



IN THE
Supreme Court of the State of Delaware

No. 411, 2005

IN RE THE WALT DISNEY COMPANY DERIVATIVE LITIGATION

WILLIAM BREHM and GERALDINE BREHM, as Trustees and Custodians,
MICHAEL GRENING, RICHARD KAPLAN and DAVID KAPLAN, as Trustees,
THOMAS M. MALLOY, RICHARD J. KAGER and CAROL R. KAGER, as Joint
Tenants, MICHAEL CAESAR, as Trustee for Howard Gunty, Inc. Profit Sharing Plan,
ROBERT S. GOLDBERG, I.R.A., MICHAEL SHORE, MICHELE DEBENEDICTIS,
PETER LAWRENCE, I.R.A., MELVIN ZUPNICK, JUDITH B. WOHL, I.R.A.,
JAMES C. HAYS, and BARNETT STEPAK,

Plaintiffs Below, Appellants,

- v -

MICHAEL D. EISNER, MICHAEL S. OVITZ, STEPHEN F. BOLLENBACH,
SANFORD M. LITVACK, IRWIN RUSSELL, ROY E. DISNEY, STANLEY P. GOLD,
RICHARD A. NUNIS, SIDNEY POITIER, ROBERT A.M. STERN, E. CARDON
WALKER, RAYMOND L. WATSON, GARY L. WILSON, REVETA F. BOWERS,
IGNACIO E. LOZANO, JR., GEORGE J. MITCHELL, LEO J. O'DONOVAN,
THOMAS S. MURPHY, and THE WALT DISNEY COMPANY,

Defendants Below, Appellees.

APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE,
IN AND FOR NEW CASTLE COUNTY, CONSOLIDATED C.A. No. 15452-N

**ANSWERING BRIEF OF
APPELLEE MICHAEL OVITZ**

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DECEMBER 9, 2005

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NATURE AND STAGE OF THE PROCEEDINGS

Plaintiffs filed this case in January 1997. Motion practice ensued, the details of which are set forth in this Court's 2000 opinion remanding the case back to the Court of Chancery. *Brehm v. Eisner*, 745 A.2d 244 (Del. 2000). Following remand, plaintiffs obtained documents from The Walt Disney Company ("Disney" or "the Company") pursuant to a demand under 8 *Del. C.* § 220. On January 3, 2002, plaintiffs filed a Second Amended Complaint, which all defendants subsequently moved to dismiss. On May 28, 2003, the Court of Chancery denied those motions.

The parties engaged in discovery. On June 21, 2004, defendant Michael Ovitz ("Ovitz") moved for summary judgment on the claims against him. On September 10, 2004, the Court of Chancery issued a Memorandum Opinion and Order granting the motion in part, dismissing the breach of fiduciary duty claim asserted against Ovitz in connection with his hiring by Disney to be its President. *In re Walt Disney Co. Deriv. Litig.*, 2004 Del. Ch. LEXIS 132 (Sept. 10, 2004).

Trial began on October 20, 2004 and continued until January 19, 2005, consuming 37 trial days, with testimony from 24 witnesses spanning over 9,360 pages of transcript, along with 1,033 trial exhibits and thousands of pages of depositions. (See Aug. 9, 2005 Op. and Order (Ex. A to Notice of Appeal) ("Opinion" or "Op.") at 1.) At the conclusion of trial, the Chancellor set a post-trial briefing schedule and directed the parties to submit evidentiary objections to trial exhibits, deposition testimony, and certain trial testimony.

On February 4, 2005, the Chancellor issued a letter opinion and order addressing those objections. Post-trial briefing followed and was completed on April 28, 2005. On August 9, 2005, the Chancellor issued a 174-page Opinion and Order, which included 97 pages of factual findings, and entered judgment in favor of all defendants on all claims.

Plaintiffs filed their Notice of Appeal on September 6, 2005, and their Opening Brief on October 24, 2005. This is Michael Ovitz's Answering Brief.¹

¹ Plaintiffs devote two paragraphs in their Nature and Stage of the Proceedings to mischaracterizing and distorting the events surrounding Disney's late production of Ovitz's work files in September 2004, and the Chancellor's February 4, 2005 letter opinion on the evidentiary objections. (Opening Brief ("OB") at 1-2.) Ovitz addresses those matters in the Argument section of this brief. See *infra* at Arguments II.B.3.b and II.B.3.c.

SUMMARY OF ARGUMENT

1-8, 10. DENIED. Paragraphs 1-8 and 10 of plaintiffs' Summary of Argument are directed to claims asserted against the non-Ovitz defendants concerning the approval of the OEA, and are not directed against Ovitz. Ovitz therefore does not address these arguments, but incorporates the arguments set forth in the other defendants' Answering Brief.

9, 11. DENIED. The Chancellor made detailed factual findings concerning Ovitz's performance as President, and correctly ruled that Disney had no grounds to terminate Ovitz for cause. The ruling was based on the Chancellor's own analysis of the extensive record and in reliance on the expert reports of both Feldman and Fox, and was, the Chancellor clearly stated, mandated under any of the potentially applicable definitions of gross negligence and malfeasance.

12. DENIED. The Chancellor correctly formulated and applied settled Delaware law in ruling that Ovitz did not owe fiduciary duties in connection with negotiation of the OEA, and that he did not violate his fiduciary duties in connection with his termination. There is ample undisputed support in the record for the Chancellor's finding that because the material terms of the OEA were negotiated before Ovitz became President, Ovitz did not owe fiduciary duties during those negotiations. The claim that Ovitz was a de facto fiduciary prior to October 1 fails because it was not made below, the doctrine does not apply here, and Plaintiffs offer no evidence showing a genuine issue of material fact. The court's conclusion that Ovitz complied with his duties when Disney terminated him is correct because the evidence established: (i) Ovitz did not interject himself into or manipulate Disney's decisionmaking process, (ii) he was terminated in a transaction Disney imposed upon him, and (iii) he received only what he was due under the OEA because Disney did not have a basis to terminate him for cause.

13. DENIED. The Chancellor's determination that Eisner and Litvack were fully informed of all material information about Ovitz when deciding whether he could be terminated for cause is amply supported by the record and is the product of an orderly and deductive reasoning process.

14. DENIED. Plaintiffs waived their waste claim by failing to present it in the manner required by the Supreme Court Rules. On the merits, the Chancellor properly formulated the legal standards for waste, and his conclusion that plaintiffs had failed to meet their burden has ample support in the record and is the product of an orderly and deductive reasoning process.

15. DENIED. The Chancellor properly applied Delaware law concerning the fiduciary duties of directors, and correctly determined, on the basis of an extensive factual record, that Ovitz complied with his fiduciary duties.

STATEMENT OF FACTS

Eight years ago, plaintiffs scripted a captivating story of secret backroom deals, ironed out behind closed doors in which two friends plotted to allow Michael Ovitz to come to Disney under a sweetheart deal, stay a year doing nothing, and then leave, colluding to take his severance benefits with him. That story was picked up and repeated in the press and elsewhere. And, until the trial, the courts were procedurally required to act as though every word were true.

But at trial, plaintiffs could no longer rest on mere allegations or snippets of evidence taken out of context. Instead, they were put to their proof. “Stripped of the presumptions in their favor that have carried them to trial” (Op. at 126), plaintiffs’ story is revealed as just that: a story. As the Chancellor concluded, the facts, as seen in the spotlight of the evidence, are clear.

Ovitz came to Disney with public fanfare and high hopes, giving up a secure and highly profitable talent agency to do so. Once at Disney, however, his hopes were shattered. His ideas and creativity were blocked at every turn. After a year, Disney’s CEO, Michael Eisner, decided to terminate Ovitz – a decision in which Ovitz neither participated nor agreed. Disney did, however, elect to honor Ovitz’s contract, negotiated before Ovitz joined the Company. Ovitz was forced out of Disney with his contractual benefits, and nothing more.

In reaching his conclusion, the Chancellor reviewed a mountain of evidence. The trial itself lasted 37 days and generated 9,360 pages of transcript. The court also reviewed thousands of pages of deposition testimony and 1,033 trial exhibits. Most notably, the 98 pages of factual findings in the opinion demonstrate the depth and intensity of the Chancellor’s review. While no summary can adequately capture the detail of those findings, Ovitz sets forth below the most relevant facts to the claims that are asserted against him on appeal.²

² Plaintiffs’ recitation of the facts reads more like a trial brief than an appellants’ brief. Focusing on the pieces of evidence that support their claims, they ignore or belittle the evidence upon which the Chancellor relied and that supports the judgment. That tactic is, of course, improper, as Plaintiffs are required, at this post-trial stage, to fairly recount the evidence in the light most favorable to the judgment. *Palmquist v. Selvik*, 111 F.3d 1332, 1337 (7th Cir. 1997) (where defendants’ brief “do[es] not mention numerous facts which supported the jury’s verdicts on plaintiff’s claims,” and contains “numerous omissions of testimony favorable to plaintiff,” court strikes statement of facts and states “[p]arties must be called to task for these omissions and failures to denominate contested issues of fact on which they lost.”)

A. Before Going To Disney, Michael Ovitz Was An Established Executive In The Entertainment Industry As The Head And Majority Owner Of The Dominant Talent Agency In Hollywood, CAA.

In 1995, Michael Ovitz was not just another talent agent. Rather, he had literally worked his way up from the mailroom of the William Morris Agency to found his own talent agency and to become “one of the most powerful figures in Hollywood.” (Op. at 8-10; B48) As the trial court found, Ovitz’s talent agency, Creative Artists Agency (“CAA”), had “reshaped an entire industry and had grown from five men sitting around a card table to [become] the premier Hollywood talent agency.” (*Id.* at 10) Ovitz, as CAA’s majority owner and president, had driven a large part of this success, including spearheading CAA’s use of “packaging,” a process that “revolutionized” the entertainment industry by shifting some of the power to assemble movie projects from the studios to the directors, actors, and writers represented by CAA. (*Id.* at 9; B48) By 1995, CAA had surpassed all of its competitors, with 550 employees and an impressive roster of roughly 1,400 of the world’s top actors, directors, writers, and musicians generating approximately \$150 million in annual revenues. (*Id.* at 10; B49) Ovitz’s share of this revenue provided him an annual income of about \$20 million. (Op. at 10, 14; B49; B1746; B818)

By 1995, Ovitz was looking for new challenges. In May, Ovitz and his partners negotiated with MCA for Ovitz to become MCA’s chairman/CEO and his partners to take other high positions. MCA offered them ten percent of the company (in addition to cash compensation) to come over (Op. at 10-11; B1146), but Ovitz declined the offer because he did not believe he would get the financial and operational support he would need to turn MCA around. (Op. at 11-12; B73) A month later, his partner, Ron Meyer, who ran CAA’s day-to-day operations, unexpectedly took the number two job at MCA. (*Id.*; B74) This stunned Ovitz, and led him to revisit the repeated overtures of his longtime friend Michael Eisner to come to Disney. (Op. at 12-13; B120)

B. In a Move Extolled by the Market, Eisner Recruited Ovitz to Become Disney’s President, Ensuring the Succession at the Head of Disney

In 1995, Disney suffered from a serious lack of senior executive leadership. Disney had tragically lost its President, Frank Wells — who had so successfully partnered with Eisner to lead Disney over the prior decade — to a helicopter crash in April 1994. (Op. at 6; B237) Shortly thereafter, Eisner underwent emergency heart surgery. (B103) Together, these developments generated “an enormous amount of speculation” inside and outside Disney as to potential successors to Eisner. Naming a successor, however, was a “decision [Disney] was not properly prepared or ready to make,” as there were “no viable [internal]

candidates.” (*Id.*; B226; *see also* B360) The July 1995 announcement that Disney would purchase ABC, and thereby nearly double in both size and complexity, only heightened the speculation. (Op. at 14; B103, B226, B241, B245-46, B348-49) Eisner needed to act, and he knew there was only one qualified candidate available for, and interested in, the job: Michael Ovitz. (B239-41)

By 1995, Eisner and Ovitz had been friends for nearly 25 years, and were well-acquainted with each other both professionally and personally. In fact, Eisner had actually attempted to recruit Ovitz to work with him numerous times over the years, but had never been successful. (B50) But the combination of Wells’ death and Ovitz’s publicized negotiations with MCA — which, for the first time, posed Eisner with the threat of Ovitz heading one of Disney’s competitors — spurred Eisner to redouble his efforts to bring Ovitz to Disney. (Op. at 12-13; B242, B242-43) After Meyer left CAA, Eisner felt the time was right to strike a deal. (B244, B304)

Throughout July and early August, Ovitz and Eisner spoke frequently about the possibility of Ovitz coming to Disney and what his role at the Company would be. As the Chancellor found, through these discussions Ovitz believed that he and Eisner reached a shared understanding on his future role at Disney. (Op. at 14-15; B51-52) Although Ovitz knew he would formally report to Eisner, he understood that in practice they would run Disney as partners — with Eisner as the senior partner — in the same way that several other famous duos (including Eisner and Wells) had led their companies. (*Id.*) Eisner intended to shake up and reinvent Disney (B51-52; *see also* B942), and led Ovitz to believe that he, Ovitz, could help shape Disney’s future. (Op. at 14-15; B52, B70) This shared vision — and Eisner’s promised support in realizing it — allayed the concerns Ovitz had expressed to Eisner about executive infighting at Disney and anticipated resistance from current executives to Ovitz’s leadership.

Through a series of arms-length negotiations (Op. at 144; B111-14, B122, B161-62), and aided by Irwin Russell, the Chairman of Disney’s Compensation Committee, and Robert Goldman, Ovitz’s financial adviser, the two sides struck a deal, the terms of which were incorporated into the August 14, 1995 Ovitz Letter Agreement (“OLA”) (A417). The OLA, which was subject to the approval of Disney’s Board and Compensation Committee, called for Ovitz to serve as Disney’s President for five years. For his service, Ovitz would receive a \$1,000,000 annual salary, a discretionary bonus, and five million stock options. Three million of those options were to be market priced and were guaranteed to be worth at least \$50 million (“A options”); if not, Disney would cover the shortfall in cash. (*Id.* at DD001769, ¶8) The remaining two million options were to be premium priced and their vesting was contingent on Ovitz’s contract being renewed for at least two years (“B options”).

The deal was announced on August 14, 1995, but with an official start date of October 1 of that year. (A414) Everyone believed Eisner had scored a great coup by hiring Ovitz (B255, B257), and Disney's market cap rose substantially. In fact, in testimony that the Chancellor considered to be "well-supported by the evidence and based upon accepted methods of analysis," defense expert Frederick Dunbar opined that Disney's market capitalization rose by just more than \$1,000,000,000 due to the announcement of Ovitz's hiring. (Op. at 26, 103-04; B1509-10, B456-57)

C. Ovitz Transitions to Disney by Giving up His Stake in CAA

In order to come to Disney, Ovitz had to give up his ownership of CAA due to the conflict of interest that owning a talent agency while running a studio would present. (See B77.1, B1787.1-87.2) But CAA was a service business that depended significantly on the personal relationships that Ovitz and his partners had with their clients, and its viability without those individuals was uncertain. (Op. at 16, n.29; B825, B72) As such, Ovitz and his partners could not readily sell CAA to a third party, so instead they transferred the business to nine CAA agents in exchange for a promise that the "new" CAA would pay them 75% of the next four years of collections on deals consummated before Ovitz left. (*Id.*; see also B163, B453, B472, B494, B825) They received, however, *no* upfront payment. And even the future payments were expressly contingent on CAA first attaining a substantial level of profitability. (*Id.*) While it turned out that CAA was profitable, at the time it was uncertain at best whether CAA would even survive, let alone generate sufficient profits to trigger any payment obligation. (*Id.*; see also B88-89, B1786, B1787)

While Ovitz was severing his ties to CAA, he simultaneously began the mammoth task of learning about Disney. This included attending Disney meetings with Eisner in Wyoming and reviewing numerous documents summarizing various divisions of the Company and its ongoing initiatives. (Op. at 39, n.133; B324, B369-70, B102; A245, A356, A410, A539, A323, A386, A358) Ovitz also spent time furthering a pre-existing Disney effort to bring an NFL team to Los Angeles. (Op. at 40; B54-55, B1477) The Chancellor characterized these efforts as "good faith efforts to benefit the Company and bring himself up to speed." (Op. at 40-41)

D. Representatives of Disney and Ovitz Prepared the Final Contract and Disney Approved It

The OLA established the broad parameters of Ovitz's employment package, but it was never intended to be his final contract. It remained to transform the deal embodied in the OLA into a final employment agreement (the "OEA"). In mid-September, 1995, Joseph Santaniello, a lawyer in Disney's General Coun-

sel's office, prepared the first full-length draft agreement, largely by adapting the language and terms in Eisner's then-current employment agreement to reflect the economic terms in the OLA. (Op. at 26; B1799)

Most pertinently, the draft agreement included language that would bar either party from terminating the agreement without consequence to itself unless "cause," as contractually-defined, had been established. (B619 at ¶11(a)(iii)) If Disney terminated Ovitz's employment other than for "gross negligence or malfeasance" — the same cause standard as in the previous contracts of Eisner and Wells (Op. at 28, n.81; B1189.3, B371) — Disney would have to pay Ovitz an NFT payment consisting of his remaining salary, \$5 million in lieu of a bonus for each remaining year of the contract, and a \$10 million contract termination payment. (B617-20 at ¶¶10, 11(c)) Ovitz's A options would also vest immediately (although the "B" options would be cancelled). (B612 at ¶5(d)) Conversely, if Ovitz quit other than for a contractually-specified good reason (B620-21 at ¶12), he would forfeit all the benefits of his contract and, critically, Disney could enjoin him from working for a competitor. (*Id.* at ¶9; B616-17)³

This draft also incorporated a change to the economic terms of the OLA. Due to unforeseen tax implications for Disney from the OLA's guarantee that Ovitz's A options would be worth at least \$50 million, Disney wanted to remove that provision. (Op. at 26-27; B1797-98; *see also* B961) In exchange, the parties agreed that Disney would reduce the B options' then-premium exercise price to market price, add a \$10 million contract termination payment if the contract was not renewed, and extend the exercisability of the three million A options to their normal expiration date in the event of a non-fault termination ("NFT"). (Op. at 26-27; B137, B138)

The first draft OEA was sent by Disney to Ovitz's lawyers on September 23, 1995. (B609) Sometime between September 23 and September 26, 1995, Ovitz and Disney agreed to increase Ovitz's "in lieu of bonus" payments in the event of an NFT from the original \$5 million for each remaining year of the contract to \$7.5 million per year. (B573)

On September 26, 1995, Disney's Compensation Committee — consisting of outside directors Russell, Watson, Poitier, and Lozano — approved the key terms of Ovitz's contract.⁴ (Op. at 27-29; B978.4, at WD01170) Next, Dis-

³ Thus, for example, had Ovitz's tenure been as successful as had been anticipated, he would not be able to leave Disney for a top spot at a competitor, for Disney would have been entitled to enjoin such an action.

⁴ Plaintiffs persist in claiming that the Committee did not approve the terms of the OEA at its September 26 meeting. (OB at 11) The Committee's minutes,

ney's Board of Directors unanimously elected him to Disney's Presidency. (Op. at 30; B556) Ovitz officially assumed his duties as President on October 1, 1995 (although he did not join Disney's Board of Directors until January 22, 1996). (A453)

The lawyers for both sides continued to exchange drafts of the OEA as they worked out the final language, but no material changes were made to the compensation structure, severance or NFT benefits, or the definition of "good cause."⁵ Meanwhile, on October 16, 1995, Disney's Compensation Committee met again. At this meeting, the Committee again approved the key terms of Ovitz's contract. (Op. at 30-32; A754-55) It also formally granted Ovitz the five million options required by his contract, exercisable at the market price on October 16, 1995, the date of the grant.

By the end of October 1995, the final agreement was almost in place. Although it took another month and a half for the two sides to finish and execute the contract, there is no evidence that this delay was anything more than the result of busy schedules and the need to smooth out the last modifications. And, although the plaintiffs now contend that a "major rewrite" of §10 of the OEA took place in December 1995 (OB 47), that change merely made the requirements for a "qualifying" contract renewal offer from Disney to Ovitz *less* specific, a change that was immaterial, and in any event, not harmful to Disney's interests. (Cf. B617, B767-68; A496, A499, A453 at ¶10)

Ovitz signed his contract on or about December 16, 1995. To reflect the parties' mutual understanding, however, and consistent with the actual conduct and performance of the parties, it had an effective date as of October 1, 1995, the day Ovitz became Disney's President. (A453)

E. Ovitz Worked Hard at Disney, But as the Chancellor Found, A Fundamental Incompatibility Between His and Eisner's Approaches to Business, Combined with Different Conceptions of His Role and Differing Communication Styles, Resulted in Limited Authority and Limited Success

The Chancellor performed an exhaustive review of Ovitz's performance at Disney and came to conclusions far different (and far better supported) than the story told and retold over the years by plaintiffs. The Chancellor found that

however, unambiguously reflect a resolution, passed unanimously, approving the terms. (B978.1)

⁵ See B649 (Oct. 3, 1995), B669 (Oct. 10, 1995), B692 (Oct. 16, 1995), B713 (Oct. 23, 1995), B759 (Oct. 24, 1995).

Ovitz was an immensely energetic and successful man who, when faced with a new environment, attempted to implement the approach with which he had been so successful in the past at CAA. Unfortunately, while his approach could perhaps have been successful in other places and at other times, it was vastly different from the approach followed by Eisner and the other senior Disney executives and was rejected by them. The Chancellor captured this dynamic succinctly:

Many of Ovitz's efforts failed to produce results, often because his efforts reflected an opposite philosophy than that held by Eisner, Iger, and Roth. This does not mean that Ovitz intentionally failed to follow Eisner's directives or that he was insubordinate. To the contrary, it demonstrates that Ovitz was attempting to use his knowledge and experience, which (by virtue of his experience on the "sell side" as opposed to the "buy side" of the entertainment industry) was fundamentally different from Eisner's, Iger's, and Roth's to benefit the Company. But different does not mean wrong.

(Op. at 47-48 (footnotes omitted))

Despite the deep philosophical divide between himself and Eisner, Ovitz was nonetheless able to achieve a measure of success during his time at Disney. For example, he suggested changing the location of the entrance to Disney's new California Adventure theme park and he restructured ABC's Saturday television morning line-up. (Op. at 35, n.119; B259, B326-27; Op. at 43, n.119; B64, B259, B67, B67-68, B69-70, B314-15; *see also* B419-20) Ovitz also played an important role in personnel issues, including the recruiting of Nickelodeon founder Geraldine Laybourne, the retention of key animators, and smoothing disputes between talent and the network, such as ABC television star Tim Allen. (*Id.* at 43; B69-70, B314-15; *see also* B419-20) In fact, early in his tenure, Eisner praised Ovitz and his performance in a series of documents that the trial court found to be credible and of particular importance. (*See* Op. at 32-35; B919, B936, B942) And, as the trial court found, "nothing in the trial record indicates . . . that Ovitz intended to bring anything less than his best efforts to the Company." (Op. at 132)

Unfortunately, however, the more typical pattern of Ovitz's tenure was that his authority to implement change was quite limited, and the proposals he put forth to Eisner were generally rejected. Thus, when tasked with improving the performance of second-rate divisions at Disney like Hollywood Records, Disney Interactive, and publishing, Ovitz's hands were tied. (Hollywood Records, in particular, was in dismal shape. (*See* B316, B1479, B1137) In fact, as Litvack put it, "Hollywood Records was, by any measure — I don't mean to overstate it — a spectacular failure to that time. . . ." (B386-87; *cf.* B1137)

Ovitz pursued three strategies to revive these moribund operations. First, he explored opportunities to purchase (or joint venture with) other companies that could give Disney a viable presence in those markets, such as EMI and Sony for the music and Disney Interactive businesses and Putnam Publishing for the publishing business. (Op. at 44-46; B59-61, B63, B80, B56-57) These proposals died, however, due to Eisner's refusal to allow Disney to make the necessary additional expenditures and his longstanding preference for growing these businesses internally. (*Id.*; B57, B60; *see also* B930, B951) Second, Ovitz explored opportunities to sign big-name stars such as Janet Jackson, Tom Clancy, and Michael Crichton to the record and publishing labels as a means to attract other artists to sign with them. (Op. at 45-46; B59-60, B856) Disney again rejected Ovitz's proposals. (*Id.*) Third, Ovitz sought to further Eisner's wishes to shake Disney up by bringing in new executives and removing underperforming ones. (B57-58) Here again, he was stymied. (B58) These limitations on his authority left Ovitz with a nearly impossible mandate: fix these problem divisions *without* making any major changes.

Ovitz brought a number of other potentially valuable opportunities to Disney that he was not allowed to pursue. For example, Ovitz brought Disney the chance to buy twenty-five to fifty percent of Yahoo! (Op. at 44-45; B62-63) He also brokered an opportunity to effect an early settlement of the breach of contract claims that former Disney executive Jeffrey Katzenberg had against Disney for a fraction of what Disney ultimately paid. (B58-59) But Disney let these opportunities pass.

It is clear in retrospect that Eisner intended a very different, and far more limited, relationship with Ovitz than the partnership Ovitz thought he was joining. (Op. at 15; B51-52) Thus, when Disney's other senior executives took bold steps to keep Ovitz out of their affairs, Eisner let it happen. For example, at a meeting held at Eisner's home on August 13, 1995 — one day before Ovitz's hiring was announced — Ovitz met CFO Bollenbach and Chief of Corporate Operations and General Counsel Litvack for the first time in connection with his hiring. Ovitz barely had time to say hello before Bollenbach and Litvack starkly said that they refused to report to him, an act the trial court characterized as a "mutiny." (Op. at 22-24; B53, B366) To Ovitz's dismay, Eisner did not take them to task. (Op. at 23-24; B53, B78) Instead Eisner privately assured Ovitz that matters would be worked out, so "Ovitz, with his back against the wall, acceded to Litvack and Bollenbach's terms." (Op. at 24; B75, B76) Then, only a week later, Roy Disney circulated a newsletter to the animation department stating that Ovitz would have no authority there, embarrassing Ovitz before a key portion of the Company. (B1101, B67) Again, Eisner did nothing.

If opposing approaches to the entertainment business and differing conceptions of Ovitz's role were not enough, different communication styles exacer-

bated the situation. Ovitz spoke in superlatives. (B286) When he was enthusiastic about an idea, he spoke persuasively and passionately about it. However, to Eisner's and Litvack's ears, this was perceived as "agenting." (Op. at 51; B402) Unfortunately, Eisner translated this sentiment in a few memos (none of which were sent to Ovitz) as problems relating to Ovitz's veracity. (B597; A191, A196) But, as the trial court found, in fact there was *no* evidence that Ovitz had told even a single material falsehood while at Disney. (Op. at 50-51) Indeed, the testimony was precisely to the contrary. (B285-86, B383-84, B1759-60, B1744, B1800, B213, B229, B327-28, B344)

F. By September 1996, Eisner's Chief Goal Was To Force Ovitz Out.

By early Fall 1996 at the latest, Eisner concluded that Ovitz must leave Disney. (Op. at 59; A641; B272) At about the same time, press reports, quoting a number of anonymous sources, were harshly critical of Ovitz, and there was open speculation that Ovitz's tenure was in doubt. (B540)

In mid-September, Litvack cornered Ovitz in his office and told him he should leave Disney. (Op. at 59; B374, B421) After reporting this conversation to Eisner, Litvack then had a second conversation with Ovitz, this time telling him that Eisner wanted him to leave Disney. (*Id.*; B374-75, B272, B307) Ovitz refused, responding that if Eisner felt that way, Eisner should say so directly. (B79) At trial, Ovitz testified about this conversation causing the Chancellor to conclude (quoting from Ovitz's testimony) that "as far as [he] was concerned, [he] was chained to that desk and that company." (Op. at 60; B79) Ovitz ended the meeting with Litvack still determined to stay at Disney and work as hard as necessary to turn things around. (B79) Ovitz even went to Eisner and, after addressing in great detail his history at Disney, the efforts he had made, and their past relationship, pleaded with Eisner to help him "make it work." (B79-80) But Eisner was not interested. (*Id.*)

By late September, Eisner believed he had come upon a perfect solution. Eisner learned that Sony, with whom Ovitz had numerous dealings, was interested in hiring Ovitz to oversee its U.S. operations. (Op. at 60; A641) Eisner hoped a deal could be reached that would let Ovitz work for Sony in a way that would save face for everybody. (*Id.*) Meanwhile, at Eisner's urging, and with his express permission (A641, A643), Ovitz negotiated with Sony for a position there. (B80) But Ovitz had no great interest in moving to Sony and the negotiations ultimately went nowhere. (B81) On November 1, he so informed Eisner, vowing to "recommit" himself to Disney. (Op. at 62; A643)

The failure of the Sony opportunity to materialize and Ovitz's unwavering determination to stay combined to frustrate an increasingly irritated Eisner. (B82, B273) "[S]truggling to make Ovitz understand that he had to leave Dis-

ney,” (Op. at 66), Eisner chose to vent his frustration in the form of a letter — never sent — to Ovitz. (A196) His nearly stream-of-consciousness diatribe included a host of alleged (and sometimes imagined) ills in an attempt to convince Ovitz that the situation was hopeless. (Op. at 66-67; A196; B273-274, B313) For example, Eisner erroneously accused Ovitz of failing to turn in gifts when the facts show that Litvack had investigated this issue and found Ovitz in compliance with Company policy. (Op. at 57-58; B386, B547) At trial, even Eisner admitted that parts of the letter were simply untrue and that he was really just trying to blame Ovitz for everything in the hope of convincing Ovitz that he had to leave. (Op. at 66; B313, B318; cf. B386-87, B547) But one statement in that letter *was* true: although Ovitz wanted to “continue under the management structure at Disney,” Eisner had concluded that he “really cannot.” (A196; *see also* Op. at 65)

G. Eisner Terminates Ovitz.

In November, Eisner prepared to oust Ovitz. As an initial matter, Eisner asked Litvack whether there was any way Disney could terminate Ovitz for cause. (Op. at 68-71; B275-76, B282, B376-77) Terminating Ovitz for cause would have made Litvack “the happiest man alive.” (B407) In fact, after reviewing all the evidence, the trial court concluded that due to “the hostile relationship between Litvack and Ovitz . . . if Litvack thought it were possible to avoid paying Ovitz the NFT payment, that out of pure ill-will, Litvack would have tried almost anything to avoid” making it. (Op. at 70, n.269; B377-78) Yet despite his personal animosity, Litvack determined that Disney had no basis to terminate Ovitz for cause, and that the question was not even close. (Op. at 68; B377-78, B383, B403, B408) Eisner disliked that answer and directed Litvack to re-think it (Op. at 69; B376-77), but Litvack could find no lawful way to deny Ovitz the NFT benefits set forth in the OEA (Op. at 70-71; B288, B377, B378) Litvack believed that attempting to threaten a for-cause termination in order to negotiate a reduced payment to Ovitz would be unethical and would make it appear that Disney was “trying to get out of its contractual obligations,” a conclusion with which the trial court agreed. (Op. at 71-72; B382, B378, B380)

Eisner enlisted the aid of Gary Wilson, a Board member and friend of Ovitz, to convince Ovitz that he had to leave Disney. (Op. at 65-66; B273, B437) Wilson agreed to use an upcoming Thanksgiving boat trip with Ovitz to deliver the news. (B293)

Concurrently, Eisner updated the Board on his decision to fire Ovitz. At an informal executive session following the regularly-scheduled November 25, 1996 Board meeting, Eisner told a number of Disney’s outside directors that a non-fault termination of Ovitz was imminent and informed them of his plan to use Wilson to break the news. (Op. at 73, n.277; B1763, B1795, B1806; B499,

B283, B341; Op. at 74; B215, B218, B356, B484-85, B499, B293) No one objected to Eisner's plan. (B275) Ovitz did not take part in this session but, as the trial court found, he was able to view at least a portion of it through a glass wall.⁶ (Op. at 73; B275)

As Eisner and Wilson had planned, Ovitz joined Wilson on their boat over Thanksgiving. (Op. at 76-77; B93, B94) During that weekend, Wilson told Ovitz that he could not stay at Disney. Ovitz was extremely distraught, telling Wilson of his frustration at not being given a fair chance to succeed. (A676; B93-94, B441-42; *see also* B294) Even so, Wilson was ultimately successful where Eisner had failed. Although torn and still wanting to stay, by the end of that weekend, Ovitz was ready to discuss departing from Disney. (Op. at 77; B82-83)

A couple of days later—on December 3—Ovitz and Eisner met to discuss Ovitz's termination. (Op. at 77-78; A678; B83; *see also* B295-99) During this conversation, Ovitz asked that Eisner allow him to stay on as a director, to consult for Disney, to continue to use his office and Disney staff, and to repurchase the car and plane he had sold to Disney when he arrived. (Op. at 77-78; A678) Ovitz also asked that he not be forced to deal personally with Litvack, although, as the trial court found, Ovitz "had no qualms about Litvack being involved."⁷ (Op. at 78; A678; B95)

In the conversations with Russell following the December 3 meeting, Ovitz pleaded again for a chance to succeed at Disney. (Op. at 79; B151) But that request was denied. (*Id.*) And over the course of the next week or so, Disney rejected *every* request Ovitz had made to Eisner, insisting instead that it would honor the OEA and do no more. (Op. at 79; B84, B172 B1443 (board seat); B84, B84, B99, B172 (consulting arrangement), B171 (continued use of office and staff), B96, B171 (repurchase of plane), B394-95; B1489 (repurchase of car)) Thus, as the Chancellor found, Ovitz did not receive *anything* more than

⁶ At trial Eisner testified that he drove to the Board meeting with Ovitz and, during the ride, told Ovitz that he intended to discuss Ovitz's situation with the Board. (B275)

⁷ And Litvack was deeply involved in Disney's handling of Ovitz's termination. He took part in the decision to rescind Ovitz's 1995-1996 bonus. (B388-89, B390, B391-92) Litvack also participated in a number of calls regarding Ovitz's benefits (including at least two with Ovitz's representatives) (B154, B158-59, B390, B409, B426, B1734-35, B814, B885, B887-88, B1491 (reflecting a December 12, 1996 call between Litvack ("SL"), Eisner ("MDE"), Russell ("IR"), Ovitz ("MSO") and Ovitz's attorneys Ron Olson ("R"), Bob Adler ("B"))) and he signed both termination letters (A698, A699).

the payments required by his contract for a non-fault termination. (Op. at 79-80) Equally important, from Ovitz's perspective, there was no basis for Disney to terminate him for cause under his contract, and no one from Disney ever suggested otherwise. (Op. at 80, n.305; B83, B85, B159, B289, B396-97, B1774)

On December 10, Disney's Executive Performance Plan Committee ("EPPC") — consisting of Directors Gold, Russell, Lozano, and Poitier (and with Watson present) — awarded Ovitz a \$7.5 million bonus for 1995-1996. (Op. at 80-81; A779) Ovitz was so informed. (See B811; see also A779) On the night of December 11, Ovitz met with Eisner in New York. (Op. at 81-82; B279, B301) The trial court found the "purpose of this meeting was to agree to a press release, let Ovitz know that he would not receive any additional items, and as Eisner described it, it served as 'the final parting.'" (Op. at 82; B301) The next day, Litvack signed the letter confirming Ovitz's departure. (A698) Disney then released the news to the press. (See also Op. at 83; A685) Although the effective date of Ovitz's departure was January 31, 1997 (A698), a devastated Ovitz never returned to Disney (Op. at 84; B84).

Disney then proceeded to take back Ovitz's bonus. Although Goldman and Ovitz's attorneys protested this decision to both Russell and Litvack (B157-59, B814, B887, B888), Disney nonetheless rescinded Ovitz's bonus on December 20, 1996 (Op. at 89-91; B589).

At about the same time, Disney and Ovitz accelerated his final departure, making it effective as of December 27, 1996. (Op. at 91; A699) Ovitz signed a release and agreed to allow Disney to withhold \$1 million from the NFT payment pending a final accounting of his expenses.⁸ (*Id.*) On December 27, after receiving the release, Disney paid Ovitz the amount it calculated that it owed him under his contract (less the \$1 million holdback) and vested his A stock options. A few days later, plaintiffs filed the instant action.

⁸ The accounting was concluded a few months later, with Ovitz receiving approximately \$860,000. Of the remaining \$140,000, half related to capital expenditures for which Disney had no right to reimbursement but kept the money anyway (Op. at 56), and half related to business expenses for which Disney concluded Ovitz had provided inadequate documentation. (*Id.*; B393-94, B1005, B1452)

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY GRANTED OVITZ PARTIAL SUMMARY JUDGMENT ON THE CLAIM RELATING TO HIS EMPLOYMENT CONTRACT

A. Standard and Scope of Review

On appeal from a decision granting summary judgment, the Supreme Court reviews the entire record to determine whether the Chancellor's findings "are clearly supported by the record" and the conclusions drawn from those findings "are the obvious product of an orderly and logical deductive process." *Dutra De Amorim v. Norment*, 460 A.2d 511, 514 (Del. 1983) (citing *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)). The Supreme Court does not draw its own conclusions with respect to those facts unless the record reveals that the Chancellor's findings are "clearly wrong" and "if justice requires." *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 930 (Del. 1982). Whether the Chancellor correctly formulated the legal standard for determining whether Ovitz owed a fiduciary duty to Disney in connection with the negotiation of the OEA presents a question of law which this Court reviews *de novo*. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993).

B. Merits

On summary judgment, Chancellor found that Ovitz breached no fiduciary duty to Disney with regard to entering into the OEA. That decision is well supported by undisputed evidence and the law. First, it is undisputed that Ovitz's employment at Disney did not officially begin until October 1, 1995. Second, based on the undisputed documentary evidence there were no material changes to the OEA on or after October 1, 1995.

Although Plaintiffs concede that Ovitz did not officially take office until October 1 (OB at 6), they nonetheless argue that Ovitz became a "de facto" fiduciary before that date, and therefore the entire negotiation process was subject to a fiduciary duty standard. (OB at 46) They also claim that there was one material change to the agreement that occurred after October 1, 1995, and therefore the fiduciary standard applies apparently to the entire negotiation. (OB at 47) Plaintiffs are wrong on both counts. Moreover, even were fiduciary duties imposed upon Ovitz, he did not breach them.

1. The Chancellor Correctly Held That Ovitz Owed No Fiduciary Duties To Disney Until October 1, 1995

Plaintiffs argue on this appeal that Ovitz became a fiduciary *prior* to Oc-

tober 1 because Ovitz was a “de facto” officer before that date. (OB at 46) Plaintiffs do not dispute that Ovitz did not officially become an officer of Disney until October 1, 1995 and was not appointed to that position by the Board of Disney until September 26. However, they argue that “Ovitz’s substantial contacts with third parties and his receipt of confidential Disney information before October 1st show that Eisner and Disney had already vested him with at least apparent authority prior to his formal investiture in office.” (OB at 46-47) There are multiple flaws with this new argument.

First, plaintiffs never opposed the motion for summary judgment on the basis that Ovitz was a “de facto” officer. The closest plaintiffs came to that argument was footnote 30 on page 52 of their brief. That footnote never refers to Ovitz as a de facto officer, never cites any authority for the argument in the footnote and does not cite the cases on which plaintiffs now rely (which do not support their contention in any event). For that reason, this argument does not deserve consideration. Supr. Ct. R. 8 (“Only questions fairly presented to the trial court may be presented for review”).

Second, the argument is meritless. The doctrine of “de facto officer” is applied in circumstances where one assumes the office but for a legal reason lacks legal title to the office. As one commentator states:

A de facto officer is one who is in actual possession of an office under the claim and color of an election or appointment, and is in the exercise of its functions and in the discharge of its duties. [citing, among other cases, *Drob v. National Memorial Park, Inc.*, 41 A.2d 589 (Del. Ch. 1945)]. A de facto director holds office under color of right, through designation or election, but fails being a de jure director by some irregularity in his or her election or by ineligibility or failure to qualify as required. In short, in order to be a de facto officer, *there must be color for the claim and colorable title to the office*. A mere pretense of being an officer does not constitute the pretender an officer de facto. Nor will a solitary exercise of power under color of title to office constitute the party...an officer de facto...One must hold office under some degree of notoriety and *exercise continuous acts of an official character*.

FLETCHER CYC. CORP. § 374 (emphasis added).⁹

⁹ See also *State ex rel. James v. Schorr*, 65 A.2d 810, 817 (Del. 1948) (“A de facto officer has been defined as ‘one whose title is not good in law, but who is in fact in unobstructed possession of an office, and is discharging its duties in full

The evidence plaintiffs identify does not come close to suggesting that Ovitz, before October 1, was acting under color of title to the office or performing the duties of an officer. Plaintiffs argue that Ovitz received confidential information, met with certain officials from the NFL, and was involved in design and construction of his new office. None of this conduct, even as characterized by plaintiffs, comes close to creating a “de facto officership.” Most significantly, plaintiffs cannot cite to a single instance where Ovitz held himself out as being an officer of Disney or took any action to bind Disney in any manner.

However, even if there had been evidence that Ovitz, on occasion, had purported to act as an officer or purported to make a decision for the Company, such evidence would not support the conclusion that Ovitz was a de facto officer in connection with the negotiation of the terms of the OEA. The de facto officer doctrine is typically used to bind the company to the commitments made by the officer, FLETCHER CYC. CORP. § 383, and does not apply to persons who are aware that the person is *not* an officer. *Id.* at § 385.¹⁰ There is no evidence that those negotiating on behalf of Disney thought that Ovitz was already an officer. It would be nonsensical to impose on Ovitz fiduciary duties as a de facto officer — he lacked the discretionary power that is the reason fiduciary duties are imposed in the first place. (2004 Del. Ch. LEXIS 132, at *10) (“...[T]here is no reason to impose a fiduciary duty upon Ovitz before he obtained fiduciary authority.”) *See also Lazard Debt Recovery GP, LLC v. Weinstock*, 864 A.2d 955, 966 (Del. Ch. 2004)).

Plaintiffs seek to establish some inconsistency between the Chancellor’s holding that fiduciary duties do not commence until an officer or director formally takes office, and the de facto director doctrine. There is no inconsistency. As one commentator noted, “[t]he outstanding and distinguishing feature of de facto office[r]s is that they are in fact occupying the office under color of right and performing its duties. When they quit the office, it necessarily follows that something was occupied and has now become vacant.” *Fletcher*, *supra* § 374 at 215. Thus, even in the case of a de facto officer, there is a “bright line” of when they assume the position in question, albeit defectively, and when they vacate it. As the Chancellor warned, it would create an unacceptable ambiguity in corporate governance to hold that a future officer becomes a fiduciary before that person, either de jure or de facto, assumes the office in question. 2004 Del. Ch.

view of the public in such manner and under such circumstances as not to present the appearance of being an intruder or usurper.”).

¹⁰ *See also Rudnitsky v. Rudnitsky*, 2000 Del. Ch. LEXIS 165, *21 (Nov. 14, 2000) (“It is an established principle of Delaware law that apparent authority cannot be asserted by a party who knew, at the time of the transaction, that the agent lacked actual authority.”)

Plaintiffs also complain that some of the insufficient evidence on which they now rely was not produced *by Disney* until after the summary judgment motion was decided. This contention is both irrelevant and without merit. First, the documents on which they now rely are wholly insufficient to establish a *de facto* officership. Indeed, plaintiffs initially sought to *exclude* the documents from evidence, even as Ovitz sought successfully to allow the documents to be used. (A7-A12)¹¹ Second, plaintiffs never moved for reconsideration of the motion for summary judgment when the documents were allowed to be used. There were four months between the summary judgment decision and the end of trial. Another three months elapsed with post-trial briefing. Yet plaintiffs never sought reconsideration of the summary judgment motion on the basis of this evidence.

2. The Chancellor Correctly Concluded That No Material Changes Were Made To Ovitz's Employment Agreement After October 1, 1995

In their one-paragraph critique of the trial court's finding that the OEA did not change after October 1, 1995 (OB at 47), plaintiffs assert only two points. First, plaintiffs claim that "[n]o binding contractual obligation arose until Ovitz and Disney signed the OEA in December 1995." (*Id.*) This argument is flawed for two reasons. The proposition that the creation of fiduciary duties turns upon the date the OEA became legally binding is nonsense. The critical question is whether the substance of the contract, as and when approved by Disney, resulted from a process in which the defendant was participating as a fiduciary. Whenever the contract became binding, the terms of Ovitz's employment, particularly those about which plaintiffs complain, were negotiated before October 1. As the court below noted, it is nonsensical to argue that Ovitz would have no fiduciary duties if the contract was signed on September 30, but does have fiduciary duties if the same contract was signed after September 30, even though *there were no material changes in the terms during the interim*. 2004 Del. Ch. LEXIS 132, *15-16.

The second flaw in plaintiffs' argument is the contention that Ovitz did not have a binding contractual relationship with Disney until December. Their only support for this assertion is the OEA's generic integration clause. (OB at 47) The integration clause states that the OEA supersedes any prior agreements.

¹¹ These events are evidenced in various docket entries from September 20, 2004 to October 12, 2004, particularly Ovitz's Motion in Limine and the concluding conference on Ovitz's Motion in Limine. Filing ID Nos: 4325094 and 4375817.

This statement is not inconsistent with the existence of a prior and binding agreement before the written agreement was signed. Rather, it assumes the possibility that such a binding agreement might exist and is being superseded. Further, the Chancellor properly found that a binding agreement did exist, stating Ovitz “almost certainly was bound based on the OLA, his oral representations, and his performance” prior to the OEA’s execution. 2004 Del. Ch. LEXIS 132, *6, n.54 That finding is fully consistent with California law, which governs this employment relationship. See *Krantz v. BT Visuals Images LLC*, 89 Cal. App. 4th 164, 175 (2001) (“Under California law, a contract will be enforced if it is sufficiently definite . . . to ascertain the parties’ obligations and to determine whether those obligations have been performed or breached”) (quoting *Ersa Grae Corp. v. Fluor Corp.*, 1 Cal. App. 4th 613, 623 (1991)); *Skirball v. RKO Radio Pictures, Inc.*, 134 Cal. App. 2d 843 (1955) (an oral contract exists and is not subject to the statute of frauds where two drafts of a written agreement were prepared to reflect the verbal terms, even though the agreement was never formally executed).

Plaintiffs also contend that there was a material change to the OEA after October 1. (OB at 47) Yet the only evidence plaintiffs cite for this “fact” is what they characterize was a “major rewrite of Section 10 of the OEA in December 1995.” (OB at 47) The “rewrite” of section 10, however, was hardly material. (Compare B767-70 with A461-62) All it did was change terms that Disney must meet to make a “qualifying offer” to renew the agreement for a second term from specific thresholds to a general requirement that Disney must make an undefined “reasonable” offer, a change that was irrelevant to the issues at hand, was not a material change, and (if anything) favored Disney rather than Ovitz.

3. Even If Ovitz Had Been A Fiduciary During The Time He Was Negotiating The Material Terms Of His Contract, He Did Not Breach Any Duties He Owed To Disney

There is no evidence from the voluminous trial record that Ovitz breached a fiduciary duty during the negotiation of his contract. In connection with Ovitz’s *termination*, the Court of Chancery concluded that Ovitz had fiduciary duties, but also concluded that he complied with those duties by “not improperly interjecting himself into the corporation’s decisionmaking process nor manipulating that process.” (Op. at 129) The same is true of the negotiation of the OEA. Ovitz did not interject himself into Disney’s decisionmaking process or manipulate that process. Indeed, as an outsider, he had no involvement in the process at all. In addition, as the other Defendants and the court below explained, there was no breach even by Disney’s actual directors and officers in connection with the negotiation and approval of Ovitz’s contract. Thus, even if Ovitz had a fiduciary duty to bargain at arms-length in a process not unfair to Disney, that duty was fulfilled.

II. THE TRIAL COURT PROPERLY CONCLUDED THAT OVITZ DID NOT BREACH HIS FIDUCIARY DUTIES TO DISNEY IN CONNECTION WITH HIS TERMINATION

A. Standard and Scope of Review

The Chancellor “enjoys the unique opportunity to examine the record and assess the demeanor and credibility of witnesses,” *Rapid-Amer. Corp v. Harris*, 603 A.2d 796, 802 (Del. 1992) and is “the sole judge of the credibility of live witness testimony,” *Hudak v. Procek*, 806 A.2d 140, 151 n.28 (Del. 2002). “This Court will accept the Court of Chancery’s factual determinations if they turn on a question of credibility and the acceptance or rejection of particular pieces of testimony.” With respect to factual findings that do not turn on questions of the credibility of live witnesses, this Court will accept such factual findings as long as they “are the product of an orderly and logical deductive process.” *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

The Chancellor’s evidentiary rulings are reviewed for abuse of discretion. *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994). Findings based on the weighing of expert opinions “may be overturned only if arbitrary or lacking any evidentiary support.” *Cavalier Oil Corp. v. Hartnett*, 564 A.2d 1137, 1146 (Del. 1989). Finally, the Chancellor’s legal rulings are subject to *de novo* review. *Hudak*, 806 A.2d at 150.

B. Merits

In challenging the trial court’s decisions pertaining to Ovitz’s termination, plaintiffs spend significant time on the issue of what standard should be applied in assessing defendants’ conduct and who has the burden of proof. (OB at 21-25) But when assessing the termination-related claims against Ovitz, which legal standard to apply essentially does not matter.

Three *factual* findings mandate that the judgment in favor of Ovitz be affirmed. First, the court found that Ovitz was terminated by Disney against his will. Second, the court found that Ovitz took no actions to interject himself into or manipulate Disney’s decision-making process regarding his termination. Third, the court found that Ovitz could not have been terminated for cause because the underlying alleged misconduct did not in fact occur.

The only legal argument plaintiffs make against Ovitz rests on the untenable theory that Ovitz, not believing that any grounds for terminating him existed and never having been told that there was even an issue in that regard, nonetheless had a personal duty to demand a board meeting be held to consider terminating him for cause in a circumstance where the Court of Chancery has concluded,

as a matter of fact, that no cause existed. To assert the proposition is to demonstrate its absurdity. (OB at 48)

1. The Record Is Overwhelming That Ovitz Did Not Leave Disney Voluntarily; Rather He Was Fired

Plaintiffs brazenly claim that the trial court erroneously “ignored contemporaneous evidence showing that Ovitz was not ‘fired’ but rather acted to ‘settle out his contract.’” (OB at 47) But the evidence they rely upon points to exactly the opposite conclusion. They point to evidence that Ovitz “wouldn’t accept being fired,” that he “wrote a note to Eisner emphasizing that he was committed to succeed at Disney,” and that Eisner’s notes refer to Ovitz as a potentially “dangerous enemy,” and then they conclude that this is not indicative of an executive “passively accepting his being ‘fired’.” (*Id.*) True enough. But far from showing that Ovitz engineered his own departure, this evidence shows that Ovitz fought being fired every step of the way. As the trial court found, “the termination was anything but a mutual agreement.” (Op. at 83; B97, B150, B292)

Indeed, the amount of evidence demonstrating that Ovitz was fired against his will is far more than the “competent evidence” necessary to affirm the trial court’s factual finding. *See Hudak*, 806 A.2d at 150. It is overwhelming. For example, even as late as mid-November 1996, Ovitz said that he would “chain himself to his desk,” a statement the trial court concluded amply demonstrated “exactly how unwilling Ovitz was to even consider leaving Disney at that point.” (Op. at 68, n.258; B273) Eisner was then forced to take the extraordinary measure of enlisting Ovitz’s friend Wilson to take a joint Thanksgiving trip with Ovitz to overcome Ovitz’s resistance. And even afterwards, when Ovitz was finally willing to accept that he was being forced out, in conversations with Russell he was still “pleading his heart out . . . with tears in his voice” to stay. (Op. at 79; B151 (brackets omitted)) Further, every witness with personal knowledge of the events has confirmed the unilateral nature of Ovitz’s termination by Disney in credible and colorful detail. Eisner, for instance, testified that Ovitz “refused to quit. He refused to quit 25 times.” (B1751) Litvack testified that Ovitz “told me he was never leaving,” and that Litvack “was absolutely certain there was no way on God’s green earth that he was going to leave short of being fired . . .” (B397)¹²

Plaintiffs’ only other evidence to support their theory that Ovitz negoti-

¹² The other individuals who were involved similarly testified that Ovitz was terminated and did not leave Disney voluntarily. (*See* B223, B439, B445-47, B485, B487, B1734, B1773-74, B1801)

ated the terms of his departure are Eisner's December 3, 1996 note to Russell and the exchanges between the Disney and Ovitz attorneys. (A678, A680, A681, A698, A699) But none of these documents suggest Ovitz *wanted* to leave Disney or had a choice in the matter. They simply show that, once Ovitz could no longer fight being forced out, there were certain issues that needed to be resolved (and that all of those issues were resolved *against* Ovitz, who was given nothing more than his contract required).

2. The Trial Court Rightly Determined that Ovitz Took No Role in the Decision's Decision to Terminate Him For Cause

At trial, the Chancellor had every opportunity to assess the most serious charge plaintiffs brought against Ovitz — that he colluded with Eisner and others to obtain an NFT payment to which he was not entitled — and found it baseless. Specifically, the court found that:

Ovitz did not breach his fiduciary duty of loyalty by receiving the NFT payment because *he played no part in the decisions: (1) to be terminated and (2) that the termination would not be for cause under the OEA.* Ovitz did possess fiduciary duties as a director and officer while those decisions were made, *but by not improperly injecting himself into the corporation's decisionmaking process nor manipulating that process,* he did not breach the fiduciary duties he possessed in that unique circumstance. . . . Once Ovitz was terminated without cause (*as a result of decisions made entirely without input or influence from Ovitz*), he was contractually entitled, without any negotiation or action on his part, to receive the benefits provided by the OEA for a termination without cause.

(Op. at 129-130 (emphasis added))

There was more than ample evidence to support this finding. As set forth above, Ovitz not only took no part in deciding that he should be terminated, he was terminated against his will and in the face of his repeated requests to stay. The course of discussions between Eisner and Litvack as to the nature of the termination took place entirely outside of Ovitz's presence or knowledge. (Op. at 68-71; B376-81) At no point prior to this litigation was Ovitz *ever* informed that Disney had even considered a for-cause termination a possibility. (Op. at 79-80; B83, B85, B159, B289, B396-97, B1774) And plaintiffs themselves concede that Ovitz made no attempt to influence the Board. (OB at 48)

The only negotiation (if one could call it that) in which Ovitz participated

with Disney related solely to how the NFT would be implemented and what, if anything, he could receive in addition to the NFT. (A678, A680, A684; B165, B282-83, B295-96, B812, B884, B1152, B1443) However, as the trial court found and Plaintiffs do not dispute, Disney rejected every single request made by Ovitz and gave him only what he was entitled to receive under his contract. (See Statement of Facts, Part G)

Thus, plaintiffs are reduced to arguing that Ovitz exerted “pressure” to ensure he would receive an NFT by: (1) not accepting being fired, and (2) after the Sony negotiations failed, writing a note “emphasizing that he was committed to succeed at Disney.” (OB at 47) However, there is no fiduciary duty that requires an executive to resign his position voluntarily and sacrifice the benefits his contract guarantees.

3. Plaintiffs Offer No Grounds to Justify Disturbing the Trial Court’s Decision that Disney Could Not Terminate Ovitz for Cause

After 37 days of trial and reviewing thousands of pages of documents and deposition testimony, the trial court concluded that “given his performance, Ovitz could not have been fired for cause under the OEA.” (Op. at 132) The Chancellor concluded that the underlying charges of misconduct were, as a matter of fact, untrue. (Op. at 38-58) Moreover, despite plaintiffs’ charge that the trial court “failed to articulate which, if any, of the differing interpretations of gross negligence and malfeasance it relied upon” in determining there was no cause to fire Ovitz under the OEA (OB at 38-39), the trial court actually held that it did not matter which legal standard was applied:

by applying the myriad definitions for gross negligence and malfeasance discussed by [Plaintiffs’ expert] Donohue [and Defendants’ experts] Feldman and Fox, I . . . independently conclude, based upon the facts as I have found them, that Ovitz did not commit gross negligence or malfeasance while serving as the Company’s President.

(Op. at 132-33 (emphasis added)) And further, the Chancellor had before him the expert reports and testimony of Messrs. Feldman and Fox, both of whom opined that, based on the record and on California law, there was no contractual cause for termination. (B504.3-04.4, B504.6) Thus, unless there are grounds for this Court to overturn the Chancellor’s detailed factual findings, there is no reason to disturb the Court’s conclusion that there was no cause to terminate Ovitz

under the OEA.¹³

On appeal, Plaintiffs focus on only two factual issues to establish contractual cause: Ovitz's veracity and his compliance with Disney's expense and gift-giving policies. (OB at 38-43)

a. The Chancellor Correctly Found That The Veracity Issues Were Without Merit

Throughout the course of this litigation, plaintiffs have repeatedly accused Ovitz of being an habitual liar. Indeed, plaintiffs' expert Donohue went so far as to state that lying was the *only* wrongdoing that by itself provided Disney grounds to terminate Ovitz for cause. (B45) But plaintiffs' arguments have always lacked one essential thing: any evidence of even a single material misstatement that Ovitz made while Disney's President. Indeed, the Chancellor expressly found that there was a complete "absence of any concrete evidence that Ovitz told a material falsehood during his tenure at Disney." (Op. at 51) In attempting to challenge that finding, plaintiffs advert to three memos and an email Eisner wrote—none of which was shown to Ovitz. (OB at 42; A188, A191, A204)

None of these documents even purports to specify a single material lie. Rather, they include rumor, speculation, and hearsay statements that Eisner supposedly gleaned from others. Usually, these others remain nameless. But to the extent these sources are identified, their testimony was at odds with the assertions in the documents. For example, these writings suggest that Litvack, ABC President Iger, and Disney Studio head Roth all complained that Ovitz habitually lied, but they all testified to the contrary. (B383-84, B1759, B1760, B1784; *see also* B213-14, B229, B327-28, B344, B1744, B1800)

¹³ Plaintiffs contend that the trial court only considered the cause issue in the context of the waste claim and that it should have shifted the burden for proving there was no cause to the defendants under an entire fairness analysis due to "the Board's knowing, conscious and culpable failure to act." (OB at 37) As the quote above demonstrates, the trial court analyzed the cause issue without invoking any concepts of burden of proof but weighed the issue purely on its merits (Op. at 132-33), so even if an entire fairness standard had been applied it would be satisfied. In any event, the entire fairness standard would not be applied to Ovitz for any of three independent reasons: (1) Ovitz was terminated involuntarily; (2) Ovitz did not participate or influence Disney's decision-making process; and (3) Ovitz did not have a personal duty to call a Board meeting. (*See supra and infra*, Sections II.B.1, 2 and 4)

Further, Eisner explained at trial that these memoranda were meant to convey only that Ovitz “pressed” too hard and spoke in superlatives. (B286-87) For example, Eisner testified that PTE 79, his memorandum to directors Russell and Watson, consisted of “hyperbole.” (B266-67) Indeed, Eisner candidly testified that Ovitz “was not lying,” and that Eisner wrote parts of this exhibit because “it sounded literate or something.” (B286-87) (Gold similarly testified that PTE 79 was Eisner’s attempt to find someone else to blame. (B221-22)) Eisner was even more blunt in discussing PTE 24, the letter to Ovitz he never sent. Eisner admitted that it was “not accurate, way exaggerated, silly, hyperbole, insensitive.” (B274) Litvack testified that, upon reviewing PTE 24, the statements Eisner made in many respects blaming Ovitz “absolutely were not” “fair or accurate recounts of [the] facts” and he identified several examples. (B386-87)

Plaintiffs ask this Court to reweigh the evidence and to reject Eisner’s trial testimony (OB at 42), without this Court having had the trial court’s “unique opportunity . . . to evaluate the live witnesses, to evaluate their demeanor and credibility and to resolve conflicts in the testimony.” *Hudak*, 806 A.2d at 150. The Chancellor viewed Ovitz’s and Eisner’s testimony for more than four full days each, and Litvack’s for three. Having heard all of the relevant testimony and read all of the relevant documents, the Chancellor credited the testimony and concluded that no one – not even Eisner – believed Ovitz had told a material lie at Disney. That conclusion is dispositive of the point.

Plaintiffs, however, go further and attempt (in a paragraph) to establish that the Chancellor “failed to consider that there were specific examples of material falsehoods in the record.” (OB at 42) In his more than 90 pages of heavily-footnoted factual findings, it is hard to believe that the Chancellor “failed to consider” *anything* of import. It is hardly surprising, then, to find that he in fact did address the bulk of plaintiffs’ claims. For example, he specifically discussed the alleged falsehoods regarding the disclosure of Ovitz’s “earn-out” agreement with CAA and found that there were no misstatements. (Op. at 51-54) That finding is demonstrably correct. In particular, Ovitz disclosed to Disney that:

I beneficially own a majority interest in my prior employer
The talent agency business of the Prior Employer is being continued by [new CAA], in which I have no direct or indirect ownership interest. The Prior Employer will continue to receive commissions from contracts entered into by its former talent agency clients on or before September 30, 1995 and will also lease out certain real and personal property to [new] CAA.

(A696) That is a succinct and accurate recitation of Ovitz’s actual continuing interest in CAA – there is nothing false or misleading about it.

At bottom, Plaintiffs' opposition boils down to a claim that they disagree with the Chancellor's credibility assessments and weighing of the evidence. On this record, however, Plaintiffs' hype is no match for the Chancellor's sober, careful conclusion. Plaintiffs' veracity claims fail.

b. In Concluding That Ovitz Complied With Disney's Expense And Gift-Giving Policies, The Chancellor Properly Excluded The PriceWaterhouse Report

Plaintiffs challenge the trial court's finding that Ovitz complied with Disney's expense and gift-giving policies (Op. at 54-58) on only a single ground: that the trial court allegedly erred in excluding the report prepared by PriceWaterhouse ("PWC report") on Ovitz's expenses as inadmissible hearsay. (OB at 39-41; *see* Op. at 55, n.207; A539) To obtain a reversal of the Chancellor's evidentiary ruling, plaintiffs must show that the trial court abused its discretion. *Lilly*, 649 A.2d at 1059.

The PWC report was properly excluded as hearsay. Plaintiffs offered the report, as they admit in their opening brief, because it allegedly "provides more than ample evidence that Ovitz could have been dismissed for cause." (OB at 39) Plaintiffs are therefore seeking to use the report to prove "the truth of the matter asserted." Accordingly, it constitutes hearsay under D.R.E. 801 and is barred by D.R.E. 802 unless an exception applies.

Plaintiffs set forth, with no discussion, a laundry list of theories as to why the PWC report is admissible hearsay, although their initial plea that "in the absence of a jury, hearsay objections can be handled less rigorously" suggests that even *they* recognize the weaknesses of these arguments. (OB at 41)

First, plaintiffs contend that the PWC report is an admissible business record. This argument was not raised by plaintiffs before the trial court and is therefore barred by the Supreme Court Rule 8. But even were the issue properly preserved, it is meritless. D.R.E. 803(6) allows business records to be admitted only if they are "kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation." But PriceWaterhouse did not make post-termination investigations of expenses as part of their regular business activities, nor was it Disney's regular practice to have such reports prepared.¹⁴ This was

¹⁴ Along these lines, plaintiffs consistently refer to the PWC report as an audit. It is not an audit, and does not purport to be one. It is a draft report based on certain "agreed upon procedures" between Disney and PriceWaterhouse. (A71)

not a financial audit such as PriceWaterhouse might typically do, but a unique project set up with unique standards. (See A72-A82 at WD4810-20) Special reports of this nature are not admissible under the business records exception. See *Paddack v. Dave Christensen Inc.*, 745 F.2d 1254, 1257-58 (9th Cir. 1984) (affirming exclusion of special audit report prepared by accounting firm recording its investigation into suspected irregularities).

Second, plaintiffs contend that the PWC report is admissible as a statement by an agent against a principal concerning a matter within the scope of the agency under D.R.E. 801(d)(2)(D). (OB at 41) Initially, PriceWaterhouse was not acting or purporting to act as anyone's agent. Further, whether or not this rule would make the report admissible against Disney on an agency theory (which it does not), it provides no basis for admitting the report against *Ovitz* or the other defendants. Indeed, *Ovitz* was no longer even an employee of Disney at the time the report was prepared, as plaintiffs admit (OB at 39), and he certainly did not initiate or direct PriceWaterhouse to prepare the report.

Third, plaintiffs suggest the report is admissible as a statement affecting an interest in property under D.R.E. 803(15). But that rule covers deeds and documents relating to property. See *MCCORMICK ON EVID.*, § 323 (5th ed.). *Ovitz's* rights to the held back funds were exclusively a matter of *contract*. (A453, A699)

Finally, plaintiffs argue that the trial court erred by not admitting the PWC report into evidence under D.R.E. 807, the residual hearsay exception. That rule requires, among other things, that "the statement [be] more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and [that] the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." The PWC report meets none of these criteria. It was not more probative than other evidence available to plaintiffs, including evidence admitted at trial. For example, many of the expense reimbursement forms underlying parts of the PWC report were far more probative and were in evidence, although none hinted at any impropriety. (See Op. at 55, n.207; A539) Nor would the interests of justice be served by admitting the PWC report. After all, the document is itself designated only as a "draft" (A71), and, as Litvack stated, it contained various errors. (B398.1) There was no abuse of discretion here.

But even were plaintiffs able to establish that the Chancellor somehow abused his discretion in excluding the PWC report, the error would be harmless. The PWC report did not purport to set forth which, if any, of *Ovitz's* expenses were outside company policy. Rather, the PWC report identified expenses that met specified thresholds established by *Disney solely for the report*. (A637) It was always anticipated that further review would be required before any deter-

mination could be made as to the propriety of a reimbursement.¹⁵ And, as Litvack testified, the instances where there was a question concerning the business purpose of an expense simply reflected the need for more information or documentation, not a conclusion that the expense in fact lacked a business purpose or was improper. (B394) In fact, Litvack repeatedly testified on cross examination that the expenses plaintiffs questioned were entirely appropriate. (B314-15, B416-17)¹⁶

Further, even if plaintiffs could show that the Chancellor abused his discretion in excluding the PWC report and that the PWC report somehow established a meaningful non-compliance with some Disney policy, the PWC report would remain irrelevant to the ultimate issue, for non-compliance would not constitute gross negligence or malfeasance by Ovitz because: (1) the expenses were submitted to and paid by Disney in accordance with applicable company process and approved by Disney personnel who did not report to or through Ovitz, and (2) Ovitz was never given the opportunity to cure any errors, if any were made, before he was terminated, as was required by his contract. In fact, in connection with his termination, by allowing for the \$1 million “holdback,” Ovitz allowed Disney unilaterally to make the determination whether there were any errors and to correct them. To suggest that these facts demonstrate gross negligence or malfeasance by Ovitz thus exemplifies the type of “witch hunt” plaintiffs erroneously argue that Disney should have conducted.

**c. The Chancellor’s Discovery-Related Rulings
Did Not Unfairly Prejudice Plaintiffs**

Plaintiffs complain that the trial court should have drawn inferences adverse to defendants from the late production by Disney of certain documents and non-production of others. (OB at 43-45) That claim has no merit.

First, plaintiffs contend that the court “prejudicially refused to delay commencement of the trial after Disney unconscionably produced Ovitz’s ‘work files’ on the eve of trial” and that the trial court “failed to draw any inference

¹⁵ In this respect, plaintiffs’ assertion that less than \$700,000 out of \$4.8 million was within Disney guidelines is especially obnoxious. As plaintiffs well know, the vast bulk of this money related to capital expenditures by Disney (mostly relating to the refurbishment of the sixth floor of the Team Disney building, a project over which Ovitz had minimal or no control. (Op. at 40; B276.1, B370, B385, B1440.1)) As for the remainder, the PWC report at most suggests that less than 1% was arguably out of compliance with some company policy. (A84)

¹⁶ In fact, there were no expenses that, even with hindsight, Litvack testified were improper.

against defendants for their production lapses.” (OB at 43) As plaintiffs impliedly acknowledge, the late production of the Ovitz work files was not the fault of Ovitz or of any other defendant. Indeed, the Chancellor did not find that *anyone* was at fault for the timing of the work file production. In any event, any failure to produce these documents was Disney’s, and, if anything, the failure to produce them prejudiced defendants (and especially Ovitz) more than plaintiffs, who claim to represent Disney’s interests.¹⁷ (See McBride Ltr to Ch. Chandler, dated September 21, 2004, at 2)

The Chancellor also took substantial steps to avoid any undue prejudice to plaintiffs. In particular, to ensure plaintiffs had adequate time to review the approximately two boxes of documents, he granted the extraordinary relief of permitting plaintiffs’ expert Donohue to testify *twice* in their case-in-chief – first at the beginning of the trial, and then again at the end of the trial three months later. Further, plaintiffs’ expert was permitted to file a supplemental report shortly before his second round of testimony based on the work files. Finally, the court gave plaintiffs leave to re-depose key defendants based on the work files, although they opted not to avail themselves of that right. In light of these extraordinary steps, plaintiffs suffered no undue prejudice here, nor was there any cause to delay the trial.

Plaintiffs also seek some unspecified relief for the Chancellor’s supposed failure to mention in its opinion that certain items could not be produced by defendants because they had been destroyed or lost. (OB at 44) However, the adverse inferences sought by plaintiffs are discretionary with the trier of fact, *Riley v. Taylor*, 277 F.3d 261, 328 (3d Cir. 2001), and only permissible if it is first demonstrated that the party against whom the inference is to be drawn bears personal responsibility for the destruction of the evidence under circumstances suggesting the actual suppression or withholding of evidence. *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 334 (3d Cir. 1995); *Collins v. Throckmorton*, 425 A.2d 146, 150 (Del. 1980). Here, there is no evidence Ovitz, or any other defendant, was responsible for the absence of this evidence. First, plaintiffs complain that Disney destroyed email from the relevant period. However, these

¹⁷ Indeed, in the context of a derivative case, where any recovery would go to the corporation, it is unfathomable why any sanction should be visited upon the individual defendants when either there is no fault at all or the fault lies with the corporation for the allegedly late production. It is for this reason, among others, that plaintiffs’ reliance on *Klonoski v. Mahlab*, 156 F.3d 255 (1st Cir. 1998) is misplaced. There, the Court of Appeals ordered a new trial where a party was permitted to use critical and highly probative evidence that *it* had wrongly failed to produce as a supplement to an earlier discovery response and that was disclosed for the first time during trial.

emails were deleted according to Disney's standard electronic back-up procedure, not at the demand or knowledge of Ovitz or any other defendant. (See A958-60) Second, plaintiffs cite the alleged loss of information from Watson's laptop, but they ignore the fact that they at least received most, if not all, of the relevant spreadsheets from it. (See B479-81, B1153, B1161, B1175, B1187) Third, plaintiffs cite Ovitz's lost day-timer, but only because it "corroborated" issues the trial court has already decided, which makes this information immaterial. (OB at 44)¹⁸ Fourth, plaintiffs refer to certain letters between Eisner and Ovitz that Disney did not produce but that were allegedly quoted in a *New Yorker* article. (*Id.*; B503-04) Of course, the Chancellor did not discuss information from the article because the article itself would be hearsay. As for defendants' alleged failure to produce these letters, there is no evidence that any defendant even had the letters in his or her possession, particularly Ovitz, who left Disney without any of his files or other documents. (B1776.2)¹⁹ Accordingly, the Chancellor did not abuse his discretion in this regard.

4. Ovitz Owed No Duty To Disney To Call A Board Meeting To Discuss His Termination

Plaintiffs argue that Ovitz breached his fiduciary duties to Disney by *not* acting affirmatively to ensure that the Board of Directors met. (OB at 48) This argument is specious.²⁰ First, as the trial court found (Op. at 162-69), the Board was not obligated to meet, and therefore no director, including Ovitz, could have breached his duties by not calling for such a meeting. Second, even if this Court were to find that the Board of Directors *should* have met, it could not be a breach of duty for *Ovitz*, as the executive being terminated, not to call the meeting.

¹⁸ In addition, Ovitz testified that the day-timer loss was accidental, not deliberate. (B85.1) The Chancellor obviously credited that testimony.

¹⁹ Plaintiffs fail to mention that the court held a hearing during trial with respect to these letters, at which plaintiffs' counsel stated that the reporter admitted to him that he did not have actual copies of the letters (B504.1) and at which the court directed the Company to submit an affidavit explaining what efforts were made to locate these letters and why they were not found. (B504.2) Such an affidavit was submitted. (A1171) Moreover, each defendant, through counsel, stated that he or she did not have the letters in question and was not the source of the quotes in the article. That ended the inquiry; plaintiffs sought no more.

²⁰ It is also irrelevant in light of the Chancellor's factual findings discussed above.

a. The Chancellor Correctly Found That Disney's Board Was Not Required To Meet Regarding Ovitz's Termination

The Chancellor examined Disney's governing documents in detail and determined that the Board was not required to meet to discuss Ovitz's termination. (*Id.*) Ovitz agrees with that analysis, but rather than reargue those issues at length, Ovitz will join the arguments of the other defendants in Section II.B of their Answering Brief.

b. Even If The Board Was Required To Meet, Ovitz Can Not Be Held Liable For Its Failure To Do So

After ruling that Ovitz was terminated against his will and that he was contractually entitled to his benefits, the Chancellor directly addressed the question whether Ovitz had a duty to Disney to call a Board meeting. He held that:

[n]o reasonably prudent fiduciary in Ovitz's position would have unilaterally determined to call a Board meeting to force the corporation's chief executive officer to reconsider his termination and the terms thereof, with that reconsideration for the benefit of shareholders and potentially to Ovitz's detriment.

(Op. at 130; B1107) The Chancellor also noted that if Ovitz had called such a meeting, that "act would in [his] mind, raise greater issues relating to a potential breach of Ovitz's duty of loyalty than not calling a meeting." (*Id.*, n.478) That conclusion is well-founded.

First, even assuming some Board or committee action were required, Ovitz had ample reason to believe it had been taken. Eisner told Ovitz on November 25, 1996, that he was going to tell the Board that Ovitz's employment had to be terminated. (B275) Later that day, Ovitz watched through a glass partition as an executive session of the Board took place to discuss his tenure. *Id.* Ovitz could not hear what was said, but he had every reason to believe that Eisner was thus given whatever Board authority might have been needed to take the actions that he ultimately took.

In addition, Ovitz and his representatives spoke numerous times with Compensation Committee Chairman Russell. (B95-96, B151-53, B172, B1000-02; *see also* A680; B1151, B1443, B1445, B813-14, B883, B888, B1004) Ovitz further knew that the EPPC, which was closely related to the Compensation Committee (B488), met to award him his bonus on December 10 (*see* B811), and later to rescind it on December 20 (*see* B814). As a faithful fiduciary, Ovitz

properly did not attend a meeting where his compensation or employment was to be discussed (A779), so he had no way to know what decisions the Committee made. He could only assume that a committee that included the person negotiating the departure would act appropriately (as it did). See *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 969 (Del. Ch. 1996) (a fiduciary may assume the integrity and honesty of corporate directors and officers absent any grounds to suspect improper conduct).

Moreover, what plaintiffs complain of is not whether Ovitz should have been terminated, but whether he should have been terminated for cause. A Board meeting to decide the cause issue was unnecessary under any analysis. The OEA had a narrow definition of cause. Accordingly, the terms of Ovitz's termination were not left to the Board's discretion. Once the decision to terminate Ovitz was made, the OEA gave him a legal *right* to his NFT benefits, as the Chancellor found. (Op. at 129-30) Indeed, even *plaintiffs'* expert on corporate governance custom and practice testified that it was neither custom nor practice for executives willingly to sacrifice contractual benefits without receiving anything in exchange (B42-43), although that is effectively what plaintiffs seek to require of Ovitz here.

Plaintiffs sidestep this issue by claiming that the trial court's post-trial decision conflicts with its own earlier decision denying Ovitz's motion to dismiss. (OB at 48) That claim is neither accurate nor sufficient. In his earlier decision, the Chancellor concluded, based solely on the allegations in the complaint, that Ovitz had a duty to bargain fairly with Disney, but instead supposedly colluded with Eisner to develop a "secret strategy" to extract the maximum benefit. *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 291 (Del. Ch. 2003). But the proven facts were different. There was no collusion here, no "secret strategy." Because the allegations in the complaint were found to be untrue, the prior legal discussion as to what consequences might flow from those allegations had they been proven is of no moment.

* * * * *

Plaintiffs' entire case was built on the stated claim that Ovitz secretly colluded with Eisner to quit Disney and take his non-fault termination benefits with him even though there was cause for a fault-based termination. But claims are not proof, and when forced to present their evidence, plaintiffs' house of cards collapsed. There was no collusion, there was no voluntary termination, and there was no cause. Ovitz fulfilled his fiduciary duties to Disney, taking with him when he was unilaterally fired only that to which he was expressly and contractually entitled to take. Judgment was therefore properly entered in his favor.

III. THE CHANCELLOR CORRECTLY HELD THAT THE RECORD DID NOT SUPPORT PLAINTIFFS' WASTE CLAIM "IN ANY CONCEIVABLE WAY"

A. Standard and Scope of Review

A claim for waste involves a mixed question of law and fact. The trial court's formulation of the standard for waste presents a question of law subject to *de novo* review. See generally *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (1993). The trial court's factual findings, as well as its determination of whether those findings established a waste claim, are entitled to "substantial deference" unless they are "clearly erroneous or not the product of a logical and deductive reasoning process." *Id.* (citing, *inter alia*, *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)); *Kahn v. Sullivan*, 594 A.2d 48, 61 (Del. 1991) (applying *Levitt* standard to affirm Court of Chancery's conclusion from the record that it was "reasonably probable" that the plaintiff's waste claim would fail).

Plaintiffs do not take issue with the Court of Chancery's formulation of the standard for waste. (Op. at 111, 133 ("an exchange that is so one-sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration," or where defendants have "irrationally squander[ed] or give[n] away corporate assets") (quoting *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000)) Thus the only question presented on appeal (if plaintiffs have not waived it) is whether the Chancellor's determinations that the OEA was not waste and that granting Ovitz an NFT was not "in any conceivable way" (Op. at 131) an act of waste are sufficiently supported by the record and the product of an orderly and logical deductive process.

B. Merits

1. Plaintiffs Waived Their Appeal Of The Waste Claim

As an initial matter, plaintiffs have waived their appeal of the waste claim by failing to address properly the issue in their brief. The Supreme Court Rules clearly require that an argument, to be presented properly, must (i) "be divided under appropriate headings distinctly setting forth the separate issues presented for review," (ii) be "raised in the body of the opening brief," and (iii) "fully state the grounds for appeal, as well as the arguments and supporting authorities on each issue or claim of reversible error." *Roca v. E.I. duPont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) (discussing Supreme Court Rule 14). Plaintiffs' discussion of waste is not in the body of the argument section of their brief, but is, instead, a single footnote at the very end of their brief. It fails to make even the most perfunctory of efforts to comply with this Court's Rules, and as such should be deemed abandoned and waived on appeal. *Id.* (dis-

cussing cases).

2. The Approval Of The OEA Was Not Waste

Ovitz joins in the arguments made by the other defendants in their Answering Brief as to why the Chancellor did not err in concluding that plaintiffs could not meet the stringent requirements to establish that the approval of the OEA was an act of waste, and will not repeat those arguments here.

3. Ovitz's Receipt Of The NFT Was Not Waste

The trial court found that Ovitz could not have been terminated for cause (*id.* at 132), that keeping Ovitz in his present position was “an unacceptable solution” (*id.* at 172), and that moving Ovitz to a different position within Disney would either have triggered the NFT or a lawsuit over Ovitz’s entitlement to it (*id.* at 172-173). Eisner made a reasoned, thoughtful decision that giving Ovitz the NFT as opposed to dishonoring the contract was in Disney’s best interest. (*Id.* at 174) This is not even close to the “one-sided” exchange or “irrational squander[ing]” of assets is necessary to sustain a waste claim.

For their part, plaintiffs make no attempt at arguing whether that standard is met; indeed, the short discussion of the waste claim suggests that they believe that if they can establish that the trial court erred in ruling that Disney could not “reasonably have terminated Ovitz for cause” (OB at 48 n.46), then their waste claim automatically follows. This is simply not the case. Even assuming plaintiffs could demonstrate that such error occurred (which, for the reasons set forth above, they cannot do), it would not be enough. Rather, plaintiffs must show that the evidence supporting a termination for cause was so strong, so undeniable, that it was the only possible conclusion that could be reached, such that any decision to the contrary could not under any conceivable set of circumstances be viewed as rational or reasonable. Chancellor Chandler, a rational and reasonable individual, came to precisely the opposition conclusion, finding that there was no possible interpretation of the record in this case that would establish cause. (Op. at 131-33) At a minimum, Disney had reasonable grounds to believe that a decision to terminate Ovitz for cause would embroil it in a wrongful termination suit with Ovitz (*see* Op. at 72, 172-73; B378-79, B382), with (as Fox opined) potential tort and contract liability exposure that could have been “several hundreds of millions of dollars” (B1578; Op. at 102-03 (placing “significant value” on Fox report); *see also* B504.3, B504.5) and could be a public relations disaster (*see* Op. at 72, 172-73; B378-79, B382), especially in view of the litigation Disney was already going through with Jeffrey Katzenberg over his employment contract (B197, B354). Plaintiffs’ waste claim thus fails. *See White v. Panic*, 783 A.2d 543, 554 (Del. 2001)..

CONCLUSION

It has now been almost nine years since plaintiffs filed their novel-length complaint alleging a story of intrigue, collusion, and corporate ineptitude. Plaintiffs have had their day in court — 37 of them — and they were given every opportunity to prove the egregious accusations they had made. The Chancellor painstakingly heard the evidence, separated fact from fiction, and rejected as untrue every one of plaintiffs' fanciful allegations. While it may not make for as interesting a story as the one plaintiffs told, the Chancellor found that in fact this is simply a case about an employment relationship that, to everyone's surprise and disappointment, did not work out. Ovitz honored his contractual and legal obligations, and all of his actions were appropriate and above-board. Based on those findings, the Chancellor properly entered judgment in Ovitz's favor. That judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christian Douglas Wright, certify that copies of the foregoing *Answering Brief of Appellee Michael Ovitz* were caused to be served on December 9, 2005 upon the following counsel of record in the manner indicated:

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