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

PART 2 of 2

even for a company of Disney's size, would indicate to a reasonable, rational director that some action would be necessary." *Disney II,* 2004 Del. Ch. LEXIS at *34 n.64 (citing *Brehm*, 746 A.2d at 259). Defendants' claim that the Supreme Court's observations in *Brehm* were limited to OEA approval falls flat because an NFT payout was just as significant an event -- a concept this Court understood in applying the materiality standard to the NFT. *Brehm*, 746 A.2d at 259-60. The self-serving testimony of defendants Wilson and Bollenbach that the NFT payout was not financially "material" is belied by, among other things, Disney's own 1997 Proxy Statement which contained a separate section entitled "Employment Agreement with Michael S. Ovitz" describing details of the NFT. PTE 55 at WD1247.

Defendants previously argued to this Court that a board meeting was necessary and had actually occurred. Pl. Br. at 71-72. These prior statements cannot be explained away as "good faith" mistakes based only upon the allegations contained in plaintiffs' original pleading. Dir. Br. at 52 n.55; Ovitz Br. at 23 n.30. The day after the January 27, 1997 board meeting, where Litvack claims to have "talked about how we intended to handle the case . . . . I talked about what was going to happen" (Tr. 6623:19-24), *Disney's legal department* signed on to a brief which raised arguments well beyond the pleadings:

> The second *decision of the Board* -- whether to abide by the specific severance protections of the Employment Agreement -- *cannot seriously be challenged as an unreasonable exercise of business judgment.* Plaintiffs do not challenge the termination of the relationship. (Compl. ¶ 2). *The decision to honor the Company's contractual commitments to Mr. Ovitz falls well within the reasonable discretion of directors exercising their business judgment.* ***Indeed, it is hard to see how they properly could have reached any other decision.***

PTE 809 at 28 (emphasis added). This brief discredits Litvack's totally inconsistent *trial* testimony that, in December 1996, he harbored the view that a board meeting was *unnecessary*. Tr. 6339:22-6341:10. Similarly undermined is defendants' claim that they reasonably relied on Litvack's silence because they were presumably confronted with contrary information at the

meeting and definitely in the brief filed on their behalf. Defendants cannot disavow the arguments they endorsed in their own contemporaneous submissions to this Court.

Defendants argue that the operative bylaws did not require the New Board to terminate Ovitz but merely gave the Board the "non-exclusive" power to terminate him and that Eisner also had the power to terminate Ovitz. Dir. Br. at 48-49. Defendants base this conclusion on provisions of the Bylaws giving Eisner, as CEO and Chairman, general authority to "supervise" Disney's officers, and which stated that the President "reports" to the Chairman. *Id.*

However, these general and non-specific provisions in the Bylaws that the President "reported" to and was "supervised" by the CEO did not, and could not, trump the specific provisions cited by plaintiffs in their opening brief, that the President held his office for such term as determined *solely* by the Board of Directors, and that the Board had the authority to remove any officer with or without cause. *See* Pl. Br. at 70-71.[30] In addition, defendants argue throughout their brief that the Board hired Ovitz and that Ovitz was not unilaterally hired by Eisner. Defendants cannot have it both ways. *See* 2 William M. Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* §466.10 at 467 (rev. ed. 1998) (where an "officer is hired by the board of directors, only the board of directors has the authority to terminate the particular . . . officer.").

The 1990 Plan Rules required, at a minimum, that the Compensation Committee to be

[30] Arguing that the sentences in Article IV, §2 of the Bylaws (PTE 498) should be read disjunctively, defendants ignore the plain language in this provision that the Board had the sole authority to determine the terms of officers. While the operative provision did go on to state that officers "may be" removed by the Board at any time "with or without cause," this sentence, when read with the one immediately prior to it, made clear that the Board was *solely* responsible for setting the terms of the President and the Board had *sole* authority to make the decision to terminate the President with or without cause. In context, the removal power invested in the Board was a subset of its "sole" power to establish officers' terms of office.

involved in any termination decision. Dir. Br. at 49-51. Those Rules expressly provided that the Compensation Committee had to make the termination decision if such action would result in the vesting of options. Such authority coincided with the Board's overall duty to approve the NFT due to its materiality and the requirements of Disney's Charter and Bylaws. PTE 41 at WD135. Based on Litvack's trial testimony, however, defendants claim that the OEA somehow superseded the terms of the 1990 Plan Rules so that Compensation Committee approval was not possibly required. Dir. Br. at 49-52. It defies logic that the 1990 Plan, which was approved by the Compensation Committee, the Board, and Disney's shareholders, could be overridden by a term in an employment agreement. Additionally, the OEA plainly states that it is subject to the 1990 Plan. PTE 7 at WD205. Indeed, there is no reference to any such intent in the Compensation Committee minutes, board minutes or in the proxy statement soliciting shareholder approval.

The OEA incorporated the 1990 Plan by reference except as "*expressly* provided" in the OEA. PTE 7 at §5(e) (emphasis added). While the OEA sets the standards for the determination as to whether or not Ovitz could be terminated for cause, no provision in the OEA purports to "expressly" override the unequivocal language in the 1990 Plan Rules. The OEA merely confers on the "Company" the power to effectuate an NFT and does not contain specific language shifting the locus of decision-making authority on that aspect of the decision from the Compensation Committee to anyone else.

The Court cannot credit Litvack's trial testimony that he and Santaniello discussed the issue either at the end of November or the beginning of December 1996. Dir. Br. at 50-51. At his deposition, Litvack gave the opposite testimony. Litvack 480:13-483:8. There is no written

evidence in the record to corroborate Litvack's conflicting trial testimony.[31]

B. Eisner And Ovitz Bypassed The Board

Ovitz secretly negotiated his exit with Eisner and was not just enforcing a contractual right as defendants repeatedly claim. This Court has already dispensed with defendants' argument, plainly ruling that "Ovitz did not have a contractual right to receive a NFT, which distinguishes this situation from the mere receipt of salary." *Disney II*, 2004 Del. Ch. LEXIS 132, at *33. Further, the overwhelming weight of evidence disproves defendants' contention that no negotiations occurred because Eisner "fired" Ovitz against his will, and Ovitz received "no more" than what the OEA provided in the event of an NFT. Defendants' arguments collapse when subjected to even the slightest scrutiny and common sense.

1. Ovitz Was Not Unilaterally "Fired"

Ovitz's overheated testimony and rhetoric sinks his claim of unilateral termination. As Ovitz recounted both in his testimony and his brief, from the minute he was hired at Disney, it was "an uphill fight." Ovitz 532:17-533:19; Ovitz Br. at 5. Ovitz claims he was "irrelevant," "relegated to the sidelines," "chronically undermined," "stymied by Eisner's directives," "castigated" and "tasked . . . with all the underperforming areas of Disney." Ovitz Br. at 5-8. Ovitz claims his "transition into Disney was difficult," he was in "shock" regarding the "layers of bureaucracy" at Disney and he had "a lot to learn about operating in a large public company." *Id.*[32] Given these admissions, it is inconceivable that Ovitz, a self-described industry innovator

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[31] At his deposition, Santaniello made no mention of discussing with Litvack whether the OEA trumped the 1990 Plan Rules. Santaniello was not called by defendants to testify although they certainly could have produced him.

[32] Eisner wrote that, "[a]t the same time you were very unhappy in a May dinner we had where you told me how much you disliked your job." PTE 24 at DD2451. Eisner further observed: "[y]ou finished off that letter by saying that you could 'think of a lot of people who could help

and master negotiator (Ovitz Br. at 2), would tolerate such working conditions let alone plead "with tears in his voice" for a chance to stay. Ovitz Br. at 16.[33] The fact that Ovitz was in constant contact with his attorneys from day one and that they were focused on the termination provisions in the OEA and his exit strategy exemplify that reality. Ovitz 155:8-156:11; *see, e.g.*, PTE 794.

Defendants fail to cite a single shred of paper in the record to corroborate that Eisner "fired" Ovitz. Defendants expend many pages of their briefs arguing that Eisner had the sole authority to fire Ovitz, but they cannot explain Eisner's own testimony that Ovitz "wouldn't accept being fired. I mean, I know that sounds ridiculous but he would not here [sic] it." Eisner 610:22-25. When a direct supervisor fires a subordinate that normally ends the matter. Eisner apparently had a different view. He testified that he could not just "throw" Ovitz out, but, instead, had to get his "consent" to leave. Tr. 4525:3-16. Indeed, Eisner claims to have gone so far as to enlist Wilson to "persuade" Ovitz to leave -- a proposition inconsistent with a unilateral "firing." Dir. Br. at 48.

2. Ovitz And Eisner Engaged In Bilateral, Secret Negotiations

The documentary record overwhelmingly shows that Eisner, Russell and Ovitz engaged in secret bilateral negotiations. By October 1996, Eisner and Ovitz exchanged handwritten letters evidencing the strong personal bonds then still existing between them and their desire to make Ovitz's departure a "win-win" situation. PTE 19 at WD399-401; Pl. Br. at 32-33. Defendants do not deny the friendship expressed in the documents, and claim only that the notes

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you more than me.' I think I have finally come to the same conclusion." PTE 24 at DD2453. The original of the quoted letter was never produced.

[33] Ovitz's purported "master plan" for turning around Disney and saving his job, which he wanted to present to Eisner if he could hold on at Disney until December, was, oddly enough, transcribed on a legal pad but then "lost." Tr. 1555:4-1560:3.

reflect Eisner's attempt to "trade" Ovitz against Ovitz's will. Dir. Br. at 17. While the immediate goal was to remove Ovitz from the organization by a transfer to Sony, the broader, shared interest between Eisner and Ovitz in effectuating Ovitz's departure on terms that were satisfactory to both is clearly evident in these private exchanges and is unrebutted.

Eisner's notes of his conversation with Wilson on December 1, 1996 plainly show that Ovitz would accept nothing less than an agreed-to settlement. Pl. Br. at 35-36. Defendants repeatedly cite the notes in their briefs for other purposes (Dir. Br. at 21, 48; Ovitz Br. at 11-12, 17) but ignore those parts of the document where Eisner recorded that Ovitz "will be available to discuss settlement -- I must be magnanimous," and a "deal should be sooner rather than later." PTE 25. Ovitz himself states that after meeting with Wilson, he was "willing to discuss his departure from Disney." Ovitz Br. at 12.

Defendants similarly ignore the typed note Eisner wrote to Russell on December 3, 1996. Pl. Br. at 36. The document reflects the fact that Ovitz wanted numerous benefits outside the OEA, including: (1) continuing on the board; (2) continuing to have an office and staff; (3) acting as a consultant to Disney; (4) keeping health insurance and security; (5) continuing to use the car; and (6) repurchasing his airplane from Disney. PTE 326. The note makes plain that Eisner initially agreed to most of the requests and acceded to Ovitz's request that "you [Russell] NOT SANDY to handle this." *Id.* The fact that Eisner apparently later changed his mind after he perceived that Ovitz violated their private non-disparagement agreement does not disprove that Ovitz made the demands and that Eisner agreed to most of them.[34] It would have been

[34] Ovitz did not hesitate to make demands that exceeded the NFT benefits defined in the contract. *See* PTE 174, 177, 178, 179, 234, 237, 244, 379, 383. Ovitz's initial termination letter of December 12th was accompanied by a press release indicating that he would remain as a consultant to the Company, a term which was not contemplated by the OEA. PTE 13, 485.

illogical for Eisner to put Russell in charge of "settling out" the OEA at the outset if the terms of Ovitz's departure required the mere mechanical application of the OEA's NFT provisions.

The December 12th and December 27th letters memorializing Ovitz's departure flatly *disprove* the contention that Ovitz was "fired." PTE 13; 14; *see* Pl. Br. at 38-41. Both letters contain carefully crafted language vetted by Ovitz's attorneys. PTE 336. The December 12th letter plainly recites that it "confirm[s] the terms of our mutual agreement" and that the agreement will "be given the same effect as though there had been" an NFT. PTE 13.[35] Eisner could not explain why Disney chose to use this language and refused to interpret it at trial. Tr. 4598:9-4599:9. The December 27th letter similarly says that by "our mutual agreement," the parties superseded the prior letter, and Ovitz's departure will be "treated as" an NFT. PTE 14. Defendants could not recall who drafted the language and why those specific words were used. *See, e.g.*, Tr. 3206:21-3211:18; 4667:8-15; 6593:23-6595:23.

The contents of the letters, themselves, evidence a private deal. The December 12th letter says that the "terms" of Ovitz's employment "will end on January 31, 1997." PTE 13. Defendants have not denied plaintiffs' claim that Eisner gave Ovitz until the end of January to leave because he could not have received his $7.5 million bonus initially awarded to him if he officially departed before then. Pl. Br. at 38-39 n.34. In his brief, Ovitz melodramatically asserts that after December 12th, "a devastated Ovitz never returned to Disney" (Ovitz Br. at 12), underscoring his understanding of a private deal allowing him to keep his title and board seat

[35] Russell himself termed the December 12th letter a "Comfort Letter" in a memorandum he sent to Ovitz's attorneys on December 12th. PTE 179. In that document, Russell also stated: "[t]rust this is okay." *Id.* Russell's words are hardly the stuff of a unilateral "firing."

until the end of January.[36] Otherwise, if no private deal to stay was struck allowing Ovitz to stay in some official capacity, Ovitz's requests for reimbursement for business expenses incurred after December 12th constituted, at a minimum, a violation of Disney's ethics policy. DTE 59 at WD4935 (billing lunch with John Eastman on 12/13/96 for "*Disney Strategic Planning*"; billing for security with "Westec-Aspen" on 12/12/96, 12/20/96, and 12/24/96 totaling $3363.12; expense labeled as "Boat" on 12/23/96 for $110); *see also id.* at WD5159 (billed for "working staff lunches" on 12/19/96, 12/21/96, 12/30/96 - total $188.04). Ovitz's submission of expense reimbursement requests, during a period after he claimed to have left Disney, raises questions about expense account abuse not unlike those referenced by Price Waterhouse in its draft report. PTE 147.

Ovitz does not deny that even after December 12, 1996, he was still a Disney director and officer: the language in the December 27th letter that the OEA "*will end at the close of business today*," and Ovitz's signature will confirm the "end of your service as an officer, and your resignation as a director" proves the point. PTE 14. Ovitz does not deny that he did nothing to inform the New Board and he willingly accepted the secret deal. Consistent with his deposition testimony that he would understand the duty of care "if it was at a hospital" (Ovitz 191:5-11), at trial Ovitz mocked the notion that he had an obligation to inform the Board. Pl. Br. at 39-40. Ovitz's claim that it would have been a "futile act[ ]" to contact the Board because he believed that Eisner kept the board members "informed of important events" (Ovitz Br. at 22) cannot be squared with his own deposition testimony that he knew Eisner said different things to different directors depending upon Eisner's relationship with them. Ovitz 513:25-517:15. Ovitz admitted

[36] Ovitz confirmed that, on December 12th, he threw Disney documents in the trash. PTE 466; Tr. 1434:21-1435:7.

he was unaware of any board meeting approving his NFT payout. Pl. Br. at 29-30.

Also ignored in defendants' briefs is the fact that Ovitz did not actually agree to leave until after he and Eisner met privately at Eisner's mother's home in New York, on December 11, 1996, away from Disney's New York offices. Defendants do not deny that Eisner agreed to allow Ovitz to serve as a consultant and that he and Ovitz reached a private non-disparagement deal at this meeting. Pl. Br. at 38-39. Defendants say nothing about the fact that Ovitz did not lose his $7.5 million bonus awarded on December 10, 1996, until after Eisner perceived that Ovitz violated the private deal. Also ignored in defendants' briefs is Eisner's e-mail on December 16, 1996 to Disney's then chief of communications, calling Ovitz, among other things, a "psychopath." Pl. Br. at 41. The chronology of events in the last two weeks of December 1996 unmistakably proves the existence of a private deal made and then privately revoked, namely:

> (1) Ovitz received a $7.5 million bonus (out of a $10 million maximum bonus) on December 10, 1996, after Russell consulted with Eisner about it (Tr. 3170:12-14; *see also* Russell 765:4-7); (2) on December 11th Eisner and Ovitz struck a private non-disparagement agreement; (3) Russell's notes indicate that Ovitz would get a bonus only if he kept his "mouth shut" (PTE 379); (4) the December 12th letter agreement permitting Ovitz to stay until the end of January; (5) Disney's December 12th press release publicly announcing that Ovitz would be a company consultant (PTE 390); (6) Eisner's perception on or about December 16th that Ovitz was violating the non-disparagement agreement; (7) the rescission of the $7.5 million on December 20th (thus eliminating the need to keep Ovitz employed at Disney through the end of January 1997); and (8) the acceleration of Ovitz's departure on December 27th minus any consulting agreement. *See* Pl. Br. at 36-43.

Defendants also cannot legitimately deny that the deal was secret: other than Eisner, Ovitz, Russell and Litvack, no other defendants saw the two departure letters -- and none of the four bothered to send the letters to the other members of the New Board. *See, e.g.*, Tr. 3938:4-

18; 5881:24-5882:7; 5990:21-5992:6; 7254:11-7255:19; 7758:2-7759:11; 7762:6-19.[37] Furthermore, even if they did know that Ovitz would be paid according to the NFT provisions of the OEA, most directors did not even know the payout amount. *See, e.g.,* Tr. 3921:4-3922:4; 5756:11-5758:3; 7606:7-18; *see also* Tr. 3198:11-3200:24; 3231:16-23. The *only* document in the record Eisner sent to directors about Ovitz's departure -- a letter dated December 12, 1996 -- states only that Ovitz's Presidency had "come to an end" and attaches a press release stating that Ovitz "will continue to serve as an advisor and consultant to the company and the Board of Directors." PTE 9. The press release also quotes Ovitz as saying it was his "decision to leave . . ." thus calling into question whether any payout was necessary.[38] *Id.*

The evidence overwhelmingly proves that Ovitz's claim that he was "chained to his desk" was, in reality, a legal strategy designed to prevent his forfeiture of an NFT payout by resigning. A privilege log produced by Ovitz's attorneys in this litigation shows that Ovitz was receiving legal advice at least as early as October 1996 regarding his impending departure from Disney. PTE 794, Log p. 6 of 10; Tr. 2039:1-10. At about this same time, Eisner wrote Litvack, in response to a note Ovitz sent to Eisner proclaiming his claimed renewed dedication to Disney, "[s]ounds like a legal letter to me." PTE 172. Eisner later observed that he considered Ovitz and his attorney to be "one and the same in a negotiation[] . . . ." PTE 24 at DD2454.

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[37] Eisner observed in his December 3rd note to Russell that Ovitz wanted to keep the deal "a total secret." PTE 326 at DD2540.

[38] On December 24, 1996, Russell sent to the entire New Board an article penned by Crystal entitled "Mike Ovitz Got Away With Murder . . . And I Helped Him" which, among other things, Crystal stated "[g]iven that Ovitz and his allies have been retailing the notion that he resigned, rather than being fired, Disney might not end up having to make good on the full value of Ovitz's severance package." PTE 10. Despite the press release language and Crystal's article, no director took any action to investigate.

C. The New Board Abdicated

The New Board members claim to have acted in good faith because they assert an active, continuing dialogue among themselves about Ovitz's departure. The defendants' briefs are completely silent, however, as to what, if anything, the New Board did between the December 12th and 27th termination letters. While a firestorm of controversy broke out in the press regarding the public's perception that Ovitz's astronomical severance overpaid him for his short, one-year tenure, the New Board sat by and did nothing. PTE 16; *see also* PTE 15, 355, 357, 466, 467. None of the directors asked for information or called for a special meeting to consider the issue at any time even though they had the authority to do so. PTE 498 at WD7098-7099. The record evidences nothing about New Board approval of the NFT. Defendants' self-serving and uncorroborated testimony about their purported involvement in the process is riddled with inconsistency and merits no weight at all.

1. The September 30, 1996 Board Meeting

The New Board defendants assert that at and around the September 30, 1996, board meeting in Orlando, Eisner began to discuss with them that Ovitz's problems at Disney had reached the point where it was likely he would be leaving the Company. Dir. Br. at 20, 53. Eisner claims he did this during one-on-one discussions over the course of the weekend -- apparently pulling directors aside at various points and speaking to them in private. Tr. 4780:20-4782:20. Aside from Father O'Donovan, however, Eisner could not specifically recall any other directors with whom he had these alleged conversations, and documentary evidence exists to support Eisner's noted assertion. *Id.* at 4782:3-20.[39] Furthermore, whatever discussions may

[39] Father O'Donovan, for his part, had no specific recollection of discussing Ovitz with Eisner during this weekend. Tr. 6768:24-6769:5.

have occurred, if they even occurred at all, were not collectively conducted at a board meeting. When Eisner told a national television audience, the *same day* as the New Board meeting, the admitted misstatement that he would hire Ovitz "again" (Tr. 4802:5-4803:2), no member of the New Board said or did anything about it.

2. The November 25, 1996 Board Meeting

Defendants claim that there was a conversation in executive session regarding "the need to terminate Ovitz" during the November 25, 1996 board meeting, which allegedly occurred in a glass-walled conference room at Disney's offices. Dir. Br. at 53-54. This story is completely contradicted by the meeting minutes which do not reference either a discussion of Ovitz or an executive session at all but do show that the New Board nominated Ovitz for a new *three-year* term. Pl. Br. at 35.

At trial, Eisner recounted this alleged executive session as, at a minimum, an awkward and uncomfortable situation, with Ovitz nervous and concerned lurking outside the glass-walled conference room while the other directors deliberated over his fate in plain sight. Tr. 4376:22-4378:5. Yet, in deposition testimony, *none* of the other directors ever testified about such an allegedly pivotal event. Prior to trial, not a single director other than Eisner testified that any discussions regarding Ovitz, in an executive session or otherwise, occurred at the November 25, 1996 meeting. Gold 361:8-19; Litvack 573:7-17; R. Disney 475:2-11; Russell 730:17-732:2; Stern 163:14-164:2. Even when defendants' apparently collective amnesia lifted at trial, they could not get their stories straight. At trial, Wilson and Roy Disney could not even recall the purported executive session. Tr. 3096:18-3097:11; 3232:19-3233:23; 4099:11-4101:19;

7040:22-7046:2.[40] Watson and Bowers only claimed recall a general conversation about Ovitz not working out, and did not testify that there was any discussion about the terms of his departure. Tr. 5929:19-5932:6; 7979:18-7982:10. After reviewing Gold's trial testimony, Stern claimed to recall the executive session, but he could not remember whether the NFT was discussed. Tr. 8180:10-8182:8.

Poitier and Murphy did not attend any executive session. PTE 91. Lozano and O'Donovan left early, so they were not present for the executive session. Tr. 6719:9-6720:10; 7742:21-7745:23. Senator Mitchell attended the meeting by telephone and hung up the line before any executive session convened. Tr. 5758:21-5759:10. Accordingly, if the executive session did occur, only seven outside directors, at most, could have been present. PTE 91 at WD1555.

Gold's testimony about the meeting was unabashedly riddled with inconsistency. Gold testified at trial that not only did he ask Eisner directly, in front of all the other directors, whether the termination was going to be for fault or non-fault, he also testified that he asked Litvack the same question after the meeting. Tr. 3773:15-3775:15. No other directors testified that Gold raised the issue of fault, nor did Litvack recall speaking with Gold after the meeting. Tr. 4100:20-24; 5760:13-18; 6347:9-16; 6683:17-22.[41] In fact, Litvack testified that he did not

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[40] Nunis, who was at the November 25, 1996 Board meeting, but who would have been excluded from the executive session as an inside director, does not recall an executive session occurring. Tr. 5863:19-5864:15.

[41] Gold's testimony cannot be credited at all. During Gold's deposition, he testified that he did not know when he had spoken to Litvack about an NFT and that it may have been at a Compensation Committee meeting. Gold 207:19-208:16. Later in his second day of deposition, Gold stated that Litvack was not present when the New Board discussed it. Gold 350:3-11. *See also* Tr. 3911:11-3914:10. After his deposition, Gold submitted an errata sheet changing his testimony to say that Litvack was present. PTE 801. Finally, at trial, Gold told yet another story, saying for the first time Litvack was not present when the Board discussed it, but that Gold

speak about the cause issue at a board meeting until January 27, 1997. Tr. 6226:12-16; 6286:23-6288:7. *See also* Pl. Br. at 78.[42]

The minutes show that the New Board could not plausibly have discussed Ovitz's termination at the November meeting because he was unanimously nominated -- an important act according to Eisner (Tr. 4495:7-4496:5) -- for a new three-year term as a director. PTE 91. Indeed, in a memorandum Russell sent to Olson and Goldman dated December 11, 1996, Russell observed:

> The Board's renomination [of Ovitz to the Board at the November 25 Board meeting] ***was made on the assumption of continuing employment under the contract***. Since this assumption ***is no longer valid, the Board must be advised*** of the facts and circumstances regarding the separation . . . . ***It would then be up to the Board*** to consider whether or not to recommend to the shareholders renomination for the additional term of three years, the staggered term for this class, ***based on the new factual situation.***

DTE 163 (emphasis added). This contemporaneous language is straightforward and compels the conclusion that the New Board learned nothing about Ovitz's departure at the November 25, 1996 meeting.

3. The EPPC Meetings

Defendants make much of the two EPPC meetings in December 1996, but the fact is that neither EPPC meeting constituted a meeting of the full Board. In December 1996, Ovitz was discussed at two EPPC meetings -- one to give him a $7.5 million bonus, and the other to rescind it ten days later. While two of the members of the EPPC testified at trial that Ovitz's impending termination was discussed at the December 10th EPPC meeting, the other two members do not

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spoke to Litvack after the undocumented "executive session." Tr. 3911:11-3917:21. Gold commented that his memory might change yet again six months after the trial. Tr. 3917:4-21.

[42] Stern claims that Litvack came into the executive session and discussed issues regarding termination in the presence of all the directors. Tr. 8179:22-8180:22. In view of this contradiction, neither Stern nor Litvack's testimony merits any consideration.

recall discussing Ovitz's termination or the NFT payout. Tr. 7246:20-7248:2 (Poitier never discussed NFT prior to Ovitz's termination); 7764:12-7766:11 (Lozano never discussed NFT prior to Ovitz's termination). The minutes are silent on any discussion of an NFT at the meeting, and no contemporaneous documents make any reference to such a conversation. Indeed, like what occurred at the November board meeting, the December 10th minutes actually show that the EPPC took only *favorable* action towards Ovitz as it awarded him $7.5 million (PTE 51 at WD1229), and established a maximum bonus target for Ovitz for the *1997 fiscal year.*[43] *Id.* at WD1230.

The Board rescinded Ovitz's bonus at the December 20, 1996, meeting of the EPPC. PTE 53. Gold testified at trial that he "lit into" Litvack, challenging him as to whether or not there was cause to fire Ovitz under the OEA and if he had received an opinion from outside counsel on the issue. Tr. 3795:16-3796:18. Despite the fact that Gold claims that he "lit into" Litvack at the meeting, none of the other individuals present at the meeting (aside from Litvack and Eisner) recall the concept of cause/no-cause being discussed. Russell 853:24-854:8; Santaniello 161:16-19; Tr. 3204:16-19; 7761:13-7762:5. Again, there are no contemporaneous documents to support the claim that the EPPC then discussed Ovitz's termination and, again, the minutes are completely silent on this topic.

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

Defendants cannot support their claim that they in good faith relied upon Litvack to make

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[43] The director defendants claim that one of the reasons Ovitz was given a $7.5 million bonus, or 75% of the maximum, was due to "the Company's success and Ovitz's hard work." Dir. Br. at 22. This cannot be rationally squared with the fact that Litvack and Roy Disney only received 17% and 20% of their maximum permitted bonuses although they were also employed during Disney's successful year and were not being terminated. Pl. Br. at 37.

the determination that (1) there was no cause to fire Ovitz, and (2) that there was no need for the Board to call a meeting to decide the terms of Ovitz's termination. Dir. Br. at 67-71. As discussed above, Litvack's silence on the necessity of calling a board meeting is facially absurd and legally deficient. The New Board could not have reasonably relied on Litvack's "opinion" that Ovitz could not be dismissed for cause because, even crediting his testimony, Litvack testified that he did not speak to the New Board about the issue until the January 27, 1997, meeting.[44] Even then, according to the board minutes and trial testimony, it is far from clear that Litvack discussed anything other than this litigation. PTE 799; Tr. 5605:23-5607:23; 5996:21-5997:3; 7255:20-7257:3; 7894:8-20; 8183:17-8184:21. Not *a single document in evidence* shows Litvack considered the cause issue at any time, and defendants never asked to see a writing on the issue.[45]

Defendants' experts, who submitted over a hundred pages of analysis, testified at trial that the definitions of gross negligence and malfeasance within the context of California employment law were wide open to different interpretations in 1996. Tr. 8329:17-8332:8; 8743:5-20. Litvack, however, did not even bother to open a legal dictionary before rendering his "opinion," and never caused anyone else to do any research. Litvack 567:14-568:21; Tr.

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[44] Defendants did not establish at trial that Litvack was known to the other directors as having any particular expertise in Delaware corporate law.

[45] Eisner could not have "relied" on Litvack's "advice" because he knew Litvack did not have all the facts. Eisner did not copy Litvack on documents he authored that were critical of Ovitz (Tr. 6370:21-6372:13), and Eisner knew that Russell (not Litvack) had been asked to speak with Ovitz about reporting his expenses. Tr. 6361:21-6362:8. Further, because Eisner's employment contract contained the same definition of cause as the OEA, Eisner had no incentive to find outside counsel willing to apply even a minimally broad definition of "gross negligence" or "malfeasance" within the parameters those terms had under then-existing California employment law.

6119:14-6121:8.[46] No evidence substantiates defendants' suggestion that Morton Pierce -- a New-York based M&A lawyer -- rendered any advice on the cause issue. Litvack testified at his deposition only that he "may" have talked to Pierce. Litvack 558:8-10. Pierce has no recollection of ever advising Litvack about cause/no-cause issues. Pierce 36:4-37:2. Dewey Ballentine produced all the time records and research files for the work performed for Disney during the relevant time period. PTE 391, 392, 393. None of these files contained any research relating to the cause issue.

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

To support their contention that Litvack thoroughly explored whether Ovitz could be terminated for cause under the OEA, defendants claim that Litvack hated Ovitz and had every reason to see Ovitz terminated without receiving an NFT. Dir. Br. at 17; Ovitz Br. at 11. However, as defendants' experts testified, if Eisner and Litvack were truly driven to terminate Ovitz for cause, they should have performed an investigation into his tenure at Disney to ascertain whether or not cause existed to terminate him. Tr. 8521:14-8523:17; 9109:10-9110:15. Defendants incorrectly assume that Litvack, who had designs on being President, would defy Eisner's wish to pay Ovitz out. *See* Ovitz 514:20-24; 522:3-523:3 ("Mr. Litvack . . . was very much an appendage of Mr. Eisner."). Defendants also fail to take into account the fact that Ovitz's payout was coming from the corporate treasury and not Litvack's pocket.

Plaintiffs have established by a preponderance of the evidence that had Litvack done

[46] Litvack testified at trial that he consulted with his subordinates, Santaniello and Cohen, regarding cause under the OEA. Tr. 6119:14-6121:8. There are no contemporaneous documents, whether in the form of a research file or otherwise, showing that Litvack in fact conferred with these individuals. Since Litvack himself was not fully aware of all of Ovitz's transgressions, it is impossible for Cohen or Santaniello to have rendered an informed opinion to Litvack.

some legal research or undertaken a reasonable factual investigation, he would have discovered that grounds existed for the Board to terminate Ovitz for cause. Pl. Br. at 90-93. Contrary to defendants' assertions that there is no evidence that Ovitz was a habitual liar but merely engaged in "agenting" (Dir. Br. at 16, 57-58; Ovitz Br. at 28-31), the record is replete with documents recording Eisner, other senior officer and directors' contemporaneous observations of Ovitz's veracity problems. *See* Pl. Br. at 44-47. Confirming Eisner's recorded impression that Ovitz was a "psychopath" (PTE 20), Litvack testified at trial about his sense that Ovitz truly believed his own (but false) versions of events. Tr. 6374:21-6377:2. The Court had several opportunities to observe Ovitz at trial where much of his self-serving testimony was contradicted by the other defendants. *Compare* Tr. 1220:14-1228:1 *with* 5081:8-5082:6; 5490:5-5491:15; 6555:5-6556:16; *compare* Ovitz Br. at 5-8 *with* Tr. 4915:21-4916:6. The documents also plainly show Ovitz's conduct was severely detrimental to the Company. Pl. Br. at 90-92; *see* PTE 20, 24, 79; *see also* PTE 435; Ohlmeyer 81:5-20. Stern, even faced with the threat of liability, conceded at trial that Ovitz was "destructive to the core values of the company." Tr. 8160:15-24. Similarly, at trial, Murphy called Ovitz "a cancer." Tr. 7556:7-17.

That Ovitz accomplished nothing relevant at Disney (Pl. Br. at 47-49) is aptly illustrated by the fact that the director defendants go so far as to list moving the location of a park entrance gate as a major Ovitz accomplishment. Dir. Br. at 14. Defendants wrongly rely on the late-produced Ovitz files to show he worked at Disney. Ovitz Br. at 32-33; *see also* Dir. Br. at 22. The files, however, consist largely of memoranda written by other executives and managers at Disney and contain virtually no documents actually generated by Ovitz. *See, e.g.,* Tr. 9282:15-9284:15 ("Ovitz could have been in a coma and still collecting these empty documents . . . ."). The files hardly reflect "pretty deep" piles of documents that, Ovitz said during his deposition,

he reviewed at Disney. Ovitz 204:2-206:7.

Litvack's claims that he investigated and absolved Ovitz of any liability for certain transgressions are not supported by any contemporaneous documents. *See, e.g.,* Pl. Br. at 74-75. Defendants do not confront the facts that Disney's hiring of Price Waterhouse to prepare a report on Ovitz's expenses (the "PW Report") and the accompanying holdback of one million dollars collide with defendants' contention that Disney had no grounds to terminate Ovitz for cause or that a full investigation would not have elucidated those grounds. Defendants cannot assert that the $1 million holdback was a regular business practice. Litvack could not identify any other departing executive from whom Disney had held back money pending an investigation by an outside auditor of their expenses. Tr. 6242:5-6243:9.

The PW Report was never issued in final form at the specific request of Disney management. Girdlestone 63:15-64:15. An internal Disney memorandum labeled "Privileged and Confidential" purportedly records the final accounting which resulted from negotiations with Ovitz's representatives. DTE 178; Tr. 6173:19-6174:7. The memorandum records Disney nonetheless withheld $70,000. Disney's in-house attorney and Litvack's direct subordinate, Edward Nowak (whose salary and bonus were determined by Litvack), was put in charge of handling the negotiations. Tr. 6176:22-6177:15. Mr. Nowak is a Disney attorney listed on defendants' brief filed in support of their January 1997 motion for a judgment on the pleadings. *See* PTE 809. Accordingly, it is reasonable to conclude that Disney called off Price Waterhouse after plaintiffs filed this lawsuit, and negotiated a settlement with Ovitz to avoid having its auditor author a final report containing factual findings deterimental to Litvack and the other defendants. Though originally listed as a trial witness, defendants chose not to have Nowak testify at trial.

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

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

As plaintiffs demonstrated, the secret negotiations between Eisner and Ovitz constituted an entirely unfair process. Pl. Br. at 81-82. Also as discussed, the Old Board committed waste in granting Ovitz the options he received in the NFT payout, which directly establishes financial unfairness. Pl. Br. at 86-88; *see infra* at 47.

Defendants, relying on their experts, nonetheless argue that they can sustain their evidentiary burden of proving entire fairness based on pure speculation that if dismissed for cause, Ovitz would have: (1) sued Disney; (2) won a verdict; and (3) been awarded hundreds of millions of dollars -- contingencies the New Board never considered. Plaintiffs have demonstrated that such speculative evidence lacks any evidentiary weight and should be disregarded: it goes without saying that the outcome of jury deliberations is completely unpredictable. *See* Pl. Br. at 92-93. Moreover, in the realm of the known and knowable, Ovitz testified that he did not even consider suing Disney and his attorney said that the prospect of a lawsuit was never seriously discussed. Ovitz 618:12-19; Olson 86:16-87:6. At a minimum, defendants' experts' speculations about the *possibility* of Ovitz's suing, and then winning, do not constitute the certainty of an adverse result to Disney that defendants must establish if they are to carry their burden of establishing by a preponderance of the evidence that giving Ovitz an NFT was entirely fair. Fox Report (DTE 430) at 35. *Cf.* Tr. 9252:23-9253:21.

Even assuming Ovitz did sue Disney, he would have had to win verdicts on separate tort claims to recover much more in damages than the OEA could provide. The OEA contains a liquidated damages clause. PTE 7. Moreover, California law prevents claimants from boot-strapping a contract-based wrongful termination claim into a tort claim. *Soules v. Cadam, Inc.*, 2

Cal. App. 4th 390 (Cal. Ct. App. 1991); *Lazar v. Superior Court*, 909 P.2d 981 (Cal. 1996). A plaintiff cannot bring a defamation claim if the operative facts giving rise to the alleged breach of contract are the same facts underpinning the tort claim. *Soules*, 2 Cal. App. 4th at 403-04.[47]

a. Fraudulent Inducement

To prevail on a claim for fraudulent inducement, Ovitz would have had the burden to show that there were material misrepresentations made by Eisner, which Eisner knew at the time were false, and upon which Ovitz reasonably relied in taking the position of Disney's President. *Lazar*, 909 P.2d at 984-85; Tr. 8553:10-14.

Ovitz's trial testimony shows that he was not deceived. *See* Tr. 2151:19-2152:13; 4209:21-4210:8; 4911:19-4912:20. On his cross-examination of Ovitz's expert at deposition and at trial, Eisner's counsel strongly contested that Ovitz could succeed on a fraudulent inducement claim. Feldman 139:4-153:9; Tr. 8412:17-8430:18. Defendants' meek assertion that the fraudulent inducement claims had a potential settlement value is speculation upon speculation. *See* Dir. Br. at 60.

b. Defamation

There is no evidence to support defendants' contention that Ovitz would have or could have brought a successful defamation claim against Disney. *See* Ovitz 36-37; Dir. Br. at 60. To prove their case, Disney, on terminating Ovitz for cause, would have had to knowingly and maliciously publish a false statement about Ovitz. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); Tr. 8463:22-8467:3. If Disney had fired Ovitz for cause, defendants can

[47] Moreover, Disney might only have to show that it acted in good faith and not bear the burden of proving the underlying misconduct. *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 948 P.2d 412, 422-23 (Cal. 1998). Ovitz harshly takes plaintiffs to task for their citations to *Cotran* but produced no California authority rejecting *Cotran* or narrowing its principles only to cases involving implied-in-fact contracts. *See* Ovitz Br. at 35.

only guess what Disney would have published about Ovitz. Ovitz does not claim that Disney defamed him in its statements regarding his departure in 1996. It is highly unlikely that they would have defamed Ovitz in the much more charged atmosphere of a hypothetical "cause" termination. It is more likely that Disney, with the help of competent counsel, would have carefully drafted such a release so as to avoid making a statement which was defamatory. As defendants' experts admitted, there could not be a defamation claim if Disney had simply reported that Ovitz was leaving Disney without saying anything more. Tr. 8411:1-3; 8456:11-22.[48] *See also* Tr. 9317:17-9319:8 ("self-publication doctrine" under California is applied extremely narrowly).

Furthermore, truth is an absolute defense to defamation, and Ovitz would have had to show that whatever statements were made in this hypothetical press release were actually false. *Hughes v. Hughes*, 122 Cal. App. 4th 931, 935-36 (2004). In fact, since Ovitz was a public figure he would have had the burden to show that the allegedly false statement was published with actual malice, that the statement was motivated by ill-will or hatred or that the statement was made without a reasonable belief in its truth in reckless disregard of the rights of the plaintiff. *Sullivan*, 376 U.S. at 279-80. Defendants' assumption that Disney would make a statement about Ovitz with "actual malice" if terminated for cause is based entirely on Litvack's undocumented belief that Ovitz could not have been terminated for cause. Had the New Board complied with its fiduciary duties, however, and determined in good faith that good cause existed, as they well could have (Tr. 9107:15-9114:3), then Ovitz would have no grounds for a

[48] Defendants' experts claimed that Ovitz could recover punitive damages, but defendants fail to address that possible claim in their brief. This is not surprising since recovery of punitive damages under California law requires proof of intentionally malicious conduct by clear and convincing evidence. *Judicial Council of California Civil Jury Instructions* (2004), CACI Nos. 3945-46.

defamation suit.

IV. PLAINTIFFS HAVE PROVED THEIR WASTE CLAIM

This Court previously held that plaintiffs had not sufficiently pled waste because there were adequate safeguards to ensure that Disney could reasonably expect to receive consideration in return for the grant of the options in the OEA. *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342 (Del. Ch. 1998). *See generally Kerbs v. Cal. E. Airways, Inc.*, 90 A.2d 652, 656 (Del. 1952). The Court reasoned that it was the Board, not Ovitz, which ultimately controlled the decision to approve the OEA as well as whether to grant Ovitz the options under its NFT provisions. *Walt Disney*, 731 A.2d at 364. The record in this case demonstrates that, although the Board should have had that control, all directors improperly ceded to Eisner the authority to grant Ovitz his NFT.

The structure of the OEA itself proves the financial component of plaintiffs' waste claims because it incentivized Ovitz to leave before the end of his five-year term, and even before the third year. Pl. Br. at 28-29; Murphy Report at 22-23. As set forth above, the OEA's structural flaws were particularly egregious because Eisner and Ovitz knew in September 1995, and possibly by as early as August 13, 1995, that Ovitz's tenure was going to soon end.[49] Ovitz's knowledge that he was going to leave early and the improbability that Eisner would fire Ovitz for cause and make him forfeit his severance package show that Disney could not have been

[49] Ovitz and the director defendants fail to respond in any way to the discussion in plaintiffs' opening brief of *Kerbs* and similar cases which require that valid option plans be structured so that the corporation receives the benefit of the employee's services and do not incentivize the employee to leave. *See* Pl. Br. at 85. In fact, the director defendants' brief does not address at all the perverse incentivizing structure of the OEA. Ovitz's argument that the B options provided him with the incentive to stay is a ruse. *See* Ovitz Br. at 39. The only way for Ovitz to receive the B options was to finish out his initial contract and obtain a new contract with Disney once the initial term expired. Because he knew from the beginning he would not finish a five-year term and agree to stay longer, any alleged incentive the B options provided was illusory.

expected to receive any value. Finally, because Ovitz should not have been provided an NFT, his receipt of NFT benefits constituted waste.

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

Defendants never proffered a damages expert. Dunbar explicitly testified that he was not retained as a testifying expert in damages. Tr. 7464:10-7466:15. As such, Professor Murphy's report and testimony are evidence essentially unrebutted. Defendants' attempts to discredit his testimony do not succeed. Defendants' criticism of the Black-Scholes methodology used by Professor Murphy as speculative is without basis. *See* Dir. Br. at 74. Black-Scholes is the industry standard to measure option values (Tr. 766:1-4; 768:1-17; 1057:2-1058:9) and Dunbar never contradicted this. Tr. 1081:13-1083:9. Disney itself employed this valuation methodology in its public filings during this same time period. Tr. 770:15-21; 1058:10-23.

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

Defendants' arguments to the contrary, the injury to Disney was not the dilution of Disney's stock upon Ovitz's exercise, but the loss to Disney of the value of his three million stock options when they immediately vested upon Ovitz's departure. Professor Murphy values the options on December 27, 1996, because if Ovitz voluntarily resigned or Disney had opted to terminate him for cause, Ovitz would not have received the three million options at all. Tr. 818:5-819:1. Since the options were fully vested upon the NFT payout, Professor Murphy calculated their value at $91 million. Tr. 819:2-11.[50] Put another way, instead of granting those

[50] According to the director defendants, Dunbar "*clearly* established that Prof. Murphy erred" by not applying an early exercise discount to his Black-Scholes analysis of Ovitz's employee stock options. Dir. Br. at 75 (emphasis added). What Dunbar and the defendants fail to acknowledge, however, was that when Ovitz's options vested, he was no longer an employee. No longer an employee, Ovitz was no longer precluded from engaging in transactions to hedge away the risk

options to Ovitz, Disney could have sold those options to raise capital. The transaction was no different than giving up property. Professor Murphy's testimony is again unrebutted on the record.

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

Defendants assert that the Court should apply as an offset to the damages calculation a purported tax deduction by Disney upon Ovitz's later exercise of the options when he later exercised them. Dir. Br. at 73-74; Ovitz Br. at 39. What the tax consequences might have been, however, is far beyond any evidence defendants proffered at trial. Indeed, Dunbar explicitly stated that his report did not address the tax consequences of the exercise of the options. DTE 428 at 9, n.17. When asked at trial whether he knew that Disney took a tax deduction supposedly equal to the amount of Ovitz's realized option gain, $70 million, Professor Murphy testified that: "To be honest with you, because of some 162-M considerations, I'm not certain that they were able to take a tax deduction for the gain . . . ." Tr. 988:7-14. Yet again, without a single shred of evidence to support this assertion, defendants' contention should be rejected.

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

Defendants do not take issue with how plaintiffs calculated the interest in their brief. Rather, defendants argue that no interest should be awarded. The purpose of an interest award is to compensate the plaintiff for its inability to use what it has lost through defendants' actions

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of the options. Tr. 825:6-829:4; 7500:16-7502:19. Thus, he did not have to exercise to gain the value of his options. In fact, exercise sacrifices the remaining time value of the options. Dunbar 201:20-202:19. Given that Ovitz had just received a check for approximately $39 million (pre-tax) and continued to receive income through his CAA booked commission agreement, he did not have the same concerns about liquidity that an average employee would have. He could also short sell Disney stock or hedge with offsetting options. Tr. 7330:3-14. The fact is that a major part of Ovitz's negotiations to come to Disney was to obtain extended exercisability periods and he would not have done so if he were interested in exercising early. *See* Tr. 827:8-829:18.

prior to and during a litigation. *Metro. Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778, 781 (Del. 1966). Defendants do not dispute that Disney lost the use of approximately $39 million in cash that Ovitz was paid upon termination. Defendants dispute an award of interest as to the Black-Scholes value of the options which vested at that time. No Delaware Court has ever ruled, however, that pre-judgment interest applies only to the lost use of *cash*. It is sufficient that plaintiff lost the use of something of value. *See, e.g., Thorpe v. CERBCO*, 1997 Del. Ch. LEXIS 18, at *16-17 (value of option part of damages and interest calculation). Had defendants not awarded the $91 million of options to Ovitz, Disney could have gone into the market and issued the equivalent value of those same securities and raised $91 million. Disney lost that significant value from the moment Ovitz's three million stock options immediately, prematurely and wrongfully vested. An award of pre- and post-judgment interest is thus entirely warranted.

CONCLUSION

For all of the foregoing reasons and those set forth in their opening brief, plaintiffs respectfully request the Court to enter a judgment in this case holding the individual defendants jointly and severally liable for violations of their fiduciary duties of care and good faith, and to award monetary damages in the amount of $129,816,000, compounding pre-judgment interest in the amount of at least $132,454,876, any post-judgment interest allowable by law, and such further relief as the Court may deem appropriate.

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Respectfully submitted,

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