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

SECOND AMENDED CONSOLIDATED DERIVATIVE COMPLAINT

1. For their Second Amended Consolidated Derivative Complaint (the "Complaint"), plaintiffs allege the following upon personal knowledge as to themselves and their own acts and upon information and belief as to all other allegations, based upon inspection and review by plaintiffs' lead counsel of books and records produced by The Walt Disney Company ("Disney" or the "Company") pursuant to 8 Del. C. § 220 and upon the investigation by plaintiffs' counsel of other materials pertinent to the claims herein alleged:

NATURE AND SUMMARY OF THE ACTION

2. Plaintiffs bring this action derivatively on behalf of the nominal corporate defendant, Disney, to redress the Director Defendants'[1] breaches of their fiduciary duties in (1) causing or permitting adoption of the Ovitz Employment Agreement (the "OEA") (a copy of which is attached hereto as Exhibit A) by which defendant Michael S. Ovitz ("Ovitz") was hired as Disney's President

[1] The Director Defendants in this action, who are identified below, were, at the inception of the litigation, current and/or former members of the Board of Directors of Disney. The directors of Disney at the time the Ovitz Employment Agreement was negotiated and executed by Disney's Board of Directors are collectively referred to in this complaint as the "Old Board". The directors of Disney at the time Ovitz received his "Non-Fault Termination" are referred to as the "New Board."

and (2) causing or permitting Ovitz's receipt of a "Non-Fault Termination" of his employment at Disney, only 14 months after the start of his employment, as a result of which Ovitz received severance benefits exceeding $140 million.

3. Defendant Michael D. Eisner ("Eisner"), Disney's Chief Executive Officer, recruited Ovitz, his long-time personal friend, to join Disney. The hiring of Ovitz was also facilitated by defendant Irwin Russell ("Russell"), the Chairman of the Compensation Committee of the Old Board, who was another long-time friend of Eisner as well as Eisner's personal attorney. Russell was paid by Disney $250,000, as additional compensation for his work in securing Ovitz's services for the Company.

4. The Disney Compensation Committee, chaired by Russell, approved a set of general terms that were supposed to provide the basis for the OEA in a meeting in September 1995. Russell and the other members of the Compensation Committee, however, inadequately investigated the proposed terms of the OEA and thus violated their fiduciary duties owed to Disney. The members of the Committee, who did not receive any materials regarding the OEA prior to the meeting, spent an extremely minimal and negligible amount of time, probably as little as ten minutes, considering the terms of the OEA. The Old Board subsequently decided to appoint Ovitz President, paying scant attention to the terms of the OEA. Indeed, both the Old Board and the Compensation Committee devoted more attention to the subject of Russell's additional compensation for working out Ovitz's package than to the terms of the OEA.

5. The members of the Compensation Committee and the Old Board, indifferently and recklessly, failed to obtain and consider all material information reasonably available to them to evaluate whether the OEA was desirable from a corporate standpoint and whether it contained adequate safeguards. They did not obtain the draft of the OEA which was available at the time. They did not obtain any calculations, assessments, or even a general picture of the compensation that Ovitz would receive in the event of Non-Fault Termination at various points in time and of how such compensation would compare with the compensation Ovitz would obtain in the event of serving the full contract term. Moreover, the Compensation Committee and the Old Board never approved more than a set of general terms and conditions that were proposed as a framework whose fine details would be subsequently negotiated and could be approved by defendant Eisner. By doing so, the members of the Old Board knowingly left to Eisner, whose very close relations with Ovitz were familiar to all of them, the task of finalizing the agreement without any further scrutiny on their part.

6. The OEA that was produced by this highly flawed and ill-informed process was one that no reasonable person would have accepted had that person been adequately informed, failed to contain adequate safeguards to secure Ovitz's future services, and was wasteful. The OEA provided Ovitz with severance compensation in the event of a Non-Fault Termination that was at least as valuable, if not more so, than if he remained in Disney's employment throughout the entire term of his employment agreement. As a result, rather than provide incentives to Ovitz to continue working for Disney and serve it well, the terms of the OEA perversely made obtaining a Non-Fault Termination far more financially attractive for Ovitz than his serving the full term of the contract.

The stock option and severance provisions in the OEA, therefore, failed to secure Ovitz's services for the full contract term and even provided a disincentive for him to perform as President for the full five years. The seriously perverse and counter-productive incentives produced by these terms of the OEA could have been detected and prevented by the directors had they properly studied them and had they obtained a comparative assessment of the benefits provided to Ovitz in the event of a Non-Fault Termination and the benefits of full contract performance by Ovitz.

7. Moreover, the Compensation Committee and the Old Board failed to secure any expert advice regarding the terms of the OEA. Although Graef Crystal ("Crystal") assisted Russell in certain aspects of the negotiations relating to the OEA, he was never retained to perform such work and merely offered such services as ancillary to advisory work that he was doing for Russell with regard to the restructuring of Eisner's employment agreement. Not surprisingly, Crystal did not render any opinion or other recommendation with regard to the terms of the OEA and never attended any meeting of the Compensation Committee or the Old Board that touched on these matters. Similarly, Crystal neither provided to the Compensation Committee or the Old Board, nor prepared for consideration by either one of them, any analysis of the terms of the OEA.

8. Although Ovitz started serving as President of Disney on October 1, 1995, and the OEA was dated as of October 1, 1995, the OEA was not finalized and executed on that date. Rather, negotiations over the OEA continued beyond this date for at least 10 weeks, and the OEA was executed on or about December 12, 1995 and backdated to October 1, 1995. The final version of the OEA that was worked out by Eisner and Ovitz deviated substantially from the general terms

approved earlier by the Disney Compensation Committee. Eisner agreed to generous and unwarranted expansion of the circumstances under which Ovitz would be entitled to a Non-Fault Termination. Furthermore, whereas the Compensation Committee had contemplated the granting of stock options with an exercise price no greater than the market price on the date of the grant, as had typically been the practice at Disney, Eisner agreed to stock option grants that were known at the time of the OEA's actual execution to be substantially in-the-money. But for Eisner's close relationship with his "best friend" Ovitz and the other directors' gross and reckless inattention, such lucrative, unearned benefits would never have been provided to Ovitz.

9. Notwithstanding the fact that Ovitz was neither an officer nor a director of Disney prior to the (backdated) effective date of the OEA (October 1, 1995), he was an officer and a director and thus a fiduciary of Disney at the time the OEA was actually executed. As a fiduciary, Ovitz violated his duties of loyalty and good faith owed to Disney in obtaining for himself an arrangement that was adverse to the interests of the Company.

10. During his tenure at Disney, Ovitz performed poorly and acted in disregard of his contractual duties to Disney. His poor performance was recognized as such by Disney's senior management, outside observers, and eventually Ovitz himself. This caused Ovitz to look actively for alternative employment and to start negotiations with Sony Corp. over his joining Sony as a senior executive. To implement this, Ovitz wrote to Eisner on or about October 8, 1996, stating that he wished to leave his positions at Disney and that he was seeking approval for his conducting employment negotiations with other companies before actually departing.

11. Confronted with Ovitz's failure as President of Disney, and with Ovitz's express desire to leave Disney, defendant Eisner agreed that he would do everything that he could to ease his friend out of Disney without his suffering any financial cost or recriminations. In a note that Eisner wrote to Ovitz on October 9, 1995, Eisner stated in part that he was "committed to make this a win-win situation, to keep our friendship intact," adding: "Nobody ever needs to know anything other than positive things from either of us . . . . you are still the only one who came to my hospital bed [when Eisner underwent heart surgery] -- and I do remember." Eisner added: that "Nobody ever needs to know anything other than positive things from either of us." In a subsequent note, Eisner also stated reassuringly to Ovitz, "I am sure we are now both protected 'every way to and from Sunday'." In that same letter, Eisner conveyed to Ovitz his wish to arrange Ovitz's departure on terms which would avoid any "embarrassment" to Eisner.

12. When Ovitz's efforts to secure another position foundered, Eisner capitulated to his friend's desire to leave, but without sacrificing any of the financial benefits of the OEA. Thus, Eisner put his personal friendship with Ovitz, and his desire to keep this friendship intact, and to avoid his embarrassment, above his fiduciary duties owed to Disney and Disney's interest in avoiding or minimizing any unnecessary payments to the departing Ovitz. He did so by unilaterally agreeing that Ovitz's departure would be treated as a Non-Fault Termination, triggering Ovitz's lucrative pay-out under the OEA. Eisner never explored any other alternatives that may have been more beneficial to Disney.

13. Consistent with his promises to his friend Ovitz, Eisner never reported to or informed the New Board about his interactions with Ovitz concerning Ovitz's departure, nor brought to the New Board any recommendation or proposal concerning the termination of Ovitz. Rather, he unilaterally caused Disney to pay Ovitz the full benefits of a Non-Fault Termination with the inexcusable acquiescence of the New Board. Although, pursuant to Disney's Bylaws, the President could only be removed by the Board, Disney's records show that, in fact, the New Board abdicated its responsibilities, leaving the decision to Eisner, who was patently conflicted in his dealings with Ovitz. By obtaining and accepting these benefits, Ovitz, acted in concert with defendant Eisner, violated his fiduciary duties to Disney.

PARTIES

14. Plaintiffs were and are holders of shares of Disney common stock who have held such shares from the time of the wrongs complained of through the present.

15. 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 as a nominal defendant.

16. At all relevant times, defendant Eisner has served as Disney's Chairman of the Board and Chief Executive Officer.

17. (a) Defendant Ovitz served as Disney's President from approximately September 26, 1995 until December 27, 1996. Ovitz also served as a Disney director from January 1996 until his departure from the Company. Ovitz and Disney announced on December 12, 1996, that Ovitz would leave Disney effective January 31, 1997. Ovitz's departure was subsequently accelerated to 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.

18. 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.

19. Defendant Sanford M. Litvack, was, at all relevant times, Disney's General Counsel as well as a Disney director.

20. Defendant Russell was, at all relevant times, a Disney director and Chairman of the Disney Board's Compensation Committee, as well as Eisner's personal attorney.

21. Defendants Eisner, Bollenbach, Litvack, Russell, Roy E. Disney, Stanley P. Gold, Richard A. Nunis, Sidney Poitier, 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."

22. Defendants Eisner, Disney, Gold, Litvack, Nunis, Poitier, Russell, Stern, Walker, Watson, Wilson, Bowers, Lozano, Mitchell, Leo J. O'Donovan and Thomas S. Murphy, excluding defendant Ovitz, are sometimes referred to as the "New Board."

23. The members of the Old Board and the New Board (excluding defendant Ovitz) are collectively referred to as the "Director Defendants."

24. Throughout the course of their service with Disney, the Director Defendants and Ovitz owed Disney fiduciary obligations, including those of due care, loyalty and good faith.

SUBSTANTIVE ALLEGATIONS

A. General Background to Ovitz's Hiring by Disney

25. Prior to joining Disney, Ovitz was Chairman of CAA. He 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 its vast theme park operations.

26. Further, Ovitz had previously functioned as a virtual kingpin in his limited domain as a talent agent. Thus, Ovitz had no track record of following orders, much less acting as a second-in-command to a powerful executive such as Eisner.

27. In 1994, Eisner lost his highly respected second-in-command, Frank Wells, in a fatal helicopter crash. Within months of Wells' death, Disney 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. Eisner had demonstrated a tendency to cause significant turnover of Disney top

executives reporting to him. For example, Eisner forced Katzenberg to leave Disney because Eisner was unwilling to name Katzenberg, who was widely regarded as a highly creative and forceful executive, as Disney's President, because this would place a potential rival in the second-most powerful position in the Company -- unacceptable to Eisner. In March of 1995, Richard Frank, the Chairman of Disney's television and telecommunications divisions, resigned. Public reports indicated that Frank's departure was caused by Eisner's aggressive and intrusive management style.

28. The departure of Katzenberg and Frank, coupled with Ovitz's lack of experience as an executive, made it especially important for the Old Board to examine the arrangements governing termination of the OEA and to satisfy itself that the OEA contained adequate safeguards to ensure that the Company would receive the benefit of its bargain and was not wasteful.

29. Before Ovitz joined Disney, Ovitz and his wife had been close friends of Eisner and his wife for over 25 years. This bond of friendship was so strong that even the disappointments and troubles caused to Eisner by Ovitz's subsequent failure as the Company's President did not undermine it. As set forth below, in a letter written in October 1996, in the period in which Ovitz and Eisner were already arranging for Ovitz's departure, and despite Ovitz's performance having generated vexing tension and disappointment within the Disney organization, Eisner stressed that it was very important for him to keep his friendship with Ovitz intact, and Ovitz referred to Eisner in a letter to him written in that period as "my best friend."

B. The Hiring of Ovitz

30. The decision to bring Ovitz in as President of Disney was made unilaterally by Eisner, who considered Ovitz his "best friend." 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 meeting, Bollenbach, Litvack and even Russell (Eisner's personal attorney) protested the decision.

31. On or about August 14, 1995, Eisner sent Ovitz a letter memorializing the principal terms of Ovitz's prospective employment by Disney. Prior to Eisner's sending Ovitz this letter, the hiring of Ovitz as President was never considered or discussed by the Old Board or any of its committees.

32. In his letter, Eisner stated that the hiring of Ovitz was subject to the formal approval of the Company's Board and its Compensation Committee. The employment of Ovitz, however, was not brought to the Board until weeks later -- September 26, 1995 -- after much of the OEA had already been formulated. At that meeting, as described herein, the Old Board spent very little time considering Ovitz's employment -- only one-half of one page of the fifteen pages of minutes of that meeting is devoted to this important matter -- and acquiesced in Eisner's unilateral choice. Importantly, no written agreement between Ovitz and the Company was presented for consideration at that meeting. Instead, Eisner was authorized to bring such negotiations to closure -- negotiations which would and did continue for months after Ovitz began working at Disney.

C. Defendants Breach their Fiduciary Duties in Connection With Entering Into The OEA

33. An internal Disney document created on or about July 7, 1995, raised concerns about the extraordinary number of options that were being negotiated and would apparently be granted to Ovitz:

> [n]umber of stock options is far beyond standards applied in Company [sic] and in corporate America and will raise very strong criticism. We should collect survey information to be prepared to answer if it becomes necessary. [Emphasis added.]

34. Neither this document nor any other document providing survey information or otherwise analyzing the benefits provided to Ovitz was submitted to the Compensation Committee or the Old Board when they agreed to Ovitz's hiring.

35. Also, before Ovitz was hired, a letter from Crystal to Russell dated August 12, 1995, noted, with reference to a "large signing bonus," that the "deficiencies of this approach are that the cost is borne immediately, and it is borne in full even though the executive, for one reason or another, fails to serve his full employment term." Neither this document nor any other document discussing, highlighting, criticizing or analyzing the similar problems created by the Non-Fault Termination provision in the OEA was submitted to the Compensation Committee or to the Old Board prior to the hiring of Ovitz.

1. The September 26, 1995 Compensation Committee Meeting

36. The Disney Compensation Committee briefly considered Ovitz's prospective employment in a meeting that was held on or about September 26, 1995. The members of the Compensation Committee were defendants Lozano, Poitier, Russell and Watson. Defendant Russell

was the Chairman of the Committee. Defendant Litvack also attended that meeting. The Committee approved in this meeting a set of general terms and conditions that were proposed as a framework whose fine details would be subsequently negotiated and could be approved by defendant Eisner. By doing so, the members of the Old Board knowingly left to Eisner, whose very close relations with Ovitz were familiar to all of them, the task of finalizing the agreement without any further scrutiny on their part.

37. The whole meeting of the Compensation Committee lasted no more than an hour, as the Old Board, including all the members of the Compensation Committee, started a meeting -- at which Ovitz was scheduled to be appointed President -- one hour after the beginning of the Compensation Committee meeting. Furthermore, the subject of Ovitz's agreement was second among three subjects discussed at the Compensation Committee meeting, and the minutes indicate that the other two subjects attracted substantially more attention and discussion from the Compensation Committee.

38. The minutes of the September 26, 1995, Compensation Committee meeting cover five pages, with the first page largely devoted to preliminary matters such as the list of participants. The next two pages were devoted to a subject unrelated to Ovitz. (A copy of this document which was provided to plaintiffs' counsel pursuant to 8 Del. C. § 220 labels those pages as "REDACTED" and "IRRELEVANT.") The last two (less than full) pages include a brief account of the Compensation Committee's consideration of Ovitz's employment (eleven lines) and a slightly longer account (fourteen lines) of the Compensation Committee's consideration of a $250,000 fee to be paid to

defendant Russell for his role in "securing" Ovitz's services. Assuming that the fraction of total text in the minutes devoted to a topic is roughly proportional to the amount of time spent on it, less than 10 minutes were spent on Ovitz's employment.

39. The minutes not only illustrate the extreme brevity of the time spent on Ovitz's agreement, but also indicate the absence of any focused attention to the subject by the members of the Compensation Committee. In fact, materially more discussion and attention was devoted to the matter of approving defendant Russell's $250,000 fee (a matter which, needless to say, was far less important to Disney's shareholders). In this regard, the minutes highlight several distinct issues that were raised with respect to Russell's fee by specific directors who are named in the minutes. In contrast, the brief account in the minutes of the consideration of Ovitz's agreement contains no reference to specific issues that were discussed, if any. The minutes only blandly note that Russell reviewed the terms of the OEA and answered questions and that a resolution of approval was then passed.

40. The Compensation Committee failed to obtain several types of information on the terms and conditions of the OEA that were reasonably available to it and were material to assessing the terms of such agreement. For example, even though a draft of the OEA was prepared by Disney and sent to Ovitz's lawyers on September 23, 1995, and even though this draft contained a more complete account of the terms and conditions of the OEA as contemplated at the time, this draft was not distributed to the members of the Compensation Committee before the meeting so that they

could read and reflect on the OEA beforehand. Nor was this draft distributed to the members of the Compensation Committee during the meeting.

41. Instead, what the directors received at the meeting was merely a rough summary and substantially incomplete account of the terms and conditions of the OEA as they then stood. For example, the summary of the terms and conditions of the OEA attached to the minutes indicated that Ovitz was to receive options to purchase five million shares. It did not indicate, even though the draft was more specific, what was the contemplated exercise price of the options, which is a critical component to any consideration of a grant of options.

42. Importantly, the Compensation Committee did not receive any materials -- whether in the form of a spreadsheet, tables, a list of estimates, or any other form -- that could provide its members with some sense of the magnitude of possible pay-outs that Ovitz would receive in the event of a Non-Fault Termination at various points in time. As a result, the Compensation Committee did not possess even a general sense or notion of the amount of compensation that Ovitz would receive in the event of a Non-Fault Termination -- much less any precise quantification of the value of the severance package that Ovitz would receive under a variety of scenarios that could reasonably come into play.

43. In a December 23, 1996, article that appeared in the Worldwide Web magazine Slate, Crystal expressed his regret that -- even though he was not retained to serve as an expert or to provide an expert report -- he did not at the time intervene to cause the simple and easy steps needed to remedy the utter failure to inform the decision-making process of the magnitude of compensation

involved. He stated in the article as follows: "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" (emphasis added).

44. Finally, even though the benefits provided to Ovitz were clearly of exceptional magnitude and structure, the Compensation Committee did not receive nor request any materials as to how these striking benefits compared with standard arrangements or even as to whether there had been any precedents for the granting, or proposed structuring, of such benefits.

45. Moreover, in considering the OEA, the Compensation Committee did not receive, and hence did not and could not rely on, any expert advice regarding the terms of the OEA. Although Graef Crystal, who in that period was retained to provide advice with regard to defendant Eisner's new employment contract, had communications with Russell relating to the negotiations and development of the OEA, Crystal was never retained, nor acted, as an expert to render any formal opinion or recommendation concerning the terms of the OEA. In that regard, Crystal did not prepare any written analysis or opinion regarding the OEA that was submitted to the Compensation Committee or the Old Board. Crystal also did not make any oral presentation to the Compensation Committee or the Old Board, and he did not participate in any of the meetings in which the hiring or contract with Ovitz was discussed. The Compensation Committee and the Old Board also did not get any advice or opinion from any other person.

46. Although woefully uninformed, the members of the Compensation Committee nonetheless approved the general terms and conditions of the OEA as they then stood. Although the

committee was informed that further negotiations would take place and that Ovitz's "stock option grant would be delayed until final contract details were worked out between Mr. Ovitz and the Corporation," the Compensation Committee did not condition its approval of the summary of terms and conditions of Ovitz's employment on being able to review subsequently the complete text of the OEA. Instead, the Committee approved a resolution under which "the terms and the conditions are hereby approved subject to such reasonable further negotiations within the framework of the terms and conditions described in Exhibit C as may be approved by the Chief Executive Officer of the Walt Disney Company."

2. The September 26, 1995, Old Board Meeting

47. A meeting of the Old Board took place on September 26, 1995, immediately following the meeting of the Compensation Committee. Crystal was not present at that Board meeting and the minutes reflect no mention of his name. Ovitz was designated at the meeting to be President of the Company effective October 1, 1995. However, the Old Board did not obtain any information nor spend any time whatsoever on the matter of Ovitz's compensation.

48. In fact, the only discussion in the minutes of that meeting that was related to the OEA (which amounted to 1 ½ pages out of the 15 pages of minutes for that meeting) was (1) that Russell should and would receive a payment of $250,000 for his work in connection with retaining Ovitz (one page in the minutes) and (2) that "the Chairman resigned the position of President of the Corporation and then recommended that Michael Ovitz be elected to the office of President of the

Corporation and reviewed Mr. Ovitz's professional and education credentials (half a page of the minutes)."

49. The minutes do not reflect that the Old Board received, let alone considered, any recommendation and/or report of the Compensation Committee and/or of defendant Russell with respect to the OEA. Nor did the Old Board receive, let alone consider, any report or advice from any expert with respect to the OEA. Needless to say, the Old Board did not consider the consequences of a Non-Fault Termination and the resultant pay-out to Ovitz that could have been expected under various scenarios, nor was a spreadsheet presented or reviewed evaluating possible pay-outs (or ranges of pay-outs) at various times if Ovitz obtained a Non-Fault Termination.

3. The October 16, 1995, Compensation Committee Meeting

50. The Compensation Committee received a brief oral report on the still-continuing negotiations over Ovitz's agreement in a meeting which took place on October 16, 1995 (more than two weeks after Ovitz had already commenced his duties as Disney President). The members of the Compensation Committee did not take advantage of this opportunity to obtain any of the information that they failed to obtain earlier and that was reasonably available to them. Again, even though a draft of the OEA was available at the time, it was not distributed to the members of the Committee either before or during the meeting; rather, the members of the Compensation Committee satisfied themselves with a similar summary and incomplete account of the main terms and conditions of the OEA that they received in their meeting of September 26, 1995. Furthermore, the Committee did not obtain any sense of the magnitude of the benefits that Ovitz would obtain in the event of a Non-

Fault Termination at various points in time and of how these benefits would compare with those of full-term service. As before, the Compensation Committee did not receive any report, advice or recommendation from any expert with regard to the OEA.

D. The Finalization, Backdating and Execution of the OEA

51. Although Ovitz began serving as Disney's President on October 1, 1995, and the OEA was dated as of October 1, 1995, the OEA was not finalized, approved by Eisner, or executed by Ovitz and Disney on October 1, 1995. Rather, negotiations over the OEA continued beyond that date, and the OEA was finalized and executed only much later, and was then backdated.

52. In the weeks and months after the September 26, 1995, Old Board meeting, Ovitz and Eisner continued to negotiate the language of the OEA. Drafts of the OEA were circulated between and among the parties' lawyers on October 3, 1995, October 10, 1995, October 16, 1995, October 20, 1995, October 23, 1995 and December 12, 1995. The OEA was physically executed only on or about December 12, 1995, and it was then backdated to October 1, 1995 -- a date more than 10 weeks before the date on which it was actually executed. The OEA was expressly between Michael S. Ovitz, "Executive" and "The Walt Disney Company, a Delaware corporation."

53. The final version of the OEA negotiated by Eisner, Ovitz and their representatives was substantially more favorable toward Ovitz than the general terms and conditions approved by the Compensation Committee at its September 26, 1995 meeting (and again at its October 16, 1995 meeting). In addition, the Stock Option Agreement in connection with the OEA was executed by defendant Eisner on behalf of Disney on April 2, 1996, and Ovitz did not countersign the agreement

until November 15, 1996, at which time he was already in discussion with Eisner about leaving the Company.

54. One significant way in which Eisner exceeded the terms and conditions reviewed by the Compensation Committee concerned the circumstances under which Ovitz would receive the benefits of a Non-Fault Termination. According to the summary of the terms and conditions of the OEA, as reported to the Compensation Committee on September 26, 1995, the Non-Fault Termination benefits would be provided to Ovitz only in the event that Disney "wrongfully" terminated Ovitz's employment (or that Ovitz died or became disabled). A similarly tight definition of the circumstances under which Ovitz would be entitled to the benefits of a Non-Fault Termination was included among the terms and conditions presented to the Compensation Committee on October 16, 1995. However, the OEA finally executed in December 1995 (and backdated to October 1, 1995), provided a much broader definition of the circumstances in which such a generous package would be paid to Ovitz. Instead of protecting Ovitz from "wrongful" behavior by Disney, the provisions concerning Non-Fault Termination now contemplated that Ovitz would have access to these massive benefits as long as he did not engage in detrimental behavior defined as "gross negligence" or "malfeasance."

55. Another way in which Eisner favored Ovitz was taking the extraordinary step of causing Disney to grant Ovitz options that were materially more in-the-money than they were supposed to be. In this regard, Eisner's granting to Ovitz Disney stock options on or about December 12, 1995, which had an exercise price equal not to the market price prevailing at that time

(the date as of December 12, 1995) but, to the market price on October 16, 1995, provided Ovitz with materially more stock option value. As a result of this decision, the exercise price of each of the three million options granted to Ovitz was reduced by $5.125 and put in-the-money to that extent.

56. In contrast, the draft OEA as of September 23, 1995, set the exercise price of Ovitz's options at Disney's stock price as of October 2, 1995, i.e., the first trading day after the anticipated effective date of the OEA. Thereafter, at its meeting on October 16, 1995, the Compensation Committee agreed to set the exercise price of Ovitz's options at Disney's stock price as of October 16, 1995 (which was roughly the same as that of October 2, 1995).

57. However, by the time that the OEA was physically executed in December 1995 (which officially granted Ovitz his stock options), the stock market had risen dramatically and so had Disney's stock price. The Dow Jones Industrial Average increased from 4784 on October 16, 1995, to 5175 on December 12, 1995 -- a gain of approximately 8%. Disney's stock price rose from $56.875 per share on October 16, 1995 to $61.50 per share on December 12, 1995 -- a similar increase of 8%.

58. Given that the price of Disney's stock went up significantly before the actual execution of the OEA, granting Ovitz Disney stock options in December 1995, with an exercise price equal to the October 16, 1995, price of Disney's stock, as was done, when Disney's stock price had risen approximately 8% from its October prices, gave Ovitz a substantial unearned benefit. Whereas granting Ovitz Disney options on October 16, 1995 with an exercise price equal to the market price

of that day would have faced Ovitz both with an upside and a downside as far as general market movements are concerned, waiting until December 1995, and granting Ovitz options at that time with an exercise price equal to the October 16, 1995, price, when it was known that the market price went up significantly since then, was equivalent to granting Ovitz a winning lottery ticket not before, but after, the results are known. Eisner, however, agreed to have the OEA grant Ovitz options which he knew at the time of this agreement to be already heavily "in-the-money."

E. The Counter-Productive and Injurious Terms of the OEA

59. The OEA that Ovitz signed with Disney had a term of five years from October 1, 1995, through September 30, 2000. The agreement called for Ovitz to devote his full time and best efforts exclusively to Disney, with exceptions for volunteer work, service on the board of another company and management of his passive investments. In return for his full-time service throughout the contract term, Ovitz was to receive generous compensation consisting of three elements: (a) an annual salary set at $1 million, (b) a discretionary bonus at the end of each full year of service as Disney's President up to $10 million, and (c) most importantly, a series of "A" options that collectively enabled Ovitz to purchase 3 million shares of Disney common stock at an exercise price equal to their market price on October 16, 1995.

60. The terms of the OEA provided that, in the event of a "Non-Fault Termination" before the OEA expired on September 30, 2000, Ovitz would enjoy a package that would be worth at least as much, if not more, than if he stayed with Disney for the full term of the OEA. This was the case

for each of the three elements of the compensation package. Hence, the stock option and severance provisions in the OEA actually afforded him an incentive to leave.

61. To start with the salary element, the OEA provided that, in the event of a Non-Fault Termination, Ovitz would immediately receive the full value of the total salary payments expected during the full contract period. Not only would all of Ovitz's remaining salary be accelerated, but it would be discounted to the present value at a risk-free rate that would not reflect the actual risk that Ovitz might be terminated or leave before the end of the contract. As a result, the accelerated salary payment was greater than it would have been on an expected value basis had a more appropriate discount rate been applied.

62. The advantage in favor of a Non-Fault Termination was even more pronounced in the treatment of potential bonuses. As a full-time employee, Ovitz could receive as much as $10 million per year in bonus compensation, but he could also receive nothing. Given Ovitz's unfamiliarity with Disney's operations and need to move up on a learning curve, as well as all the risks and uncertainties that ordinarily go into an award of bonus compensation, Ovitz could never be assured of what his annual bonus compensation would be. By contrast, in the event of a Non-Fault Termination, Ovitz would receive $7.5 million per remaining year on his contract (75% of the maximum), again discounted to present value at a risk-free interest rate keyed to Disney's borrowing costs. Thus, the base amount of bonus compensation for purposes of the severance pay-out was very high, while the discount rate applied to converting that amount to present value was unrealistically

low. As a result, Ovitz was markedly better off with regard to the bonus compensation component by leaving Disney early than by staying throughout the full contract term.

63. As to the "A" options, in the event of Non-Fault Termination, Ovitz would receive the same number of options as he would if he served a full term and, furthermore, the options would vest immediately. If Ovitz were to serve a full term, the options would vest in increments of one million shares on September 30 of each year commencing September 30, 1998 through September 30, 2000. In addition, the exercise period for Ovitz's options was extended until the later of 24 months after the date of a Non-Fault Termination, or September 30, 2002.

64. With respect to the A Options, Ovitz not only would receive as many of those options in the event of a Non-Fault Termination as he would by remaining for the full contract term, he would also receive the full allotment of those options in one block and sooner than if he stayed with Disney for the full five-year term. Thus, instead of providing Ovitz with the incentive to constructively contribute to Disney's success and growth by conditioning the options on certain performance milestones or even just Ovitz's continued tenure at the Company, the options provided incentives for Ovitz to secure a Non-Fault Termination.

65. As yet another benefit from having the OEA terminated prematurely, the OEA also called for Ovitz to receive a "termination payment" of $10,000,000 in the event that he was terminated other than for good cause prior to the September 30, 2000, conclusion of the contract.

66. The OEA also provided that if Ovitz completed the entire five-year term and then entered into a new contract with Disney, he would receive a second set of stock options, the so-called

"B options," for two million additional shares. The Company, however, was completely free to refrain from entering into a new employment contract with Ovitz. Thus, the parties could and should have expected that, in the event that they would later enter into negotiations over a new contract, the presence of this provision would in no way impede the Company from offering less B options or no such options at all, as it would not impede Ovitz from demanding more B options or other types of options.

67. As a result, the OEA provided Ovitz with at least as much by way of option compensation for a Non-Fault Termination as he would receive by working full-time for Disney for the five-year contractual term of his employment. Also, all such options would be received immediately, allowing Ovitz to exercise them without delay, and relieving him of the risk that the options would subsequently go "out of the money" or that Ovitz might be terminated for fault, thus eliminating his entitlement to any such options, risks he would face if he stayed a Disney employee. It was thus in Ovitz's pecuniary interest at all times to have a Non-Fault Termination rather than continue his service as President, particularly since the OEA contained no non-compete restrictions on his ability to earn income outside of Disney if he left its employ. Accordingly, the OEA did not contain adequate safeguards to ensure that Disney would get the bargained-for-benefit and, in fact, should Ovitz at any time develop a preference to leave the Company, the OEA would perversely encourage him to quit rather than hold him to the full term of his employment.

68. An article published in the January 13, 1997, edition of California Law Business reported the assessment of Crystal, who was a contemporaneous observer, with respect to the

preparations, and the arrangement of, the OEA. The California Law Business article described the perverse nature of the structure of the contract as follows:

> [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 to Ovitz the sooner he left Disney, Crystal says. [Emphasis added.]

F. Ovitz's Failures As President of Disney

69. From the outset, Ovitz's performance as Disney's President was undistinguished and counter-productive -- as judged not only by the outside world but also by other executives and directors at the Company.

70. 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 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 that 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.

71. The New York Times reported in its December 14, 1996, edition a similar account of how Ovitz's tenure at Disney was viewed by the Company's executives:

> 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.

72. Ovitz's failure as President was in part caused by his deliberate refusal to learn certain important aspects of Disney's business as he was expected to do. 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 on 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 with Disney's affairs. In 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.

73. A harsh account of how Ovitz failed to carry out his duties was delivered by defendant Bollenbach in the December 1996 issue of Vanity Fair. 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."[Emphasis added.]

74. Even prior to his resignation from Disney, Ovitz had admitted publicly that he was performing poorly in his role as Disney's President and had not learned important aspects of his job. In a September 30, 1996, interview of Eisner and Ovitz on "Larry King Live," held a year after Ovitz had joined Disney, Ovitz stated that "I probably know about 1% of what I need to know."

75. In disregard of his contract with Disney, which required Ovitz to "devote his full time and best efforts exclusively to the Company," Ovitz looked actively for alternative employment while President of Disney. 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 Corp. of Japan, the parent company of Sony Corporation of America's ("SCA").

76. The fact that Ovitz was actively searching for alternative job prospects could not be 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."

G. Eisner and Ovitz Engineer a Lucrative Departure for Ovitz

77. Sometime in or about August or September of 1996, Ovitz determined that he wished to leave Disney provided he could get Eisner's agreement to work together towards an orderly departure that would be placed in the best possible light. He had several reasons for this. First, according to Section 12 of the OEA, Ovitz had the right to terminate his employment only if one of three events occurred (none of which occurred in this case). Moreover, resigning outright would have been a violation of the OEA and would have made Ovitz liable for damages to Disney and, at the very least, would have prevented Ovitz from receiving the benefits of a Non-Fault Termination. A handwritten letter from Ovitz written to Eisner on October 8, 1996, expressed Ovitz's concern that his unilaterally resigning from Disney to pursue other opportunities would be injurious to him:

> If I get an offer I assume that you, Sandy [Litvack] and/or the company will not raise any claims against me or the other company under my employment contract or, if I make a deal that the same applies. . . . I will try to do this in the next few weeks. If I cannot, then I guess you are stuck with me until I can find something to do that works for the both of us. . . . Since Sandy relayed his P.O.V on the company and me I think I need you to acknowledge this note by signing it so that I do not end up in a problem which I do not want with the company or my best friend.

78. Another reason why Ovitz wanted to leave was that he was hoping to use the time that would be freed for him to take advantage of other lucrative opportunities whose realization required Ovitz to free himself of Disney. As set forth herein, Ovitz had a tempting opportunity at Sony and he was also attracted to the idea of setting up a business for himself.

79. Finally, it was important for Ovitz to exit Disney in a way that would tarnish Ovitz's reputation as little as possible. This, again, was something for which he needed Eisner's cooperation and participation, which was readily given.

80. On October 9, 1996, Eisner wrote to Ovitz and stated cooperatively:

> I read your note, and I really appreciate the spirit in which it is written -- in light of all our conversations, I am sure you realize that I do not object to your trying to work out a deal for yourself with Sony. And if Sony replaces Disney's financial obligations to you so you come out the same or better, and if Sony handles the "Disney and MDE [Michael D. Eisner] embarrassment equation" by making some strategic deal with us, then we certainly would not stand in the way of your closing your deal. I agree with you that we must work together to assure a smooth transition and deal with the public relations brilliantly. I am committed to make this a win-win situation, to keep our friendship intact, to be positive, to say and write only glowing things . . . . Nobody ever needs to know anything other than positive things from either of us. This all can work out! You still are the only one who came to my hospital bed -- and I do remember. [Emphasis added.]

81. As this letter indicates, Eisner attached great importance to his friendship with Ovitz and was willing to elevate his friendship with Ovitz over Disney's interests by cooperating in a

sacrifice of the Company's interests to advance their collective public interest concerns and their avoidance of "embarrassment."

82. On or about October 16, 1996, Eisner sought to allay Ovitz's concern about one source of potential liability toward Disney. He wrote to Ovitz enclosing a letter that Eisner had written to Mr. Idei of Sony in which Eisner stated that Ovitz could negotiate with Sony for an employment position there and not fear any repercussion. In his letter, Eisner stated reassuringly to his friend: "I am sure we are now both protected 'every way to and from Sunday'." [Emphasis added.]

83. With the green light by Eisner, Sony turned on October 17, 1996, to its outside counsel, the New York law firm of Rosenman & Colin, LLP, to assist Sony in negotiating an employment agreement with Ovitz. The negotiations by Sony 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.

84. Sony and Rosenman & Colin documents indicate that Ovitz and Sony were contemplating a five-year, $100 million contract. Ovitz was to lead Sony's entertainment business, but the negotiations failed.

85. When Ovitz's efforts to secure another position foundered, Eisner, who had originally sought to arrange Ovitz's exit on terms whereby Sony would effectively absorb the cost, capitulated

to his friend's desire to leave, but without sacrificing any of the financial benefits of the OEA – the ideal solution from Ovitz's standpoint. On December 11, 1996, defendants Eisner, Litvack and Ovitz met at Eisner's apartment to finalize Ovitz's Non-Fault Termination from Disney. The next day, December 12, 1996, defendant Litvack sent a letter to Ovitz in which Litvack stated that, by "mutual agreement," (1) the term of Ovitz' employment under the OEA would end on January 31, 1997 and (2) "this letter will for all purposes of the Employment Agreement be given the same effect as though there had been a 'Non-Fault Termination,' and the Company will pay you, on or before February 5, 1997, all amounts due you under the Employment Agreement, including those under Section 11(c) thereof. In addition, the stock options granted pursuant to Option A, will vest as of January 31, 1997 and will expire in accordance with their terms on September 30, 2002." Ovitz's receipt of a Non-Fault Termination would provide him with severance benefits worth $140 million. Ovitz's departure from Disney was publicly reported on December 12, 1996.

86. The parties apparently perceived a defect in the letter sent to Ovitz on December 12, 1996, as that letter was superseded by a December 27, 1996, letter from defendant Litvack to Ovitz. One apparent defect was the letter's choice of language -- providing Ovitz with the benefits of a Non-Fault Termination "as though" there had been a Non-Fault Termination.

87. The December 27, 1996, letter stated that (1) the term of Ovitz's employment with Disney would "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 . . . . be treated as a 'Non-Fault Termination' [and,] by mutual agreement, the total

amount payable to you . . . is $38,888,230.77, net of withholding; [and] (3) . . . the option to purchase 3,000,000 shares of [Disney] Common Stock granted to you pursuant to Option A . . . will vest as of today and will expire in accordance with its terms on September 30, 2002." Both Litvack and Ovitz signed the December 27, 1996, letter.

88. Consistent with Eisner's promise to his friend Ovitz that "no one needs to know," Disney has no record that at any point in time during the process described above, or afterwards, Eisner reported to the New Board or to any of its committees, either in writing or orally in a Board meeting, the process leading to Ovitz's departure and his receipt of a Non-Fault Termination. However, between December 12, 1996, when Ovitz's departure was publicly announced, and December 27, 1996, when he left, the Disney Board had ample opportunity to intervene and control this process, but did not. Instead, they left a conflicted Eisner with the task of ushering his friend out the door.

H. The Absence of An Affirmative Board Decision With Regard To Ovitz's Termination

89. According to Disney's Bylaws, the President of the Company may be removed only by the Board. The Bylaws state that in pertinent part that: "[a]ll officers of the corporation shall hold office until their successors are chosen and qualified, or until their earlier resignation or removal. Any officer elected by the Board of Directors may be removed at any time by the Board of Directors with or without cause." A Non-Fault Termination of Ovitz was the functional equivalent of his removal and needed Disney Board action and approval. Eisner had no authority to cause that result himself.

90. As represented by defendants herein to the Delaware Supreme Court in this case:

> the board retained the ability to determine whether or not Mr. Ovitz would leave under a fault or no-fault termination. There is no way, short of Mr. Ovitz's death, that Mr. Ovitz could part with all of the termination benefits unless the board of directors of Disney acted affirmatively. There had to be an affirmative action by the board of directors to enable Mr. Ovitz to depart with all of the benefits.
>
> *******
>
> number two; the company received assurance that he [Ovitz] would work for the company unless the board -- unless the board determined otherwise during the five-year term of that agreement.

Transcript of Oral Argument, dated June 15, 1999, pages 24-29.

91. However, Ovitz did depart, with all of the termination benefits, without the New Board of Directors of Disney having acted affirmatively. A review of the documents produced by Disney in response to 8 Del. C. § 220 evidences no documents or decisions made by the New Board or any of its committees relating to Ovitz's receipt of a Non-Fault Termination.

92. The New Board, with knowledge that Eisner and Ovitz were working out arrangements for Ovitz's separation, made a tacit, knowing decision to stand aside and permit Eisner to make the decisions that the New Board was charged to make.

93. Each and every member of the New Board was aware that Eisner was negotiating Ovitz's separation from Disney and that, at least as of December 12, 1996, Disney had given Ovitz a Non-Fault Termination effective some time thereafter. The members of the New Board, however, adopted a supine attitude in acquiescing to the lopsided severance that the conflicted Eisner had negotiated with his friend.

94. The New Board, in gross dereliction of its duties and in bad faith, failed to obtain any information or investigate the options that Disney had at that juncture of its relationship with Ovitz. For example, despite Ovitz's failures as President, his refusal to learn his job and his efforts to seek other employment, the Board never examined into whether Ovitz could have been terminated for cause. Similarly, the New Board failed to inquire whether there were any grounds to let Ovitz depart under terms that included none or only some of the benefits provided by a Non-Fault Termination. Throughout the relevant period, the New Board did not seek nor did it receive any advice or recommendation from an expert on these issues.

95. Ovitz's separation from Disney was publicly reported and confirmed on December 12, 1996. There was, therefore, ample time and opportunity for the Disney Board to convene and consider the terms and conditions of Ovitz's separation from Disney even assuming that it was not informed of this matter by Eisner until December 12, 1996, at the latest. However, despite the huge costs to Disney of a Non-Fault Termination, and the plain requirement that the Board be involved, the New Board simply acquiesced in Eisner's willingness to accommodate Ovitz -- without investigation, deliberation or even discussion about the respective rights and liabilities of Disney and Ovitz or the relative pros and cons of the course set by Eisner.

96. In fact, there was a second opportunity for the New Board to take affirmative steps when Litvack, acting at Eisner's behest, accelerated Ovitz's departure from January 31, 1997 to December 27, 1996, and accelerated the receipt of all of Ovitz's severance benefits to December 27,

1996. Yet, at this juncture as well, there is no evidence that the New Board took any action other than to abdicate to Eisner the decision to benefit his friend.

97. Moreover, notwithstanding the New Board's apparently passive and supine performance, the legal documentation relating to Ovitz's Non-Fault Termination signed on or about December 27, 1996, included a general release from all claims (the "Release") executed by Ovitz running to Disney and, inter alia, all of its officers and directors, including all claims relating to or arising from the OEA, the Non-Fault Termination and his tenure with Disney. The Release conferred a tangible benefit on each of the members of the New Board.

I. Ovitz's Breaches of Fiduciary Duties In Connection With His Non-Fault Termination

98. Because Ovitz was an officer and a director of Disney until December 27, 1996, he was an officer and director when he joined forces with Eisner, who Ovitz knew had his own personal agenda, to arrange the payment to himself of the full benefits of a Non-Fault Termination. Accordingly, Ovitz was subject to all the fiduciary duties of an officer and director of Disney at all relevant times and breached those duties.

99. In addition, because Ovitz was a director during this latter period, he was fully aware that the New Board did not make any decisions or take any affirmative steps with respect to his receipt of a Non-Fault Termination. Furthermore, due to the circumstances of his departure and his relationship with Eisner, Ovitz was fully aware that Eisner's unilateral decision to grant him the benefits of a Non-Fault Termination was not based on business reasons. Rather, Eisner's decision was solely or primarily motivated by his desire to keep his friendship intact with Ovitz, appreciation

of past acts of kindness (which Ovitz exploited) and by Eisner's motive to neutralize the "MDE embarrassment equation," as he put it in his October 9, 1996 letter to Ovitz.

100. As an officer and director of Disney, Ovitz was duty-bound to pursue departure from Disney only on terms that would be entirely fair to Disney and were consonant with the fiduciary duties of all Board members. By arranging, together with Eisner, the payment of full Non-Fault Termination benefits, Ovitz wrongfully and self-servingly failed in the performance of his duties to the Company.

J. The Magnitude of Ovitz's Severance Benefits at Disney's Expense

101. Because Ovitz's departure from his post as Disney's President was treated as a "Non-Fault Termination," the options to purchase three million shares of Disney common stock became immediately exercisable upon termination of his employment at Disney. Those options were priced at the market price of Disney common stock as of October 16, 1995 (approximately $57 per share). Based on Disney's closing stock price of $71.25 on December 27, 1996 (the date of Ovitz's official departure), the cash value of the options on that date exceeded $42 million. About $16 million of this amount was a product of the setting of the exercise price at the level of the market price two months preceding the date on which the OEA was actually executed, and then backdated.

102. The true value of Ovitz's severance package, however, cannot be calculated solely by determining the cash value of the stock options as if they were exercised on the date of Ovitz's departure. A more accurate approach to calculating the value of Ovitz's Disney 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. Employing reasonable assumptions, namely, 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 value of Ovitz's stock options at the end of November 1996 was $101.5 million.

103. In addition to the enormous value of the stock options granted to Ovitz at the time of his departure from Disney, 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 OEA 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 Disney.

104. As set forth above, Eisner and Litvack agreed with Ovitz that the then present value of the Non-Fault Payment was $38,869,000, net of withholdings. Accordingly, the total value of Ovitz's severance benefits was approximately $140 million, or about $10 million for each month of his employment at Disney.

105. At $140 million, the payments granted to Ovitz upon departure amounted to approximately $0.20 per share of Disney common stock, as compared to Disney's first fiscal quarter 1997 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 Disney's earnings for the first fiscal quarter of 1997.

PRE-SUIT DEMAND ON DISNEY'S BOARD OF DIRECTORS IS EXCUSED

106. Plaintiffs did not make pre-suit demand on the Disney Board to seek the relief sought in this complaint because such demand is excused for the following reasons:

A. A majority of the Board, at the time this action was commenced, consisted of members of both the Old Board and New Board. The members of the Old Board and the New Board were grossly derelict in discharging their fiduciary obligations to Disney in connection with Ovitz's hiring and Ovitz's receipt of a Non-Fault Termination. The particularized allegations of this Complaint create the requisite reasonable doubt that the members of the Old Board and the New Board fulfilled their duty of care in hiring Ovitz and allowing him to depart from Disney with a Non-Fault Termination.

B. The members of the Compensation Committee and the Old Board were grossly negligent -- to the point of recklessness and/or bad faith -- in not taking readily available steps to ascertain the rough value of the payout to Ovitz if he were terminated without "fault." As set forth above, the members of the Old Board failed to heed "red flags" posted by Disney's staff about the magnitude and counter-productive nature of the stock option package which accompanied the OEA. Furthermore, Eisner was conflicted because of Ovitz's status as Eisner's "best friend" and Russell was conflicted because he was Eisner's personal lawyer and was paid $250,000 for "securing" Ovitz's services for the Company.

C. In addition, the members of the Compensation Committee and the Old Board abdicated their responsibilities by simply granting to Eisner a general authorization to proceed with

and complete the agreement with Ovitz, without reserving to themselves the power to scrutinize and approve its final terms. As one of the results thereof, the OEA substantially deviated in Ovitz's favor from the general guidelines that the directors had approved. The directors knew that Eisner was not independent of Ovitz but failed to insulate him from the process or oversee his activities.

D. Eisner, Ovitz and Russell also had conflicts of interest in connection with the execution of the OEA.

E. Because the members of the Old Board violated their duties of care, good faith and loyalty in connection with the OEA, the execution of the OEA was not the product of properly informed business judgment, nor can defendants invoke the Business Judgment Rule to avoid judicial scrutiny of their actions for fairness. Pre-suit demand on defendants is, therefore, excused.

F. Similarly, the members of the New Board were grossly negligent -- to the point of recklessness and/or bad faith -- in connection with the termination of Ovitz's employment by Disney. As set forth in the preceding sections of this Complaint, the New Board abdicated its duties to decide whether Disney's President should be removed and whether he should be given the benefits of a Non-Fault Termination. They allowed Eisner, who they knew lacked independence from Ovitz, to arrange all aspects of Ovitz's removal. The New Board also made no effort whatsoever to inform itself about this important termination and about the severance payments, notwithstanding the tens of millions of dollars -- aggregating $140 million in value -- that Ovitz garnered for a brief and unproductive 14 months as an employee of Disney, despite ample opportunity to do so. The New Board's failure to convene and consider the terms of Ovitz's separation under circumstances where

all Board members were aware of the negotiations between Eisner and Ovitz was reckless and unconscionable.

G. The OEA constituted a waste of Disney's assets. While the OEA may have induced Ovitz to join Disney, the terms of the OEA, with the accompanying stock option package, deprived Disney of any reasonable expectation that it would receive the benefit of its bargain -- five years of productive service by Ovitz. No reasonable person, if fully informed and acting in his or her interest, would enter into such an agreement. Thus, demand is excused on this basis as well.

H. Furthermore, the Release executed by Ovitz running to the Director Defendants conferred a tangible benefit on each of the members of the New Board in connection with Ovitz's receipt of a Non-Fault Termination and provided each of them with a conflicting interest in responding to a demand.

FIRST CLAIM FOR RELIEF

107. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth herein.

108. In allowing the OEA to be entered into without adequate investigation and consideration of all material information reasonably available to the Old Board, and without consulting any expert, the members of the Old Board breached their fiduciary duties of good faith and due care which they owed to Disney.

109. In working out and arranging the terms of the OEA, defendants Eisner and Russell, who lacked the requisite independence, violated their fiduciary duties of good faith and loyalty

which they each owed to Disney. The other members of the Old Board similarly violated their fiduciary duties by allowing the conflicted Eisner and Russell to arrange with Ovitz the terms on which he would be hired.

110. In negotiating, arranging and finalizing the terms of the OEA, defendant Ovitz violated his fiduciary duties of good faith and loyalty which he owed to Disney.

111. Ovitz and Eisner colluded with each other in causing the OEA to be signed and, as fiduciaries, acted unfairly and in bad faith in doing so. The other directors, by their knowing and wrongful inaction, failed to take such steps as would be necessary to afford this transaction the protection of the Business Judgment Rule and it is, therefore, subject to scrutiny for fairness. The OEA does not pass muster under that standard.

SECOND CLAIM FOR RELIEF

112. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth herein.

113. The Old Board approved the OEA and thereby wasted Disney's assets in violation of its members' fiduciary duties of loyalty, good faith and due care. Among other things, the stock option and severance provisions in the OEA failed to secure Ovitz's full and undivided services for the entire contract term and even provided him with a disincentive to stay.

114. Defendant Ovitz wrongfully caused Disney to engage in Waste.

THIRD CLAIM FOR RELIEF

115. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth herein.

116. In connection with the Non-Fault Termination received by Ovitz, the members of the New Board wrongfully acquiesced in Eisner's unilateral negotiations, entirely abdicating their duties and failing to inform themselves of all material information reasonably available to them, thereby violating their fiduciary duties of good faith and due care which they owed to Disney.

117. In pursuing and benefitting from the Non-Fault Termination, defendant Ovitz violated his fiduciary duties of loyalty and good faith which he owed to Disney.

118. In accommodating Ovitz's wish for a Non-Fault Termination, defendant Eisner was motivated by friendship and the desire to avoid personal embarrassment rather than undivided loyalty to Disney. Defendant Eisner also violated his fiduciary responsibilities in failing to take any steps to bring the matter of Ovitz's Non-Fault Termination to the New Board for its review, including consideration of the impact of Ovitz's failures in the performance of his duties. Eisner also, due to his conflicting motives, allowed Ovitz to exit the Company without attempting to rework Ovitz's departure in a manner which better served the Company's financial interests. Instead, the characterization of Ovitz's departure as a Non-Fault Termination, proceeding from Eisner's conflicted motives, represented a complete capitulation to Ovitz's position and utter sacrifice of corporate well-being. Defendant Eisner is therefore liable to Disney for breaching his duties of loyalty and good faith which he owed to Disney.

119. Ovitz and Eisner, with the active participation of Litvack, colluded with each other in causing the Non-Fault Termination to be granted and, as fiduciaries, acted unfairly and in bad faith in doing so. The other directors, by their knowing and wrongful inaction, failed to take such steps as would be necessary to afford this transaction the protection of the Business Judgment Rule and it is, therefore, subject to scrutiny for fairness. The granting of the Non-Fault Termination does not pass muster under that standard.

120. Furthermore, the actions and inaction of the New Board, ridden by due care violations and bad faith, are subject to scrutiny for fairness and defendants must bear the burden of demonstrating that Ovitz's departure was on terms that were fair to the Company. Such showing cannot be made because the grant of the Non-Fault Termination represented a complete capitulation to Ovitz and total sacrifice of Disney's rights and best interests.

AS TO ALL CLAIMS

121. As a result of the foregoing, Disney has sustained damages and injuries and defendant Ovitz has unjustly profited.

122. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand judgment in their favor and in favor of Disney against all of the Director Defendants and Ovitz as follows:

A. Declaring that the Director Defendants and defendant Ovitz, individually and collectively, breached their fiduciary duties owed to Disney;

B. Directing the Director Defendants and Ovitz to account to Disney for all damages sustained by Disney as a result of the wrongs complained of herein;

C. Directing defendant Ovitz to account to Disney for all profits unlawfully obtained by him as a result of the wrongs complained of herein;

D. Rescinding all stock options granted to defendant Ovitz and not yet exercised;

E. Awarding pre-judgment and post-judgment interest to Disney at the maximum rate allowable by law;

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

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

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