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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE THE WALT DISNEY COMPANY DERIVATIVE LITIGATION	CONSOLIDATED C.A. NO. 15452-NC

PLAINTIFFS' POST-TRIAL REPLY BRIEF

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PART 1 of 2

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. DEFENDANTS IGNORE AND MISSTATE THE EVIDENTIARY BURDENS 1

II. THE OLD BOARD ACTED IN BAD FAITH IN APPROVING THE OEA 4

A. Eisner Hired Ovitz On His Own And Set Ovitz's Compensation 4

1. The Compensation Committee Did Nothing 5

2. The Old Board Did Nothing 7

3. Disney's Market Price Movements Prove Nothing 9

4. The Contract "Negotiations" Do Not Exculpate Defendants 10

B. The September 26, 1995 Compensation Committee Meeting Was A Mere Formality 15

C. The September 26, 1995 Board Meeting Was A Mere Formality 16

III. THE NEW BOARD ACTED IN BAD FAITH IN ALLOWING OVITZ TO RECEIVE AN NFT PAYOUT 24

A. The New Board Had To Authorize The NFT Payout 24

B. Eisner And Ovitz Bypassed The Board 28

1. Ovitz Was Not Unilaterally "Fired" 28

2. Ovitz And Eisner Engaged In Bilateral, Secret Negotiations 29

C. The New Board Abdicated 35

1. The September 30, 1996 Board Meeting 35

2. The November 25, 1996 Board Meeting 36

3. The EPPC Meetings 38

D. The Board Cannot Reasonably Rely On Disney's Officers In Connection With The Decision To Grant Ovitz An NFT 39

1. No Investigation Was Performed To Determine If Cause Existed To Terminate Ovitz 41

E. Defendants Have Not Met Their Burden Of Proving That Ovitz's Receipt Of A Full NFT Payout Was Entirely Fair 44

1. The Hypothetical Results Of A Jury Trial In A Lawsuit Not Contemplated By Ovitz Not Prove Entire Fairness 44

IV. PLAINTIFFS HAVE PROVED THEIR WASTE CLAIM 47

V. DEFENDANTS HAVE NOT DISPROVED THE DAMAGES ELEMENT OF PLAINTIFFS' CLAIMS 48

A. In Addition To Cash, Disney Lost The Value Of Three Million Options On Ovitz's Termination Date 48

B. There Is No Offset To Disney For A Tax Deduction 49

C. Plaintiffs Are Entitled To An Award Of Pre- and Post-Judgment Interest 49

CONCLUSION 50

TABLE OF AUTHORITIES

CASES

Page(s)

Am. Gen. Corp. v. Unitrin, Inc.,
1994 Del. Ch. LEXIS 187, *rev'd on other grounds*, 651 A.2d 1361 (Del. 1995)................9

Aronson v. Lewis,
473 A.2d 805 (Del. 1984)..1

Brehm v. Eisner,
746 A.2d 244 (Del. 2000)..*passim*

Citron v. Fairchild Camera & Instrument Corp.,
1988 Del. Ch. LEXIS 67..4

Cotran v. Rollins Hudig Hall Int'l, Inc.,
948 P.2d 412 (Cal. 1998)..45

Emerald Partners v. Berlin,
787 A.2d 85 (Del. 2001)..2

Emerald Partners v. Berlin,
2003 Del. Ch. LEXIS 42..2

In re Emerging Communications, Inc. S'holders Litig.,
2004 Del. Ch. LEXIS 70..2, 20

Grobow v. Perot,
526 A.2d 914 (Del. Ch. 1987), *aff'd*, 539 A.2d 180 (Del. 1988)................................12, 13

Hughes v. Hughes,
122 Cal. App. 4th 931 (2004)..46

Kerbs v. Cal. E. Airways, Inc.,
90 A.2d 652 (Del. 1952)..47

Lazar v. Superior Court,
909 P.2d 981 (Cal. 1996)..45

Lewis v. Fuqua,
502 A.2d 962 (Del. Ch. 1985)..3

Metro. Mut. Fire Ins. Co. v. Carmen Holding Co.,
220 A.2d 778 (Del. 1966)..50

New York Times Co. v. Sullivan,
376 U.S. 254 (1964)....................45, 46

Paramount Communications, Inc. v. Time, Inc.,
1989 Del. Ch. LEXIS 77, *aff'd*, 571 A.2d 1140 (Del. 1989)....................9

Pereira v. Cogan,
294 B.R. 449 (S.D.N.Y. 2003)....................4

Smith v. Van Gorkom,
488 A.2d 858 (Del. 1985)....................19

Soules v. Cadam, Inc.,
2 Cal. App. 4th 390 (Cal. Ct. App. 1991)....................44, 45

Thorpe v. CERBCO,
1997 Del. Ch. LEXIS 18....................50

In re Walt Disney Co. Derivative Litig.,
731 A.2d 342 (Del. Ch. 1998)....................47

In re Walt Disney Co. Derivative Litig.,
825 A.2d 275 (Del. Ch. 2003)....................2

In re Walt Disney Co. Derivative Litig.,
2004 Del. Ch. LEXIS 132....................*passim*

OTHER AUTHORITIES

2 William M. Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* §466.10 at 467 (rev. ed. 1998)....................26

Judicial Council of California Civil Jury Instructions (2004), CACI Nos. 3945-46....................46

ARGUMENT

I. DEFENDANTS IGNORE AND MISSTATE THE EVIDENTIARY BURDENS

As directors and officers, the individual defendants owed the Company fiduciary duties of due care and good faith.[1] Plaintiffs rebut the presumption of the business judgment rule and establish a due care violation when they demonstrate that defendants acted with gross negligence. Pl. Br. at 53-54. Directors must consider all material, reasonably available information before making a business decision. *See Brehm v. Eisner*, 746 A.2d 244, 259 (Del. 2000).

Defendants structure their briefs on the mistaken notion that the business judgment rule can apply to individual or general *conduct* taken outside the context of a board's business decision. *See, e.g.*, Dir. Br. at 26 ("Eisner is Entitled to the Protections of the Business Judgment Rule in Connection with His Role in the Hiring of Ovitz"). The law is to the contrary: "The business judgment rule operates only in the context of director action." *Aronson v. Lewis*, 473 A.2d 805, 813 (Del. 1984).

The individual defendants wrongly claim that plaintiffs cannot establish a *prima facie* case for duty of good faith violations absent a showing that the individual defendants acted with a "dishonest purpose or moral obliquity . . . contemplat[ing] a state of mind affirmatively operating with furtive design or ill will." Dir. Br. at 39 (citation omitted). *See also* Dir. Br. at 77 (claiming that defendants did not act with "hearts dark enough"). Again, defendants misstate the law. This Court distinctly held that violations of the fiduciary duty of good faith can be

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[1] All citations to plaintiffs' opening post-trial brief, director defendants' post-trial brief and Ovitz's post-trial brief will hereinafter be referred to as "Pl. Br.," "Dir. Br." and "Ovitz Br.," respectively. All defined terms used herein are as previously defined in plaintiffs' opening post-trial brief.

established in this case by a showing that the individual defendants "failed to exercise *any* business judgment and failed to make *any* good faith attempt to fulfill their fiduciary duties . . . ." *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 278 (Del. Ch. 2003) ("*Disney I*"). A showing of objective circumstances demonstrating that the individual defendants abdicated "all responsibility to consider appropriately an action of material importance to the corporation" is legally sufficient to establish a claim. *Id.*

Defendants do not dispute that if plaintiffs can meet their evidentiary burden, the burden of proof shifts to them to demonstrate entire fairness by a preponderance of the evidence. *See Emerald Partners v. Berlin*, 2003 Del. Ch. LEXIS 42, at *7. Likewise, plaintiffs do not carry the burden, as defendants claim, of demonstrating that the individual defendants' conduct is exempt from §102(b)(7) and Disney's Charter. Dir. Br. at 39-41; DTE 185 (Article Eleventh (B)). To the contrary, §102(b)(7) is an *affirmative defense*. Defendants must establish that they are liable only for due care violations and did not act in bad faith. *Emerald Partners v. Berlin*, 787 A.2d 85, 95 (Del. 2001); *see In re Emerging Communications, Inc. S'holders Litig.*, 2004 Del. Ch. LEXIS 70, at *145-46.

The director/officer defendants are exempt from §102(b)(7) protection for their conduct taken in their separate capacity as Disney *officers*. Pl. Br. at 93-96.[2] Eisner and Litvack assert that §102(b)(7) applies to such conduct because their conduct as officers was "inextricably woven" into their conduct as directors. Dir. Br. at 63. Defendants' interpretation, however, defies the plain language of the statute. Defendants all claimed that Eisner, acting as CEO, hired, fired and granted Ovitz an NFT payout. *See* Dir. Br. at 47-48, 68-69. Defendants also claim that

[2] Disney's Charter contravenes §102(b)(7) by purporting to exempt from liability both officers and directors. DTE 185 at Article Eleventh (B).

they relied on Litvack's legal "advice." *See, e.g.*, Dir. Br. at 69-70. Bollenbach and Ovitz did not report to the Board action they took in their respective capacities as officers, which interfered with the Board's role regarding Ovitz's employment. While plaintiffs initially obtained jurisdiction over the officer/director defendants in their capacity as directors under §3114, no defendant entered a limited appearance, and as discussed above, Eisner and Litvack repeatedly rely on their officer status to defend the legitimacy of their conduct, as well as to justify the remaining defendants' inaction.

The Court has already ruled that Ovitz's negotiated departure "was an interested transaction within the meaning of §144 because he, as a director and officer, engaged in a transaction with the corporation for which he was a fiduciary and received a benefit greater than that of Disney's stockholders." *In re Walt Disney Co. Derivative Litig.*, 2004 Del. Ch. LEXIS 132, at *32-33 ("*Disney II*").[3] As shown below, the §144 safe harbor is not available to Ovitz because defendants' conduct met none of the standards necessary for its invocation.[4] Ovitz's claim that he was unilaterally "fired" is contrary to the weight of the evidence. The Court has already rejected his claim that the NFT payout was a "contractual right," and in all events, none of the cases Ovitz cites support the claim that §144 applies only to so-called "bilateral" transactions.

Defendants cannot avoid liability based solely (or primarily) upon their own self-serving testimony uncorroborated (and often contradicted) by contemporaneous documents. Rational defendants can be expected to testify that they acted in good faith. Thus, the Court should

[3] Accordingly, §102(b)(7) does not apply to him.

[4] Namely, a majority of disinterested directors did not approve the NFT, Disney's shareholders did not approve the NFT and the NFT was unfair. *See, e.g., Lewis v. Fuqua*, 502 A.2d 962, 970 (Del. Ch. 1985).

principally assess defendants' actions through objective, contemporaneous documents, circumstantial evidence and inferences drawn from overt conduct. *Pereira v. Cogan*, 294 B.R. 449, 540 (S.D.N.Y. 2003) ("[A] court [is] not required to accept 'fiduciaries' uncorroborated or self-serving testimony' of legitimate business purposes for expenditures where there is no documentation thereof."); *Citron v. Fairchild Camera & Instrument Corp.*, 1988 Del. Ch. LEXIS 67, at *46-47.

II. THE OLD BOARD ACTED IN BAD FAITH IN APPROVING THE OEA

A. Eisner Hired Ovitz On His Own And Set Ovitz's Compensation

Eisner recruited Ovitz and bound Disney to the principal terms of Ovitz's contract without consulting the Old Board, the Compensation Committee or Crystal. Eisner testified during his cross-examination (prompted by an objection from his own counsel) that he hired Ovitz in Aspen on Friday, August 11, 1995, after Ovitz phoned Eisner to accept his offer of employment. Tr. 4959:4-4961:10. *See also* Pl. Br. at 7; Ovitz 138:12-19; Tr. 1337:13-1339:1. By then, most of the basic terms of the OEA were set. Ovitz understood he would become Eisner's subordinate and "number two." Tr. 4839:10-23. Ovitz knew that he would not get the COO title. Tr. 4841:1-5. Ovitz also knew that Bollenbach would not report to him. Tr. 4827:7-18. At that time, most aspects of Ovitz's compensation were set, including the understanding that two of five million of his stock options would be contingent on another term. Tr. 4204:7-17. The OLA, executed on August 14, 1995, was intended to memorialize the verbal understanding Eisner and Ovitz reached on August 11th. *See* Eisner 266:15-22; Tr. 1300:11-16.

Thus, on August 11th, the deal was basically done. Defendants make no effort to rebut the contemporaneous evidence showing that Ovitz immediately began working at Disney in mid-August. Pl. Br. at 17. The late-produced Ovitz files show that Ovitz was copied on confidential documents at least as of mid-August and began to distribute correspondence on Disney

letterhead at that time. *See, e.g.*, PTE 539; 545; 575; 622; 631; 724; 740; 742; 757; DTE 189; 190; 192; 193; 224. Defendants say nothing about the August 28, 1995, invitation to the Old Board members to a luncheon *immediately after the Board meeting scheduled for September 26, 1995* "to meet and welcome Michael Ovitz to The Walt Disney Company." PTE 216.

1. The Compensation Committee Did Nothing

Defendants do not deny that the Compensation Committee did not meet before Eisner and Ovitz reached their oral agreement in Aspen. Pl. Br. at 15, 17. Defendants claim Russell, Watson (who had just learned about the negotiations) and Crystal met on August 10, 1995, but there is no written evidence of what was discussed, how long the meeting lasted and why neither Poitier nor Lozano was invited.[5] Russell, Crystal and Watson's testimony about what analyses (if any) were performed on Crystal and Watson's laptops at this meeting is incapable of corroboration because Russell's law office, where the meeting took place, supposedly lacked a printer (Tr. 3276:9-12), and like much of the potential evidence in this case, Watson "lost" his laptop's hard-drive. Tr. 7905:10-7906:14.[6]

Eisner cannot credibly claim that he relied on the advice of Russell and Watson. Dir. Br. at 26. No written contemporaneous evidence exists showing that Russell, Watson or Crystal communicated any results of their August 10 "meeting" to Eisner before Ovitz and Eisner reached agreement on August 11th. Russell's *ex-post* memorandum, curiously labeled "privileged and confidential," does not say that Eisner was informed of any aspect of the August 10th meeting. PTE 218. Even fully crediting defendants' uncorroborated version of events,

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[5] Time was also spent discussing Eisner's new contract. Crystal 146:4-19 (explaining PTE 198); PTE 82 at DD3160.

[6] Disney destroyed all of its hard drives and back-up tapes of its e-mail during the relevant period. Ryan 46:19-55:14.

Russell, Watson and Crystal purportedly met again at 6:00 p.m., August 12, 1996, *after* Eisner purportedly began phoning each director to convey the news of Ovitz's hiring. Thus, any "advice" given to Eisner on August 10, 1995 was incomplete.

Defendants place heavy reliance on purported calls Russell placed to Poitier and Watson made to Lozano but do not explain why Russell and Watson did not convene a collective Compensation Committee telephonic meeting where corporate formalities including, but not limited to, the creation of minutes presumptively would have been followed. Dir. Br. at 9. Russell's purported 28-minute call placed to Poitier's yacht off the coast of Sardinia (which included other topics), on the evening of August 12, 1995, occurred a day *after* Eisner and Ovitz had reached agreement. Lozano admitted that Watson's call to him occurred in mid-September and lasted approximately 10 minutes. Tr. 7663:21-7664:20; 7833:18-7834:2; Pl. Br. at 9-10. Contrary to defendants' claim (Dir. Br. at 9 n.10), Watson's testimony is consistent with what Lozano recalled.

No written record exists to corroborate that the calls occurred or what was discussed. Neither Poitier nor Lozano had any memory of the calls at their *depositions*.[7] Additionally, Russell, Watson, Poitier and Lozano all admitted at trial that there were no documents sent to them prior to the calls, there was no discussion of the Black-Scholes value of the options, no copy (or summary) of the OLA was reviewed, and there was no discussion of NFT consequences to Disney. Pl. Br. at 17-23, 58-60. Russell's *ex-post* confidential memorandum merits no

[7] Defendants wrongly criticize plaintiffs for relying on deposition testimony. Dir. Br. at 3. Deposition testimony is indisputably part of the record in this case. Where deposition testimony conflicts with later trial testimony, the former should be given greater evidentiary weight because it is given closer in time to the relevant events and is less susceptible to cross-pollination. *See, e.g.*, Tr. 8155:20-8156:4. At the trial, the Court observed numerous instances where trial testimony was impeached by earlier deposition testimony.

evidentiary weight because it does not purport to recount the substance of the calls (if they did in fact occur), is contrary to Watson and Lozano's testimony about when the call took place, and was never sent to Lozano or Poitier for their review.

2. The Old Board Did Nothing

Eisner did not consult with the Old Board before hiring Ovitz on August 11, 1995. The phone calls Eisner claims to have made to individual members of the Old Board are legally and factually irrelevant. Under Delaware law, private one-on-one communications cannot substitute for collective board action and have no legal force. Pl. Br. at 50; 55; Tr. 43:4-47:12; 83:12-84:6. Consistent with that fundamental proposition, Disney's Charter specified that the board could not act unless it convened a meeting or acted by unanimous written consent. PTE 497, Article III, §§6, 7. Bypassing collective board discussion gave Eisner the ability to push through decisions he favored and prevent dissent.

Defendants claim that Eisner had a "standard practice" of speaking with board members (Dir. Br. at 27), but they admit that he varied the amount and type of information that he discussed with them. Dir. Br. at 9-10. Eisner similarly restricted access to writings critical of Ovitz to a select group, including Russell, Watson and Bass. *See, e.g.,* PTE 17; 24; 67; 79; 172. Eisner 526:10-22, 546:4-547:2, 605:15-606:7; Litvack 643:2-11; Tr. 5023:4-23; 5190:21-5191:6; 6143:3-9; 6378:18-6379:9. Ovitz corroborated that Eisner shared much more information and spoke more frequently with an inner circle that included Russell, Gold, Murphy and Watson in addition to Litvack. Ovitz 513:23-518:24.

The *only* document defendants cite to substantiate Eisner's purported calls with directors around the time he hired Ovitz, Eisner's phone log (DTE 413; Dir. Br. at 9), is entitled to no

weight. The "log" shows that Eisner began calling some directors on August 12th.[8] The document does not even hint at the content of any such conversations nor confirm that Eisner spoke to all the directors he telephoned.[9] Old Board members received nothing in writing. No members of the Old Board asked to see the OLA, any document Crystal authored, or any other documents at all. *See, e.g.*, Tr. 2910:6-13; 5976:11-5977:5. Other than Eisner, Litvack and Russell, neither Crystal nor any Old Board member saw the OLA before Eisner and Ovitz signed it. *See, e.g.*, Russell 397:24-398:11; Tr. 3867:20-3868:7; 5823:21-5824:4; 6946:24-6947:5; 7187:9-14; 7692:3-12.

Crystal, the Old Board's claimed compensation consultant, never saw the OLA, and when shown the document at trial, he testified that it *did not reflect* what he understood the terms of Ovitz's compensation package to be at that time. Tr. 3570:21-3572:14 ("had I known about this, I wouldn't have bothered to write an angry letter on the 15th protesting certain things because it looks like it was a done deal"). The fact that Crystal did not communicate with Eisner before Ovitz was hired, and in all events was completely unfamiliar with the OLA, negates defendants' claimed reliance on Crystal's "expertise."

[8] The phone log shows that a number of calls to directors were not completed and that some of those calls lasted but a few minutes, hardly sufficient time for Eisner to convey significant information regarding Ovitz. DTE 413. In addition, the phone log was produced in redacted form.

[9] It is highly unusual that Eisner produced a phone log to corroborate his story but failed to produce, among other things, his self-described check lists of other calls purportedly placed to directors during the relevant time (Tr. 4927:5-4930:5), a calendar or diary, and several memoranda cited in Eisner's November 1996 written summary (PTE 24). Disney's "custodian of records," Edward Nowak, a senior Disney lawyer, and during the relevant time period a direct report to Litvack, could not explain why Disney did not maintain the memoranda in its files, even though James Stewart quoted them in his *New Yorker* article published a week before the trial concluded. *See* Pl. Br. at 30.

3. Disney's Market Price Movements Prove Nothing

Disney's stock price reaction does not validate the OEA and absolve the Old Board's abdication. Dir. Br. at 10. Disney's stock price movement is entirely irrelevant to the collective decisions the Old Board should have made *before* Ovitz's hiring was publicly announced on August 14th. Stock market price changes are not relevant to prove compliance with fiduciary duties. *See generally Paramount Communications, Inc. v. Time, Inc.*, 1989 Del. Ch. LEXIS 77, at *26, *aff'd*, 571 A.2d 1140 (Del. 1989); *Am. Gen. Corp. v. Unitrin, Inc.*, 1994 Del. Ch. LEXIS 187, at *26, *rev'd on other grounds*, 651 A.2d 1361 (Del. 1995).

Defendants' professional expert Dunbar was unable to opine regarding the extent to which the market was reacting specifically to Ovitz or to the fact that Disney had apparently found a replacement for Wells and a potential successor to Eisner.[10] Tr. 7405:24-7407:15. The August 14th press release announcing the hiring did not disclose the terms of the OLA. *Disney II*, 2004 Del. Ch. LEXIS 132, at *5-7. Defendants cannot credibly argue that the market reaction on August 14th nonetheless "anticipated" (and thus validated) the OEA. Disney's stock market price decreased slightly when Ovitz's receipt of 5 million stock options was disclosed in Disney's Proxy. Tr. 7416:24-7417:20. Dunbar could not have concluded that the relatively small stock price movement that occurred on November 13th and 14th showed that the market had anticipated the value of the OEA on August 14th. The disclosure about the options in the proxy statement consisted of just a few lines in a 194-page document replete with information regarding the impending CapCities/ABC transaction. DTE 142 at WD1003, WD1074. Dunbar,

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[10] Defendants' expert is a full-time consultant for defense counsel in securities fraud litigation. Tr. 7349:10-7350:19. He never previously testified as an expert on fiduciary responsibility or stock market reaction in any stockholder derivative action in the Delaware Court of Chancery. Tr. 7361:20-7362:1.

a proponent of the efficient market hypothesis, could not explain whether the 194 pages of information in the proxy affected the price movement he attributed solely to the passing disclosure of Ovitz's options. Tr. 7429:13-7432:14. Thus, it is just as likely that Disney's stock price could have plunged absent the generally positive news in the proxy about Disney's acquisition of CapCities/ABC.

4. The Contract "Negotiations" Do Not Exculpate Defendants

Defendants claim that Eisner and Russell acted in good faith because the OEA was the result of purported arm's-length "heavy negotiation." Dir. Br. at 6; 29-30.[11] There is no contemporaneous evidence demonstrating that "heavy negotiations" took place at all. *See* Pl. Br. at 3-4. The first proposal Disney sent to Ovitz, the "Case Study," had many of the same structural elements as were ultimately embodied in the OEA.[12] *Compare* PTE 64 *with* PTE 7. As the "Case Study" demonstrates, as early as July 7, 1995, a signing bonus was already off the table. PTE 64.

Defendants' claim that negotiations were at arm's-length because Eisner purportedly rejected Ovitz's demand for eight million options (Dir. Br. at 67) is not credible. Ovitz could not recall making such a demand. Tr. 2141:20-2144:2. Moreover, it is absurd to argue, as

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[11] The "negotiation" was kept a secret by those select directors in the know, including Russell, Gold, Stern, and Roy Disney. Russell testified that he had mutually agreed with Eisner that the negotiation had to be kept confidential (Russell 94:22-95:7), and Gold testified that he knew about the negotiation but did not speak with any other directors other than Russell, Eisner and Disney. Tr. 3866:11-15.

[12] Defendants' attempt to mischaracterize the Case Study as a "discussion platform" (Dir. Br. at 5-6 n.3), as opposed to a real offer, is disingenuous at best. Russell, the author of the Case Study, provided a copy to Ovitz at the time negotiations were intensifying. Tr. 2751:16-2752:12. The Case Study was the first serious articulation of terms and included specifics such as security, entertainment expenses and plane usage. PTE 64. Like many other then-existing documents, the Case Study was never seen by either the full Compensation Committee or the Old Board. Tr. 2752:1-6.

defendants have, that the largest executive contract at the time (*see generally* PTE 426 ("Murphy Report")) was a result of "tough," arm's-length negotiating. Dir. Br. at 43. There is nothing "tough" or arm's-length about a contract richer than that of any other non-CEO President of a public corporation at the time. Tr. 748:22-749:13. There are no counter-proposals from Ovitz in the record.

Defendants assert that the "entertainment industry" uniquely lavishes compensation on its executives but offer no evidence to rebut Professor Murphy's opinion that Ovitz's compensation package was then the largest ever in any business sector. Murphy Report at 11; Tr. 781:8-782:4; 785:8-787:14; 790:21-791:11. Undermining defendants' argument is the fact that Crystal did not analyze Ovitz's compensation with specific reference to the entertainment industry even though he had previously assembled a proprietary database of entertainment industry executive pay based on non-public information. Tr. 3244:7-3246:11. Like Professor Murphy, Crystal "looked at the aggregate pay levels of all five executives in the 900 companies comprising the S&P 500 Index group and the S&P Mid-Cap 400 Index group [4,500 executives] for the years 1992 through 1994." PTE 58. Crystal concluded, as did Professor Murphy: "[t]here really is no precedent for offering a non-CEO the sum of $25 million per year." *Id.* Crystal's analysis and observations remained unchanged even after he prepared a "corrected" version of his letter at Russell's request. PTE 366. Russell was well aware that no comparables existed, even before receiving Crystal's letters, writing in the Case Study that "[b]ase salary is top amount for *any* corporate officer," and that "[n]umber of options is far beyond standards applied *in company and in corporate America*." PTE 64 (emphasis added). In view of these facts, what Disney possibly bargained Ovitz down from would be anyone's guess.

Ovitz's contract was not at all comparable to that of Frank Wells. Dir. Br. at 43, 74. As

Professor Murphy made clear, the OEA was worth many times more than Well's contract and included other different, more valuable features like the extended exercisability feature of Ovitz's options. Murphy Report at 6-7; Tr. 779:2-784:22.

Relying on Eisner's self-serving trial testimony, defendants claim that Eisner and Ovitz's friendship had nothing to do with Ovitz's hiring and his receipt of the most lucrative, publicly-reported employment contract at the time. Dir. Br. at 5. However, as Ovitz's Answering Brief makes clear, Eisner was best friends with Ovitz and pursued the hiring of Ovitz "forever." Ovitz Br. at 3; Eisner 111:3-7. The record demonstrates that Eisner did not seriously consider any other candidates for the position and did not employ an executive search firm to seek out other potential candidates. *See* Pl. Br. at 24 n.25.

Russell's involvement in the negotiations proves Eisner's bad faith rather than exculpating him. Dir. Br. at 29-32. The evidence shows that Eisner put Russell in charge of the negotiations to secure Eisner's control. Defendants do not deny that neither the Compensation Committee nor the Board had delegated to Russell the authority to negotiate with Ovitz. Pl. Br. at 3, 58; *see also* PTE 465. In fact, virtually the entire Board was completely unaware that Russell was involved in the negotiations. Pl. Br. at 9. In return, Eisner signed off on a $250,000 payment to Russell for his work on the Ovitz matter. *Id.* at 25. Defendants are silent on this payout and Eisner's central role in facilitating its behind-the-scenes approval. PTE 78 ("Ray [Watson] this is all true plus!!! What should we pay?").

Defendants' assertion that Russell was the most experienced and knowledgeable person available to Disney to negotiate with Ovitz strains credulity. Dir. Br. at 41-42.[13] Disney could

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[13] Defendants' reliance on *Grobow v. Perot*, 526 A.2d 914 (Del. Ch. 1987), *aff'd*, 539 A.2d 180 (Del. 1988), for the proposition that Eisner and Russell were appropriate individuals to negotiate

have employed a host of highly-experienced business people to negotiate with Ovitz. Certainly, Litvack, the head of Human Resources and Chief Legal Counsel of Disney at the time, was a plausible choice. Eisner precluded that possibility, however, by handpicking Russell (Pl. Br. at 3) and by excluding Litvack from the negotiations. Litvack 103:6-22. Ovitz and Russell were long-time acquaintances and were not disposed to engage in the much more robust negotiations that some truly independent person could have been expected to provide. Tr. 1454:24-1457:14.

In fact, Russell was especially unqualified to negotiate with Ovitz. Defendants do not deny that as Eisner's long-time personal attorney, Russell had an ethical obligation to represent Eisner's best interests to the exclusion of others. Pl. Br. at 3. Defendants also do not deny that Russell was beginning renegotiations of Eisner's contract at the same time he was involved in the Ovitz contract talks. *Id.* at 3-4. Despite defendants' argument to the contrary (Dir. Br. at 42 n.49), Eisner and Ovitz's contracts were linked. Pl. Br. at 3-4. *See also*, PTE 58; 59; 366; Crystal 174:17-22. Tellingly, defendants have nothing to say about the documents which prove this link. *See* PTE 58; 59; 366; 346; *see also* PTE 220; Tr. 2437:22-3438:15.

Despite Ovitz's admitted reputation for what defendants call "agenting" -- Ovitz's "speech is replete with superlatives, and he uses language to persuade" (Ovitz Br. at 9; Dir. Br. at 16) -- Russell accepted at face value the representations of Ovitz's representative, Goldman, regarding how much Ovitz had been making at CAA (Pl. Br. at 6 n.7) -- representations that were exaggerated by millions of dollars. *See* PTE 200.[14] Prior earnings are a key metric in

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with Ovitz is misplaced. *Grobow* merely states in *dicta* that it is unnecessary for a company's entire board to negotiate. *Id.* at 926.

[14] The director defendants label Ovitz a "salesman" and actually catalogued some of the hyperbolic language he used at trial. Dir. Br. at 58 n.63.

making compensation decisions. Tr. 3512:17-3514:8.[15] Defendants' assertion that in arm's-length negotiations one can simply rely on the word of the other side because one "knew" them prior to the onset of the negotiations (Dir. Br. at 36 n.44) is facially preposterous. CAA's outward success, the size of CAA's headquarters and the amounts CAA purportedly earned on Disney projects cannot substitute for independent verification of statements made by the agent of a "salesman." Dir. Br. at 36-38 n.44.[16]

Defendants argue that Ovitz's compensation package was fair due to the fact that Ovitz needed to be highly compensated in order to entice him to leave CAA. Dir. Br. at 6. That does not absolve defendants from having failed to actually learn how much Ovitz was making or obtain any information regarding Ovitz's lucrative earn-out arrangement with CAA. Moreover, defendants do not dispute that Ovitz was anxious to leave the "service industry" at that time and that CAA itself had become increasingly uncomfortable for Ovitz in light of the rising pressures from the "Young Turks." Pl. Br. at 5-7. In fact, Ovitz, as evidenced by being "crazed at the conference," was already highly vulnerable to Eisner's overtures after the MCA fiasco, but there is no evidence that Eisner ever attempted to utilize his leverage resulting from Ovitz's then state of mind. Pl. Br. at 5-7.

[15] Defendants erroneously argue that the $17 million in Ovitz's W-2 represented $20-25 million once annualized. Dir. Br. at 36 n.44. However, Ovitz received a disproportionate payout on the last day of CAA's fiscal year (September 30, 1995), amounting to approximately $13 million, which coincided with his departure from that firm. PTE 200 at CAA0002. As such, this W-2 represents the best evidence of what Ovitz earned at CAA in 1995. No record evidence corroborates Ovitz's claim that in prior years he regularly earned $20-$25 million. Thus, the only writing in the record demonstrates that Ovitz and Goldman "agented" Russell due to Russell's lack of diligence.

[16] Russell was not aware of how much Ovitz stood to earn by leasing the CAA headquarters building and its contents to "new" CAA. Tr. 2758:9-2759:17.

B. The September 26, 1995 Compensation Committee Meeting Was A Mere Formality

By September 26, 1995, Ovitz had been publicly touted, and he had already started to work. The basic terms of his employment agreement were nearly complete (*Disney II*, 2004 Del. Ch. LEXIS 132, at *28 n.54), he was billing the Company for expenses (PTE 146; 147; DTE 59), his office was being constructed (PTE 476; DTE 110) and he was giving gifts to senior executives (Iger). *See, e.g.*, PTE 636 at WD13757. The Compensation Committee meeting that occurred on September 26, 1995 was, at best, a *post hoc* empty formality. Pl. Br. at 17-23; 58-60. Defendants do not deny that: (1) the Committee met for only one hour at most; (2) a host of topics other than the prospective terms of the OEA were discussed during the hour-long meeting; (3) Crystal did not attend; (4) Crystal's letters were not distributed or discussed; (5) there was no discussion of the meaning of a "for cause" termination as defined in drafts of the OEA that had already been circulated to Ovitz; and (6) no actual draft agreement was distributed. Further, the Committee meeting did not discuss, and Poitier and Lozano were not told of, Crystal's conclusion of the lack of comparables to the OEA within the entertainment industry and relative to all Fortune 500 and S&P companies (PTE 58; 59; 366; Tr. 785:5-788:23), despite the fact that both Murphy and Crystal have testified that comparable pay is fundamental in any analysis of executive compensation. Tr. 775:1-776:13; 3384:18-3386:14. Defendants' argument that Crystal supposedly "was available by phone" is not sufficient to warrant application of §141(e). The Committee "did not in fact rely on the expert" (*Brehm*, 746 A.2d at 262) if Crystal was waiting for a phone call none of the directors ever made. Crystal's surprise assertion at trial that he was involved after August 17, 1995 is directly contrary to his prior deposition testimony. Crystal 180:21-183:8.

Defendants' assertion that Watson's spreadsheets were "distributed" at the committee

meeting (Dir. Br. at 31-32) is unproven through contemporaneous written evidence. Unlike the summary of the OEA, which was attached to the minutes, no spreadsheet was either referenced in or attached to the minutes. PTE 39. Moreover, Watson's self-serving testimony regarding the spreadsheets falls flat, as he was unable to identify at trial which, if any, of his differing types of spreadsheets -- created during different times -- he supposedly showed to the other committee members. Pl. Br. at 11 n.13. The spreadsheets were fundamentally flawed because they failed to use the industry-standard Black-Scholes methodology (Tr. 3272:16-3273:1), and as *Crystal* testified, they were not sufficiently informative or accurate. Crystal 97:3-9.

Defendants wrongly assert that Poitier and Lozano "appropriately relied on the work of Russell and Watson . . . in analyzing the terms of Ovitz's proposed compensation, overseeing the drafting of the OEA, soliciting Crystal's views, and informing them of this work." Dir. Br. at 32. Section 141(e) permits reasonable reliance only on "information, opinions, reports or statements presented to the corporation . . . ." Defendants do not, because they cannot, cite a single case for the remarkable proposition that §141(e) permits directors to rely on the conduct of other directors: if so, why be on the committee at all? As a matter of fact, Poitier and Lozano could not possibly have relied on Russell and Watson, as neither of them were aware that Russell, and to a much lesser degree, Watson, were involved with negotiating with Ovitz or looking at the terms of the OEA. Lozano 63:8-64:9; Poitier 108:11-109:17. Similarly, Poitier and Lozano testified at their depositions that they could not remember knowing whether Crystal did any work for the Committee. Lozano 64:10-16; Poitier 78:6-79:2. As discussed above, no credible evidence exists as to what, if anything, Watson and Russell told Poitier and Lozano.

C. The September 26, 1995 Board Meeting Was A Mere Formality

The meeting of the Old Board on September 26, 1995, was entirely defective. Pl. Br. at 23-25; 54-57. Defendants claim that these defects were irrelevant because the entire Board

purportedly did not have to approve the OEA. *See* Dir. Br. at 34-35. Defendants' own contemporaneous documents prove them wrong. Disney's Charter and Bylaws mandated full board "approval" of the panoply of terms contained in the OEA. Pl. Br. at 55-56.[17] Defendants' documents evidence a *consistent view* at the time. *See, e.g.*, PTE 33 (OLA); PTE 64 ("Case Study"); DTE 33 (Russell notes).[18] Moreover, the fact that defendants claim to have discussed the OEA in detail during the Board's executive session undermines their claim that the Compensation Committee was fully vested with the authority to approve the OEA.

Defendants' arguments also side-step the Supreme Court and this Court's prior rulings that full board approval was necessary given the materiality of an NFT payout. *Brehm*, 746 A.2d at 259-60; *see also Disney II*, 2004 Del. Ch. LEXIS 132, at *34 n.64. Defendants cannot credibly claim that *Brehm* did not address the question as to whether the full Board had to

[17] Defendants completely ignore the analysis of the Charter by Prof. DeMott cited in plaintiffs' opening brief. Tr. 171:9-177:5. First, defendants do not take issue with the basic point that any delegation of duties by a Board to a Committee must be clear and explicit. PTE 462 at ¶ 12. The Compensation Committee Charter (PTE 465) contained two paragraphs which defendants argue could be applied to the OEA: Charter ¶ 2, which delegated to the Compensation Committee the power to "establish" the "salaries" of the CEO and COO and to "approve" the "salaries" of those reporting to the CEO; and Charter ¶ 5(c), which delegated to the Compensation Committee the power to "approve" employment contracts of any other employee whose salary exceeded $250,000 in the initial year. At the time Ovitz was hired, however, Disney's President was defined under its applicable Bylaws to also be Disney's COO. PTE 497 at WD7085. In addition Ovitz reported to the CEO. Thus, the clear intent of the Charter was that ¶ 2 of the Charter and not the more capacious ¶ 5 (which covered "other" situations and employees), was applicable to Ovitz and the OEA. Analyzing further, ¶ 2 of the Charter only referenced the Committee approving the "salary" of the COO or someone reporting to the CEO. When read in context the Charter does not include within the term "salary" other forms of remuneration, such as options, bonuses and other benefits, because in other paragraphs, the Charter talks about those types of remuneration separately from "salary." The Charter thus does not explicitly delegate to the Compensation Committee the full range of remuneration which Ovitz received as part of his OEA.

[18] The OLA unambiguously states that it is "[s]ubject to the formal approval of the Company's Board of Directors and its Compensation Committee." PTE 33. There is no contemporaneous written evidence to support defendants' view that the OLA was meant to specify that board approval was necessary only for the hiring. Dir. Br. at 35 n.39.

approve the OEA. Dir. Br. at 51. Instead, *Brehm* establishes that full board consideration was necessary. *Brehm*, 746 A.2d at 263 ("a boards' *decision* on executive compensation is entitled to great deference") (emphasis added).[19]

In fact, the Old Board *acted* to facilitate ratification of the OEA when, in November 1995, it unanimously voted through written consents to amend Disney's 1990 Stock Option Plan ("1990 Plan") to allow Ovitz's options to remain exercisable beyond the then-existing, two-year post-termination limit, subject to further approval by the shareholders. Pl. Br. at 25-28; 64-65. Plaintiffs explained in detail why the Old Board's conduct in approving the amendment constituted an abdication of its fiduciary duties. *Id.* Defendants devote only a single line in their brief to the Old Board's decision to amend the 1990 Plan (Dir. Br. at 13), thereby implicitly admitting plaintiffs' arguments.

The Old Board could not have elected Ovitz in good faith without first engaging in a "cost-benefit analysis." Pl. Br. at 61-62. Both Professor Murphy and Crystal testified that a cost-benefit analysis is essential to the process of hiring any senior executive. *Id.* *Not a single* contemporaneous document exists in the record showing that the Old Board made even the *slightest* inquiry as to the cost of electing Ovitz, and specifically, the significant material costs Disney would incur if Ovitz received an NFT payout. Pl. Br. at 61-62.

The agenda for the board meeting makes no reference to a discussion of the OEA (PTE 38), and no relevant documents were sent to the Old Board in advance even though they were readily available. The minutes do not mention consideration of the OEA.[20] This absence

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[19] Disney disclosed the options element of the Ovitz agreement in a November 1995 SEC filing. DTE 142.

[20] Defendants do not claim that the minutes of any meeting were inaccurate. In fact, all minutes were formally approved at subsequent meetings of the Board or Committee involved.

of written board materials should be accorded substantial weight. *See Smith v. Van Gorkom*, 488 A.2d 858, 879 (Del. 1985) (finding that the absence of conditional requirements in "any notes of the Board meeting or in the Board Resolution accepting the Pritzker offer or in the Minutes of the meeting itself" showed that no such requirements existed).

The negative evidentiary presumption arising from the fact that the minutes and other board materials do not mention the OEA is further enhanced by the absence of any other contemporaneous documentation. Unlike the summary OEA terms attached to the Compensation Committee minutes, no such documents were attached to the board minutes. Russell, an inveterate note-taker and author of memoranda written to purportedly "memorialize" the Ovitz hiring process on at least two separate occasions (PTE 218; 226), curiously failed to produce any documentation concerning what occurred at the *only* board meeting relevant to the OEA. Further, no written evidence exists to *even hint* that the Old Board engaged in a discussion of: (1) comparable employment agreements (Pl. Br. at 19-20); (2) the Black-Scholes value of the options (*id.* at 23); (3) anything Crystal wrote in his letters or supposedly discussed with Russell and Watson (*id.* at 19; 23); (4) any spreadsheets detailing what would happen in the event of an NFT (*id.* at 23); (5) the meaning of gross negligence or malfeasance (*id.*); or (6) the fact that Ovitz was solely being elected as President and not COO contrary to the requirement in the Company's Bylaws. *Id.* at 24.[21]

The Old Board's entire defense is thus predicated on self-serving, undocumented testimony as to what supposedly occurred during the purported "executive session." According to the minutes, the only topic discussed during the executive session was the payment to Russell

[21] The Old Board cannot rely on Crystal pursuant to §141(e) because he had no communications with them at all. *See* Pl. Br. at 10-13.

of $250,000 for his services in connection with Ovitz's hiring. PTE 29 at WD1195. Defendants claim Ovitz was not mentioned in the minutes because the Old Board did not vote on the OEA. Dir. Br. at 13 n.20. Defendants ignore the fact, however, that *they elected* Ovitz at the board meeting, and were required to value the OEA so as to make an informed hiring decision.

Defendants' reliance on undocumented discussions during the executive session of the meeting is entitled to no weight. The Old Board was not informed before the meeting that Eisner planned to convene an executive session. PTE 38.[22] No Old Board member testified that he/she asked for documentation or to consult with Crystal (or anyone else) before voting to elect Ovitz. Litvack and Bollenbach were excluded from the discussion in executive session and sat silent during the portion of the meeting where the minutes recite that Ovitz's qualifications were supposedly discussed. Tr. 5453:23-5454:5. The Court should not credit the Old Board members' testimony about what purportedly occurred at the meeting because it is hopelessly plagued by limited recall, inconsistency and contradiction. *See Emerging*, 2004 Del. Ch. LEXIS 70, at *91-92 (finding that a witness's trial testimony was not credible due to the fact that it differed substantially from his deposition testimony).[23]

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[22] Defendants' contention that the Compensation Committee rendered a report on the OEA (Dir. Br. at 33) cannot be squared with the fact that Russell testified that the "Compensation Committee Report" referenced in the minutes pertained only to general compensation committee business, and *not* the OEA. Russell 567:20-569:2.

[23] *Compare* Bollenbach at 159:16-162:15; 215:11-17 (no recall of meeting at all) *with* Tr. 5436:18-5437:15 (testimony regarding the Board approving the hiring of Ovitz at the meeting); *compare* Bowers 228:5-9 (no recall of NFT discussion) *with* Tr. 5919:22-5924:21 (recall of NFT including viewing Watson spreadsheets on his computer screen); *compare* Tr. 5920:11-16 (Bowers recalls discussion of Ovitz was confined to the executive session) *with* Tr. 6070:14-6072:2 (Litvack confirms he did not attend executive session, but recalls discussion of Ovitz); Tr. 4050:4-13 (R. Disney had no recall of the Board ever discussing the OEA); *compare* Lozano 146:4-147:16 (no discussion of Ovitz termination terms or spreadsheets) *with* Tr. 7715:18-7719:8 (recalls seeing draft OEA on 9/26/95); *compare* Nunis 59:7-18 (no recall of discussion of Ovitz at meeting) *with* Tr. 5893:19-5894:18 (Nunis recalls discussing Ovitz at 9/26/95 executive

There is no written evidence that Eisner informed the Old Board that he was having doubts about Ovitz's tenure. This was even more relevant because Ovitz had no prior experience as an executive at a large public company and was accustomed to being boss.[24] Pl. Br. at 25. It is beyond cavil that such information was highly material before the decision was made to grant Ovitz an employment agreement, which included NFT clauses that would pay Ovitz as much or more to leave the Company early. Pl. Br. at 64-65; Murphy Report at 23; Tr. 801:17-807:16.

If anything, the incentive structure and loopholes in the OEA should have been given enhanced scrutiny so as to assure that the Company secured Ovitz's services. Defendants do not deny the authenticity of Eisner's document which memorializes his pre-litigation observation that "[b]y Labor Day I was wondering what it would cost in dollars and embarrassment to end our corporate partnership right away." PTE 24 at DD2449. Although defendants rely on Eisner's trial testimony that his observation was false (Dir. Br. at 58 n.63), defendants fail to mention that *at his deposition*, Eisner testified, "I think everything in it [PTE 24] is true . . . ." Eisner 594:19-23; *see also* Eisner 600:17-18; 607:9-15.

The accuracy of Eisner's own observations were confirmed during the deposition of third-party witness Sid Bass. Bass testified on a number of occasions that Eisner harbored substantial concerns about Ovitz's veracity and ability to handle the job of President. *See, e.g.*, Bass 43:23-46:11; 48:6-49:8. Bass testified at his deposition that Eisner told him, within five weeks of hiring Ovitz, that he had decided to fire Ovitz:

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session); Tr. 8145:13-8146:3 (Stern testified there was no discussion about OEA economic terms at 9/26/95 meeting); *see also* Tr. 7218:1-7224:8 (Poitier first testifies at trial that the directors discussed the OEA, only to recant this testimony when shown his deposition testimony to the contrary).

[24] Ovitz acknowledges that the transition "was a shock to say the least." Ovitz Br. at 8.

> Then finally it -- after 30 days, in fact, 35 days, I suppose, I remember it was five weeks, I had a discussion with Michael at dinner in New York. And he had given up on Ovitz, in the sense that we have a problem, a serious problem. And he was having no success in dealing with Ovitz, and Ovitz was making no improvement . . . . It was continuous problems of veracity and being an incompetent executive in other ways. He just didn't care about money. It's just like -- as this e-mail you just gave me, it was typical of saying, you know, all he thought about was money and how much money we were spending in the studio. And he just thought big, but he never looked at economics. I insisted on firing him immediately and Michael said that if he did Ovitz would commit suicide. And then he said, either that or he'd shoot me, meaning Eisner. He meant that facetiously . . . . But he honestly was concerned about Ovitz's mental stability in that case, that he would feel so devastated to have been fired.

Bass 88:15-89:17. Later at the deposition, Bass was again asked about the timing of Eisner's comments and confirmed that Eisner expressed them to him within the first two weeks of November 1995:

> [He had] to keep him for 12 months. He said he could control him. I said you can never control people like that. You can never control liars. And as president he has authority and it's going to be a disaster. It's too dangerous, you can't do it. And he insisted that he keep him for 12 months and just try to corral him.

Bass 90:9-16.[25]

Defendants cannot credibly discredit Bass. Dir. Br. at 15-16 n.23. Bass was, and still is, a close friend of Eisner's. Bass 116:21-117:14; Ovitz 513:25-514:13. In fact, defendants do not challenge the accuracy of what Bass said, but claim only that Bass mistakenly testified about when the conversation occurred. Dir. Br. at 15 n.23. The scenario concocted at *trial* -- that the conversation occurred in May 1996 because Eisner and Ovitz then attended the play *Rent* (*itself* based on *La Boheme*), the fact that Admiral Boorda had recently committed suicide and Eisner was then thinking about a poem he had read in high school dealing with suicide called *Richard*

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[25] Further corroboration of Bass's recollection is shown by the fact that Bollenbach left as CFO in February 1996 in substantial part because of issues he had with Ovitz. Tr. 5203:11-5204:5. Those issues must have developed much earlier than the beginning of 1996.

Corey (Tr. 5111:9-5130:24) -- would be laughable if not for its tragic subject matter.

As discussed above, Bass twice confirmed the timing of the conversation at his deposition. Eisner's counsel attended the deposition and examined Bass for approximately 25 minutes, but never once asked Bass any questions regarding Eisner's desire to fire Ovitz within five weeks of his hiring, the timing of his recollection, Admiral Boorda, *Rent, La Boheme*, the *Richard Corey* poem or Eisner's purported concern about Ovitz's mental health. Bass 167:1-188:5.

Eisner failed to produce his personal diary, so it is impossible to even confirm if he and Ovitz together attended *Rent* in New York. For his part, Ovitz claims that he "lost" his Day-Timers, in which he kept notes, when they fell out of his pocket in Paris, France. Tr. 1417:6-13.[26] Defendants' attempt to corroborate Eisner's strained story with documentary evidence miserably fails. The one document defendants cite, an e-mail Eisner sent to Bass on May 26, 1996 (PTE 67), says nothing about: (1) any decision to terminate Ovitz; (2) Admiral Boorda or *Rent*; (3) Eisner's concern about Ovitz's mental state; or (4) what Bass and Eisner discussed during a dinner referenced in the document.[27] The e-mail actually focuses on advice Bass had given Eisner about Iger and references *Iger's* issues with Ovitz. PTE 67.

Other documents defendants cite, in which Eisner appears to be "enthusiastic" about Ovitz (Dir. Br. at 27-28), actually support plaintiffs' point -- Eisner believed Ovitz was on the

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[26] At his deposition, Ovitz claimed, inconsistently with his trial testimony, that he stored his old Day-Timers in boxes in his house, which were then lost. Ovitz 201:22-202:17. The apparent disappearance of the Day-Timers is not trivial -- Ovitz claimed they were replete with personal and business information and notations. Ovitz 200:2-203:25. Ovitz's failure to produce the Day-Timers prevented plaintiffs from impeaching Ovitz's testimony with his own contemporaneous record of events.

[27] The facts establish that Eisner placed his friendship with Ovitz ahead of the best interests of Disney regardless of when the conversation occurred.

way out from the very beginning, before the Old Board elected Ovitz to office, and before Ovitz signed the OEA. Bollenbach testified at trial that Eisner's favorable comments about Ovitz made in his October 20, 1995, letter to the board and his wife were not accurate. Tr. 5483:14-5485:11. Defendants fail to cite a substantially similar letter Eisner privately sent to Ovitz on October 10, 1995, to, as Eisner wrote, "counter what looked like some bad instincts . . . I wrote this memo also to get you to concentrate in what really matters, quality and the bottom line." PTE 24.[28] Eisner's proclivity of telling one thing to a public audience about Ovitz and another to his personal confidants is vividly illustrated by Eisner's admission at trial that he lied when he appeared on the *Larry King Show* on September 30, 1995, and told a national audience that he would again hire Ovitz and that negative reports of Ovitz's tenure were "bologna." Tr. 4800:13-4807:21.[29]

III. THE NEW BOARD ACTED IN BAD FAITH IN ALLOWING OVITZ TO RECEIVE AN NFT PAYOUT

A. The New Board Had To Authorize The NFT Payout

Defendants' claim that Eisner had the sole authority to terminate Ovitz cannot be logically squared with *Brehm* and this Court's prior decision that "the magnitude of the NFT,

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[28] Defendants also fail to mention the letter Eisner sent to his biographer and copied to Ovitz in December 1995, regarding "corporate ethics," mentioning the dangers to executives of "fall[ing] from grace" over ethical violations. PTE 765. Ovitz's handwritten note in the margin of the document, that Eisner should be "*very* careful" in what he plans to say in his biography, could reasonably be interpreted as a veiled threat. *Id.*

[29] The letter Eisner sent to his biographer that the defendants cite (Dir. Br. at 27-28) actually says that Eisner is having a "difficult time assimilating Michael Ovitz into the company . . ." and that he "had a difficult time having Michael Ovitz accept the other players as, if not equals, close to being equals." PTE 316 at MDE35. The same letter also describes the fact that Litvack may never settle in with Ovitz at Disney "because of his basic annoyance with the style of Michael Ovitz" and discusses the fact that Ovitz knows little about corporate governance. *Id.* at MDE36-37. The polite note Eisner wrote to Ovitz in December 1995, which defendants cite, contains only hortatory words of encouragement, is consistent with Eisner's desire to mollify Ovitz for 12 months, and fails to mention a single Ovitz accomplishment. PTE 331.