assets that serves no corporate purpose; or for which no consideration at all is received." *Brehm*, 746 A.2d at 263.

Here, Ovitz was paid to serve as Disney's President. There is no dispute that he devoted himself full-time to that effort and in fact made a number of positive contributions to the Company. *See* Facts B1. Thus, by definition, plaintiffs have failed to show that the OEA served no corporate purpose or that the payments made under the OEA were for no consideration. *Brehm*, 746 A.2d at 263. Similarly, any assertion that the decision to pay Ovitz for a NFT was wasteful must also fail. The NFT provisions were part of the OEA which brought Ovitz to Disney. Clearly a reasonable person (Fox, Feldman, Litvack, *et al.*) could (and did) conclude that Disney did not have any legal basis to terminate Ovitz for cause. That alone, as well as Ovitz's release of all potential claims against Disney, obviates any cause of action predicated upon waste.

IV. PLAINTIFFS HAVE FAILED TO ESTABLISH ANY DAMAGES TO THE COMPANY.

Wholly apart from their burden to establish liability, which they have failed to carry, plaintiffs have failed with respect to their separate burden of proving that either the hiring or the subsequent non-fault termination of Ovitz caused actual, non-speculative damages to the Company. *Cincinnati Bell Cellular Sys. Co. v. Am. Mobile Phone Svc. of Cincinnati, Inc.*, 1996 WL 506906, at *20 (Del. Ch. Sept. 3, 1996) ("Damages cannot be speculative or uncertain . . ."); *Lasher v. Inter-continental Biologics, Inc.*, 1984 WL 137716, at *15 (Del. Ch. June 14, 1984) (requiring plaintiff to establish "reasonable probability" of damages). Their effort to satisfy their burdens rested entirely upon the report and testimony of Prof. Murphy that the cost to the Company of the options granted Ovitz was $90.95 million, to which Murphy simply added the $38,869 million cash termination payment to Ovitz required under the OEA (OB 97).[78] Plaintiffs nowhere explain—and they cannot—how this calculation relates to their claim that the hiring of Ovitz was improper, and for the reasons which follow their argument is also insufficient to establish damage to the Company with respect to the termination of Ovitz.

First, plaintiffs never come to grips with the facts (i) that this is a derivative action, not a direct action premised upon dilution of the shareholders, *see Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004) (derivative claim must involve injury to the corporation itself); and (ii) that, instead of a drain on the corporate treasury, the exercise of options by Ovitz resulted both in an influx of $78,061,500 into the Company's treasury upon the exercise as well as a tax deduction. The Company deducted an aggregate of $70,407,222 in FY

[78] While contesting that any damages are appropriate in this case, defendants acknowledge that the cash payment to Ovitz of $38,869,000 is established in the record as that called for under the terms of the OEA upon his termination. Prof. Murphy's halfhearted attempt in his report to challenge that figure, (Continued)

1999 and 2000, DTE 180, for a savings at the applicable 35% federal marginal corporate tax rate of $24,642,527.70, plus savings from applicable state corporate tax. *See Tuckman v. Aerosonic Corp.*, 1982 WL 116990 (Del. Ch. Sept. 20, 1982) (reducing damages by amount of tax benefit to the corporation).[79] Second, plaintiffs make no effort to quantify any amount by which Ovitz was allegedly overpaid, ignoring their own expert's view that, setting aside amount, each component of Ovitz's termination package was typical in the marketplace, PTE 426 at 6-20, as well as precedent within Disney such as the contract of Wells. *See* DTE 67 (Wells contract); DTE 246. Third, their approach ignores the consistent view of this Court that, because of trading restrictions, an intelligent dollar and cents valuation cannot be placed upon employee stock options at the time they are issued, *Kaufman v. Shoenberg*, 91 A.2d 786, 794 (Del. Ch. 1952), and that the Black Scholes model as applied to employee stock options is inherently speculative. *In re 3COM Corp. S'holders Litig.*, 1999 WL 1009210, at *4, n.17 (Del. Ch. Oct. 25, 1999) ("This Court has consistently taken a rather jaundiced view of these valuations and their reliability," *citing Rovner v. Health-Chem Corp.*, 1998 WL 227908, at *5 (Del. Ch. Apr. 27, 1998), and *Lewis v. Vogelstein*, 699 A.2d 327, 339 (Del. Ch. 1997). *Accord, Louisiana State*

PTE 426 at 31-33, was essentially abandoned at trial, 815-16, and completely refuted by Dunbar. 7333-37; DTE 421 at 21-26.

[79] For this reason too, plaintiffs' request for prejudgment interest, compounded monthly, fails. This Court has recognized that the purpose of prejudgment interest, which is to be awarded subject to principles of fairness, is "to compensate plaintiffs for losses suffered from the inability to use the money awarded during the time it was not available." *Trans World Airlines, Inc. v. Summa Corp.*, 1987 WL 5778, at *1 (Del. Ch. Jan. 21, 1987); *see Brandin v. Gottlieb*, 2000 WL 1005954, at *29 (Del. Ch. July 13, 2000) (awarding compound interest in light of market realities, plaintiff's financial sophistication and defendant's multiple breaches of fiduciary duty). Defendants are aware of no case awarding compound prejudgment interest outside a breach of the duty of loyalty or appraisal context. Moreover, plaintiffs' calculation of prejudgment interest ignores the undisputed fact that the required cash outlay of $38.9 million was dwarfed by the subsequent cash infusion of $78 million and the corporate tax benefit. As such, the Company suffered no loss from an inability to use cash in the corporate treasury, with the result that prejudgment interest, compound or otherwise, is inappropriate in this case.

Employees' Ret. Sys. v. Citrix Sys., Inc., 2001 WL 1131364, at *7 (Del. Ch. Sept 19, 2001); *In re Coleman Co., Inc. S'holders Litig.*, 750 A.2d 1202, 1208 (Del. Ch. 1999).

Wholly apart from the inappropriateness of the Black Scholes model as a basis for damages, the report and testimony of Fred Dunbar clearly established that Prof. Murphy erred in failing to apply in his Black Scholes calculation the early exercise discount required by Black Scholes theory,[80] *see* DTE 421 at 9-20 and 7306-33, and by Delaware case law. *Lewis*, 699 A.2d at 332 ("the Black-Scholes model overstates the value of options that can be exercised at any time during their term because it does not take into account the cost-reducing effect of early exercise"). *See also* Hall, Brian J. & Murphy, Kevin J., "The Trouble With Stock Options," *Journal of Economic Perspectives*, Vol. 17, No. 3, p. 9 (2003) (acknowledging need for "downward adjustments" to Black Scholes for early exercise). Such discount reduces the Murphy Black Scholes calculation by $30.9 million, to $60,000,000. DTE 421 at 13-16; 7315-23.

This amount is much closer than Murphy's $90.95 million to what actually occurred.[81] In fact, Ovitz did exercise early, while also permitting a large number of options to lapse unexercised. Murphy calculates this "realized cost" to be $70.41 million. PTE 426 at 28, fig. 3. Assuming any damages were appropriate by reason of the grant to, vesting and exercise of options by Ovitz, at least this number has the benefit of being based in fact, rather than the speculation inherent in the Black Scholes calculation which, given the lapsed options, would clearly result in an impermissible windfall to the Company. *See Tuckman v. Aerosonic*, 1982

[80] Plaintiffs' characterization of Prof. Murphy's valuation report as "unrebutted" (OB 97) is both disingenuous and wrong.

[81] Had Ovitz acted as Prof. Murphy assumes in his model and held the options until just before their expiration date, the "realized cost" to Disney would have been zero since by the end of the exercise period all the options were underwater. 972.

WL 17811, at *1 (Del. Ch. June 21, 1982) (in awarding damages, "it is not the function of this Court to confer a windfall on the shareholders").

For all the reasons cited, plaintiffs have failed to establish any damage. Were the Court nonetheless to conclude that liability was established, that damage was incurred by the Company, and that such damage is not speculative, the maximum amount payable by those defendants determined to be liable, if any, should not exceed the cash paid to Ovitz and the "realized cost" of the options, *less* both the direct tax benefit to the Company from the payment of the cash and the exercise of the options, and that amount which the Court determines under all of the circumstances, including the terms of the OEA, to constitute the termination amount which should have been paid to Ovitz in the absence of any found fiduciary duty breach.

CONCLUSION

There can be no personal liability for any particular individual defendant unless the Court makes a finding, based on the evidence of record, that he or she acted in bad faith. In its May 28, 2003 decision, in explaining the bad faith standard, the Court stated that it would impose liability on the defendants if, after discovery and trial, "the defendant directors *knew* that they were making material decisions without adequate information and without adequate deliberation, and that they simply did not care if the decisions caused the corporation and its stockholders to suffer injury and loss." 825 A.2d at 289 (emphasis in original). Plaintiffs urge the Court to make that finding, but cannot point the Court to evidence that would support it. To the contrary:

- As to Eisner, he always held paramount, and was closely aligned with, the interests of shareholders because he was a major shareholder himself; had a pay-for-performance contract; and devoted most of his working life to Disney.

- As to Litvack, he was a skilled and experienced lawyer who, because of his positions with the Company, was knowledgeable about matters relating to Ovitz's performance as Disney's President, gave advice that he believed in and that he thought was in the best interests of his client—the Company.

- With respect to Russell and Watson, the record demonstrates that they deliberated, not just adequately, but painstakingly. Poitier and Lozano considered the analysis of their fellow Compensation Committee members and reached their own judgments as to Ovitz's hiring—they believed getting Ovitz on the terms that had been negotiated was a coup for Disney and that firing Ovitz was unavoidable if the Company were to move forward.

- As to Roy Disney and Gold, with their record of active involvement as directors and as representatives of a large family investment, plaintiffs' claim that they knew they were acting without adequate information and deliberately turned a blind eye to the interests of the Company that bears Mr. Disney's name is ludicrous. Nor can there be a question that people like Murphy and Nunis believed they were acting in the interests of the stockholders—as they testified, the fruits of their long and storied careers consisted largely of Disney stock. And what credibility do plaintiffs retain when they say that, despite the extensive evidence to the contrary, each and every one of the other defendants—Fr. O'Donovan, Bowers, Bollenbach, Wilson, Stern, Walker and Sen. Mitchell—acted with hearts dark enough to allow themselves to *know* that they were acting with insufficient information and yet did not even care if the corporation and its stockholders suffered injury and loss?

All these people believed that what they were doing was in the interests of the Company and none of them personally benefited. An objective review of the evidence of record compels the conclusion that none of the individual defendants acted in bad faith. For all the reasons stated above, plaintiffs are entitled to no recovery whatsoever against any defendant.

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