IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE THE WALT DISNEY COMPANY DERIVATIVE LITIGATION,	:	
----------	:	No. 411, 2005
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 DeBendictis; Peter Lawrence, I.R.A.; Melvin Zupnick; Judith B. Wohl, I.R.A.; James C. Hays; and Barnett Stepak,	:	Court Below:
	:	Court of Chancery of the State of Delaware in and for New Castle County
	:	Cons. C.A. No. 15452-N
	:	Chancellor William B. Chandler III
Plaintiffs Below, Appellants,	:	
vs.	:	
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.	:	

APPELLANTS' OPENING BRIEF

PART 5 of 11

institution."[110] Eisner testified that the October 20 letter accurately reflected his views of Ovitz at the time it was written.[111] Eisner also used the October 20 letter to reiterate his views regarding the appropriateness of acquisitions for the Company.[112]

The third document is dated November 10, 1995, and is a memo addressed to Tony Schwartz, Eisner's biographer.[113] In it, Eisner says that Ovitz has had a difficult time accepting Bollenbach and Litvack as his equals, but that Ovitz was adjusting, realizing that he need not "prove to himself, to the group, to the world, that he is in charge."[114] Eisner also reaffirmed that "Michael Ovitz is the right choice. He will, in short order, be up to speed in the areas we have discussed endlessly—brand management, corporate direction, moral compass and all those difficult areas, especially

---

[110] PTE 313 at MDE000041; *see also* Tr. 3746:13-3747:14 (Gold) (testifying that "very early on" in Ovitz's tenure, Eisner's communications to him about Ovitz "were relatively complimentary"); 3750:20-3751:10. *But see* Tr. 4018:9-4021:6 (Roy Disney) (testifying that Ovitz was known by October 1995 as being habitually late to meetings); 6088:12-6092:23 (Litvack) (testifying to an argument between himself and Ovitz in October 1995 regarding Disney characters appearing on the David Letterman Show and explaining how this was an example of how Litvack and Ovitz could not get along, but that the fault belonged to both of them).

[111] Tr. 4265:7-4266:7.

[112] PTE 313 at MDE000042-44.

[113] PTE 316. Eisner testified that his statements contained in PTE 316 were "honest and candid" when they were written. Tr. 4273:13-19; 4274:15-20.

[114] PTE 316 at MDE000035.

for Disney, to define."[115] Eisner described the already-existing tension between Ovitz and Litvack as attributable to Litvack by saying, "Sandy Litvack may never settle in because of his basic annoyance with the style of Michael Ovitz, but he may. Time may make it work, if he will let it."[116]

As late as the end of 1995, Eisner's attitude with respect to Ovitz was positive.[117] Eisner wrote, "1996 is going to be a great year—We are going to be a great team—We every day are working better together—Time will be on our side—We will be strong, smart, and unstoppable!!!"[118] Eisner opined that Ovitz performed well during 1995,[119] notwithstanding the difficulties Ovitz was experiencing assimilating to Disney's culture.[120]

---

[115] *Id.* at MDE000036. If these areas were difficult for Disney to define, it is understandable that Ovitz would have a difficult time making the necessary adjustments.

[116] *Id.* at MDE000037.

[117] PTE 331; Tr. 4277:8-4278:15.

[118] PTE 331 at DD002275.

[119] Tr. 4278:18-4279:2. Especially after seeing the project come to fruition, Eisner is thankful for Ovitz's advice during late 1995 to place the gate to Disney's California Adventure theme park directly across from the main gate to Disneyland. Tr. 4278:18-4279:23; *see* Tr. 5302:19-5304:10 (Bollenbach) (testifying that he believed that notwithstanding Ovitz's difficulties, Ovitz could still be "valuable" and "a contributor to the company").

[120] Tr. 4279:24-4280:6. These positive, but still realistic, evaluations of Ovitz's performance stand in contrast to statements that Bass claims Eisner made at a dinner in early November 1995. *See* Bass 88:15-90:16. In my discretion as fact-finder, I do not find Bass' statements on this subject credible, and I conclude instead that the contemporaneous documents authored by Eisner, together with his trial testimony in regards to them, are credible and probative. At his deposition, Bass said that only after having his recollection refreshed was he able to recall that his meeting in Aspen with Ovitz occurred in August 1995, Bass 40:18-23, and when asked the "approximate date" of Ovitz's hiring, Bass could only reply "Fall 95." Bass 76:3-5. Because the time at which Eisner made the statements attributed to him is of paramount importance, I do not

2. A Mismatch of Cultures and Styles

In 1996, however, the tenor of the comments surrounding Ovitz's performance and his transition to The Walt Disney Company changed.[121] In January 1996, a corporate retreat was held at Walt Disney World in Orlando, Florida.[122] At that retreat, Ovitz failed to integrate himself in the group of executives by declining to participate in group activities, insisting on a limousine when the other executives, including Eisner, were taking a bus, and making inappropriate demands of the park employees.[123] In short, Ovitz

---

credit Bass' deposition testimony for that reason, but not that reason alone. *See* Tr. 4274:21-4276:12 (Eisner) (testifying that Bass was mistaken with respect to when certain events occurred). Bass' testimony is also vague as to the problems attributed to Ovitz— that Eisner "was having no success in dealing with Ovitz," that Ovitz "didn't care about money," "never looked at economics," and had "continuous problems of veracity." Bass 88:25-89:8. Furthermore, Eisner may not have been completely truthful with Bass or may have exaggerated the extent of the problems with Ovitz due to the stresses of that day or any other reason. *See* Tr. 4372:13-16; 4373:11-17; 4431:6-4433:21. Had I had the opportunity to observe Bass at trial, I might have reached a different conclusion as to the weight of his testimony, but based upon the record presented to me and my personal determinations as to the credibility of the testimony presented at trial, I find Eisner's account of Ovitz's performance together with the contemporaneous documents credible, and Bass' deposition testimony not credible. As a totally separate matter, Bass' statements would be of little worth even if I were to credit them, because they are hearsay and, therefore, inadmissible against all defendants other than Eisner. D.R.E. 801.

[121] *See* Tr. 6970:21-6971:11; 7141:2-22. *Compare* Tr. 2567:7-16, 3746:17-3747:14, 3750:20-3751:6, 4010:10-4011:1, 5591:20-5593:1, 5806:12-5808:7, 5925:3-5926:10, 6086:5-17 *and* 7640:9-12 *with* 2567:17-2568:2, 3751:11-3751:18, 4021:7-4022:9, 4280:7-13, 5291:24-5292:16, 5593:2-11, 5808:8-20, 5926:11-24, 7241:14-7243:20, 7552:2-16, 7640:13-22, 7854:24-7857:12 *and* 8146:9-8147:2 (comparing the directors' views of Ovitz in 1995 and 1996).

[122] Tr. 4280:14-4282:22.

[123] Tr. 4281:4-4282:1.

3. Approaching the Endgame

By the fall of 1996, directors began discussing that the disconnect between Ovitz and the Company was likely irreparable, and that Ovitz would have to be terminated.[128] Additionally, the industry and popular press were beginning to publish an increasing number of articles describing dissension within The Walt Disney Company's executive suite.[129] One of the more prominent of these articles was an article published in Vanity Fair based on an interview given by Bollenbach,[130] which many of the directors discussed while present for the November 25, 1996 board meeting.[131]

4. Specific Examples of Ovitz's Performance as President of The Walt Disney Company

Throughout this litigation, plaintiffs have argued that Ovitz acted improperly while in office. The specific examples discussed below demonstrate that the record created at trial does not support those allegations.

---

[128] *See* Tr. 4345:17-4346:4; 4354:3-4355:6; 4368:1-18; 7555:22-7556:2; 8153:10-8154:5.

[129] PTE 8; PTE 21; PTE 22; PTE 166; PTE 171; PTE 300; PTE 304; PTE 321; PTE 507; PTE 508; PTE 509.

[130] PTE 8.

[131] Tr. 5930:2-13; *see* PTE 89 (fax from Gold to Roy Disney on November 6, 1996, attaching the text of the article); *see also* Tr. 5199:20-5200:23 (Eisner) (recalling having read the article); 6580:13-15 (Litvack) (testifying he is "sure" all the directors saw the article); 7574:10-14 (Tom Murphy read it). *But see also* Tr. 6757:14-21 (O'Donovan) (failing to recall reading the article); 7916:23-7917:3 (Watson) (recalling the article's existence, but not reading it).

Plaintiffs have alleged that even before Ovitz was formally elected as President and employed by Disney, that he exercised Presidential authority in connection with the construction or renovation of his office.[132] The record does provide support for the benign assertion that Ovitz performed some work for the Company before his hiring was official.[133] In addition to the fact that the documents plaintiffs rely on evidence no effort by Ovitz to direct the office work or authorize expenditures for it,[134] the testimony of both Ovitz and Eisner was that Ovitz's involvement in the project was limited. Furthermore, Ovitz's authority over the project both before and

---

[132] Ovitz 183:21-187:5; PTE 476; DTE 110; *see* Tr. 1927:6-1940:24; PTE 24 at DD002451.

[133] Ovitz 162:16-163:7; Tr. 5289:14-5291:23 (Bollenbach) (testifying that he thought it was a "very good practice" to provide information to an officer coming to a senior position at the company before that person officially begins work); 6074:22-6075:8 (Litvack testified that: "It was not unusual at all," for someone to begin work before their employment agreement was executed). *See generally* Tr. 2222:9-2223:8; PTE 545 (presentation regarding the CapCities/ABC acquisition that was forwarded to Ovitz before he arrived at the Company, but there is nothing in the record to suggest that Ovitz received this document before mid-August 1995); PTE 622; PTE 742; DTE 190; DTE 192; DTE 193; DTE 224. Eisner also applauds Ovitz's attendance on a trip to Jackson Hole, Wyoming to meet the Company's Consumer Products division before his employment officially began. PTE 316 at MDE000037. Because Ovitz was performing work either on behalf of the Company, or in preparation for his tenure there, his request for reimbursement of expenses related to The Walt Disney Company during that period of time are therefore appropriate and reasonable. *See* DTE 59 at WD6601. The appropriate persons in both management and auditing approved those September 1995 expenses. *Id.*

[134] PTE 476; DTE 110; *cf.* Tr. 1934:11-1935:24; PTE 475 (memo dated January 15, 1995 addressed to Ovitz with respect to millwork expenditures in Ovitz's office, though the context makes it clear that if January 15 is the correct date, that the memo must have intended to be dated January 15, 1996, as DTE 144, DTE 152 and DTE 153 all indicate that there were outstanding issues regarding the millwork in Ovitz's office from December 1995 until at least February 1996).

after October 1, 1995, was minimal at best, yet at the same time consistent with the input that would be expected from an executive when a new office is built for him or her.[135]

In addition to allegations that Ovitz overstepped his authority with respect to his office, plaintiffs contend that Ovitz acted improperly in connection with discussions he had, either personally, or on behalf of the Company, with representatives from the National Football League ("NFL") with respect to bringing a team to the Los Angeles area.[136] First and foremost, contemporary documents indicate that Disney, under Eisner's direction, was considering bringing an NFL franchise to Los Angeles before Ovitz's hiring was even announced, much less completed.[137] Second, any work Ovitz may have done on behalf of the Company in regards to the NFL before his employment formally began is, in my mind, evidence of Ovitz's good faith efforts to benefit the Company and bring himself up to speed—

---

[135] Tr. 4389:10-4391:11; 6075:12-6076:16; 6141:9-24; *see also* Tr. 1318:13-1326:1; 1927:6-1940:24; DTE 144; PTE 654. Furthermore, the work that may have occurred on Ovitz's office between mid-August 1995 and the formal commencement of his employment on October 1 of that year is consistent with what would be anticipated when a company prepares for a new employee before their expected arrival.

[136] *See* Tr. 1128:5-1133:18.

[137] DTE 188 (memo to Eisner dated August 14, 1995 summarizing the status of the Company's prior discussions with the NFL; Ovitz was copied on the memo).

not evidence of malfeasance or other ulterior motives.[138] Third, it is clear from the record that, as soon as Eisner instructed Ovitz to cease discussions with the NFL, Ovitz complied with Eisner's directive.[139] Again, the record fails to support allegations of misconduct by Ovitz in this regard either before or after October 1, 1995.

Plaintiffs argue that Ovitz is responsible, at least in part, for Bollenbach's decision to leave the Company,[140] and the controversy surrounding the hiring of Jamie Tarses to ABC. Bollenbach's trial testimony, however, contradicts the assertion that he left because of Ovitz.[141] Instead, he left the Company to pursue a better opportunity with Hilton Hotels.[142]

---

[138] *See* PTE 621; PTE 631; DTE 189; DTE 191 (duplicative of PTE 631); Tr. 5159:12-5166:18. There are no allegations, nor any factual support in the record, for the proposition (which plaintiffs have not put forward) that Ovitz received a salary from the Company for work performed before October 1, 1995.

[139] Tr. 1133:19-1134:2; 5164:7-16. The deposition testimony cited by plaintiffs (Bass 76:9-77:25; Eisner 330:3-331:6), which they argue supports the contrary proposition that Ovitz continued pursuing a deal with the NFL after Eisner instructed him to cease such discussions, is too vague to contradict the trial testimony previously cited. *See also* Tr. 4283:19-21 (Eisner) (testifying that Ovitz "walked away from" deals that made no economic sense).

[140] *See* PTE 8 at DD002123, DD002125.

[141] Tr. 5308:10-5310:10. Bollenbach did, however, reaffirm at trial that certain portions of PTE 8 were accurate. *See* Tr. 5399:7-5401:4; 5412:18-5413:9; 5471:22-5472:6.

[142] Tr. 5308:10-5310:10.

In mid-1996, ABC hired Jamie Tarses.[143] It was reported in the press that Ovitz "orchestrated" Tarses' hiring even though she was under contract at NBC for roughly fifteen more months.[144] Eisner testified that Ovitz was not at fault for the perceived negative repercussions of Tarses' hiring, saying that he "was convinced that [Ovitz] was brought into something he did not instigate."[145] In fact, Tarses' hiring was championed by Iger and approved by Litvack.[146]

Another "failure" plaintiffs have attempted to pin on Ovitz, but which is in reality more attributable to Iger, revolves around the film *Kundun*, directed by Martin Scorsese.[147] The film was not well received by the Chinese government and, at least initially, may have caused the Company some setbacks in that rapidly expanding market.[148] Once again, however, the testimony was clear that Ovitz did not have authority to approve the

---

[143] Ms. Tarses was a television executive and is sometimes referred to as Jamie McDermott. Tr. 1698:7-8; 1713:7-8.

[144] PTE 85; PTE 303; *see* PTE 435.

[145] Tr. 4385:3-4386:16; DTE 194; *see* Tr. 1700:5-22. *But see* Ovitz 450:14-451:3.

[146] Iger 97:21-99:8; *see* Tr. 6136:23-6138:1. *But see* Bass 123:7-125:5 (Bass' opinion on the Tarses situation is that it was Ovitz's fault based upon statements made by Eisner that are inadmissible hearsay against all defendants but Eisner).

[147] Tr. 1217:14-19; 4386:17-23.

[148] Tr. 1218:19-1220:4; 6138:10-15.

movie; instead, that authority (and the concomitant responsibility) rested wholly with Roth and Eisner.[149]

Although the general consensus on Ovitz's tenure is largely negative, Ovitz did make some valuable contributions while President of the Company. As previously mentioned,[150] Ovitz made a key recommendation with respect to the location of the gate to Disney's California Adventure theme park, built on part of the Disneyland parking lot.[151] He was instrumental in recruiting Geraldine Laybourne, founder of the children's cable channel Nickelodeon, and overhauling ABC's Saturday morning lineup.[152] Ovitz was successful in bringing Tim Allen back to work after he walked off the set of Home Improvement due to a disagreement.[153] He also helped retain several animators that Katzenberg was trying to bring over to Dreamworks.[154] Ovitz also assisted Roth in handling relationships with

---

[149] Tr. 1217:20-1218:12; 4386:24-4389:3; 6138:2-15. Because Ovitz had no authority over the motion picture studio, Eisner's attempt to blame him for losses in that area was unwarranted. *See* PTE 755 at WD09868. Indeed, Eisner had recognized in his May 26, 1996, email to Bass that the cost overruns in the motion picture studio were due to Roth's decision to dramatically increase marketing costs on unsuccessful movies. PTE 67 at DD002980-81.

[150] *See supra* note 119.

[151] Tr. 1204:11-1208:2; 4278:18-4279:23.

[152] Tr. 1233:8-1238:5.

[153] Tr. 1249:7-1255:14; 5034:5-5038:13; *see also* Tr. 6539:6-6542:6.

[154] Tr. 1229:16-1231:9.

"talent."[155] Ultimately, however, Ovitz's time as President was marked by more "woulda, coulda, shoulda" than actual success.

As an example, Jeffrey Katzenberg was formerly the head of Walt Disney Studios.[156] After his contract with Disney was not renewed, he founded Dreamworks and embroiled the Company in a very costly lawsuit.[157] Ovitz testified that after some discussions with Katzenberg, he could have settled that dispute before the lawsuit was filed for roughly $90 million, and although the actual amount of the settlement remains confidential, Ovitz believes that it was in excess of $250 million.[158] Ovitz, however, was not given authority to settle that suit on behalf of the Company.[159] The litigation, therefore, was filed and continued until the confidential settlement in 1999.[160]

Ovitz was assigned to oversee Disney Interactive, which created interactive video games.[161] Eisner testified that Disney Interactive was "doing very badly, actually," but he hoped that Ovitz might be able to turn it

---

[155] Tr. 1208:3-1209:18; Roth 9:22-10:18. In the end, Ovitz and Roth had different and wholly incompatible perspectives on the use of talent. *See* Roth 34:9-38:15.

[156] Tr. 1153:18-24; 4053:8-16.

[157] Tr. 4690:1-6; *see also* Tr. 3824:1-3829:22.

[158] Tr. 1153:18-1160:12.

[159] Tr. 1159:18-1160:5.

[160] Litvack testified that "[n]o one could settle the Jeffrey Katzenberg case for $90 million." Tr. 6132:22-23. *See supra* note 157.

[161] Tr. 1164:7-1165:12; 5168:12-24.

around.[162] Ovitz was unable to do so.[163] In the face of Eisner's critical view of Ovitz's performance with respect to Disney Interactive, Ovitz testified that he had several ideas for Disney Interactive which could have potentially helped Disney Interactive,[164] including a joint venture with Sony,[165] and a purchase of part of Yahoo!®,[166] all of which Eisner rejected. Ovitz also pursued, together with Roth, a deal intended to benefit Disney's motion picture studio with Beacon Communications, a company run by Armyan Bernstein, a writer and director. Again Eisner instructed Ovitz not to close the deal.[167]

Ovitz wanted the Company to purchase Putnam Publishing in order to acquire the rights to author Tom Clancy. He also wanted to place other prominent authors (and former clients) such as Michael Crichton and Stephen King under contract with Disney's publishing division.[168] Eisner rejected these efforts as ill conceived.[169]

---

[162] Tr. 5168:20-5169:6; *see* PTE 744 at WD09336-37.
[163] Tr. 5170:5-10.
[164] *See* Tr. 1180:14-1181:8.
[165] Tr. 1165:13-1171:18.
[166] Tr. 1171:19-1179:17; *see also* Tr. 1179:18-1180:13.
[167] Tr. 1210:23-1213:6; PTE 322; PTE 747; PTE 749.
[168] Tr. 1160:18-1163:19.
[169] Tr. 1163:21-1164:9; *see also* Tr. 4286:8-12.

A similar story emerges of Ovitz's leadership over Hollywood Records.[170] Ovitz wanted to place Janet Jackson under contract with Hollywood Records,[171] acquire EMI (a Hollywood Records competitor) or enter into a joint venture with Sony.[172] Once again, however, Eisner rejected all of these suggestions.[173] Eisner and others were also critical of what they perceived to be a lack of attention paid by Ovitz to Hollywood Records,[174] though Ovitz's files belie the assertion that Ovitz ignored his oversight of Hollywood Records.[175]

There are three competing theories as to why Ovitz was not successful. First, plaintiffs argue that Ovitz failed to follow Eisner's directives, especially in regard to acquisitions,[176] and that generally, Ovitz

---

[170] *See* Tr. 1134:7-1137:24. Hollywood Records, according to Litvack, was from its creation to that time, "a spectacular failure." Tr. 6146:23-6147:5; *see also* DTE 207; PTE 638.

[171] Tr. 1138:1-1139:10.

[172] Tr. 1139:18-1147:2.

[173] Tr. 1139:11-17; 1147:3-9.

[174] *See* PTE 24 at DD002452-53; PTE 626; PTE 780 at WD13842.

[175] *See* PTE 606; PTE 622; PTE 629; PTE 768; DTE 190. Donohue's predictable opinion that "Ovitz could have been in a coma and still collecting these empty documents" is of no benefit to the Court and, indeed, documents such as PTE 606 and PTE 622 contain marginalia with Ovitz's handwriting, which would refute Donohue's opinion that there is no indication that the files were ever read by Ovitz. *See* Tr. 9282:15-9284:16. Furthermore, plaintiffs' attempt to use Ovitz's statement on the Larry King Live show— that after a year on the job he knew "about one percent of what I need to know"—to demonstrate that Ovitz failed to apply himself on the job, is specious and wholly unpersuasive. PTE 323 at 7.

[176] Plaintiffs' authority for this argument comes from the letter Eisner wrote to Ovitz dated October 10, 1995. PTE 267. Plaintiffs often quote the letter in this way:

did very little. Second, Ovitz contends that Eisner's micromanaging prevented Ovitz from having the authority necessary to make the changes that Ovitz thought were appropriate.[177] In addition, Ovitz believes he was not given enough time for his efforts to bear fruit.[178] Third, the remaining defendants simply posit that Ovitz failed to transition from a private to public company, from the "sell side to the buy side," and otherwise did not adapt to the Company culture or fit in with other executives. In the end, however, it makes no difference why Ovitz was not as successful as his reputation would have led many to expect, so long as he was not grossly negligent or malfeasant.

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.[179] This does not mean that Ovitz intentionally failed to follow Eisner's directives or that he was insubordinate. To the contrary, it

---

"Acquisitions are something we should . . . almost never do." *Id.* at DD002290. The sentence actually reads: "Acquisitions are something *we should look at* and almost never do." *Id.* (emphasis added). It is obvious that this letter, therefore, can provide no support for the proposition that Ovitz intentionally disobeyed an order or directive from Eisner to not pursue acquisitions under any circumstances. As discussed above, the record does not bear out the assertion that Ovitz continued pursuing specific acquisitions after being instructed by Eisner to no longer pursue them.

[177] Ironically, Ovitz testified that Eisner advised him not to take the job at MCA because Eisner believed that Ovitz would not have enough autonomy to turn the company around. Tr. 1275:14-1276:14.

[178] *See, e.g.*, Tr. 1171:14-18.

[179] *See* Roth 29:16-30:20.

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.[180] But different does not mean wrong. Total agreement within an organization is often a far greater threat than diversity of opinion.[181] Unfortunately, the philosophical divide between Eisner and Ovitz was greater than both believed, and as two proud and stubborn individuals, neither of them was willing to consider the

---

[180] *See* Tr. 4284:9-4285:10.

[181] I note that Judge Posner eloquently emphasized this point in his critique of the 9/11 Commission Report by saying that:

> Much more troublesome [than the public relations effort by the commission, especially the participation of victims' relatives] are the inclusion in the report of recommendations (rather than just investigative findings) *and the commissioners' misplaced, though successful, quest for unanimity.... And pressure for unanimity encourages just the kind of herd thinking now being blamed for that other recent intelligence failure—the belief that Saddam Hussein possessed weapons of mass destruction.*
>
> At least the commission was consistent. It believes in centralizing intelligence, and people who prefer centralized, pyramidal governance structures to diversity and competition deprecate dissent. *But insistence on unanimity . . . deprives decision makers of a full range of alternatives. For all one knows, the price of unanimity was adopting recommendations that were the second choice of many of the commission's members or were consequences of horse trading.* The premium placed on unanimity undermines the commission's conclusion. . . .

Richard A. Posner, *The 9/11 Report: A Dissent*, N.Y. TIMES, August 29, 2004 (emphasis added). Judge Posner's critique also warns against the dangers of judging past actions with the benefit of perfect hindsight, saying that, "The commission's statement that Clinton and Bush had been offered only a 'narrow and unimaginative menu of options for action' [in response to al Qaeda] is hindsight wisdom at its most fatuous," by outlining several of the available options. *Id.*

possibility that their point of view might be incorrect, leading to their inevitable falling out.[182]

5. Veracity and "Agenting"

At trial, plaintiffs, together with their expert on these issues, Donohue, spent a great deal of effort attempting to persuade the Court that Ovitz was a habitual liar, and that his lack of veracity would constitute good cause to terminate him without paying the NFT.[183] Defendants respond that the purported veracity problems attributable to Ovitz do not involve material falsehoods, but instead were caused by Ovitz's tendency to "handle" or "agent" others.

---

[182] *See* Tr. 3811:3-3814:15.

[183] As with many of their other allegations, plaintiffs heavily rely on PTE 20, PTE 24, PTE 67, PTE 79, and the hearsay statements of Bass. In attempting to bolster their position, plaintiffs point to part of Ovitz's trial testimony to argue that his "self-serving" testimony was contradicted by other witnesses. *See, e.g.*, Tr. 1220:14-1228:1. In that passage, Ovitz recalls meetings in New York with Bollenbach, Litvack and Iger, followed by a meeting with Eisner in Los Angeles. *Id.* Eisner's testimony indicates a lack of specific recollection of that meeting, but basic familiarity with the issues purportedly discussed there. Tr. 5081:8-5084:5. Bollenbach could not specifically recall the meeting either, but does remember at least one meeting in New York with Ovitz. Tr. 5488:10-5493:11. Litvack's testimony was unclear on whether he remembered the meeting to which Ovitz was referring, at one point saying "I am sure that we met with Mr. Eisner after these meetings, yes," with the very next words out of his mouth being, "I don't recall." Tr. 6555:5-6556:16. Needless to say, the contradiction is, at most, minimal and a natural consequence of the many years that have passed since these events transpired rather than evidence of a lack of honesty on the part of Ovitz.

Eisner testified that, with respect to Iger's statement that Iger did not trust Ovitz,[184] the lack of trust was related to Ovitz's failure to communicate with Iger, and that Ovitz "wasn't doing anything wrong."[185] Eisner also expressed that he personally did not trust Ovitz.[186] From both the tenor of the document (written shortly after the stress of his mother's death) and from Eisner's more emotionally detached trial testimony,[187] however, it is clear that Eisner was not referring to any material falsehoods, but instead to Ovitz's salesmanship[188] or, in other words, his "agenting."[189]

---

[184] PTE 67 at DD002981; Tr. 4298:6-4302:7.

[185] Tr. 4300:7-4301:22. This testimony demonstrates that there could be any number of reasons for which Iger would no longer trust Ovitz. Lack of veracity is but one.

[186] Eisner wrote:

> Michael [Ovitz] does not have the trust of anybody. I do not trust him. None of the people he works with feels comfortable with his directness and honesty. Like an athlete who has lost his way, Michael is pressing, is confused, [is] ineffective. His heart may be in the right place, but his ego never allows it to pump. His creative instincts may be in the right place, but his insecurity and existential drive never allows a real functioning process. . . . He would be a great salesman, but his corporate disingenuous nature undermines him. And his lack of interests in long-term outcomes affects his judgment on short-term deals. The biggest problem is that nobody trusts him, for he cannot tell the truth. He says whatever comes to mind, no matter what the reality. Because of all the above his executives, outside business associates, and the Press have turned against him.

PTE 79 at DD002624.

[187] Tr. 4434:1-4439:22; *see also* Tr. 3763:11-23; 6386:24-6388:4.

[188] Tr. 4438:10-4439:22.

[189] Tr. 6373:18-6374:13. *But cf.* Bass 44:17-46:5; 102:24-103:5 (Bass' opinion that Ovitz was not honest was not based upon first hand experience and personal knowledge, but was based instead on the hearsay statements of Eisner and other unnamed declarants). Eisner's credible trial testimony on this subject significantly undermines the probative

Litvack felt the same way, saying that he did not trust Ovitz's judgment and that he did not trust Ovitz generally because Ovitz would "handle" Litvack and "put his spin on things."[190] Litvack also said that the "worst that I could remember in terms of lies was—and I use the word 'lies'—was 'I was on the phone with someone important and couldn't be on time for the meeting.'"[191] Other executives and directors made similar comments that they could recall no material falsehoods told to them by Ovitz.[192]

In the absence of any concrete evidence that Ovitz told a material falsehood during his tenure at Disney, plaintiffs fall back on alleging that Ovitz's disclosures regarding his earn-out with, and past income from, CAA, were false or materially misleading.[193] As a neutral fact-finder, I find that

---

value of Bass' testimony, which again, the Court was not able to observe personally. *See, e.g.*, Tr. 4434:1-4439:22.

[190] Tr. 6132:11-19; *see also* Tr. 6088:12-6092:23; 6374:18-6378:17.

[191] Tr. 6135:1-4. Clearly, these statements, even if construed as lies, would not constitute gross negligence or malfeasance.

[192] *See* Tr. 2621:15-2622:13 (Russell); 3755:8-3756:9 (Gold); 4012:14-4013:8 (Roy Disney); 5307:17-5308:9 (Bollenbach); 5809:3-7 (Nunis); 5940:20-23 (Bowers); 6724:7-15 (O'Donovan); 6847:10-16 (Wilson); 7148:8-12 (Poitier); 7552:23-7553:1 (T. Murphy); 7649:10-16 (Lozano); 7867:6-9 (Watson); 8161:6-7 (Stern); Roth 118:20-119:13.

[193] At trial, when asked to give specific instances of lies by Ovitz, Donohue could only provide two concrete examples of Ovitz's lying, one with respect to a deal Ovitz apparently made to sell an airplane to one of his prior business partners, *see* PTE 404 at 45 n.48, and the other relating to breaking the purported mutual non-disparagement agreement that Ovitz agreed to when he left the Company. Tr. 655:24-658:12. Donohue's report indicates that even he did not consider the alleged deception with

the evidence simply does not support either of those assertions.[194] The allegedly false or misleading disclosure regarding Ovitz's earn-out rights is contained in the copy of the Company's "Statement of Policy Regarding Conflicts of Interest and Business Ethics and Questionnaire Regarding Compliance" that Ovitz signed on October 24, 1995.[195]

Plaintiffs attack this disclosure on several grounds. First, they argue that Ovitz was entitled to a majority of some unknown list of booked commissions that allegedly changed over time. The disclosure by Ovitz makes clear that he owned a majority interest in his prior employer, which

---

respect to the airplane grounds for a for-cause termination because it did not occur in the course of Ovitz's duties for Disney. PTE 404 at 45 n.48. Any statements Ovitz may have made that violated a mutual non-disparagement agreement would similarly not constitute cause for termination because they occurred after his termination was publicly announced, and were not made in the course of his duties for the Company.

[194] *See* PTE 200 (W-2 for 1995 representing Ovitz's income at CAA from January 1, 1995 to the end of September 1995 for almost $18 million). This W-2 is consistent with Ovitz's testimony. Tr. 1099:5-15.

[195] PTE 314; PTE 127 (transmission of the signature page of the document by Adler to Santaniello). Ovitz's statement reads as follows:

> I beneficially own a majority interest in my prior employer ("Prior Employer"), a franchised talent agency. My ownership interest is held by an independent trustee. The talent agency business of the Prior Employer is being continued by Creative Artists Agency LLC ("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 certain real and personal property to CAA.
>
> Except for ownership interests of less than 5% in publicly traded companies, either I or my Prior Employer may be deemed to beneficially have ownership interests in the following entities that are engaged in the media, entertainment, communications or publishing businesses: Diamond Cable Communications PLC [&] Ziff-Davis Holdings Corp.

PTE 314 at DD000292.

would lead any reasonable person to believe that he would receive a majority of the income from that entity.[196] The disclosure also clearly spells out that Ovitz would be entitled to receive commissions from contracts entered into on or before September 30, 1995.[197] Ovitz's testimony that it is common practice in the industry for some of these contracts to be oral is not contradicted.[198] Plaintiffs' assertion that the commissions list evolved over time is consistent with the parties' agreement, but there is no support in the record for the assertion that the *definition* of those commissions changed during any time relevant to this suit.[199]

---

[196] Oldco's (also known as CAA, Inc. or "Prior Employer") receipt of revenues from booked talent commissions were based upon Newco's (also known as CAA, LLC) financial success. *See* PTE 203 at MTO 1660; Tr. 1450:5-1452:5; 1533:2-1535:4. To alleviate any potential conflicts relating to this symbiotic relationship between Oldco and Newco, Disney created a process by which conflicts of interest between Ovitz and CAA were to be avoided through approval of transactions greater than $100,000 involving a CAA client by any two of (1) Eisner, (2) Litvack, or (3) Gerry Swider. PTE 148; PTE 374; Tr. 1298:11-1299:22; 1610:20-1613:2; 6457:15-6469:20; 6696:5-6697:1. Plaintiffs attempt to use PTE 581 to demonstrate that this process was not followed, but Litvack's memory of these deals is hazy, and with respect to many of the deals, Litvack testified that he believed the projects related to many of those deals were not completed. Tr. 6494:11-6508:7. Given the sparsity of this record, I cannot conclude first, that the conflict of interest avoidance procedure was not used, or second (and more importantly), that if the procedure was not used, such failure was attributable to Ovitz, or that Ovitz used his position as President to facilitate deals with CAA clients in order to advance his personal financial interests. *See* Tr. 8844:10-8851:19.

[197] *See* PTE 202 at MTO 582, PTE 206 at MTO 611-12; PTE 208.

[198] Ovitz 561:22-562:6; *see also* PTE 206 at MTO 610-11.

[199] It appears that the definition of booked commissions may have been altered in 1999, long after Ovitz left Disney, making such change irrelevant to this case. PTE 209 at MTO 2161-63. This alteration may have been necessitated by Newco's arrearages in paying Oldco, arrearages which were substantial as of October 1997. PTE 205.