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U.S. Corporate Law: Management, Directors and Shareholders and the Division of Power

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Mickey Mouse and the Walt Disney Company: A well-known U. S. corporation illustrates a case of a dominant chairman and an ineffective board of directors.

Stockholders in U.S. corporations can – and do - sue directors alleging that the directors breached the fiduciary duty they owe stockholders and should be held liable for damages. This has led to a rich body of case law that is summarized in Part II of the Disney case.

In the Disney case, the stockholders contended that the directors were at fault for having acquiesced in the extraordinarily expensive hiring and firing of Michael Ovitz, as President of the Company.

Ovitz was, essentially, hired and fired by Michael Eisner, the Chairman and Chief Executive Officer ("CEO") of Disney. But, the Board of Directors were involved in the actions Eisner took, although, as the plaintiffs charged, not involved enough.

The defendants included Eisner and Sanford Litvak, who were senior members of management, as well as directors. The defendants also included Roy Disney, the nephew of Walt Disney, who along with his father, Roy Sr., founded the company. Roy Jr., was also a large stockholder and he and his lawyer-confidant, Stanley Gold, had long challenged Eisner's management in their role of directors and stockholders. However, they were not the stockholders that brought suit.

The other directors, as the Court points out on page 30 at footnote 488, were allies of Eisner's that the Court believed acted as "yes men."

Read the case to

first, grasp the factual context;
second, grasp the legal standards; and
finally, the reasoning of the Court

While the Court held in favor of all of the defendants, Eisner subsequently lost his job. The Disney stockholders, unhappy with the manner of his "imperial" management, lodged a vote of no confidence. They did so by registering a powerful negative vote at the 2004 annual meeting of stockholders at which every director had to stand for annual re-election. Although Eisner gained enough votes to remain as a director, the large negative vote caused him to resign as Chairman.

As Chancellor Williams said on page 2, in some cases, redress comes not from the Courts, but from action in the marketplace. Ultimately, the shareholders spoke through the process of annual balloting in the election of directors.

And, ultimately, Eisner listened.

A. Take note the tone of the Court Judge:

1. Is Chancellor Chandler trying to teach? Who is he trying to teach?
2. How did he choose his facts? He says the trial before him consumed thirty seven days and generated 9,360 pages of transcripts, plus thousands of pages of deposition transcripts.
3. Which facts were important to you?
4. Why did the plaintiffs challenge the conduct of the directors? What did the directors do wrong? Couldn't they leave the hiring/firing decision to Eisner, the CEO?
5. Was it all the CEO's fault? i.e., all about Michael Eisner's independent decision making? Was he acting as an imperial CEO?

B. Pretend that, after this decision, you become a corporate lawyer working at Disney under a new CEO. The CEO says that he plans to hire a new President, Tomáš Masaryk, at a guaranteed five year contract of $75 million a year. He says he knows the price will lead to criticism and that for that reason, he does not want to involve the board in the decision, and will take sole responsibility for it.

What advice do you give him?

1. Would it make any difference if the salary were $1 million a year?
2. Would it make a difference if he hired Masaryk as a lesser officer?
3. Would it make a difference if the proposed President is an old college friend of the CEO?; an undisclosed business partner of the CEO?
4. What if the proposed President is the undisclosed business partner of one of the other directors?
5. What if the CEO calls an impromptu conference call to ask the board to approve the $75 million a year contract and after a five minute discussion, the board tells you it is ready to approve the contract?

C. 1. Would the Delaware formulation of the duty of directors to stockholders work well in the Czech Republic?

2. Does case law depend upon developing a culture in which stockholders can find lawyers to bring suit? In Disney, the plaintiffs were represented by a law firm that always represents stockholders and defendants looked to law firms that routinely defend management and directors.
3. Could a governmental regulator be given the power to act on behalf of stockholders? Does U.S. corporate law provide for this approach? What about Czech or EU law?

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LEXSEE 2005 DEL. CH. LEXIS 113

IN RE THE WALT DISNEY COMPANY DERIVATIVE LITIGATION

CONSOLIDATED C. A. No. 15452

COURT OF CHANCERY OF DELAWARE, NEW CASTLE

2005 Del. Ch. LEXIS 113; 35 Employee Benefits Cas. (BNA) 1705

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NOTICE: [*1] THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

PRIOR HISTORY: *In re Walt Disney Co. Derivative Litig, 2005 Del. Ch. LEXIS 28 (Del. Ch., Feb. 4, 2005)*

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OPINIONBY: William B. Chandler

OPINION:

OPINION AND ORDER

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* This law firm is in the business of bringing actions by shareholders.

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INTRODUCTION

This is the Court's decision after trial in this long running dispute over an executive compensation and severance package. The stockholder plaintiffs have alleged that the director defendants breached their fiduciary duties in connection with the 1995 hiring and 1996 termination of Michael Ovitz as President of The Walt Disney Company. The trial consumed thirty-seven days (between October 20, 2004 and January 19, 2005) and generated 9,360 pages of transcript from twenty-four witnesses. The Court also reviewed thousands of pages of deposition transcripts and 1,033 trial exhibits that filled more than twenty-two 31/2-inch binders. Extensive post-trial memoranda also were submitted and considered. After carefully considering all of the evidence and arguments, and for the reasons set forth in this Opinion, I conclude that the director defendants did not breach their fiduciary duties or commit waste. Therefore, I will enter judgment in favor of the defendants as to all claims in the amended complaint.

As I will explain in painful detail hereafter, there are many aspects of defendants' conduct that fell significantly short of the best practices of ideal corporate governance. [*4] Recognizing the protean nature of ideal corporate governance practices, particularly over an era that has included the Enron and WorldCom debacles, and the resulting legislative focus on corporate governance, it is perhaps worth pointing out that the actions (and the failures to act) of the Disney board that gave rise to this lawsuit took place ten years ago, and that applying 21<st> century notions of best practices in analyzing whether those decisions were actionable would be misplaced.

Unlike ideals of corporate governance, a fiduciary's duties do not change over time. How we understand those duties may evolve and become refined, but the duties themselves have not changed, except to the extent that fulfilling a fiduciary duty requires obedience to other positive law. This Court strongly encourages directors and officers to employ best practices, as those practices are understood at the time a corporate decision is taken. But Delaware law does not -- indeed, the common law cannot -- hold fiduciaries liable for a failure to comply with the aspirational ideal of best practices, any more than a common-law court deciding a medical malpractice dispute can impose a standard of liability [*5] based on ideal -- rather than competent or standard-medical treatment practices, lest the average medical practitioner be found inevitably derelict.

Fiduciaries are held by the common law to a high standard in fulfilling their stewardship over the assets of others, a standard that (depending on the circumstances) may not be the same as that contemplated by ideal corporate governance. Yet therein lies perhaps the greatest strength of Delaware's corporation law. Fiduciaries who act faithfully and honestly on behalf of those whose interests they represent are indeed granted wide latitude in their efforts to maximize shareholders' investment. Times may change, but fiduciary duties do not. Indeed, other institutions may develop, pronounce and urge adherence to ideals of corporate best practices. But the development of aspirational ideals, however worthy as goals for human behavior, should not work to distort the legal requirements by which human behavior is actually measured. Nor should the common law of fiduciary duties become a prisoner of narrow definitions or formulaic expressions. It is thus both the province and special duty of this Court to measure, in light of all the facts and [*6] circumstances of a particular case, whether an individual who has accepted a position of responsibility over the assets of another has been unremittingly faithful to his or her charge.

Because this matter, by its very nature, has become something of a public spectacle -- commencing as it did with the spectacular hiring of one of the entertainment industry's best-known personalities to help run one of its iconic businesses, and ending with a spectacular failure of that union, with breathtaking amounts of severance pay the consequence -- it is, I think, worth noting what the role of this Court must be in evaluating decision-makers' performance with respect to decisions gone awry, spectacularly or otherwise. It is easy, of course, to fault a decision that ends in a failure, once hindsight makes the result of that decision plain to see. But the essence of business is risk -- the application of informed belief to contingencies whose outcomes can sometimes be predicted, but never known. The decision-makers entrusted by shareholders must act out of loyalty to those shareholders. They must in good faith act to make informed decisions on behalf of the shareholders, untainted by self-interest. [*7] Where they fail to do so, this Court stands ready to remedy breaches of fiduciary duty.

Even where decision-makers act as faithful servants, however, their ability and the wisdom of their judgments will vary. The redress for failures that arise from faithful management must come from the markets, through the action of shareholders and the free flow of capital, and not from this Court. Should the Court apportion liability based on the ultimate outcome of decisions taken in good faith by faithful directors or officers, those decision-makers would necessarily take decisions that minimize risk, not maximize value. The entire advantage of the risk-taking, innovative, wealth-creating engine that is the Delaware corporation would cease to exist, with disas-

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trous results for shareholders and society alike. That is why, under our corporate law, corporate decision-makers are held strictly to their fiduciary duties, but within the boundaries of those duties are free to act as their judgment and abilities dictate, free of *post hoc* penalties from a reviewing court using perfect hindsight. Corporate decisions are made, risks are taken, the results become apparent, capital flows accordingly, [*8] and shareholder value is increased.

Because of these considerations, I have tried to outline carefully the relevant facts and law, in a detailed manner and with abundant citations to the voluminous record. I do this, in part, because of the possibility that the Opinion may serve as guidance for future officers and directors -- not only of The Walt Disney Company, but of other Delaware corporations. And, in part, it is an effort to ensure meaningful appellate review. Ultimately, however, it is for others to judge whether my effort here offers reasonable guidance to corporate directors, in general, on the subject of executive compensation and severance payments. n1 What follows is my judgment on whether each director of The Walt Disney Company fulfilled his or her obligation to act in good faith and with honesty of purpose under the unusual facts of this case.

n1 The subject of executive compensation itself has recently produced much thoughtful analysis and comment. *See, e.g.*, Lucian Bebchuk and Jesse Fried, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004) (describing how management influence distorts the compensation process); Stephen M. Bainbridge, *Executive Compensation: Who Decides, 83 TEX. L. REV. 1615 (2005)* (reviewing and critiquing Bebchuk and Fried's *Pay Without Performance*).

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I. FACTS n2

n2 To be consistent with the parties' submissions, the trial transcript will be cited as "Tr. # # # #," and at relevant times will indicate the particular witness by including that witness' name in parentheses. Deposition testimony will be cited as "[Deponent] # # # #." Plaintiffs' trial exhibits will be cited as "PTE" and Defendants' trial exhibits will be cited as "DTE." Finally, for the sake of clarity, the Court will refer to Roy Disney as such.

A. Michael Ovitz Joins The Walt Disney Company

1. Background

The story of Michael Ovitz's rise and fall at The Walt Disney Company ("Disney" or the "Company") begins with the unfortunate and untimely demise of Frank Wells. Before his death, Wells served as Disney's President and Chief Operating Officer, and both he and Michael Eisner, Disney's Chairman and CEO, enjoyed ten years of remarkable success at the Company's helm. In April 1994, a fatal helicopter crash ended Wells' tenure at Disney and forced the company to consider a decision [*10] it was not properly prepared or ready to make. n3

n3 *See* Tr. 4148:11-4150:5.

Disney's short list of potential internal successors produced, for one reason or another, no viable candidates. n4 Instead, Eisner assumed Disney's presidency, and for a brief moment, the Company was able to stave off the need to replace Wells. Within three months, however, misfortune again struck the Company when Eisner was unexpectedly diagnosed with heart disease and underwent quadruple bypass surgery. The unfortunate timing of Eisner's illness and operation set off an "enormous amount of speculation" concerning Eisner's health and convinced Eisner of the need to "protect[] the company and get[] help." n5 Over the next year, Eisner and Disney's board of directors discussed the need to identify Eisner's successor. These events were the springboard from which Eisner intensified his longstanding desire to bring Michael Ovitz within the Disney fold. n6

n4 Tr. 3997:24-3999:4; *see also* 6025:7-19.

[*11]

n5 *see* Tr. 4150:20-4152:8.

n6 Eisner never called a board meeting for the specific purpose of discussing the possibility of hiring Ovitz, but at various times Eisner did contact board members on an individual basis. *See* Tr. 3665:1-3676:20 (Gold); 3997:6-3999:4 (Roy Disney); 4699:19-4700:24 (Eisner); 5913:23-5914:10 (Bowers); 7125:2-18 (Poitier); 7628:19-

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7629:2 (Lozano); 8142:2-8 (Stern); *see also* Bowers 183:13-185:6; 192:8-25; Lozano 54:13-56:14; Mitchell 17:23-19:14; Wilson 44:22-45:23; 48:14-49:2.

By the summer of 1995, Michael Ovitz and Michael Eisner had been friends for nearly twenty-five years. These men were very well acquainted, both socially and professionally. Over time, this relationship engendered numerous overtures, by which Eisner and Ovitz flirted with the idea of joining ranks and doing something together. n7 As Eisner put it: "I had been trying to hire him forever. . . . I couldn't do business with him . . . he was too tough, so I thought he would be better . . . on our side." n8 But until Eisner had offered Ovitz Disney's presidency, Ovitz had never [*12] seriously considered any of Eisner's offers and, according to Ovitz, there was good reason.

[Ovitz had formed CAA in 1974.] CAA had a modest beginning and, from 1974 to 1979, the company's revenues were barely sufficient to meet its expenses. By 1995, CAA had reshaped an entire industry and had grown from five men sitting around a card table to the premier Hollywood talent agency. When Ovitz joined Disney, he left behind 550 employees and an impressive roster of about 1400 of Hollywood's top actors, directors, writers and musicians -- a roster that earned CAA approximately $ 150 million in annual revenues. In turn, this success translated into an annual income of $ 20 million for Ovitz and, for his part, he was regarded as one of the most powerful figures in Hollywood.

[*15]

Eisner's efforts to hire Ovitz were in full swing by mid-July 1995. Russell, per Eisner's direction, assumed the lead role in negotiating the financial terms of the contract. These efforts took on significant import in the face of Disney's recent announcement of the acquisition of CapCities/ABC, a transaction that would double the size of Disney, place even greater demands on Eisner, and exacerbate the need for someone else to shoulder some of the load. Russell, in his negotiations with Bob Goldman, Ovitz's attorney, learned that Ovitz was making approximately $ 20 to $ 25 million a year from CAA and owned fifty-five percent of the company. n24 From the start, Ovitz made it clear that he would not give up his fifty-five percent interest in CAA without downside protection. n25

n24 Plaintiffs have contended that the compensation committee had no informed discussions concerning Ovitz's earnings while with CAA and attribute this failure to Russell. *See* Pls.' Post Trial Open. Br. at 20; Tr. 2755:1-22. Russell did, however, have a basic understanding of what MCA was willing to pay Ovitz. *See* Tr. 2630:8-2631:10; *see also* DTE 76 at DD001991. Russell also testified that Goldman had represented to him that Ovitz was earning approximately $ 20 to $ 25 million a year from CAA and that he had no reason to question Goldman's veracity. Tr. 2755:1-22.

[*21]

n25 Ovitz repeated several times throughout his testimony that he had learned during his years of experience representing talent always to negotiate for upside participation and downside protection, and that when it came to negotiating for his own interests, he wanted no less. *See, e.g.,* Tr. 1277:9-1278:5; 2175:2-2177:7.

While Russell and Goldman were in the preliminary stages of negotiating the financial terms of Ovitz's contract, Eisner and Ovitz continued their talks as well. From these talks, Ovitz gathered that it was his skills and experience that would be brought to bear on Disney's current weaknesses, which he identified as poor talent relationships and stagnant foreign growth. Remaining cautious, Ovitz wanted assurances from Eisner that Ovitz's vision was shared and that Eisner was sincere in his desire to re-invent Disney. Apparently, Eisner was able to assuage Ovitz's concerns, because at some point during these negotiations, Ovitz came to the understanding that he and Eisner would run Disney as partners. Ovitz did recognize that Eisner was Chairman and would be his superior, [*22] but he believed that the two would work in unison -- in a relationship akin to the one that exists between senior and junior partners. As it would turn out, Ovitz was mistaken, for Eisner had a radically different perception of their respective roles at Disney.

4. Ovitz's Contract With Disney Begins to Take Form

By the beginning of August 1995, the non-contentious terms of Ovitz's employment agreement (the "OEA") were $ 1 million in annual salary and a performance-based, discretionary bonus. The remaining terms were not as easily agreed to and related primarily to stock options and Ovitz's insistence for downside protection. Using both Eisner's and Wells' original employment contracts as a template, the parties reached a compromise. Under the proposed OEA, Ovitz would receive a five-year contract with two tranches of options. The first tranche consisted of three million options vesting in

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equal parts in the third, fourth and fifth years, and if the value of those options at the end of the five years had not appreciated to $ 50 million, Disney would make up the difference. The second tranche consisted of two million options that would vest immediately if Disney and Ovitz opted to renew the contract.

The proposed OEA sought to protect both parties in the event that Ovitz's employment ended prematurely and provided that absent defined causes, neither party could terminate the agreement without penalty. If Ovitz, for example, walked away, for any reason other than those permitted under the OEA, he would forfeit any benefits remaining under the OEA and could be enjoined from working for a competitor. Likewise, if Disney fired Ovitz for any reason other than gross negligence or malfeasance, Ovitz would be entitled to a non-fault payment (Non-Fault Termination or "NFT"), which consisted of his remaining salary, $ 7.5 million a year for any unaccrued bonuses, the immediate vesting of his first tranche of options and a $ 10 million cash out payment for the second tranche of options. n33

n33 *See* PTE 33 at DD001768-69.

5. Crystal is Retained to Assist Russell and Watson in Evaluating the OEA

As the basic terms of the OEA were coming together, Russell authored and provided Eisner and Ovitz with a "Case Study" outlining the OEA parameters and Russell's commentary on what he believed was an extraordinary level of executive compensation. Specifically, Russell noted that it was appropriate to provide Ovitz with "downside protection and upside opportunity" and to assist Ovitz with "the adjustment in life style resulting from the lower level of cash compensation from a public company in contrast to the availability of cash distributions and perquisites from a privately held enterprise." According to Russell, Ovitz was an "exceptional corporate executive" who was a "highly successful and unique entrepreneur." Nevertheless, Russell cautioned that Ovitz's salary under the OEA was at the top level for any corporate officer and significantly above that of the CEO and that the number of stock options granted under the OEA was far beyond the standards applied within [*26] Disney and corporate America "and will raise very strong criticism." Russell rounded out his analysis by recommending an additional study so that he and Eisner could answer questions should they arise. Russell did not provide this Case Study to any other member of Disney's board of directors.

With the various financial terms of the OEA sufficiently concrete, Russell enlisted the aid of two people who could help with the final financial analysis: Raymond Watson, a current member of Disney's compensation committee and the past chairman of Disney's board of directors (and one of the men who designed the original pay structure behind Wells' and Eisner's compensation packages); n40 and Graef Crystal, an executive compensation consultant, who is particularly well known within the industry for lambasting the extravagant compensation paid to America's top executives. [*27] n41 The three men were set to meet on August 10. Before the meeting, Crystal prepared, on a laptop computer, a comprehensive executive compensation database that would accept various inputs and run Black-Scholes n42 analyses to output a range of values for the options. At the meeting, the three men worked with various assumptions and manipulated inputs in order to generate a series of values that could be attributed to the OEA. In addition to Crystal's work, Watson had prepared several spreadsheets presenting similar assessments, but these spreadsheets did not use the Black-Scholes valuation method. At the end of the day, the men made their conclusions, discussed them, and agreed that Crystal would memorialize his findings and fax the report to Russell.

n40 This was the first instance where a board member other than Russell or Eisner was brought into the Ovitz negotiation process. *See, e.g.*, Tr. 7167:5-13 (Poitier) (testifying that before August 13, 1995 he did not discuss Ovitz's compensation package); 7658:4-21 (Lozano) (testifying that before the August 1995 press release, he did not speak to any board member, aside from Eisner, concerning Ovitz's employment); 2425:18-2427:15 (Russell) (testifying that it was his intention to inform Watson of the negotiations only after there was a good possibility of a deal).

[*28]

n41 Crystal, who had previously headed Towers Perrin's compensation practice, has consulted on behalf of Disney for many years and is actively engaged in both teaching and publishing in the field. *See* Tr. 2714:5-2715:5; 3243:2-3261:15.

n42 The Black-Scholes' method is a formula for option valuation, widely used and accepted by industry figures and regulators, that determines option value based upon a complex calculation involving the exercise price and term of the options, the price of the underlying stock, its dividend history and volatility, and the risk-free interest rate. Tr. 764:20-765:13.

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Two days later, Crystal faxed his memorandum to Russell. In the memo, Crystal concluded that the OEA would provide Ovitz with approximately $ 23.6 million per year for the first five years of the deal. Crystal estimated that [*29] the contract was worth $ 23.9 million a year, over a seven-year period, if Disney and Ovitz exercised the two-year renewal option. Crystal opined that those figures would approximate Ovitz's present compensation with CAA. That evening, Russell, Watson and Crystal phoned each other and further discussed Crystal's conclusions and the assumptions underlying those conclusions. Up until this point, only three members of Disney's board of directors were in the know concerning the status of the negotiations with Ovitz or the particulars of the OEA -- Eisner, Russell and Watson.

[*31]

6. Ovitz Accepts Eisner's Offer

While Russell, Watson and Crystal were finalizing their analysis of the OEA, Eisner and Ovitz were coming to terms of their own. Eisner, having recently conferred with Russell concerning his ongoing research, gave Ovitz a take-it-or-leave-it offer: If Ovitz joined Disney as its new President, he would not assume the duties or title of COO. n54 After short deliberation, Ovitz accepted Eisner's terms, and that evening he, Eisner and Sid Bass (and their families) celebrated Ovitz's decision.

n54 While vacationing together, Eisner told Ovitz that Sid Bass was flying into Aspen for dinner and that "either we're going to have a deal by the time he lands . . . or we're not, . . . [and] the deal will be gone." Ovitz was then given until 6:00 p.m. that night to concede on a number of issues; the two largest concessions were: 1) the reduction in the number of options from a single grant of five million to two separate grants, -- the first grant being three million options for the first five years, and the second grant consisting of an additional two million options if the contract was renewed; and 2) Ovitz abandoning the idea of joining the Company as a Co-CEO. *See* Tr. 4196:10-4198:3.

[*32]

As it would turn out, the celebratory mood was short lived. The next day, August 13, Eisner called a meeting at his home in Los Angeles to discuss his decision and, in addition to Ovitz and Russell, Sanford Litvack (Disney's General Counsel) n55 and Stephen Bollenbach (Disney's Chief Financial Officer) were invited to attend. At the meeting, Litvack and Bollenbach, who had just found out the day before that Eisner was negotiating with Ovitz, were not happy with the decision. Their discontent "officially" stemmed from the perception that Ovitz would disrupt the cohesion that existed between Eisner, Litvack and Bollenbach, and both Litvack and Bollenbach made it clear that they would not agree to report to Ovitz but would continue to report to Eisner. At trial, the Court was left with the perception that Litvack harbored resentment that he was not selected to be Disney's President and that this fueled, to some extent, Litvack's resistance to Ovitz assuming the post he coveted. Bollenbach's resistance was more curious. Indeed, Bollenbach had been hired before Ovitz and, at the time, his expectation was that he would report only to Eisner. Still, his testimony seemed disingenuous [*33] to the Court when he pinned his resistance on the fact that he had been part of a cohesive trio (*i.e.*, Bollenbach, Litvack, and Eisner). After all, Bollenbach had been with the Company for a total of three months before he was informed of the negotiations with Ovitz. Despite this mutiny, Eisner was able to assuage Ovitz's concern about his shrinking authority in the Company, and Ovitz, with his back against the wall, acceded to Litvack and Bollenbach's terms.

n55 Litvack was also Disney's Chief of Corporate Operations and Executive Vice President for Law and Human Resources.

The next day, August 14, Ovitz and Eisner signed the letter agreement ("OLA") that outlined the basic terms of Ovitz's employment. n61 The OLA specified that Ovitz's hiring was subject to approval of Disney's compensation [*34] committee n62 and board of directors. That same day, Russell contacted Sidney Poitier (for a second time) to inform him that Eisner and Ovitz reached an agreement. At trial, Poitier failed to recount with any specificity his conversation with Russell. He made clear that he was never faxed Crystal's analysis or the draft of the OLA (which Litvack had prepared for Russell on August 12). Nevertheless, Poitier did testify that Russell had "mentioned the terms" of the OEA and that Russell promised to stay in touch with any developments. Poitier believed that hiring Ovitz was a good idea because he knew Ovitz's reputation in the entertainment business and considered him an innovator who understood the movie business. Poitier also expressed the opinion that Ovitz would adequately adapt to running a public company such as Disney. Watson also contacted Ignacio "Nacho" Lozano by phone. The record is unclear as to exactly when Lozano was called. As with Poitier, relatively little of Lozano's phone conversation was recounted at trial, except to say that Lozano testified that he felt comfortable with Ovitz's ability to make the tran-

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sition from a private company culture [*35] to that of a public company. n71 As for communications with the other board members, Eisner contacted each of them by phone to inform them of the impending deal. During these calls, Eisner described his friendship with Ovitz, and Ovitz's background and qualifications. n72

n61 *See* PTE 60.
n62 The compensation committee was comprised of Russell, Watson, Ignacio Lozano and Sidney Poitier.

On the same day that Eisner and Ovitz signed the OLA, the news of Ovitz's hiring was made public via a press release. Public reaction was extremely positive. Disney was applauded for the decision, and Disney's stock price [*37] increased 4.4 percent in a single day -- increasing Disney's market capitalization by more than $ 1 billion. n73

On September 26, 1995, the [*39] compensation committee met *for one hour* to consider (1) the proposed terms of the OEA, (2) the compensation packages for various Disney employees, (3) 121 stock option grants, (4) Iger's CapCities/ABC employment agreement and (5) Russell's compensation for negotiating, the Ovitz deal. The discussion concerning the OEA focused on a term sheet (the actual draft of the OEA was not distributed), from which Russell and Watson outlined the process they had followed back in August and described Crystal's analysis. Russell testified that the topics discussed were historical comparables such as Eisner's and Wells' option grants, n80 and the factors that he, Watson and Crystal had considered in setting the size of the option grants and the termination provisions of the contract. n81 Watson testified that he provided the committee with the spreadsheet analysis he had performed back in August and discussed his findings. Crystal, however, did not attend the meeting and his work product was not distributed to the Committee. At trial, Crystal testified that he was available via telephone to respond to questions if needed, but no one from the committee in fact called. After Russell's [*40] and Watson's presentations, Litvack responded to various questions but the substance of those questions was not recounted in any detail at trial. Poitier and Lozano testified that they believed they had received sufficient information from Russell's and Watson's presentations n85 to enable them to exercise their judgment in the best interest of the Company. n86 When the discussions concluded, the Committee unanimously voted to approve the terms of the OEA subject to "reasonable further negotiations within the framework of the terms and conditions" n87 described in the OEA. n88

n80 Tr. 2521:8-2522:19. Although Russell used Wells' and Eisner's contracts as benchmarks for Ovitz's pay package, neither Poitier nor Lozano were able to recall any discussion concerning Crystal's observation that there were no comparables of non-CEO presidents of public companies that could justify Ovitz's pay package. *See* Tr. 7181:21-7182:1; 7701:4-10.
n81 *See, e.g.*, Tr. 2522:11-2523:4. Although the term sheet did highlight the term "wrongful termination," no one on the committee recalled any discussion concerning the meaning of gross negligence or malfeasance. *See* Tr. 2903:8-16; 7198:14-20; 7701:23-7702:2; 7716:22-7717:3. Despite this omission, the terms gross negligence or malfeasance were not foreign to the board of directors, as the language was standard, and could be found, for example, in Eisner's, Wells', Katzenberg's and Roth's employment contracts. *See* Tr. 6081:1-9.
[*41]

n85 Plaintiffs have demonstrated that at no point were the following matters discussed in the committee meeting: (1) the purchase of Ovitz's private jet for $ 187,000 over the appraised value; (2) the purchase of Ovitz's BMW at acquisition cost and not the depreciated market value; (3) the purchase of Ovitz's computers at replacement value instead of their lower book value; (4) any specific list of perquisites, despite Eisner already agreeing to provide Ovitz with numerous such benefits; and (5) that despite Ovitz's bonus being payable completely on a discretionary basis, Russell's memorandum to Ovitz indicating that the bonus would likely approximate $ 7.5 million annually. Although I have concluded that plaintiffs have established these facts, they are ultimately immaterial to my decision.
n86 *See* Tr. 7136:23-7137:3; 7140:12-19; 7636:2-10; 7639:21-7640:3.
n87 PTE 39 at WD01170.
n88 At the behest of Watson, the committee discussed the time and energy Russell had placed into the negotiations and suggested that the committee recommend to the full board that Russell be compensated $ 250,000. The compensation committee voted to recommend this fee and the full board, while in executive session, approved it. See PTE 39 at WD01171; PTE 29 at

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WD01195-96. Russell abstained from voting on the issue.

[*43]

An executive meeting of Disney's board immediately followed the compensation committee's meeting. In executive session, the board was informed of the reporting structure that Eisner and Ovitz agreed to, but no discussion of the discontent Litvack or Bollenbach expressed at Eisner's home was recounted. Eisner led the discussion regarding Ovitz, and Watson then explained his analysis and both he and Russell responded to questions by the board. Upon resuming the regular session, the board deliberated further, then voted unanimously to elect Ovitz as President.

B. Ovitz s Performance as President of The Walt Disney Company

1. Ovitz's Early Performance

Ovitz's tenure as President of The Walt Disney Company officially began on October 1, 1995. n103 Eisner authored three documents shortly after Ovitz began work that shed light on his early performance on the job. The first is a letter written to Ovitz dated October 10, 1995. n104 Eisner lauded Ovitz's initial performance, n105 and also provided Ovitz with some written guidance with respect to Eisner's management philosophies. n106 Ovitz testified [*48] that this letter was a continuation of conversations he had already had with Eisner, and that the letter was "incredibly helpful and very supportive," especially in light of the fact that Ovitz was adjusting to working at a publicly-traded company.

n103 *See* PTE 3 at DD002012.

n104 PTE 267 (Eisner faxed a copy of the letter to Watson on October 16, 1995); Tr. 4251:7-18.

n105 Some examples of Eisner's compliments to Ovitz: "I have noticed how quickly and brilliantly you have taken to the company and the company to you. . . ." PTE 267 at DD002287. "Your instincts were right in coming to The Walt Disney Company and mine were right in suggesting it." *Id.* "Our partnership is born in corporate heaven. . . ." *Id.* at DD002290. "This is basically your first week on the job and I can already see how well it is all going to work." *Id.* at DD002291.

n106 Eisner wrote that PTE 267 "is a practical letter." *Id.* at DD002288. Some examples of Eisner's teachings: "There is no need to tell you how unique this company is. . . ." *Id.* at DD002287. "We generally stay away from partnership and joint ventures. . . . We recognize that business control is creative control." *Id.* at DD002287-88. "We must concentrate on the operations. We must concentrate on continuing to lead creatively. We must throw out mediocrity." *Id.* at DD002288. Eisner told Ovitz that public company executives should "act like Caesar's wife'." *Id.* "I feel about acquisitions exactly as I feel about everything else. We don't need them. . . . Most companies create the fiction that they can run anything better than the management of a target company. Often that is not true." *Id.* at DD002289. Eisner also provided a list of ten questions to ask before making an acquisition. *Id.* at DD002290.

[*49]

The second document is a letter Eisner wrote to the board of directors, the Bass family, and his wife on October 20, 1995. In it, Eisner called Ovitz's hiring "a great coup for us and a saving grace for me. . . . Everybody is excited being with him, doing business with him. . . . He has already run a private company, and being a quick study, has quickly adapted to the public institution." Eisner testified that the October 20 letter accurately reflected his views of Ovitz at the time it was written. Eisner also used the October 20 letter to reiterate his views regarding the appropriateness of acquisitions for the Company.

The third document is dated November 10, 1995, and is a memo addressed to Tony Schwartz, Eisner's biographer. In it, Eisner says that Ovitz has had a difficult time accepting Bollenbach and Litvack as his equals, but that Ovitz was adjusting, realizing that he need not "prove to himself, to the group, to the world, that he is in charge." Eisner also reaffirmed that "Michael Ovitz is the right choice. He will, in short order, be up to speed in the areas we have discussed endlessly -- brand management, corporate direction, moral compass and all those difficult areas, especially for Disney, to define." Eisner described the already-existing tension between Ovitz and Litvack as attributable to Litvack by saying, "Sandy Litvack may never settle in because of his basic annoyance with the style of Michael Ovitz, but he may. Time may make it work, if he will let it."

As late as the end of 1995, Eisner's attitude with respect to Ovitz was positive. Eisner wrote, "1996 is going to be a great year -- We are going to be a great team -- We every day are working better together -- Time will be

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on our side -- We will be strong, smart, and unstoppable!!!" Eisner opined that Ovitz performed well during 1995, notwithstanding the difficulties Ovitz was experiencing assimilating to Disney's culture.

2. A Mismatch of Cultures and Styles

In 1996, however, the tenor of the comments surrounding Ovitz's performance and his transition to The Walt Disney Company changed. In January 1996, a corporate retreat was held at Walt Disney World in Orlando, Florida. At that retreat, Ovitz failed to integrate himself in the group of executives by declining to participate in group activities, insisting on a limousine when the other executives, including Eisner, were taking a bus, and making inappropriate demands of the park employees. In short, Ovitz "was a little elitist for the egalitarian Walt Disney World cast members [employees]," and a poor fit with his fellow executives.

As 1996 wore on, it became apparent that the difficulties Ovitz was having at the Company were less and less likely to be resolved. By the summer of 1996, Eisner had spoken with several directors about Ovitz's failure to adapt to the Company's culture. In June 1996, Eisner, Ovitz, and Wilson were in France for a cycling trip during which "it became clear [to Wilson] that what [he] had been hearing was not just idle gossip," but that "there was a problem of Mr. Ovitz being accepted into the organization."

3. Approaching the Endgame

By the fall of 1996, directors began discussing that the disconnect between Ovitz and the Company was likely irreparable, and that Ovitz would have to be terminated. Additionally, the industry and popular press were beginning to publish an increasing number of articles describing dissension within The Walt Disney Company's executive suite. One of the more prominent of these articles was an article published in Vanity Fair based on an interview given by Bollenbach, which many of the directors discussed while present for the November 25, 1996 board meeting.

Although the general consensus on Ovitz's tenure is largely negative, Ovitz did make some valuable contributions while President of the Company. As previously mentioned, Ovitz made a key recommendation with respect to the location of the gate to Disney's California Adventure theme park, built on part of the Disneyland parking lot. He was instrumental in recruiting Geraldine Laybourne, founder of the children's cable channel Nickelodeon, and overhauling ABC's Saturday morning lineup. Ovitz was successful in bringing Tim Allen back to work after he walked off the set of Home Improvement due to a disagreement. He also helped retain several animators that Katzenberg was trying to bring over to Dreamworks. Ovitz also assisted Roth in handling relationships with "talent." Ultimately, however, Ovitz's time as President was marked by more "woulda, coulda, shoulda" than actual success.

As an example, Jeffrey Katzenberg was formerly the head of Walt Disney Studios. After his contract with Disney was not renewed, he founded Dreamworks and embroiled the Company in a very costly lawsuit. Ovitz testified that after some discussions with Katzenberg, he could have settled that dispute before the lawsuit was filed for roughly $ 90 million, and although the actual amount of the settlement remains confidential, Ovitz believes that it was in excess of $ 250 million. Ovitz, however, was not given authority to settle that suit on behalf of the Company. The litigation, therefore, was filed and continued until the confidential settlement in 1999.

There are three competing theories as to why Ovitz was not successful. First, plaintiffs argue that Ovitz failed to follow Eisner's directives, especially in regard to acquisitions, and that generally, Ovitz did very little. Second, Ovitz contends that Eisner's micromanaging prevented Ovitz from having the authority necessary to make the changes that Ovitz thought were appropriate. In addition, Ovitz believes he was not given enough time for his efforts to bear fruit. Third, the remaining defendants simply posit that Ovitz failed to transition from a private to public company, from the "sell side to the buy side," and otherwise did not adapt to the Company culture or fit in with other executives. In the end, however, it makes no difference why Ovitz was not as successful as his reputation would have led many to expect, so long as he was not grossly negligent or malfeasant.

Many of Ovitz's efforts failed to produce results, often because his efforts reflected an opposite philosophy than that held by Eisner, Iger, and Roth. This does not mean that Ovitz intentionally failed to follow Eisner's directives or that he was insubordinate. To the contrary, it demonstrates that Ovitz was attempting to use his knowledge and experience, which (by virtue of his experience on the "sell side" as opposed to the "buy side" of the entertainment industry) was fundamentally different from Eisner's, Iger's, and Roth's, to benefit the Company. But different does not mean wrong. Total agreement within an organization is often a far greater threat than diversity of opinion. Unfortunately, the philosophical divide between Eisner and Ovitz was greater than both believed, and as two proud and stubborn individuals, neither of them [*70] was willing to consider the

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possibility that their point of view might be incorrect, leading to their inevitable falling out.

5. Veracity and "Agenting"

At trial, plaintiffs, together with their expert on these issues, Donohue, spent a great deal of effort attempting to persuade the Court that Ovitz was a habitual liar, and that his lack of veracity would constitute good cause to terminate him without paying the NFT. Defendants respond that the purported veracity problems attributable to Ovitz do not involve material falsehoods, but instead were caused by Ovitz's tendency to "handle" or "agent" others.

[*72]

Eisner also expressed that he personally did not trust Ovitz. n186 From both the tenor of the document (written shortly after the stress of his mother's death) and from Eisner's more emotionally detached trial testimony, however, it is clear that Eisner was not referring to any material falsehoods, but instead to Ovitz's salesmanship or, in other words, his "agenting."

n184 PTE 67 at DD002981; Tr. 4298:6-4302:7.
n185 Tr. 4300:7-4301:22. This testimony demonstrates that there could be any number of reasons for which Iger would no longer trust Ovitz. Lack of veracity is but one.
n186 Eisner wrote:

> Michael [Ovitz] does not have the trust of anybody. I do not trust him. None of the people he works with feels comfortable with his directness and honesty. Like an athlete who has lost his way, Michael is pressing, is confused, [is] ineffective. His heart may be in the right place, but his ego never allows it to pump. His creative instincts may be in the right place, but his insecurity and existential drive never allows a real functioning process. . . . He would be a great salesman, but his corporate disingenuous nature undermines him. And his lack of interests in long-term outcomes affects his judgment on short-term deals. The biggest problem is that nobody trusts him, for he cannot tell the truth. He says whatever comes to mind, no matter what the reality. Because of all the above his executives, outside business associates, and the Press have turned against him.

Litvack felt the same way, saying that he did not trust Ovitz's judgment and that he did not trust Ovitz generally because Ovitz would "handle" Litvack and "put his spin on things." Litvack also said that the "worst that I could remember in terms of lies was -- and I use the word lies'-was I was on the phone with someone important and couldn't be on time for the meeting.'" Other executives and directors made similar comments that they could recall no material falsehoods told to them by Ovitz.

C. Ovitz's Termination

1. The Beginning of the End

Ovitz's relationship with Eisner, and with other Disney executives and directors, continued to deteriorate through September 1996. In mid-September, Litvack, with Eisner's approval, spoke with, or more accurately cornered Ovitz. Litvack told Ovitz that he thought it was clear that Ovitz was not working out at Disney and that he should start looking for both a graceful way out of Disney and a new job. After Litvack reported this conversation to Eisner, Eisner, hoping to make Ovitz realize that [*86] there was no future for him at Disney, sent Litvack back to Ovitz and asked Litvack to make it clear that Eisner no longer wanted Ovitz at Disney and that Ovitz should seriously consider other employment opportunities, including the opportunity at Sony. It seems that Ovitz brought up the possibility of moving to Sony with Eisner during a flight in June 1996 to New Orleans. Eisner believed that Ovitz meant it as a threat, but Eisner welcomed the idea of Ovitz leaving the Company. Litvack conveyed Eisner's sentiments, and Ovitz responded by telling Litvack that he was "going to have to pull me out of here . . . I'm not leaving," and that if Eisner wanted him to leave Disney, Eisner could tell him so to his face. At trial, Ovitz testified that he felt that "as far as [he] was concerned, [he] was chained to that desk and that company. [That he] wasn't going to leave there a loser," that the guy that hired him or the full board would have to fire him, and that he hoped he could still make it work and make all these problems just disappear.

2. The September 30, 1996 Board Meeting

During the course of the Sony discussions the Disney board convened a meeting on September 30, 1996, while attending a Disney [*91] anniversary at the Walt

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Disney World Resort in Orlando, Florida. Ovitz was in attendance at the board meeting, and it is undisputed that neither Ovitz's future with Disney nor his conversations to date with Eisner and Litvack were discussed at the general board meeting. Eisner, however, testified that he spoke with various directors either during an executive session held that same day at which Ovitz was not present, or in small groups during the weekend, to notify them that there were continuing problems with Ovitz's performance. Additionally, other directors testified that Eisner apprised them of the developing situation with Ovitz either during or prior to September 1996. Although Eisner never sat down at a full board meeting to discuss the persistent and growing Ovitz problem, it is clear that he made an effort to notify and talk with a large majority, if not all of the directors.

On the night of September 30, Eisner and Ovitz made their now-famous appearance on *The Larry King Live Show* in which Eisner refuted the then current Hollywood gossip that there was a growing rift between himself and Ovitz and emphatically stated that if given the chance, he would hire Ovitz again. n242 It is clear now that this entire interview was a shameless public relations move during which both Eisner and Ovitz did not candidly answer Larry King's questions with the goal of deflating the negative rumors surrounding their failed partnership.

n242 PTE 323, PTE 505.

On October 1, the day after the Larry King interview, Eisner sent a letter that he had been working on since the summer, to Russell and Watson detailing Eisner's mounting difficulties with Ovitz, including Ovitz's failure to adapt to Disney's corporate culture in even the slightest fashion, Eisner's lack of trust for Ovitz, and Ovitz's complete failure to alleviate Eisner's workload. Apparently, an incident at Eisner's mother's funeral, [*93] which involved Ovitz getting into an argument on a New York City street over a parking space, spurred Eisner to finally send this letter. The letter stated that:

> If I should be hit by a truck, the company simply cannot make [Ovitz] CEO or leave him as president with a figurehead CEO. It would be catastrophic. I hate saying it, but his strength of personality together with his erratic behavior and pathological problems, and I hate saying that, is a mixture leading to disaster for this company.

Eisner stated that his goal in writing the letter was to keep Ovitz from succeeding him at Disney should the opportunity arise. Because of that purpose, the letter contained a good deal of hyperbole to help Eisner better "unsell" Ovitz as his successor. n245 Neither Russell nor Watson divulged at any time the contents of the letter with other members of the board. n246

n245 Tr. 4436:14-4439:6.
n246 Tr. 3078:17-3079:15; 7881:10-7887:3.

Eisner was informed on November 1 that Ovitz's negotiations with Sony had failed to result in Ovitz leaving Disney. Once Eisner discovered that the Sony negotiations had failed to produce the desired result, Eisner decided that Ovitz must be gone by the end of the year. n247 To facilitate Ovitz's departure, Eisner asked Wilson to take a Thanksgiving trip on the yacht that Ovitz and Wilson jointly owned, the Illusion. n248 It was Eisner's hope that Wilson, a confidant of Ovitz's, could help Ovitz finally understand not only that Ovitz had to leave Disney, but that [*95] everyone, including Ovitz, would be better off if he left.

n247 Tr. 4368:9-4369:3.
n248 Tr. 4369:4-4370:2; 6838:18-6839:11.

Still struggling to make Ovitz understand that he had to leave Disney, Eisner wrote a letter to Ovitz on November 11 (which was never sent), in which he again tried to put Ovitz on notice that he was no longer welcome at Disney. Eisner characterized this letter as:

> [A] shot at trying to conjure up every argument, every issue exaggerated to the point of extreme nature so that [Ovitz] could see how deadly serious [Eisner] was. . . . However, [Eisner] realized it was . . . not accurate, way exaggerated, silly, hyperbole, insensitive, and it read like . . . a Vanity Fair article.

In this letter, Eisner told Ovitz that:

> I think we should part ways professionally. I believe you should resign (this is

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> not a legal suggestion but a cosmetic one), and we should put the best possible face on it. When we talked last Friday, I told you again that my biggest problem was that you played the angles too much. I told you 98% of the problem was that I did not know when you were telling the truth, about big things, about small things. . . . We are beyond the curing stage. We are now in salvation. I would like to remain friends, to end this so it looks like you decided it, and to be positive and supportive . . . I hope we can work together now to accomplish what has to be done. I am ready to work as hard as necessary and as long. n252

n252 PTE 24 at DD002454-002455.

[*97]

Eisner sent this document to Bass and Russell for their review. Eisner also believed that he may have shown the letter to Litvack, but Litvack did not recall having seen this letter before trial. For my purposes, Russell was the only director to receive this document and he did not share it or the matters it concerned with anyone else on the board. Instead of sending this letter to Ovitz, Eisner met with Ovitz personally on November 13 and they discussed much of what was contained in the letter, especially Ovitz's alleged management and ethics problems. Notes taken by Eisner following this meeting stated that the meeting was "2 hours and 15 minutes of [Eisner] telling [Ovitz] that it was not going to work." Eisner believed that Ovitz just would not listen to what he was trying to tell him and instead, Ovitz insisted that he would stay at Disney, going so far as to state that he would chain himself to his desk.

3. Options for Ovitz's Termination

Since the Sony option was discussed in early September, Eisner and Litvack had also been discussing whether Ovitz could be terminated, and more importantly, whether he could be terminated for cause. n259 Eisner hoped to obtain a termination for cause because he believed that although Ovitz "had not done the job that would warrant [the NFT] payment" Disney was obliged to honor the OEA. n260 Honoring the OEA meant that if Ovitz was terminated without cause, he would receive the NFT payment that the OEA called for, which consisted of the balance of Ovitz's salary, an imputed amount of bonuses, a $ 10 million termination fee and the immediate vesting of his three million stock options at the time. Litvack advised Eisner from the very beginning that he did not believe that there was cause to terminate Ovitz under the OEA.

n259 Tr. 4379:23-4380:19; 6110:12-6111:3.

[*99]

n260 Tr. 4380:22-4381:15.

As the end of November approached, Eisner again asked Litvack if Disney had cause to fire Ovitz and avoid the costly NFT payment. n261 Litvack proceeded to examine more carefully the issue of whether cause existed under the OEA. Litvack reviewed the OEA, refreshed himself on the meaning of gross negligence and malfeasance and reviewed all of the facts concerning Ovitz's performance of which he was aware. n262 Litvack freely admits that he did not do any legal research in answering the cause question; n263 nor did he order an outside investigation to be undertaken or an outside opinion to be authored. n264 Litvack did state that in December he consulted with Morton Pierce, a senior partner at Dewey Ballantine, and that Pierce agreed that there was no cause. Pierce, however, was not admitted to the California Bar (California law governed the OEA), was not an expert in employment law, and could not recall speaking with Litvack regarding Ovitz. Furthermore, Pierce's bills to Disney do not clearly reflect that any such conversation took place regarding [*100] whether Ovitz could be terminated for cause. After taking these steps, Litvack, for the second time, concluded that there was no cause to terminate Ovitz. In fact, despite Ovitz's poor performance and concerns about his honesty, Litvack believed that the question of whether Ovitz could be terminated for cause was not a close question and, in fact, Litvack described it as "a no-brainer." n269 Litvack, however, produced no written work product or notes to show to the board that would explain or defend his conclusion, and because he did not ask for an outside opinion to be authored, there was no written work product at all. When Litvack notified Eisner that he did not believe cause existed, Eisner testified that he "checked with almost anybody that [he] could find that had a legal degree, and there was just no light in that possibility. It was a total dead end from day one." n270

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n261 Tr. 6110:15-6111:3.

n262 Tr. 6113:21-6114:19.

n263 Tr. 6114:20-10 (Litvack) (stating that he did not do any case research because he "didn't believe that there were going to be any cases that were going to answer the question for [him]. [He] had been dealing with contracts and litigation all [his] life. . . . [He] felt he knew the facts as to what the man had done and not done.").

[*101]

n264 Tr. 6115:22-6116:14 (Litvack) (stating that he did not order an outside investigation because he believed he knew the facts and an outsider would have gone to him to get the facts, and also because he believed that the firing of Ovitz was a sensitive matter and he wanted to involve as few people as possible); 6130:5-24 (Litvack) (explaining that he did not order an outside written opinion because it would have been expensive, and he believed it was a "CYA tactic done by general counsels to cover themselves" and he didn't believe he needed that). Litvack consulted Val Cohen, co-head of the Disney litigation group, and possibly Santaniello, and to the extent he met with them, he stated that they both agreed with his conclusion that there was no cause, although there is no record of their having met or discussed the existence of cause. *See* Tr. 6119:22-6121:8. Litvack admits, however, that all the information Val Cohen knew about Ovitz, she would have learned from Litvack. *See* Tr. 6401:2-6405:4.

n269 Tr. 6114:24-10. In light of the hostile relationship between Litvack and Ovitz, I believe if Litvack thought it were possible to avoid paying Ovitz the NFT payment, that out of pure ill-will, Litvack would have tried almost anything to avoid the payment. *See* Tr. 6115:9-21 ("If there was a way not to pay him, I would have loved not to pay him. . . . I didn't like him, and he didn't like me. I didn't feel he had done the job.").

n270 Tr. 4380:10-21.

In a perfect, more responsible world, both Litvack and Eisner would have had sufficient documentation not only to back up their conclusion that Ovitz could not be terminated for cause, but they would have also had sufficient evidence of the research and legwork they did to arrive at that conclusion. Despite the paucity of evidence, it is clear to the Court that both Eisner and Litvack wanted to fire Ovitz for cause to avoid the costly NFT payment, and perhaps out of personal motivations. The Court is convinced, based upon these two factors, that Eisner and Litvack did in fact make a concerted effort to determine if Ovitz could [*103] be terminated for cause, and that despite these efforts, they were unable to manufacture the desired result.

4. The November 25, 1996 Board Meeting

The Disney board held its next meeting on November 25, and Ovitz was present. The minutes of this meeting contain no record that the board engaged in any discussion concerning Ovitz's termination, or that they were informed of the actions that Eisner and Litvack had taken to this point concerning Ovitz. n274 The only action recorded in the minutes concerning Ovitz is his unanimous renomination to a new three-year term to the board. n275 Gold testified, however, that by this time the board knew that Ovitz would be fired, but because Ovitz was present at the meeting it would have been akin to a "public hanging" to fail to re-nominate him. n276

n274 PTE 91.

n275 *Id.* at WD01561A.

n276 Tr. 3771:21-3772:16 (Because the proxy was not due for some time, Gold stated that the board chose to renominate Ovitz and then change the slate after he was fired instead of embarrassing Ovitz at the meeting.).

[*105]

Although there was no mention of Ovitz's impending termination at the board meeting, it is apparent, despite the lack of a written record, that directly following the board meeting, there was some discussion concerning Ovitz at the executive session which was held at Disney Imagineering in a glass-walled room (according to those in attendance who remember this event). One of the more striking images of this trial is that apparently Ovitz was directly outside the glass walls -- looking in at this meeting -- while his fate at Disney was being discussed. There are no minutes to show who attended the executive session, but I am reasonably certain that at least Eisner, Gold, Bowers, Watson and Stern were in attendance. In the absence of further evidence, I must conclude that no other directors attended this session. It is also clear that Eisner notified the directors in attendance at the executive session that it was his intention to fire Ovitz by year's end and that he had asked Wilson to speak with Ovitz while they were onboard the Illusion during the upcoming Thanksgiving holiday.

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5. The Illusion Dispelled

Shortly after the November 25 board meeting and executive session, the Ovitz and Wilson families left on the Illusion for a Thanksgiving trip to the British Virgin Islands. Ovitz embarked on this trip with the hope that if he could figure out a way to make it to Christmas, he could fix everything [*109] with Disney and make his problems go away. Wilson, however, had other plans. Ovitz recalled the conversations between him and Wilson quite well. Ovitz recalled that Wilson told him that "it wasn't going to work and that [Eisner] wanted [Ovitz] out of the company." Ovitz said that after speaking with Wilson he began to realize how serious the situation with Disney had become and that he needed to talk to his attorneys and get some perspective on the situation. Wilson was unable to recall the details of what he and Ovitz spoke about, but Wilson does recall that Ovitz was quite "emotionally concerned" with his situation at Disney.

At some point during the trip, Eisner contacted Wilson by phone and Wilson related the situation and the progress he had made with Ovitz. n291 Wilson was unable to remember the specifics of his conversation with Eisner, but his recollection was refreshed after viewing notes, dated December 1, taken by Eisner following the conversation. n292 Wilson recalled describing Ovitz as a "wounded animal . . . in a corner," and stated that by this he meant that Ovitz could become dangerous to the organization if the relationship with Disney continued. n293 Wilson also recalled stating that Ovitz was a "loyal friend and devastating enemy," n294 and advising that Eisner should be reasonable and magnanimous, both financially and publicly, so Ovitz could save face. n295

n291 Tr. 7016:23-7017:9.
n292 PTE 25.
n293 Tr. 7026:22-7027:23; *see also* PTE 25.
n294 Tr. 7028:2-7029:1.
n295 Tr. 7030:6-7031:9.

On December 3, having returned from his Thanksgiving trip, Ovitz, armed with his newfound [*111] understanding that his time at Disney was rapidly coming to an end, met with Eisner to discuss the terms of his departure. Eisner memorialized this meeting in a note to Russell which read "I met with Michael Ovitz today who wants to bring our discussions to a conclusion this week, wants you and Bob Goldman to settle out his contract immediately and sign it by weeks end." n296 Essentially, this note asked Russell to take charge of managing the Ovitz departure. Ovitz asked that he not have to deal personally with Litvack during the termination process, although he had no qualms about Litvack being involved. n297 Ovitz also asked for several concessions from Disney, including keeping his seat on the board, obtaining a consulting/advising arrangement with Disney, the continued use of an office and staff (but not on the Disney lot), continued health insurance and home security, continued use of the company car and the repurchase of his plane.

The following evening, Eisner met with Ovitz at Eisner's mother's apartment in New York City. By the time this meeting occurred, it had already been decided that Ovitz was being terminated, without cause, and would be receiving his contractual NFT payment, and that he would not be receiving any of the additional items that he asked for. The purpose of this meeting was to agree to a press release to announce the termination, let Ovitz know that he would not receive any additional items, and as Eisner described it, it served as "the final parting." Eisner and Ovitz apparently came to some understanding that neither Ovitz nor Disney was to defame each other in the press, and that the separation was to be undertaken with dignity and respect for both sides. Ovitz's termination was memorialized the following day in a letter signed by Litvack and dated December 12. Litvack testified that Russell negotiated the terms in the letter, but Litvack signed this document on Eisner's instructions. The board was not shown the December 12 letter, nor did it meet to approve its terms.

n315 PTE 13

The letter reads:

This will confirm the terms of our mutual agreement as follows:

1. The term of your employment under your existing Employment Agreement with Disney will end on January 31, 1997.

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

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A, will vest as of January 31, 1997 and will expire in accordance with their terms on September 30, 2002.

Also on December 12, Disney issued the press release announcing Ovitz's termination. n319 The press release stated that "Michael S. Ovitz, will leave the company by mutual agreement effective January 31, 1997. He will continue to serve as an advisor and consultant to the company and the Board of Directors." n320 Although I am puzzled by the use of the phrase "mutual agreement," I am nonetheless convinced, based upon Ovitz's constant self-denial and difficult behavior during the months leading up to his termination, and Eisner's commitment that he would handle the termination gracefully for Ovitz's benefit (and likely to prevent Ovitz from defaming him and Disney in the press), n321 that the termination was anything but a mutual agreement. n322 Additionally, although I am troubled by the statement in the press release that Ovitz would continue to serve as an advisor and consultant to the [*119] board, because this was either a deliberate untruth or an incredibly irresponsible and sloppy error on Disney's part, it is ultimately immaterial to the issues to be resolved in this case. Therefore, I do not believe that the statement in the press release regarding Ovitz continuing as an advisor and consultant to the Disney board is reflective of any agreement or understanding that Disney and Ovitz had at the time. n323 The Court believes that both of these untrue statements were likely made as part of an effort by Disney to make Ovitz's departure seem as amicable as possible so that Ovitz's reputation would not be publicly tarnished any more than could be avoided. In any event, once Ovitz left Eisner's mother's apartment, he never again returned to Disney. n324

n319 PTE 390.
n320 *Id.*
n321 PTE 19 at WD4000. *See also* Tr. 2088:1-5 (Ovitz) (stating "what we agreed on that they tried to handle this with some dignity for me and some grace and were very generous in their press release, which was very nice for them to do.").
n322 *See also* Tr. 2087:6-2088:5 (Ovitz) (stating that "I wouldn't leave by mutual agreement and I wasn't going to serve as an advisor and consultant. I wanted to [serve in those positions.]"); 2573:11-21 (Foster: "[Ovitz's] departure was not voluntary, is that correct?" Russell: "No way, no way."); 4525:12-16 (Schulman: "You were trying to work out getting Mr. Ovitz's consent; correct?" Eisner: "I was not trying to get his consent on being fired. I was trying to get his consent of leaving the company in a graceful way.").
[*120]

n323 Tr. 2087:6-2088:5. What makes it even clearer that Disney was simply trying to mislead the public is that no such representation was made in Ovitz's termination letter. PTE 13.
n324 Tr. 1382:22-1383:1.

That same day, Eisner at least attempted to contact each of the Board members by phone before the issuance of the press release in order to notify them that Ovitz had been officially terminated. n325 None of the board members at that time, or at any other time before or during trial, ever objected to Ovitz's termination; in fact, most if not all thought it was the appropriate move for Eisner to make. n326 Also on December 12, copies of the press release along with a letter from Eisner were sent to each of the directors. n327 The letters contained no more information regarding the termination than was contained in the press release.

Thus, as of December 12, Ovitz was officially terminated without cause. Up to this point, however, the Disney board had never met in order to vote on, or even discuss, the termination at a full session, and few if any directors did an independent investigation of whether <u>Ovitz could be terminated for cause. As a result, the Disney directors had been taken for a wild ride, and most of it was in the dark. Additionally neither the EPPC nor the compensation committee had a vote on the matter, and it seems as though they had yet to have a substantive discussion of whether Ovitz could be terminated for cause. Many directors believed that Eisner had the power to fire Ovitz on his own and that he did not need to convene a board meeting to do so. Other directors believed that if a meeting was required to terminate Ovitz, that Litvack, serving as corporate counsel, would have advised them that was the case and he would have made sure one was called. Litvack believed that Eisner had the power to fire Ovitz on his own accord and, therefore, did not believe it was necessary to convene [*123] a meeting. Litvack also stated that he did not call a meeting because not only did he believe that Eisner was empowered to fire Ovitz on his own, but Litvack believed that all the directors were up to speed and in agreement that Ovitz should be terminated. Although there was no meeting called to vote on or even discuss Ovitz's termination, it is clear that most, if not all, directors trusted Eisner's and Litvack's conclusion that there was no cause and that Ovitz should</u>

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still be terminated without cause even though this entailed making the costly NFT payment. n332

n332 Tr. 2574:5-2576:21 (Russell) (stating that he believed that Eisner and Litvack had done sufficient research and trusted their judgment that there was no cause to terminate Ovitz, that he was unaware of anything that would constitute cause to fire Ovitz, and that he was aware that Ovitz would receive the NFT payment); 3775:12-3778:18 (Gold) (stating that he was aware of the size of the NFT payment, that after asking Litvack about his conclusions concerning cause he believed that Litvack had done and was continuing to do sufficient research and Gold trusted his and Eisner's conclusions, and that Gold also had no knowledge of any act that would have constituted cause to fire Ovitz); 5597:18-5598:13 (Mitchell) (stating that he relied on and trusted Litvack's determination that there was no cause and Mitchell knew of nothing that would have constituted cause); 5813:2-24 (Nunis) (stating that he believed that if Eisner and Litvack could have avoided paying the NFT that they would have done so); 5933:4-5934:24 (Bowers) (agreeing with Eisner's decision, that Disney would honor the terms of the OEA and make a large payment to Ovitz including a large cash payment and acceleration of the options); 6781:18-6782:9 (O'Donovan) (stating that he was not aware of the value of Ovitz's payment and relied on Litvack entirely to make the cause determination); 7557:2-15 (Murphy) (stating that he believed that if there was a way that Eisner could have avoided paying Ovitz he would have and he therefore trusted Eisner's judgment on the issue of cause); 7867:2-7868:2 (Watson) (stating that he did not believe that Ovitz was grossly negligent or malfeasant and that therefore he could not be fired for cause); 8160:2-8161:16 (Stern) (stating that he believed that Ovitz never lied to him, and that Stern trusted Eisner's judgment because he had a reputation for being "a tough buck," and if Eisner could have avoided paying Ovitz he would have).

[*124]

During the week that Ovitz was terminated (December 11-16), articles began appearing in the press with quotes from Ovitz or his representatives describing why Ovitz left Disney and detailing to some extent the size of his severance package. n333 For example, a December 14 article in the Baltimore Sun reported that "Resigning Disney President Michael Ovitz said yesterday through a representative that Disney is giving him a $ 90 million severance package." n334 Other articles describing Ovitz's frustrations at Disney stated that Ovitz "wasn't game to struggle against a bad situation," n335 and that "Ovitz was frustrated by his poorly defined role, Eisner's reluctance to share power and repeated clashes with other senior Disney executives . . . notably [Litvack] and [Bollenbach]," n336 and that "the reality was that Eisner did not let go . . . [and that] Eisner thwarted [Ovitz] by not giving him detailed responsibilities or the power to manage the various Disney divisions." n337 The articles also stated that Ovitz's departure was mutual, n338 and some went so far as to state that Ovitz's departure was his own idea. n339 Additionally, it was reported that Ovitz had hired a public [*125] relations consultant named Steven Rivers to put a positive spin on the termination for Ovitz. n340 Ovitz, however, testified that he did not employ Rivers or any other PR firm at this time. n341 Eisner believed that he had been generous in his treatment of Ovitz, as well as his agreement to make the termination seem mutual, and felt that these articles were:

> an incredible betrayal not of a contract, not of any kind of written agreement, but that I had bent over backwards, and not because he was my friend. I would do it with anybody that was leaving under these circumstances, and he just, you know, threw it right in the company's face. And I was reading every single day about what idiots we were, the Disney Company, and how he had done this enormous feat. n342

On December 16, Eisner reacted to these stories by sending an e-mail to John Dreyer, Disney's communications chief, which among other things stated that Ovitz was a "psychopath" and "totally incompetent." n343 Eisner described the letter as his effort at "venting" and that "although [he] didn't know what the words meant, [he] was just so angry." n344

D. Expert Witnesses

Six expert witnesses testified over the course of the trial. n363 In general, their reports and testimony, while meeting the minimum standards for admissibility, were not of as much help to the Court as they could have been because of the polarized nature of their opinions, especially their interpretations of the factual questions that are of central importance in this trial.

1. Professor Deborah DeMott

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Plaintiffs offered Professor DeMott, the David F. Cavers Professor of Law at Duke Law School, as an expert on "the custom and practice with regard to corporate governance in Delaware public companies in the time period relevant to this case."

Thus, there is very little, if any, of Professor DeMott's report that is of benefit to the Court, especially because the relevant question is not whether the defendants complied with the custom and practice of other Delaware corporations during the relevant time frame, but whether they complied with their fiduciary duties. n373

> n373 Professor DeMott's testimony was useful, however, in the sense that it drew in stark relief the contrast between ideal corporate governance practices and the unwholesome boardroom culture at Disney -- that is, her testimony clarified how ornamental, passive directors contribute to sycophantic tendencies among directors and how imperial CEOs can exploit this condition for their own benefit, especially in the executive compensation and severance area. *See* Tr. 43:4-46:15 (individualized one-on-one discussions between management and directors can lead to directors who are "unequally or unevenly informed with regard to significant matters" and "have the effect of vitiating, sapping the board's ability as an institution to function together collectively and collegially and deliberatively"); 83:12-84:6.

II. LEGAL STANDARDS

The outcome of this case is determined by whether the defendants complied with their fiduciary duties in connection with the hiring and termination of Michael Ovitz. At the outset, the Court emphasizes that the best practices of corporate governance include compliance with fiduciary duties. n399 Compliance with fiduciary duties, however, is not always enough to meet or to satisfy what is expected by the best practices of corporate governance.

> n399
>
> > All good corporate governance practices include compliance with statutory law and case law establishing fiduciary duties. But the law of corporate fiduciary duties and remedies for violation of those duties are distinct from the aspirational goals of ideal corporate governance practices. Aspirational ideals of good corporate governance practices for boards of directors that go beyond the minimal legal requirements of the corporation law are highly desirable, often tend to benefit stockholders, sometimes reduce litigation and can usually help directors avoid liability. But they are not required by the corporation law and do not define standards of liability.
>
> *Brehm v. Eisner, 746 A.2d 244, 256 (Del. 2000).*

[*148]

The fiduciary duties owed by directors of a Delaware corporation are the duties of due care and loyalty. n400 Of late, much discussion among the bench, bar, and academics alike, has surrounded a so-called third fiduciary duty, that of good faith. Of primary importance in this case are the fiduciary duty of due care and the duty of a director to act in good faith. Other than to the extent that the duty of loyalty is implicated by a lack of good faith, the only remaining issues to be decided herein with respect to the duty of loyalty are those relating to Ovitz's actions in connection with his own termination. n401 These considerations will be addressed *seriatim*, although issues of good faith are (to a certain degree) inseparably and necessarily intertwined with the duties of care and loyalty, as well as a principal reason the distinctness of these duties make a difference-namely *§ 102(b)(7) of the Delaware General Corporation Law*. n402

> n400 The Delaware Supreme Court has been clear that outside the recognized fiduciary duties of care and loyalty (and perhaps good faith), there are no other fiduciary duties. In certain circumstances, however, specific applications of the duties of care and loyalty are called for, such as so-called "*Revlon*" duties and the duty of candor or disclosure. *See Malpiede v. Townson, 780 A.2d 1075, 1083, 1086 (Del. 2001)*; *Paramount Communications Inc. v. QVC Network, Inc., 637 A.2d 34, 43 (Del. 1994)* ("The directors' fiduciary duties in a sale of control context are those which generally attach. In short, the directors must act

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in accordance with their fundamental duties of care and loyalty.'") (citation omitted)).

[*149]

n401 *See In re The Walt Disney Co. Derivative Litig. ("Disney III"), 2004 Del. Ch. LEXIS 132, 2004 WL 2050138, at *7 (Del. Ch. Sept. 10, 2004)*; *Brehm, 746 A.2d at 257-58*.

n402 Perhaps these categories of care and loyalty, so rigidly defined and categorized in Delaware for many years, are really just different ways of analyzing the same issue. Professor Sean Griffith said it best when he recently wrote:

> At first glance, the duties of care and loyalty appear quite distinctive. . . .
>
> A bit of digging beneath these surface differences, however, reveals the richly interconnected roots of the two doctrinal paradigms. Start with the duty of care: directors must conduct themselves as ordinarily prudent persons managing their own affairs. So far so good, but a moment's reflection reveals that an ordinarily prudent person becomes an ordinarily prudent director only once we assume an element of loyalty. How do ordinarily prudent directors conduct their affairs? A decision is taken with due care, when from an array of alternatives, the directors employ a procedure to pick the one that best advances *the interests of the corporation.* Now pause for a moment to consider what a funny way this is of conceiving what an ordinarily prudent person would do *in the conduct of her own affairs.* We might typically assume that an ordinarily prudent person, in evaluating a set of alternatives, picks the one that provides the most benefit and least cost to *herself.* A director's decision-making process, however, can be evaluated only by changing the referent from herself to the corporation. The question of prudence, in other words, is framed with a tacit element of loyalty.
>
> . . .
>
> . . . [Shareholders and courts] are worried about the directors' loyalty because we are concerned that their disloyalty will result in a poor bargain for the corporation. We are concerned, in other words, that conflicted directors will strike bargains for the corporation that an ordinarily prudent person would not strike for herself. This can be seen most clearly if the non-arms-length transactions that raise duty of loyalty concerns are imagined as arms-length transactions with third parties. Would an ordinarily prudent person lease a corporate asset to a third party on exceedingly generous terms? Would an ordinarily prudent person lavish compensation on a third party and permit the third party to divert investment opportunities that would otherwise come her way? These are duty of loyalty concerns framed as duty of care questions. The phrasing is natural because, at its core, the duty of loyalty is just a bet that some situations are likely to lead to careless or imprudent transactions for the corporation, which is to say that the duty of care is a motivating concern for the duty of loyalty. Here again the duties overlap.

Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L. J. (forthcoming 2005) (manuscript of May 25, 2005 at 39-42 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=728431) (emphasis in original, citations omitted).

[*150]

A. The Business Judgment Rule

A comprehensive review of the history of the business judgment rule is not necessary here, but a brief discussion of its boundaries and proper use is appropriate. Delaware law is clear that the business and affairs of a corporation are managed by or under the direction of its board of directors. n403 The business judgment rule serves to protect and promote the role of the board as the

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ultimate manager of the corporation. n404 Because courts are ill equipped to engage in *post hoc* substantive review of business decisions, the business judgment rule "operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation." n405

n403 *8 Del. C. § 141(a).*
n404 *See Zapata Corp. v. Maldonado, 430 A.2d 779, 782 (Del. 1981).*
n405 *Cede & Co. v. Technicolor, Inc. ("Cede III"), 634 A.2d 345, 360 (Del. 1993)* (citing *Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1988)).*

[*151]

The business judgment rule is not actually a substantive rule of law, n406 but instead it is a presumption that "in making a business decision the directors of a corporation acted on an informed basis, . . . and in the honest belief that the action taken was in the best interests of the company [and its shareholders]." n407 This presumption applies when there is no evidence of "fraud, bad faith, or self-dealing in the usual sense of personal profit or betterment" on the part of the directors. n408 In the absence of this evidence, the board's decision will be upheld unless it cannot be "attributed to any rational business purpose." n409 When a plaintiff fails to rebut the presumption of the business judgment rule, she is not entitled to any remedy, be it legal or equitable, unless the transaction constitutes waste. n410

n406 *Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1162 (Del. 1995)* (citing *Cede III, 634 A.2d at 360*); *see Emerald Partners v. Berlin, 787 A.2d 85, 90-91 (Del. 2001)*; *Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1374 (Del. 1995).*

[*152]

n407 *Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).* In *Smith v. Van Gorkom*, the Delaware Supreme Court clarified that "the presumption that the directors acted in good faith [is] irrelevant in determining the threshold issue of whether the directors as a Board exercised an informed business judgment." *488 A.2d 858, 889 (Del. 1985).* In *In re Holly Farms Corp. S'holders Litig.*, the Court of Chancery denied the protections of the business judgment rule to a board of directors' agreement to a lock up because it was "the product of a fundamentally flawed process and cannot be in the interests of the stockholders." *1988 Del. Ch. LEXIS 164, 1988 WL 143010, at *6 (Del. Ch. Dec. 30, 1988).*

n408 *Grobow v. Perot, 539 A.2d 180, 187 (Del. 1988)*; *Cede III, 634 A.2d at 360*. In *Gagliardi*, Chancellor Allen described the policy rationale for the business judgment rule in the paragraph quoted below. Although this statement, made in 1996, may at first appear to be undercut by the increased incentive compensation of the dot-com era, the rationale still applies because of the relatively small percentages of stock held by officers and directors of public companies.

> Corporate directors of public companies typically have a very small proportionate ownership interest in their corporations and little or no incentive compensation. Thus, they enjoy (as residual owners) only a very small proportion of any "upside" gains earned by the corporation on risky investment projects. If, however, corporate directors were to be found liable for a corporate loss from a risky project on the ground that the investment was too risky (foolishly risky! stupidly risky! egregiously risky!-you supply the adverb), their liability would be joint and several for the whole loss (with I suppose a right of contribution). Given the scale of operation of modern public corporations, this stupefying disjunction between risk and reward for corporate directors threatens undesirable effects. Given this disjunction, only a very small probability of director liability based on "negligence", "inattention", "waste", etc. could induce a board to avoid authorizing risky investment projects to any extent! Obviously, it is in the shareholders' economic interest to offer sufficient protection to directors from liability for negligence, etc., to allow directors to conclude that, as a practical mat-

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ter, there is no risk that, if they act in good faith and meet minimalist proceduralist standards of attention, they can face liability as a result of a business loss.

Gagliardi v. TriFoods Int'l Inc., 683 A.2d 1049, 1052 (Del. Ch. 1996).
[*153]

n409 *Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)*; *see also Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).*
n410 *In re J.P. Stevens & Co., Inc. S'holders Litig., 542 A.2d 770, 780 (Del. Ch. 1988).*

This presumption can be rebutted by a showing that the board violated one of its fiduciary duties in connection with the challenged transaction. n411 In that event, the burden shifts to the director defendants to demonstrate that the challenged transaction was "entirely fair" to the corporation and its shareholders. n412

n411 *Emerald Partners, 787 A.2d at 91.*
n412 *Id.* In certain circumstances, the burden can shift back to the plaintiffs in the event of ratification by disinterested directors or shareholders. *See Solomon v. Armstrong, 747 A.2d 1098, 1111, 1113-17 (Del. Ch. 1999), aff'd, 746 A.2d 277 (Del. 2000).*

[*154]

In *Van Gorkom*, the Delaware Supreme Court analyzed the Trans Union board of directors *as a whole* in determining whether the protections of the business judgment rule applied. n413 More recent cases understand that liability determinations must be on a director-by-director basis. In *Emerging Communications*, Justice Jacobs wrote (while sitting as a Vice Chancellor) that the "liability of the directors must be determined on an individual basis because the nature of their breach of duty (if any), and whether they are exculpated from liability for that breach, can vary for each director." n414 There is a not insignificant degree of tension between these two positions, notwithstanding the procedural differences between the two cases.

n413 *Van Gorkom, 488 A.2d at 889.*
n414 *In re Emerging Communications Inc. S'holders Litig., 2004 Del. Ch. LEXIS 70, 2004 WL 1305745, at *38 (Del. Ch. Jun. 4, 2004).*

Even if the directors have exercised their business judgment, the protections of the [*155] business judgment rule will not apply if the directors have made an "unintelligent or unadvised judgment." n415 Furthermore, in instances where directors have not exercised business judgment, that is, in the event of director inaction, the protections of the business judgment rule do not apply. n416 Under those circumstances, the appropriate standard for determining liability is widely believed to be gross negligence, n417 but a single Delaware case has held that ordinary negligence would be the appropriate standard. n418

n415 *Mitchell v. Highland-Western Glass, 19 Del. Ch. 326, 167 A. 831, 833 (Del. Ch. 1933)*; *Van Gorkom, 488 A.2d at 872.*

n416 *Aronson, 473 A.2d at 813.* This is not to say that all director inaction is not subject to the business judgment rule. As the *Aronson* Court noted, "*a conscious decision to refrain from acting* may nonetheless be a valid exercise of business judgment." *Id.* (emphasis added).
n417 *See Seminaris v. Landa, 662 A.2d 1350 (Del. Ch. 1995)*; *In re Baxter Int'l, Inc. S'holders Litig., 654 A.2d 1268 (Del. Ch. 1995).*
[*156]

n418 *Rabkin v. Philip A. Hunt Chem. Corp., 1987 Del. Ch. LEXIS 522, 1987 WL 28436, at *1-3 (Del. Ch. Dec. 17, 1987). See Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130, 41 Del. Ch. 78 (Del. 1963).* I confess to being mystified why plaintiffs did not cite *Rabkin* and its lower standard of liability when they did cite *Aronson* for the proposition that the business judgment rule does not apply to director inaction, as well as a bankruptcy decision that heavily relied upon *Rabkin. See Pereira v. Cogan, 294 B.R. 449 (S.D.N.Y. 2003), vacated and remanded sub nom. Pereira v. Farace, 413 F.3d 330 (2d Cir. 2005).* A similar mystery confronted then-Vice Chancellor Berger in *Rabkin*, where she wrote:

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> Both parties agree that liability must be predicated upon a finding of gross negligence. As a result, the Court did not have the benefit of what it assumed would be plaintiffs' arguments in support of the Court's original ruling [that ordinary negligence was the appropriate standard] and the Court is left in the unenviable position of deciding against both parties.

*1987 Del. Ch. LEXIS 522, at *4*. It also bears noting that no Delaware decision (until this one) has cited *Rabkin*, decided roughly eighteen years ago, and it would appear that *Seminaris, In re Baxter Int'l*, and *In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996)*, have since eclipsed *Rabkin* by implicitly accepting that gross negligence is the appropriate standard even in cases of alleged director inaction and lack of oversight.

[*157]

B. Waste

Corporate waste is very rarely found in Delaware courts because the applicable test imposes such an onerous burden upon a plaintiff -- proving "an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." n419 In other words, waste is a rare, "unconscionable case[] where directors irrationally squander or give away corporate assets." n420

n419 *Brehm, 746 A.2d at 263*; *In re The Walt Disney Co. Derivative Litig. ("Disney I"), 731 A.2d 342, 362 (Del. Ch. 1998)* (quoting *Glazer v. Zapata Corp., 658 A.2d 176, 183 (Del. Ch. 1993))*.
n420 *Brehm, 746 A.2d at 263*.

The Delaware Supreme Court has implicitly held that committing waste is an act of bad faith. n421 It is not necessarily true, however, that every act of bad faith by a director constitutes waste. For example, if a director acts in bad faith (for whatever reason), [*158] but the transaction is one in which a businessperson of ordinary, sound judgment concludes that the corporation received adequate consideration, the transaction would not constitute waste. n422

n421 *See White v. Panic, 783 A.2d 543, 553-55 (Del. 2001)* (citing *J.P. Stevens, 542 A.2d at 780-81*).

n422 Nevertheless, if the director acted in bad faith, it would be extraordinarily difficult for the defendant directors to prove that the transaction was entirely fair to the corporation because it would be difficult to demonstrate fair process. *See Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983)*.

C. The Fiduciary Duty of Due Care

The fiduciary duty of due care requires that directors of a Delaware corporation "use that amount of care which ordinarily careful and prudent men would use in similar circumstances," n423 and -- "consider all material information reasonably available" in making business decisions, and that deficiencies in the directors' [*159] process are actionable only if the directors' actions are grossly negligent. n424 Chancellor Allen described the two contexts in which liability for a breach of the duty of care can arise:

> First, such liability may be said to follow *from a board decision* that results in a loss because that decision was ill advised or "negligent". Second, liability to the corporation for a loss may be said to arise from an *unconsidered failure of the board to act* in circumstances in which due attention would, arguably, have prevented the loss. n425

Chancellor Allen then explained with respect to board decisions:

> . . . [These] cases will typically be subject to review under the director-protective business judgment rule, assuming the decision made was the product of *a process* that was *either* deliberately considered in good faith or was otherwise rational. What should be understood, but may not widely be understood by courts

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> or commentators who are not often required to face such questions, is that compliance with a director's duty of care can never appropriately be judicially determined by reference to *the content of the board decision* that leads to a corporate [*160] loss, apart from consideration of the good faith or rationality of the process employed. That is, whether a judge or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through "stupid" to "egregious" or "irrational", provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in *a good faith* effort to advance corporate interests. To employ a different rule-one that permitted an "objective" evaluation of the decision-would expose directors to substantive second guessing by ill-equipped judges or juries, which would, in the long-run, be injurious to investor interests. Thus, the business judgment rule is process oriented and informed by a deep respect for all *good faith* board decisions.
>
> Indeed, one wonders on what moral basis might shareholders attack a *good faith* business decision of a director as "unreasonable" or "irrational". Where a director *in fact exercises a good faith effort to be informed and to exercise appropriate judgment*, he or she should be deemed to satisfy fully the duty of attention. n426

With respect to liability [*161] for director inaction, Chancellor Allen wrote that in order for the inaction to be so great as to constitute a breach of the director's duty of care, a plaintiff must show a "lack of good faith as evidenced by sustained or systematic failure of a director to exercise reasonable oversight." n427 The Chancellor rationalized this extremely high standard of liability for violations of the duty of care through inaction by concluding that:

> [A] demanding test of liability in the oversight context is probably beneficial to corporate shareholders as a class, as it is in the board decision context, since it makes board service by qualified persons more likely, while continuing to act as a stimulus to *good faith performance of duty* by such directors. n428

n423 *Graham, 188 A.2d at 130*.

n424 *Brehm, 746 A.2d at 259*; *Official Comm. Of Unsecured Creditors of Integrated Health Services, Inc. v. Elkins, et al. ("IHS"), 2004 Del. Ch. LEXIS 122, 2004 WL 1949290, at *9 n.37 (Del. Ch. Aug. 24, 2004)*; *In re Nat'l Auto Credit, Inc. S'holders Litig., 2003 Del. Ch. LEXIS 5, 2003 WL 139768, at *12 (Del. Ch. Jan. 10, 2003)*. In *Cede III*, the Supreme Court affirmed and adopted Chancellor Allen's "presumed findings" that the directors of Technicolor "were grossly negligent in failing to reach an informed decision when they approved the agreement of merger, and . . . thereby breached their duty of care." *634 A.2d at 366*. By way of example, a board of directors need not read "*in haec verba* every contract or legal document that it approves, but if it is to successfully absolve itself from charges of [violations of the duty of care], there must be some credible evidence that the directors knew what they were doing, and ensured that their purported action was given effect." *Van Gorkom, 488 A.2d 858, 883 n.25 (Del. 1985)*.

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n425 *Caremark, 698 A.2d at 967* (emphasis in original).

n426 *Id. at 967-68* (internal citations and footnotes omitted, emphasis in original).

n427 *Id. at 971*.

n428 *Id.* (emphasis in original).

In the duty of care context with respect to corporate fiduciaries, gross negligence has been defined as a "reckless indifference to or a deliberate disregard of the whole body of stockholders' or actions which are without the bounds of reason.'" n429 Because duty of care violations are actionable only if the directors acted with gross negligence, n430 and because in most instances money damages are unavailable to a plaintiff who could theoretically prove a duty of care violation, n431 duty of care violations are rarely found.

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n429 *Tomczak v. Morton Thiokol, Inc., 1990 Del. Ch. LEXIS 47, 1990 WL 42607, at *12 (Del. Ch. Apr. 5, 1990)* (quoting *Allaun v. Consol. Oil Co., 16 Del. Ch. 318, 147 A. 257, 261 (Del. Ch. 1929)*, and citing *Gimbel v. Signal Cos., Inc., 316 A.2d 599, 615 (Del. Ch.), aff'd, 316 A.2d 619 (Del. 1974))*. For example, on a motion to dismiss, in order for a plaintiff to successfully plead that the directors acted with gross negligence (as opposed to regular negligence), the plaintiff should articulate "facts that suggest a *wide* disparity between the process the directors used . . . and that which would have been rational." *Guttman v. Huang, 823 A.2d 492, 507 n.39 (Del. Ch. 2003)* (emphasis in original).

[*163]

n430 *Brehm, 746 A.2d at 259*.
n431 *See 8 Del. C. § 102(b)(7)*.

D. The Fiduciary Duty of Loyalty

The fiduciary duty of loyalty was described in the seminal case of *Guth v. Loft, Inc.*, in these strict and unyielding terms:

> Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. . . . A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands [*164] that there be no conflict between duty and self-interest. n432

n432 *23 Del. Ch. 255, 5 A.2d 503, 510 (Del. 1939)*.

More recently, the Delaware Supreme Court stated that there is no safe-harbor for divided loyalties in Delaware, n433 and that the duty of loyalty, in essence, "mandates that the best interest of the corporation and its shareholders take[] precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." n434 The classic example that implicates the duty of loyalty is when a fiduciary either appears on both sides of a transaction or receives a personal benefit not shared by all shareholders. n435

n433 *Weinberger, 457 A.2d at 710*.
n434 *Cede III, 634 A.2d at 361* (citing *Pogostin v. Rice, 480 A.2d 619, 624 (Del. 1984))*.
n435 *Id. at 362* (citing *Nixon v. Blackwell, 626 A.2d 1366, 1375 (Del. 1993))*.

[*165]

In the specific context at issue here with respect to a classic duty of loyalty claim, Ovitz, as a fiduciary of Disney, was required to act in an "adversarial and arms-length manner" when negotiating his termination and not abuse or manipulate the corporate process by which that termination was granted. n436 He was obligated to act in good faith and "not advantage himself at the expense of the Disney shareholders." n437

n436 *In re The Walt Disney Co. Derivative Litig. ("Disney II"), 825 A.2d 275, 290 (Del. Ch. 2003)*; *Disney III, 2004 Del. Ch. LEXIS 132,*20, 2004 WL 2050138, at *7*.
n437 *Disney II, 825 A.2d at 290*; *see IHS, 2004 Del. Ch. LEXIS 122, *30, 2004 WL 1949290, at *16*.

E. Section 102 (b) (7)

Following the Delaware Supreme Court's landmark decision in *Van Gorkom*, n438 the Delaware General Assembly acted swiftly to enact *8 Del. C. § 102(b)(7)*. n439 *Section 102(b)(7)* states that a corporation may include in its certificate of incorporation:

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> (7) A provision eliminating [*166] or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer (x) to a member of the governing body of a corporation which is not authorized to issue capital stock, and (y) to such other person or persons, if any, who, pursuant to a provision of the certificate of incorporation in accordance with *§ 141(a)* of this title, exercise or perform any of the powers or duties otherwise conferred or imposed upon the board of directors by this title.

The [*167] purpose of *Section 102(b)(7)* was explained by the Delaware Supreme Court in this manner:

> The purpose of *Section 102(b)(7)* was *to permit shareholders*- who are entitled to rely upon directors to discharge their fiduciary duties at all times -- to adopt a provision in the certificate of incorporation to exculpate directors from any personal liability for the payment of monetary damages for breaches of their duty of care, but not for duty of loyalty violations, good faith violations and certain other conduct. n440

Recently, Vice Chancellor Strine wrote that, "one of the primary purposes of *§ 102(b)(7)* is to encourage directors to undertake risky, but potentially value-maximizing, business strategies, so long as they do so in good faith." n441 Or in other words, *§ 102(b)(7)* is most useful "when, despite the directors' good intentions, [the challenged transaction] did not generate financial success and . . . the possibility of hindsight bias about the directors' prior ability to foresee that their business plans would not pan out" could improperly influence a *post hoc* judicial evaluation of the directors' actions. n442

n438 *488 A.2d 858*.
[*168]

n439 65 DEL. LAWS, c. 289 (1986).

n440 *Emerald Partners, 787 A.2d at 90* (emphasis in original); *see Malpiede, 780 A.2d at 1095*.
n441 *Prod. Res. Group, L.L.C. v. NCT Group, Inc., 863 A.2d 772, 777 (Del. Ch. 2004).*
n442 *Id.*

The vast majority of Delaware corporations have a provision in their certificate of incorporation that permits exculpation to the extent provided for by *§ 102(b)(7)*. This provision prohibits recovery of monetary damages from directors for a successful shareholder claim, either direct or derivative, that is exclusively based upon establishing a violation of the duty of due care. n443 The existence of an exculpation provision authorized by *§ 102(b)(7)* does not, however, eliminate a director's fiduciary duty of care, because a court may still grant injunctive relief for violations of that duty. n444

n443 *Emerald Partners, 787 A.2d at 91.*

n444 *Malpiede, 780 A.2d at 1095*; E. Norman Veasey, et al., *Delaware Supports Directors With a Three-Legged Stool of Limited Liability, Indemnification, and Insurance, 42 BUS. LAW. 399, 403 (1987)* ("*Section 102(b)(7)* does not eliminate the duty of care that is properly imposed upon directors. Directors continue to be charged under Delaware law with a duty of care in the decisionmaking process and in their oversight responsibilities. The duty of care continues to have vitality in remedial contexts as opposed to actions for personal monetary damages against directors as individuals."). *Cf. Strassburger v. Earley, 752 A.2d 557, 581 (Del. Ch. 2000)* (holding that rescissory damages, although an equita-

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ble remedy, is not appropriate for breaches solely of the duty of care).

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An exculpation provision such as that authorized by *§ 102(b)(7)* is in the nature of an affirmative defense. n445 As a result, it is the burden of the director defendants to demonstrate that they are entitled to the protections of the relevant charter provision. n446

n445 *Emerald Partners, 787 A.2d at 91-92*.
n446 *See id.*; *Emerging Communications, 2004 Del. Ch. LEXIS 70, 2004 WL 1305745, at *42*.

F. Acting in Good Faith

Decisions from the Delaware Supreme Court and the Court of Chancery are far from clear with respect to whether there is a separate fiduciary duty of good faith. n447 Good faith has been said to require an "honesty of purpose," and a genuine care for the fiduciary's constituents, n448 but, at least in the corporate fiduciary context, it is probably easier to define bad faith rather than good faith. n449 This may be so because Delaware law presumes that directors act in good faith when making business judgments. n450 Bad faith has been defined as authorizing a transaction [*170] "for some purpose *other than* a genuine attempt to advance corporate welfare or [when the transaction] is *known to constitute* a violation of applicable positive law." n451 In other words, an action taken with the intent to harm the corporation is a disloyal act in bad faith. A similar definition was used seven years earlier, when Chancellor Allen wrote that bad faith (or lack of good faith) is when a director acts in a manner "unrelated to a pursuit of the corporation's best interests." n452 It makes no difference the reason why the director intentionally fails to pursue the best interests of the corporation. n453

n447

> It does no service to our law's clarity to continue to separate the duty of loyalty from its essence; nor does the recognition that good faith is essential to loyalty demean or subordinate that essential requirement. There might be situations when a director acts in subjective good faith and is yet not loyal (*e.g.*, if the director is interested in a transaction subject to the entire fairness standard and cannot prove financial fairness), but there is no case in which a director can act in subjective bad faith towards the corporation and act loyally. . . . For example, one cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey.

Guttman, 823 A.2d at 506 n.34. See In re Gaylord Container Corp. S'holders Litig., 753 A.2d 462, 475 n.41 (Del. Ch. 2000); *In re ML/EQ Real Estate P'ship Litig., 1999 Del. Ch. LEXIS 238, 1999 WL 1271885, at *4 n.20 (Del. Ch. Dec. 21, 1999)*; *Barkan v. Amsted Indus. Inc., 567 A.2d 1279, 1286 (Del. 1989)*; *Blasius Indus. Inc. v. Atlas Corp., 564 A.2d 651, 663 (Del. 1988)* (holding that because the acts taken by the directors thwarted the shareholder franchise, even if the directors acted in good faith, those actions "constituted an unintended violation of the duty of loyalty that the board owed to the shareholders."); *cf. IHS, 2004 Del. Ch. LEXIS 122, *3, 2004 WL 1949290, at *9* (analyzing good faith claims under the rubrics of care and loyalty, as appropriate, instead of as a separate duty).

[*171]

n448 E. Norman Veasey, *Reflections on Key Issues of the Professional Responsibilities of Corporate Lawyers in the Twenty-First Century, 12 WASH. U. J. L. & POL'Y 1, 9 (2003)*.
n449 Despite the existence of significant jurisprudence with respect to good faith in the contractual context of the covenant of good faith and fair dealing, *see, e.g., Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P., 624 A.2d 1199 (Del. 1993)*, Delaware decisions have shown a reluctance to importing these contractual standards into the corporate fiduciary realm.
n450 *See Allaun, 16 Del. Ch. 318, 147 A. 257*; *Van Gorkom, 488 A.2d at 873*.

n451 *Gagliardi, 683 A.2d at 1051 n.2* (citing *Miller v. AT&T, 507 F.2d 759 (3d Cir. 1974)*, emphasis in original). Chancellor Allen then explained that "there can be no personal liability of

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a director for losses arising from illegal' transactions if a director were financially disinterested, acted in good faith, and relied on advice of counsel reasonably selected in authorizing a transaction." *Id.* In *Cinerama, Inc. v. Technicolor, Inc., 1991 Del. Ch. LEXIS 105, 1991 WL 111134, at *15 (Del. Ch. June 24, 1991)*, Chancellor Allen to a certain extent equated good faith with loyalty when he stated that there was "persuasive evidence" of bad faith on the part of one of the Technicolor directors (Sullivan) because he had met and cooperated with the acquiror before the acquiror had met with the CEO. Sullivan also received a $ 150,000 "finder's fee" for his assistance from the post-merger Technicolor. *1991 Del. Ch. LEXIS 105, *23*. This portion of the decision was not appealed because Cinerama abandoned its claims that the directors acted in bad faith. *Cede III, 634 A.2d at 359*. *See also* Veasey, *infra* n.457 at 448 (noting that intentional violations of law implicate good faith by stating that "the utter failure to follow the minimum expectations of Sarbanes-Oxley, or the NYSE or NASDAQ Rules . . . might . . . raise a good faith issue").

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n452 *In re RJR Nabisco, Inc. S'holder Litig., 1989 Del. Ch. LEXIS 9, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989)*; *cf. Strassburger, 752 A.2d at 581* (holding that certain directors breached their duty of loyalty by "indifference to their duty to protect the interests of the corporation and its minority shareholders," because their primary loyalty was instead given to the interests of their employer).

n453 *See Guttman 823 A.2d at 506 n.34* ("The reason for the disloyalty (the faithlessness) is irrelevant, the underlying motive (be it venal, familial, collegial, or nihilistic) for conscious actions not in the corporation's best interest does not make it faithful, as opposed to faithless."); *Nagy v. Bistricer, 770 A.2d 43, 48 n.2 (Del. Ch. 2000)* (The duty of good faith, "if it is useful at all as an independent concept, [good faith's] utility may rest in its constant reminder . . . that, regardless of his motive, a director who consciously disregards his duties to the corporation and its stockholders may suffer a personal judgment for monetary damages for any harm he causes," even if for a reason "other than personal pecuniary interest.") *Emerging Communications, 2004 Del. Ch. LEXIS 70, *147, 2004 WL 1305745, at *38* (holding that certain defendants violated their duty of "loyalty and/or good faith" because of the uncertainty in defining those terms).

[*173]

Bad faith can be the result of "any emotion [that] may cause a director to [intentionally] place his own interests, preferences or appetites before the welfare of the corporation," including greed, "hatred, lust, envy, revenge, . . . shame or pride." n454 Sloth could certainly be an appropriate addition to that incomplete list if it constitutes a systematic or sustained shirking of duty. n455 Ignorance, in and of itself, probably does not belong on the list, but ignorance attributable to any of the moral failings previously listed could constitute bad faith. It is unclear, based upon existing jurisprudence, whether motive is a necessary element for a successful claim that a director has acted in bad faith, n456 and, if so, whether that motive must be shown explicitly or whether it can be inferred from the directors' conduct. n457

n454 *Guttman, 823 A.2d at 506 n.34*; *cf. Malpiede, 780 A.2d at 1085 n.29* (holding that plaintiffs did not adequately allege a breach of the "duty of loyalty and good faith" merely by pleading conclusory statements that the target's board rejected an offer based upon "(1) the interested director's desire to consummate [the deal proposed by the other bidder], (2) a desire to benefit [the majority shareholders] with a quick deal, (3) dislike' of [the spurned bidder], or (4) a personal desire to complete the sale process."). 455 *See* Hillary A. Sale, *Delaware's Good Faith, 89 CORNELL L. REV. 456, 488-91 (2004)* (advocating application of federal scienter standards from the Rule 10b-5 context to an analysis of whether directors have satisfied their duty of acting in good faith when the allegations Stern from directors' deliberate indifference).

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n456 *Compare Van Gorkom, 488 A.2d at 873, with Zirn v. VLI Corp., 681 A.2d 1050, 1061-62 (Del. 1996)* (discussing good faith motives with respect to proxy disclosures) and *Johnson v. Shapiro, 2002 Del. Ch. LEXIS 122, 2002 WL 31438477 (Del. Ch. Oct. 18, 2002)* (same).

n457 *See E.* Norman Veasey, *State-Federal Tension in Corporate Governance and the Profes-*

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sional Responsibilities of Advisors, 28 J. CORP. L. 441, 447 (2003).

Shrouded in the fog of this hazy jurisprudence, the defendants' motion to dismiss this action was denied because I concluded that the complaint, together with all reasonable inferences drawn from the well-plead allegations contained therein, could be held to state a non-exculpated breach of fiduciary duty claim, insofar as it alleged that Disney's directors "*consciously and intentionally disregarded their responsibilities*, adopting a we don't care about the risks' attitude concerning a material corporate decision." n458

n458 *Disney II, 825 A.2d at 289* (emphasis in-original); *see Gagliardi, 683 A.2d at 1051* ("In the absence of facts showing self-dealing or improper motive, a corporate officer or director is not legally responsible to the corporation for losses that may be suffered as a result of a decision that an officer made or that directors authorized in good faith.").

[*175]

Upon long and careful consideration, I am of the opinion that the concept of *intentional dereliction of duty*, a *conscious disregard for one's responsibilities*, is an appropriate (although not the only) standard for determining whether fiduciaries have acted in good faith. n459 Deliberate indifference and inaction *in the face of a duty to act* is, in my mind, conduct that is clearly disloyal to the corporation. n460 It is the epitome of faithless conduct.

n459 Indeed, *§ 102(b)(7)* on its face seems to equate bad faith with intentional misconduct. *See 8 Del. C. § 102(b)(7)(ii)*.

n460 This is, in my opinion, what the Supreme Court was trying to communicate in *Van Gorkom* when it wrote:

> In the specific context of a proposed merger of domestic corporations, *a director has a duty under 8 Del. C. § 251(b)*, along with his fellow directors, to act in an informed manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders. *Certainly in the merger context, a director may not abdicate that duty* by leaving to the shareholders alone the decision to approve or disapprove the agreement. Only an agreement of merger satisfying the requirements of *8 Del. C. § 251(b)* may be submitted to the shareholders under *§ 251(c)*.
>
> *It is against those standards that the conduct of the directors of Trans Union must be tested*, as a matter of law and as a matter of fact, regarding their exercise of an informed business judgment in voting to approve the Pritzker proposal.

488 A.2d at 873 (citations and footnotes omitted; emphases added). In other words, in *Van Gorkom*, the directors were under a statutory duty to act. That duty, by law, could not be abdicated to the shareholders, much less to the officers of the corporation.

[*176]

To act in good faith, a director must act at all times with an honesty of purpose and in the best interests and welfare of the corporation. The presumption of the business judgment rule creates a presumption that a director acted in good faith. In order to overcome that presumption, a plaintiff must prove an act of bad faith by a preponderance of the evidence. To create a definitive and categorical definition of the universe of acts that would constitute bad faith would be difficult, if not impossible. And it would misconceive how, in my judgment, the concept of good faith operates in our common law of corporations. Fundamentally, the duties traditionally analyzed as belonging to corporate fiduciaries, loyalty and care, are but constituent elements of the overarching concepts of allegiance, devotion and faithfulness that must guide the conduct of every fiduciary. The good faith required of a corporate fiduciary includes not simply the duties of care and loyalty, in the narrow sense that I have discussed them above, but all actions required by a true faithfulness and devotion to the interests of the corporation and its shareholders. A failure to act in good faith may be shown, for [*177] instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, n461 where the fiduciary acts with the intent to violate applicable positive law, n462 or where the fiduciary intentionally fails to act in the face of a known duty to act,

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demonstrating a conscious disregard for his duties. n463 There may be other examples of bad faith yet to be proven or alleged, n464 but these three are the most salient. As evidenced by previous rulings in this case both from this Court and the Delaware Supreme Court, issues of the Disney directors' good faith (or lack thereof) are central to the outcome of this action. With this background, I now turn to applying the appropriate standards to defendants' conduct.

n461 *Gagliardi, 683 A.2d at 1051 n.2*.
n462 *Id.*

n463 *Disney II, 825 A.2d at 289-90*; *see Allaun, 147 A. at 261* (further judicial scrutiny is warranted if the transaction is a result of directors' "reckless indifference to or a deliberate disregard of the interests of the whole body of stockholders."); *Gimbel, 316 A.2d at 604* (motion for a preliminary injunction denied, *inter alia*, because there was "nothing in the record [that] would justify a finding . . . that the directors acted . . . out of improper motive or *intentional disregard of shareholder interests.")* (emphasis added); *see also Caremark, 698 A.2d at 971-72* (where the fiduciaries' failure to act was allegedly "sustained or systematic"). The first two of these examples seem to sound in the fiduciary duty of loyalty, whereas the last appears to be an extension, or rather, an example of, severe violations of the fiduciary duty of care. In the end, so long as the role of good faith is understood, it makes no difference whether the words "fiduciary duty of" are placed in front of "good faith," because acts not in good faith (regardless of whether they might fall under the loyalty or care aspects of good faith) are in any event non-exculpable because they are disloyal to the corporation. *See 8 Del. C. § 102(b)(7)*.

[*178]

n464 Another example of how the concept of good faith may operate in a situation where ensuring director compliance with the fiduciary duties of care and loyalty (as we have traditionally defined those duties) may be insufficient to protect shareholders' interests, is found in *8 Del. C. § 144(a)*. Under *§ 144(a)*, a transaction between a corporation and its directors or officers will be deemed valid if approved by a majority of the independent directors, assuming three criteria are met: 1) the approving directors were aware of the conflict inherent in the transaction; 2) the approving directors were aware of all facts material to the transaction; and 3) the approving directors acted in good faith. In other words, the inside transaction is valid where the independent and disinterested (loyal) directors understood that the transaction would benefit a colleague (factor 1), but they considered the transaction in light of the material facts (factor 2 -- due care) mindful of their duty to act in the interests of the corporation, unswayed by loyalty to the interests of their colleagues or cronies (factor 3 -- good faith). On the other hand, where the evidence shows that a majority of the independent directors were aware of the conflict and all material facts, in satisfaction of factors 1 and 2 (as well as the duties of loyalty and care), but acted to reward a colleague rather than for the benefit of the shareholders, the Court will find that the directors failed to act in good faith and, thus, that the transaction is voidable. In such a case, the duties of care and loyalty, as traditionally defined, might be insufficient to protect the equitable interests of the shareholders, and the matter would turn on the good faith of the directors.

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III. ANALYSIS

Stripped of the presumptions in their favor that have carried them to trial, n465 plaintiffs must now rely on the evidence presented at trial to demonstrate by a preponderance of the evidence that the defendants violated their fiduciary duties and/or committed waste. More specifically, in the area of director action, plaintiffs must prove by a preponderance of the evidence that the presumption of the business judgment rule does not apply either because the directors breached their fiduciary duties, acted in bad faith or that the directors made an "unintelligent or unadvised judgment," n466 by failing to inform themselves of all material information reasonably available to them before making a business decision. n467

n465 *See Disney II, 825 A.2d at 279*; *Disney III, 2004 Del. Ch. LEXIS 132, 2004 WL 2050138, at *3*.
n466 *Mitchell, 167 A. at 833*; *Van Gorkom, 488 A.2d at 872*.
n467 *Brehm, 746 A.2d at 259*; *Van Gorkom, 488 A.2d at 872*; *Kaplan v. Centex Corp., 284 A.2d 119, 124 (Del. 1971)*.

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If plaintiffs cannot rebut the presumption of the business judgment rule, the defendants will prevail. If plaintiffs succeed in rebutting the presumption of the business judgment rule, the burden then shifts to the defendants to prove by a preponderance of the evidence that the challenged transactions were entirely fair to the corporation. n468

n468 *Technicolor, Inc., 663 A.2d at 1162*; *Emerald Partners, 787 A.2d at 91*.

As it relates to director inaction, plaintiffs will prevail upon proving by a preponderance of the evidence that the defendants breached their fiduciary duties by not acting. In order to invoke the protections of the provision in the Company's certificate of incorporation authorized by *8 Del. C. § 102(b)(7)*, the defendants must prove by a preponderance of the evidence that they are entitled to the protections of that provision. n469

n469 *Emerald Partners, 787 A.2d at 95*.

[*181]

B. Defendants Did Not Commit Waste

Plaintiffs pursued a claim for waste at trial and argued in their briefs that they have proven this claim. n480 As stated above, the standard for waste is a very high one that is difficult to meet. n481 Plaintiffs refer to Professor Murphy's opinion that the OEA improperly incentivized Ovitz to leave the Company and receive an NFT, rather than complete the term of the OEA, to support their argument for waste. n482 Of course, Professor Murphy's opinion relies on the assumptions that either Ovitz would be able to procure for himself an NFT, or that Eisner had agreed to terminate him even before Ovitz was hired.

n480 Ovitz had moved for summary judgment on the waste claim, but neither party addressed it in the summary judgment briefing or at oral argument, and the motion for summary judgment was therefore denied. *Disney III, 2004 Del. Ch. LEXIS 132, 2004 WL 2050138, at *6*.

[*187]

n481 *See supra* notes 419-420 and accompanying text.

n482 PTE 426 at 22-23.

The record does not support these assertions in any conceivable way. Apart from his job performance, Ovitz was never in a position to determine if he would be terminated, and if so, whether it would be with or without cause. As it relates to job performance, I find it patently unreasonable to assume that Ovitz intended to perform just poorly enough to be fired quickly, but not so poorly that he could be terminated for cause. First, based upon my personal observations of Ovitz, he possesses such an ego, and enjoyed such a towering reputation before his employment at the Company, that he is not the type of person that would intentionally perform poorly. Ovitz did not build Hollywood's premier talent agency by performing poorly. Second, nothing in the trial record indicates to me that Ovitz intended to bring anything less than his best efforts to the Company. Additionally, I have found and concluded above that Eisner believed Ovitz would be an excellent addition to the company throughout 1995, n483 a far [*188] cry from plaintiffs' accusations of deciding to hire him for the purpose of firing him shortly thereafter with a spectacular severance payoff.

n483 *See supra* text "Ovitz's Early Performance" at 32.

More importantly, however, I conclude that given his performance, Ovitz could not have been fired for cause under the OEA. Any early termination of his employment, therefore, had to be in the form of an NFT. In reaching this conclusion, I rely on the expert reports of both Feldman and Fox, whose factual assumptions are generally consonant with my factual findings above. Nevertheless, by applying the myriad of definitions for gross negligence and malfeasance discussed by Donohue, Feldman and Fox, I also independently conclude, based upon the facts as I have found them, that Ovitz did not commit gross negligence or malfeasance while serving as the Company's President.

As a result, terminating Ovitz and paying the NFT did not constitute waste because he could not be terminated for cause and because many of the [*189] defendants gave credible testimony that the Company would be better off without Ovitz, n484 meaning that it would be impossible for me to conclude that the termination and receipt of NFT benefits resulted in "an exchange that is so one sided that no business person of ordinary, sound

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judgment could conclude that the corporation has received adequate consideration," n485 or a situation where the defendants have "irrationally squandered or given away corporate assets." n486 In other words, defendants did not commit waste.

n484 *See supra* note 326.
n485 *Brehm, 746 A.2d at 263*; *Disney I, 731 A.2d at 362* (quoting *Glazer, 658 A.2d at 183*.)
n486 *Brehm, 746 A.2d at 263*.

C. The Old Board's Decision to Hire Ovitz and the Compensation Committee's Approval of the OEA Was Not Grossly Negligent and Not in Bad Faith

The members of the "Old Board" (Eisner, Bollenbach, Litvack, Russell, Roy Disney, Gold, Nunis, Poitier, Stern, Walker, [*190] Watson, Wilson, Bowers, Lozano and Mitchell) were required to comply with their fiduciary duties on behalf of the Company's shareholders while taking the actions that brought Ovitz to the Company. For the future, many lessons of what not to do can be learned from defendants' conduct here. Nevertheless, I conclude that the only reasonable application of the law to the facts as I have found them, is that the defendants did not act in bad faith, and were at most ordinarily negligent, in connection with the hiring of Ovitz and the approval of the OEA. In accordance with the business judgment rule (because, as it turns out, business judgment *was* exercised), ordinary negligence is insufficient to constitute a violation of the fiduciary duty of care. I shall elaborate upon this conclusion as to each defendant.

1. Eisner

Eisner was clearly the person most heavily involved in bringing Ovitz to the Company and negotiating the OEA. He was a long-time friend of Ovitz and the instigator and mastermind behind the machinations that resulted in Ovitz's hiring and the concomitant approval of the OEA. In that aspect, Eisner is the most culpable of the defendants. He was pulling the strings; [*191] he knew what was going on. On the other hand, at least as the duty of care is typically defined in the context of a business judgment (such as a decision to select and hire a corporate president), of all the defendants, he was certainly the most informed of all reasonably available material information, making him the least culpable in that regard.

This dichotomy places the Court in a somewhat awkward position. By virtue of his Machiavellian (and imperial) nature as CEO, and his control over Ovitz's hiring in particular, Eisner to a large extent is responsible for the failings in process that infected and handicapped the board's decisionmaking abilities. n487 Eisner stacked his (and I intentionally write "his" as opposed to "the Company's") board of directors with friends and other acquaintances who, though not necessarily beholden to him in a legal sense, were certainly more willing to accede to his wishes and support him unconditionally than truly independent directors. n488 On the other hand, I do not believe that the evidence, considered fairly, demonstrates that Eisner actively took steps to defeat or short-circuit a decisionmaking process that would otherwise have occurred. [*192]

n487 It is precisely in this context -- an imperial CEO or controlling shareholder with a supine or passive board -- that the concept of good faith may prove highly meaningful. The fiduciary duties of care and loyalty, as traditionally defined, may not be aggressive enough to protect shareholder interests when the board is well advised, is not legally beholden to the management or a controlling shareholder and when the board does not suffer from other disabling conflicts of interest, such as a patently self-dealing transaction. Good faith may serve to fill this gap and ensure that the persons entrusted *by shareholders* to govern Delaware corporations do so with an honesty of purpose and with an understanding of whose interests they are there to protect. In a thoughtful article, Professor Lyman Johnson has written about the richer historical and literary understanding of loyalty and care, beyond their more narrow "non-betrayal" and "process" uses in contemporary jurisprudence. Professor Johnson's description of a more expansive duty of loyalty to encompass affirmative attention and devotion may, in my opinion, fit comfortably within the concept of good faith (or vice versa) as a constituent element of the overarching concept of faithfulness. *See* Lyman P. Q. Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law, 28 DEL. J. CORP. LAW 27 (2003).*
[*193]

n488 Some of this deference may be due, at least in part, to Eisner's success at the Company's helm in the eleven years preceding these events. Tr. 4131:20-4133:1. Nevertheless, the board's collective kowtowing in regard to Ovitz's hiring is also due to Eisner's desire to surround himself with yes men. *See* 3845:20-3847:3 (Gold) (testifying that he believes that Bowers, Poitier, Stern, Wat-

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son and Mitchell are not competent as board members). As examples of Eisner's success at surrounding himself with non-employee directors who would have sycophantic tendencies: Russell was Eisner's personal attorney, Tr. 2650:10-2651:7; Mitchell was hand-selected by Eisner to serve on the board, Tr. 5627:18-5628:2, and now serves as chairman, a position which provides Mitchell with substantial remuneration worth about $ 500,000 annually, Tr. 5629:9-24; Reveta Bowers is an administrator of a private school in West Hollywood, California, Tr. 5901:11-5903:9, that was attended by three of Eisner's children, Tr. 5944:24-5945:8, and to which Eisner and entities related to the Company have made substantial contributions, Tr. 5945:9-5947:16; O'Donovan was president of Georgetown University from 1989 to 2001, Tr. 6710:7-6711:15, (Eisner served on Georgetown University's board of directors from 1985 to 1991, Tr. 6712:16-24) where Eisner's son attended college until 1992, Tr. 6712:16-6713:3, and to which Eisner made a $ 1 million donation in 1996 at O'Donovan's request, Tr. 6713:4-16.

[*194]

Eisner had demonstrated a desire to bring Ovitz to the Company before mid-1995. His efforts to actually hire Ovitz became more intense in the summer of 1995, culminating in the signing of the OLA on August 14 of that year, together with the press release issued that same day. Eisner obtained no consent or authorization from the board before agreeing to hire Ovitz, before agreeing to the substantive terms of the OLA, or before issuing the press release. n489 Indeed, outside of his small circle of confidantes, it appears that Eisner made no effort to inform the board of his discussions with Ovitz until after they were essentially completed and an agreement in principle had been reached.

n489 Nevertheless, I do not doubt that Eisner was entirely convinced that the board would support him in this decision.

As a general rule, a CEO has no obligation to continuously inform the board of his actions as CEO, or to receive prior authorization for those actions. n490 Nevertheless, a reasonably prudent CEO (that is [*195] to say, a reasonably prudent CEO with a board willing to think for itself and assert itself against the CEO when necessary) would not have acted in as unilateral a manner as did Eisner when essentially committing the corporation to hire a second-in-command, appoint that person to the board, and provide him with one of the largest and richest employment contracts ever enjoyed by a non-CEO. I write, "essentially committing," because although I conclude that legally, Ovitz's hiring was not a "done deal" as of the August 14 OLA, n491 it was clear to Eisner, Ovitz, and the directors who were informed, that as a practical matter, it certainly was a "done deal." n492

n490 In a corporation of the Company's size and scope, the only logical way for the corporation to operate is that the everyday governance should be "under the direction" of the board of directors rather than "by" the board. More than twenty years ago, this Court wrote (and it is even more true today):

> A fundamental precept of Delaware corporation law is that it is the board of directors, and neither shareholders nor managers, that has ultimate responsibility for the management of the enterprise. Of course, given the large, complex organizations though which modern multi-function business corporations often operate, the law recognizes that corporate boards, comprised as they traditionally have been of persons dedicating less than all of their attention to that role, cannot themselves manage the operations of the firm, but may satisfy their obligations by thoughtfully appointing officers, establishing or approving goals and plans and monitoring performance. Thus *Section 141 (a) of DGCL* expressly permits a board of directors to delegate managerial duties to officers of the corporation, except to the extent that the corporation's certificate of incorporation or bylaws may limit or prohibit such a delegation.

Chapin v. Benwood Foundation, Inc., 402 A.2d 1205, 1211 (Del. Ch. 1979) (quoting *Abercrombie v. Davies, 35 Del. Ch. 599, 123 A.2d 893, 899 (Del. Ch. 1956)*), *aff'd sub nom. Harrison v. Chapin, 415 A.2d 1068 (Del. 1980).*

[*196]

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Notwithstanding the foregoing, Eisner's actions in connection with Ovitz's hiring should not serve as a model for fellow executives and fiduciaries to follow. His lapses were many. He failed to keep the board as informed as he should have. He stretched the outer boundaries of his authority as CEO by acting without specific board direction or involvement. He prematurely issued a press release that placed significant pressure on the board to accept Ovitz and approve his compensation package in accordance [*199] with the press release. To my mind, these actions fall far short of what shareholders expect and demand from those entrusted with a fiduciary position. <u>Eisner's failure to better involve the board in the process of Ovitz's hiring, usurping that role for himself, although not in violation of law, n496 does not comport with how fiduciaries of Delaware corporations are expected to act</u>.

> n496 Eisner's authority to take these actions was not restricted in any way by statute, the Company's certificate of incorporation, bylaws, or a board resolution.

Despite all of the legitimate criticisms that may be leveled at Eisner, especially at having enthroned himself as the omnipotent and infallible monarch of his personal Magic Kingdom, I nonetheless conclude, after carefully considering and weighing all the evidence, that Eisner's actions were taken in good faith. That is, Eisner's actions were taken with the subjective belief that those actions were in the best interests of the Company -- he believed that his taking charge [*200] and acting swiftly and decisively to hire Ovitz would serve the best interests of the Company notwithstanding the high cost of Ovitz's hiring and notwithstanding that two experienced executives who had arguably been passed over for the position (Litvack and Bollenbach) were not completely supportive. n497 Those actions do not represent a knowing violation of law or evidence a conscious and intentional disregard of duty. In conclusion, Eisner acted in good faith and did not breach his fiduciary duty of care because he was not grossly negligent.

> n497 Eisner's stellar track record as the Company's Chairman and CEO over the preceding eleven years (from 1984 to 1995) bolsters his belief that his decisions generally benefit the Company and its shareholders.

3. Watson

Watson's main role in Ovitz's hiring and his election as President of the Company was helping Russell evaluate the financial ramifications of the OEA. n508 Watson is a past Chairman of the Company's board, and served in that position when Eisner and Wells were hired in 1984. n509 Watson was familiar with Crystal, having worked with him on Eisner's and Wells' contracts in 1984 and again in 1989. n510

> n508 Tr. 7822:1-7823:7. Russell phoned Watson on several occasions beginning on August 2, 1995. *See* DTE 120 at WD07493-95.
> n509 Tr. 7803:8-7813:6.
> n510 Tr. 7825:18-7827:8.

Watson conducted extensive analyses of Ovitz's proposed compensation package, sharing those analyses with Crystal and Russell at their meeting on August 10, and in their later discussions stemming from that meeting. He was also involved in determining how to replace the proposed option guarantee with the extended exercisability of Ovitz's options (together with other features). He also spoke with [*207] Lozano (although the date is unclear) sometime before the September 26, 1995 compensation committee meeting in order to inform him somewhat of his and Russell's analyses and discussions.

4. Poitier and Lozano

Poitier and Lozano were the remaining members of the compensation committee that considered the economic terms of the OEA. It is not disputed that they were far less involved in the genesis of the OEA than were Russell, and to a lesser extent, Watson. The question in dispute is whether their level of involvement in the OEA was so low as to constitute gross negligence and, therefore, a breach of their fiduciary duty of care, or whether their actions evidence a lack of good faith. As will be shown, I conclude that neither of these men acted in a grossly negligent manner or in bad faith.

Poitier is a man celebrated for his work both within and outside the entertainment industry. n515 Poitier was elected to the Company's board of directors in 1994, [*209] and attended his first board meeting during January of 1995. n516 Lozano was the publisher of the nation's largest Spanish language daily newspaper, is the former chairman of the board of that entity, and also served as the United States' ambassador to El Salvador. n517 Lozano had a long tenure on the Company's board of directors, serving from the early 1980s until 2001.

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n518 Lozano also has experience on the compensation committees of other corporations. n519

n515 *See* Tr. 7101:19-7116:20; 7118:8-7119:8; 7122:1-7123:5.
n516 Tr. 7123:6-7124:15.
n517 *See Tr.* 7623:5-7624:14.
n518 Tr. 7624:15-7625:3; 7628:3-7.
n519 Tr. 7628:11-15.

There is no question that Poitier and Lozano's involvement in the process of Ovitz's hiring came very late in the game. As found above, Poitier received a call from Russell on August 13 (and another the next day), during which they discussed the terms of the proposed OLA. n520 Lozano spoke with Watson regarding this same subject. It appears [*210] that neither Poitier nor Lozano had any further involvement with the hiring process, apart from these phone calls, until the September 26, 1995 compensation committee meeting.

n520 *See* Tr. 2445:22-2447:13.

At that meeting, both Poitier and Lozano received the term sheet that explained the key terms of Ovitz's contract, and they were present for and participated in the discussion that occurred. Both then voted to approve the terms of the OEA, and both credibly testified that they believed they possessed sufficient information at that time to make an informed decision. n521 Plaintiffs largely point to two perceived inadequacies in this meeting (and in Poitier and Lozano's business judgment) -- first, that insufficient time was spent reviewing the terms of Ovitz's contract and, second, that Poitier and Lozano were not provided with sufficient documentation, including Crystal's correspondence, Watson's calculations, and a draft of the OEA. These arguments understandably hearken back to *Van Gorkom* [*211] , where the Supreme Court condemned the Trans Union board for agreeing to a material transaction after a board meeting of about two hours and without so much as a term sheet of the transaction as contemplated. Although the parallels between *Van Gorkom* and this case at first appear striking, a more careful consideration will reveal several important distinctions between the two.

n521 Tr. 7136:23-7137:3; 7634:18-23; 7636:2-10.

First and foremost, the nature of the transaction in *Van Gorkom* is fundamentally different, and orders of magnitude more important, than the transaction at issue here. In *Van Gorkom*, the Trans Union board was called into a special meeting on less than a day's notice, without notice of the reason for the meeting, to consider a merger agreement that would result in the sale of the entire company. As footnoted above, Delaware law, *as a matter of statute*, requires directors to take certain [*213] actions in connection with a merger of the corporation, as was being contemplated by Trans Union. No statute required the Company's board to take action in connection with Ovitz's hiring. The Company's governing documents provide that the officers of the corporation will be selected by the board of directors, and the charter of the compensation committee states that the committee is responsible for establishing and approving the salary of the Company's President. That is exactly what happened. The board meeting was not called on short notice, and the directors were well aware that Ovitz's hiring would be discussed at the meeting as a result of the August 14 press release more than a month before. Furthermore, analyzing the transactions in terms of monetary value, and even accepting plaintiffs' experts' bloated valuations for comparison purposes, it is beyond question that the $ 734 million sale of Trans Union was material and significantly larger than the financial ramifications to the Company of Ovitz's hiring. n533

n533 Eisner's decision to enter into the OLA with Ovitz, and the compensation committee's later decision to approve the economic terms of the OEA on September 26, 1995, have to be understood in context. In fiscal 1996, the Company had almost $ 19 billion in revenues, and more than $ 3 billion in operating income. PTE 442 at WD02085. Roth, below both Eisner and Ovitz in the chain of command, had authority to budget the development and marketing of feature films, apparently without prior authorization from Eisner, Ovitz or the board. *See supra* note 149. According to a contemporary memorandum written by Eisner, an average live-action feature film cost $ 33 million to develop and another $ 19 million to market and distribute, for a total cost of $ 52 million per film. PTE 558 at WD08652. Disney had budgeted thirty such live-action feature films for fiscal 1996, though Eisner expected that number to decline by one-third in the coming years. *Id.;* PTE 587 at WD10772. Eisner also believed

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> that Roth was responsible for losses of $ 60 million attributable only to three films, and that his expenditures were $ 90 million "more than what was prudent." PTE 67 at DD002980; *see* PTE 587 at WD10767 (two box office failures alone resulted in a $ 45 million negative variance to profit forecasts). The big-budget summer blockbuster, *The Rock*, was expected to cost $ 122.9 million ($ 67 million in development, and another $ 55.9 million in distribution and marketing), and *Ransom*, to be released just two weeks after *The Rock*, was expected to cost $ 126 million ($ 68.6 million in production, and $ 57.4 in distribution and marketing). *Id.* at WD 10772. Between these two motion pictures alone, Roth had the authority to spend almost $ 250 million, with an expected profit of ten percent. *Id.* If Roth had this much authority, the proposition that Eisner, the Company's chief executive officer, entered into the OLA without prior board authorization, or that the compensation committee approved Ovitz's contract based upon a term sheet and upon less than an hour of discussion, seems eminently reasonable given the OEA's (relatively small) economic size.

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Second, the Trans Union board met for about two hours to discuss and deliberate on this monumental transaction in the life of Trans Union. A precise amount of time for the length of the compensation committee meeting, and more specifically, the length of the discussion regarding the OEA, is difficult to establish. The minutes of the compensation committee's meeting and the full board's meeting indicate that the compensation committee meeting convened at 9:00 a.m., and that the full board's meeting convened at 10:00 a.m., leaving no more than an hour for the compensation committee to meet. Lozano, although he had little recollection of the meeting, believed that the compensation committee meeting ran long-until 10:30 a.m. As I found above, the meeting lasted about an hour. Russell testified that the discussion of the OEA took about 25-30 minutes, significantly more time than the brief discussion reflected in the minutes would seem to indicate. Lozano believed that the committee spent "perhaps four times as much time on Mr. Ovitz's contract than we did on Mr. Russell's compensation."

I am persuaded by Russell and Lozano's recollection that the OEA was discussed for a not insignificant length of time. n539 Is that length of time markedly less than the attention given by the Trans Union board to the merger agreement they were statutorily charged with approving or rejecting? Yes. Is that difference probative on the issue of whether the compensation committee adequately discussed the OEA? Not in the least. When the Trans Union board met for those two hours, it was the very first time any of those directors had discussed a sale of the company. n540 Here, all the members of the committee were aware in advance that Ovitz's hiring would be discussed, and the members of the committee had also previously had more than minimal informal discussions amongst themselves as to the *bona fides* of the OEA before the meeting ever occurred. Furthermore, as mentioned above, the nature and scope of the transactions are fundamentally [*217] different.

> [a drafting bit of advice for lawyers drafting minutes] n539 It would have been extremely helpful to the Court if the minutes had indicated in any fashion that the discussion relating to the OEA was longer and more substantial than the discussion relating to the myriad of other issues brought before the compensation committee that morning.
> n540 *See 488 A.2d at 875*.

Third, the Trans Union board had absolutely no documentation before it when it considered the merger agreement. n541 The board was completely reliant on the misleading and uninformed presentations given by Trans Union's officers (Van Gorkom and Romans). n542 In contrast, the compensation committee was provided with a term sheet of the key terms of the OEA and a presentation was made by Russell (assisted by Watson), who had personal knowledge of the relevant information by virtue of his negotiations with Ovitz and discussions with Crystal. Additionally, the testimony and documentary evidence support this conclusion. It is true that the compensation committee [*218] did not review and discuss the then-existing draft of the full text of the OEA. This, however, is not required. Nor is it necessary for an expert to make a formal presentation at the committee meeting in order for the board to rely on that expert's analysis, although that certainly would have been the better course of action. Furthermore, the Company's compensation committee reasonably and wisely left the task of negotiating and drafting the actual text of the OEA in the hands of the Company's counsel.

> n541 *Id.*
> n542 *Id. at 874-78*.

Fourth, Trans Union's senior management completely opposed the merger. In contrast, the Company's

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senior management generally saw Ovitz's hiring as a boon for the Company, notwithstanding Litvack and Bollenbach's initial personal feelings. In sum, although Poitier and Lozano did very little in connection with Ovitz's hiring and the compensation committee's approval of the OEA, they did not breach their fiduciary duties. I conclude that they were informed by Russell and Watson of all *material* information reasonably available, [*220] even though they were not privy to every conversation or document exchanged amongst Russell, Watson, Crystal and Ovitz's representatives.

The compensation committee reasonably believed that the analysis of the terms of the OEA was within Crystal's professional or expert competence, and together with Russell and Watson's professional competence in those same areas, the committee relied on the information, opinions, reports and statements made by Crystal, even if Crystal did not relay the information, opinions, reports and statements in person to the committee as a whole. Crystal's analysis was not so deficient that the compensation committee would have reason to question it. Furthermore, Crystal appears to have been selected with reasonable care, especially in light of his previous engagements with the Company in connection with past executive [*222] compensation contracts that were structurally, at least, similar to the OEA. For all these reasons, the compensation committee also is entitled to the protections of *8 Del. C. § 141(e)* in relying upon Crystal.

Viewed objectively, the compensation committee was asked to make a decision knowing that: 1) Ovitz was a third party with whom Russell negotiated at arms' length; 2) regardless of whether Ovitz truly was "the most powerful man in Hollywood," he was a highly-regarded industry figure; 3) Ovitz was widely believed to possess skills and experience that would be very valuable to the Company, especially in light of the Cap-Cities/ABC acquisition, Wells' death, and Eisner's medical problems; 4) in order to accept the Company's presidency, Ovitz was leaving and giving up his very successful business, which would lead a reasonable person to believe that he would likely be highly successful in similar pursuits elsewhere in the industry; 5) the CEO and others in senior management were supporting the hiring; and 6) the potential compensation was not economically material to the Company.

Poitier and Lozano did not intentionally disregard a duty to act, nor did they bury their heads in the sand knowing a decision had to be made. They acted in a manner that they believed was in the best interests of the corporation. Delaware law does not require (nor does it prohibit) directors to take as active a role as Russell and Watson took in connection with Ovitz's hiring. There is no question that in comparison to those two, the actions of Poitier and Lozano may appear casual or uninformed, but I conclude that they did not breach their fiduciary duties and that they acted in good faith in connection with Ovitz's hiring. n559

n559 Furthermore, the compensation committee did not commit a later breach of fiduciary duty nor act in bad faith (or fail to act in good faith) when the final version of the OEA was executed without their approval. The resolution passed on September 26, 1995 clearly contemplated that some details had yet to be decided, *see* PTE 39 at WD01170, and as I concluded on Ovitz's motion for summary judgment, no material changes to the OEA were made during Ovitz's tenure as President. *See Disney III, 2004 Del. Ch. LEXIS 132, 2004 WL 2050138, at *4-6*; *cf. Van Gorkom, 488 A.2d at 883-84* (Van Gorkom executed the amendment to the merger agreement in a manner both inconsistent with the authorization given him by the board and detrimental to Trans Union's interests).

[*225]

5. The Remaining Members of the Old Board n560

n560 The remaining members of the Old Board are: Bollenbach, Litvack, Roy Disney, Nunis, Stern, Walker, O'Donovan, Murphy, Gold, Bowers, Wilson and Mitchell. Even though Bollenbach, Litvack and seemingly Roy Disney were officers of the Company, in electing Ovitz to be President, they were acting in a function that was exclusively directoral according to the Company's certificate of incorporation and, as such, their status as officers is irrelevant. *See* DTE 69 at Article IV, Section 1 (bylaws as of April 26, 1993); PTE 497 at Article IV, Section 1 (bylaws as of April 25, 1994); PTE 2 at Article IV, Section 1 (bylaws as of September 20, 1995); PTE 46 at WD00415 (exhibit to resolution electing officers of the Company on January 22, 1996); PTE 498 at Article IV, Section 1 (bylaws as of April 22, 1996).

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In accordance with the compensation committee's charter, it was that committee's responsibility to establish and approve Ovitz's compensation arrangements. [*226] In accordance with the OLA and the Company's certificate of incorporation, it was the full board's responsibility to elect (or reject) Ovitz as President of the Company. Plaintiffs' argument that the full board had a duty and responsibility to independently analyze and approve the OEA is simply not supported by the record. As a result, the directors' actions must be analyzed in the context of whether they properly exercised their business judgment and acted in accordance with their fiduciary duties when they elected Ovitz to the Company's presidency.

[*227]

The record gives adequate support to my conclusion that the directors, before voting, were informed of who Ovitz was, the reporting structure that Ovitz had agreed to and the key terms of the OEA. Again, plaintiffs have failed to meet their burden to demonstrate that the directors acted in a grossly negligent manner or that they failed to inform themselves of all material information reasonably available when making a decision. They did not intentionally shirk or ignore their duty, but acted in good faith, believing they were acting in the best interests of the Company.

Are there many aspects of Ovitz's hiring that reflect the absence of ideal corporate governance? Certainly, and I hope that this case will serve to inform stockholders, directors and officers of how the Company's fiduciaries underperformed. As I stated earlier, however, the standards used to measure the conduct of fiduciaries under Delaware law are not the same standards used in determining good corporate governance. For all the foregoing reasons, I conclude that none of the defendants breached their fiduciary duties or acted in anything other than good faith in connection with Ovitz's hiring, the approval of the [*228] OEA, or his election to the Company's presidency.

D. Eisner and Litvack Did Not Act in Bad Faith in Connection With Ovitz's Termination, and the Remainder of the New Board Had No Duties in Connection Therewith

The New Board n564 was likewise charged with complying with their fiduciary duties in connection with any actions taken, or required to be taken, in connection with Ovitz's termination. The key question here becomes whether the board was under a duty to act in connection with Ovitz's termination, because if the directors were under no duty to act, then they could not have acted in bad faith by not acting, nor would they have failed to inform themselves of all material information reasonably available before making a decision, because no decision was required to be made. Furthermore, the actions taken by the Company's officers (namely Eisner and Litvack) in connection with Ovitz's termination must be viewed through the lens of whether the board was under a duty to act. If the board was under no such duty, then the officers are justified in acting alone. If the board was under a duty to act and the officers improperly usurped that authority, the analysis would obviously be [*229] different.

n564 The New Board consisted of Eisner, Ovitz, Roy Disney, Gold, Litvack, Nunis, Poitier, Russell, Stern, Walker, Watson, Wilson, Bowers, Lozano, Mitchell, O'Donovan and Murphy.

1. The New Board Was Not Under a Duty to Act

Determining whether the New Board was required to discuss and approve Ovitz's termination requires careful consideration of the Company's governing instruments. The parties largely agree on the relevant language from the Company's certificate of incorporation and bylaws, but as would be expected, they disagree as to the meaning of that language. n565 Article Tenth of the Company's certificate of incorporation states:

> The officers of the Corporation shall be chosen in such a manner, shall hold their offices for such terms and shall carry out such duties as are determined solely by the Board of Directors, subject to the right of the Board of Directors to remove any officer or officers at any time with or without cause. n566

The Company's bylaws state at Article [*230] IV:

> Section 1. General. The officers of the Corporation shall be chosen by the Board of Directors and shall be a Chairman of the Board of Directors (who must be a director), a President, a Secretary and a Treasurer.
>
> . . . .
>
> Section 2. Election. The Board of Directors at its first meeting held after each Annual Meeting of stockholders shall elect the officers of the Corporation who shall hold their offices for such terms and shall exercise such powers and perform

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such duties as shall be determined from time to time solely by the Board of Directors, which determination may be by resolution of the Board of Directors or in any bylaw provision duly adopted or approved by the Board of Directors; and all 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. Any vacancy occurring in any office of the Corporation may be filled only by the Board of Directors.

Section 3. Chairman of the Board of Directors. The Chairman of the Board of Directors shall be the Chief Executive [*231] Officer of the Corporation, shall preside at all meetings of the Board of Directors and of stockholders and shall, subject to the provisions of the Bylaws and the control of the Board of Directors, have general and active management, direction, and supervision over the business of the Corporation and over its officers. . . . He shall perform all duties incident to the office of chief executive and such other duties as from time to time may be assigned to him by the Board of Directors. He shall have the right to delegate any of his powers to any other officer or employee.

Section 4. President. The President shall report and be responsible to the Chairman of the Board. The President shall have such powers and perform such duties as from time to time may be assigned or delegated to him by the Board of Directors or are incident to the office [of] President. n567

Other relevant language comes from the board resolution that elected Ovitz as President, which states: "RESOLVED, that Michael S. Ovitz be, and hereby is, elected President of the Corporation, effective October 1, 1995, to serve in such capacity at the pleasure of this Board of Directors." n568

n565 The parties are also in agreement as to the particular versions of the certificate of incorporation (DTE 185) and bylaws (PTE 498) that were in effect at the time of Ovitz's termination.
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n566 DTE 185 at Article Tenth; *see 8 Del. C. § 142*.
n567 PTE 498 at WD07100-01.
n568 PTE 29 at WD01196.

Having considered these documents, I come to the following conclusions: 1) the board of directors has the sole power to elect the officers of the Company; 2) the board of directors has the sole power to determine the "duties" of the officers of the Company (either through board resolutions or bylaws); 3) the Chairman/CEO has "general and active management, direction, and supervision over the business of the Corporation and over its officers," n569 and that such management, direction and supervision is subject to the control of the board of directors; 4) the Chairman/CEO has the power to manage, direct and supervise the lesser officers and employees of the Company; 5) the board has the *right*, but not the *duty* to remove the officers of the Company with or without cause, and that right is non-exclusive; and 6) because that right is non-exclusive, and because the Chairman/CEO is affirmatively charged with the management, direction and supervision of the officers [*233] of the Company, together with the powers and duties incident to the office of chief executive, the Chairman/CEO, subject to the control of the board of directors, n570 also possesses the *right* to remove the inferior officers and employees of the corporation. n571

n569 PTE 498 at WD07101.
n570 Care should be taken to not read too much into the phrase, "subject to the control of the board of directors," as this "restriction" is simply a reflection of basic agency principles, and not a limitation on the powers and authority that would otherwise be incident to the office of chief executive. A chief executive officer has authority to govern the corporation subject to the control of the board of directors -- that is, the chief executive officer may act as a general agent for the benefit of the corporation and in the manner in which the chief executive officer believes the board of directors desires him to act, but may not act in a manner contrary to the express desires of the board of directors. *See RESTATEMENT (SECOND) OF AGENCY § § 33, 39, 73* (1958). More generally, the rule has been stated thusly:

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> Implied authority (including incidental' and inferred' authority) of the agent to act is a natural consequence of the express authority granted. It is implied from what is actually manifested to the agent by the principal. It is obvious that implied authority cannot, by its very nature, be inconsistent with express authority because any expression of actual authority must control.

WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 15 (3d ed. 2001). For example, as it would apply to this case, the chief executive officer possesses the authority to remove inferior employees (including officers) so long as the board of directors does not expressly limit or negate the chief executive officer's implied or inherent authority to do so. No member of the New Board expressed, either contemporaneously or at trial, any objection to Ovitz's termination.

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n571 These conclusions conform to the Company's custom and practice. *See* Tr. 6150:6-16 (Litvack) (testifying that "loads" of Company officers were terminated during his tenure as general counsel and that the board never once took action in connection with their terminations). The chief executive officer's non-exclusive (because it is shared with the board) right to employ and terminate inferior officers and. employees extends to employees who are also directors. *See* 2 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § § 499 (perm ed. rev. vol. 1998). The power to terminate inferior officers may be delegated by the board to an officer/agent even though the decision may require "the highest degree of judgment and discretion." *Id.* § 495. Fletcher's treatise also contains language that would indicate that, *under certain circumstances*, the removal of officers must occur by the directors:

> The removal [of directors, other officers and agents] must *ordinarily* be by the body or officer authorized to elect or appoint. . . . Absent express authority, the [presiding officer] of a corporation has no power to remove an officer appointed by the board of directors *where the power of removal is in the board*, but a managing agent of a corporation may be removed from that position, when the term of employment has expired, by the [presiding officer] of the company by whom that agent was appointed.

Id. at § 357 (emphases added and citations omitted). Nevertheless, this same section also indicates that provisions in any particular corporation's governing documents would supercede this general rule: "If the statutes, charter or bylaws place the power of removal in the directors *or other officers*, as is usually the case as to offices that are not directorships, they are the ones to exercise it." *Id.* (emphasis added and citations omitted). The most applicable statement in any of the leading Delaware treatises with respect to the removal of officers comes from Folk's treatise, where conceding a lack of positive law on the issue, it is stated that "presumably, the removal of officers is governed by the same provisions that regulate their election." RODMAN WARD, JR. ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 142.4 (4th ed. 2004). My conclusion here does not contravene the general rule (to the extent it is a recognized rule of Delaware law), but is simply an application of the more specific requirements, guidelines and governance contained in the Company's governing documents.

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The New Board unanimously believed that Eisner, as Chairman and CEO, possessed the power to terminate Ovitz without board approval or intervention. Nonetheless, the board was informed of and supported Eisner's decision. n573 <u>The board's simultaneous power to terminate Ovitz, reserved to the board by the certificate of incorporation, did not divest Eisner of the authority to do so, or vice-versa</u>. n574 Eisner used that authority, and terminated Ovitz -- a decision, coupled with the decision to honor the OEA, that resulted in the Company's obligation to pay the NFT. n575 Because Eisner unilaterally terminated Ovitz, as was his right, n576 the New Board was not required to act in connection with Ovitz's termination.

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n573 *See supra* note 570.

n574 The delegation of authority by a board to an officer "does not mean that the board has completely abdicated its authority; moreover, the duties and powers of an officer or general manager do not deprive the directors of all stated authority and responsibilities." FLETCHER, § 495, *supra* note 571.

n575 *See* Tr. 4524:11-4526:24; 4584:3-9; 4919:8-4926:17.

n576 That is, Eisner possessed that right unless and until he received contrary instructions from the board, which he did not. *See supra* note 570.

Therefore, the fact that no formal board action was taken with respect to Ovitz's termination is of no import. This is true regardless of the fact that Ovitz received a large cash payment and the vesting of three million options in connection with his termination. The board had delegated to the compensation committee *ex ante* the responsibility to establish and approve compensation for Eisner, Ovitz and other applicable Company executives and high-paid employees. The approval of Ovitz's compensation arrangements [*237] by the compensation committee on September 26, 1995 included approval for the termination provisions of the OEA, obviating any need to meet and approve the payment of the NFT upon Ovitz's termination. Because the board was under no duty to act, they did not violate their fiduciary duty of care, and they also individually acted in good faith. For these reasons, the members of the New Board (other than Eisner and Litvack, who will be discussed individually below) did not breach their fiduciary duties and did not act in bad faith in connection with Ovitz's termination and his receipt of the NFT benefits included in the OEA.

3. Eisner

Having concluded that Eisner alone possessed the authority to terminate Ovitz and grant him the NFT, I turn to whether Eisner acted in accordance with his fiduciary duties and in good faith when he terminated Ovitz. n588 As will be shown hereafter, I conclude that Eisner did not breach his fiduciary duties and did act in good faith in connection with Ovitz's termination and concomitant receipt of the NFT.

n588 The parties essentially treat both officers and directors as comparable fiduciaries, that is, subject to the same fiduciary duties and standards of substantive review. Thus, for purposes of this case, theories of liability against corporate directors apply equally to corporate officers, making further distinctions unnecessary. For a discussion of the duties and liabilities of non-director corporate officers and how they may differ from those of directors, *see* Lyman P. Q. Johnson, *Corporate Officers and the Business Judgment Rule*, *60 Bus. LAW. 439* (2005); Lawrence A. Hamermesh and A. Gilchrist Sparks, III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, *60 Bus. LAW. 865* (2005).

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When Eisner hired Ovitz in 1995, he did so with an eye to preparing the Company for the challenges that lay ahead, especially in light of the CapCities/ABC acquisition and the need for a legitimate potential successor to Eisner. To everyone's regret, including Ovitz, n589 things did not work out as blissfully as anticipated. Eisner was unable to work well with Ovitz, and Eisner refused to let Ovitz work without close and constant supervision. Faced with that situation, Eisner essentially had three options: 1) keep Ovitz as President and continue trying to make things work; 2) keep Ovitz at Disney, but in a role other than President; or 3) terminate Ovitz. In deciding which route to take, Eisner, consistent with his discretion as CEO, considered keeping Ovitz as the Company's President an unacceptable solution. Shunting Ovitz to a different role within the Company would have almost certainly entitled Ovitz to the NFT, or at the very least, a costly lawsuit to determine whether Ovitz was so entitled. n590 Eisner would have also rightly questioned whether there was another position within the Company where Ovitz could be of use. Eisner was then left with the only alternative he considered [*244] feasible-termination. Faced with the knowledge that termination was the best alternative and knowing that Ovitz had not performed to the high expectations placed upon him when he was hired, Eisner inquired of Litvack on several occasions as to whether a for-cause termination was possible such that the NFT payment could be avoided, and then relied in good faith on the opinion of the Company's general counsel. n591 Eisner also considered the novel alternative of whether a "trade" of Ovitz to Sony would solve the problem by both getting rid of Ovitz and simultaneously relieving the Company of the financial obligations of the OEA. In the end, however, he bit the bullet and decided that the best decision would be to terminate Ovitz and pay the NFT.

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n589 *See* PTE 341; Tr. 1757:15-1758:21.
n590 *See* PTE 7 at PP 10, 11(c), 12(b).
n591 Tr. 4379:23-4381:15; 4419:11-4422:2; 4476:11-4483:7. There being no indication in the record that Eisner was aware that Litvack did not consult with outside counsel in regard to Ovitz's termination, Eisner is entitled to rely on Litvack's assertion that he consulted with outside counsel even though, as explained above, I am not convinced that Litvack did indeed speak with Pierce regarding the cause issue.

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After reflection on the more than ample record in this case, I conclude that Eisner's actions in connection with the termination are, for the most part, consistent with what is expected of a faithful fiduciary. Eisner unexpectedly found himself confronted with a situation that did not have an easy solution. He weighed the alternatives, received advice from counsel and then exercised his business judgment in the manner he thought best for the corporation. Eisner knew all the material information reasonably available when making the decision, he did not neglect an affirmative duty to act (or fail to cause the board to act) and he acted in what he believed were the best interests of the Company, taking into account the cost to the Company of the decision and the potential alternatives. Eisner was not personally interested in the transaction in any way that would make him incapable of exercising business judgment, and I conclude that plaintiffs have not demonstrated by a preponderance of the evidence that Eisner breached his fiduciary duties or acted in bad faith in connection with Ovitz's termination and receipt of the NFT.

IV. CONCLUSION

Based on the findings of fact and conclusions [*246] of law made herein, judgment is hereby entered in favor of the defendants on all counts.

ORDER

For the reasons set forth in the Court's Opinion of this date, judgment is hereby entered in the above captioned action against plaintiffs and in favor of defendants on all counts. The parties shall bear their own costs.

IT IS SO ORDERED.

William B. Chandler III

Chancellor

Dated: August 9, 2005