Case: Disney Derivative
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Participants:
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Williams: Good morning. We're going to resume our discussion of the discussion of the Disney litigation. We have here Chancellor William Chandler, who presided over the trial and wrote several opinions in the matter. And Chancellor, I want to, if I could, just walk you through just a little bit from a chronological standpoint, and get you to share to with us to the extent you can the judicial perspective, which of course, we on the other side the bar don't get to know often what's going on behind the scenes. Sometimes maybe we want to know, sometimes maybe it's better not to know. But when you first had significant contact with this case with the initial motion to dismiss on 23.1 grounds, did it seem to you at all to be an extraordinary case or something in a significant way out of the ordinary?

Chandler: Greg, I don't recall that I thought of it that way. You know, I thought of it as it's another case. And all the judges on that court treat every case with the same degree of seriousness that comes to every case. So I didn't single it out as somehow special or different. I knew it involved, you know, sort of this great American or iconic company and I knew there was a lot of media attention to companies like that. And I knew that since it was in that business that there was going to be even extra attention paid to it. [00:02:03] So I sort of had that in the back of my mind. But in terms of the issues and the principles that were in play in the case, I didn't really treat it differently or think of it differently.

Williams: And with an executive comp issue, you certainly would expect to get a 23.1 motion from the perspective of a Chancellor, did you get tired of these repetitive 23.1 motions? Because I know in my practice, it felt like we always needed to push hard the 23.1 motion in derivative cases. It was just something that a good defense lawyer had to go to first. Do you get tired of these 23.1 motions?

Chandler: I hadn't at this point in my career, Greg, I'll say it that way. [laugh] You know, this was 1996, '97, '98, that time frame. I had been on the court then for roughly ten years or so. And so it hadn't got old yet. But towards the end of my career in the 2008, '9, '10 time period, I would probably confess to you that it was probably getting a little routine and a little tired. But at this point, no.

Williams: To be expected? You granted the first motion to dismiss in what I would call a relatively predictable routine decision. It was an executive comp matter. You had a majority of outside independent directors. Let's fast forward a little bit to the Supreme Court's decision. So they largely endorse your reasoning, at least in the primary opinion, but nonetheless give the plaintiffs the opportunity to replead after pursuing a 220 demand. That seemed a little unusual to me at the time. You didn't often get the Supreme Court approving of the reasoning but then just reversing to give the plaintiffs the opportunity to replead. Did it strike you as odd at all, the decision?

Chandler: [00:04:13] Not so much that it struck me as odd, but I had a different take on it than I think perhaps you had on it. I mean, to me there was definitely some background music that I was picking up in that opinion. Number one, it struck me that yes, they largely endorsed the reasoning that I had used to dismiss the case. But they did so... the language of the opinion suggested to me that they did so half-heartedly. That they were very troubled by the case. As was I in some respects. But they made it pretty clear in some respects, I thought, between the lines of the decision, that this was a very close case, very close call, and they were obviously not happy with the way the plaintiffs had handled the case, had pleaded the case and the background research that they should have done to plead it in a better fashion. I think the language that they used suggested to me that the Supreme Court really believed this was a case that had some real legs to it and that should have gone into the discovery stage and perhaps trial, because there were some serious issues about the way that the board of directors performed and acted in this case in respect to the compensation--the initial compensation decision with Mr. Ovitz's--hiring him. But also with respect to the back end of the case, when they terminated him and decided to pay the severance amounts. So I picked up first of all on the theme of they weren't happy with the way the case had been pleaded. I mean, they used language like a prolix pastiche of invective of the complaint and included even a cartoon. So they were unhappy with that. [00:06:02] Number two, you know, they in the course of this opinion reversed some of their earlier decisions about the standard they would apply to the trial courts in 23.1 cases, which had always been an abuse of discretion standard. And they backed off that and said no, it's going to be a de novo review from now on, which for a trial judge is a pretty significant thing. So that was the second ingredient. The third ingredient was the one you mentioned, that, yes, they affirmed me in part, but they explicitly encouraged the plaintiffs to replead. So they changed the dismissal with prejudice to dismissal without prejudice effectively, and encouraged the plaintiffs to plead another complaint. And this time they actually gave them sort of a road map, said you ought to use one of the tools at hand that books and records process, using 220--you should use that. And if you do, it may well be that you can plead claims that can survive a 23.1 motion. So I put all of those things together collectively along with sort of the other background music. You had one justice., [00:07:13] a former vice Chancellor on the Court

of Chancery: Justice Hartnett, who agreed and concurred with the majority, but went out of his way, I thought, to point out he viewed some of the claims that had been alleged adequate to survive a motion under 23.1 as they were pleaded, albeit barely, he said. But still sufficient. And it was clear that he was on the side that there ought to be some discovery here and this case ought to go on because it's a very serious case, it's a very close case. The magnitude of this case and the severance and all the circumstances, and the ambiguities that were pointed out in the opinion by Chief Justice Veasey, about whether the board was really advised by Graef Crystal, the compensation advisor and expert that they had hired, was the board or committee really advised by him or not? Should they get the benefit of 141(e) protection or not? There were enough things in that opinion for a trial judge, Greg, to cause me to think that yeah, they affirmed it, but they have real doubts about what happened here and felt that there ought to be an opportunity to actually file another complaint. And maybe that one would be sufficient to withstand a dismissal. [00:08:31] And go forward and get discovery and potentially a trial.

Williams: And it seems like maybe the opinion, the Chief Justice Veasey opinion was a bit of a compromise opinion designed to sort of bring Justice Hartnett into the fold. Because there was a lot of talking--I don't want to say talking out of both sides of the court's mouth--but there was a lot of adoption of your analysis. But then as you say, this language that led some to think that there was some discomfort, and then you have the concurrent - so maybe the court was trying to compromise and figure a way to resolve the motion that made Justice Hartnett happy, we'll never know. But then when you then got the next complaint after the 220 demand, and the plaintiffs had reviewed a lot of documents, do you remember your reaction to it? Did it seem to you to be materially different, materially stronger than the first complaint that you dealt with?

Chandler: [00:09:29] I do remember that. And it was decidedly different in my opinion. The second complaint was much more thorough and careful. They had gotten documents, they had gotten minutes of the board meetings, of the comp committee's meetings. And to me it was a much stronger complaint, it was not filled with as much just rhetoric that the first complaint I thought had been filled with, but actually had detailed what the meetings were, what happened at the meetings, and how much time had been spent at the meetings, and what was actually in the minutes of those meetings. And so the complaint, I did feel was just dramatically different from the first one. And that played a large role in why I came out differently on the second complaint.

Williams: Yeah, and you... Let me ask you this... And you and I haven't discussed this and maybe this is something that was just sort of a figment of the defense bar's imagination but maybe not, we'll find out. The first complaint assumed that the board had approved Ovitz's termination and his receipt of the termination benefit. It didn't assume,

it plead that was what happened. [00:10:43] And the motion to dismiss was argued based on the allegations of the complaint that the board had acted. And that's the way it was presented to you. Then when you get the next complaint after the 220 demand, you see that in fact there was no board decision with respect to his termination, it was a management decision which Michael Eisner, which you had learned at trial, had talked to the directors about individually. But the board, qua board did not act. Did you feel that that fact, that the board as a board hadn't acted was something that should have come to you, come to your attention as defense counsel in conjunction with the first motion to dismiss, and the first complaint? Do you remember having that sentiment?

Chandler: I don't remember explicitly thinking gee, why wasn't I told this the first go around? But if that's counsel... I mean, it did stand out in the fact that I was now dealing with a different set of facts about how the termination had occurred. But it--for me, Greg, it played more into this sort of a theme of the complaint of the board was just missing in action. Not only on the back end but on the front end. That was sort of the theme that to me was most remarkable--that they were just weren't--they were just AWOL--they weren't involved in the hiring and they weren't involved in the firing, except in these ways that we learned out later that they were involved, in these side calls, telephone calls and side meetings with Eisner. [00:12:26] But that for me was the most remarkable thing about the complaint. And I didn't--it wasn't something that... I know that there's that sort of legend out there that I might have been upset with the defense bar because I had been led down this path. I didn't have that reaction as much as I was just taken aback by the fact that this board had seemed to have been so disengaged with such a terrific--what was thought to be a terrific hire. But they seemed to be so disengaged in the process from the beginning all the way through to the end. That for me was, you know, a very telling thing, and it led me to believe that there had to be discovery, that this needed to go forward.

Williams: Yeah. Well, among the--just as a practice point, I'd say this case and the way that the motions were presented, led to a discussion among defense lawyers about how much investigation of the factual allegations of a complaint do you have to do prior to briefing and arguing a motion to dismiss? On one side some people would say well you don't have to do any because the motion is a procedural one which assumes that the well pled allegations of the complaint are true, and so you don't have to do a factual investigation. And then others say, well, yeah, but maybe you need to have some fundamental knowledge of the facts of the case to make sure that you don't argue something which while based on the allegations of the complaint, perhaps creates an impression with the judge that you are vouching for that factual story. And so it did lead to that discussion, and I think there's probably still lots of different opinion on how much defense counsel has to do prior to filing in arguing a motion to dismiss. But one extraordinary thing about your opinion, which I read for the first time when people came

to me and said, hey, we're now going to trial, we need help, can you Greg Williams get involved in the case. I hadn't been involved in it and I read it and I thought oh my gosh this is a march to defeat. This is a very strongly worded opinion is the way that I read it. And I particularly noted at the end of the opinion you said, and by the way, I entered a case scheduling order that's going to bring this to trial promptly. [00:14:46] That was pretty extraordinary, wasn't it, to do that?

Chandler: At the time it was. Now it's pretty routine, I think. But I think at the time it was unusual to do that. It was a very deliberate effort on my part to send a signal that this case had already--

Williams: Been knocking around for a long time--

Chandler: Yep. Had already grown a little bit of some whiskers around it and I wanted it to get on quickly. I also thought that doing that, I was always hopeful that people would sit down and reason together, maybe compromise and find a way to maybe resolve the case. And so I thought that by signaling this is now we were on the road to a trial and it was going to happen, would help that process.

Williams: Yeah. Did you take any active involvement in encouraging the parties to settle?

Chandler: Well, I don't recall specifically, Greg, but I always do that. And I'm sure I did it here in either conference calls--most likely in conference calls if we were on the line about something. I would have always said that there's a better way than having someone like me in a black robe make this decision for you. So I try to encourage people. This was sort of before the era of deliberately sending people to mediation and or asking one of the colleagues on the court to actually mediate a case. It was before that era. So I didn't do anything like that.

Williams: [00:16:10] And as the trial approached, there was at the time a lot of academic discussion about executive comp. It was a hot issue. And so here you are with this huge executive comp case and there's a lot of academic debate about whether people are paid too much and pay for performance was then a big issue. Did you feel you had a little bit of a spotlight on you with the financial world watching this trial?

Chandler: You know, I did recognize that a little bit. I mean, it didn't really affect me all that much because I tend to tune out the press and the media and all that, I don't pay attention to that. There was another issue, though, that was kicking about. And that one I actually had my eye on more. And that was the whole sort of academic and partly judicial debate or dialogue going on about what does this duty of good faith mean, what is it all

about? And how should the court apply that? That was in its heyday around this time. And so I had one eye a little bit on the academics who were writing about it some. And some even speeches and remarks who xxx were made by members of the Supreme Court and members of my own court about what it meant or could mean and how it might be applied. And so that was something I sort of did keep my one eye on. The other part, the media coverage and the whole compensation debate, I was aware that was going on. But that didn't influence me as much or worry me as much.

Williams: And at the time as you rightly point out, we weren't that far into the era of 102(b)(7). All these things had changed, you know, recently. So we had seen a change in the landscape where the legislature had gotten involved, you know, change some sort of fundamental dynamics. And so now you have after 102(b)(7)--and after the legislature's forray into other areas--you get 102(b)(7) which tells stockholders you can't get a judgment against directors for just violation of the duty of care. And so bad faith became sort of the only game in town.

Chandler: That's right.

Williams: And that's sort of why it became I guess so important. There was some prior case law in Delaware on bad faith, but it was a little dated, as I recall.

Chandler: Mhmm. Right. And the line of decisions, if you look at them now, all sort of can be, you can make sense of them. But I just remember at the time there was a good deal of concern and uncertainty of what this was taking--was there really a truly third duty and how would it be applied? And so this decision, this opinion, I thought, was going to be examined and scrutinized because I thought the plaintiffs were exactly on that point here. They were going to push--this wasn't just a simple breach of the duty of care. There wasn't just gross negligence here. There was actually a complete abdication of duty--a total failure and a total failure, and deliberate indifference to what the duties were of a director of a Delaware company. That's the emphasis that I saw the plaintiffs putting on their claim for the very reason you mentioned. It's the only way they could escape the bar of 102(b)(7). And so I knew that was the issue coming at me. And so that was sort of in the back of my mind the whole time. All the way through the trial and then through the writing of the decision I was trying to work out how I was going to express this in this particular setting.

Williams: Yeah. [00:19:55] Well let's talk about the trial. I think it was originally scheduled for about four weeks.

Chandler: That's right.

Williams: Which is an extraordinary trial in Chancery on its own. It's a four week trial, it's a long trial as you and I know. It ended up going for more than two months with some breaks for the holidays. What was your perception of why this case took so long to try?

Chandler: Well I was as surprised and as amazed perhaps as anyone else was, that it took that long. I would have never have thought that. And to be quite honest with you, I had moved the case from Wilmington to Georgetown for a couple of reasons. [00:20:44] One of the reasons was that I thought it would help move people more quickly--that they would be uncomfortable being further away from home, further away from their home offices. They would be wanting to be getting back home, back to their offices instead of being in this little county at the southern end of Delaware. And so part of the reasoning was that--that I thought that would help prompt things and move things along. It turned out, I think, to be the wrong prediction. Because I think, in fact, people actually enjoyed it.

Williams: We had a wonderful time.

Chandler: And you know, that you got to go along and walk along the beach at the end of the trial--

Williams: Exactly

Chandler: And eat at some really nice restaurants. And so unfortunately I think it may have rebounded against me and actually caused it to take a little longer. But I don't really think that was the reason. I think when you're bringing in as many witnesses--I mean, we had 24 or 25 witnesses--and I think most of all the directors came in live.

Williams: They were.

Chandler: yeah. This--and then you had I think six expert witnesses testify. And you had over a thousand exhibits. When you start adding up that number of exhibits and that number of witnesses, you're going to eat up a fair amount of trial days. You just are--particularly with those experts. And so when I saw that lineup, you know, in the back of my mind, I thought oh my goodness, this is going to go longer, even though I moved it down here it to make everyone uncomfortable. But then it took as long as it did. And I don't think it could have been moved, frankly, Greg, I don't think I could have moved it any faster or the lawyers could have moved it any faster than they did. It was just, this was the logistics of the trial of this size, with this many witnesses, and documents.

Williams: And you were... you probably don't remember this, but I remember because I was designated to speak on the defense on their behalf. We came into chambers one day after trial. It was before Thanksgiving. The trial had started, I think, on October 16th, and it was before Thanksgiving. And we had been consulting--both sides had. And we had agreed that we weren't going to finish by the appointed date, which I think was November 20th or something. And so we came in and said Chancellor we're doing the best we can but it's going to take more time. And you were very generous. You said, look, I'll give you whatever time you need. My perception was in part that you also wanted to make sure that no one could complain that they weren't able to put their case on. Is that something that you remember, a mindset?

Chandler: I do. [00:23:13] I mean that's sort of my philosophy, anyway. I don't want anyone to complain that they didn't have their day, and I knew everyone wanted to get a trial and that was the only trial, that wouldn't have to be a do-over, of any sort. And so I wanted to take as much time as it took. This was too important to try to truncate things or try to short circuit things. I wanted the record to be as fulsome and complete as possible. Everything that could be in that record that could be input in that record, I wanted there, so that no one could complain about it, and so that when I wrote an opinion--and that was part of the way I operate, too--I wanted an opinion that was air tight as I could make it, and was as complete as possible. And so that's why I was very agreeable as extending it as much as necessary.

Williams: About the logistics of this trial--you're the chief judge of the court and you've got a courthouse down there that hadn't probably seen a trial at that time of that sort of public interest--how did you deal with special logistical arrangements, security, etc?

Chandler: Well we were blessed in that it was a new courthouse, it was sort of state of the art. We had sort of everything up to date at that time in terms of technology and you had the courtroom video systems all brand new systems and quite operational. And I had arranged to have all the IT people I needed in case there were breakdowns or problems or issues with the computers and everything. We actually called in additional capitol police. We had our own security, of course, but we called in extra support from capitol police. So we did all those things and then just the staff that were part of the court. Some of them came down from Wilmington to assist because others were the local staff in the Court of Chancery and the Register’s office were consumed with the trial's management. So we actually got help from Wilmington on that, so it worked out I thought pretty well.

Williams: It worked out perfect. And I'm trying to remember was there an admission ticket system in the beginning anyway? Because I know the courtroom was full in the back.

Chandler: [00:25:20] There was. In the beginning we had a ticket system where you had to have a ticket on the seat because there wasn't enough seating for everyone to be able to get into the courtroom. I think by the end, you know, that wasn't necessary for people, they'd kind of worn themselves out. They would only make appearances for special people, like when Sidney Poitier, I think showed up to testify. Naturally, a lot of the local population came out to see Sidney Poitier.

Williams: Right. Let's talk about the trial itself. So the order of witnesses. On the defense side of things, we know it's not a jury trial, but still, there was a lot of discussion about the order of witnesses and the resolution was that Ovitz would go first. From the judicial perspective in a bench trial, does it really matter what the order of witnesses is? Do you sometimes think it affects the way you see the case or learn the case?

Chandler: Well I never experience it. If it does for others, it may have. But for me I've never seen the order of witnesses have an effect on the way I look at the case or the way I decide it. I was a little bit surprised--not a lot, but a little bit surprised, that Ovitz was the very first witness. But his examination, cross examination, I remember at the time coming back and talking to my law clerks and saying we're in for something here. This is the beginning. I don't know what it's going to end up as, but this was an interesting first witness and it sort of set the tone for the whole trial.

Williams: It was dramatic, really.

Chandler: Very much so.

Williams: You know, because some of it was I would say almost bordering on emotional. Some of the testimony. And you felt that he was--I felt that he was sort of baring his soul up there. And I didn't know if he was really baring his soul or whether he was just appearing to bare his soul. But let's talk about some other witnesses and get your just off the cuff reaction. How about Michael Eisner, his testimony?

Chandler: Much like Ovitz I thought he was, you know, a very interesting witness. I thought he was... He came across to me as more calculating, and so I thought after hearing the two them... you know, once I heard both sort of those sort of key people in the trial, my law clerks and all, all had the same reaction, which is it's amazing. These two could never have worked together where one reports to another. And spending just a few minutes with both of them would tell you that--that they both were just people who could not answer to another, they would have to be in charge. They were very - individuals blessed with very large egos and impressions of their own abilities. And I just thought this was

doomed from the beginning once I heard them testify and knew this was a recipe of disaster in terms of a working relationship---of president CEO.

Williams: And you had Irwin Russell testify for a couple, few days. You know he was the chairman of the comp committee and my partner Anne Foster took him very meticulously through volumes of handwritten notes about the process. And I think that that to me it was a, maybe the last trial I'll ever see where a fiduciary had such extensive handwritten notes. What do you recall about Irwin's testimony?

Chandler: Well, only that it was meticulous, and you know, he was a very careful and thoughtful man, I thought, who in my judgment had been put in just an intolerable situation. To be the guy who's Eisner's personal lawyer, who's negotiating with Ovitz, who's answering to the comp committee, I think it was just a difficult, difficult thing to ask him to do. But he came across as a very credible witness. I thought he was really credible and careful and meticulous. It's interesting now because I'm often asked in my new life what do you think about directors or fiduciaries who take extensive notes? And I'm always, be very careful. If you take really good notes--and I think he did.

Williams: Yes, he did.
Chandler: If you take really good notes it's ok. Unfortunately most people don't take really good notes and so I caution them about it. But in this case I think it redounded to his benefit.
Williams: Yeah, well he certainly had a roadmap and we could tell you what actually he was thinking. It was all there. And then Sidney Poitier came, you know, one of the great movie stars and did fill the courtroom. And he started off with a fairly long discussion of his life story.
Chandler: It was like a soliloquy of his whole beginning from his youth right up until he came to the United States and became a famous person.
Williams: Yes, and I remember that plaintiff's lawyers objected on relevance and said "your honor, this is just.."
Chandler: And I agreed. It was totally irrelevant but I said this is the most interesting testimony I heard so far and I'm not going to interrupt Mr. Poitier, I'm going to let him finish his story. But I think they were unhappy with me for letting him do that but I didn't see any harm in it, frankly.
Williams: That's the way I felt. I didn't put the witness on but it's an interesting story, we've been at trial a long time and this isn't going to make or break us. But then you had some other defense witnesses whom I won't identify by name who were elderly. This case was ten years old or so by the time we came to trial. The events were ten years old and some of these folks were, you know, pretty along in their years. Didn't have a strong recollection, but the defense

determination was that we should put all these people on the stand so that if the Chancellor is going to find that they acted in bad faith he's going have to do so having seen them as people. And when defense lawyers in a case like this put a director up there who understands, recollects the basics but not a lot of the detail, what effect does it have on? Do you remember the effect of these directors, the ones in the middle, I'll call them, in the trial sequence?

Chancellor: I mean, my general recollection was just that these were folks who again, were put in a difficult spot and were doing the best they could. It did help, you know, in a way, humanize them a little bit for me. And it did help. I wouldn't be critical to the idea of calling each of these individuals. It does help. Because in our law you have to go director by director and count noses as they say. And so it gave me a face, it gave me a person who I could understand that they would have problems recollecting things that were that far back in time. And it helped, though, a little bit with understanding sort of the culture of the company and the way it operated and the way Eisner and the board kind of operated. That helped me understand the way things could have happened the way they did but not that they made it proper or the best way to do things. But it helped me sort of understand that, yes, humans can interact like this, a board could work like this. So I think it was overall helpful to me at trial just to hear every one of those witnesses.

Williams: Yeah, well that's good to hear. I know that it was educational to the defense team. Because as a Delaware lawyer you get used to these sort of best practices and this is the way that a board should conduct itself and we study all that and that becomes our truth. And I remember being educated by one particular director that I put on at trial. And I was sort of discussing with him the sensitivity of the fact that there wasn't a board meeting to terminate Ovitz. And he was quite adamant, you know, you don't know what you're talking about. He reported to the CEO. If the CEO's not happy with him, the CEO should fire him. And that's the way I looked at it as a director, and that's the way I run my own business. And you know, it may have been right or wrong from a corporate governance standpoint, but it was certainly an honestly held strong view. So sometimes these business people do have a different way of looking at things than we... Delaware lawyer says oh--

Chandler: I think that's exactly right, Greg. And that's why I think it was worth it and it was a valuable thing to call every single one of them even though their memories and recollections in some cases were very dim and faulty. But they all came across. I do remember thinking these were all people who were honestly trying to do what they thought was the right thing and they weren't trying to do anything that was deliberate or intentional or harmful. They may not have done it the best way, but they were all, I thought, very credible and honest in the way they presented to me how this happened and what they remember of how it happened. And that's why I think overall it was a very valuable thing to bring all of those individuals before the court. And again, like I said, I can't underestimate the effect of this. It humanizes them because they're just a name otherwise. But when they come in and you see them and you hear them and you look at them on the stand and you look at their body language. A judge

looks at all that and can say yeah, I can understand how they would have done what they did and I can understand how this came pass. So it was helpful to me.

Williams: So you start with the new complaint after the new Supreme Court opinion and it's a much stronger complaint and it looks like an abdication of directorial responsibility which became, in some way, the definition of good faith after the trial. How did your thinking evolve as the trial progressed? What led you to do the decision ultimately that these individuals had not acted in bad faith?

[00:35:30] Chandler: So what you often do as a trial judge is, and it's what I did. When we come back out of chambers or out of the courtroom into chambers and talk about this, we do this everyday. Every day at the end of the trial we talk about this. And we would start to summarize, each of us, we would, each summarize what we thought we had heard. And whether it was something that we thought it would be something that would be problematic when we wrote the opinion. Because we were going to write this sort of on a daily basis in a way. And what was phenomenal to me was that all of--there were three law clerks working on this case with me, and myself. We all came by the second or third day of the trial, we were all saying I don't think the evidence is going to support the theory here that everybody was just sticking their heads in the ground and letting Michael Eisner run this. I think there was difficulties and problems with the way this board operated. But we didn't get that sense from the very get go of the trial, that that was going to be what happened. And by the end of it we were convinced. And to me the opinion then was easy to write in the sense of I knew that there was not going to be a story that you could read and say these people were just totally out to lunch, they just totally missed everything, they weren't paying attention, they didn't care a bit about the company, they weren't worried about what was going to happen by hiring this new guy. To me the story told itself from the very beginning as a story of we didn't do this in the right way but we weren't doing it to deliberately harm the company, or just with total indifference to what the consequences might be by entering into a contract. That story just wouldn't write, and because it wouldn't write, to me, it was easy then just to come up with a formulation of this duty of good faith and to apply it to these facts and the outcome was what it was.

Williams: Did you ever think. I thought during the trial if I--and I'm going to ask Seth about this later today. But I thought if I was on the plaintiff side I might have let some of those outside directors out of the case or maybe all of them and really focused on the insiders: Eisner and his in-house attorney Sandy Litvack, also a member of the board. And whether the way they conducted the process might somehow be deemed bad faith. For example, the decision by Michael Eisner and Sandy Litvack not to convene a board meeting to discuss and approve the termination. You almost can't fault the outside directors. There wasn't a meeting and they had a discussion. But if you're the person devising the corporate governance mechanic and you choose not to put all the directors in the room, and you talk to them one by one, thereby avoiding the group dynamic, I wondered whether they should have sort of picked a much

narrower group of defendants. I'm not suggesting for a second that the outcome would be different, but did that ever occur to you? Why are you holding on to the Reveta Bowers of the world and--

Chandler: It did occur me and I, to this day, I'll be interested to see what Seth says, to this day I wondered if they should have just strategically just let those folks off. I don't know, like you said, if it would have changed the result, probably not. But I think it would have changed, a, the length of the trial, and b, it may have caused less of that humanizing effect that I mentioned earlier, for me, of hearing everyone of these people testify, and instead might have left me with a slightly less favorable impression if you just had Eisner, Ovitz, Litvack and a few of these guys who were sort of the insiders, look and portray them as they were driving everything, they were controlling everything. And there was this long relationship between Eisner and Ovitz, and so, surprise, here's what you get. That might have played a little differently. Outcome might not have changed, but it might have made it a much more difficult opinion to write.

Williams: So tell me about the actual writing of the opinion, probably one of the longest ones you've written in your tenure, I'm guessing. Is something that long is, is a first draft... or was it written by the clerks, a first draft?

Chandler: Well, took parts of the opinion. I asked certain clerks to write certain parts and I wrote certain parts, and then we married it together. I did the legal part, I wanted help with the factual, just amassing the facts. Now if you read the opinion which 170 something pages long, most of it is facts, most of it is telling the story. I wanted that story to be told almost in agonizing detail. So I had three clerks and sort of divided up the writing of that. And I forget how long it took but after we had gotten it pretty much where I was content with it, I asked some of my colleagues to take a look at it, which is sort of a tradition in Chancery, that's not unheard of and it's not some secret that we do that. But I asked some of my colleagues to take a look at it, and they did. And they all got back to me with very good suggestions and thoughts about some of the things that I written that they thought maybe I could tone down a little bit because it was a little stronger in places than maybe it should have been. So I did that. So that process took a little while--

Williams: Stronger critical of the board?

Chandler: Critical of the board.

Williams: Ok

Chandler: And so they thought that I might want to just tone it down a little bit here and there. But it wasn't major, it was just minor word choices here and there. So I did that and then I slept on it a little while which is what my practice is, or practice was, was to always sleep on

it for a day or two after I think I got it done and I go back and read it one more time. And so that was the evolution of the opinion.

Williams: You elected not to have a post-trial argument.

Chandler: Yes

Williams: And why?

Chandler: That's a personal thing. I felt that I had heard from you all a lot as it was and I had a lot of briefing and I had read all of that and I think I had it in my mind as good as I needed it to be able to write what I needed to write. If I had some questions or doubts about where I wanted to go with the opinion, Greg, then I would have asked for an oral argument.

Williams: Yeah. But you had to have felt fully immersed in the fact pattern at the end of this 2 and a half months.

Chandler: Yeah, well I lived this story for seven or eight years, so I knew what the story was all about.

Williams: So now the last time the Supreme Court had touched this they had some significant concerns about what had happened here, at least seemed to have. And Justice Hartnett clearly did. Now it's going back up to the Supreme Court. Were there areas of the analysis that you felt were maybe a little vulnerable, that if they were going to be a problem, it was going to be these particular areas?

Chandler: [00:42:42] Probably on the termination part, on whether Eisner had that authority and whether the board's non-involvement in that was a problem. I felt a little exposed on that issue but not on any of the others, I don't think. Even on the good faith and how to sort of apply that and define, I really didn't feel too vulnerable there, but I guess I was prepared for anything. But my view was, Greg, I really felt, look, if you read... and I had people who told me this, my colleagues who read it, they said Bill, after you read the facts--

Williams: Pretty easy case.

Chandler: It's a pretty easy case. I mean those facts, you just can't go any other direction if those are the facts. So if you got the facts right and the clerk should, the Supreme Court should, defer to your fact finding in terms of credibility determinations, and so on. So I felt pretty confident about the outcome ultimately in the Supreme Court because all my colleagues said it's so compelling, the story is so compelling, you had to come out this way, you shouldn't worry about it. So I didn't. I typically didn't worry about it, anyway, the Supreme

Court decisions. But that was the attitude I had going into the opinion, that it had a pretty good chance of surviving review because the story told itself.

Williams: Had it been a due care case, would it have been closer?

Chandler: It would have been a lot closer. Just pure due care?

Williams: Pure due care.

Chandler: Been a lot closer on that.

Williams: Do you ever think about how that would have come out? I mean you never had to do the analysis, so if it was just purely gross negligence as opposed to willful intentional disregarded duty, did you ever think about how that would come out?

Chandler: I thought about it some but I didn't like to think about it because I think it's a very difficult question and I think my instincts were if I had to call that I would have called that gross negligence, I likely would have called it gross negligence.

Williams: And the gross negligence, not to explore it too much, but in not having a board meeting to discuss the termination, the going out part was more problematic?

Chandler: That was more problematic than the coming in, the hiring. The going out was much more difficult in my mind, the lack of board involvement and that whole process was I thought difficult to understand.

Williams: Do you remember there were some, I have them here with me, there were some memos/emails in the early days of emails written by Michael Eisner about Ovitz. They were quite explicit and quite critical. He doesn't seem to know right from wrong. I think at one point he called him a pathological liar or something like that. I could be wrong about that, but there was some use of the word pathological, I believe by Eisner. And that of course gave the plaintiffs the argument that this should have been a for cause termination, and if you terminated him for cause then you wouldn't have to pay out this hundred million dollar payment. Did that issue get any traction with you, that really this should have been a for cause termination?

Chandler: Well, you know you have a lot of expert testimony about that, too. And at first I was kind of had me going back and forth because this was going to be under California law, first of all, and I'm not that familiar with California law. But it struck me as an argument that the plaintiffs had to make because it would get them to the point of saying they could have fired him and it would have avoided this whole payment. But once I got into the weeds of trying to understand that, to me, it just seemed, look, if you had done that, he would have been suing

the company and you would have been involved in all kinds of litigation over that and the risks of that, who can assess that? So I sort of threw up my hands a little bit about that, Greg, that I thought, you know, who knows whether they could have done that or not? And you had these memos or emails and things and you had Bass and others who were saying things about Ovitz. But I thought it was too hard for me to sit back and say oh yes, you could have fired him for cause and avoided all of this and it would have been clear. That was too difficult for me to understand how they could have done that or whether they could have done that. And the little bit I saw about Ovitz's performance, yeah, they were saying things like he doesn't know the truth when it hits him and he doesn't know how to run a public company, he's only a private side guy. I saw that but I couldn't from looking at it. There were other things that were very complimentary of him, that he was doing this very well, that he had done this very well. He was doing things apparently that were beneficial so to me it was a mixed bag too hard to call.
Williams: Yeah. One of the things that I felt on the defense side that would have been really helpful... and it didn't exist. And sometimes people criticize legal memos being written, oh well that's not necessary, that's not important enough, but it would have been very helpful to have a detailed memo that went to the board to lay out the standards for for cause termination, and here's what you have to find, and here's our analysis, an outside firm or inside counsel, of the facts of this case. That didn't exist. And it was one of those situations where I think it would have been worth its weight in gold in terms of reducing litigation risk. So back at this time the argument was available to be watched online, as I recall.
Chandler: Yes
Williams: And did you watch it?
Chandler: No, I didn't watch it.
Williams: Ok. Tell me about that. Is it just because you had a conflict or you prefer not to watch?
Chandler: You know I want to see just what I see in the courtroom and I don't want to watch anything other than that. I want to just be immersed in what's going on in the courtroom and I don't want anything that's being filmed--
Williams: Oh no, I'm sorry, I confused you. I'm asking about the Supreme Court argument.
Chandler: [00:49:13] Oh, the Supreme Court argument! Trial judges are too busy.
Williams: To watch something like that.

Chandler: So I did not watch that. Now today I watch it all the time because I'm in a different role and a different life so I watch their live streaming of their arguments all the time but I did not watch the Disney one.
Williams: Did you get any reports about how things seemed to go from the Supreme Court argument?
Chandler: If I did I don't recall them, I don't remember any specific reactions.
Williams: So then you get the Supreme Court's opinion and do you remember your reaction to it? It was a very detailed opinion?
Chandler: I think Justice Jacobs. I thought it was a very Jacobs-like opinion, very workmanlike, very thorough, and to me, the most important thing was on the first page which said affirmed. That was the line I looked for first and I thought he was very complimentary of the trial court process and I was happy to see that so that's my reaction to it, I was glad to see it.
Williams: And as you define bad faith and applied that in the case, that definition has withstood scrutiny, it has remained a part of our law. As you look back on the case now with some years in the rear view mirror, do you feel that it was all done well and nothing you would change in that regard?
Chandler: So jokingly I might say I would change one of my earlier decisions in the Disney case which was when your colleague at Richards Layton [00:50:46] urged me not to dismiss the case, to send it to California. And I agreed with him. I sometimes regret that decision should have sent it to California. It would have saved me a lot of anguish and agony. But no, Greg, I look back on it and I don't really think there's anything I would change or do differently. There isn't anything... my analysis or thoughts about how the case ought to be resolved. I really wouldn't change anything at all.
Williams: Well you did a wonderful job, and I don't say that just because we won. It was a great experience. It was a great experience for me. And I remember on the last day of trial that was so many people there. I think a lot of people came. The defense team had, must have been, twenty-five lawyers probably that spoke at various points on the defense side, and the plaintiff had a number of folks. And I think a lot of folks came back for the last day of trial and we all posed for a picture which you gracefully orchestrated. I think it was among both sides of the lawyers involved, it was a very good experience, maybe one that we're not going to have again. And you're right about the backfiring of your thought about making people come down to Georgetown. Because in fact we were all staying in Rehoboth Beach. It turned out to be a beautiful fall, we had nice hotel rooms, most of us could go home to

Wilmington on the weekends and then come back on Sunday night or Monday morning. And it was a pretty happy way to live, so.

[00:52:20]

Williams: So Chancellor, let's expand a little bit on the expert testimony. My recollection is a little foggy and I'm sure yours is, too. I know you had a professor Deborah DeMott to come talk about, broadly summarized, corporate governance principles and customs and practices among directors. Certainly we were sensitive to the fact that it was coming perilously close to telling the Chancellor what fiduciary duties mean. Do you recall that testimony and what effect did it have?

Chandler: I do. And of course I remember that I had made it clear that Professor DeMott was welcome to come testify, but not with respect to how fiduciary duty law works in Delaware. Because, with all due respect to Professor DeMott who I know well and I adore, she's terrific and I've spoken to her about this in the years since when I visited down in Duke. But the fiduciary duty law if course is something that judges naturally think-- Delaware judges think that they're the experts on it and they don't really need expert testimony on that. Although I wanted to be somewhat deferential and respectful to Professor DeMott, I didn't want to open the door to allowing experts to come in the Delaware courts and testify about Delaware law. So I wanted to cabin ited. And I wrote a little letter opinion, I think, that basically said she can testify but not with respect to what fiduciary duty law is or how it should apply here. But if she wants to speak more broadly and generally about customs and practices in the world of corporate directors and corporate governance rules more generally, then she's welcome to testify. So that's what she did. She came to Georgetown and did testify as an expert. And her testimony was really interesting and useful in some ways. Because she sort of seconded what I had already thought, which was that this board operated in a way that was a little unconventional in that they wouldn't usually have meetings where there would be discussion, but instead, Mr. Eisner would sort of speak to different board members at different points in time. And that obviously is problematic from a governance perspective for a lot of reasons. [00:26:25] And she went through that in her testimony. And I found that interesting and somewhat helpful. Not the decision, ultimately, but just in general. And I made reference to it in the opinion, that she made these comments about this sort of board operating procedure was not ideal and other boards certainly should not be following it. But that was the way that testimony came in. And so it really wasn't useful or helpful in the larger sense, but I was always happy to have academics come and testify. And since then I might say, since then, you know there was another case, the United Rentals case, where I had an expert from Harvard who wanted to come testify about what I thought was really contract law and how to interpret contacts under Delaware law. And consistently with my earlier decision I said no, I don't need advice on that. But if you'd like

to testify sort of about the way merger agreements ordinarily have certain languages in them in the universe of drafters, that's fine and you can testify about that. And he did. So it all depends on what the testimony is. But Professor DeMott's testimony was interesting but was not really helpful to the ultimate decision.

Williams: Then you had, both sides brought in some high powered labor lawyers, as I recall, to talk about the termination and whether it had been done for cause or not, and what the grounds would have been for a cause termination. Now you didn't have probably any great expertise in labor questions and for cause termination. How did that expert testimony affect you and how useful was it for you?

[00:28:10] Chandler: Well it turned out not to be terribly useful. It educated me a little bit about sort of the conflicting ways that one could look at Ovitz's performance while he was with the company for that roughly fourteen months that he was there, and how employment lawyers could marshal arguments on both sides of the question of whether or not his behavior and conduct and performance would meet the gross negligence standard or malfeasance standard, which were very high standards. And I think in the end both experts were very good and very knowledgeable about California law, which this was governed by California law. But I wasn't persuaded ultimately that would help me decide the case, that is the expert testimony. To me it came back to what did the board think and what did Eisner and his team think about the risks of terminating Ovitz for cause? And likely fighting it out in a courtroom over whether or not that was a proper termination. And to me, you know, it wasn't ideal that we didn't have lots of legal input at the board level or even at the Eisner level when he was making that decision. You know, Litvack had basically given him the impression that his understanding of contract law and he was a lawyer who was an expert. And then he said that he didn't need to go out and hire independent people to analyze this. He had looked at all of the conduct of Ovitz over a period of months and it just didn't rise to the level of gross negligence or malfeasance in office. [00:29:53] And so they acted on the basis of that legal advice. Was it ideal? No, it wasn't ideal. Was it the optimal thing that they could have done? No, it wasn't. Would I have liked to seen internally that they had actually gone out and gotten an independent firm to look at it and to render a legal opinion? That would have helped a lot. You had the 141(e) ability then. But they didn't do that. And in the end as I said in the opinion, they came to a conclusion based on what information they had. It doesn't appear to have been completely an uniformed decision. They were obviously thinking about the risks that Ovitz would try to sue them if they were to terminate him for cause, and all of the negative publicity and reputational effect that would have on the company and on them individually. And then [00:30:49] just the cost on top of that. It was sufficient for the day, I suppose. It wasn't ideal but it was sufficient for the day to say this is enough and it's for me to now

conclude that they had a basis on which to find they couldn't go the termination for cause route.

Williams: Again, very important to come back to what the legal standards are and on the other side of the case it really was bad faith as opposed to due care, which was a completely different spectrum. Let me ask you this question which I forgot to ask you earlier. Every day, at least for the first month or so, the Wall Street Journal and the New York Times had press reports about the trial, they had reporters present. You're not like a sequestered juror, you're able to look at press reports. Were you reading the papers about how the trial was going?

Chandler: No, I wasn't. And I did it deliberately because I wanted to be sure I wasn't influenced in any way about what someone is synthesizing the evidence to say. I wanted to be my own synthesizer without any influence, without any outside effect. And I couldn't take the risk that if I read stories about the trial and the take that a particular reporter might have on what the testimony implied or meant or what effect it might have, the fear I had is if I read that it could influence my own thinking. And I just wanted to just process all of the testimony as it came in daily. And that's why I said at the end of every day the law clerks and I would talk about what we heard and try to synthesize it and process it that very day. So that we would maintain that and I didn't want to run the risk that reading something about it would influence the way we were interpreting it on the scene at the time. That's why I didn't do that.

Williams: Let me ask you this inside baseball kinda question. So we all see judges taking notes during trials and you would take notes during the trial and you would have this conversation. What are you writing down? Are you writing down your observations or are you writing down what the witness said? Is it more he testifies that there was no discussion on this point, or are you writing down I was surprised to hear the testimony there was no discussion? This is troubling, must come back and revisit this?

Chandler: [00:33:18] Speaking only personally, I don't know what other judges do, but my practice always was to write down things that the witness was saying, or if there was a document that a witness was testifying about, that to me were important to remember, that I wanted to be sure that I remembered what he said or she said about a particular thing that happened so that I can cross check it later. I can ask the law clerks, you heard her say this? That seems inconsistent with what I heard someone else say, or that seems inconsistent with something I think's in the record. That's the way I use it to sort of check myself and when I come out that's what those notes are for, is to help me ask the clerks you heard this, I heard this, did you think of it and understand it the way I did or did you hear it differently? That's how I always use my notes.

Williams: Greg, well this has been fascinating. Thank you so much.

[00:34:12 end of video]