

Eisner's efforts to hire Ovitz were in full swing by mid-July 1995. Russell, per Eisner's direction, assumed the lead role in negotiating the financial terms of the contract. These efforts took on significant import in the face of Disney's recent announcement of the acquisition of CapCities/ABC, a transaction that would double the size of Disney, place even greater demands on Eisner, and exacerbate the need for someone else to shoulder some of the load. Russell, in his negotiations with Bob Goldman, Ovitz's attorney, learned that Ovitz was making approximately \$20 to \$25 million a year from CAA and owned fifty-five percent of the company.²⁴ From the start, Ovitz made it clear that he would not give up his fifty-five percent interest in CAA without downside protection.²⁵

While Russell and Goldman were in the preliminary stages of negotiating the financial terms of Ovitz's contract, Eisner and Ovitz continued their talks as well. From these talks, Ovitz gathered that it was his

²⁴ Plaintiffs have contended that the compensation committee had no informed discussions concerning Ovitz's earnings while with CAA and attribute this failure to Russell. *See* Pls.' Post Trial Open. Br. at 20; Tr. 2755:1-22. Russell did, however, have a basic understanding of what MCA was willing to pay Ovitz. *See* Tr. 2630:8-2631:10; *see also* DTE 76 at DD001991. Russell also testified that Goldman had represented to him that Ovitz was earning approximately \$20 to \$25 million a year from CAA and that he had no reason to question Goldman's veracity. Tr. 2755:1-22.

²⁵ Ovitz repeated several times throughout his testimony that he had learned during his years of experience representing talent always to negotiate for upside participation and downside protection, and that when it came to negotiating for his own interests, he wanted no less. *See, e.g.*, Tr. 1277:9-1278:5; 2175:2-2177:7.

skills and experience that would be brought to bear on Disney's current weaknesses, which he identified as poor talent relationships and stagnant foreign growth.²⁶ Remaining cautious, Ovitz wanted assurances from Eisner that Ovitz's vision was shared and that Eisner was sincere in his desire to reinvent Disney. Apparently, Eisner was able to assuage Ovitz's concerns, because at some point during these negotiations, Ovitz came to the understanding that he and Eisner would run Disney as partners. Ovitz did recognize that Eisner was Chairman and would be his superior, but he believed that the two would work in unison in a relationship akin to the one that exists between senior and junior partners.²⁷ As it would turn out, Ovitz was mistaken, for Eisner had a radically different perception of their respective roles at Disney.

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

By the beginning of August 1995, the non-contentious terms of Ovitz's employment agreement (the "OEA") were \$1 million in annual salary and a performance-based, discretionary bonus.²⁸ The remaining terms were not as easily agreed to and related primarily to stock options and

²⁶ Tr. 1108:5-1113:5.

²⁷ Tr. 1113:21-1115:4; 1116:7-1119:2.

²⁸ See PTE 386 at DD001925; *see also* Tr. 2415:2-14.

Ovitz's insistence for downside protection.²⁹ Ovitz, using Eisner's contract as a yardstick, was asking for options on eight million shares of Disney's stock. Both Russell and Eisner, however, refused to offer eight million options and believed that no options should be offered within the first five years of Ovitz's contract.³⁰ This was a non-starter, since Ovitz would not leave CAA without downside protection and Disney had a policy against front-loading contracts with signing bonuses. Using both Eisner's and Wells' original employment contracts as a template, the parties reached a compromise.³¹ Under the proposed OEA, Ovitz would receive a five-year contract with two tranches of options. The first tranche consisted of three million options vesting in equal parts in the third, fourth and fifth years, and if the value of those options at the end of the five years had not appreciated to \$50 million, Disney would make up the difference. The second tranche

²⁹ After the MCA negotiations fell apart, and Ovitz decided to go to Disney, Ovitz, Meyer, and Haber transferred their interests in CAA to nine agents in exchange for seventy-five percent of revenues over the next four years on deals consummated before Ovitz left. *See* PTE 204. These payments were conditioned upon the new CAA first attaining certain financial benchmarks. *See id.* At the time this transfer occurred, no up-front cash was paid and it was uncertain whether new CAA would be profitable. *See, e.g.,* Tr. 1274:13-24. The record demonstrates that the compensation committee did not consider this arrangement when they determined Ovitz's level of compensation. *See* Tr. 2761:9-15 (Russell); 7206:22-7207:20 (Poitier); 7698:24-7699:2 (Lozano); 8096:1-10 (Watson).

³⁰ *See* Tr. 2415:4-2421:13; 4203:22-4204:6.

³¹ *See* DTE 40 at DD001942; *see also* Tr. 2391:14-2392:18.

consisted of two million options that would vest immediately if Disney and Ovitz opted to renew the contract.

The proposed OEA sought to protect both parties in the event that Ovitz's employment ended prematurely and provided that absent defined causes, neither party could terminate the agreement without penalty. If Ovitz, for example, walked away, for any reason other than those permitted under the OEA, he would forfeit any benefits remaining under the OEA and could be enjoined from working for a competitor.³² Likewise, if Disney fired Ovitz for any reason other than gross negligence or malfeasance, Ovitz would be entitled to a non-fault payment (Non-Fault Termination or "NFT"), which consisted of his remaining salary, \$7.5 million a year for any unaccrued bonuses, the immediate vesting of his first tranche of options and a \$10 million cash out payment for the second tranche of options.³³

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

As the basic terms of the OEA were coming together, Russell authored and provided Eisner and Ovitz with a "Case Study" outlining the OEA parameters and Russell's commentary on what he believed was an

³² See PTE 7 ¶ 9 at WD00209. *But see* Tr. 804:18-805:5 (Murphy) (opining that the OEA did not contain a mitigation or non-compete clause and that Ovitz "would be perfectly free to go accept additional alternative employment").

³³ See PTE 33 at DD001768-69.

extraordinary level of executive compensation.³⁴ Specifically, Russell noted that it was appropriate to provide Ovitz with “downside protection and upside opportunity” and to assist Ovitz with “the adjustment in life style resulting from the lower level of cash compensation from a public company in contrast to the availability of cash distributions and perquisites from a privately held enterprise.”³⁵ According to Russell, Ovitz was an “exceptional corporate executive”³⁶ who was a “highly successful and unique entrepreneur.”³⁷ Nevertheless, Russell cautioned that Ovitz’s salary under the OEA was at the top level for any corporate officer and significantly above that of the CEO and that the number of stock options granted under the OEA was far beyond the standards applied within Disney and corporate America “and will raise very strong criticism.”³⁸ Russell rounded out his analysis by recommending an additional study so that he and Eisner could answer questions should they arise. Russell did not provide this Case Study to any other member of Disney’s board of directors.³⁹

With the various financial terms of the OEA sufficiently concrete, Russell enlisted the aid of two people who could help with the final financial

³⁴ PTE 64 at DD001935.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at DD001936.

³⁹ Tr. 2765:2-5.

analysis: Raymond Watson, a current member of Disney's compensation committee and the past chairman of Disney's board of directors (and one of the men who designed the original pay structure behind Wells' and Eisner's compensation packages);⁴⁰ and Graef Crystal, an executive compensation consultant, who is particularly well known within the industry for lambasting the extravagant compensation paid to America's top executives.⁴¹ The three men were set to meet on August 10. Before the meeting, Crystal prepared, on a laptop computer, a comprehensive executive compensation database that would accept various inputs and run Black-Scholes⁴² analyses to output a range of values for the options.⁴³ At the meeting, the three men worked with various assumptions and manipulated inputs in order to generate a series of values that could be attributed to the

⁴⁰ This was the first instance where a board member other than Russell or Eisner was brought into the Ovitz negotiation process. *See, e.g.*, Tr. 7167:5-13 (Poitier) (testifying that before August 13, 1995 he did not discuss Ovitz's compensation package); 7658:4-21 (Lozano) (testifying that before the August 1995 press release, he did not speak to any board member, aside from Eisner, concerning Ovitz's employment); 2425:18-2427:15 (Russell) (testifying that it was his intention to inform Watson of the negotiations only after there was a good possibility of a deal).

⁴¹ Crystal, who had previously headed Towers Perrin's compensation practice, has consulted on behalf of Disney for many years and is actively engaged in both teaching and publishing in the field. *See* Tr. 2714:5-2715:5; 3243:2-3261:15.

⁴² The Black-Scholes' method is a formula for option valuation, widely used and accepted by industry figures and regulators, that determines option value based upon a complex calculation involving the exercise price and term of the options, the price of the underlying stock, its dividend history and volatility, and the risk-free interest rate. Tr. 764:20-765:13.

⁴³ Tr. 3268:13-3269:11.

OEA.⁴⁴ In addition to Crystal's work, Watson had prepared several spreadsheets presenting similar assessments, but these spreadsheets did not use the Black-Scholes valuation method. At the end of the day, the men made their conclusions, discussed them, and agreed that Crystal would memorialize his findings and fax the report to Russell.

Two days later, Crystal faxed his memorandum to Russell. In the memo, Crystal concluded that the OEA would provide Ovitz with approximately \$23.6 million per year for the first five years of the deal.⁴⁵ Crystal estimated that the contract was worth \$23.9 million a year, over a seven-year period, if Disney and Ovitz exercised the two-year renewal option.⁴⁶ Crystal opined that those figures would approximate Ovitz's present compensation with CAA. That evening, Russell, Watson and Crystal phoned each other and further discussed Crystal's conclusions and the assumptions underlying those conclusions.⁴⁷ During those discussions some questions surfaced, and Russell asked Crystal to revise his memo to

⁴⁴ The various inputs accounted for different numbers of options, vesting periods, and potential proceeds of option exercises at various times and prices. *See, e.g., id.*; *see also* DTE 12; DTE 28; DTE 32; DTE 56.

⁴⁵ PTE 365.

⁴⁶ *Id.*

⁴⁷ Plaintiffs have questioned whether this conversation actually occurred. *See* Pls.' Post Trial Opening Br. at 11. Based on the testimony adduced at trial the Court is satisfied that Crystal, Watson and Russell did indeed speak by phone to discuss their findings. *See* Tr. 2444:13-2445:4; 2452:10-16; *see also* DTE 120 at WD07502; PTE 215.

resolve the ambiguities Russell believed existed in the current draft. Instead of addressing the points Russell highlighted, Crystal faxed a new letter to Russell expressing Crystal's concern over the portion of the OEA that created the \$50 million option appreciation guarantee.⁴⁸ Crystal contended that the current language of the OEA, if he was reading it correctly, would allow Ovitz to hold the first tranche of options, wait until his five-year term was up, collect the \$50 million guarantee and then exercise in-the-money options for an additional windfall.⁴⁹ In light of this, Crystal was philosophically opposed to a pay package that would give Ovitz the best of both worlds—*i.e.*, low risk and high return.⁵⁰ Crystal's letter was never circulated to any board member other than Eisner.⁵¹ Rather, Russell addressed Crystal's concerns and clarified that the guarantee would not function in the manner Crystal believed⁵² and, on August 18, Crystal augmented his August 12 memo and faxed Russell the revised copy. Again, Crystal opined that the OEA, during the first five years, was, as he originally estimated, worth \$23.6 million, but as to the value of the OEA's renewal option, Crystal revised his estimation and believed that the two additional

⁴⁸ See PTE 59.

⁴⁹ *Id.* at DD001391.

⁵⁰ *Id.*

⁵¹ See Tr. 2790:11-21; 7707:8-7708:3.

⁵² See PTE 214 at DD001385; *see also* Tr. 2458:3-2460:11.

years would increase the value of the entire OEA to \$24.1 million per year.⁵³ Up until this point, only three members of Disney's board of directors were in the know concerning the status of the negotiations with Ovitz or the particulars of the OEA—Eisner, Russell and Watson.

6. Ovitz Accepts Eisner's Offer

While Russell, Watson and Crystal were finalizing their analysis of the OEA, Eisner and Ovitz were coming to terms of their own. Eisner, having recently conferred with Russell concerning his ongoing research, gave Ovitz a take-it-or-leave-it offer: If Ovitz joined Disney as its new President, he would not assume the duties or title of COO.⁵⁴ After short deliberation, Ovitz accepted Eisner's terms, and that evening he, Eisner and Sid Bass (and their families) celebrated Ovitz's decision.

As it would turn out, the celebratory mood was short lived. The next day, August 13, Eisner called a meeting at his home in Los Angeles to discuss his decision and, in addition to Ovitz and Russell, Sanford Litvack

⁵³ See PTE 366.

⁵⁴ While vacationing together, Eisner told Ovitz that Sid Bass was flying into Aspen for dinner and that "either we're going to have a deal by the time he lands . . . or we're not, . . . [and] the deal will be gone." Ovitz was then given until 6:00 p.m. that night to concede on a number of issues; the two largest concessions were: 1) the reduction in the number of options from a single grant of five million to two separate grants,—the first grant being three million options for the first five years, and the second grant consisting of an additional two million options if the contract was renewed; and 2) Ovitz abandoning the idea of joining the Company as a Co-CEO. See Tr. 4196:10-4198:3.

(Disney's General Counsel)⁵⁵ and Stephen Bollenbach (Disney's Chief Financial Officer) were invited to attend. At the meeting, Litvack and Bollenbach, who had just found out the day before that Eisner was negotiating with Ovitz,⁵⁶ were not happy with the decision. Their discontent "officially" stemmed from the perception that Ovitz would disrupt the cohesion that existed between Eisner, Litvack and Bollenbach,⁵⁷ and both Litvack and Bollenbach made it clear that they would not agree to report to Ovitz but would continue to report to Eisner.⁵⁸ At trial, the Court was left with the perception that Litvack harbored resentment that he was not selected to be Disney's President and that this fueled, to some extent, Litvack's resistance to Ovitz assuming the post he coveted.⁵⁹ Bollenbach's resistance was more curious. Indeed, Bollenbach had been hired before Ovitz and, at the time, his expectation was that he would report only to Eisner. Still, his testimony seemed disingenuous to the Court when he pinned his resistance on the fact that he had been part of a cohesive trio (*i.e.*, Bollenbach, Litvack, and Eisner). After all, Bollenbach had been with the Company for a total of three months before he was informed of the

⁵⁵ Litvack was also Disney's Chief of Corporate Operations and Executive Vice President for Law and Human Resources.

⁵⁶ *See* Tr. 6040:20-23; 6045:15-6047:11.

⁵⁷ *See id.*

⁵⁸ Tr. 5274:4-5276:2; 6048:1-6049:13.

⁵⁹ *See, e.g.*, Tr. 6027:13-6028:22.

negotiations with Ovitz.⁶⁰ Despite this mutiny, Eisner was able to assuage Ovitz's concern about his shrinking authority in the Company, and Ovitz, with his back against the wall, acceded to Litvack and Bollenbach's terms.

The next day, August 14, Ovitz and Eisner signed the letter agreement ("OLA") that outlined the basic terms of Ovitz's employment.⁶¹ The OLA specified that Ovitz's hiring was subject to approval of Disney's compensation committee⁶² and board of directors.⁶³ That same day, Russell contacted Sidney Poitier (for a second time) to inform him that Eisner and Ovitz reached an agreement.⁶⁴ At trial, Poitier failed to recount with any specificity his conversation with Russell. He made clear that he was never faxed Crystal's analysis or the draft of the OLA (which Litvack had prepared for Russell on August 12).⁶⁵ Nevertheless, Poitier did testify that Russell had "mention[ed] the terms" of the OEA and that Russell promised

⁶⁰ See Tr. 5271:22-5272:11.

⁶¹ See PTE 60.

⁶² The compensation committee was comprised of Russell, Watson, Ignacio Lozano and Sidney Poitier.

⁶³ See PTE 60 at DD002932.

⁶⁴ In his prior deposition, Poitier testified that the first contact concerning the Ovitz contract occurred at the compensation committee meeting on September 26, 1995. See Poitier 117:19-118:5. At trial, the witness revised his testimony to reflect that the first contact actually occurred via a phone call from Russell on Sunday August 13. Tr. 7125:19-7126:13; 7167:5-13. Russell testified that he had called Poitier twice. The first call occurred on August 13, and the second call was made the next day before the press release on August 14. See Tr. 2445:17-2446:20. I am satisfied that both calls did in fact occur and that at the time of the calls, Poitier was on his yacht vacationing in Sardinia.

⁶⁵ Tr. 7167:14-17.

to stay in touch with any developments.⁶⁶ Poitier believed that hiring Ovitz was a good idea because he knew Ovitz's reputation in the entertainment business and considered him an innovator who understood the movie business.⁶⁷ Poitier also expressed the opinion that Ovitz would adequately adapt to running a public company such as Disney.⁶⁸ Watson also contacted Ignacio "Nacho" Lozano by phone.⁶⁹ The record is unclear as to exactly when Lozano was called.⁷⁰ As with Poitier, relatively little of Lozano's phone conversation was recounted at trial, except to say that Lozano testified that he felt comfortable with Ovitz's ability to make the transition from a private company culture to that of a public company.⁷¹ As for communications with the other board members, Eisner contacted each of them by phone to inform them of the impending deal. During these calls,

⁶⁶ Tr. 7126:10-13.

⁶⁷ Tr. 7127:4-17.

⁶⁸ Tr. 7129:13-18.

⁶⁹ Tr. 7637:14-7638:3.

⁷⁰ Lozano could not recall when the call occurred, but in an August 18, 1995 memo, Russell notes that "all the members of the Compensation Committee heartily endorse this pay package. Watson had a long discussion with Ignacio Lozano and I had two long conversations with Sidney Poitier in which all the details were reviewed and discussed before the deal was signed." PTE 215 at DD001636.

⁷¹ Tr. 7631:18-7632:1.

Eisner described his friendship with Ovitz, and Ovitz's background and qualifications.⁷²

On the same day that Eisner and Ovitz signed the OLA, the news of Ovitz's hiring was made public via a press release. Public reaction was extremely positive. Disney was applauded for the decision, and Disney's stock price increased 4.4 percent in a single day—increasing Disney's market capitalization by more than \$1 billion.⁷³

7. Disney's Board of Directors Hires Michael Ovitz

Once the OLA was signed, Joseph Santaniello, who was an in-house attorney within Disney's legal department, took charge of embodying the terms Russell and Goldman had agreed upon and which were memorialized in the OLA.⁷⁴ To that end, Santaniello concluded that the \$50 million guarantee presented negative tax implications for the Company, as it might not have been deductible.⁷⁵ Concluding that the provision must be eliminated, Russell initiated discussions on how to compensate Ovitz for this change—from this, an amalgamation of amendments to certain terms of the

⁷² See, e.g., Tr. 4215:12-4216:14 (Eisner); 3704:3-23 (Gold) (testifying that he received a call from Eisner and also spoke with Roy Disney); 5388:9-23 (Bollenbach); 5582:15-5583:8 (Mitchell); 5802:14-23 (Nunis); 7658:4-21 (Lozano); 8141:23-8143:3 (Stern); see also DTE 413 (Eisner's phone log).

⁷³ See DTE 92; DTE 428 Ex. 4a.

⁷⁴ Tr. 6055:16-6056:14.

⁷⁵ Santaniello 48:23-49:19.

OEA arose in order to replace the back-end guarantee.⁷⁶ Russell again worked with Watson and Crystal to consider the possible consequences of the proposed changes.⁷⁷ Russell and Crystal applied the Black-Scholes methodology to assess the value of the extended exercisability features of the options and Watson generated his own analysis to the same end.⁷⁸

On September 26, 1995, the compensation committee met *for one hour* to consider (1) the proposed terms of the OEA, (2) the compensation packages for various Disney employees, (3) 121 stock option grants, (4) Iger's CapCities/ABC employment agreement and (5) Russell's compensation for negotiating the Ovitz deal.⁷⁹ The discussion concerning the OEA focused on a term sheet (the actual draft of the OEA was not distributed), from which Russell and Watson outlined the process they had followed back in August and described Crystal's analysis. Russell testified that the topics discussed were historical comparables such as Eisner's and

⁷⁶ See *id.* at 50:7-19; see also PTE 348 (Russell's letter to Eisner suggesting the elimination of the \$50 million guarantee and replacing it with: (1) the reduction in the option strike price from 115% to 100% of the Company's stock price on the day of the grant for the two million options that would become exercisable in the sixth and seventh year after commencement of employment; (2) Payment of \$10 million in severance if the Company chose not to renew Ovitz's contract; and (3) alteration of the renewal option to provide for a five year extension, \$1.25 million per year in salary, the same bonus structure as the first five years of the contract, and the grant of three million additional options).

⁷⁷ Tr. 2485:22-2486:16.

⁷⁸ See, e.g., Tr. 2489:7-21.

⁷⁹ PTE 39.

Wells' option grants,⁸⁰ and the factors that he, Watson and Crystal had considered in setting the size of the option grants and the termination provisions of the contract.⁸¹ Watson testified that he provided the committee with the spreadsheet analysis he had performed back in August and discussed his findings.⁸² Crystal, however, did not attend the meeting and his work product was not distributed to the Committee. At trial, Crystal testified that he was available via telephone to respond to questions if needed, but no one from the committee in fact called.⁸³ After Russell's and Watson's presentations, Litvack responded to various questions but the substance of those questions was not recounted in any detail at trial.⁸⁴

⁸⁰ Tr. 2521:8-2522:19. Although Russell used Wells' and Eisner's contracts as benchmarks for Ovitz's pay package, neither Poitier nor Lozano were able to recall any discussion concerning Crystal's observation that there were no comparables of non-CEO presidents of public companies that could justify Ovitz's pay package. *See* Tr. 7181:21-7182:1; 7701:4-10.

⁸¹ *See, e.g.*, Tr. 2522:11-2523:4. Although the term sheet did highlight the term "wrongful termination," no one on the committee recalled any discussion concerning the meaning of gross negligence or malfeasance. *See* Tr. 2903:8-16; 7198:14-20; 7701:23-7702:2; 7716:22-7717:3. Despite this omission, the terms gross negligence or malfeasance were not foreign to the board of directors, as the language was standard, and could be found, for example, in Eisner's, Wells', Katzenberg's and Roth's employment contracts. *See* Tr. 6081:1-9.

⁸² Tr. 7848:16-21. Poitier could not recall whether Watson had actually distributed copies of his spreadsheets, but he did recall that "figures and numbers" were passed around and discussed. *See* Tr. 7222:20-7223:8. Lozano also had no recollection at trial that these spreadsheets were actually distributed. Tr. 7702:3-6. I attribute this lack of recollection to the nine years that have passed between that meeting and the trial and do not attribute any lack of veracity to Watson's testimony because of it.

⁸³ Tr. 3602:2-21.

⁸⁴ Plaintiffs contend that since Litvack had no responsibility in the actual negotiations of the Ovitz contract, the question session, which followed Russell's and Watson's

Poitier and Lozano testified that they believed they had received sufficient information from Russell's and Watson's presentations⁸⁵ to enable them to exercise their judgment in the best interest of the Company.⁸⁶ When the discussions concluded, the Committee unanimously voted to approve the terms of the OEA subject to "reasonable further negotiations within the framework of the terms and conditions"⁸⁷ described in the OEA.⁸⁸

An executive meeting of Disney's board immediately followed the compensation committee's meeting.⁸⁹ In executive session, the board was informed of the reporting structure that Eisner and Ovitz agreed to, but no

presentations, and was memorialized in the committee minutes, could not have been of any substance. *See* Pls.' Post Trial Opening Br. at 21. The Court does not agree with this contention. Litvack testified that he knew what the deal was. *See* Litvack 384:18-385:4. He could therefore speak intelligently to questions from the committee. Whatever personal animosity Litvack harbored for Ovitz, not actually negotiating the deal did not prevent him from answering the committee's questions with "substance."

⁸⁵ Plaintiffs have demonstrated that at no point were the following matters discussed in the committee meeting: (1) the purchase of Ovitz's private jet for \$187,000 over the appraised value; (2) the purchase of Ovitz's BMW at acquisition cost and not the depreciated market value; (3) the purchase of Ovitz's computers at replacement value instead of their lower book value; (4) any specific list of perquisites, despite Eisner already agreeing to provide Ovitz with numerous such benefits; and (5) that despite Ovitz's bonus being payable completely on a discretionary basis, Russell's memorandum to Ovitz indicating that the bonus would likely approximate \$7.5 million annually. Although I have concluded that plaintiffs have established these facts, they are ultimately immaterial to my decision.

⁸⁶ *See* Tr. 7136:23-7137:3; 7140:12-19; 7636:2-10; 7639:21-7640:3.

⁸⁷ PTE 39 at WD01170.

⁸⁸ At the behest of Watson, the committee discussed the time and energy Russell had placed into the negotiations and suggested that the committee recommend to the full board that Russell be compensated \$250,000. The compensation committee voted to recommend this fee and the full board, while in executive session, approved it. *See* PTE 39 at WD01171; PTE 29 at WD01195-96. Russell abstained from voting on the issue.

⁸⁹ PTE 29 at WD01195-96.

discussion of the discontent Litvack or Bollenbach expressed at Eisner's home was recounted.⁹⁰ Eisner led the discussion regarding Ovitz, and Watson then explained his analysis and both he and Russell responded to questions by the board.⁹¹ Upon resuming the regular session, the board deliberated further, then voted unanimously to elect Ovitz as President.⁹²

8. The October 16, 1995 Compensation Committee Meeting

In accordance with the compensation committee's resolution roughly three weeks before,⁹³ the compensation committee convened again on October 16, 1995, in a special meeting to discuss several issues relating to stock options.⁹⁴ After a presentation by Litvack, during which he responded to questions from the members of the committee, the compensation committee unanimously approved amendments to The Walt Disney

⁹⁰ Neither Litvack nor Bollenbach attended the executive session. *Id.*

⁹¹ Tr. 2537:11-2540:16 (Russell); 3733:1-3735:16 (Gold); 4014:7-4017:24 (Roy Disney); 4872:4-4879:4 (Eisner); 5585:12-5588:11 (Mitchell); 5919:7-5925:2 (Bowers); 7851:5-7853:9 (Watson); 8145:13-8146:8 (Stern).

⁹² PTE 29 at WD01196.

⁹³ PTE 39 at WD01170 (mentioning that Ovitz's stock option grant would be delayed until further details were worked out between Ovitz and the Company), WD01186-88 (term sheet outlining vesting schedule, other special terms of Ovitz's options, and that Ovitz's options would be formally granted at a later date).

⁹⁴ PTE 41 at WD00118; Tr. 2546:1-2547:24; 2971:3-2972:10; 7228:18-7229:1. Although not members of the compensation committee, Litvack, Schultz (Vice President-Corporate Compensation) and Santaniello attended this meeting. PTE 41 at WD00118; Tr. 6076:22-6077:2; Schultz 86:10-15; Santaniello 102:12-19. Poitier and Russell attended by telephone from the Company's New York office, but Lozano and Watson were present in person. PTE 41 at WD00118; *see also* PTE 372 (Russell's notes of the October 16, 1995 meeting).

Company 1990 Stock Incentive Plan, thereafter titled The Walt Disney Company Amended and Restated 1990 Stock Incentive Plan (the “1990 Plan”), and also approved a new plan, known as The Walt Disney Company 1995 Stock Incentive Plan (the “1995 Plan”).⁹⁵ Both plans were subject to further approval by the full board of directors and by shareholders.⁹⁶

Following approval of these plans, Litvack reviewed the terms of the proposed OEA with the compensation committee,⁹⁷ after which the committee unanimously approved the terms of the OEA and the award of Ovitz’s options pursuant to the 1990 Plan.⁹⁸ Ovitz’s options were priced at market as of the date of the meeting.⁹⁹ As a final wrap-up before adjourning, the compensation committee passed a resolution “that all of the actions

⁹⁵ PTE 41 at WD00119-21, WD00123-141; Tr. 6077:3-6078:17. *But see* Tr. 7732:12-17 (Lozano has no independent recollection of the October 16, 1995 meeting).

⁹⁶ PTE 41 at WD00120; *see* PTE 30 (memo requesting the board’s unanimous consent to the amendments to the 1990 Plan and adoption of the 1995 Plan and explaining the differences between the old 1990 Plan and the new Plans, including the potential for exercisability beyond twenty-four months following termination); PTE 265 (unanimous written consent of the Company’s board of directors approving the amendments to the 1990 Plan and adoption of the 1995 Plan); DTE 142 (proxy statement dated November 13, 1995 requesting shareholder approval of the amendments to the 1990 Plan and adoption of the 1995 Plan); Tr. 2548:1-2549:9.

⁹⁷ Discussion of the *bona fides* of the OEA was minimal because that discussion had occurred at the compensation committee meeting on September 26, 1995. *See* Tr. 2976:17-2977:3; 6648:9-6649:1.

⁹⁸ PTE 41 at WD00121-22; Tr. 2979:7-10; 6078:21-6080:4; *see* PTE 43 (memo from Marsha Reed to Donna Scanlon confirming the grant of Ovitz’s options and their key terms); PTE 44 (PTE 43 with marginalia); PTE 48 (Ovitz’s Stock Option Agreement); PTE 339 (same). *But see* Tr. 7230:4-7231:10 (Poitier) (testifying that he does not independently recall Litvack’s discussion of the OEA).

⁹⁹ PTE 41 at WD00122; Tr. 2979:11-16; 2980:18-2981:4; 6083:7-24; *see* PTE 43; PTE 44; PTE 48; PTE 339.

heretofore taken by the officers of the Corporation in connection with the foregoing resolutions [relating to the OEA] be, and they hereby are, confirmed and ratified.”¹⁰⁰

The amendment to the 1990 Plan (consistent with the provisions of the new 1995 Plan), together with the terms of the Stock Option Agreement,¹⁰¹ provided that, in the event of an NFT, Ovitz’s options would be exercisable until the later of September 30, 2002, or twenty-four months after termination, but in no event later than October 16, 2005 (ten years from the date of grant).¹⁰²

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

1. Ovitz’s Early Performance

Ovitz’s tenure as President of The Walt Disney Company officially began on October 1, 1995.¹⁰³ Eisner authored three documents shortly after Ovitz began work that shed light on his early performance on the job. The first is a letter written to Ovitz dated October 10, 1995.¹⁰⁴ Eisner lauded

¹⁰⁰ PTE 41 at WD00122. A similar resolution was also part of the resolutions approving the amendments to the 1990 Plan and adoption of the 1995 Plan. *Id.* at WD00121.

¹⁰¹ PTE 48; PTE 339.

¹⁰² PTE 48 at DD002785; *see* PTE 41 at WD00142-43.

¹⁰³ *See* PTE 3 at DD002012.

¹⁰⁴ PTE 267 (Eisner faxed a copy of the letter to Watson on October 16, 1995); Tr. 4251:7-18.

Ovitz's initial performance,¹⁰⁵ and also provided Ovitz with some written guidance with respect to Eisner's management philosophies.¹⁰⁶ Ovitz testified that this letter was a continuation of conversations he had already had with Eisner, and that the letter was "incredibly helpful and very supportive,"¹⁰⁷ especially in light of the fact that Ovitz was adjusting to working at a publicly-traded company.¹⁰⁸

The second document is a letter Eisner wrote to the board of directors, the Bass family, and his wife on October 20, 1995.¹⁰⁹ In it, Eisner called Ovitz's hiring "a great coup for us and a saving grace for me. . . . Everybody is excited being with him, doing business with him. . . . He has already run a private company, and being a quick study, has quickly adapted to the public

¹⁰⁵ Some examples of Eisner's compliments to Ovitz: "I have noticed how quickly and brilliantly you have taken to the company and the company to you. . . ." PTE 267 at DD002287. "Your instincts were right in coming to The Walt Disney Company and mine were right in suggesting it." *Id.* "Our partnership is born in corporate heaven. . . ." *Id.* at DD002290. "This is basically your first week on the job and I can already see how well it is all going to work." *Id.* at DD002291.

¹⁰⁶ Eisner wrote that PTE 267 "is a practical letter." *Id.* at DD002288. Some examples of Eisner's teachings: "There is no need to tell you how unique this company is. . . ." *Id.* at DD002287. "[W]e generally stay away from partnership and joint ventures. . . . We recognize that business control is creative control." *Id.* at DD002287-88. "We must concentrate on the operations. We must concentrate on continuing to lead creatively. We must throw out mediocrity." *Id.* at DD002288. Eisner told Ovitz that public company executives should "act like 'Caesar's wife'." *Id.* "I feel about acquisitions exactly as I feel about everything else. We don't need them. . . . Most companies create the fiction that they can run anything better than the management of a target company. Often that is not true." *Id.* at DD002289. Eisner also provided a list of ten questions to ask before making an acquisition. *Id.* at DD002290.

¹⁰⁷ Ovitz 211:21-22.

¹⁰⁸ *Id.* at 212:2-9.

¹⁰⁹ PTE 313; Tr. 4263:5-18.