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-NC

PLAINTIFFS' POST-TRIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs in this shareholders' derivative action brought on behalf of nominal defendant The Walt Disney Company ("Disney" or the "Company") respectfully submit their post-trial brief in support of their request for judgment based on a finding that a preponderance of the evidence has established, *inter alia*, that defendants[1] breached their fiduciary duties of care, loyalty and good faith to the Company and/or committed waste in: (1) causing or permitting the adoption of the Ovitz Employment Agreement (the "OEA"), by which Ovitz was hired as the Company's President; and by (2) causing or permitting Ovitz's receipt of amounts equal to full "Non-Fault Termination" ("NFT") severance payments and benefits in connection with his departure from the Company.

Plaintiffs have rebutted any favorable presumption afforded by the business judgment rule, thus shifting to defendants the burden of establishing the entire fairness of the challenged transactions as well as the burden of proving their entitlement to the protections of any exculpatory provision of Disney's charter pursuant to § 102(b)(7). Defendants have failed to carry those substantial evidentiary burdens. Accordingly, plaintiffs are entitled to judgment on behalf of Disney as follows: (1) declaring that defendants, individually and/or collectively, breached their fiduciary duties owed to the Company; (2) declaring that defendants, individually and/or collectively, are liable for causing or committing waste; (3) awarding to Disney the damages defendants caused it to incur in the amount of $129,816,000 million, pre-judgment interest in the amount of $132,454,876 and post-judgment interest as allowed by law, all to be paid jointly and severally by defendants, without any offset, reduction or reimbursement for indemnification or otherwise; and (4) such other relief as the Court deems appropriate.

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[1] Unless otherwise indicated, references to "defendants" exclude Disney.

STATEMENT OF FACTS

I. OVITZ JOINS DISNEY

A. Eisner Decides To Hire His Friend Ovitz

Eisner and Ovitz had been friends and colleagues in the entertainment business for at least twenty years prior to Ovitz's hiring in 1995. PTE 3; 135; Tr. 1290:20-1291:9; 4156:15-4157:13; 5582:23-5583:1.[2] Ovitz considered Eisner his "best friend" and "life partner." Tr. 1392:13-1395:6. Ovitz provided important political and moral support to Eisner when he was seeking to become Disney's CEO and Chairman in 1984. Ovitz 119:24-120:12; 120:21-121:8; Tr. 1259:12-1260:1; 4677:11-4678:11. Eisner "had been trying to hire [Ovitz] forever," (Eisner 111:6-7), and such efforts took on greater importance after Disney President and COO Frank Wells suddenly died in an accident on April 3, 1994. Litvack 39:20-42:6.

In July 1994, Eisner underwent coronary bypass surgery at a hospital in Los Angeles. Eisner 106:4-107:20. Ovitz and his wife, after being called in the middle of the night by Eisner's wife, immediately returned to Los Angeles from a conference in Sun Valley, Idaho to stand guard outside Eisner's room during his hospitalization (Litvack 77:21-79:4; Tr. 1106:14-1107:22; 2016:3-12) — an act of friendship Eisner later poignantly recalled in a note to Ovitz. PTE 19 at WD401 ("you still are the only one who came to my hospital bed – and I do remember"). Under pressure to hire a potential successor and number two (PTE 266),[3] Eisner saw Ovitz's discussions with MCA, Inc. ("MCA") in the Spring of 1995 as an opening to renew efforts to hire Ovitz as Disney's President. Tr. 2316:2-2317:3; 2325:4-16. Eisner had made it

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[2] Deposition references are: "Deponent __." Trial transcript references are: "Tr. __."

[3] The Cap Cities/ABC merger put additional pressure on Eisner to hire a President. As a result of the merger, Disney nearly doubled in size. Tr. 2414:1-10.

clear in prior conversations with Ovitz that he was only interested in hiring Ovitz as a "number two" and reiterated that point in the 1995 discussions. Eisner 110:16-111:12; Tr. 4839:10-23.

Eisner did not call a meeting of the Old Board to discuss the possibility of hiring Ovitz. Tr. 4702:21-4703:7; 8022:10-19.[4] Eisner simply called Board members on a one-on-one basis sometime before the public announcement of Ovitz's hiring to inform them of his decision to hire Ovitz. *See, e.g.*, Bowers 183:13-192:25; Lozano 54:13-56:14; Mitchell 17:23-20:7; Wilson 45:6-49:2; Tr. 5390:8-12 (Bollenbach was not called by Eisner *until* August 13, 1995); 6565:8-6566:6 (Litvack was not called by Eisner *until* August 13, 1995). Board members were not aware that specific contract negotiations had been ongoing, or who was conducting them. *See, e.g.*, Bowers 187:10-188:4, 197:6-10; Lozano 63:80-12; Poitier 108:19-24; Stern 66:21-67:6, 75:15-22; Wilson 45:20-23; Tr. 6936:21-6937:1.

Eisner selected Russell to negotiate with Ovitz (Tr. 2676:11-2677:14; 2678:8-19) and specifically excluded Litvack, Disney's then chief counsel and head of human resources. Tr. 6054:23-6055:7. Neither Eisner nor Russell convened a meeting of the Board to give Russell authority to negotiate with Ovitz. Tr. 2678:3-11; 8025:19-22. Ovitz, for his part, was represented by his long time financial advisor Bob Goldman, the CFO of Creative Artists Agency, Inc. ("CAA") and attorney Ronald Olson of Munger Tolles & Olson ("Olson"). Tr. 1287:17-1288:4; 2163:6-9.

Russell was Eisner's personal attorney and owed Eisner an ethical obligation to represent him with undivided loyalty. Tr. 2650:10-2651:7. In the Summer of 1995, Russell began negotiating a new employment contract for Eisner. PTE 198. Elements of Ovitz's pay package,

[4] The terms "Old Board" and "New Board" have the same meanings as those used in Pre-Trial Stipulation and Order, Section II ¶¶ 21 and 22.

including bonuses, were pegged to 75% of Eisner's proposed compensation. PTE 199; 215; 366; Tr. 2405:16-2406:9; 2438:7-15; 2472:7-12; 2522:6-10. Accordingly, the more Ovitz received, the more Eisner might expect to receive in his new contract.[5] Crystal 174:17-22.

On or about July 7, 1995, Russell authored and provided Eisner and Ovitz with a "Case Study" designed to set out the parameters of a deal. PTE 64. The document, among other things, informed Ovitz that the proposed base salary was the "top amount for any corporate officer, and significantly above CEO, and others at highest level" and that the "[n]umber of stock options is far beyond standards applied in Company and in corporate America and will raise very strong criticism." *Id.* at DD1936. In light of these facts, the Case Study cautioned Ovitz and Eisner that "[w]e should collect survey information to be prepared to answer if it becomes necessary." *Id.* at DD1936-DD1937. Although the Case Study noted that the "compensation package . . . will be approved by [Disney's] Board . . ." (*id.* at DD1935), no other member of the Old Board received the Case Study (Russell 131:16-18; Tr. 2752:1-9), and neither Eisner nor Ovitz ever presented any "survey" information to the Old Board or the Compensation Committee. Tr. 2765:17-2766:22. Russell claimed in the Case Study that Disney had to offer a "top" compensation package to convince Ovitz to come to Disney and compensate him "to the extent feasible for present and future values of the very successful business he will *abandon*." PTE 64 at DD1935 (emphasis added).

[5] Russell testified that he "recused" himself from participating as a member of the Compensation Committee when negotiating Eisner's contract (Tr. 2664:11-2666:1), but a document defendants were compelled to produce at trial plainly shows that Russell participated in substantive conversations with Eisner and the Compensation Committee about Eisner's contract. PTE 825; *see also* PTE 362; Tr. 2740:24-2742:11.

B. Ovitz Was Highly Motivated To Leave CAA

Ovitz did not need any special incentives to leave CAA. *Id.* Although for many years, Ovitz had been the dominant 55% owner of CAA (Tr. 1296:16-18), a privately-held talent agency run by three partners (Tr. 1449:15-23), by 1995 Ovitz had decided to leave CAA to do "something in the public arena, not the private arena." Ovitz 96:11-15.[6] Ovitz was also under siege through the efforts of a group of CAA agents, dubbed the "Young Turks," to obtain a greater share of the profits. PTE 222; DTE 82; Tr. 2703:18-2705:7.

During the Spring of 1995, Ovitz began negotiations with Edgar Bronfman, Jr., whose family holding company, Seagram's, had recently acquired the MCA/Universal Studios from Matsushita. Bronfman 12:2-11; Tr. 1269:10-20; 2114:4-11. Ovitz was negotiating to become MCA/Universal's Chairman and CEO (Bronfman 14:13-21), where he would report solely to Bronfman. *Id.* at 35:7-16. In addition, Ovitz envisioned that as part of the deal, the entire CAA agency would either be sold to MCA or acquired by a third-party. PTE 793 at 2; Tr. 1871:9-15; 1876:20-1877:2. Ovitz's impending leap to MCA was the subject of a major article in *Newsweek* magazine, which hailed Ovitz on its cover as "The King of the Deal." DTE 80. Bronfman, however, grew disenchanted with Ovitz and orchestrated a breakdown in the negotiations. Bronfman 28:13-31:19.

Shortly after the MCA talks ended, Ovitz was shocked to learn that Meyer had been offered and accepted the position of Chairman at MCA/Universal. Ovitz was "crushed" (Tr. 1285:6-17) and "couldn't conceive of working without" Meyer at CAA. Ovitz 101:19-24. Contemporaneously, CAA's other founding partner, Bill Haber, indicated his intention to retire

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[6] CAA partner Ronald Meyer had run the day-to-day business operations of CAA. Ovitz 22:3-6; Tr. 2117:18-2118:10. By the time Ovitz left in 1995, CAA employed, in addition to the three partners, only 25 senior executives and 150 agents. Ovitz 25:8-19.

from CAA. Ovitz 165:12-16. Ovitz "was hurt" and "emotionally devastated by the situation" (Ovitz 104:7-9), and Eisner knew that Ovitz was "incredibly disturbed" by these developments. Tr. 1287:4-9. Ovitz called Eisner to tell him how unhappy he was about the adulation Meyer was receiving over the MCA deal at the Sun Valley conference both were attending. Eisner 129:13-130:22. Russell contemporaneously recorded Eisner's perception that Ovitz "was crazed at the conference." PTE 195; Tr. 2773:23-2775:5.

Eisner took this opportunity to intensify negotiations with Ovitz. A major premise of those negotiations was that Ovitz would be giving up an enormous amount by leaving CAA. Tr. 2337:4-2338:4.[7] According to Russell's notes, Goldman stated that CAA had $200 million in "booked commissions" of which Ovitz was owed his share. DTE 47; Tr. 2351:7-2352:2. In fact, there is no evidence in the record demonstrating what level of "booked commissions" CAA had when Ovitz negotiated to join Disney. The record shows, however, that after Eisner and Ovitz reached a handshake agreement in August 1995 for Ovitz to join Disney, Ovitz and the "Young Turks" negotiated a series of arrangements by which Ovitz preserved his 55% interest in CAA's booked commissions through an earn-out arrangement with the new CAA:

- The parties negotiated agreements for the sale and transfer of the assets of CAA, Inc. ("OldCo") to CAA, LLC ("NewCo"), primarily the commissions due on agency contracts. Tr. 1600:17-1606:13. These negotiations occurred while Ovitz separately negotiated his deal with Eisner and Russell, culminating in a series of CAA agreements (the "Separation Agreements"). PTE 203; 204; 206; 208; 255.

- Under the Separation Agreements, OldCo was entitled to, *inter alia*, 75% of the assigned "booked commissions," which were broadly defined to include commissions that would be due to OldCo during the next four years for "agreements and arrangements" which were contemplated by OldCo's clients and third parties as of

[7] Goldman told Russell that Ovitz made between $20-25 million at CAA (Tr. 2352:3-6; 2362:20-2363:4), but Russell made no effort to verify that information. Tr. 2755:2-11. According to Ovitz's Form W-2, he earned approximately $17 million from CAA in 1995. PTE 200.

October 1, 1995 but need not have been put into formal contracts at the time. PTE 206 at MTO0609-MTO0610; M. Dreyer 50:22-51:19; Olson 133:24-134:1.

- The agreements and arrangements were listed in a two-volume master list, which was never requested by, or produced to, Disney during negotiations of the OEA. *See* PTE 206 at MTO 611-12; M. Dreyer 74:10-75:7; Olson Tr. 133:24 – 134:1. Furthermore, this booked commissions list was not concrete and evolved while Ovitz was Disney's President and thereafter. *See, e.g.*, PTE 202 at MTO 582 (Schedule A to Assignment of Agency Contracts); PTE 208; 209.

- The Separation Agreements had a servicing fee arrangement under which OldCo would only receive booked commissions once NewCo had achieved an agreed "break-even" number. PTE 206 at MTO612-MTO613.

- The Separation Agreements also provided for payments by NewCo to OldCo pursuant to a lease of the CAA headquarters and a personal property lease for the contents therein. PTE 468. *See also* PTE 202; 256.

OldCo was paid $169,189,364 pursuant to the Separation Agreements through September 30, 1999, of which Ovitz received 55.56%. *See* PTE 205; 367. In 1996 alone, while at Disney, Ovitz's share of NewCo's payments to OldCo was $ 27,960,570. PTE 369. Disney was never informed of these contracts nor the amounts Ovitz received (and never asked). Eisner 393:16-22; M. Dreyer 74:10-75:7; Olson 133:24-134:1; Tr. 2902:17-2903:3; 6455:8-6457:15; 6492:10-6493:16; 7201:13-7208:1.

C. Eisner Strikes A Private Deal With Ovitz In Aspen

On Friday, August 11, 1995, while the two friends were vacationing with their families in Aspen, Eisner and Ovitz reached an oral agreement, *i.e.*, handshake, for Ovitz to join Disney as Eisner's number two. Ovitz 138:12-19; Tr. 2144:3-20; 4440:3-6. Ovitz, as part of the deal, had agreed to report to Eisner and be subject to Eisner's supervision. Russell 157:4-19; Eisner 214:19-215:3; Tr. 2145:12-18; 4825:14-18. Ovitz knew that he would only hold the title of "President" and not "COO" (unlike Wells). Eisner 239:17-18; Tr. 4825:19-22. Eisner told Ovitz that, as a result, Disney's legal and financial divisions would not report to him. Eisner 239:18-20. Eisner did not think that Ovitz was as yet qualified to assume those duties. Eisner 239:22-

240:17. Eisner also testified that he told Ovitz that Bollenbach, the CFO, was contractually entitled to only report to him. Tr. 4844:23-4847:1. Ovitz was also told prior to the "handshake" agreement that Eisner would continue to run "Animation," as Eisner had done when Frank Wells was COO. Tr. 4911:8-4913:7.

Eisner nonetheless harbored doubts about Ovitz's ability to function in a public company, both in terms of his ability to manage a large business and to comply with Disney's corporate policies and codes of conduct. PTE 24 ("By Labor Day I was wondering what it would cost in dollars and embarrassment to end our corporate partnership right away."); Bass 48:6-49:8. During a July 10, 1995, phone conversation between Russell and Ovitz, Russell told Ovitz of Eisner's doubts about whether Ovitz could adapt "operationally" and "financially" to Disney. PTE 194. *See also* Russell 158:2-160:24.[8] Russell shared these doubts with Eisner, but never communicated them to either the Compensation Committee or the Board. Tr. 2703:3-2703:11. Eisner also doubted Ovitz's ability to tell the truth. Bass 43:23-46:11. In a January 1995 memo, Eisner had questioned Ovitz's ethics, drawing an adverse comparison between Ovitz's business ethics and those of Eisner's previous boss, Barry Diller. PTE 266 at DD2991. *See also* Eisner 168:10-169:6 ("when you are dealing with an agent at times they do waiver from their word"). At Eisner's request, Bass spoke with Ovitz about business ethics in a public company. Bass 40:3-17. Bass, too, had communicated concerns to Eisner as early as May 1995 regarding Ovitz's suitability to serve as President. Bass 42:2-25.

Before Eisner and Ovitz shook hands on a deal, the Compensation Committee had not met to discuss Ovitz's hiring or the parameters of his pay package. *See* Tr. 7188:13-16; 7693:19-

[8] Russell recorded in his contemporaneously dated notes that it would be a "disaster if 6 months is found out a mistake." PTE 194 at DD1930.

23. Until shortly before the weekend of August 11th, Russell took no other Compensation Committee member into his confidence regarding the negotiations with Ovitz. Tr. 7167:5-13; 7663:21-7664:20. Watson, for example, did not become aware of the negotiations until he received a phone call from Russell on or about August 4, 1995. PTE 81 at DD1911; Tr. 2427:16-2428:3. Poitier learned of Ovitz's hiring on August 13, 1995, after the handshake deal had been struck, in a call from Russell to where Poitier was vacationing on a yacht near Sardinia. DTE 120 at WD7501; Tr. 7167:5-13.[9] This conversation, of which Russell produced no notes despite his regular practice of taking notes of meetings and calls (Tr. 2873:7-10), apparently lasted only 25 minutes (DTE 120 at WD7501) and included time spent on pleasantries regarding "the well being of his [Russell's] family, [and] the well being of my [Poitier's] own family." Tr. 7164:12-19.[10] No information was sent to Poitier prior to this conversation (Tr. 2790:11-14), and Poitier did not request any documents be sent to him after he was informed about the deal. Tr. 2790:15-21.

Russell testified that while he called Poitier, he entrusted Watson with the task of phoning Lozano, the fourth member of the Compensation Committee. Tr. 2792:1-4. Lozano testified that this call occurred about one week before the September 26th Compensation Committee meeting and possibly lasted only five to ten minutes. Tr. 7663:21-7664:20. Neither Russell nor Watson provided Poitier or Lozano with any analysis of comparable executive

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[9] At his deposition (where he repeatedly expressed an inability to recall events from seven years prior (*see, e.g.,* Poitier 91:2-11)), Poitier could not remember any discussion of Ovitz's pay package in connection with Ovitz becoming President. *Id.* at 89:11-91:23; 113:17-117:18; 130:11-13.

[10] Russell, who produced 140 pages of notes, not only did not produce any notes of his purported communications with Poitier, but also any notes of several other critical conversations and meetings involving Ovitz's pay, performance and termination. *See* Tr. 2534:3-2535:8; 2791:14-16; 2876:20-24.

contracts or any Black-Scholes valuation of Ovitz's proposed stock options. Tr. 7666:20-7668:13.[11]

D. Graef Crystal Did Not Advise The Compensation Committee Or The Old Board

Eisner unilaterally selected Graef Crystal, who had not advised any public company but Disney regarding executive compensation for many years (PTE 10; Crystal 19:4-14; Tr. 3422:17-24), to work with Russell, and later Watson, on aspects of Ovitz's prospective compensation. PTE 10; Crystal 39:15-41:16; Tr. 3258:10-3261:12; *but see* 7687:19-7688:2 (Lozano believed that Russell and/or Watson selected Crystal). Crystal, who had advised on the renegotiation of Eisner's contract in 1989, agreed to take on the assignment as a "favor" to Eisner. PTE 10; Tr. 3265:3-4. Crystal testified that the word "engagement" did not properly define his role. Crystal 1612:1-9. Moreover, Crystal's work with Russell and Watson effectively terminated after he sent Russell his modified letter on August 17, 1995 (Crystal 180:21-25), more than a month before the Compensation Committee and Board meetings where the OEA was purportedly first discussed. Crystal's input regarding Ovitz's prospective compensation package, which only commenced in August 1995, was intertwined with advice he was contemporaneously giving on negotiations for a new employment agreement for Eisner. PTE 198; 362.

In a memorandum prepared for Russell on August 12th (PTE 58) – then revised at Russell's urging on August 17th but backdated to August 12th (PTE 366; *see also* PTE 59; 218)

[11] Lozano admitted that he only had a "vague" understanding of Black-Scholes and that the formula was "much too complicated" for him to understand. Tr. 7668:7-13. Additionally, Gold testified that Poitier, Stern, Watson and Mitchell did not have the "financial background and skills in order to do a proper job of oversight of an executive team and strategic kinds of decisions." Tr. 3845:20-3847:3.

– Crystal wrote that if a deal were consummated with Ovitz, it would "appear ripe to consummate a deal with Michael Eisner himself." *Id.* at DD1879.[12] Crystal added that a deal with Ovitz at the contemplated levels would give "fighter cover" to a new compensation package for Eisner. PTE 218 at DD2266; PTE 366 at DD1879. In the same memorandum, which was also circulated to Watson and Eisner but not to anyone else on the Old Board, Crystal noted that there were no precedents for offering a non-CEO the amounts Eisner was contemplating paying Ovitz and that the deal would be subject to public criticism. PTE 366 at DD1878.

On August 14, 1995, Watson sent Russell a spreadsheet showing possible option payouts for both Ovitz *and Eisner*. PTE 346. Crystal testified that the document showed "that someone was thinking about how these two executives' pay packages would fit in." Crystal 163:9-18. Watson's calculations, which were not based on Black-Scholes — the industry gold standard for valuing options (Tr. 3392:13-3394:13) — yielded results showing that Ovitz and Eisner could ultimately reap option profits over a hundred million dollars. PTE 346. This spreadsheet, and other similar spreadsheets, were not distributed to the Compensation Committee or the Board. Russell 524:24-526:6; 549:18-550:3; Watson 194:25-195:3.[13]

Crystal's August 12th letter to Russell — later revised on August 17th and backdated to August 12th — and the meeting that he reportedly had with Russell and Watson on August 12th

[12] Russell claims that he had asked Crystal to revise his memorandum because Crystal had "misunderstood" the terms of the then-contemplated $50 million guarantee (Tr. 2458:3-2461:15), casting doubt on Crystal's knowledge of the proposed terms. Russell could not explain why either version of the memorandum contained Crystal's comments about Eisner's contract. Tr. 2809:3-2810:4.

[13] Watson's recollection changed at trial. He testified that he brought a copy of a spreadsheet with him to the meetings but he was unable to identify which, if any, of his spreadsheets he circulated or discussed. Tr. 8079:8-8080:3. Although Bowers recalled seeing a spreadsheet since she sat next to Watson at the Board meeting she did not recall that the spreadsheet was circulated at the meeting. Tr. 5959:21-5960:8. No such spreadsheet was appended to the minutes of the meeting, in contrast to other documents so attached. *See* PTE 39 at WD01186.

was notably late in the process, as Eisner and Ovitz had already reached their handshake agreement on August 11th and were admittedly toasting their arrangement on the evening of August 12th. Tr. 4440:3-22. Crystal's August 12th letter to Russell (which was forwarded to both Watson and Eisner (PTE 365)) contained material information withheld from Poitier and Lozano. For example, Crystal valued Ovitz's prospective contract at $117.9 million, utilizing a form of Black-Scholes methodology. PTE 365 at DD3335-DD3336. He criticized the pay package due to the fact that: "there really is no precedent for offering a non-CEO the sum of $25 million per year" (PTE 365 at DD3337), that "there is only one executive – Sandy Weill – who can provide anything in the way of fighter cover"(*id.*); and "there is no real comfort to be had from looking at . . . 'comparables.'" *Id.*

Crystal complained in a letter he sent to Russell and Watson on August 15, 1995 that "absolutely none of my advice concerning Mr. Ovitz was taken. In effect, I became a calculator for the Compensation Committee, and, I am afraid to say, a high-priced calculator at that." PTE 59 at DD1392. Neither Watson nor Russell circulated that letter to anyone else except Eisner. *See* Tr. 2790:15-21; 7707:8-7708:3. In the letter, Crystal drew a direct link between Ovitz's compensation and Eisner's proposed compensation, complaining that the rich Ovitz package compromised his "advice" to Eisner on ways in which Eisner should limit his package. PTE 59 at DD1392. Crystal questioned whether he could further assist Disney given the "deep philosophical divide between what I believe should have been done for Mr. Ovitz and what was done and between what I believe ought to be done for Mr. Eisner and what *seems likely will be done* . . . ." *Id.* (emphasis added).

Crystal's involvement with the Ovitz contract effectively ended after he sent Russell his backdated letter on August 17, 1995. Crystal 180:21-24. Russell wanted Crystal's letter to paper

the record.[14] Crystal did not write, nor was he asked to write, any other analysis of Ovitz's pay.[15] Importantly, after Crystal's last writing on the contract, the material terms changed significantly, including elimination of the $50 million option guarantee as well as bonus guarantee provisions, elimination of the out-of the money feature for the final 2 million tranche of stock options (contingent on contract renewal) and a significant expansion of Ovitz's rights and benefits in the event of an NFT (including extension of the exercisabilty of the Ovitz options in the event of an NFT for up to seven years from the inception date of the OEA). PTE 7; 39 at WD1186-WD1188; 108; 109; 220. Although Crystal and Russell both suggested in their testimony that Crystal was "around" to offer oral advice regarding negotiation of Ovitz's contract in September 1995 (Crystal 162:1-9; Tr. 2518:18-24; 2910:14-19), there is no contemporaneous evidence of further input from Crystal, and no member of the Board or Compensation Committee ever asked to speak with Crystal. *Id.* Crystal did not "sign off" on Ovitz's pay package at all and never attended any Compensation Committee or Board meeting where the OEA was discussed.[16] PTE 370; Russell 515:25-516:3; Tr. 2518:9-24; 2960:19-21; 5843:10-12.

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[14] Russell attached the "revised letter" — now acceptable to him — to a memorandum he penned to Eisner on August 18, 1995, to purportedly "memorialize" the Ovitz negotiations. PTE 218. The memo, which cites conversations with Poitier and Lozano purportedly pre-dating August 14, 1995, was not reviewed or sent to either Poitier or Lozano. *Id.* at DD2261; Tr. 2805:8-19.

[15] In contrast, Crystal wrote a fairness opinion concerning Eisner's new compensation package (PTE 362), which was explicitly referenced in the minutes of the September 30, 1996 Board meeting. PTE 334 at WD6406.

[16] In a *Los Angeles Times* article dated November 15, 1995, entitled *Ovitz's Disney Pay Includes Stock Plan That Could Total $110 Million*, Crystal is quoted as 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." PTE 351. Crystal's critical assessment of Ovitz's pay package cannot be rationally squared with any purported "sign-off" shortly before.

E. Eisner Closes the Deal With Ovitz Over Opposition From Bollenbach and Litvack

On or about August 12, 1995, Litvack learned from Eisner that Ovitz was joining Disney. Tr. 6040:20-6041:15. Litvack told Eisner that hiring Ovitz was "not a very good idea." Tr. 5270:12-17. Bollenbach, whom Eisner had also just informed of Ovitz's hiring, expressed to Litvack his view that the hiring was a "mistake" and a "bad idea." Litvack 125:7-24; Tr. 5271:17-21.

On August 13, 1995, a meeting took place at Eisner's house in Los Angeles, attended by Litvack, Russell, Bollenbach, Ovitz and Eisner. Tr. 2453:19-2454:10. No other defendant participated. Tr. 2811:13-2813:6. Before Ovitz arrived, Bollenbach expressed to the others his view that hiring Ovitz would "destroy" Disney's management team, and that the hiring was a "mistake" because Ovitz had no experience running a large public company. Bollenbach 128:8-19 (confirming quotes in PTE 8); Litvack 125:7-24; Tr. 5271:17-21; 5285:9-11. After Ovitz's arrival, both Bollenbach and Litvack informed him that they intended to continue reporting directly to Eisner and would not report to Ovitz. Tr. 6048:7-6049:13.

After Litvack and Bollenbach expressed their position, Eisner and Ovitz went upstairs for a private discussion. Ovitz 148:10-13; Tr. 2151:9-12; 4847:9-13. Eisner told Ovitz: "Look, that's the way it is. If you don't want to do the deal, just tell me so right now." Eisner 248:13-15. Ovitz responded: "Okay, I'll do the deal." Eisner 248:17; *see also* Ovitz 149:13-16; Tr. 1123:9-1124:17.[17] Thereafter, in the presence of all attendees, Ovitz expressed his agreement that Litvack and Bollenbach would report directly to Eisner and not him. Tr. 2813:10-13;

[17] Ovitz testified that Eisner assured him during this private discussion that "we'll take care of this over the next few months." Tr. 1124:19-20. Eisner, at trial, denied giving any such assurances to Ovitz. Tr. 4836:3-18.

4849:14-17; 5274:18-5275:16; 6048:7-6051:3. That same evening, Ovitz called his counsel, Olson, regarding the day's events. Ovitz 155:8-20; Ovitz 653:19-21 (Olson was "aware of what was going on . . . from the day I got there"). The meeting planted serious seeds of doubt and discontent in Ovitz's mind:

> ...I don't think [Eisner] wanted me to leave but I think he made it clear that he wasn't going to back what I was going to do. And if I projected myself forward I knew it was going to be an uphill fight and that was the beginning for me of the uphill fight. It was a difficult proposition.

Ovitz 533:13-19.

On August 14, 1995, Ovitz and Eisner signed an agreement on Eisner's stationery, memorializing the terms of Ovitz's hiring as President, effective October 1, 1995 ("OLA"). PTE 33. The OLA plainly stated it was "[s]ubject to the formal approval of the Company's Board of Directors and its Compensation Committee . . ." *Id.* at DD1768. Eisner and Ovitz added a new clause to the draft giving Ovitz the same perquisites as Eisner. *Compare* PTE 143 *with* PTE 33. No Board member other than Eisner, Litvack and Russell ever saw the OLA (or was even aware of its existence) before Eisner and Ovitz signed it. Russell 397:24-398:11; Tr. 3867:20-3868:7; 5823:21-5824:4; 6946:24-6947:5; 7692:3-12. Crystal could not recall seeing the OLA (Tr. 3570:24-3572:23) and further testified that it did not reflect what he understood to be the terms of the deal at that time. *Id.*

F. The Old Board Remains Dormant

On August 14th Disney publicly trumpeted the hiring of Ovitz in a press release. PTE 3. The press release stated that Eisner and the other Board members had "great confidence" in Ovitz (PTE 3 at DD2012), but at that point neither the Old Board nor the Compensation Committee had convened to discuss Ovitz's qualifications or the terms of his employment. *See, e.g.,* Tr. 3867:13-16; 5823:17-20; 7679:21-24. The press release did not disclose that Ovitz's

hiring remained subject to approval by the Compensation Committee and the Board. PTE 3. Nor did the press release disclose that Ovitz's employment agreement was still being negotiated and that several of its key terms were in the process of being revised. *Id.* Although the press release stated that Litvack and Bollenbach would continue to report to Eisner, the press release was silent on the fact that they would not report to Ovitz, which represented a material change from the official reporting relationships when Frank Wells held the post. *Id.* Additionally, while the press release reflected Eisner's glowing endorsement of the hiring of his friend, it made no mention of the fact that Litvack and Bollenbach had expressed their opposition to the hiring of Ovitz. *Id.* Even Roy Disney's endorsement quoted in the press release was drafted for him (*id.* at DD2013) and conflicted with the truer sentiments reflected in Roy Disney's statement in a newsletter circulated to Disney's animators, shortly after the press release, stating that the animators would continue to report directly through him and Peter Schneider to Eisner. PTE 434; *see* Ovitz 367:8-12 ("You could have blown me over with a feather when someone put this on my desk").

The press release also stated that Ovitz would "be nominated to the Board of Directors." PTE 3 at DD2012. The Nominating Committee charter gave it "important" (Tr. 5650:7-9) duties to "solicit recommendations for candidates for the Board of Directors; develop and review the background information for candidates; make recommendations to the Board regarding such candidate; and review and make recommendations to the Board for candidates for directors proposed by the shareholders." DTE 182 at 13. *See also* Tr. 8035:3-22. The Nominating Committee, however, never met to nominate Ovitz to the Board, either before or after Disney issued the press release. Tr. 5656:7-10; 6951:2-21; 8036:17-21.

G. Ovitz's Substantial Work For Disney Prior To The Effective Date Of His Contract

Ovitz began operating as Disney's President almost immediately after issuance of the press release on August 14, 1995. On or about August 15th, Roy Disney's newsletter admittedly crossed Ovitz's "desk." Ovitz 367:8-12. In fact, even prior to that date, Ovitz began receiving confidential, internal Disney documents. PTE 545 (7/30/95); 622 (9/5/95); 742 (9/12/95); DTE 190 (8/21/95); 192 (9/8/95); 193 (9/14/95); 224 (9/7/95). Ovitz indeed started working on the Disney grounds before October 1, 1995. Ovitz 162:21-163:3. Beginning in August 1995, Ovitz scheduled and thereafter attended meetings with high-level outsiders concerning Disney's business, including NFL Commissioner Paul Tagliabue. PTE 621 at WD13212 (Ovitz memorandum of 9/8/95 sent on Disney letterhead); 631 (Ovitz memorandum of 9/7/95 sent on Disney letterhead); DTE 189. Additionally, Ovitz began to submit requests for reimbursement to Disney for business expenses incurred in September 1995. *See, e.g.,* DTE 59 at WD6601. At the same time, work began on the renovation of an office space for Ovitz to meet his specifications. PTE 476; DTE 110. Confirming that Ovitz was already acting as President and that their approval was a mere formality, on August 28, 1995, the Old Board received an invitation to attend a lunch honoring Ovitz to be held following the upcoming September 26, 1995 Old Board meeting. PTE 5; 216. Old Board members correctly understood that Ovitz's hiring was already a "done deal." Lozano 124:20-125:4, 140:10-22; Litvack 126:20-127:8; Stern 84:4-8; Tr. 2807:5-23; 7693:19-7694:6; 8198:5-21.

H. The Compensation Committee Rubber-Stamps Ovitz's Pay Package

The Compensation Committee waited until its regularly scheduled meeting on September 26, 1995, to "consider," among many other things, Ovitz's employment agreement. Tr. 7188:13-16; 7693:19-23. Before that meeting, Russell, at Watson's request, wrote a memorandum

discussing the reasons why he deserved to be paid for his work on the Ovitz matter. PTE 78. Russell kept no time records (Russell 18:14-19:6; Tr. 2836:3-8) and was not asked to produce any. Watson 42:4-6. Eisner received a copy of Russell's request and wrote at the top of the page in a note dated 9/22: "Ray - this is all true plus!!!! What should we pay?" PTE 78. At the bottom, Eisner wrote in a note dated 9/25 (*i.e.*, one day *before* the scheduled Compensation Committee and Board meetings): "Sandy: as approved by the Board, 250,000 K." *Id.* Russell's memorandum was not circulated to either Poitier or Lozano. Tr. 2851:6-9.

According to the minutes,[18] the only contemporaneous record defendants produced, the Compensation Committee meeting commenced at 9:00 a.m. Many topics were discussed at the hour-long meeting, including numerous other compensation packages for Disney employees, 121 stock option grants, Iger's Capital City/ABC employment agreement, and Russell's request to be reimbursed $250,000, all of which took time to review. PTE 370; *see also* Litvack 366:3-382:5; Tr. 2838:8-2853:13.[19] In addition to these issues, the Committee also supposedly considered all thirteen items on a summary of the OEA attached to the minutes. PTE 370 at WD1186-WD1188.

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[18] According to Litvack, Marsha Reed, the Corporate Secretary responsible for all of the minutes during the relevant time period, produced satisfactory work product. Additionally, the minutes were subsequently reviewed by the legal department and submitted to all directors in attendance for their review and comment. Any comments or corrections were made prior to the approval of the minutes at the next meeting. Tr. 6288:11-6289:19.

[19] Neither Watson, Lozano, Poitier, nor anyone else at the meeting questioned why Russell had been negotiating with Ovitz in a role outside the scope of his authority provided by the Compensation Committee charter. PTE 465; Tr. 6566:7-6568:7; 7686:21-7687:1. Eisner attended the portion of the meeting devoted to Russell and favorably commented on his performance. Tr. 2849:14-17. No member of the Committee asked Eisner to recuse himself from the conversation. Tr. 2853:4-13. The Committee did not ask for Russell's time records (Tr. 2851:3-5; 7209:14-7210:1) or raise a question about his potential conflict of interest as Eisner's personal attorney. Tr. 6634:17-6636:17.

1. Crystal Did Not Attend Or Participate

Crystal did not attend the meeting, and no one requested his presence. PTE 370; Russell 515:25-516:3; Tr. 2518:9-24. Crystal did not provide a written report to the Compensation Committee, nor was Crystal mentioned in the minutes. PTE 370; Russell 516:4-7; Tr. 7707:21-7708:3.[20] The letters Crystal had written to Russell about Ovitz and Eisner's pay packages were neither distributed nor discussed. *See, e.g.,* Tr. 2790:11-14; 7707:21-7708:3. No other compensation consultant of any type attended or provided materials to the members of the Compensation Committee at its meeting.

2. No Consideration Of Comparables

A review of comparable pay is a basic metric in determining executive compensation. Tr. 776:4-13; 3384:18-3386:14. Nonetheless, the Compensation Committee did not receive a comparables analysis (Tr. 7181:21-7182:1; 7701:4-6), despite the fact that such information was available. Tr. 3435:3-15. *See generally* PTE 426 ("Murphy Report"). If it had been obtained, the Compensation Committee would have learned that, as of 1995, the total value of Ovitz's pay package was far higher than that received "by any Non-CEO President in the S&P 500." *Id.* at 8; *see also* PTE 365 at DD3337 ("there really is no precedent for offering a non-CEO the sum of $25 million per year . . . there is only one executive – Sandy Weill – who can provide anything in the way of fighter cover."). Ovitz's 1995 grant of stock options was more than double the present value of options granted to *any* other executive (including CEO) during any year prior to 1996, thus constituting the largest grant of options in the history of United States business at that time. *Id.* at 10; Tr. 781:24-782:4; 2914:1-9. Moreover, no comfort could be drawn from the

[20] In contrast, Crystal provided a formal opinion letter to both the Board and Compensation Committee on Eisner's 1996 contract (PTE 362), which was explicitly mentioned in the September 30, 1996 Board minutes.

reported size of the package Ovitz had unsuccessfully attempted to negotiate with MCA because that deal was not comparable.[21]

3. No Drafts

None of the Compensation Committee members requested or were provided with a copy of any draft of the OEA (Russell 542:11-22; Tr. 2905:12-2906:4; 7212:15-18) although drafts existed at the time and had been sent to Russell. PTE 108; 109; Russell 542:5-22; Litvack 361:18-362:10. Ovitz's qualifications were not discussed. Tr. 7697:12-15.

4. No Discussion of CAA Arrangements

There was no informed discussion of the level of compensation Ovitz had been receiving at CAA (Tr. 2755:2-2756:1; 7697:16-7698:5; 8093:14-8094:7; 8095:15-18), or of his earn-out, real and personal property lease agreements with NewCo and the fact that OldCo kept a security interest in NewCo. Tr. 2761:9-15; 7206:22-7207:20; 7698:24-7699:2; 8096:6-10.[22]

5. No Serious Discussions

None of the participants at the meeting remembered any questions they may have asked. Russell 520:13-15; Poitier 87:22-88:15. According to the minutes, Litvack answered questions

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[21] Unlike the OEA, the proposed MCA deal included the hiring of Ovitz, Meyer and Haber (Bronfman 14:13-17), as well as the purchase (or other disposition) of the consulting portion of CAA. PTE 793. Additionally, the MCA deal required Ovitz, Meyer and Haber to sell their interests in the remaining portion of CAA to a third party and use the proceeds of that sale, plus the equity in the CAA building, to purchase MCA stock. *Id.*

[22] Defendants took the position in their post-trial evidentiary submission that Ovitz's CAA payouts were "not relevant." Letter to Chancellor Chandler from Individual Defendants, Feb. 4, 2005 at p. 13 ("The amount of money that Mr. Ovitz ultimately received as a payout from his interest in CAA . . . was not considered by Disney's Compensation Committee in negotiating Mr. Ovitz's Compensation.") During his one year at Disney, Ovitz received $27,960,570 in payouts pursuant to the Separation Agreements with NewCo. PTE 369. Ovitz eventually received over $90 million pursuant to the Separation Agreements through the third quarter of 1999, which was within the five-year term of the OEA. PTE 367. Defendants' position cannot be squared with their claim that Ovitz deserved a rich employment package to compensate him for "giving up" his CAA earnings.

but he was "100% sure" that he had no role in the contract negotiations, indicating that he did not, and could not, have said anything of substance. Litvack 307:22-308:3. Litvack responded to questions about his involvement in the negotiations that: "Michael Eisner deliberately kept me out of this. I stayed out of it. I got sent drafts, I may have looked at them. I knew what the deal was. I was negotiating nothing." Litvack 384:24-385:4. After draft minutes of the meeting were circulated, Russell instructed Reed to insert in the minutes that he had briefed the Compensation Committee "in great detail." Santaniello 72:13-73:15; Tr. 2857:19-2858:12.

6. NFT Provisions Ignored

The evidence does not substantiate that there was any discussion of the grounds for which Ovitz could be terminated "for cause." Exhibit C attached to the minutes which was a purported summary of the terms of the OEA provided to members of the Committee, discussed the concept of a "wrongful termination" but did not indicate what standard would be employed in determining whether a termination for cause was warranted. PTE 370 at WD1186-WD1188. This omission occurred despite the fact that the "gross negligence" and "malfeasance" standards had already been incorporated in OEA drafts that had been circulated among the lawyers, including Russell. PTE 112. None of the members of the Committee could independently remember discussion of this topic. Russell 524:13-22; Tr. 2903:8-16; 7198:14-20; 7701:23-7702:12; 7716:22-7717:3. The Committee did not receive or review a Black-Scholes valuation which described the magnitude of possible payouts that Ovitz would receive in the event of an NFT. Russell 524:6-12; Tr. 6630:17-22; 7167:23-7168:1; 7668:3-13.

7. No Final Action Taken

The Compensation Committee did not give final approval of the terms of the OEA, which was not yet complete. As Exhibit C to the minutes recites: "Action to be taken: Discussion only. Options and agreement *will be approved when finalized* by Unanimous Written Consent

expected to be effective October 2, 1995." PTE 370 at WD1188 (emphasis added). The Committee adopted a resolution giving Eisner authority to complete negotiations within the parameters set forth in the summary of contract terms attached to the minutes but did nothing to ensure that Eisner complied. Neither Watson, Poitier, nor Lozano reviewed the OEA before it was eventually signed in December 1995. Lozano 100:4-18; Tr. 8001:12-20.

8. No Consideration Of Side Deals

The Compensation Committee did not discuss nor approve many other benefits Eisner agreed to give Ovitz. *See, e.g.*, Tr. 2918:10-19. With the exception of Russell, the Compensation Committee did not know that Eisner had already agreed to pay Ovitz $187,000 in excess of the appraised value of Ovitz's private jet. DTE 126; Tr. 2508:23-2510:4; 2915:1-2917:20. Similarly, the Compensation Committee was not aware of, nor did it approve, Eisner's decisions to cause Disney to purchase Ovitz's BMW car from CAA at its acquisition cost instead of its depreciated market value (*see* PTE 808; DTE 245; Tr. 6325:7-6337:21) or buy Ovitz's CAA computers at their "replacement value" instead of their lower book value. PTE 154. The Compensation Committee similarly failed to consider or approve the specific perquisites Eisner, through Russell, agreed to give Ovitz (PTE 146; Tr. 2860:13-2861:2), even though the general concept of "perquisites" were generally referenced in the summary of contract terms attached to the minutes. PTE 370 at WD1187. The Committee did not discuss the side-deal reflected in a memorandum Russell sent to Ovitz to the effect that Ovitz's annual bonus would be approximately $7.5 million in Ovitz's first two years (PTE 226)[23], even though Exhibit C (and

[23] The document bears an "MTO" Bates number designation, meaning that it was produced by Munger Tolles.

all the drafts) specified that Ovitz's annual bonus was to be fully discretionary. PTE 370 at WD1186.

I. The Board Rubber-Stamps Ovitz's "Hiring"

As set forth in the only existing contemporaneous document defendants produced, the official Board minutes, the Old Board met at 10:00 a.m. on September 26th, immediately following the Compensation Committee meeting. PTE 29. Crystal did not attend. *Id.*; Tr. 2960:19-21; 5704:23-5705:6; 5843:10-12; 7728:14-16. The Old Board did not receive any written materials about the Ovitz agreement, including Crystal's August letters, nor drafts of the OEA, or any survey data or comparables of executive pay either before, during or after the meeting. Watson 210:16-211:1; Tr. 2960:12-18; 3886:6-19; 5443:3-5; 5843:4-9; 7212:15-18. The Old Board was not presented with a spreadsheet, table, list of estimates, or a Black-Scholes valuation which described the magnitude of possible payouts that Ovitz would receive in the event of an NFT. Tr. 3885:10-19; 7716:2-21. The Old Board did not discuss the definition of "malfeasance" or "gross negligence" — the terms by which Ovitz could be dismissed for cause. Tr. 5456:10-13; 7716:22-7717:3. The financial impact of an NFT payout on Disney was not discussed, and no defendant requested information on the issue. Russell 556:22-557:2; Eisner 365:24-366:8.

The Old Board reportedly discussed ten topics in addition to Ovitz. PTE 29.[24] The Old Board was not told about, nor did it consider, the terms of Ovitz's earn-out agreement with CAA or obtain objective information about Ovitz's earnings at CAA or continuing receipts. Tr.

[24] Bollenbach testified that Ovitz's compensation package and hiring were not discussed whatsoever at the regular Board meeting, and this discussion only took place, if at all, in Executive Session (which he did not attend). Tr. 5443:6-24. Bowers concurred in that version of events. Tr. 5920:11-16. Wilson did not recall Ovitz's hiring being discussed either in the regular portion of the meeting or Executive Session. Tr. 6953:10-13.

3888:18-3889:4; 5681:1-14. Eisner said nothing about his deepening doubts about Ovitz's veracity and ability to serve as President (Tr. 4016:23-4017:3), and neither Litvack, Russell nor Bollenbach discussed their concerns about hiring Ovitz. Tr. 4017:12-20.

The Old Board did not approve the OEA at the meeting or at *any* time. PTE 29; Tr. 2960:22-2961:1. The Old Board adopted a resolution electing Ovitz as President as of October 1995, to serve at the "pleasure of the Board." PTE 29 at WD1196. Lozano interpreted the language to mean that "[Ovitz]e could be terminated as president by the board of directors and no one else." Lozano 154:5-23.

The Old Board was also not informed that despite being named President and compensated at an extremely high level, Ovitz would not be receiving the title of COO that had been conferred on Wells. Tr. 5701:4-15; 5844:3-12. Nor was the Old Board informed that the bylaws in effect at that time, specifically mandated that the President also be the COO. PTE 497 at Art. IV, Section 4; Tr. 5701:4-11; 5844:3-12; 7216:3-18; 8126:20-8127:9.

No written materials were distributed at, or prior to, the meeting regarding Ovitz's qualifications. Tr. 5443:3-5; 7212:15-18. The Old Board did not request a background check on Ovitz, examine his references or scrutinize his track record. R. Disney 66:7-69:20; Tr. 4041:8-14; 5822:18-5823:16; 5964:22-5965:1; 6944:14-17.[25] Among other things, the directors were not presented with information regarding a consent decree that Ovitz had signed with the U.S. Department of Labor and that had been publicly reported. PTE 315 at DD2328; Tr. 2968:7-11;

[25] Ovitz's selection radically departed from how Watson, Disney's then-Chairman, led the process of hiring Eisner and Wells in 1984. Both Eisner and Wells were interviewed by most of the members of the Board (Tr. 3645:24-3646:4; 8021:4-8); other candidates were considered (Tr. 3648:17-3649:4; 4123:13-16; 7810:6-12); the whole Board was involved in the search (Tr. 8021:9-12); and meetings were held with members of the Board so that they could get to know both Wells and Eisner better before voting on them. (Tr. 4122:24-4123:12; 4124:5-14).

5699:6-10; 7215:5-9. No critical attention was given to Ovitz's actual level of performance in prior much-vaunted transactions cited as support for Ovitz's special qualities, or to the fact that Ovitz's transaction with MCA had aborted on Bronfman's initiative. PTE 315 at DD2328; Tr. 2966:10-13; 7214:10-7215:4; 7699:3-10. Instead, many directors testified that they considered Ovitz to be a suitable choice as Disney's President because of his "most powerful man in Hollywood" reputation (Tr. 5279:11-5820:25; 7630:3-7), a title Ovitz characterized in his testimony as "one of the silliest things" he had ever heard. Tr. 1462:22-1463:2. The Board also did not discuss the fact that Ovitz had never been a "number two" of a company or that he had never worked in a public company.

The minutes reference that the Old Board met in "Executive Session" during the meeting. PTE 29 at WD1195. No written record exists that even hints Ovitz was discussed during that session, as the minutes reference only a discussion of the $250,000 payment to Russell — a discussion again attended by Eisner. *Id.* Litvack and Bollenbach, both of whom harbored concerns about Ovitz, were excluded from the session. *Id.*[26]

J. The Old Board Extends The Post-Termination Exercise Period Of Ovitz's Options Without A Meeting

On October 16, 1995, the Compensation Committee convened a special meeting. PTE 41. Crystal did not attend the meeting, and no Crystal documents were circulated. Russell 571:8-13; Schultz 88:25-89:3; Tr. 2972:11-17. There was no discussion of Ovitz's qualifications nor of Eisner's mounting problems with him. PTE 41. Watson, who had been copied on an October 10, 1995 memorandum Eisner sent to Ovitz instructing him on business priorities and

[26] There was no reason for Litvack not to attend. Litvack knew since the August 13th meeting at Eisner's house, that he would not be reporting to Ovitz. Litvack was also present at the entire Compensation Committee meeting an hour before.

ethics, said nothing about Ovitz's qualifications. PTE 267. The minutes do not show any discussion of the NFT clauses approving the possible payouts to Ovitz if an NFT occurred. As before, only a summary of contract terms was provided to the Committee. The summary did not define "gross negligence" or "malfeasance." PTE 41 at WD143; Tr. 2977:20-2978:8.[27]

During the meeting, the Committee adopted a resolution approving an amendment to Disney's 1990 Stock Option Plan to permit an extension of the exercise period of Ovitz's options past the existing 24-month limit following termination. PTE 41 at WD120-WD121. The amendment, which gave Ovitz until September 30, 2002, to exercise his options post-termination (a potential six-year period if terminated in 1996) — was unprecedented in U.S. executive contracts at the time. Murphy Report at 19. The Committee did not discuss this fact at the meeting, nor did it discuss the increased value such an extension would confer on Ovitz. Russell 574:17-21; Tr. 6655:11-17. The obvious disincentive the extension would give Ovitz to remain at Disney was also not discussed. Tr. 7231:6-10; 7736:16-21.

The Committee adopted a resolution at the meeting requiring both the Board and Disney's shareholders to approve the option extension by amending the 1990 Stock Option Plan. PTE 41 at WD120. The Rules to the Stock Option Plan, which were attached to the minutes and also approved by the Committee, plainly vested the Committee with the sole authority to determine the terms of a participant's termination. *Id.* at WD125. The Rules provided:

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

[27] Litvack did not even know whether a final version of the contract existed at the time of the meeting (Litvack 469:20-470:4), and Lozano did not even know who was negotiating with Ovitz on behalf of Disney. Tr. 7736:22-7737:4.

PTE 41 at WD135. The Compensation Committee, at no time during this meeting or ever, discussed whether the OEA was intended to supersede the Plan Rules.

On October 26, 1995, Russell sent a memorandum to the Old Board soliciting its approval of the 1990 Plan amendments by written consent. PTE 30 at DD2183; Russell 616:3-617:5; Tr. 2548:8-20. Among other things, the memorandum stated that the amendment included "a provision for extended exercisability under limited circumstances." PTE 30 at DD2184. The memorandum did not specify under what "limited circumstances" Ovitz could take advantage of the extended exercise period. PTE 30. Thus, 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. The Board did not consider the value of any such extension. Tr. 3005:12-16. No director asked to convene a meeting or asked any questions. Russell 620:12-621:10. The memorandum did not say that Ovitz's OEA would modify, in any way, the Committee's sole authority to determine the terms of Ovitz's termination pursuant to the Plan Rules. PTE 30.[28]

On November 1, 1995, each Old Board member executed a written consent. PTE 265. On December 19th , the elements of Ovitz's compensation were disclosed in a Disney SEC filing. PTE 821. In an article dated November 15, 1995, which Disney produced from its files, Crystal was quoted as valuing the options at $110 million and commented that such value was part of "*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." PTE 351 (emphasis added); Crystal 204:18-205:7. The Old Board did nothing in response.

[28] Similarly, no explanatory language was included in the Disney Proxy soliciting shareholder approval of the 1990 Plan Amendments and Rules. DTE 142 at WD1071-WD1076. Disney's shareholders approved the amendments, and the Rules were effective when Ovitz left Disney.

The OEA was not finalized and signed until mid- to late December 1995. However, within five weeks of Ovitz's hiring, approximately three months before the OEA was signed, Eisner had already "given up on Ovitz." Bass 88:15-22. Eisner recognized that there was a "serious problem" with Ovitz. *Id.* He "was having no success in dealing" with Ovitz, and "Ovitz was making no improvement." *Id.* Instead of firing him immediately, as Bass requested, Eisner insisted on keeping him for twelve months because he was concerned about Ovitz's mental stability and said he feared Ovitz might commit suicide. Bass 89:9-17. At no time did Eisner bring these facts to the Old Board's attention; instead, he allowed the OEA negotiations and signing to go forward. Indeed, over a month later, on or about December 19, 1995, Ovitz executed the final OEA that was backdated to be effective as of October 1, 1995. PTE 353.

K. The OEA

The OEA had a five-year term commencing on October 1, 1995 and, among other things, required Ovitz to devote his time and best efforts exclusively to Disney. PTE 7 at Sections 1, 2. The OEA provided Ovitz with, *inter alia*, compensation consisting of: (1) an annual salary set at $1 million; (2) a discretionary bonus at the end of each full year of service as Disney's President up to $10 million; and (3) a series of "A" options that allowed Ovitz to purchase 3 million shares of Disney common stock at an exercise price equal to their market price as of October 16, 1995. *Id.* at Sections 3, 4, 5(a), 5(b).[29]

The NFT provisions of the OEA provided Ovitz with a pay package that would be worth at least as much, if not more, than if he stayed with Disney for the full term of the OEA with

[29] The OEA also provided that if Ovitz completed the entire five-year term and then entered into a new contract with Disney, he could receive a second set of two million stock options. PTE 7 at Section 5(f). These options are irrelevant, as Ovitz knew even before he executed the OEA that he could not complete a five-year term. Ovitz 151:17-21.

respect to each of the three basic elements of his compensation. As plaintiffs' executive compensation expert – Professor Kevin J. Murphy – opined, "there were virtually no incentives for Mr. Ovitz to stay at Disney. . . . [O]nce he developed a preference for leaving (or once he concluded there was little chance of having his contract renewed), the value of the NFT payment significantly exceeded the present value of remaining employed." Murphy Report at 23. Not surprisingly, the severance provisions garnered Ovitz's particular attention after the August 13th meeting at Eisner's house. Tr. 8092:12-8093:8. Ovitz specifically insisted that Disney completely revise the termination provisions. PTE 126 at WD190A. Much new language was not approved by the Compensation Committee or the Board, but found its way into the OEA. Tr. 2986:13-19.

II. OVITZ'S DEPARTURE

A. Disney Monitored Ovitz

The doubts Russell, Eisner, Bass, Litvack and Bollenbach harbored about Ovitz came to fruition as Ovitz's tenure at Disney was troubled from the beginning. By early October 1995, Ovitz had already clashed with Eisner over fundamental aspects of Disney's business and his role as President. Prior to his "official" hiring date of October 1, 1995, Ovitz attempted to lure a professional football team to Los Angeles for Disney. PTE 631; Bass 79:24-81:3; Bollenbach 95:13-97:20. Eisner told Ovitz that Disney could not do the deal because it was a public company. *See* PTE 24 at DD2449; Eisner 330:3-331:2. Before Labor Day 1995, Eisner began "wondering what it would cost in dollars and embarrassment to end [their] corporate partnership right away." PTE 24 at DD2449. Eisner told Bass in early November 1995 that he planned to fire Ovitz within twelve months. Bass 88:23-90:16.

As a result of his concerns, on October 10, 1995, Eisner wrote a long, detailed memorandum to Ovitz emphasizing what was expected of Disney's President. PTE 267 at

DD2287-DD2291. The memorandum discusses in depth Eisner's belief that Disney had to be maintained, improved, and grown from within. *Id.* at DD2288-DD2290. According to Eisner, acquisitions should "almost never" be done. *Id.* at DD2290. The memorandum urged Ovitz to "act like Caesar's wife" and also warned him that "[t]oo many effective corporate managers 'go down' over stupid, self-serving actions, executives who believe that they are above the rules or have outside conflict of interests." *Id.* at DD2288. Eisner sent a copy of the October 10th memorandum with an attached handwritten note to Watson by facsimile on October 16, 1995, the same day the Compensation Committee met to discuss Ovitz's stock option grant. *Id.* at DD2286.

Eisner also asked Bollenbach to meet with Ovitz to learn about the financial side of Disney's business. Bollenbach informed Eisner that the meetings never occurred. PTE 8 at DD2123. Bollenbach thought that Ovitz just "did not care" about the business. *Id.; see also* Bollenbach 176:13-178:9.

Eisner maintained at least one file on Ovitz designating its contents with the notation "MSO" or "OM." *See* Tr. 4553:1-16; 8280:3-8281:7; Affidavit of Edward Nowak, 1/18/05, ¶ 3. Such a practice is routinely advised where a cause dismissal is deemed likely. Tr. 8343:13-16; 8519:24-8520:5. Absent a few of the documents that he shared with selected directors, Eisner did not show many of the most critical documents concerning Ovitz's transgressions and lapses to either Litvack or other members of the New Board. *See, e.g.*, Murphy 91:4-20; O'Donovan 182:10-20; Tr. 3814:23-3815:2; 3818:22-3819:11; 5025:17-5026:11; 5730:23-5733:2; 6143:3-9; 6378:18-22; 7575:1-7576:5.

Eisner engaged in unusual methods to monitor Ovitz. Litvack and Bollenbach were assigned to oversee the purchase of Ovitz's CAA computers, seemingly trivial matters for the

chief counsel and CFO, respectively, of a major entertainment conglomerate. *See* PTE 154. Eisner engaged Russell, not Disney's internal accounting department, to monitor Ovitz's expense-related issues. PTE 318; 378; DTE 151. Eisner again turned to Russell in early 1996 to instruct Ovitz on gift-giving, gift-receiving and other issues which could possibly be violations of Company policy. PTE 17; 378; DTE 151 Russell acknowledged that by policing Ovitz's expenses, he was acting outside the scope of his authority conferred by the Compensation Committee charter. PTE 465; Tr. 3015:15-3016:12. Litvack was completely unaware that Eisner had recruited Russell for these duties. Tr. 6361:21-6362:8.

B. Eisner Begins The Process Of "Firing" Ovitz

Ovitz's performance had deteriorated to the point that by at least September 21, 1996, Eisner and Ovitz had begun to directly discuss Ovitz's departure from the Company. PTE 18; Ovitz 549:16-551:7; Tr. 4354:9-4355:6. A few days later, Litvack entered Ovitz's office, at Eisner's request, and told Ovitz that he should leave the Company. Litvack 669:20-670:19; Ovitz 537:14-538:25; Tr. 4731:13-4732:1. Ovitz purportedly refused, telling Litvack: "Sandy, you are going to have to pull me out of here. I'm not leaving." Ovitz 537:24-25. Litvack reported the conversation to Eisner, who then instructed Litvack to return to Ovitz's office and specifically say that Eisner wanted Ovitz to leave. Tr. 6562:4-16. Litvack again spoke to Ovitz and relayed Eisner's message. *Id.* Ovitz told Litvack that if Eisner wanted him "fired," Eisner would have to do it himself. Ovitz 538:10-16. Neither Eisner nor Litvack informed the New Board about these conversations. *See, e.g.*, Tr. 6677:2-11; 7592:8-10.

C. Ovitz Is Not Discussed During The September Disney Board Meeting In Orlando

On September 30, 1996, the New Board convened a meeting while attending a Disney anniversary at the Orlando Disney World Resort. PTE 334. Ovitz attended the entire board

meeting but his future with the Company was not discussed. *Id.* Eisner did not mention his prior meetings with Ovitz or his instruction to Litvack to get rid of Ovitz. *Id.*

The same day as the board meeting, Ovitz and Eisner jointly appeared on CNN's "Larry King Live" show. PTE 323; 505. During the show, Eisner emphatically denied rumors of any troubles with Ovitz and asserted that he would hire Ovitz again. *Id.; see also* Tr. 4809:18-4810:18. None of the directors ever questioned Eisner's representations made during the show. *See, e.g.*, Tr. 5746:12-18; 6677:12-6678:10.

D. Eisner And Ovitz Attempt To Engineer A "Win-Win" Exit

Without seeking the New Board's approval or advice, Eisner suggested to Ovitz the idea that he seek employment with Sony – a potential violation of Section 9 of the OEA. PTE 7 at WD209-WD210; Tr. 1997:3-24; 4354:17-4355:6. On October 8, 1996, Ovitz wrote a note to Eisner about possibly joining Sony. PTE 18. The letter references several conversations between Ovitz and Eisner following their September 21st meeting. *Id.* at WD397. Stating that he "didn't want to leave [himself] open" and wanted to act with Eisner's "blessing," Ovitz wrote:

> . . . [*I*]*f I make a deal we will work together to insure the best possible transition, timing and P.R. issues are taken into consideration* for the benefit of the companies involved as well as you and I. As you said, *we need to do this together and put the right face on it*. . . Since Sandy relayed his P.O.V. on the company and me I think I need you to acknowledge this note by signing it so that I do not end up in a problem which I do not want with the company *or my best friend.*

Id. at WD397-WD398 (emphasis added). Without consulting the New Board, on October 9, 1996, Eisner handwrote a reply to Ovitz granting his permission and, stating, in part, his desire to engineer Ovitz's departure so as to avoid:

> . . . the "*Disney and MDE embarrassment equation*" . . . I agree with you that we must work together *to assure a smooth transition and deal with the public relations brilliantly*. I am committed to make this *a win-win situation, to keep our friendship intact*, to be positive, to say and write only *glowing things* . . . . *Nobody ever needs to know anything other than positive things from either of us.* This all can work out!

PTE 19 at WD399-WD401 (emphasis added). At the end of this note, Eisner expressed in the clearest terms one of the primary motivating factors for his special treatment of his friend: "You still are the only one who came to my hospital bed - and I do remember." *Id.* at WD401. To facilitate the alleged plan with Ovitz, Eisner handwrote a note to Sony's Chairman, Idei (PTE 229), which was attached to another handwritten note Eisner wrote to Ovitz on October 16, 1996, which stated: "I am sure we are now both protected 'every way to and from Sunday.'" PTE 19 at WD403.

Litvack and Russell reviewed the notes to Idei and Ovitz before Eisner sent them to Ovitz. Eisner 567:4-23. The Board never authorized Eisner to allow Ovitz to speak with Sony or otherwise unilaterally waive the Company's rights under Ovitz's OEA. Eisner 566:21-567:2; Livack 665:23-666:25; O'Donovan 159:11-18; Stern 166:14-20; Watson 394:8-395:12; Tr. 7586:3-6; 7766:12-16. Gold, who knew about the Sony negotiations, supported them but did not discuss the issue with any other directors aside from his business partner, Roy Disney. Tr. 3894:6-18.[30]

On October 1, 1996, Eisner wrote a memorandum to Russell and Watson detailing his fundamental difficulties with Ovitz. PTE 79. Neither Eisner, Russell nor Watson showed or discussed the contents of the memorandum with the New Board. *See* Tr. 3078:17-3079:15; 7881:10-7887:3. Watson considered the memorandum to be "confidential." Tr. 7886:13-

[30] Two weeks later, on November 1, 1996, Ovitz wrote a note to Eisner and told him that he had "decided to end the discussions and re-commit myself to you and Disney. I do so with an even higher commitment of my own energies and an increased appreciation of your friendship and the company you have built." PTE 19. Upon receiving the letter, Eisner wrote a note to Litvack, stating that it "sounds like a legal letter to me . . . ." PTE 172. Eisner testified that Ovitz's letter was "obviously written by Ron Olson or some lawyer" because Ovitz "wanted to make sure that I understood that he is back. He's back." Eisner 575:20-24. Eisner recalled that Ovitz had told him at that point that he was going to "chain himself to the desk." Eisner 578:2-4.

7887:3. In the memorandum, among other things, Eisner recorded his impression that nobody within Disney trusted Ovitz. PTE 79 at DD2624. Eisner wrote that instead of helping him, Ovitz had created a burden for him. *Id.* Nonetheless, Eisner wrote: "I am going to continue to try to make it work, but if by February the situation is no better; then I will recommend a change." *Id.* at DD2625. Although the memorandum recites that Eisner had been thinking about its contents for several weeks (*id.* at WD2623), he did not share any of his concerns with the New Board during the Orlando Board meeting that had occurred just two days prior. Tr. 3078:17-3079:15; 7881:10-7887:3.

In apparent response to Ovitz's note of November 1st , on November 11, 1996, Eisner wrote (but did not send to Ovitz) a letter to Ovitz detailing his numerous contemporaneously held impressions of Ovitz's failures and ethical lapses. PTE 24. The letter states:

> I believe you should resign (*this is not a legal suggestion but a cosmetic one*) . . . I want you to direct your energies to how to exit, not how to cure. *We are beyond the curing stage*. . . .. I would like to remain friends, *to end this so it looks like you decided it, and to be positive and supportive.* I tried that before with the Sony situation, but you did not want to work with me on that. I hope we can work together now to accomplish what has to be done. I am ready to work as hard as necessary and as long.

Id. at DD2454-DD2455 (emphasis added). Eisner sent the document to Bass and Russell. Eisner 606:4-7. Eisner never consulted with any directors, aside from Russell, before discussing the letter with Ovitz, nor did Russell inform any other Board members of the existence of the letter. Tr. 3090:9-3091:8; 3095:20-3096:3. No directors other than Russell ever saw this document prior to this lawsuit. *See, e.g.*, O'Donovan 182:16-20; Tr. 3819:8-11; 5731:14-5733:2; 6372:1-13; 7575:1-16.

On November 13, 1996, Eisner met with Ovitz. PTE 325; Eisner 606:8-607:14. According to Eisner's contemporaneous notes, he spent over two hours telling Ovitz, "it wasn't going to work." PTE 325. During the meeting, Eisner discussed much of the contents of his

November 11 letter with Ovitz, including ethics and other performance issues. Tr. 5199:14-19. *See generally* Tr. 2017:17-2018:15.

E. The New Board Did Not Take Any Action To Terminate Ovitz At The November 25, 1996 Board Meeting

The New Board met on November 25, 1996. PTE 91. The only action the New Board took regarding Ovitz was his renomination to a new three-year term. *Id.* at WD1561A. Eisner and Litvack are not recorded in the minutes to have said anything about their prior conversations regarding Ovitz's termination. PTE 91. *See also* Tr. 4100:1-7. No calculations were provided at the meeting detailing what the payout to Ovitz would be in the event of an NFT. *See, e.g.,* Tr. 4101:1-19; 7245:20-7246:8. Nor were alternatives to an NFT discussed or considered. *See, e.g.,* Tr. 4105:13-4106:20; 5784:2-5785:3; 5881:11-23; 6795:18-6796:10; 7053:15-18; 7245:16-19; 7606:19-7607:3. The minutes do not reflect an "Executive Session" discussion at all or any board resolution whatsoever approving the grant of an NFT.[31]

F. Wilson And Ovitz Sail On the "Illusion"

On October 31, 1996, Eisner enlisted Wilson to convince Ovitz to leave Disney when the two were later vacationing together on a 166-foot yacht Wilson and Ovitz co-owned, called the "Illusion." Tr. 4542:5-4546:22; 7019:1-10. The boat trip occurred on the Thanksgiving holiday after the November Board meeting. Tr. 7015:21-7016:9. Eisner's contemporaneous notes of a conversation he had with Wilson on December 1, 1996, reported that Ovitz was a "wounded animal in a corner" and a "loyal friend, devastating enemy." PTE 25. Eisner understood Wilson

[31] Although plaintiffs requested all Board minutes where Ovitz's departure was discussed in both their Section 220 demand and document requests, the November 1996 minutes were not produced until plaintiffs specifically asked for them in connection with a request for minutes dealing with the New Board's adoption of so-called corporate governance guidelines. Even then, Disney produced a highly redacted version referencing only the corporate governance guidelines discussion. PTE 91A. Later pressured, Disney produced the minutes in their entirety. PTE 91.

to be communicating "don't screw [Ovitz] financially and don't embarrass him in public." Eisner 626:5-9. Eisner noted that Wilson reported that Ovitz was "available to discuss settlement" and Eisner had to be "magnanimous" with Ovitz. PTE 25; *see also* Eisner 627:3-10.

G. Eisner Pays Off His Friend

Apparently heeding Wilson's advice that he deal with Ovitz "magnanimously," Eisner and Ovitz held a private meeting on or about December 3, 1996, to discuss the terms of Ovitz's departure. PTE 326; Eisner 628:3-20. Eisner recorded in a contemporaneous note to Russell: "I met with Michael Ovitz today who wants to bring our discussions to a conclusion this week, wants *you* and Bob Goldman to settle out his contract immediately and sign it by weeks end." PTE 326 at DD2539 (emphasis added). Eisner understood that Ovitz wanted several items not provided in his contract, including continuing on the Board, continuing to have an office and staff, becoming a Company advisor, continuing to use his Company car and having the Company sell him "his old airplane at a decent price." *Id.* at DD2539-DD2540. Eisner wrote to Russell that he did not immediately object to any of Ovitz's demands, except for his continued use of the Disney car: "I don't want to nit pick here, but we are paying him *a fortune*." *Id.* (emphasis added).

Eisner noted to Russell that any agreement "that is one cent more than the contract" should include a provision that would cause Ovitz to forfeit his benefits if, during a five-month period, he "bad mouth[s] me or the Company . . . ." *Id.* at DD2540. Russell later confirmed a separation agreement should have a "bad mouth prohibition," and Ovitz would get a "bonus if [he] does a good job and keep [sic] mouth shut – complete discretion." *See also* PTE 379 ("no press - direct or indirect - spin - discontinue at any time"). *See also* Russell 755:17-756:5. Eisner noted his thoughts that Ovitz "wants it to be a total secret until Jan. 6," and informed Russell he was still planning Ovitz's 50th birthday party. PTE 326 at DD2540.

Russell and Eisner did not share their communications with the New Board. *See* Tr. 3139:19-3140:5. In fact, many directors were not aware Russell had been designated to negotiate Ovitz's departure. *See, e.g.*, R. Disney 204:18-23; Tr. 3104:23-3106:13; 5771:10-22; 5882:3-13; 7988:17-7989:1. Although the 1990 Stock Option Plan Rules vested the Compensation Committee with the sole authority to determine the terms for Ovitz's departure (PTE 41 at WD135), Russell, as its Chairman, did not seek to exercise the Committee's authority to do so. Tr. 3106:1-3107:5.

H. Disney Inexplicitly Awards Ovitz A $7.5 Million Bonus

On December 10, 1996, Disney's Executive Performance Committee ("EPPC") met to consider granting top executives, including Ovitz, annual bonuses. The EPPC was chaired by Gold, and its other members were Lozano, Poitier and Russell. PTE 51. Eisner, Watson and Litvack, among others, also attended the meeting (*id.*) despite the fact that the EPPC had been set up to exclude the involvement of inside directors, pursuant to Internal Revenue Code requirements. PTE 334 at WD6404.

The EPPC awarded Ovitz a $7.5 million bonus out of a possible maximum amount of $10 million for his services during the 1996 fiscal year, despite Ovitz's imminent firing. PTE 51 at WD1229. Russell recommended that Ovitz receive the bonus after consulting with Eisner. Tr. 3170:12-19. The $7.5 million bonus was the largest in absolute terms and the largest percentage of the possible total payouts (75%) of any executive reviewed by the EPPC, including Litvack (17%) and R. Disney (20%). PTE 51 at WD1229. The EPPC resolution authorizing Ovitz's bonus mentioned that it was payable in January 1997, "subject, in each case, to the continuing employment by the corporation of such officer on the date of payment." *Id.* at WD1225.

The minutes of the meeting reflect that the EPPC had the authority to "exercise negative discretion" on the bonuses. *Id.* None of the participants, however, questioned why Ovitz was

entitled to a bonus. Russell told the EPPC members (erroneously) that Disney was "contractually obligated" to pay Ovitz his bonus. Gold 199:16-25; Tr. 3926:11-15. Eisner said nothing, even though he, too, knew the bonus was discretionary. Tr. 3170:5-8. Watson, who claimed to have been involved in the OEA negotiations, thought the bonus was mandatory despite the EPPC's power to adjust bonuses downward. Tr. 7752:1-16.[32] Litvack claims to have known that the bonus was discretionary but said nothing because he purportedly did not want to "embarrass" Russell. Tr. 6154:12-6156:9. Contrary to his testimony, the next day Litvack wrote a note to a subordinate addressing a tax calculation for the full bonus amount: "Please handle. This means [Ovitz] should be paid his bonus in 1996." PTE 175.

I. Ovitz Receives A Full NFT Payout As The New Board Abdicates

Ovitz finally "agreed" to leave only after he and Eisner met in New York on December 11, 1996. Eisner 637:22-638:14. The meeting occurred in Eisner's mother's apartment. Eisner 636:21-23; Tr. 4591:18-4592:1. Among other things, Ovitz agreed not to "spin" the news of his departure in the press. Eisner 654:16-655:16. The next day, on December 12, 1996, Litvack, on Eisner's instructions, signed a letter "confirming the terms of our mutual agreement" regarding Ovitz's separation from the Company. PTE 13; Tr. 6157:13-6158:2.[33]

The letter recites that Ovitz's five-year contract "will end on January 31, 1997" and that "[t]his letter will for all purposes of the OEA *be given the same effect as though* there had been a

[32] Remarkably, despite having received Eisner's harshly critical assessment of Ovitz (PTE 79), Watson claimed to have been unaware of any facts that negatively impacted the amount of a bonus to be awarded Ovitz. Tr. 7755:16-7756:6.

[33] Litvack claims no involvement in drafting the letter agreement or in any of the discussions leading to Ovitz's termination. Tr. 6157:13-6158:2.

"Non-Fault Termination . . . ." PTE 13 (emphasis added).[34] The letter specifies that Disney will pay Ovitz "all amounts due [him] under" the OEA, including those under the NFT provisions. *Id.* No witness was able to explain why the letter contained the carefully crafted clause "be given the same effect as though." *See* Eisner 650:25-651:24; Litvack 769:12-770:3; Tr. 4598:3-4599:9. The letter did not address whether Ovitz had then resigned as a director. PTE 13. According to Disney's charter, Ovitz could only have been removed as a director by shareholder vote. DTE 185, Article Sixth.

The New Board was not shown the December 12th letter (*see, e.g.*, Bowers 335:3-14; Gold 207:13-18; R. Disney 189:20-190:10) and never met to approve its terms. *See* Tr. 3933:8-20; 4102:23-4103:11; 5772:18-5773:4; 5881:24-5882:23; 5990:21-5991:10; 7248:3-7249:6; 7615:19-7616:16; 7758:2-7759:22. Despite the then well-publicized problems known to the New Board through press clippings (*e.g.*, Tr. 5927:22-5929:17; 6106:20-6107:1; 6718:14-6719:4; 7916:15-22) and some defendants' one-on-one communications with Eisner (*see, e.g.*, Tr. 4351:1-22; 4369:4-17; 4379:23-4380:9), no defendant ever requested a meeting to discuss Ovitz's termination, its treatment, its value, or the Company's alternatives to paying a full NFT, including the possibility of firing Ovitz for cause or attempting to negotiate a lesser amount. Russell 800:12-23; Tr. 4668:15-4670:3. No Board or Committee resolution approving Ovitz's "firing" and the grant to him of full NFT benefits was ever adopted. PTE 91; 799.

A few directors learned about Ovitz's departure from a letter Eisner wrote to each of them dated December 12, 1996. PTE 9. None of those letters referenced the terms of the separation or its value. PTE 9. For his part, Ovitz, a director as well as an officer, took no action

[34] The letter presumably called for a January 1997 termination date because Ovitz's $7.5 million bonus was conditioned upon his continued employment through that time. PTE 51 at WD1225.

to interact with the New Board or assure that it had reviewed and approved the terms of his severance:

> [Q:] "do you know of any board meeting of the Disney board that occurred in December 1996 to address the question of your receiving a nonfault termination? . . . [A:] I don't know. I have no idea."

Ovitz 666:19-23; *see also* Tr. 2078:8-22. ("You're asking me if I suggested that the board meet to discuss my termination? . . . No. I forgot that suggestion.").

Also on December 12th, Disney issued a press release announcing Ovitz's departure. PTE 390.[35] Living up to Eisner's pledge to Ovitz to "deal with the public relations brilliantly" and "to say and write only glowing things" (PTE 19 at WD4000), the press release carefully states Ovitz would:

> "leave the company by mutual agreement" . . . "continue to serve as an adviser and consultant to the company and the Board." [Eisner] will miss Michael's energy, creativity and leadership at Disney. . . . [W]e have been doing business together *while being friends* for many years. . . . Michael Eisner has been my good friend for 25 years. . . . Hope that *my* decision to leave will eliminate an unnecessary distraction for a great company.

PTE 390 (emphasis added). In addition, the press release indicated that Ovitz would continue to serve as an advisor and consultant to the Board and the Company (*id.*), which was an additional term to his severance the New Board knew nothing about and was not asked to approve. Gold 377:3-15; Tr. 4601:6-23[36]; 5770:21-5771:7; 6764:8-14; 7050:24-7051:15; 7250:17- 7251:3; 7617:15-7618:9; 7760:17-7761:5.[37]

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[35] The press release was attached to the letters sent to directors. PTE 9.

[36] During his trial testimony, Eisner testified that he made the agreement with Ovitz that he could serve as an advisor and consultant during the meeting at his mother's house on December 11, but that it was "for one day," presumably because he did not intend to honor his agreement with Ovitz. Tr. 4601:6-23.

[37] Neither the press release nor the few letters Eisner sent to New Board members specified, as set forth in the December 12th termination letter, that Ovitz was going to continue at Disney

Immediately upon release of the news, a firestorm of controversy erupted over Ovitz's receipt of a huge severance package after only fourteen months at Disney. As the New Board heard from widely-published reports in the press, the value of the payout was approximately $75-$90 million (too low as it turns out). *See, e.g.*, PTE 359; 466; 467. Investors and the press were harshly critical. *See, e.g.*, PTE 10; 16; 359; 466.

J. Eisner Decides To Accelerate Ovitz's Departure

Even before Disney issued its press release, articles appeared in the financial press favorable to Ovitz and echoing many of the themes he sounded in this litigation. *See* PTE 467. *The Wall Street Journal* reported on December 12th: "Mr. Ovitz has been pondering his options on the heels of a frustrating stretch at the entertainment giant. . . . Ovitz has had difficulties in carving out a clear role for himself." *Id.* at DD2111. The article also reported that it was possible that Ovitz and Eisner "will mutually agree to sever ties" and will possibly "negotiate" an "expensive" "settlement." *See* PTE 467 at DD2111. Eisner testified that this article and others like it were "completely in violation of the agreement [Ovitz] and I - the verbal understanding we had in the apartment" (Eisner 654:16-655:16) and that he was angered by what he considered a "betrayal of an agreement that I had really worked hard to have him, you know, leave as best he could without making a big deal out of it." *Id.* Eisner at this time sent an email dated December 16, 1996 to John Dreyer, Disney's communication chief, calling Ovitz a "psychopath" and "totally incompetent." PTE 20.

On December 20, 1996, a meeting of the EPPC was convened to discuss the rescission of Ovitz's $7.5 million bonus. PTE 53. Retreating from his position articulated just ten days

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until January 31, 1997. Accordingly, for all they knew, Ovitz had already departed. Indeed, after Ovitz left Eisner's mother's apartment and received his termination letter, he considered himself out of the Company and never returned. Tr. 1382:22-1383:1.

before at the earlier EPPC meeting, Russell came to the revelation that "Committee members cannot be asked to try to justify it [bonus] based on good performance." PTE 93.

Eisner accelerated Ovitz's departure to December 27, 1996, as recorded in a letter agreement dated that same day. *Compare* PTE 13 *with* PTE 14. Ovitz simultaneously tendered his resignation as a director. The second paragraph of the letter states that Ovitz's departure "will for all purposes of the Employment Agreement be treated as a 'Non-Fault Termination.'" PTE 14. There was no longer any mention in the letter that Ovitz would serve as a consultant. *Id.* The letter provided that Ovitz would immediately receive $38 million in cash and the immediate vesting of three million "A" options.[38] The Black-Scholes value of the A options at the time they vested was $129,820,000. Murphy Report at 30. Disney withheld $1,000,000 "pending final settlement" of [Ovitz's] accounts. PTE 14.

Litvack testified that he signed the letter agreement because no one else was available to do so during the holidays, but otherwise had no role in negotiating or drafting it. Tr. 6170:14-19; 6586:18-6587:5. The New Board never considered or approved the terms of the letter agreement, including the acceleration of Ovitz's departure date or the $1,000,000 holdback. Tr. 3942:15-3944:22; 5885:5-5887:2; 6420:4-20; 7258:17-7260:16; 7774:15-7775:10; 7909:13-7910:21. In fact, with the exception of Eisner, Litvack, and possibly Russell, no defendant even saw the letter at the time. Bowers 336:20-24; Lozano 213:19-214:2; Mitchell 40:13-23; T. Murphy 106:14-21: Nunis 80:3-5; O'Donovan 119:23-120:4; Poitier 176:24-177:18; Stern 192:9-23; Watson 442:16-19; Wilson 125:25-126:8; R. Disney 190:11-24; Tr. 3207:11-16;

[38] The cash component was supposed to be calculated at a discount rate equivalent to Disney's "cost of capital" (PTE 7 at § 11(c)), but, in reality, no witness could determine how the Company chose the discount rate they used. Murphy Report at 31; Tr. 812:10-813:14. Disney had several reasonably available higher, and thus more favorable, rates it could have applied. Murphy Report at 31-33; Tr. 813:15-19.

3938:4-3939:18; Tr. 4103:15-4104:17. No member of the New Board made an attempt to cause Disney to ascertain the value of the vesting of the options. Tr. 5993:12-5994:8. The New Board never met to approve the terms of Ovitz's departure, nor did the Compensation Committee take action as required by the Stock Option Plan and Rules.

K. The New Board Failed To Investigate Or Consider Alternatives To The Ovitz "Settlement"

Although aware of Ovitz's performance failures, the New Board completely failed to inform itself whether Disney could "fire" Ovitz for cause and thus avoid an NFT payout or some other cost-saving measure. *See, e.g.*, Tr. 3207:1-3209:17; 3938:4-3939:11; 4103:15-4104:17; 4668:15-4669:14; 5784:2-5785:3; 5993:12-5994:8; 7256:14-21; 7617:15-7618:9; 7759:11-7760:1; 8007:7-8010:6. The New Board could not reasonably rely on Litvack, the head of Disney's human resources department and chief counsel, as he failed to make any meaningful inquiry as to whether Ovitz could be terminated for cause or be offered less than a full NFT payout before it was a *fait accompli*. Litvack, who had just recently been admitted to the California Bar and was not an employment law expert, did not research or cause anyone to research definitions of either "gross negligence" or "malfeasance." *See* Tr. 6114:20-6115:8; 6417:20-6419:24. Although Litvack testified that he thought he talked to Morton Pierce of Dewey Ballantine about this issue, he admitted that he could not "be certain" that he had done so. Tr. 6121:21-6122:2. Documents produced by Dewey Ballantine, however, indicate legal research was only performed on the issue of whether Ovitz's bonus could be rescinded. PTE 393. Morton Pierce had no recollection of ever providing advice to Disney regarding the grant of an NFT to Ovitz. Pierce 32:23-34:4, 34:19-38:4. In contrast to the volumes defendants' experts wrote and offered in testimony, not a *single scrap* of paper exists in the record showing *any* contemporaneous research or investigation. Despite Litvack's insistence that he was

adequately familiar with the Ovitz situation to give an opinion, Eisner did not share his private written reflections on Ovitz with Litvack (Tr. 6370:21-6372:13), and the record evidences numerous other facts that could have come to Litvack's attention through a reasonable, contemporaneous inquiry, such as Tarses' testimony in this case that she spoke only to Ovitz regarding how to extricate herself from her NBC contract (Tarses 58:25-59:7, 63:24-64:3), expense reports filed by Ovitz claiming reimbursement for alleged business expenses which were non-Disney-related (*see, e.g.,* DTE 59) and contemporaneous documentation of Ovitz's giving and receipt of gifts outside Company policy. *See, e.g.,* PTE 17; Tr. 3028:23-3031:4; 6421:13-23; 6524:23-6530:17.

1. Ovitz's Habitual Lying Was Overlooked.

At all times, defendants had information reasonably available to them to justifiably deny Ovitz a full NFT payout. Habitual lying constitutes "gross negligence" or "malfeasance" under California law and thus grounds for "cause" dismissal under the OEA. PTE 404 ("Donohue Report") at 45-50. Honesty and business ethics were especially important to a family-oriented company like Disney. Eisner *repeatedly* informed Ovitz that he had to conduct himself like "Caesar's wife." *See, e.g.,* PTE 24 at DD2449; PTE 267 at DD2288. Documents authored by Eisner and shared with other defendants strongly question Ovitz's veracity and business ethics. *See generally* PTE 20; 24; 67; 79. Eisner's May 25, 1996 email to Bass, which he forwarded to Russell and Watson, memorialized Eisner's recollection that Bob Iger did not trust Ovitz and "gave [Eisner] many examples" of Ovitz's dishonesty. PTE 67 at DD2981. In another communication Eisner sent to Watson and Russell in October 1996, Eisner references his perception that Ovitz had pathological problems and was dishonest on the job: "The biggest problem is that nobody trusts him, for he cannot tell the truth." PTE 79 at DD2624. Eisner further recorded his thoughts that:

> How does one tell a friend that he is *not truthful* and *nobody trusts him*? . . . Recently we spoke on a plane for two hours. I pointed out things he had done in *just the past day* that were devious and damaging in his dealings with Joe Roth for example. He does not seem to understand that *he stretches the truth, changes the truth, leaves out information as to bend the truth.*

Id. at DD2625 (emphasis added).

In his November 11, 1996 writing, Eisner again recorded his impression that Disney executives did not trust Ovitz. PTE 24 at DD2454 ("I told you 98% of the problem was that *I did not know when you were telling the truth, about big things, about small things*") (emphasis added). Litvack recalled providing Eisner with many examples of Ovitz's lies (Litvack 719:12-720:5) and acknowledged that Ovitz had lied to him many times. Tr. 6132:11-6133:5; 6373:18-6378:8. Ovitz's dishonesty was also perceived by Bass, Disney's then-largest shareholder and Eisner's confidant. *See, e.g.,* Bass 44:17-46:5, 102:24-103:5.

As part of his continuing effort to mislead Disney into the belief that he gave up a lot in leaving CAA, Ovitz misstated his CAA earn-out rights in an ethics statement he signed on October 24, 1995. PTE 314 at DD292 (OldCo "will continue to receive commissions from contracts entered into by its former talent agency clients on or before September 30, 1995"). In reality, Ovitz was entitled to a majority share of "earn-out" rights defined to include deals that had not specifically been memorialized in a written contract and based on a secret booked commission listing, which could change and expand over time. *See* Statement of Facts Section I.B. The ethics statement also recited that Ovitz would have "no direct or indirect ownership interest" in NewCo despite the fact that OldCo received and perfected a security interest in all the proceeds of the agency contracts from which any covered booked commission could arise. *See* PTE 203 at MTO 1668 (creation of security interest); PTE 254 (perfection of security interest). This carefully crafted language represented less than full disclosure, enabling Ovitz to

garner substantial side income without scrutiny.[39] Misstating the truth in an employment application, according to Crystal, is grounds for immediate termination. Tr. 3513:19-3514:8. The submission of the ethics statement was also a requirement of the OEA, underscoring the importance of truthful disclosure in that document. *See* PTE 7 at WD209; Tr. 1677:1-1693:15. Yet Disney took completely on faith Ovitz's response to the ethics statement, the falsity of which would have been revealed by reasonable investigation then or prior to his departure. Tr. 75:13-82:2.

Before he departed Disney, Ovitz signed a statement that he was in compliance with Disney's Statement of Policy Regarding Conflicts of Interest and Business Ethics and Questionnaire Regarding Compliance (PTE 70; 314) ("Ethics Policy"), but defendants had information reasonably available to them that this representation was false. *See* PTE 17; *see generally* PTE 147 at WD4810-WD4820 (listings of expenses, supporting documentation, event logs, lists of aviation charges, project budgets, and capital project authorizations obtained from Disney Corporate Accounting, Disney's Vice President of Corporate Projects, and Disney employee T.J. Baptie). Russell and Litvack both specifically warned Ovitz not to give Disney-purchased gifts to Disney employees or to others for non-business purposes. The "draft" report prepared by PriceWaterhouse ("PW") on or about January 27, 1997 commissioned by Disney

[39] Pursuant to the terms of his earn-out agreement, Ovitz was entitled to compensation only after NewCo hit certain earnings targets. PTE 203 at MTO1660. Thus, it was in Ovitz's interests at all times to ensure that his former CAA clients remained at the agency regardless of whether he could expect direct renumeration for so-called "booked commissions." *Id.* This created a substantial potential for conflict as well. Disney purported to initiate a policy requiring approval of two of three designated Disney officers before it would enter into agreements with NewCo-represented talent in amounts over $100,000. PTE 148. Compliance or even enforcement of such a "policy," if it existed, was non-existent and no one at Disney was ever armed with the total facts. *See generally* PTE 581 (not sent to Litvack or Swider); Tr. 6459:11-6466:14; 9152:3-9153:19.

after Ovitz's termination, however, contained information which, had it been timely obtained, would have put Disney on notice of potential violations of Company policy by Ovitz regarding improper business reimbursement requests and Ovitz's responsibility for excessive or improper corporate expenditures, warranting further inquiry. PTE 147. The PW document was addressed to the New Board but, it never reviewed or discussed it. Tr. 3021:8-20; 5610:16-5613:21; 5885:5-5887:2; 7258:10-7259:5; 7584:23-7585:16; 7774:15-7775:2; 7909:13-1910:10. Disney eventually withheld $140,000 from Ovitz's termination payout, almost half of which was attributed to expenses with no discernible "business purpose." *See generally* PTE 147, PTE 403 at WD1995; WD1999. Ultimately, the $140,000 holdback cannot be squared with Ovitz's representations that he complied with Disney's ethics policy.

Further, Ovitz had reported only one gift at the time. Eisner sent a note to Russell, nine months into Ovitz's employment, stating to Russell that "Michael is obviously not reporting gifts." PTE 17. When Litvack allegedly looked into the issue, Ovitz had only reported two gifts. PTE 406. On or about November 11, 1996, Eisner recorded his continuing impression that Ovitz had not reported gifts and references one gift in particular which does not appear on Disney's gift list for Ovitz. PTE 24 at DD2451-DD2452. *See also* DTE 61. Eisner also complained that Ovitz had to be reminded to report gifts. PTE 24. A final gift list, not compiled until after Ovitz was terminated, showed that Ovitz received four gifts during his tenure, two of which were not reported until after he was terminated. DTE 61.

2. Ovitz Failed To Follow Eisner's Directives

Ovitz agreed, in connection with his hiring, that he was Eisner's "number two" and had to follow his direction. Tr. 2145:12-18. The OEA reinforced Ovitz's obligation to follow such direction. PTE 7. Contrary to his commitments and the responsibilities of his office, Ovitz did not heed Eisner's directions with respect to Disney's affairs. Violations of such duties

constitutes "gross negligence" or "malfeasance" pursuant to the OEA. Donohue Report at 15-16; Tr. 288:12-289:11. Ovitz was told not to pursue acquisitions but did so anyway. PTE 24; PTE 267. When told not to pursue an NFL franchise, either on behalf of Disney or personally, Ovitz persisted. Bass 76:9-77:25; Eisner 330:3-331:6.

Meanwhile, Disney divisions under Ovitz's control posted huge losses. In a note found in Ovitz's files, Eisner told Ovitz that his handling of Disney's live action film division was a "disaster" and "driving [Disney] out of business." PTE 755 at WD9868. Eisner wrote that Ovitz's spending on films, despite Eisner's directives, was "a great problem." PTE 67. Although Ovitz was in direct charge of ABC, Eisner had to appeal to Iger to "get ABC back in control," again noting that a division under Ovitz's control was a "disaster." PTE 550 at WD8269.

Eisner understood that he assigned Ovitz to oversee Disney Interactive. PTE 24 at DD2452. Eisner recorded his impressions that Ovitz did not handle the strategic initiatives assigned to him. *Id.* Eisner expressed displeasure when perceiving Ovitz's surprise in discovering that Disney Interactive's losses totaled $100 million. *Id.* at DD2452-DD2453.

Moreover, during Ovitz's Presidency, Eisner wrote to Ovitz directing him to take charge of Hollywood Records, and Eisner disapproved Ovitz's lack of attention to the division. *Id.* at DD2449. Though Eisner understood that he had repeatedly urged Ovitz to work on projects such as Hollywood Records, Ovitz professed to Eisner that he had nothing to do. *Id.* at DD2452. Bob Pfeifer, president of Hollywood Records, wrote Ovitz in September 1996, expressing his disappointment over Ovitz missing a scheduled meeting to discuss "fundamental" issues regarding the division. PTE 626. Eisner wrote a note to Litvack questioning what, if anything, Ovitz was doing with Hollywood Records. PTE 780 at WD13842. Eisner believed Ovitz had