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

NOTICE OF FILING AMENDED COMPLAINT

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PLEASE TAKE NOTICE that plaintiffs herewith file the attached Amended Stockholders' Derivative and Class Action Complaint pursuant to Court of Chancery Rule 15(a) and an agreement among the parties.

In compliance with Rule 15(aa), plaintiffs aver that the Amended Complaint is in full substitution for the Complaints filed in the constituent actions.

ROSENTHAL, MONHAIT, GROSS
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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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AMENDED STOCKHOLDERS' DERIVATIVE AND CLASS ACTION COMPLAINT

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Plaintiffs, by their undersigned attorneys, for their complaint against defendants, allege the following upon information and belief, except as to allegations concerning plaintiffs, which are alleged upon plaintiffs' knowledge:

NATURE OF THE ACTION

1. This is an action alleging stockholders' derivative claims on behalf of nominal defendant The Walt Disney Company ("Disney" or the "Company"). The individual defendants in this action are current and former members of the board of directors of Disney (the "Board") who face and/or faced disabling conflicts of interest in negotiating, adopting and/or enforcing the terms of an onerous and unconscionable employment agreement with defendant Michael S. Ovitz (the "Ovitz Employment Agreement") and who failed to act with appropriate diligence and independence in connection with such matters.[1]

2. At the time the Former Director Defendants originally approved the Ovitz Employment Agreement, Ovitz was an untested entertainment executive who had never held any executive position at a public corporation, much less a multi-billion dollar, widely diversified, international enterprise such as Disney. Nevertheless, Eisner heavily recruited Ovitz to join Disney as the Company's President. Eisner's desire to bring Ovitz to Disney, and his

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[1] The directors of Disney at the time the Ovitz Employment Agreement was negotiated, executed, voted upon and/or ratified by the Company's Board are collectively referred to herein as the "Old Board." The Old Board consists of defendants Michael D. Eisner, Stephen F. Bollenbach, Roy E. Disney, Stanley P. Gold, Sanford M. Litvack, Richard A. Nunis, Sidney Poitier, Irwin E. Russell, Robert A.M. Stern, E. Cardon Walker, Raymond L. Watson, Gary L. Wilson, Reveta F. Bowers, Ignacio E. Lozano Jr., and George J. Mitchell (collectively, the "Former Director Defendants"). The directors of Disney at the time the Disney Board decided to pay Ovitz the maximum benefits available under the Ovitz Employment Agreement are collectively referred to herein as the "Current Board." The Current Board consists of defendants Ovitz, Eisner, Disney, Gold, Litvack, Nunis, Poitier, Russell, Stern, Walker, Watson, Wilson, Bowers, Lozano, Mitchell, Leo J. O'Donovan and Thomas S. Murphy (collectively, the "Current Director Defendants"). The Former Director Defendants and the Current Director Defendants are collectively referred to herein as the "Individual Defendants."

willingness to provide Ovitz with an exorbitant compensation package, stemmed from the fact that Eisner, Ovitz and their wives have been very close personal friends for over 25 years. In the end, Eisner was able to determine unilaterally the terms of Ovitz's employment with Disney because Irwin Russell, another long-time friend of Eisner's who also serves as Eisner's personal attorney, was the Chairman of the Compensation Committee of the Disney Board. In theory, the Compensation Committee was charged with reviewing the terms of the Ovitz Employment Agreement and the severance payments ultimately made to Ovitz by Disney, but no in-depth review was ever accorded.

3. At the time Ovitz joined Disney, the Former Director Defendants were well aware that numerous high-level executives had been unable to work cohesively with defendant Eisner, the Company's Chairman and Chief Executive Officer, and had therefore left Disney in the months immediately preceding the appointment of Ovitz. Other Disney executives departed the Company because they were dissatisfied with the role prescribed for them by Eisner in the time period immediately following Ovitz's appointment. In addition, the Former Director Defendants were well aware that the entertainment industry has historically been characterized by rapid turnover in the executive ranks as employees have frequently moved from opportunity to opportunity in search of greater prestige or higher-paying positions.

4. In the face of those circumstances, the Former Director Defendants, under the direction of Eisner, agreed to provide Ovitz with a compensation package that included options to purchase 3 million shares of Disney common stock which were awarded to Ovitz <u>without any assurance that he would have to serve as a Disney employee -- for any period of time -- in order to enjoy the full economic benefits of those options</u>.

5. Equally as important, Graef Crystal, the executive compensation consultant who advised the Old Board with respect to the Ovitz Employment Agreement, has admitted that the

Old Board never considered the prospective amount of severance to which Ovitz would be entitled in the event he was terminated by the Company for a reason other than cause. Crystal, referring to what he now calls "the shocking amount of severance" paid to Ovitz, has bluntly stated, "Nobody quantified this and I wish we had." The Former Director Defendants also ignored the fact that the manner in which the Ovitz Employment Agreement was structured perversely provided Ovitz with strong economic incentives to arrange to have himself terminated by Disney as rapidly as possible (albeit under circumstances which could be made to appear as not being "for cause"). Those incentives arose because, by arranging for his termination by Disney as soon as he became employed there, Ovitz could receive all of the salary, bonus payments and stock options he would have collected in the event he remained in the employ of Disney until September 30, 2000, plus a $10 million cash payment he would not otherwise receive (a total package valued in excess of $140 million at the date of Ovitz's separation from Disney in 1996).

6. Thus, in agreeing to the Ovitz Employment Agreement and its illogical and perverse structure, the Former Director Defendants acted without undertaking a reasonable investigation of appropriate executive compensation and without exercising reasonable and prudent business judgment. The Former Director Defendants' conduct in adopting the Ovitz Employment Agreement amounted to willful, reckless and/or bad faith violations of their fiduciary duties of good faith, loyalty and due care. Furthermore, the adoption of the Ovitz Employment Agreement, and, in particular, its provisions concerning the 3 million options awarded to Ovitz with no guarantees that he would actually provide any valuable services to the Company, constituted a gross waste of corporate assets.

7. Ultimately, however, Ovitz provided the Current Director Defendants with an opportunity to remedy the wrongs committed by the Former Director Defendants. On or about

September 5, 1996, Ovitz wrote a letter to Eisner in which Ovitz stated that he was very dissatisfied with the role he had been assigned at Disney and wanted to leave his position with the Company. Under the Ovitz Employment Agreement, if Ovitz had simply been permitted to execute his plan to quit his position as Disney's President, he would have been entitled to virtually no severance payments.

8. In the succeeding months, however, as Eisner and Ovitz unilaterally (i.e., without the involvement of the Current Board) arranged and agreed upon the terms of Ovitz's separation from the Company, Ovitz realized that by implementing his announced intention to quit Disney he would forfeit the unconscionable sums he could pocket should Disney agree to "terminate" him. As a result, although Ovitz had no intention of remaining at Disney, and was, in fact, breaching his contractual obligations to provide full-time service to the Company by actively searching for alternative employment positions (including a five-year, $100 million contract with Sony Corporation of America), Ovitz requested that his close personal friend Eisner agree to terminate Ovitz pursuant to the "Non-Fault Termination" provisions of the Ovitz Employment Agreement. Ovitz further requested that Eisner cause his personal attorney, Russell, who is the head of the Disney Board's Compensation Committee, to accede to Ovitz's request. Eventually, Eisner agreed to Ovitz's requests and caused the Current Director Defendants to rubber-stamp his decision. As a result, Ovitz received the unconscionable severance payments attacked herein.

9. Hence, rather than avail themselves of a clear opportunity to remedy the wasteful, injudicious and imprudent actions of the Old Board, the Current Director Defendants, in deference to Eisner, chose to aggravate the consequences arising from the Former Director Defendants' misconduct by approving the payment of Ovitz's full severance package. Before agreeing to open Disney's corporate coffers to Ovitz and waste its assets on him, the Current Director Defendants failed to take the steps necessary to investigate fully whether Ovitz was

entitled to those payments. In fact, the Current Director Defendants recklessly or intentionally ignored a number of red flags that should have apprised them that Ovitz had breached the terms of the Ovitz Employment Agreement and, accordingly, was not entitled to <u>any</u> severance payments from Disney. At a minimum, had Disney's directors fulfilled their duties to investigate and inquire into the relevant facts and insist upon the assertion of all of Disney's legal rights and protections under the circumstances, it is virtually certain that Ovitz would have received far less than he actually did receive -- if anything at all.

10. As a result of the foregoing misconduct and breaches of fiduciary duties, Ovitz was awarded a severance package with a present value <u>in excess of $140 million</u> that has been universally denounced as unconscionable and contrary to sound corporate governance by the financial press and institutional investors. The excessive nature of Ovitz's severance package is underscored by the fact that Ovitz was forced to leave Disney after <u>only fourteen months</u> of what, by all accounts, was <u>unproductive and deleterious</u> service as Disney's President.

11. Even Crystal, who supposedly advised the Old Board on the terms of Ovitz's contract, has publicly stated: "Mike Ovitz got away with murder . . . <u>and I helped him</u>."[2] Indeed, Crystal now admits that: (a) he "wishes" the negotiations for Ovitz's contract had "collapsed"; (b) "I wish now I'd made a spreadsheet showing just what the deal would total"; and (c) "<u>Eisner is at fault</u>." In fact, Crystal believes that "large severance packages [like Ovitz's] are the dirty little secret of executive compensation" and professes that he would "love to find a way to stop all this severance" as there is "<u>no social justice</u>" in such exorbitant payments. The sole positive Crystal envisions arising from the entire affair is that Ovitz's mammoth and unwarranted compensation package might "shine a huge spotlight on that dirty

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[2] Unless otherwise noted, all emphasis provided herein has been added by plaintiffs.

little secret" because Ovitz's "huge severance package . . . for failing" is "incomprehensible." To say the least, the expression of such sentiments from the expert retained by Disney to advise the Old Board concerning the Ovitz Employment Agreement is a damning indictment of the contract.

12. In the months following Ovitz's separation from Disney, the motive for Eisner's willingness to defer to Ovitz's wish that he be "terminated" by Disney became clear. At the same time Eisner unilaterally agreed to award Ovitz the unconscionable severance package, Eisner was putting the finishing touches on his own highly lucrative compensation agreement with Disney (the "Eisner Compensation Agreement") -- the largest one ever signed by a corporate CEO.

13. Thus, Eisner's decision to accommodate Ovitz's desire to be "terminated" was not motivated by his belief that such a course of action was somehow in the best interests of Disney and its shareholders. Rather, Eisner adopted such a strategy, and directed his hand-picked Board to approve it, in an attempt to avoid generating controversy regarding Ovitz's pay package and, therefore, his own, unprecedented new contract.

14. In addition to challenging the conduct of the Individual Defendants that resulted in the payment of Ovitz's unconscionable severance package, plaintiffs allege a class action claim which charges that the disclosures made by defendants in Disney's 1997 Proxy Statement (the "Proxy Statement") and at the 1997 annual meeting were materially misleading and, therefore, amounted to a breach of the Current Director Defendants' fiduciary duties of candor. Plaintiffs' breach of candor claim is brought on behalf of a class (the "Class") of all stockholders of Disney as of December 30, 1996.

15. In particular, plaintiffs allege that the votes orchestrated by defendants with respect to three issues, (a) the Eisner Compensation Agreement, (b) Disney's 1997 Cash Bonus

Performance Plan (the "Bonus Plan"), and (c) the re-election of five directors to Disney's staggered Board were materially deficient. None of those three provisions would have been approved by Disney's shareholders had the Current Director Defendants provided full and fair disclosures to the Company's shareholders.

16. The disclosures concerning each of the three measures challenged by plaintiffs were materially misleading because of the Current Director Defendants' failure to disclose several highly material facts. First, Eisner characterized the hiring of Ovitz at the 1997 annual meeting as a "mistake" and claimed that the Current Director Defendants had no choice but to cause Ovitz to "resign." In fact, the Current Board agreed to pay Ovitz the excessive severance benefits despite the fact that they possessed considerable information that indicated that Ovitz had breached the terms of the Ovitz Employment Agreement and was not entitled to the huge severance payments he has been paid. Had the full truth been disclosed, the re-election of the directors and the approval of the two compensation plan measures could have been achieved.

17. With respect to the Eisner Compensation Agreement and the Bonus Plan, defendants' disclosures were materially deficient because the Proxy Statement did not reveal that the manner in which defendants proposed to alter the formula for determining the bonuses to be paid to Eisner and other Disney executives (basing the bonus on growth in earnings per share ("EPS"), rather than return on equity) rendered the amount of those bonuses easily manipulable. As defendants were aware, such manipulation could be accomplished through, <u>inter alia</u>, accounting maneuvers and stock repurchases that are totally under their control.

18. The Current Director Defendants' failure to disclose those facts was particularly significant in light of the facts that: (a) Disney had recently taken huge accounting charges in connection with its merger with Capital Cities/ABC Inc. ("Capital Cities"); (b) those charges would have the effect of permitting Eisner to manipulate and inflate the Company's future EPS

by reversing and drawing down on those reserves at his discretion to make certain that Disney's future reported EPS exceeded the threshold hurdles in Eisner's contract, thereby triggering the payment of huge bonuses to Eisner; and (c) defendants intended to engage in substantial stock repurchases during the pendency of the Bonus Plan and the Eisner Compensation Agreement in order to offset the increase in the number of Disney shares outstanding that would result from the purchase of Disney shares by option holders at below-market prices. As a result, Eisner and other senior Disney executives would be shielded from any dilution in reported EPS, which could harm their bonuses, while continuing to receive and exercise lucrative stock options.

19. Defendants' disclosures concerning the Eisner Compensation Agreement were also materially defective in that the Proxy Statement did not reveal that the Company's continual pattern of issuing shares to employees at below-market option strike prices and repurchasing at least an equal number of shares at prevailing market prices would have a severely negative impact upon the Company's performance and valuation from a cash flow and net worth standpoint. Such disclosure was particularly imperative in this instance because defendants knew that they would cause Disney to repurchase a sufficient number of shares to offset any options exercised by Eisner to avoid diluting the Company's reported EPS.

20. Had the foregoing facts concerning the economics underlying the Bonus Plan and the Eisner Compensation Agreement been accurately disclosed, neither measure would have been approved by Disney's shareholders.

21. As is alleged in detail below, the conflicting interests and reckless conduct engaged in by the Individual Defendants rendered futile any demand that the Individual Defendants pursue the causes of action alleged herein. In fact, the conflicts faced by the Disney Board are so rampant that the November 25, 1996 edition of Business Week named the Disney Board as one of the 25 worst corporate boards in America. Here, those conflicts produced

conduct that grievously injured Disney as a result of, inter alia: (a) Eisner's ability to dominate the Disney Board's decision-making by virtue of his control over the compensation of Disney's employees and consultants; (b) the financial incentives Eisner and other Disney employees possessed to guarantee that Ovitz's compensation was set at lofty levels; and (c) Eisner's strong self-interest in avoiding controversy regarding executive compensation at the Company shortly before his own massive compensation package was put to a vote of the Company's shareholders.

22. Demand is also excused because the Disney Board's decision-making in adopting and ratifying the Ovitz Compensation Agreement was the product of gross negligence and bad faith and amounted to a waste of the Company's assets. In particular, the Individual Defendants' decisions to award Ovitz with a compensation package that provided him with substantial incentive to exit Disney as soon after his arrival as possible (with millions in hand) and to bestow the unconscionable severance package upon Ovitz although he had repeatedly breached his contractual obligations cannot be justified as valid exercises of business judgment.

23. Disney will suffer severe injury if Ovitz is permitted to retain the unconscionable cash payments and stock options awarded to him for no or inadequate consideration. Likewise, Disney's shareholders will suffer irreparable injury if the measures which were approved by Disney's shareholders at the Company's 1997 annual meeting on the basis of defective and misleading disclosures are allowed to stand. Plaintiffs accordingly bring this action derivatively on behalf of the Company to enjoin the fulfillment and enforceability of the Ovitz Employment Agreement, to seek a declaration as to the invalidity of the options granted to Ovitz and to prevent the Individual Defendants from continuing their wasteful and wrongful course of conduct. Plaintiffs also bring this action as a class action to require defendants to submit the challenged measures adopted at the Company's 1997 annual meeting to Disney's shareholders with the benefit of full and fair disclosure and to void the measures ratified by Disney's

shareholders at the annual meeting on the basis of the Current Board's misleading representations.

PARTIES

A. Plaintiffs

24. Plaintiffs William Brehm and Geraldine Brehm are shareholders of in excess of 2000 shares of Disney common stock in their capacities as custodians and/or trustees. The Brehms have owned the common stock of Disney and its predecessor, Capital Cities, at all times material to the allegations of this Complaint. Certain of the Disney shares held by William Brehm, as custodian, became Disney shares by operation of law at the time Disney acquired Capital Cities on February 9, 1996. Prior to Disney's acquisition of Capital Cities, William Brehm, as custodian, had held the shares of Capital Cities common stock that became Disney shares by operation of law for a number of years.

25. Plaintiffs Richard Kaplan and David Kaplan are trustees of a number of trusts which collectively own in excess of 30,000 shares of Disney common stock. The Kaplans have held Disney shares as trustees at all times relevant to this action.

26. Plaintiff Thomas M. Malloy owns 300 shares of Disney common stock. Malloy has owned those shares at all times relevant to this action.

27. Plaintiffs Richard J. Kager and Carol R. Kager, JTWROS, own 200 shares of Disney common stock. The Kagers have owned those shares at all times relevant to this action.

28. Plaintiff Michael Caesar, as Trustee for Howard Gunty, Inc. Profit Sharing Plan (1/1/70), has owned shares of Disney common stock at all times relevant to this action.

29. Plaintiff Robert S. Goldberg, I.R.A., owns 4,400 shares of Disney common stock and has held those shares at all times relevant to this action.

30. Plaintiff Michael Shores owns 100 shares of Disney common stock and has held those shares at all times relevant to this action.

31. Plaintiff Michael Grening owns 400 shares of Disney common stock and has held those shares at all times relevant to this action.

32. Plaintiff Michelle De Benedictis owns 50 shares of Disney common stock and has held those shares at all times relevant to this action.

33. Plaintiff Peter Lawrence, I.R.A., owns 61.59385 shares of Disney common stock and participates in the Disney Dividend Reinvestment Program. Lawrence has held shares of Disney common stock at all times relevant to this action.

34. Plaintiff Melvyn Zupnick owns 400 shares of Disney common stock and has held those shares at all times relevant to this action.

35. Plaintiff Judith B. Wohl, I.R.A., owns 100 shares of Disney common stock and has held those shares at all times relevant to this action.

36. Plaintiff James C. Hays is the holder of 100 shares of Disney common stock and has owned those shares at all times relevant to this action.

37. Plaintiff Barnett Stepak is the holder of 1,300 shares of Disney common stock and has owned those shares at all times relevant to this action.

B. Defendants

38. Disney is a Delaware corporation with its principal place of business located at 500 South Buena Vista Street, Burbank, California. Disney identifies itself in its filings with the Securities and Exchange Commission ("SEC") as "a diversified international entertainment company with operations in three business segments: Creative Content; Broadcasting; and Theme Parks and Resorts." Disney is named in this action only as a nominal defendant.

39. Defendant Eisner is the Company's Chairman of the Board and Chief Executive Officer. Eisner has served in those roles since 1984.

40. (a) Defendant Ovitz served as the Company's President from approximately October 2, 1995 until December 27, 1996. Ovitz also served as a Disney director for most of that period. Ovitz and Disney announced on December 12, 1996 that Ovitz would leave Disney, effective January 31, 1997. Subsequently, and for unexplained reasons, Disney revealed in the Proxy Statement that Ovitz's employment at Disney ended on December 27, 1996.

(b) Prior to his employment at Disney, Ovitz founded, and served as Chairman of, Creative Artists Agency ("CAA"), a firm of talent agents. Before joining Disney, Ovitz had neither served as an entertainment industry executive nor as an officer of a publicly-traded company.

(c) Ovitz was not a Disney director at the time the Ovitz Employment Agreement was entered into between him, acting in his personal capacity, and Disney, or at the time the Proxy Statement was issued. Ovitz is named as a defendant because he insisted upon and received exorbitant and unwarranted financial benefits in connection with his departure from Disney in violation of his supervening fiduciary obligations to Disney. In addition, Ovitz is named as a defendant to the claim that the monies and stock options he has received under his Employment Agreement were wrongfully paid and received by him because, for the reasons stated herein, he was not contractually entitled to such benefits.

41. (a) Defendant Stephen F. Bollenbach is the former Senior Executive Vice President and Chief Financial Officer of Disney. Bollenbach served in those positions, and as a Disney director, from approximately April of 1995 until February of 1996. In those capacities, Bollenbach was generously compensated by the Company. A significant percentage of Bollenbach's compensation from Disney was paid in the form of a discretionary annual bonus

that depended, in large part, upon the recommendation of defendant Eisner. Accordingly, Bollenbach did not act independently in voting in favor of or ratifying the terms of the Ovitz Employment Agreement, which Eisner had espoused and endorsed.

(b) Bollenbach resigned from his post as a Disney director before Ovitz agreed to leave his position as Disney's President and before defendants issued the Proxy Statement. Bollenbach is therefore named as a defendant in this action solely with respect to the actions he undertook in approving and/or ratifying the terms of the Ovitz Employment Agreement during his tenure as a Disney director.

42. Defendants Eisner, Bollenbach, Roy E. Disney, Stanley P. Gold, Sanford M. Litvack, Richard A. Nunis, Sidney Poitier, Irwin E. Russell, Robert A.M. Stern, E. Cardon Walker, Raymond L. Watson, Gary L. Wilson, Reveta F. Bowers, Ignacio E. Lozano Jr., and George J. Mitchell were the members of the Old Board.

43. Defendants Ovitz, Eisner, Disney, Gold, Litvack, Nunis, Poitier, Russell, Stern, Walker, Watson, Wilson, Bowers, Lozano, Mitchell, Leo J. O'Donovan and Thomas S. Murphy were the members of the Current Board.

44. (a) By virtue of their positions as directors and/or officers of the Company, all of the Individual Defendants named as defendants herein have had and have exercised, throughout the course of their affiliation with the Company, the power to control and influence the Company's actions in negotiating, considering, approving, ratifying and seeking to enforce the Ovitz Employment Agreement.

(b) Throughout the course of their affiliation with the Company, the Individual Defendants owed Disney fiduciary obligations of loyalty, good faith, due care and candor. As a result, during their respective tenures as Disney directors and officers, all of the Individual Defendants were required to: (a) use their ability to control and manage the Company in a fair, just and equitable manner; (b) act in furtherance of the best interests of Disney and its shareholders; (c) refrain from abusing their positions of control; and (d) not favor their own interests or personal concerns, or those of their fellow officers and/or directors, at the expense and to the detriment of the Company and its shareholders.

THE FACTS AND CIRCUMSTANCES THAT SUPPORT THE CLAIMS ALLEGED BY PLAINTIFFS

A. Eisner Unilaterally Hires Ovitz

45. In or about September of 1995, Eisner hired Ovitz to serve as the Company's President, or second-in-command. Ovitz commenced his employment at Disney on October 2, 1995. Prior to that time, Ovitz was the Chairman of CAA, a talent agency.

46. Only weeks before Ovitz was named as Disney's President, he had engaged in protracted negotiations with MCA, Inc. about the possibility of becoming that entertainment company's President. When those talks broke down over the amount of Ovitz's compensation, Ovitz reportedly was reluctant to return to CAA to work as a "mere" agent. As a result, while Ovitz had previously refused offers to work at Disney, he was very receptive to Eisner's renewed expression of interest.

47. Ovitz and his wife were close friends of Eisner and his wife for over 25 years before Ovitz joined Disney. Before hiring Ovitz, Eisner told Ovitz that he would be Disney's second-in-command.

48. It was widely recognized within Disney and on Wall Street that the Company badly needed an effective and capable executive to assume responsibility for the day-to-day management of Disney and the coordination and integration of Disney's far-flung and diversified business operations, which had recently been greatly expanded by the acquisition of Capital Cities. Only shortly before the Capital Cities acquisition, Eisner had undergone major heart

surgery. In addition, in 1994, Eisner lost his highly respected second-in-command, Frank Wells, in a fatal helicopter crash. Within months of Wells's death, Eisner also lost the services of Jeffrey Katzenberg, a leading figure in the motion picture and animation fields in which Disney had recently recorded great successes. Although Eisner had also been greatly assisted and complemented during his tenure by Katzenberg, Eisner forced Katzenberg to leave the Company due to Eisner's unwillingness to name Katzenberg as the Company's President, and thereby place a potential rival in the second-most powerful position in the Company.

49. Eisner therefore knew that he needed to find a powerful and highly respected entertainment industry executive if the Company's requirements were to be served and the concerns raised by his own health problems were to be alleviated. Ovitz, who had never served in an entertainment industry executive capacity, was, at best, a highly risky selection under stressful circumstances.

50. The decision to bring Ovitz to the Company was made unilaterally and peremptorily by Eisner. At a meeting held at Eisner's Bel Air home on or about August 13, 1995, Eisner announced to Old Board members Bollenbach, Litvack and Russell that he had hired Ovitz. At that point, Bollenbach, Litvack and even Russell (Eisner's personal attorney) <u>denounced</u> the decision. As with all decisions at Disney, however, the Old Board eventually bowed to Eisner's wishes despite the staunch opposition initially expressed by three of its most knowledgeable members. Those facts were not revealed until after Ovitz's premature departure from his Disney post.

B. Defendants Waste Disney's Corporate Assets On Ovitz With An Exorbitant And Reckless Compensation Package

51. Before commencing his employment at Disney, Ovitz had no experience in working as an officer of a public corporation, much less one the size and scope of Disney.

Moreover, Ovitz had no experience in many of Disney's principal businesses, including the Company's vast theme park operations.

52. Furthermore, Ovitz had previously functioned as a virtual kingpin in his limited domain as a talent agent. Thus, Ovitz had no track record following orders, much less acting as a second-in-command to a powerful executive such as Eisner. In turn, even prior to Ovitz's hiring and eventual separation from Disney, Eisner had demonstrated little or no capacity to work with important or well-known subordinate executives who wanted to position themselves to succeed him, adding further fuel to an already volatile and unstable situation.

53. Despite Ovitz's status as a relative neophyte in the corporate world, and the significant executive turnover which had characterized Disney's operations since Eisner became Disney's Chairman and CEO, Disney signed Ovitz to the ill-conceived, long-term Ovitz Employment Agreement. That agreement lavished Ovitz with benefits that vastly exceeded any conceivable value that Ovitz could possibly have contributed to the Company. Indeed, even had Ovitz been qualified to fill the demands of the position for which he was being hired (a highly doubtful proposition), the agreement was structured in a manner that all but assured that he would maneuver for his termination and thereby reap the full financial benefits of the Agreement without contributing anything of value to Disney's operations. If the Former Director Defendants were seeking to stabilize and strengthen the Company's executive managerial ranks by the employment of Ovitz, they could not have chosen a less auspicious contractual arrangement because the agreement provided Ovitz with every incentive to maneuver for his early departure.

54. The Ovitz Employment Agreement is dated October 1, 1995. The agreement called for Ovitz to receive a generous compensation package for performing services as the Company's President, but one not nearly so generous as the severance package he would receive

in the event his employment were terminated for any reason other than cause before the contract expired on September 30, 2000.

55. Ovitz's annual salary as Disney President was set at $1 million. In addition, he was to receive a discretionary bonus at the end of each full year he served as the Company's President.

56. By far the most significant element of Ovitz's compensation package was the options by which he was granted the right to purchase 3 million shares of the Company's common stock at an exercise price of $57 per share. The options provided for vesting in increments of 1,000,000 shares on September 30 of each year commencing September 30, 1998. Importantly, however, the options provided for immediate vesting upon Ovitz's separation from the Company unless: (a) he was terminated by Disney for good cause; or (b) he resigned without the Company's consent. In addition, upon any such termination, the exercise period for Ovitz's stock options was extended until the later of September 30, 2002 or 24 months after the date of termination.

57. As has been conceded by Graef Crystal, the executive compensation consultant who advised the Old Board with respect to the Ovitz Employment Agreement, the Old Board never considered the costs that would be incurred by Disney in the event Ovitz was terminated from the Company for a reason other than cause prior to the natural expiration of the Ovitz Employment Agreement.

58. The Ovitz Employment Agreement also called for Ovitz to receive a "termination payment" of $10,000,000 in the event Ovitz was terminated other than for cause prior to the September 30, 2000 conclusion of the contract.

59. Further, in the event Ovitz was terminated as an employee of Disney (other than for cause), the Ovitz Employment Agreement called for an additional payment equal to the

present value of (i) the remaining salary payments under the Agreement through September 30, 2000, and (ii) the product of $7.5 million and the number of fiscal years remaining under the Ovitz Employment Agreement (i.e., foregone bonuses).

C. The Perverse Financial Incentives Created By The Ovitz Employment Agreement

60. As Graef Crystal noted in the January 13, 1997 edition of California Law Business, Ovitz's compensation package was structured in such a manner as to produce irrational and perverse results, i.e., the agreement actually provided Ovitz with enormous financial incentives to have his employment with Disney terminated as quickly as possible (provided that events could be orchestrated to make it appear that his departure was not for cause). The California Law Business article stated:

> [Ovitz] was given a lucrative exit package that guaranteed him his salary and bonuses over the life of the contract, as well as a $10 million termination payment and options on 3 million shares of Disney stock. Thus, the contract was most valuable financially to Ovitz the sooner he left Disney, Crystal says.
>
> With no one expecting failure, the sleeper clauses in Ovitz's contract seemed innocuous, Crystal says, explaining that no one added up the total cost of the severance package. "Nobody quantified this and I wish we had," he says.

61. Thus, the Ovitz Employment Agreement permitted Ovitz, an untested executive used to being the unquestioned leader of a much smaller, less diversified business, to leave Disney after only a brief tenure at the Company with a severance package equal to or greater than the benefits to which he would have been entitled had he served out the full term of the Ovitz Employment Agreement, which was scheduled to run through September 30, 2000.

62. Indeed, because Ovitz would receive the $10 million cash contract termination payment only in the event he was terminated, it was actually in his economic interests at all times to force his termination. From Ovitz's perspective, every day he spent at Disney cost him money he could be earning elsewhere, particularly in light of the fact that Disney was more than

willing to pay him his full contract benefits for doing absolutely nothing. In fact, the only step Ovitz could possibly have undertaken to serve his personal financial interests any further was to arrange for his separation from Disney even earlier than he eventually did.

63. The decision to provide Ovitz with such a lucrative exit opportunity early in his tenure as Disney President was a particularly egregious waste and diminution of Disney's assets because, in addition to the fact that Ovitz was almost totally inexperienced and unqualified for his position, the recent history of high-level executive departures from Disney indicated that there was at least substantial risk that Ovitz could not or would not serve out the full term of the Ovitz Employment Agreement under Eisner's supervision.

64. In April of 1994, Disney's President, Frank G. Wells, was killed in a helicopter crash. Since that time, Disney's executive offices have been in constant turmoil. First, the Chairman of Disney Studios, Jeffrey Katzenberg, left the Company in August 1994 after his campaign to be named Wells's successor as Disney's President was rebuffed by Eisner, who resented Katzenberg's aspirations to share Eisner's power. At that time, Eisner assumed the duties that Wells had performed as Disney President, hardly an optimal result from the corporate standpoint.

65. In March of 1995, Richard Frank, the Chairman of Disney's television and telecommunications divisions, resigned. Public reports indicated that Frank's departure from the Company was directly linked to Eisner's aggressive, hands-on and intrusive management style.

66. In April 1995, defendant Bollenbach became the Company's Senior Executive Vice President and Chief Financial Officer and was elected to the Board. Bollenbach's tenure with the Company lasted but ten months. He left Disney in February 1996 after having supervised the Capital Cities acquisition.

67. Thus, in the months immediately preceding and following Disney's hiring of Ovitz, the Individual Defendants were provided with several examples of rapid turnover in the senior executive ranks at Disney. Nevertheless, the Individual Defendants agreed to structure the Ovitz Employment Agreement in a manner that provided Ovitz with no incentive to render long-term services to Disney. Rather, Ovitz was afforded the opportunity to garner enormous personal profit by leaving Disney soon after he arrived without delivering any corresponding benefit to the Company.

D. Ovitz's Ineffectual Performance At Disney

68. From the outset, Ovitz's performance as Disney's President was undistinguished and unproductive. Indeed, the published reports concerning Ovitz's record at Disney have universally concluded that he produced virtually no positive results during his tenure and, in certain respects, acted contrary to Disney's best interests and in violation of his own fiduciary duties as a director and officer of the Company.

69. For example, The Wall Street Journal reported in its February 24, 1997 edition that, only months after Ovitz was hired by Disney, Eisner wrote, in a memorandum to defendant Watson, that he "had made an error in judgment in who I brought into the company." According to Eisner:

> I made it very clear to [Watson] and a few other people that if I should get hit by this truck, he should not expand my error and continue it. . . . I made it very clear I had made a mistake, way before it became clear to the public and way before I acted. I knew that it was not going to work and I did not want to leave a legacy of my mistake.

70. The Wall Street Journal reported in its December 12, 1996 edition that "[Ovitz's] relationship with Disney Chairman Michael Eisner has seemed strained at times, and Mr. Ovitz has had difficulties in carving out a clear role for himself at the company." In that regard, the same Wall Street Journal article stated:

Over time, however, it has been difficult to see how Mr. Ovitz fits at Disney. He hasn't been intimately involved in the company's core film, television and theme-park businesses, forcing him to be entrepreneurial as he searched for a role. But Mr. Ovitz's efforts in those areas -- such as finding a way to shore up Disney's music business -- have been slow in developing.

71. The New York Times delivered a similar description of Ovitz's tenure at Disney in its December 14, 1996 edition:

Even Disney executives acknowledge that Mr. Eisner's management style was, perhaps, anathema to Mr. Ovitz. But studio executives said Mr. Ovitz bore the brunt of the blame with some highly publicized missteps, including clashes with top Disney officials, an imperious management style that included a huge office and staff, even by Hollywood standards, and a feud with NBC that was set off when he lured a top programmer, Jamie Tarses, from that network to Disney's ABC network.

Mr. Ovitz also went out of his way to recruit Martin Scorsese, the film director who was his former client, to Disney, agreeing to distribute the film maker's project, "Kundun," a film about the Dalai Lama, the Tibetan spiritual leader, in open conflict with the Chinese. Another entertainment company, Universal Studios Inc., had refused to distribute the film partly because of fears that it would damage efforts to expand business in China.

Yet Mr. Ovitz -- and Disney -- were startled when the Chinese threatened to derail the company's efforts to expand in China if the Scorsese film was released. Disney announced it would proceed with the film. But the episode was one more embarrassing setback for Mr. Ovitz, who had focused his role at Disney on the international marketplace, especially China.

Critics inside Disney said that since Mr. Ovitz had made himself the company's point man on China, he should have been on top of the situation from the outset.

72. Significantly harsher criticism of Ovitz's performance was delivered by defendant Bollenbach in a Vanity Fair article. The article states:

[Bollenbach] suggested that his new colleague sit down with briefing books and familiarize himself with the details of company operations. "Let's you and I take a day, a day and a half, and I'll go through all this with you, go through a budget and you'll understand this business," Bollenbach remembers telling Ovitz. "His response was 'Great. I can't thank you enough, let's set up a meeting.' That conversation occurred 25 times. And we never had the meeting. The point was, Michael Ovitz didn't understand the duties of an executive at a public company and he didn't want to learn."

73. Similarly, an October 7, 1996 article in The New York Times reported that Ovitz was instructed by Eisner to meet weekly with defendant Bollenbach during Bollenbach's tenure as Disney's Chief Financial Officer. Those meetings were scheduled to be held Mondays at 2:00 P.M. As The New York Times reported, however, "each Monday . . . Mr. Ovitz canceled the meeting at the last minute, reportedly angering Mr. Bollenbach," who had already noted Ovitz's refusal to meet with him simply for the purpose of becoming better oriented to Disney's affairs. In large part because of his conflicts with Ovitz and dissatisfaction with Eisner's choice of Ovitz as Disney's second-in-command, defendant Bollenbach left Disney on February 5, 1996.

74. Investors were also of the opinion that Ovitz had contributed virtually nothing to the Company's operations -- in a situation where, by all accounts, strong and decisive leadership and effective management were required. For example, The New York Times reported on December 13, 1996 that "analysts said Ovitz's departure would have little effect on Disney's day-to-day operations."

75. Even prior to his resignation from Disney, Ovitz had admitted publicly that he was performing ineffectively in his role as Disney's President. In a September 30, 1996 interview of Eisner and Ovitz on "Larry King Live" held nearly a year after Ovitz had joined the Company, Ovitz stated: "We've talked about a two-year learning curve . . . I probably know about 1% of what I need to know." During the interview, Eisner falsely denied reports that the Company was disappointed with Ovitz's performance.

76. The foregoing negative overall assessments of Ovitz's performance at Disney were well-grounded in fact. Indeed, additional specific examples of Ovitz's detrimental and frequently embarrassing conduct as Disney's President abound:

- According to a March 1996 article in Vanity Fair, Ovitz predicted that Disney's extraordinarily successful film "Toy Story" would be a box office flop. As a result, Disney did not distribute a sufficient volume of Toy Story-related products for the Christmas season.

- Ovitz's "successful" negotiations in bringing NBC programming executive Jamie Tarses to ABC were facilitated by public reports that Tarses had been sexually harassed by NBC West Coast President Don Ohlmeyer. In response to those rumors, which were reportedly planted by Ovitz, Ohlmeyer dubbed Ovitz "the Antichrist" in a Time Magazine article published on December 27, 1995. As reported in the May 16, 1997 edition of The Wall Street Journal, Tarses's job at Disney is now in severe jeopardy as a result of the woeful performance of the ABC network since Disney's acquisition of Capital Cities.

- Ovitz's efforts to arrange for Disney to purchase the Los Angeles Lakers and the Seattle Seahawks sports franchises were utter failures.

- On October 31, 1995, Ovitz recruited CAA agent Michael Rosenfeld to be a senior vice president of ABC Entertainment. Less than a year later, on September 9, 1996, Rosenfeld resigned from his post at ABC. When Rosenfeld announced to Ovitz that he intended to quit, Ovitz stated to Rosenfeld, "You can't quit, because it would be personally embarrassing to me."

- Ovitz failed in his efforts to negotiate a partnership deal with producer Brad Grey, even though Grey already had a production agreement with Disney-owned ABC.

77. Another highly-publicized contract entered into by Ovitz with the husband-and-wife production team of Kathleen Kennedy and Frank Marshall, with whom Ovitz had been personally and professionally involved for several years before joining Disney, was likewise criticized for failing to provide any benefits to Disney as a result of the extraordinary costs associated with that contract. On or about December 14, 1995, it was reported in the Hollywood Reporter that "Kennedy/Marshall Prods. has left Paramount Pictures after three years at the studio and signed a three-year, nonexclusive production deal with Walt Disney Pictures to develop and produce projects for the studio under their Kennedy/Marshall Co. banner." According to the same article, Kennedy/Marshall was expected to produce two to three feature films a year.

78. Among other costly and unusual clauses included in the Kennedy/Marshall deal, were the following:

- The deal included lucrative "overhead" provisions for Kennedy/Marshall. Disney agreed to pay the salaries and overhead on twenty employees rather than the four typically called for in a production deal.

- Kennedy/Marshall exceeded even the generous overhead allowance agreed to by Ovitz, in part by building expensive new offices in Santa Monica. Ovitz tolerated those cost over-runs without question.

- Kennedy did not live up to her contractual obligations to Disney. Instead of concentrating on the Disney film "Journey To The Center Of The Earth," she produced films for Warner Brothers and Universal.

E. Realizing His Failure As A Disney Executive, And The Incentives Under His Contract To Orchestrate His Departure, Ovitz Actively Searches For Alternative Employment

79. Ostensibly because of his inability to define any role for himself at the Company, Ovitz began to look actively for alternative employment within a year of his arrival at Disney. Such actions by him, however, could easily have been predicted. Disney's executive suite was chronically in turmoil. If Ovitz could secure a lucrative new position and, at the same time, arrange for his termination "without cause," he would reap a financial bonanza. Eventually, certain aspects of Ovitz's job search were prominently reported in the trade and financial press.

80. As early as September 12, 1996, The Wall Street Journal reported that Ovitz was interviewing for a top position at Sony with Nobuyuki Idei, the Chairman of Sony Corporation of America's ("SCA") parent company, Sony Corp. of Japan ("Sony Japan" and collectively with SCA, "Sony"). While The Wall Street Journal reported that sources had denied that rumor, Sony refused to comment on the situation.

81. At least as early as October 10, 1996, negotiations between Ovitz and Sony had proceeded sufficiently far to require Sony's in-house counsel to provide a memorandum to Idei

regarding the negotiations. Other Sony documents reveal that Ovitz and Sony were contemplating a five-year, $100 million contract.

82. On or before October 17, 1996, Sony had turned to its outside counsel at the New York law firm of Rosenman & Colin, LLP for the purpose of assisting Sony in negotiating an employment agreement with Ovitz.

83. Furthermore, by October 19, 1996, the negotiations between Sony and Ovitz had proceeded sufficiently far that a draft employment agreement between Ovitz and Sony was created.

84. The fact that the negotiations between Ovitz and Sony had progressed substantially is further confirmed by the identities of the individuals who were involved in the discussions. Indeed, the negotiations were conducted by five of the highest-ranking officials of SCA and Sony Japan, including: Idei, Sony Japan's Chairman; Tsunao Hashimoto, Sony Japan's Vice Chairman; Teruo Masaki, SCA's General Counsel; Marinus Henny, SCA's Executive Vice President and CFO; and Tamotsu Iba, the Executive Deputy President and CFO of Sony Japan and the representative of Sony Japan on the SCA board. In turn, Ovitz relied principally upon his long-time counsel, Ronald L. Olson of Munger, Tolles & Olson, to negotiate the agreement on his behalf.

85. Among numerous communications between representatives of Sony and Ovitz that occurred during the course of the negotiations, on October 23, 1996, Olson met with Paul Burak (a partner at Rosenman & Colin and a member of SCA's board of directors), Iba and Masaki.

86. According to an October 31, 1996 Rosenman & Colin draft of Ovitz's employment agreement with Sony, Ovitz was to be hired by either a newly-created or existing subsidiary of SCA which would hold SCA's entertainment businesses ("Sony Entertainment"). Ovitz was to serve as the Chairman and Chief Executive Officer of Sony Entertainment and was

to report only to the President and Chief Operating Officer and/or Chairman and Chief Executive Officer of Sony Japan and the boards of directors of Sony Entertainment, SCA and Sony Japan. Sony also agreed to use its best efforts to cause Ovitz to be elected to the boards of directors of Sony Japan, SCA and Sony Entertainment.

87. Notably, at the same time Ovitz was negotiating with Sony on his personal behalf, he was also purportedly negotiating with Sony regarding corporate transactions with Disney, thereby presenting a clear-cut conflict of interest. In that regard, The Los Angeles Times reported on September 27, 1996 that "Ovitz has discussed a series of different scenarios with Sony President, Nobuyuki Idei and other executives, the most intriguing of which is whether Sony would sell all or part of its lucrative music operation to Disney. . . . [T]he companies also are talking about possible joint ventures in music, technology and other areas."

88. The fact that Ovitz was busily searching for alternative job prospects was not kept secret. For example, in its December 12, 1996 edition, The New York Times reported that "Michael Ovitz, the president of the Walt Disney Company and one of the most formidable power brokers in Hollywood, has held conversations with Sony in recent weeks about taking a top job there, a high-level entertainment executive said tonight."

89. On December 13, 1996, The Wall Street Journal reported that Ovitz "has recently discussed employment options with Sony Corp., among others." Likewise, The New York Times reported that "Ovitz had been talking recently with Sony about possible top jobs."

90. Ovitz's efforts to obtain a job with Sony were also reported in a variety of additional publications, including the December 13, 1996 edition of the Hollywood Reporter and the December 16, 1996 edition of Variety.

91. Sony was not the only company with which Ovitz sought employment during his tenure at Disney. In fact, it was widely reported in the media that Ovitz had campaigned for

the chief executive officer's position at Viacom Inc. In January 1996, Viacom Chairman Sumner Redstone had fired that company's former chief executive, Frank Biondi. A December 12, 1996 article in The Wall Street Journal reported that Ovitz had been hinting well before the announcement of his separation from Disney that he was considering leaving Disney. The article further reported, "Earlier this week, he met with Viacom Chairman Sumner Redstone while on a business trip to New York, and left people at Viacom with the impression that he was looking for another job." Likewise, a December 13, 1996 article in the Hollywood Reporter noted that published reports had been indicating that Ovitz was seeking a job at Viacom as well.

92. As Ovitz's tenure at Disney was drawing to a close, the media continued to report numerous stories concerning his attempts to obtain alternative employment. Indeed, on the day Ovitz and Eisner met to finalize the terms of Ovitz's separation from Disney, December 11, 1996, the media reported that Sony's Idei was in New York and speculated that he was there to discuss a possible contract with Ovitz.

F. Ovitz's Job Search And Ineffectual Performance Constituted A Breach Of The Ovitz Employment Agreement

93. Ovitz's active efforts to obtain alternative employment while he was under contract as Disney's President breached the explicit terms of his employment agreement. The Ovitz Employment Agreement required Ovitz to "devote his full time and best efforts exclusively to the Company," thereby precluding any efforts by Ovitz to obtain other employment while still under contract to Disney.

94. The Ovitz Employment Agreement also stated that Ovitz was prohibited from "compet[ing] in any manner, directly or indirectly, whether as a principal, employee, consultant, agent, owner or otherwise, with [Disney] or any affiliate thereof." By seeking and soliciting

employment with other principal competitors in the entertainment industry, Ovitz was actually or anticipatorily in breach of that commitment.

95. The Ovitz Employment Agreement further provided that Disney could terminate Ovitz's employment under the following circumstances:

> For good cause (A) immediately upon notice from Company if Company shall reasonably determine that the conduct or cause specified in such notice is not curable; or (B) upon thirty days' notice from Company, if Company shall determine that the conduct or cause specified in such notice is curable, unless Executive has, within ten days after the date such notice has been given by Company, commenced in good faith to cure the conduct or cause specified in such notice and has completed such cure within 30 days following the date of such notice. Termination by Company of Executive's employment for "good cause" as used in this Agreement shall be limited to gross negligence or malfeasance by Executive in the performance of his duties under this Agreement or the voluntary resignation by Executive prior to expiration of the Term (other than pursuant to a valid termination of employment by Executive in accordance with Section 12 hereof) as an employee of Company without the prior written consent of Company.

96. By actively searching for alternative employment during the course of his employment by Disney, Ovitz not only breached the fiduciary duties he owed to the Company and its shareholders, but committed "malfeasance," as that term is utilized in the Ovitz Employment Agreement. Accordingly, he was not entitled to any severance benefits from Disney.

97. Moreover, the Ovitz Employment Agreement permitted Ovitz to terminate the agreement and receive severance compensation only under very narrowly-defined circumstances. In particular, since Ovitz decided to leave Disney voluntarily, he forfeited his contractual rights and should therefore have been entitled to <u>no severance payments whatsoever.</u>

98. As specified above, Ovitz also breached the Ovitz Employment Agreement by means of his dismal performance in his role as Disney's President. In particular, Ovitz's refusal to avail himself of Bollenbach's efforts to orient Ovitz to critical aspects of Disney's business

operations constituted gross negligence in the performance of his duties as the Company's President. Accordingly, Disney did not owe any severance benefits to Ovitz.

G. Ovitz's Breaches Of The Ovitz Employment Agreement By Performing Services On Behalf Of CAA

99. Ovitz also committed malfeasance, violated the exclusive services provision of the Ovitz Employment Agreement, and violated his fiduciary obligations to Disney and its shareholders by endeavoring to convince former CAA clients not to leave the agency during his tenure at Disney.

100. In some cases, Ovitz's efforts on behalf of CAA were undertaken even as he negotiated significant agreements with his former clients on behalf of Disney. For example, Ovitz negotiated lucrative Disney production deals with Scorsese and actor Sean Connery at the same time he was urging them not to defect from CAA.

101. According to Daily Variety, Ovitz's deal with Connery was consummated in October 1995. At that time, Ovitz signed Connery and his company, Fountainbridge Films, to a "two-year housekeeping deal." Connery's deal with Disney was highly unusual in that studios generally enter such "housekeeping deals" only with film-makers who have demonstrated an ability to develop projects, not actors. Connery, an actor, is not an established film-maker.

102. During the course of his tenure at Disney, Ovitz also urged director Barry Levinson to remain at CAA. As Vanity Fair reported in its December 1996 issue:

> [Ovitz advised] Barry Levinson -- who was on the brink of defecting to ICM . . . to consider the fate of his most recent project, "Sleepers." Ovitz's argument . . . was that "Sleepers" was packed with CAA clients, including De Niro, Dustin Hoffman and Brad Pitt. "If you leave now," the argument went, "what incentive does CAA have to support the film?"

103. Ovitz also interceded on behalf of CAA when Dustin Hoffman, a former client, was considering leaving CAA.

104. Ovitz's efforts to convince former clients to remain at CAA were not motivated, first and foremost, by loyalty to the colleagues he had left behind at that firm. Rather, shortly before his departure from CAA, Ovitz had negotiated a lucrative buyout of the equity in CAA that was owned by him and two co-founders of the agency. As was reported in the September 28, 1995 edition of Daily Variety, "Wall Street mergers and acquisitions expert Martin Lipton of Wachtell Lipton Rosen & Katz has designed a system in which the Troika will be bought out over the next five years, with money generated by any deals the agency closed or initiated before each partner exited."

105. The September 18, 1995 edition of Variety reported, "When CAA's nine new managing directors officially take control of Hollywood's most powerful talent agency on [October 1, 1995], they will essentially be buying the business with no down payment and no bank loans -- nothing but a five-year chit payable to co-founders Michael Ovitz, Ron Meyer and Bill Haber." The Variety article also stated that the funds to buy out Ovitz, Meyer and Haber were to be provided by money generated over five years by deals the agency closed or initiated before the three men left CAA. The Variety article also quoted "[a] member of CAA's new brass" who stated, "Ovitz, Haber and Meyer will be getting rent and money from their deals."

106. The rent referred to in the Variety article was rent paid by CAA to Ovitz and his co-founders of CAA for the agency's headquarters, which was owned by Ovitz, Haber and Meyer. The percentage of the fees generated by former clients of Ovitz, Haber and Meyer that CAA agreed to pay to the three co-founders is not publicly known. The September 18, 1995 Variety article stated, however: "According to sources at the agency, the existing CAA brass felt they deserved 90% of receivables from all deals that closed or were in motion by October

1. Those agents staying at CAA felt that Meyer, Ovitz and Haber's ownership was worth an amount closer to 75% of receivables to be paid out over five years."

107. As The Los Angeles Times reported on August 22, 1995:

> Essentially the buy out structure is an "earn out" arrangement, meaning that as money from clients' movies or TV series flow in, the three will be paid over a number of years. It is unclear whether this kind of arrangement, which alleviates the new partners from being saddled with bank debt, will raise any conflict-of-interest issues for Ovitz and Meyer who are both going to be buyers at competing studios.

108. Unsurprisingly, the September 18, 1995 Variety article also acknowledged that "CAA's earn-out scenario appears fraught with the potential for conflicts of interest." Those conflicts of interest arose from, inter alia, the fact that Ovitz would be receiving funds generated by CAA clients whom he was in a position to hire in his role at Disney. CAA needed to maintain significant cash flows from its existing stable of clients if its onerous obligations to Ovitz and the others covered by the deal were to be satisfied. Ovitz also had to take steps to assure that lucrative deals that were in place when he left the agency did not unwind after his departure, thereby depriving him of the profits generated by those agreements. Ovitz knew this and thus exerted his influence to bolster CAA's operations and results, even after he had ostensibly cut all ties with his former firm.

109. Further evidence that Ovitz's actions in signing former clients Scorsese and Connery to lucrative production deals were motivated by self-interest, rather than the interests of Disney and its shareholders, is provided by the fact that Joe Roth, the respected head of Disney's Studios, was publicly critical of Ovitz's deals. In the September 27, 1996, edition of the Los Angeles Times, Roth stated, "[I]t may have been hard for him to accept, it became clear after Connery and Scorsese that simply making first-look deals with high-end talent wasn't in the company's long-term interest."

H. Defendants' Efforts To Conceal The Fact That Ovitz Breached The Ovitz Employment Agreement By Means Of His Ineffectual Performance

110. Defendants were aware virtually from the start of Ovitz's tenure as Disney's President that Ovitz was floundering and failing to fulfill his duties as Disney's President. Indeed, The Los Angeles Times reported on February 28, 1997 that "Disney director Ray Watson confirms that, as reported in The Wall Street Journal this week, Eisner advised him and a few other board members of his misgivings about Ovitz just a few months after hiring the former talent agent in August 1995."

111. Nevertheless, defendants continually sought to cover-up that situation by representing to Disney shareholders that Ovitz's efforts at the Company were proceeding successfully. For example, in a March 1996 interview with Vanity Fair, Ovitz stated: "It's working fantastically. We've been having a lot of fun. We're doing everything together because I'm trying to learn Disney's business. The first 100 days have been one of the most fantastic experiences of my life."

112. Among other instances in which defendants falsely represented that all was well in Disney management are the following instances which were catalogued in a February 28, 1997 article in The Los Angeles Times:

- "In an interview with The Times in September, Eisner used the word 'ludicrous' four times to describe rumors of a rift between the two executives, blaming jealous competitors as the source of such speculation."

- "Eisner subsequently debunked the rumors wherever they surfaced. 'I am very satisfied with his performance,' he told Newsday."

- "'From my point of view, he's a talented, strong and effective executive . . . Performance is the key. In my opinion, we are performing so spectacularly and it is under the management of Michael Eisner and Michael Ovitz,' [Eisner] told The New York Times."

- "In a Newsweek article [Eisner] referred to the whole brouhaha as 'infinitesimally unimportant.'"

113. Thus, as The Los Angeles Times concluded, "It now appears that Eisner was deceiving the news media, his shareholders, analysts and others at the time, believing early on, as he now indicates, that the Ovitz situation was not resolvable."

I. Ovitz's "Termination" As Disney's President

114. As a result of Ovitz's failure to fulfill his duties as Disney's President, his divided loyalties, the increasingly public nature of Ovitz's job search, and Ovitz's desire to put his tenure at Disney behind him, Eisner, together with Ovitz, decided to arrange for Ovitz to leave the Company. They met to finalize the terms of Ovitz's separation from the Company on the evening of December 11, 1996.

115. During the course of a four-hour meeting held at Eisner's apartment in New York City that ended at approximately 2:30 A.M., Eisner agreed to provide Ovitz with a Non-Fault Termination as Disney's President, as that term is defined in the Ovitz Employment Agreement. Thus, Ovitz served as Disney's President for only approximately fourteen months.

116. According to a report that appeared in the Los Angeles Times on December 13, 1996, Ovitz's counsel, Ronald Olson, was heavily consulted by Ovitz during the course of the late-night meeting with Eisner. Olson insisted that any statement concerning Ovitz's departure from the Company state that Ovitz was leaving Disney by mutual agreement. As The Los Angeles Times reported, if Ovitz had acknowledged that he was unilaterally resigning -- or quitting -- he would have forfeited all of the payments subsequently made to him under the Ovitz Employment Agreement.

117. While Ovitz and his lawyers made sure to create the appearance that his departure from Disney was, at least in part, prompted by the Company, the fact remains that Ovitz's

employment at Disney ended of his own volition. At least as early as September 5, 1996, Ovitz wrote to Eisner and expressed his desire to quit. Moreover, Ovitz has elsewhere publicly repudiated any notion that Disney could or would seek to fire him. As is reported in a recently-published biography of Ovitz written by Robert Slater, when The London Times reported in the summer of 1996 that Eisner wanted to terminate Ovitz's employment with Disney, Ovitz "thought it was funny" because it "was just too preposterous." Even in the press release issued in connection with Ovitz's separation from the Company, Ovitz characterized his departure as "my decision to leave," i.e., totally his determination to make and under his ultimate control.

118. As was also reported in the Slater biography, the only reason Ovitz did not simply state outright the he quit his position at Disney was his realization that doing so would deprive him of all severance benefits available to him under the Ovitz Employment Agreement. As a result, Ovitz requested that his friend Eisner agree to characterize Ovitz's resignation as a Non-Fault Termination under the Ovitz Employment Agreement.

119. Indeed, Ovitz knew that he could maneuver Eisner into agreeing to that characterization because Eisner was at that same time putting together his own exorbitant compensation package and was highly reluctant to engage in a public dispute with Ovitz similar to the one that was at that time festering with Katzenberg, Disney's former entertainment chieftain. Katzenberg, who once enjoyed warm relations with Eisner, was suing Disney for $250 million in severance benefits and deferred obligations which he claimed that Disney owed him. Hence, rather than force Ovitz to resign -- as he had already announced his desire and intention to do -- or terminate Ovitz for cause (as would have been warranted), Eisner willingly agreed that Ovitz should be granted a Non-Fault Termination. Eisner thereafter caused the Current Board to rubber-stamp his decision (by "mutual consent").

120. In a January 7, 1997 editorial, The Wall Street Journal commented upon the inexplicable nature of Disney's failure to undertake any negotiations with respect to the terms of Ovitz's severance package. The Wall Street Journal stated that Ovitz and Eisner

> hashed out this settlement themselves, and nothing was stopping them from settling on a presentable sum between the mountain of money Mr. Ovitz would get for being fired and the lump of coal he'd get for walking away. Hollywood knows how: Disney could have struck a deal to invest in his future products. There could at least have been the hint of him doing something to earn his payoff.

121. The discussions surrounding Ovitz's departure from the Company presented an ideal and compelling opportunity to revisit the unconscionable and onerous terms of the Ovitz Employment Agreement, particularly given Ovitz's active pursuit of other employment alternatives, malfeasance in the performance of his duties and his fostering of CAA's pecuniary interests while under exclusive contract with Disney. These actions by Ovitz were contrary to the Ovitz Employment Agreement and his fiduciary duties of good faith, loyalty and due care. Nevertheless, Eisner and the other Current Director Defendants failed to demand that Ovitz's termination be deemed to arise out of his breach of the Ovitz Employment Agreement or, at a minimum, that the oppressive terms of Ovitz's severance package be renegotiated to more accurately reflect Ovitz's "contribution" to the Company during his brief tenure as President. Disney had at its disposal an entire panoply of legal weapons that it could and should have utilized to negate, or at least temper, Ovitz's overreaching demands. It chose to use none of them -- in dramatic contrast to the "hard ball" approach it was utilizing with respect to Katzenberg, who, at least, was widely recognized as having performed in a highly successful manner during his tenure at Disney.

122. Nor was any consideration given to the possibility of repudiating the stock options granted to Ovitz as being void ab initio as a gross waste of corporate assets or asserting that Ovitz's dismal performance had denied Disney of the benefit of its bargain or created

circumstances that constituted or warranted a "for cause" dismissal, with a corresponding diminution in (or forfeiture of) Ovitz's financial benefits. In that regard, it is particularly noteworthy that the Ovitz Employment Agreement provided that, in the event Ovitz breached the contract's provision with respect to the exclusivity of his services to the Company, Disney was entitled to injunctive and legal relief against him.

123. In all events, Ovitz, as a fiduciary of Disney and its shareholders, was at no time free simply to seek enforcement of the unconscionable and onerous terms of the Ovitz Employment Agreement. Rather, he was duty-bound to pursue a separation from the Company on terms that were fair to the Company and its shareholders, rather than insisting on terms that were unconscionably beneficial to him. By insisting upon and securing the agreement of Eisner (and the Current Board) to characterize Ovitz's separation from the Company as a Non-Fault Termination, Ovitz therefore breached the fiduciary obligations of good faith and loyalty he owed to Disney and its shareholders. The remaining defendants recklessly, in bad faith and wrongfully acquiesced and/or facilitated this scheme.

J. The Unconscionable Benefits Paid To Ovitz

124. By any estimation, the Ovitz Employment Agreement is a huge windfall for Ovitz and a gross waste of the Company's assets.

125. Importantly, because Ovitz's resignation from his post as Disney's President purportedly qualified as a "Non-Fault Termination," as that term is defined in the Ovitz Employment Agreement, the options to purchase 3 million shares of Disney common stock discussed above became immediately exercisable upon the termination of his employment at Disney. Those options are priced at the market price of Disney common stock as of October 16, 1995 (approximately $57 per share) and are therefore already worth approximately $26 per share (or $78 million) if exercised immediately. Based upon Disney's closing stock price of

$71.25 on December 27, 1996 (the date of his official resignation), the value of the stock options purportedly owed to Ovitz under the Ovitz Employment Agreement if exercised immediately was in excess of $42 million. The Current Director Defendants have failed to avail themselves of any steps to render those lucrative stock options null and void, even though they were granted to Ovitz for no or insignificant consideration and, under the circumstances, have afforded no benefit to Disney (nor were they ever likely to do so).

126. In addition to the enormous value of the stock options, at the time of Ovitz's termination as Disney's President, the Company paid him: (a) a "Contract Termination Payment" of $10,000,000; and (b) a "Non-Fault Payment" equal to the present value of all base salary due to Ovitz through the end of the Ovitz Employment Agreement on September 30, 2000, plus the present value of an assumed annual bonus of $7,500,000 for all fiscal years not completed at the time Ovitz left the Company.

127. Ultimately, Disney and Ovitz agreed that the present value of the Non-Fault Payment was $28,869,000. Thus, upon the conclusion of his employment, Ovitz received cash compensation from Disney amounting to $38,869,000.

128. Notably, the true value of the severance package awarded to Ovitz cannot be calculated solely by determining the cash value of his stock options if they were exercised today. A more accurate approach to calculating the value of the stock options is to formulate a present value for those options pursuant to commonly-accepted valuation techniques, such as the Black-Scholes option pricing model. Assuming a volatility of Disney stock of 22.5%, a risk-free rate of return of 6.8%, and quarterly dividends of $0.1325 per share, the present value of Ovitz's stock options at the end of November of 1996 was a startling **$101.5 million** (and, accordingly, the total value of Ovitz's severance package was in excess of **$140 million**). By the end of April

1997, the value of the package had grown to over **$150 million** as a result of certain appreciation in Disney stock.

129. Employing the $140 million value, Ovitz's severance package amounts to approximately $0.20 per share of Disney common stock, as compared to the Company's 1997 first fiscal quarter EPS of $1.09. Moreover, the cash severance payment made to Ovitz alone amounted to approximately $0.03 per outstanding Disney share. That expense negatively impacted the Company's earnings for the first fiscal quarter of 1997.

130. By comparison, the total quarterly dividend payable to Disney shareholders at the time of Ovitz's resignation was only approximately $0.11 per share. The startling relationship between Ovitz's severance payments and the size of Disney's quarterly dividend caused the Chicago Sun-Times to query in a December 16, 1996 article, "If you were -- or are -- a Disney shareholder, would it be worth it to you to give up a quarterly dividend so that Michael Ovitz could do nothing for you?" A similar comparison was made by The Los Angeles Times in a December 13, 1996 article. There, The Los Angeles Times stated, "So investors can focus on Eisner's costly mistake: Ovitz's reported contract settlement is about 7.5% of Disney's fiscal 1996 net income."

131. The sheer size of Ovitz's severance package is particularly appalling in light of the fact that, unlike situations in which executives have collected significant profits as a result of appreciation in the value of a company's stock that resulted from the executives' efforts, none of the appreciation in Disney's stock price that occurred during Ovitz's tenure (or subsequently) can fairly be attributed to his efforts. Rather, Ovitz merely had the good fortune to have been awarded stock options near the height of the greatest bull market in this century.

132. In that regard, executive compensation expert George B. Paulin stated in the December 14, 1996 edition of the Los Angeles Times that Disney stock has "frankly gone up

with the market." Nevertheless, as The Los Angeles Times reported, "Ovitz stands to profit handsomely despite his arguably thin contributions."

133. Hence, what at first glance appeared to be a significant setback for Ovitz was subsequently revealed to be a financial windfall for him as a result of the unconscionable and onerous terms of the Ovitz Employment Agreement. Despite the unconscionable nature of the payments made to Ovitz, the Current Director Defendants failed to undertake any serious exploration of Disney's legal alternatives under the circumstances or to investigate or pursue any steps to reduce or eliminate the Company's financial obligations under circumstances where the recipient of the payments was clearly deserving of much less (if anything at all).

K. The Overwhelming Public Criticism Of Defendants' Conduct And Ovitz's Severance Benefits

134. Once the public recognized that Ovitz would receive the exorbitant benefits outlined above, defendants were exposed to a drumbeat of harsh criticism regarding their conduct in negotiating, approving and fulfilling the Non-Fault Termination provisions of the Ovitz Employment Agreement.

135. The following are merely a few examples of the scores of articles that have expressed outrage at the terms of Ovitz's unconscionable severance package:

- the Associated Press reported on December 20, 1996 that "Mark Lipis, a Los Angeles compensation expert, said Ovitz's compensation package 'is unconscionable. I can't believe they're actually going ahead with it the way it's been reported'";

- one source quoted in the December 13 edition of The Hollywood Reporter stated that the severance package was "a corporate embarrassment that would be paid for by shareholders";

- the December 14, 1996 edition of The New York Times characterized Ovitz's severance package as "an extraordinary windfall, perhaps as much as $90 million after only 14 months in the No. 2 job";

- according to a December 16, 1996 article in The Wall Street Journal, Tom Van Dyke, co-founder of the firm Progressive Asset Management, called the compensation package "perverse" and added, "Mickey's pocket has been picked by a Hollywood hype man, while the shareholders and employees who give their life to work at Disney stand by and watch";

- a December 25, 1996 article in The Washington Post stated that "the contract transcends wretched excess" and that "[t]he lavish severance package simply defies normal bounds of propriety and common sense";

- in the December 14, 1996 edition of The Los Angeles Times, Gary Hourihan, Chairman of SCA Consulting was quoted as stating, "I think it is outrageous";

- the same article quoted the head of one entertainment company as stating, "In terms of human equities, it's as outrageous as any sum paid for services not rendered that I can think of. . . . It's indefensible on any level and is regarded as a complete industry joke";

- the same article quoted another source as stating, "For an executive to take out that amount of money is tantamount to corporate waste. In any other business, this would be grounds for a shareholder suit"; and

- a Disney executive quoted in the same article stated, "It's really difficult to fathom and swallow. . . . Everybody is staggered. It's been a 'Twilight Zone' day around here. The bombshell was that he got any compensation at all, let alone this kind of money."

136. Even the man who had originally advised the Disney Board concerning the Ovitz Employment Agreement, Graef Crystal, was forced to concede that the payments made to Ovitz were grossly excessive. In the December 13, 1996 edition of The Los Angeles Times, Crystal stated, "It's a lot of money for what apparently was a mistake." Furthermore, in the January 13, 1997 edition of California Law Business, Crystal characterized Ovitz's severance package as a "shocking amount of severance."

137. The sheer absurdity of the severance payments made to Ovitz was captured by a December 25, 1996 article in The San Diego Union-Tribune. That article noted that, even if the amount of Ovitz's compensation package were assumed to be a conservative $90 million, he

was paid $295,000 per day for each work day since he joined Disney in October 1995, although he accomplished virtually nothing of consequence during that time.

138. In fact, Ovitz's severance package has become such a national symbol of greed and corporate excess that the front page of the Sunday, December 29, 1996 edition of The New York Times "Money and Business" section declared the entire fiasco one of the "Financial Follies of '96." In addition to awarding defendants Eisner and Ovitz that dubious "honor," The New York Times lampooned them in the following cartoon, which conveys bitter humor for Disney and its shareholders:

Film Major of the Year

To Michael S. Ovitz, who said his first couple of years as Disney's No. 2 to Michael D. Eisner would be spent learning about the business. After 14 months, he evidently decided that Professor Eisner's courses were too difficult, and left with a severance package worth about $90 million.

L. Ovitz's Formal Separation From The Company

139. On December 12, 1996, defendant Litvack sent a letter to defendant Ovitz concerning Ovitz's separation from the Company. Defendants apparently perceived that some defect existed in that letter because, on December 27, 1996, Litvack sent another letter to Ovitz concerning his separation. In the December 27 letter, Litvack wrote, "Reference is made to my letter to you dated December 12, 1996. By our mutual agreement this letter will supersede and replace my prior letter."

140. Litvack's December 27 letter stated:

> This will confirm the terms of your agreement with the Company as follows:
>
> 1. The Term of your employment under your existing Employment Agreement with The Walt Disney Company will end at the close of business today. Consequently, your signature confirms the end of your service as an officer, and your resignation as a director, of the Company and its affiliates.
>
> 2. This letter will for all purposes of the Employment Agreement be treated as a "Non-Fault Termination." By our mutual agreement, the total amount payable to you under your Employment Agreement, including the amount payable under Section 11(c) in the event of a "Non-Fault Termination," is $38,888,230.77, net of withholding required by law or authorized by you. By your signature on this letter, you acknowledge receipt of all but $1,000,000 of such amount. Pursuant to our mutual agreement, this will confirm that payment of the $1,000,000 balance has been deferred until February 5, 1997, pending final settlement of accounts.
>
> 3. This letter will further confirm that the option to purchase 3,000,000 shares of the Company's Common Stock granted to you pursuant to Option A described in your Employment Agreement will vest as of today and will expire in accordance with its terms on September 30, 2002.

M. Concessions Concerning The Former Director Defendants' Failure To Consider Adequately The Terms Of The Ovitz Employment Agreement

141. In two separate publications, Crystal has conceded that the Old Board <u>never</u> considered the exorbitant costs the Company would incur in the event Ovitz's employment with the Company were to end very soon after his arrival. Crystal's admissions are damning

evidence of defendants' reckless lack of diligence and abdication of their fiduciary responsibilities in light of the fact that Crystal was hand-picked by Eisner to advise the Old Board concerning the terms of the Ovitz Employment Agreement.

142. First, in a December 23, 1996 article that appeared in the Worldwide Web magazine Slate, Crystal wrote, "Of course, the overall costs of the package would go up sharply in the event of Ovitz's termination (and I wish now that I'd made a spreadsheet showing just what the deal would total if Ovitz had been fired at any time)."

143. Crystal made a very similar admission in the January 13, 1997 edition of California Law Business. There, an article stated, "With no one expecting failure, the sleeper clauses in Ovitz's contract seemed innocuous, Crystal says, explaining that no one added up the total cost of the severance package. 'Nobody quantified this and I wish we had,' he says."

N. Eisner's Compelling Incentives To Provide Ovitz With The Maximum Amount Potentially Payable In Severance Benefits And Not To Dispute Ovitz's Claim To Such Benefits

144. The reason why the Current Director Defendants responded in such a supine manner to Ovitz's desire that he be provided with a Non-Fault Termination as Disney's President became readily apparent once Disney released the Proxy Statement. At that time, defendants revealed that the Company had agreed to award Eisner with a compensation package that dwarfed even the unconscionable sums the Company agreed to pay to Ovitz.

145. Eisner was compensated in 1996 pursuant to the terms of his 1989 compensation agreement (the "1989 Agreement") with Disney. Crystal was retained by Disney to advise the Company with respect to the terms of the 1989 Agreement. Pursuant to the 1989 Agreement, Eisner was paid a bonus of $7,900,000 for 1996, compared to $14,021,229 for fiscal 1995 and $9,907,201 for fiscal 1994. Those bonuses were calculated on the basis of Disney's return on equity during the relevant fiscal years. The fact that Eisner's bonus declined appreciably in

1996 using this formula precipitated efforts by him to supplant the 1989 Agreement with a bonus formula that could more easily be manipulated for his financial benefit.

146. Although the 1989 Agreement still had two remaining years, Eisner caused the Company to renegotiate his compensation package during 1996. Once again, Crystal provided the Disney Board with advice and input regarding the terms of the Eisner Compensation Agreement. Notably, it was Eisner, not the Disney Board, who retained Crystal.

147. Eisner's retention of Crystal to represent his "adversary" in determining Eisner's compensation, as unusual as it was, was far from the most extraordinary aspect of the negotiations leading up to the Eisner Compensation Agreement. As The Wall Street Journal noted in its February 24, 1997 edition, "The contract negotiations were marked by a bizarre circumstance involving Irwin Russell, who is both chairman of the board's compensation committee and Mr. Eisner's personal lawyer."

148. Purportedly, Russell relinquished his role on the Disney Compensation Committee during the course of the negotiation of Eisner's new employment contract. As the The Wall Street Journal reported:

> Other directors concede it is an unusual arrangement, but say it worked because of Mr. Russell's integrity. "I agree that that's not a profile you would normally want to see," says director Raymond L. Watson, a compensation-committee member who stepped in as chairman for Mr. Russell. "But you've got to go to individuals."

149. Irrespective of the Company's patent efforts to place a favorable "spin" on the negotiation of Eisner's new compensation agreement, the product of that bizarre negotiation dynamic was quite extraordinary and yielded incredible benefits for Eisner. On September 30, 1996, the material terms of the Eisner Compensation Agreement were approved by Disney's Compensation Committee and ratified by the Disney Board, subject to the negotiation of a final agreement. The final Eisner Compensation Agreement was executed on January 8, 1997.

150. As publicly disclosed, the Eisner Compensation Agreement has a duration of ten years. The benefits bestowed upon Eisner by virtue of that agreement include: (a) an annual salary of $750,000; (b) rights to a substantial annual bonus; and (c) options to purchase 8 million shares of Disney common stock. Of those 8 million shares, an option with respect to 5 million shares bears an exercise price of $63.31, the fair market value of the Company's common stock on September 30, 1996. Those options vest on September 30, 2003, with an expiration date of September 30, 2008. Three additional options, each with respect to 1,000,000 shares, bear exercise prices in excess of fair market value on the date of grant: one with an exercise price of $79.13 (125% of fair market value), vests on September 30, 2004; the second, with an exercise price of $94.96 (150% of fair market value), vests on September 30, 2005; and the third, with an exercise price of $126.62 (200% of fair market value), vests on September 30, 2006. The final three options expire on September 30, 2011.

151. Even before these new options were granted to Eisner, he possessed options to purchase 8 million shares of Disney common stock. As of April 24, 1997, those options, if immediately exercised, had a cash value of $483,880,000.

152. The potential financial benefits Eisner can garner under the Eisner Compensation Agreement are nothing short of astounding. Based upon an assumed Disney stock volatility of 22.5%, the risk-free rate of return implied by U.S. Treasury strips and current quarterly Disney dividends of $0.1325 per share, the present value of Eisner's newly-granted stock options, standing alone, was $364,000,000 as of April 24, 1997, thereby making Eisner the most highly-compensated executive in corporate history.

153. In that regard, on February 22, 1997, an article in The Washington Post stated:

> Thanks to a new 10-year pay package that includes generous stock options, the top executive of the entertainment conglomerate could reap nearly $771 million over the next decade, according to estimates by the compensation expert who

designed Eisner's new contract [Crystal]. The figure doesn't include Eisner's $750,000-per-year salary or bonuses that could add another $15 million annually.

154. As defendant Watson conceded in a February 22, 1997 article in The Washington Post, the $195.4 million estimate Disney placed upon the value of Eisner's options in the Proxy Statement was "a conservative figure, based on the low end of assumptions about Disney's future performance." In the same article, Crystal estimated that, assuming an 11% annual return, Eisner would realize a $770.9 million profit from exercising his options between 2003 and 2006. Unsurprisingly, The Wall Street Journal reported on February 24, 1997 that Executive Compensation Reports had estimated that Eisner's compensation package includes "the largest options grant ever to a sitting chief executive."

155. If that were not enough, the Eisner Compensation Agreement also permits Eisner, at any time, to request a renegotiation of the bonus formula set forth in the agreement if circumstances arise that cause the results of the bonus formula to be "unfair and inequitable." These terms are conspicuously left undefined.

156. The Eisner Compensation Agreement also significantly altered the manner in which Eisner's annual bonus was to be calculated. Prior to the adoption of the Eisner Compensation Agreement, Eisner was entitled to a non-discretionary annual bonus equal to 2% of the amount by which the Company's net income for the fiscal year exceeded the amount representing a return on stockholders' equity of 11%. In November 1996, that formula was adjusted pursuant to a provision in the 1989 Agreement providing for adjustments in the event of mergers or other corporate combinations.

157. Under the newly-approved Eisner Compensation Agreement, Eisner's bonuses for fiscal 1997 and 1998 will be determined under Disney's 1997 Cash Bonus Performance Plan (the "Bonus Plan"). As was stated in the Proxy Statement, "Under the plan [Disney's executive

performance plan committee] is charged with responsibility for the establishment of specific annual 'performance targets' for each executive officer who participates in the plan for performance periods of one or more years from October 1, 1996 through September 30, 2001." At the time the committee selects the performance targets, the committee must also establish an objective standard for calculating the maximum bonus payable to each participating executive officer. According to the Proxy Statement, the committee established the performance target for fiscal 1997 based upon net income. The actual numerical target utilized by the committee was not revealed in the Proxy Statement, however.

158. The Proxy Statement reveals that the maximum bonus payable to Eisner pursuant to the Bonus Plan during 1997 and 1998 is $15 million.

159. Beginning in fiscal 1999, Eisner's bonus will be tied to the compounded growth rate of the Company's earnings per share above an annual threshold rate of 7.5%. The threshold EPS for fiscal 1999 will be an amount 7.5% above the average EPS of the Company for fiscal years 1997 and 1998 (subject to a maximum of $3.25 and a minimum of $2.75 for such average). For each subsequent fiscal year, the threshold EPS will be 7.5% more than the prior year's threshold EPS. Those benchmark amounts will be determined prospectively once Disney's 1997 and 1998 EPS are calculated. Thus, if Disney vastly exceeds 7.5% growth in one year, the target for the following year will not be 7.5% higher than the actual EPS achieved. Rather, the benchmark EPS for the following year will remain the amount determined immediately following the calculation of 1997 and 1998 EPS. The bonus for each year will be determined by multiplying (a) the amount by which the Company's reported EPS exceeds the specified threshold level by (b) a specified "Bonus Percentage" (which varies annually) and (c) multiplying the resulting amount by the number of outstanding shares used by the Company in calculating its reported EPS.

160. Thus, Eisner had much to lose by questioning any payment made to Ovitz under the Ovitz Employment Agreement. That fact was all the more obvious to Eisner because, as Crystal stated in a January 10, 1997 Associated Press report, Disney and Eisner had already come to terms with respect to his agreement before Ovitz resigned. Also, the same executive compensation consultant -- Crystal -- had been intimately involved in structuring both Eisner's and Ovitz's compensation packages. As a result, the ramifications of contesting Ovitz's severance package -- including the clear possibility that any controversy regarding Ovitz's compensation would lead to intense scrutiny of Eisner's own enormous compensation -- were exceedingly clear to Eisner at the time the decision to grant Ovitz a Non-Fault Termination was made.

161. Amazingly, according to a January 9, 1997 report by The Associated Press, Crystal, the person retained by Eisner to advise the Disney Board with respect to the terms of the Eisner Compensation Package, publicly "said he considers Eisner's compensation package too high." Thus, it appears that the Current Director Defendants neglected the advice of the expert hired by Eisner for them in agreeing to the terms of the Eisner Compensation Agreement in order to advance Eisner's personal financial interests at the expense of Disney and its shareholders.

162. The fact that it was Eisner's desire to protect at all costs his unprecedented Compensation Agreement that caused him to permit Ovitz to leave the Company with all of the benefits of a Non-Fault Termination is confirmed by contrasting the manner in which Ovitz was treated by Disney with the events surrounding the termination of Jeffrey Katzenberg, the former Chairman of Disney Studios. Those events also confirm that Disney had many weapons available to it to combat any claim by Ovitz that he was entitled to the full benefits available in the event of a "Non-Fault Termination."

163. On August 25, 1994, Katzenberg was terminated as the Chairman of Walt Disney Studios by Eisner. According to public reports issued at that time and since, Katzenberg's termination was engineered exclusively by Eisner. Indeed, as defendant Watson stated in a Newsweek article published on September 5, 1994, the decision to fire Katzenberg was "100 percent Eisner's."

164. During Katzenberg's tenure as the Chairman of Walt Disney Studios, the profits at the division he ran had increased from $2 million in 1984 to $800 million in 1994. In fact, under Katzenberg's supervision, Disney produced such highly profitable films as "The Lion King," "Beauty and the Beast" and "Aladdin," thereby reviving Disney's franchise in animated, youth-oriented films.

165. Despite the fabulous successes Katzenberg had engineered for Disney (during 1993, his divisions produced 43% of Disney's overall profit), Eisner arranged for Katzenberg's termination. On August 24, 1994, when Katzenberg arrived in Eisner's office to pitch himself as the successor to Frank Wells as Disney's President, Eisner coldly handed Katzenberg an already-drafted press release that announced Katzenberg's departure from Disney and the reassignment of his responsibilities at the Company.

166. In the aftermath of Katzenberg's termination, he was forced to sue Disney in California Superior Court for at least $250 million -- his contractual share of the profits from the highly successful movies he created for the Company. A trial is anticipated this Fall.

167. The December 14, 1996 edition of the Los Angeles Times noted the startling contrast between the treatment to which Katzenberg was subject and the lavish benefits Disney imparted upon Ovitz. The Los Angeles Times reported:

> That source and a number of other prominent Hollywood figures contended that the payment to Ovitz underscored the injustice of Eisner refusing to settle up with former longtime Disney Studios Chairman Jeffrey Katzenberg,

who spent 10 years helping build the once-moribund theme park company into a multibillion-dollar empire.

O. Public Criticism Of The Eisner Compensation Agreement

168. Despite Eisner's efforts to shield his compensation package from public criticism, the massive size of his agreement has engendered significant public scorn and derision. Indeed, Eisner's exorbitant compensation package was subjected to widespread ridicule as yet another example of the Disney Board's lack of diligence and excess in awarding executive compensation and willingness to subordinate the interests of the Company and its shareholders to the personal pecuniary interests of Disney's executives.

169. For example, a March 17, 1997 article in Newsweek stated:

> Let's start with Eisner, whose package is, to be polite, ridiculous. As you may know, Eisner recently got stockholders to approve $196 million of stock options for himself at the same time Disney disclosed that it had paid about $90 million in cash and options to have Michael Ovitz vacate its presidential suite after less than a year on the job. Maybe Eisner figured that if an executive flameout was worth 90 million bucks, a success like himself is a steal at mere 200 and change.

170. Similarly, a March 30, 1997 article in The New York Times concerning recent trends in executive pay stated:

> The most astronomical numbers emanated from the Walt Disney Company, where the chairman, Michael D. Eisner, received $8.7 million in salary and bonus last year, plus stock options that are today valued at $181 million. That is the largest single grant in corporate history, though it was his first grant since 1989.
>
> Even that number looks Mickey Mouse compared with the future value of Mr. Eisner's option grant -- $583.7 million in 2007, as estimated by Mr. Crystal using a commonly accepted valuation model that anticipates the price of Disney's stock at the most likely time the options would be exercised. (Mr. Crystal, a former consultant who no longer counsels companies, made an exception last year and advised Mr. Eisner on pay issues at Disney.)
>
> No one else comes close to Mr. Eisner . . .

P. Defendants' Disclosure Violations In Connection With The Proxy Statement And 1997 Annual Meeting

171. The Current Director Defendants failed to disclose several critical facts in the Company's 1997 Proxy Statement. As a result, they breached the fiduciary duty of candor they owed to Disney's shareholders in soliciting their approval of the re-election of certain Disney directors and the adoption of the Disney Bonus Plan and the Eisner Compensation Agreement. Accordingly, the re-election of directors Bowers, Disney, Lozano, Mitchell and Wilson accomplished at Disney's annual meeting on January 9, 1997 was invalid. In addition, the shareholder votes in favor of Disney's Bonus Plan and Eisner's Compensation Agreement were improperly obtained.

172. The first critical fact defendants failed to disclose in the Proxy Statement was that by replacing the formula by which Eisner's bonus was calculated from one based objectively and consistently upon the Company's return on equity to one based upon Disney's earnings per share, Eisner was empowering himself with the ability to manipulate the Company's financial results in a manner designed to maximize his annual bonus.

173. Many of the reasons why it will be a simple matter for Eisner to manipulate the Company's EPS upwards in the future relate to the numerous accounting charges made with respect to Capital Cities' assets at the time of Disney's acquisition of that company.

174. The first accounting step taken by defendants that will have the effect of increasing the Company's reported EPS growth was defendants' decision to decrease the value of the assets acquired from Capital Cities to $5.4 billion from the $7.2 billion at which those assets were carried on Capital Cities' books prior to the acquisition.

175. Also, in the Company's SEC Form 10-Q for the quarter ended March 31, 1996 (the "Second Fiscal Quarter 10-Q"), defendants announced that Disney had taken two non-

recurring charges during the quarter. First, the Company recognized a $300 million non-cash charge in connection with the Company's adoption of Statement of Financial Accounting Standards No. 121 ("SFAS 121"). That charge related to the reduction of the value placed upon certain assets included in the Company's Theme Parks and Resorts segments.

176. The timing of Disney's adoption of SFAS 121 was, to say the least, quite curious. The SEC did not mandate the application of SFAS 121 until fiscal years beginning after December 15, 1995. Thus, because Disney's 1997 fiscal year did not begin until October 1, 1996, Disney was not required to implement the new accounting measure until that time. Furthermore, while early adoption of SFAS 121 was permissible, the measure had been announced in March 1995. Hence, Disney was aware of SFAS 121 for over a year before the Company adopted the measure, yet then decided to implement it months before such a step was required by the SEC.

177. Defendants also announced in the Second Fiscal Quarter 10-Q that the Company had taken a $225 million charge related to acquisition costs incurred in connection with the purchase of Capital Cities. The Form 10-Q nebulously stated:

> Acquisition-related costs consist principally of interest costs related primarily to imputed interest for the period from the effective date of the acquisition until March 14, 1996, the date that cash and stock consideration was issued to Capital Cities shareholders.

No explanation of the term "imputed interest" appeared in the Form 10-Q.

178. The net effect of the foregoing devaluation of Capital Cities' assets and the two write-downs referred to in the Second Fiscal Quarter 10-Q is to increase Disney's reported earnings for all quarters after the second quarter of fiscal 1996. Because Capital Cities' assets were devalued, the amount of Disney's acquisition costs assignable to goodwill was increased. Accordingly, amortization that would otherwise have been charged against earnings over the life

of a television series or film (three to five years) was transferred to goodwill, which is amortized over forty years. Because of that lower amortization expense, Disney's reported earnings will be significantly increased as a result of the devaluation of Capital Cities' assets.

179. The accounting charges related to Disney's adoption of SFAS 121 and the acquisition-related expenses also improved Disney's future earnings. Rather than decreasing earnings as a result of amortization expenses that would have had to be realized over a short period, the Company realized all such expenses in a single quarter, thereby enabling the Company to show improved results related exclusively to the absence of the amortization expense that would otherwise have been recognized.

180. Disney again wrote down the value of the assets it had acquired from Capital Cities at the end of the Company's fiscal 1996 (September 30, 1996), this time from $5.4 billion to $4.8 billion. Again, this write-down had the effect of enhancing the Company's future reported earnings.

181. Another accounting manipulation the Company employed at the time of the Capital Cities acquisition to increase Disney's future reported earnings was the adoption of "purchase accounting" to value Capital Cities' programming. As Forbes reported in a March 10, 1997 article:

> According to the rules of purchase price accounting, the acquiring company writes down the difference between what a show costs the selling company and what the acquiring company expects to receive from that show in revenues. . . . The acquiring company then assigns the new value to the show when it puts it on its own books. So, if the buyer decides the show may not be a hit, it ends up marking down the value of the show even before it is released.

In the event a show which is written down performs better than expected, i.e., the show was marked down too much by the acquiring entity, "unexpected" revenues increase future earnings.

182. Moreover, all of the accounting charges taken by Disney in connection with the Capital Cities acquisition can benefit the Company's future reported EPS in circumstances where Disney determines that the estimated costs reflected in the charges were too high and that a portion of the charges should therefore be reversed. The timing and size of such reversals are under management's control.

183. The extent to which purchase accounting resulted in enhanced reported earnings for Disney was highlighted by a May 5, 1997 article in The Wall Street Journal. There, The Wall Street Journal noted that nearly 10% of Disney's EPS for the quarter ended September 30, 1997 was expected to result from "purchase accounting." Moreover, nearly 50% of the $410 million in profit generated by ABC during fiscal 1996 was the result of such accounting methods.

184. According to the May 5, 1997 Wall Street Journal article, Disney employed purchase accounting to write down the assets purchased from Capital Cities by $1.5 billion. According to the same article, Disney is planning to spread the benefits of that accounting treatment over three to five years. Thus, Eisner, whose annual bonus is now calculated on the basis of the EPS generated by the Company on an annual basis, will greatly benefit from this reporting technique.

185. The positive impact that Disney's accounting manipulations in connection with the Capital Cities acquisition have had and are continuing to have upon the Company's reported earnings was also highlighted in a March 10, 1997 article in Forbes. As Forbes reported, Disney's "pro forma" earnings for 1996 showed steady growth in the Company's earnings. The pro forma earnings adopted the fiction that the Disney/Capital Cities merger had been completed during 1995. In contrast, Disney's "as reported" earnings for 1996, i.e., those earnings which compared the numbers separately reported by Disney and Capital Cities during 1995 with those

generated by Disney during 1996, revealed that Disney had actually generated flat earnings over the two years.

186. As Forbes explained in its March 10, 1997 article, Disney's pro forma results demonstrated improvement because Disney revised the 1995 pro forma income for the combined Disney-Capital Cities entity downward from $2.60 per share to $1.94 per share by writing down the value of assets Disney acquired from Capital Cities.

187. Forbes also reported that Disney was expected to increase its reported earnings per share as a result of its utilization of purchase price accounting in connection with the acquisition of Capital Cities. Specifically, Forbes stated that it "has learned, however, that purchase price accounting should have an impact at Disney this year. It will help keep that earnings momentum up during a time when a massive merger could impose many unforeseen and unforeseeable costs."

188. In addition to failing to disclose how easily manipulable Disney's EPS were as a result, inter alia, of the accounting measures explained above, defendants failed to accurately describe in the Proxy Statement the relationship between the Company's grants of options to its executives and its share repurchases. In particular, defendants failed to disclose that the Company consistently employs stock repurchases to keep the number of the Company's outstanding shares from increasing significantly when large blocks of options are awarded to and exercised by Disney's executives. By means of those repurchases, defendants have attempted to keep the number of outstanding Disney shares from growing, and thereby prevent an increased number of outstanding Disney shares from diluting the Company's reported EPS.

189. Even more fundamentally, defendants have failed to disclose that when Disney engages in stock repurchases designed to keep the number of Company shares outstanding at near-constant levels, such repurchases exert a dramatically negative effect upon the Company's

financial condition and net worth. That negative effect results from the following circumstances: (a) when Disney executives exercise stock options, the exercise price of the options is always below the market price of Disney shares at the time of exercise (the options having been granted at prior times), and, frequently, significantly below that price; (b) when Disney repurchases shares, the Company is forced to do so at the market price of Disney common stock; and (c) when Disney repurchases shares for the purpose of preventing option exercises from diluting the Company's earnings per share, the Company receives far less in proceeds from the executives that exercise options than it spends in repurchasing a like (or greater) number of shares, thereby significantly diminishing the Company's cash resources and net worth.

190. Beneficially for executives seeking to maintain or increase their bonuses, however, the cash expenditures associated with share repurchases have no impact on reported earnings; rather, they are only reflected in the cash flow statement and in the balance sheet -- financial reports which are not taken into account in computing EPS-based bonuses under Disney's newly-enacted compensation scheme.

191. In the Company's SEC Form 10-Q for the quarter ended March 31, 1996, the quarter immediately after the quarter in which Eisner was awarded 8 million options and Ovitz's 3 million options became immediately exercisable, Disney revealed that the Company had adopted a share repurchase program that would permit the Company to repurchase as many as 104.5 million shares of Disney common stock in future periods.

192. The representations made by the Current Director Defendants in the Proxy Statement and at the Company's 1997 annual meeting concerning Ovitz's departure from the Company were also materially misleading. In the Proxy Statement, the Current Director Defendants merely stated that "Ovitz's employment with the Company was terminated as of

December 27, 1996." No discussion of the circumstances surrounding Ovitz's departure was provided.

193. Those circumstances were addressed by Eisner at the 1997 annual meeting, however. There, Eisner initially stated:

> I'd like to think this mistake thing does not apply to me . . . And at home I make that clear to my children. But in the office, it happens, as in the Ovitz situation. Not good. A mistake. Won't happen again.

194. Later, when pressed by Disney shareholders for an explanation of Ovitz's massive severance package, Eisner stated:

> He came to the company with no guaranteed stock, no guaranteed bonus, with a salary of about a tenth of what he was worth on the open market. . . .
>
> Because he did not make it at our company, <u>we had to</u> [give Ovitz the severance payments].

195. By characterizing Disney's payment of the severance benefits to Ovitz as mandatory, Eisner and the remaining Current Director Defendants became obligated to disclose that: (a) Ovitz had violated the terms of the Ovitz Employment Agreement by actively searching for alternative employment and by performing services on behalf of CAA; (c) Eisner had unilaterally determined that Ovitz should be awarded all of the benefits to which he was entitled in the event of a Non-Fault Termination; and (c) Ovitz had expressed his desire to quit his position at Disney in a letter written to Eisner. No such disclosures were made by the Current Director Defendants. Accordingly, the shareholder votes in favor of the Eisner Compensation Agreement, the Bonus Plan and the re-election of directors Bowers, Disney, Lozano, Mitchell and Wilson accomplished at Disney's annual meeting on January 9, 1997 were invalid.

DEMAND ALLEGATIONS

196. The First, Second and Third Causes of Action alleged herein are brought derivatively in the name, and in the right, of Disney. Disney is named as a nominal defendant solely in a derivative capacity.

197. Plaintiffs will adequately and fairly represent the interests of Disney and its shareholders in enforcing and prosecuting the Company's rights.

A. The Disabling Conflicts Of Interest Faced By The Current Director Defendants

198. As alleged in detail below, demand is excused because each of the Current Director Defendants face disabling conflicts of interest with respect to whether or not to assert the claims alleged by plaintiffs.

(1) Eisner's Conflicts Of Interest

199. Eisner is a long-time colleague of Ovitz and was a close personal friend of Ovitz at the time the Employment Agreement was "negotiated." Moreover, as Ovitz stated in conjunction with the announcement of his departure from the Company, "Michael Eisner has been my good friend for 25 years and that will not change. . ."

200. Eisner exercised near unilateral control in bringing Ovitz to Disney and in determining the terms of the Ovitz Employment Agreement. He also dictated to the Current Board (excluding Ovitz) the terms of Ovitz's severance from the Company.

201. Eisner's breaches of his fiduciary obligations to the Company directly resulted in the Ovitz Employment Agreement and Ovitz's lucrative severance payments, which constitute a waste of Disney's corporate assets and a breach of the fiduciary duties owed by Eisner and Disney's other directors to the Company. Accordingly, Eisner is disabled from considering the Company's options with respect to attempting to render Ovitz's severance payments

unenforceable, seeking a legal determination that Ovitz has failed to perform in accordance with the Ovitz Employment Agreement or otherwise pursuing legal action against those responsible for its oppressive and unfair terms.

202. Eisner also faced substantial conflicts of interest in determining the terms of the Ovitz Employment Agreement and in deciding to pay Ovitz the exorbitant severance payments outlined above in that Eisner's personal interest in maximizing his own income from Disney was directly served by: (a) maximizing the payments made by Disney to Ovitz; and (b) minimizing, to the extent possible, the controversy surrounding Ovitz's severance pay. In effect, by paying his second-in-command the unconscionable sums provided for in the Ovitz Employment Agreement, Eisner set a base line from which he could negotiate upward in connection with his own employment agreement with the Company. Any public dispute with Ovitz would have conflicted with Eisner's desire to temper any negative public reaction to his own exorbitant compensation package, which was announced and submitted for shareholder approval shortly after Ovitz left the Company. Accordingly, Eisner was conflicted in all decision-making concerning the Ovitz Employment Agreement.

(2) Ovitz's Conflicts Of Interest

203. Ovitz's self-interest in seeing that the terms of the Ovitz Employment Agreement are enforced is obvious. As specified above, Ovitz stands to be paid compensation after just one year of service that may range well in excess of **$150 million** should the oppressive and unconscionable terms of the Ovitz Employment Agreement be fulfilled. Accordingly, Ovitz was unable to act independently in considering the Company's alternatives with respect to rendering his severance payments unenforceable, seeking a legal determination that he has failed to perform in accordance with his employment contract or otherwise pursuing legal action against those responsible for its oppressive and unfair terms.

(3) Roy E. Disney's Conflicts Of Interest

204. Roy E. Disney is employed by Disney as Vice Chairman of the Board and as the head of the Company's animation department. In those capacities, he serves under defendant Eisner. Roy E. Disney was paid a salary of $459,614 and a bonus of $700,000 in 1996, $350,000 in salary and $550,000 in bonuses in 1995, and a salary of $350,000 and a bonus of $500,000 in 1994. During 1995, Roy E. Disney was awarded 200,000 options to purchase Disney common stock, with a value of $5,856,518, assuming a 5% rate of appreciation in the price of Disney stock, or $14,841,567, assuming a 10% rate of appreciation. The terms of Roy E. Disney's compensation package as a Company employee are dependent, in large part, upon the recommendation of Eisner. Roy E. Disney's decision-making as a member of the Disney Board is therefore dominated by Eisner.

205. Furthermore, Roy E. Disney voted in favor of or ratified the Ovitz Employment Agreement and the payment of the excessive severance benefits bestowed on Ovitz. As a Disney employee, it was in Roy E. Disney's financial interest to set the compensation of Ovitz and Eisner as high as possible so as to establish a heightened compensation level throughout the Company. Indeed, defendants tacitly conceded the conflicted interests of Disney's officers with respect to employee compensation issues by having Eisner, Ovitz, Litvack and Nunis, all then employees of the Company, abstain from the vote of the Current Board concerning the Eisner Compensation Agreement.

206. Thus, Roy E. Disney is impermissibly conflicted and disqualified from considering the Company's options with respect to attempting to render Ovitz's severance payments unenforceable, seeking a legal determination that Ovitz has failed to perform in accordance with the Ovitz Employment Agreement, or otherwise pursuing legal action against those responsible for its oppressive and unfair terms.

(4) Gold's Conflicts Of Interest

207. Defendant Stanley P. Gold is the President and Chief Executive Officer of Shamrock Holdings, Inc., an entity which was identified in the Company's SEC Form 10-K for the fiscal year ended September 30, 1995 as being "engaged in real estate development and the making of investments." The Form 10-K did not reveal that Shamrock was the wholly-owned investment company of the family of defendant Roy E. Disney. In addition, Gold has served, for a number of years, as the personal attorney of Roy E. Disney.

208. Gold's ties to Eisner date back to at least 1984, when Eisner was hired by Disney as a result of the initiatives of Roy E. Disney, Gold and Shamrock.

209. Gold receives directors' fees from the Company in the amount of $30,000 per year, plus $1,000 for every Board or Board committee meeting attended. In addition, he receives grants of options to purchase 2,000 shares of Disney common stock in equal increments vesting over a five-year period and having a ten-year term for each year he serves as a Disney director. Those stock options are priced at the market price of Disney common stock on the date the options are granted.

210. Furthermore, Gold voted in favor of or ratified the Ovitz Employment Agreement and the payment of the excessive severance benefits bestowed on Ovitz. Thus, like Roy E. Disney himself, Gold is impermissibly conflicted and disqualified from considering the Company's options with respect to attempting to render Ovitz's severance payments unenforceable, seeking a legal determination that Ovitz has failed to perform in accordance with the Ovitz Employment Agreement, or otherwise pursuing legal action against those responsible for its oppressive and unfair terms.

(5) Litvack's Conflicts Of Interest

211. Defendant Sanford M. Litvack, formerly a lawyer for Disney, has been the Senior Vice President and Chief of Corporate Operations of the Company since August 1994. Beginning in April 1991, he has held additional executive positions with the Company. In all of those positions, Litvack served under defendant Eisner. During 1996, Litvack received a salary of $650,000 and a bonus of $1,100,000. During 1995, Litvack received a salary of $647,115 and a bonus of $1,600,000. During 1994, Litvack received a salary of $500,000 and a bonus of $1,600,000 and options to purchase 200,000 shares of Disney common stock. The amount of Litvack's bonus was determined, in substantial part, on the basis of the recommendation made by defendant Eisner. Litvack also received substantial fees from Disney, at the direction of Eisner, while he was in private practice as an attorney for the law firm of Dewey Ballantine. As a result, Litvack's decision-making as a Disney director is controlled by Eisner.

212. Furthermore, Litvack voted in favor of or ratified the Ovitz Employment Agreement and the payment of the excessive severance benefits bestowed on Ovitz. As a Disney employee, it was in Litvack's financial interest to set the compensation of Eisner and Ovitz as high as possible so as to establish a heightened compensation level throughout the Company.

213. Accordingly, Litvack is impermissibly conflicted and disqualified from considering the Company's options with respect to attempting to render Ovitz's severance payments unenforceable, seeking a legal determination that Ovitz has failed to perform in accordance with the Ovitz Employment Agreement, or otherwise pursuing legal action against those responsible for its oppressive and unfair terms.

(6) Nunis's Conflicts Of Interest

214. Defendant Richard A. Nunis is the Chairman of Walt Disney Attractions, the arm of the Disney organization that operates the Company's theme parks and resorts. In that capacity, Nunis serves under defendant Eisner. Nunis receives substantial compensation from Disney as a result of his employment by the Company, including significant bonus compensation that is dependent, in large part, upon the recommendation of Eisner. As a result, Nunis's decision-making as a Disney director is controlled by Eisner.

215. Furthermore, Nunis voted in favor of or ratified the Employment Agreement and the payment of the excessive severance benefits bestowed on Ovitz. As a Disney employee, it was in Nunis's financial interest to set the compensation of Ovitz and Eisner as high as possible so as to establish a heightened compensation level throughout the Company.

216. Accordingly, Nunis is impermissibly conflicted and disqualified from considering the Company's options with respect to attempting to render Ovitz's severance payments unenforceable, seeking a legal determination that Ovitz has failed to perform in accordance with the Ovitz Employment Agreement, or otherwise pursuing legal action against those responsible for its oppressive and unfair terms.

(7) Poitier's Conflicts Of Interest

217. Defendant Sidney Poitier, a professional actor, has been a client of CAA (Ovitz's talent agency) for over fifteen years. During that time period, Ovitz and Poitier earned millions of dollars together as a result of contracts for acting, directing and other employment CAA negotiated on behalf of Poitier.

218. Poitier also receives directors' fees from the Company of $30,000 per year plus $1,000 for every Board or Board committee meeting attended as well as grants of stock options to purchase 2,000 shares of Disney common stock in equal increments vesting over a five-year

period and having a ten-year term for each year he serves as a Disney director. Those options are priced at the market price of Disney common stock on the date the options are granted.

219. Furthermore, Poitier voted in favor of or ratified the Ovitz Employment Agreement and the payment of the excessive severance benefits bestowed on Ovitz. As a result, Poitier is impermissibly conflicted and disqualified from considering the Company's options with respect to attempting to render Ovitz's severance payments unenforceable, seeking a legal determination that Ovitz has failed to perform in accordance with the Ovitz Employment Agreement, or otherwise pursuing legal action against those responsible for its oppressive and unfair terms.

(8) Russell's Conflicts Of Interest

220. Defendant Irwin E. Russell is an entertainment lawyer who serves as Eisner's personal counsel, and who has a long history of personal and business ties to Eisner. In fact, the relationship between Russell and Eisner is so close that Russell's law office is listed as the mailing address for Eisner's primary residence in Beverly Hills, California.

221. Russell's business relationship with Ovitz dates back at least to the founding of CAA. At that time, Ovitz and his co-founders secured their first office space by calling Russell with respect to leasing some space from television producer David Wolper.

222. Russell serves as the registered agent of Scenario Lane Productions, Inc., a corporation which Eisner serves as President. The mailing address of Scenario Lane Productions, Inc. is the address of Russell's law office. Russell is the registered agent and general partner of a California limited partnership known as the Rust Family Investment Fund, LP. Jane Eisner, defendant Eisner's wife, is also a general partner of that entity. Russell is listed as the registered agent of the Eisner Foundation, which was incorporated in October 1996. Jane Eisner is the Foundation's president. Russell was named as the registered agent of Jane

Eisner Productions, Inc., which was incorporated in February 1979 and dissolved in October 1988. Russell is also the registered agent for Green Records, Inc., which was incorporated in August 1994. Eric Eisner, defendant Eisner's son, is that company's president.

223. Russell receives directors' fees from the Company of $30,000 per year plus $1,000 for every Board or Board committee meeting attended. In addition, Russell received a payment of $250,000 in connection with his role in "negotiating" the Ovitz Employment Agreement on behalf of Disney. Russell also receives grants of stock options to purchase 2,000 shares of Disney common stock in equal increments vesting over a five-year period and having a ten-year term for each year he serves as a Disney director. Those options are priced at the market price of Disney common stock on the date the options are granted.

224. Furthermore, Russell voted in favor of or ratified the Ovitz Employment Agreement and the payment of the excessive severance benefits bestowed on Ovitz. Because of his close personal and professional ties to Eisner, the substantial sums he is paid as Eisner's personal attorney, the role he played in negotiating the Ovitz Employment Agreement, and the payment he received in connection with that role, Russell is impermissibly conflicted and disqualified from considering the Company's options with respect to attempting to render Ovitz's severance payments unenforceable, seeking a legal determination that Ovitz has failed to perform in accordance with the Ovitz Employment Agreement, or otherwise pursuing legal action against those responsible for its oppressive and unfair terms.

(9) Stern's Conflicts Of Interest

225. Defendant Robert A.M. Stern is an architect who has designed many buildings for Disney that have resulted in his firm (Robert A.M. Stern Architects of New York) collecting millions of dollars in fees from the Company. Those buildings include the Yacht and Beach Club Hotels at the Walt Disney World Resort, the Newport Bay Club and the Cheyenne Hotel

at Disneyland-Paris, Disney's Boardwalk Hotel at the Walt Disney World Resort and the Feature Animation Building at the Company's headquarters in Burbank, California. Stern was also one of two master planners for Disney's enormous Celebration project, a 4,900 acre town near Orlando, Florida. In addition to his role as master planner, Stern designed several of Celebration's buildings. Many, if not all, of the buildings for which Stern's firm was chosen as architects by Disney were contracted for during Eisner's tenure as Chairman and Chief Executive Officer of the Company. Moreover, it is within Eisner's power to select or refuse to select Stern's firm as the Company's architects. Stern also designed an Aspen, Colorado home for Eisner.

226. Moving backward in time from fiscal 1996 to fiscal 1992, Stern's architectural firm was paid $168,278, $201,363, $669,895, $982,123 and $741,000 each year, respectively, by Disney. Those fees were received by Stern's firm although Business Week reported in its May 2, 1994 edition concerning conflicted directors that Eisner had said that "Stern is unlikely to get new Disney contracts while on the board."

227. As was reported in a January 30, 1996 article in The San Francisco Chronicle, Stern owes much of his success to Disney. The article stated, "Stern weathered the recession of the early '90s better than most architects, nimbly lining up commissions from Walt Disney Co. . . ."

228. Stern also receives directors' fees in the amount of $30,000 per year, plus $1,000 for every Board or Board committee meeting he attends. In addition, he receives grants of stock options to purchase 2,000 shares of Disney common stock in equal increments vesting over a five-year period and having a ten-year term for each year he serves as a Disney director. Those options are priced at the market price of Disney common stock on the date the options are granted.

229. Furthermore, Stern voted in favor of or ratified the Ovitz Employment Agreement and the payment of the excessive severance benefits bestowed on Ovitz. Accordingly, Stern is impermissibly conflicted and disqualified from considering the Company's options with respect to attempting to render Ovitz's severance payments unenforceable, seeking a legal determination that Ovitz has failed to perform in accordance with the Ovitz Employment Agreement, or otherwise pursuing legal action against those responsible for its oppressive and unfair terms.

(10) Walker's Conflicts Of Interest

230. Defendant E. Cardon Walker was a senior executive of Disney for 25 years. During his tenure at Disney, Walker served as Disney's President from 1971 to 1977 and as Chairman of the Board and Chief Executive Officer from 1980 until 1983. From 1984 through 1989, Walker served as a consultant for Disney and performed various projects at the direction of Eisner.

231. In recent years, Walker was paid the following amounts by Disney in connection with his investments in certain Disney films: (a) $1,031,000 in 1992; (b) $452,000 in 1993; (c) $835,000 in 1994; (d) $565,000 in 1995; and (e) $609,836 in 1996. Walker also receives directors' fees in the amount of $30,000 per year, plus $1,000 for every Board or Board committee meeting attended from the Company. In addition, he receives grants of stock options to purchase 2,000 shares of Disney common stock in equal increments vesting over a five-year period and having a ten-year term for each year he serves as a Disney director. Those options are priced at the market price of Disney common stock on the date the options are granted.

232. Furthermore, Walker voted in favor of or ratified the Ovitz Employment Agreement and the payment of the excessive severance benefits bestowed on Ovitz. Accordingly, Walker is impermissibly conflicted and disqualified from considering the Company's options with respect to attempting to render Ovitz's severance payments

unenforceable, seeking a legal determination that Ovitz has failed to perform in accordance with the Ovitz Employment Agreement, or otherwise pursuing legal action against those responsible for its oppressive and unfair terms.

(11) Watson's Conflicts Of Interest

233. Defendant Raymond L. Watson has served as Chairman of the Executive Committee of the Company's Board of Directors since September 1984 and was Chairman of the Board of the Company from May 1983 until September 1984.

234. Watson receives directors' fees in the amount of $30,000 per year, plus $1,000 for every Board or Board committee meeting attended from the Company. In addition, he receives grants of stock options to purchase 2,000 shares of Disney common stock in equal increments vesting over a five-year period and having a ten-year term for each year he serves as a Disney director. Those options are priced at the market price of Disney common stock on the date the options are granted.

235. Furthermore, Walker voted in favor of or ratified the Ovitz Employment Agreement and the payment of the excessive severance benefits bestowed on Ovitz. Accordingly, Watson is impermissibly conflicted and disqualified from considering the Company's options with respect to attempting to render Ovitz's severance payments unenforceable, seeking a legal determination that Ovitz has failed to perform in accordance with the Ovitz Employment Agreement, or otherwise pursuing legal action against those responsible for its oppressive and unfair terms.

(12) Wilson's Conflicts Of Interest

236. Defendant Gary L. Wilson is Co-Chairman of the Board of Northwest Airlines Corporation. From July 1985 through December 1989, Wilson served under defendant Eisner as Executive Vice President and Chief Financial Officer of the Company. During that period,

Wilson received substantial compensation from Disney, including substantial bonus compensation that was paid primarily at the recommendation of Eisner. During fiscal 1995, Disney paid $121,122 to an interior decorating firm owned by defendant Wilson's wife for work on a vacation club Disney was building in Newport Beach, California.

237. Eisner richly awarded Wilson at the time of his resignation as Disney's Executive Vice President and Chief Financial Officer in 1989. At that time, Disney and Wilson executed a five-year contract pursuant to which Wilson worked as a consultant to Disney with respect to acquisitions and financial issues. In accordance with that agreement, Wilson was paid a bonus of $2 million. In addition, he retained options to purchase 339,400 shares of Disney stock, which, at the time, were worth approximately $35 million. Wilson was also paid a bonus of $500,000 for 1990, which he had deferred from his $2 million 1989 paycheck. In 1989, Wilson realized a $47.5 million gain on Disney stock options he sold. In 1992, Wilson exercised an additional $23 million in Disney's stock options.

238. Wilson receives directors' fees in the amount of $30,000 per year, plus $1,000 for every Board or Board committee meeting he attends. In addition, he receives grants of stock options to purchase 2,000 shares of Disney common stock in equal increments vesting over a five-year period and having a ten-year term for each year he serves as a Disney director. Those options are priced at the market price of Disney common stock on the date the options are granted.

239. Furthermore, Wilson voted in favor of or ratified the Ovitz Employment Agreement and the payment of the excessive severance benefits bestowed on Ovitz. Accordingly, Wilson is impermissibly conflicted and disqualified from considering the Company's options with respect to attempting to render Ovitz's severance payments unenforceable, seeking a legal determination that Ovitz has failed to perform in accordance with

the Ovitz Employment Agreement, or otherwise pursuing legal action against those responsible for its oppressive and unfair terms.

(13) Bowers' Conflicts Of Interest

240. Reveta Bowers is the elementary school principal of Eisner's now-grown children. She was elected to the Disney Board because of her ties to Eisner and, therefore, her decision-making is dominated by Eisner.

241. Bowers receives directors' fees from the Company in the amount of $30,000 per year, plus $1,000 for every Board or Board committee meeting attended. In addition, she receives grants of stock options to purchase 2,000 shares of Disney common stock in equal increments vesting over a five-year period and having a ten-year term for each year she serves as a Disney director. Those options are priced at the market price of Disney common stock on the date the options are granted.

242. Furthermore, Bowers voted in favor of or ratified the Ovitz Employment Agreement and the payment of the excessive severance benefits bestowed on Ovitz. Accordingly, Bowers is impermissibly conflicted and disqualified from considering the Company's options with respect to attempting to render Ovitz's severance payments unenforceable, seeking a legal determination that Ovitz has failed to perform in accordance with the Ovitz Employment Agreement, or otherwise pursuing legal action against those responsible for its oppressive and unfair terms.

(14) O'Donovan's Conflicts Of Interest

243. Leo J. O'Donovan is the President of Georgetown University in Washington, D.C., which one of Eisner's sons attended. Eisner has donated more than $1 million to Georgetown since 1989.

244. O'Donovan receives directors' fees in the amount of $30,000 per year, plus $1,000 for every Board or Board committee meeting attended from the Company.

245. Furthermore, O'Donovan voted in favor of or ratified the payment of the excessive severance benefits bestowed on Ovitz. Accordingly, O'Donovan is impermissibly conflicted and disqualified from considering the Company's options with respect to attempting to render Ovitz's severance payments unenforceable, seeking a legal determination that Ovitz has failed to perform in accordance with the Ovitz Employment Agreement, or otherwise pursuing legal action against those responsible for its oppressive and unfair terms.

(15) Mitchell's Conflicts Of Interest

246. George L. Mitchell is special counsel to the law firm of Verner, Lipfert, Bernhard, McPherson & Hand in Washington, D.C. Mitchell has been a Disney director since 1995. Mitchell has been retained by Disney to provide consulting services with respect to matters such as the Company's international business operations and development efforts. During fiscal 1996 alone, Disney paid Mitchell an aggregate of $50,000 for such services. During the same time period, Disney engaged Mitchell's law firm to advise the Company on various matters, including its merger with Capital Cities. Mitchell's firm was paid a total of $122,764 for those services.

247. Furthermore, Mitchell voted in favor of or ratified the Employment Agreement and the payment of the excessive severance benefits bestowed on Ovitz. Accordingly, Mitchell is impermissibly conflicted and disqualified from considering the Company's options with respect to attempting to render Ovitz's severance payments unenforceable, seeking a legal determination that Ovitz has failed to perform in accordance with the Ovitz Employment Agreement, or otherwise pursuing legal action against those responsible for its oppressive and unfair terms.

248. The foregoing array of conflicts faced by the Disney Board has not escaped the attention of investors or the financial press. Indeed, the November 25, 1996 edition of Business Week derided the Disney Board as one of the 25 worst corporate boards in America because of the rampant conflicts of interest faced by its members. As was reported in the December 3, 1996 edition of the Los Angeles Times:

> Business Week dissed Disney for packing its board with insiders and friends -- potentially a recipe for passivity and rubber-stamp decision-making. More than one-third of Disney's board is made up of current or former employees. Other members such as architect Robert Stern have performed work for Disney, raising questions about their independence.

249. Business Week's view of the Disney Board was echoed in the February 24, 1997 edition of The Wall Street Journal by John Nash, President of the National Association of Corporate Directors. Mr. Nash stated:

> I would say that [the Disney Board] is living in the Dark Ages of good corporate-governance practices . . . It would not meet the standard that's being demanded by institutional shareholders and corporate-governance authorities. It's too beholden to Eisner. There are too many conflicts of interest. There are too many business relationships that cloud independence.

250. The Wall Street Journal also reported in its February 24, 1997 edition that many indicators suggest that the Disney Board has not paid close scrutiny to the actions of Disney's management. According to the Journal:

> Ownership of the company's stock is low; four directors own no shares at all. (As a Jesuit priest, Father O'Donovan isn't allowed to own any.) Though Mr. Eisner floods members with memoranda, the Board doesn't hold a regular strategic-planning retreat. Outside directors don't meet regularly in the absence of company executives such as Mr. Eisner. The Board doesn't give Mr. Eisner an annual written assessment of his performance, even though 89% of the nation's biggest industrial corporations do, according to a 1996 survey by executive recruiters Korn-Ferry International.

B. Additional Factors That Demonstrate That Defendants' Decisions Were Not The Product Of A Valid Exercise Of Business Judgment

251. The following additional factors, which are applicable to all members of the Current Board, demonstrate that no demand upon the Disney Board at the commencement of this litigation was required because any such demand would have been futile:

(a) The agreement to pay and the payment of the exorbitant sums purportedly due to Ovitz pursuant to the Ovitz Employment Agreement constituted an improvident and inequitable waste of Disney's corporate assets, which cannot be justified as a reasonable exercise of business judgment or valid corporate action, and which therefore cannot be ratified by the Disney Board. The failure to pursue any and all legal remedies against making such payments constitutes an abdication of fiduciary responsibility and a willful or reckless refusal to consider information available to the Current Board.

(b) In particular, the grant of stock options to Ovitz constituted a waste of Disney's assets because the Company received no or insufficient consideration for those options. The options granted to Ovitz by Disney in no way guaranteed, encouraged or secured Ovitz's services for the Company. Thus, there was no reasonable relationship between the value of the stock options granted to Ovitz and the value of the services he was retained to render.

(c) The agreement to pay, the payment by Disney and the acceptance by Ovitz of the sums purportedly owed to him under the Ovitz Employment Agreement constituted a breach of the duty of loyalty owed by Ovitz and each one of the members of the Current Board to Disney. Such conflicts of interest, breaches of the duties of loyalty and self-dealing, coupled with the passive reaction of the Current Board to the payment to Ovitz of the grossly excessive severance compensation outlined above, cannot be ratified. Such conduct constituted unfair dealing by Ovitz and the Current Board.

(d) Each member of the Old Board voted in favor of or ratified the terms of the Ovitz Employment Agreement at or about the time it was entered into by Disney and Ovitz in October 1995. Furthermore, all of the members of the Current Board have failed to fulfill their obligation to undertake all steps reasonably necessary to minimize or eliminate the payment of compensation to Ovitz pursuant to the Ovitz Employment Agreement, causing gross corporate waste. Thus, each of the Individual Defendants has a strong personal interest in guaranteeing that the claims alleged herein are not brought by the Company and that they, and their fellow directors, not be named as defendants in any action brought by Disney.

(e) At all relevant times, Eisner wielded controlling influence in determining the compensation to be paid to Disney employees and in determining what parties would be hired to perform architectural, legal and professional services for the Company and was in a position to and did dominate the Disney Board. Eisner unilaterally directed the Board to hire his close friend, Ovitz, in 1995. The unconscionable terms of the Ovitz Compensation Agreement directly benefitted Eisner by setting a lofty base line from which he could negotiate upward his own compensation. Later, Eisner unilaterally caused the Board to provide Ovitz with an unduly generous severance package that benefitted Ovitz at the expense of Disney and its shareholders. Eisner caused the Current Board to grant Ovitz a Non-Fault Termination in order: (a) to avoid the personal embarrassment that would have resulted from a public dispute or litigation with Ovitz concerning the terms of Ovitz's severance package; and (b) to attempt to shield his own exorbitant compensation package from public criticism. The members of the Current Board failed to counteract Eisner's impulse to use Company funds to buy himself out of an uncomfortable situation that could potentially have negatively impacted Eisner's compensation. Accordingly, the members of the Current Board cannot exercise independent, objective judgment in deciding whether the adoption and fulfillment of the Ovitz Employment Agreement was and is in the best interests of Disney.

(f) The composition of the Disney Board is designed to and does make the members of the Current Board dependent upon and deferential to Eisner, who controls and dominates the process by which directors are selected, and who approves their re-nomination to the Board. Eisner personally chose or endorsed the continuance of each of the members of the Current Board as Disney directors.

(g) Likewise, the composition of Disney's upper-level management is controlled by Eisner. Accordingly, the Individual Defendants who are Disney employees or otherwise receive compensation from the Company in capacities other than as directors are deferential to Eisner's decision-making because their employment or retention -- and the substantial financial benefits entailed therein -- depend upon Eisner's approval. Furthermore, like Eisner, the other Disney employees who are Disney directors directly benefitted from having the compensation paid to Ovitz set as high as possible so that they could negotiate upward their own compensation.

252. Demand is also excused in this instance because the current directors recklessly or in bad faith ignored obvious signs that the compensation provided for in the Ovitz Employment Agreement was excessive and that Ovitz had breached the Ovitz Employment Agreement before the time it was agreed that he would end his employment with Disney. As a result, the Current Board knew or was reckless in not knowing that Ovitz was not entitled to the generous severance payments he received. Accordingly, the Individual Defendants' adoption, ratification and enforcement of the unconscionable terms of the Ovitz Employment Agreement cannot be said to constitute a valid exercise of the Individual Defendants' business judgment. Among other red flags that should have alerted the Individual Defendants that the

Ovitz Employment Agreement provided for excessive compensation and that Ovitz had breached the Ovitz Employment Agreement, were the following:

(a) Eisner, who obviously had a personal interest in setting his second-in-command's compensation at as high a level as possible, unilaterally negotiated with Ovitz the terms of the Ovitz Employment Agreement.

(b) The Ovitz Employment Agreement provided Ovitz with no incentive to remain in the Company's employ. Rather, as outlined above, the agreement encouraged Ovitz to seek to secure his termination as soon as possible.

(c) The sheer number of stock options granted to Ovitz, when coupled with the fact that Ovitz could receive those options without rendering any services to the Company, rendered the compensation called for in the Ovitz Employment Agreement unconscionable from the outset.

(d) At least as early as September 5, 1996, Ovitz wrote to Eisner and stated that he wished to end his employment at Disney. Any such voluntary resignation by Ovitz would have freed Disney from the obligation to pay him any severance benefits whatsoever. Yet, the Individual Defendants failed to undertake any action to oppose Eisner's unilateral determination that Ovitz should be granted a Non-Fault Termination, with full severance benefits.

(e) Numerous media reports and other evidence outlined above indicated that Ovitz was actively interviewing with other entertainment companies at the time he was employed by Disney. Defendants were provided with ample access to that evidence.

(f) Ovitz had freely admitted that he was searching for alternative employment while he was still employed by Disney. Indeed, in the biography written by Robert Slater, Ovitz states, "[By October 12, 1996,] I knew I was leaving . . . and I was in the process of putting together the deal I'm doing now. I thought I'd make an announcement while I was there [at Disney]."

253. As executives and directors of an entertainment industry conglomerate, defendants either were or should have been aware of the foregoing facts, which provided Disney with the ability to void all payments to Ovitz under the Ovitz Employment Agreement.

FIRST CAUSE OF ACTION

(Breaches of the Fiduciary Duties of Loyalty, Good Faith and Due Care)

254. Plaintiffs repeat and reallege each of the foregoing paragraphs as if fully set forth herein.

255. This claim is asserted derivatively on behalf of Disney against all of the Individual Defendants.

256. The Individual Defendants have breached fiduciary duties of loyalty and good faith owed to the Company and its stockholders by:

(a) with respect to the Former Director Defendants, subordinating the best interests of Disney to their allegiance to defendants Eisner and/or Ovitz by agreeing to the unconscionable and unlawful terms of the Ovitz Employment Agreement, as was recommended by defendant Eisner to the Board, although that agreement called for the payment of grossly excessive and unfair compensation to Ovitz -- particularly in the event of an early termination of that agreement for any reason other than cause, which was always a likely possibility; and

(b) with respect to the Current Director Defendants, subordinating the best interests of Disney to their allegiance to defendants Eisner and/or Ovitz by agreeing to abide by the terms of the Ovitz Employment Agreement, as was recommended by defendant Eisner to the Board at or about the time Ovitz agreed to end his employment with Disney, although: (i) that agreement calls for the payment of compensation to Ovitz that results in a breach of the fiduciary duties owed by Ovitz and the other Individual Defendants to Disney and a waste of the Company's assets; (ii) the circumstances surrounding Ovitz's departure from the Company (including the fact that he was seeking alternative employment) were sufficient to justify a "for cause" dismissal within the terms of the Ovitz Employment Agreement or provided grounds to challenge the enforceability of the contract; and (iii) Ovitz's failure to perform and fulfill the duties of Disney's President amounted to a material breach of the Ovitz Employment Agreement;

(c) with respect to Ovitz, insisting upon the payment of the unconscionable severance payments outlined above during the course of his discussions with Eisner concerning his separation from the Company, although he was a Disney fiduciary at the time of those discussions and, therefore, was obligated not to exploit the unconscionable terms of the Ovitz Employment Agreement; and

(d) with respect to Eisner, failing to explore legal defenses to the Ovitz Employment Agreement to improve Disney's bargaining leverage as a result of his desires to eliminate Ovitz from the Company, to extricate himself from the adverse consequences of his ill-considered decision to hire Ovitz and to minimize public attention to his own unconscionable compensation package.

257. The Individual Defendants have breached the fiduciary duty of due care they owe to the Company and its stockholders by:

(a) with respect to the Former Director Defendants, agreeing to, voting in favor of or taking steps to ratify the Ovitz Employment Agreement, which (as specified above) provides Ovitz with grossly excessive compensation for his unproductive fourteen months of service to the Company, and effectively rewards him for an early departure, when such an early termination was reasonably foreseeable at all relevant times;

(b) with respect to the Former Director Defendants, failing to investigate adequately the possible ramifications of agreeing to the Ovitz Employment Agreement, including the financial effect upon the Company of a voluntary or forced resignation by Ovitz from his position as the Company's President prior to the natural termination of the agreement, which was foreseeable and likely to occur under its terms; and

(c) with respect to the Current Director Defendants, failing to investigate and pursue all reasonable avenues of legal recourse against Ovitz, or others, for the purpose of minimizing, if not eliminating, the payment of compensation to Ovitz pursuant to the unconscionable, oppressive and unfair terms of the Ovitz Employment Agreement as originally entered into and now as carried out.

258. The Individual Defendants' approval of or acquiescence to the terms of the Ovitz Employment Agreement cannot be justified as valid acts of business judgment given the patently excessive severance compensation the Ovitz Employment Agreement calls for Ovitz to receive, particularly when considered in light of: (a) Ovitz's brief and unproductive service to the Company; (b) his limited credentials when he was hired to serve as Eisner's second-in-command; and (c) the material risk that Ovitz would seek to trigger the lucrative "golden parachute" payments he was able to extract. The Individual Defendants therefore do not enjoy any business judgment protection for their actions, which were reckless and in bad faith in all essential respects, and which constitute violations of their fiduciary obligations of due care and, as alleged above, a costly waste of Disney's assets.

259. By reason of the foregoing, the Company has sustained and will continue to sustain serious damage, for which relief is sought herein.

260. Plaintiffs and the Company have no adequate remedy at law.

SECOND CAUSE OF ACTION

(Waste)

261. Plaintiffs repeat and reallege each of the foregoing paragraphs as if fully set forth herein.

262. This cause of action is asserted derivatively on behalf of Disney against all of the Individual Defendants.

263. Each of the Individual Defendants owe and owed to Disney the obligation to protect the Company's assets from undue loss or waste.

264. As specified above, by any objective assessment, the compensation received or to be received by Ovitz as a result of the termination of his employment as President of the Company is grossly excessive and bears no relation to the value of the purported services Ovitz provided to the Company in exchange for that compensation.

265. Nor are those severance payments commensurate with any legal obligation (if any) owed to Ovitz because he has materially breached the Ovitz Employment Agreement and his separation is, or could validly be claimed to be, for cause.

266. The Former Director Defendants' purported ratification of the Ovitz Employment Agreement constituted a waste of Disney's corporate assets and was grossly unfair to the Company. The contract was structured in a manner which did not give adequate protection to Disney and all but guaranteed Ovitz's early and costly departure. In particular, the value of the stock options given to Ovitz under the Ovitz Employment Agreement in exchange for what was received or was to be received is grossly disproportionate and unfair to Disney, and no conditions were set forth in the Ovitz Employment Agreement to ensure that Disney would receive the services for which it bargained. In fact, the Ovitz Employment Agreement called

for the stock options to vest under circumstances where Disney could (and did) receive nothing of value in return, facts which were known to the Individual Defendants from the outset.

267. In addition, the Current Director Defendants' failure to undertake all reasonable legal steps necessary to assure that Ovitz did not receive the grossly excessive payments purportedly due him under the Ovitz Employment Agreement, including, but not limited to, the Current Director Defendants' failure to seek a legal determination that Ovitz breached the terms of the Ovitz Employment Agreement, or was subject to dismissal for cause, represents another manifestation of the Individual Defendants' pattern of wasting and squandering the Company's assets, inter alia, to serve Eisner's personal interests.

268. By reason of the foregoing, the Company has sustained and will continue to sustain serious damage, for which relief is sought herein.

269. Plaintiffs and the Company have no adequate remedy at law.

THIRD CAUSE OF ACTION

(Breach of Contract)

270. Plaintiffs repeat and reallege each of the foregoing paragraphs as if fully set forth herein.

271. This claim is asserted derivatively on behalf of Disney against defendant Ovitz.

272. On October 1, 1995, Disney and Ovitz entered into the Ovitz Employment Agreement. By means of that agreement, Disney agreed to employ Ovitz as the Company's President. Section 20(f) of the Ovitz Employment Agreement provides that "[t]his Agreement shall be governed by and construed in accordance with the laws of the state of California." The Ovitz Employment Agreement was for a term of five years.

273. As is set forth above, Ovitz breached the terms of the Ovitz Employment Agreement by, inter alia: (a) actively seeking alternative employment at the time he was under

contract to Disney; (b) seeking to establish a new business which would compete with Disney while he was under contract as Disney's President; (c) performing services for or on behalf of CAA while under contract as Disney's President, particularly in connection with attempting to convince high-profile CAA clients to remain with the agency (as was dictated by Ovitz's own financial interests); (d) tendering his resignation as Disney's President; and (e) performing his duties as Disney's President in a grossly deficient manner amounting to malfeasance. Accordingly, Ovitz was not entitled to any severance payments under the Ovitz Employment Agreement.

274. Ovitz is therefore liable to Disney for all compensation paid to him as severance in connection with the Ovitz Employment Agreement, including: (a) the 3 million stock options awarded to Ovitz; and (b) the $38,869,000 in cash payments made to Ovitz as a Non-Fault Termination payment on or about December 27, 1996.

275. By reason of the foregoing, the Company has sustained and will continue to sustain serious damage, for which relief is sought herein.

276. Plaintiffs and the Company have no adequate remedy at law.

FOURTH CAUSE OF ACTION

(Breach of the Fiduciary Duty of Candor)

277. Plaintiffs repeat and reallege each of the foregoing paragraphs as if fully set forth herein.

278. Plaintiffs bring this cause of action pursuant to Court of Chancery Rule 23, on their own behalf and on behalf of a Class of all holders of Disney common stock as of December 30, 1996 and their successors in interest. The defendants herein and any person, firm, trust, corporation or other entity related to, controlled by or affiliated with any of the defendants are excluded from the Class.

279. This claim is brought against all of the Current Director Defendants.

280. This action is properly maintainable as a class action for the following reasons:

(a) The Class of shareholders on whose behalf this action is brought is so numerous that joinder of all Class members is impracticable. As of May 8, 1996, there were 680,618,048 shares of Disney common stock outstanding. Those shares were held by thousands of shareholders of record and beneficial owners. Members of the Class are scattered throughout the United States and the world.

(b) There are questions of law and fact common to members of the Class. The common questions include, inter alia:

(1) whether the disclosures made by defendants in the Proxy Statement adequately described the terms of the Bonus Plan and the Eisner Compensation Agreement;

(2) whether defendants were obligated to disclose the fact that Ovitz's separation from the Company was the result of his own volition;

(3) whether plaintiffs and the other members of the Class are being injured and will continue to be injured by the wrongful conduct alleged herein; and

(4) in the event the Court determines that plaintiffs and the members of the Class have been injured, what is the proper remedy for defendants' misconduct.

(c) Plaintiffs' claims are typical of the claims of other members of the Class. Plaintiffs are not aware of any interests they possess that are adverse or antagonistic to the interests of the Class.

(d) Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel experienced in litigation of this nature. Plaintiffs are therefore adequate representatives of the Class and will fairly and adequately protect the interests of the Class.

(e) Plaintiffs anticipate that there will not be any difficulty in the management of this litigation as a class action.

(f) Defendants have acted in a manner which affects plaintiffs and all members of the Class, thereby making appropriate injunctive relief and/or corresponding declaratory relief with respect to the Class as a whole.

(g) The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for defendants, or adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of other members or substantially impair or impede their ability to protect their interests.

281. As specified above, in connection with the issuance of the 1997 Proxy Statement, the Current Director Defendants made certain misleading representations concerning Disney's Bonus Plan and Eisner's Compensation Agreement.

282. The representations made by the Current Director Defendants in the Proxy Statement failed to satisfy the fiduciary duty of candor owed by the Current Director Defendants to Disney and its shareholders because defendants failed to disclose that: (a) the EPS measure utilized to calculate bonuses under the Bonus Plan and Eisner's Compensation Agreement was inherently subject to manipulation in the manner alleged in detail above; (b) defendants had facilitated such manipulation by employing stock repurchases and purchase accounting and substantial asset write-downs in connection with the Company's acquisition of Capital Cities; (c) those accounting measures would have the effect of inflating the bonuses paid to Eisner and other Disney executives under the Bonus Plan and the Eisner Compensation Agreement; (d) Disney had utilized stock repurchases in the past for the purpose of offsetting the dilutive

effect of stock option exercises by Disney executives; and (e) when the Company engaged in repurchases for that purpose, Disney suffered a direct financial loss because the proceeds collected by the Company were significantly smaller than the amounts paid by the Company to repurchase stock.

283. The Current Director Defendants' description in the Proxy Statement and at the 1997 annual meeting of the circumstances leading to Ovitz's separation from the Company was also materially deficient. In particular, defendants failed to disclose the facts that: (a) Ovitz indicated, in a letter written to Eisner on or about September 4, 1996, that he wished to end his employment at Disney; (b) Eisner, when approached by Ovitz, had unilaterally determined to treat Ovitz's resignation from Disney as a Non-Fault Termination under the Ovitz Employment Agreement (a decision the Current Director Defendants acquiesced to), thereby triggering the exorbitant severance payments referred to above; and (c) Ovitz breached the terms of the Ovitz Employment Agreement by, inter alia, actively seeking alternative employment during his tenure at Disney, providing services on behalf of CAA and performing his duties as Disney's President in a grossly deficient manner.

284. As a direct and proximate result of the conduct complained of herein, plaintiffs and the members of the Class were injured in that they were deprived of their right to elect Disney directors and vote upon the Bonus Plan and the Eisner Compensation Agreement with the benefit of full disclosures concerning all facts material to those matters.

285. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand judgment in their favor and in favor of the Company against all of the Individual Defendants as follows:

A. Declaring that the Fourth Cause of Action is properly maintainable as a class claim and certifying plaintiffs as class representatives;

B. Declaring that the Individual Defendants have violated their fiduciary duties to the Company and have wasted the Company's assets;

C. Declaring that the Ovitz Employment Agreement and any release granted by Disney in connection with the separation of Ovitz from the Company are null and void because they amount to waste of the Company's assets and breaches of the Individual Defendants' fiduciary duties of due care, loyalty and good faith;

D. Alternatively, declaring the termination of Ovitz's employment by Disney a "for cause" termination as defined in the Ovitz Employment Agreement, and/or that any severance payments thereunder have been forfeited or diminished due to Ovitz's failure to perform in accordance with the Ovitz Employment Agreement;

E. Enjoining the Individual Defendants and all other persons from undertaking any steps to abide by the terms of the Ovitz Employment Agreement;

F. Enjoining defendant Ovitz from taking any steps to receive remuneration pursuant to the Ovitz Employment Agreement, including any action necessary to exercise the stock options to which he is purportedly entitled under the Ovitz Employment Agreement;

G. Ordering the Individual Defendants to account for all damages caused by them and all profits and unjust enrichment they obtained as a result of their unlawful conduct and imposing a constructive trust thereon;

H. Freezing or sequestering any compensation paid to Ovitz in connection with his separation from Disney until the instant lawsuit is resolved;

I. Alternatively, awarding compensatory or rescissory damages against the Individual Defendants jointly and severally in an amount to be determined at trial, together with pre-judgment interest at the maximum rate allowable by law;

J. Declaring the election of directors at Disney's 1997 annual meeting and the shareholders' approval of the Bonus Plan and the Eisner Compensation Agreement null and void;

K. Awarding plaintiffs the costs and disbursements of this action, including reasonable allowances for plaintiffs' attorneys' and experts' fees and expenses; and

L. Granting such other or further relief as may be just and proper under the circumstances.

Dated: May 28, 1997

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CERTIFICATE OF SERVICE

I, Norman M. Monhait, hereby certify that on May 28, 1997, I caused copies of the foregoing Notice of Filing Amended Complaint to be served by hand delivery on the following:

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