



Eisner, Gold, Bowers, Watson and Stern were in attendance.<sup>278</sup> In the absence of further evidence, I must conclude that no other directors attended this session. It is also clear that Eisner notified the directors in attendance at the executive session that it was his intention to fire Ovitz by year's end and that he had asked Wilson to speak with Ovitz while they were onboard the *Illusion* during the upcoming Thanksgiving holiday.<sup>279</sup>

Beyond Ovitz's impending doom and Wilson's upcoming boat trip, there is some controversy as to whether any details of the NFT and the cause question were discussed at this meeting. Eisner testified that, in addition to the other items, he informed those in attendance of what the NFT would cost Disney.<sup>280</sup> Gold tells a somewhat more elaborate (and certainly more self-serving) version of the meeting in which Gold asks Eisner whether Ovitz's termination would be for cause, and Eisner assures Gold, in the presence of the other directors, that Litvack had advised Eisner that there were no grounds for a "for cause" termination.<sup>281</sup> After the executive session

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<sup>278</sup> Mitchell was called after the meeting by Eisner and was told that there was some discussion of Ovitz's performance. Tr. 5758:21-5759:10. Mitchell, however, was not told anything concerning the NFT. *See* Tr. 5782:8-18.

<sup>279</sup> Tr. 4551:17-4552:21 (Eisner); 3772:17-3773:18, 3785:3-9 ("You couldn't have left the November . . . executive session without knowing where Mr. Eisner was going [as concerned Ovitz].") (Gold); 5950:20-5952:13 (Bowers); 7859:23-7862:5 (Watson); 8155:13-8158:4 (Stern).

<sup>280</sup> Tr. 4425:7-4426:10.

<sup>281</sup> Tr. 3773:15-3774:16.

adjourned, Gold testified that Litvack came into the room and Eisner told Gold to ask Litvack about cause, and that Litvack then told Gold that there was no cause to terminate Ovitz.<sup>282</sup> Stern, noting at trial that he had failed to recall anything at all concerning this meeting during his deposition, echoed Gold's version, stating that after the meeting, Litvack said that there was "no other way to go" besides an NFT.<sup>283</sup>

Outside of Gold and Stern, nobody else present at the executive session recalled Gold raising the issue of fault with Eisner or having witnessed Gold speak with Litvack. Litvack recalls speaking with Gold sometime before December 12, and he recalls in substance a similar conversation to what Gold and Stern recall, that is, Eisner telling Gold to ask Litvack about cause. Litvack, however, cannot place that conversation in time, believes it took place in the boardroom and believes that the only people present were Eisner, Gold and himself.<sup>284</sup> Because of these numerous discrepancies, I cannot conclude that Gold questioned Eisner during this meeting regarding cause, nor can I conclude that the conversation

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<sup>282</sup> Tr. 3774:17-3776:7; 3906:17-3908:4. Gold told a slightly different story at his deposition which had Litvack in the room during the entire executive session and did not have Gold asking Litvack questions about outside counsel. *See* Gold 348:12-351:15.

<sup>283</sup> Tr. 8155:13-8158:4.

<sup>284</sup> Tr. 6343:20-6346:5.

that took place between Gold and Litvack occurred after the executive session in the presence of those who were in attendance.

#### 5. The Illusion Dispelled

Shortly after the November 25 board meeting and executive session, the Ovitz and Wilson families left on the Illusion for a Thanksgiving trip to the British Virgin Islands. Ovitz embarked on this trip with the hope that if he could figure out a way to make it to Christmas, he could fix everything with Disney and make his problems go away.<sup>285</sup> Wilson, however, had other plans.<sup>286</sup> Ovitz recalled the conversations between him and Wilson quite well. Ovitz recalled that Wilson told him that “it wasn’t going to work and that [Eisner] wanted [Ovitz] out of the company.”<sup>287</sup> Ovitz said that after speaking with Wilson he began to realize how serious the situation with Disney had become and that he needed to talk to his attorneys and get some perspective on the situation.<sup>288</sup> Wilson was unable to recall the details of

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<sup>285</sup> Tr. 2050:1-10.

<sup>286</sup> Wilson also testified that Eisner informed him that Ovitz would be entitled to a payment under the OEA if he was terminated without fault, and that Wilson knew what the approximate value of that payment was. *See* Tr. 7031:10-7032:4.

<sup>287</sup> Tr. 2051:7-11.

<sup>288</sup> *Id.*

what he and Ovitz spoke about,<sup>289</sup> but Wilson does recall that Ovitz was quite “emotionally concerned” with his situation at Disney.<sup>290</sup>

At some point during the trip, Eisner contacted Wilson by phone and Wilson related the situation and the progress he had made with Ovitz.<sup>291</sup> Wilson was unable to remember the specifics of his conversation with Eisner, but his recollection was refreshed after viewing notes, dated December 1, taken by Eisner following the conversation.<sup>292</sup> Wilson recalled describing Ovitz as a “wounded animal . . . in a corner,” and stated that by this he meant that Ovitz could become dangerous to the organization if the relationship with Disney continued.<sup>293</sup> Wilson also recalled stating that Ovitz was a “loyal friend and devastating enemy,”<sup>294</sup> and advising that Eisner should be reasonable and magnanimous, both financially and publicly, so Ovitz could save face.<sup>295</sup>

On December 3, having returned from his Thanksgiving trip, Ovitz, armed with his newfound understanding that his time at Disney was rapidly coming to an end, met with Eisner to discuss the terms of his departure.

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<sup>289</sup> Tr. 7016:16-22.

<sup>290</sup> Tr. 7017:24-7018:5.

<sup>291</sup> Tr. 7016:23-7017:9.

<sup>292</sup> PTE 25.

<sup>293</sup> Tr. 7026:22-7027:23; *see also* PTE 25.

<sup>294</sup> Tr. 7028:2-7029:1.

<sup>295</sup> Tr. 7030:6-7031:9.

(Cont'd)

Eisner memorialized this meeting in a note to Russell which read “I met with Michael Ovitz today who wants to bring our discussions to a conclusion this week, wants you and Bob Goldman to settle out his contract immediately and sign it by weeks end.”<sup>296</sup> Essentially, this note asked Russell to take charge of managing the Ovitz departure. Ovitz asked that he not have to deal personally with Litvack during the termination process, although he had no qualms about Litvack being involved.<sup>297</sup> Ovitz also asked for several concessions from Disney, including keeping his seat on the board, obtaining a consulting/advising arrangement with Disney, the continued use of an office and staff (but not on the Disney lot), continued health insurance and home security, continued use of the company car and the repurchase of his plane.<sup>298</sup>

Although Eisner and Ovitz did not see eye to eye on Ovitz’s requests, Eisner initially objected only to Ovitz’s continued use of the company car, telling Russell, “I don’t want to nit pick here, but we are paying him a fortune.”<sup>299</sup> The memo to Russell does not reflect Eisner’s objections to Ovitz’s other requests. Eisner, however, testified that “by the time I got from

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<sup>296</sup> PTE 326 DD002539.

<sup>297</sup> *Id.* at DD002540; *see also* Tr. 2060:19-2061:9.

<sup>298</sup> PTE 326.

<sup>299</sup> *Id.* at DD002539.

number one to number five [of listing Ovitz's requests] I had already realized it was a bad idea, and the next day I called him and told him that . . . it would be impossible."<sup>300</sup> Eisner also told Russell that:

Any deal we make that is one cent more than the contract should include a non raid clause with teeth, a non compete in areas he advises us in, and a non disclose or bad mouth me or the company for five years at least. It would be great if you paid some of his money out over time which he would lose if he broke that deal.<sup>301</sup>

Shortly after this meeting, Ovitz spoke with Russell on the phone, and Russell described the conversation as "a very, very troubling and unusual conversation."<sup>302</sup> Russell stated that during their conversation, Ovitz made clear that he understood that the door to Disney was closed, but he was still "pleading his heart out . . . [with] tears in his voice."<sup>303</sup> Over the next week, Disney, and more accurately, Eisner, rejected every request that Ovitz had made, informing him that all he would receive is what he had contracted for in the OEA and nothing more.<sup>304</sup> Other than the extra benefits which Ovitz requested and Disney summarily denied, there seems to have been no

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<sup>300</sup> Tr. 4397:20-24.

<sup>301</sup> PTE 326 at DD002540; *see also* PTE 379.

<sup>302</sup> Tr. 2577:3-2578:1.

<sup>303</sup> *Id.*

<sup>304</sup> Tr. 1379:21-1380:5, 3228:9-3229:19 (denial of continuing seat on board); 1379:1-20, 2098:5-13, 3227:8-18 (denial of consulting agreement); 3224:7-21 (denial of use of office and staff); 2063:21-2064:10, 3225:10-13 (denial of opportunity to repurchase plane); 6178:15-6179:23 (denial of repurchase or continued use of car).

(Cont'd)

negotiation between anyone in Ovitz's camp and anyone at Disney concerning whether there would be a for cause termination or an NFT, and nobody seems to have even mentioned to Ovitz or his representatives the possibility of a for cause termination.<sup>305</sup>

#### 6. Ovitz's Bonus and His Termination

On December 10, the Executive Performance Plan Committee ("EPPC") met to consider annual bonuses for Disney's most highly-compensated executive officers. The EPPC was chaired by Gold, its other members Lozano, Poitier and Russell, attended, although Poitier and Lozano attended by phone.<sup>306</sup> Also in attendance were Eisner, Watson, Litvack, Santaniello, and Marsha Reed.<sup>307</sup> Russell informed all those in attendance of his conversations with Ovitz's representatives and that Ovitz was going to be terminated, but that he was not going to be terminated for cause.<sup>308</sup> At this meeting, Russell recommended that Ovitz, despite his poor performance and

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<sup>305</sup> Tr. 1378:6-14 (Ovitz) (stating that Eisner never mentioned to him the possibility that he would be fired for cause); 4455:3-19 (Eisner) (stating that at no time did he mention to Ovitz the possibility that he could be fired for cause, and denying that any negotiations took place between the two parties); 2640:17-2641:21 (Russell) (stating that he had never mentioned anything concerning a for cause termination to Ovitz or anyone working for Ovitz); 6186:15-6187:4 (Litvack) (stating that to the best of his knowledge, neither he nor anyone else at Disney ever mentioned to Ovitz or one of his representatives that he could be fired for cause).

<sup>306</sup> PTE 51.

<sup>307</sup> *Id.* Watson attended by phone.

<sup>308</sup> Tr. 2581:23-2582:17; 3785:3-3786:11; 4429:7-4430:4; *see also* DTE 163.



imminent termination, should receive a \$7.5 million bonus for his services during the 1996 fiscal year because Disney had done so well during the fiscal year and because Disney had a large bonus pool.<sup>309</sup> The EPPC approved this recommendation and it appears that Russell may have even advised the EPPC (despite the *clear* language in the OEA stating that the *bonus was discretionary*) that Disney was contractually obligated to pay Ovitz his bonus.<sup>310</sup> Despite the fact that all of those in attendance should have known better, nobody spoke up to correct the mistaken perception that Ovitz had to receive a bonus, let alone a \$7.5 million bonus.

The following evening, Eisner met with Ovitz at Eisner's mother's apartment in New York City.<sup>311</sup> By the time this meeting occurred, it had already been decided that Ovitz was being terminated, without cause, and would be receiving his contractual NFT payment, and that he would not be

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<sup>309</sup> PTE 51 at WD01229; *see also* 2582:18-2583:12.

<sup>310</sup> Tr. 3926:11-15 (Gold) (stating that Russell stated that the bonus was mandatory); 7752:1-7754:22 (Lozano) (stating that although he could not recall Russell advising the EPPC that the bonus was mandatory, that he believed that they were contractually obligated to grant Ovitz a \$7.5 million bonus); 6154:15-6156:16 (Litvack) (stating that Russell told the EPPC that the bonus was mandatory, and that Litvack did not say anything because he was not sure what Russell was referring to and he did not want to embarrass Russell). Planning to correct Russell's mistake when he spoke with him later on, Litvack nonetheless ordered that Ovitz's bonus be paid. *See* PTE 175; Tr. 6156:16-6157:10.

<sup>311</sup> Tr. 4402:8-4403:8.

receiving any of the additional items that he asked for.<sup>312</sup> The purpose of this meeting was to agree to a press release to announce the termination, let Ovitz know that he would not receive any additional items, and as Eisner described it, it served as “the final parting.”<sup>313</sup> Eisner and Ovitz apparently came to some understanding that neither Ovitz nor Disney was to defame each other in the press, and that the separation was to be undertaken with dignity and respect for both sides.<sup>314</sup> Ovitz’s termination was memorialized the following day in a letter signed by Litvack and dated December 12.<sup>315</sup> Litvack testified that Russell negotiated the terms in the letter, but Litvack

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<sup>312</sup> Eisner did give some testimony that by December 11 he still intended to give Ovitz some sort of consulting arrangement separate from and unrelated to the OEA. The overwhelming weight of the evidence, however, demonstrates that this was not in fact the case, and it certainly did not happen. *See* Tr. 4601:6-23.

<sup>313</sup> Tr. 4592:18-4593:6.

<sup>314</sup> Eisner 654:16-655:16; *see also* Tr. 4601:8-18.

<sup>315</sup> PTE 13. The letter reads:

This will confirm the terms of our mutual agreement as follows:

1. The term of your employment under your existing Employment Agreement with Disney will end on January 31, 1997.
2. This letter will for all purposes of the Employment Agreement be given the same effect as though there had been a “Non-Fault Termination,” and the Company will pay you, on or before February 5, 1997, all amounts due you under the Employment Agreement, including those under Section 11 (c) thereof. In addition, the stock options granted pursuant to Option A, will vest as of January 31, 1997 and will expire in accordance with their terms on September 30, 2002.

signed this document on Eisner's instructions.<sup>316</sup> The board was not shown the December 12 letter,<sup>317</sup> nor did it meet to approve its terms.<sup>318</sup>

Also on December 12, Disney issued the press release announcing Ovitz's termination.<sup>319</sup> The press release stated that "Michael S. Ovitz, will leave the company by mutual agreement effective January 31, 1997. He will continue to serve as an advisor and consultant to the company and the Board of Directors."<sup>320</sup> Although I am puzzled by the use of the phrase "mutual agreement," I am nonetheless convinced, based upon Ovitz's constant self-denial and difficult behavior during the months leading up to his termination, and Eisner's commitment that he would handle the termination gracefully for Ovitz's benefit (and likely to prevent Ovitz from defaming him and Disney in the press),<sup>321</sup> that the termination was anything but a mutual agreement.<sup>322</sup> Additionally, although I am troubled by the statement

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<sup>316</sup> Tr. 6157:11-6159:8.

<sup>317</sup> Bowers 335:3-14; Gold 207:13-18; Roy Disney 189:20-190:10.

<sup>318</sup> Tr. 3933:8-20 (Gold); 4102:23-4103:11 (Eisner); 5772:18-5773:4 (Mitchell); 5881:24-5882:23 (Nunis); 5990:21-5991:10 (Bowers); 7248:3-7249:6 (Poitier); 7615:19-7616:16 (Murphy); 7758:2-7759:22 (Lozano).

<sup>319</sup> PTE 390.

<sup>320</sup> *Id.*

<sup>321</sup> PTE 19 at WD4000. *See also* Tr. 2088:1-5 (Ovitz) (stating "what we agreed on that they tried to handle this with some dignity for me and some grace and were very generous in their press release, which was very nice for them to do.").

<sup>322</sup> *See also* Tr. 2087:6-2088:5 (Ovitz) (stating that "I wouldn't leave by mutual agreement and I wasn't going to serve as an advisor and consultant. I wanted to [serve in those positions.]"); 2573:11-21 (Foster: "[Ovitz's] departure was not voluntary, is that correct?"; Russell: "No way, no way."); 4525:12-16 (Schulman: "You were trying to

in the press release that Ovitz would continue to serve as an advisor and consultant to the board, because this was either a deliberate untruth or an incredibly irresponsible and sloppy error on Disney's part, it is ultimately immaterial to the issues to be resolved in this case. Therefore, I do not believe that the statement in the press release regarding Ovitz continuing as an advisor and consultant to the Disney board is reflective of any agreement or understanding that Disney and Ovitz had at the time.<sup>323</sup> The Court believes that both of these untrue statements were likely made as part of an effort by Disney to make Ovitz's departure seem as amicable as possible so that Ovitz's reputation would not be publicly tarnished any more than could be avoided. In any event, once Ovitz left Eisner's mother's apartment, he never again returned to Disney.<sup>324</sup>

That same day, Eisner at least attempted to contact each of the Board members by phone before the issuance of the press release in order to notify them that Ovitz had been officially terminated.<sup>325</sup> None of the board

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work out getting Mr. Ovitz's consent; correct?" Eisner: "I was not trying to get his consent on being fired. I was trying to get his consent of leaving the company in a graceful way.").

<sup>323</sup> Tr. 2087:6-2088:5. What makes it even clearer that Disney was simply trying to mislead the public is that no such representation was made in Ovitz's termination letter. PTE 13.

<sup>324</sup> Tr. 1382:22-1383:1.

<sup>325</sup> DTE 413 (Eisner's incoming and outgoing phone log from December 12 through December 14 listing calls placed to Nunis, Roy Disney, Russell, O'Donovan, Wilson,

members at that time, or at any other time before or during trial, ever objected to Ovitz's termination; in fact, most if not all thought it was the appropriate move for Eisner to make.<sup>326</sup> Also on December 12, copies of the press release along with a letter from Eisner were sent to each of the directors.<sup>327</sup> The letters contained no more information regarding the termination than was contained in the press release.

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Murphy, Gold, Stern, Bowers, Poitier and Walker); *see also* Tr. 3802:6-2223 (Gold) (testifying that Eisner notified him by phone, and asked him to pass the news on to Roy Disney); 5810:19-5811:20 (Nunis) (testifying that Eisner notified him by phone); 5932:7-5833:3 (Bowers) (testifying that Eisner notified her by phone); 7556:1-7557:15 (T. Murphy) (testifying that Eisner notified him by phone); 7642:21-7643:9 (Lozano) (testifying that Eisner notified him by phone); 8159:19-8160:24 (Stern) (testifying that Eisner notified him by phone). Eisner also notified Bass and Warren Buffett. Tr. 4405:18-4406:14.

<sup>326</sup> Tr. 3778:1-23 (Gold) (stating that as of the November 25 executive session, he concurred with Eisner's decision to terminate Ovitz despite what it would cost Disney); 4026:13-4028:5 (Roy Disney) (stating that he supported the decision to terminate Ovitz despite the cost involved because of the significant problems Ovitz was causing within Disney); 4405:18-4409:10 (Eisner) (stating that he received no objection from any board member after placing phone calls to notify them of Ovitz's termination or after they received copies of the press release and accompanying letter); 5810:19-5811:20 (Nunis) (stating that as of the press release he supported Eisner's decision to terminate Ovitz because "turmoil at the top of the company" was dangerous for everyone); 5933:22-5935:15 (Bowers) (stating that she supported Eisner's decision to terminate Ovitz as of the press release because it was clear that Ovitz was not a team player); 6720:11-6720:23 (O'Donovan) (stating that he supported Eisner's decision to terminate Ovitz because it is important to have harmony at the top of a large organization); 7144:3-7146:13 (Poitier) (stating that he believed Ovitz had to be terminated according to the terms of the OEA because it was a "clear mismatch"); 7556:3-7557:7 (Murphy) (stating that he supported Eisner's decision to terminate Ovitz despite the cost because it was the best thing for Disney and its shareholders); 7642:21-7643:24 (Lozano) (stating that he supported Eisner's decision to terminate Ovitz despite the cost to Disney); 8158:5-8160:24 (Stern) (stating that he supported Eisner's decision to terminate Ovitz because it was a bad relationship, and the amount Disney would save would outweigh the cost of the termination).

<sup>327</sup> PTE 13.

Thus, as of December 12, Ovitz was officially terminated without cause. Up to this point, however, the Disney board had never met in order to vote on, or even discuss, the termination at a full session, and few if any directors did an independent investigation of whether Ovitz could be terminated for cause. As a result, the Disney directors had been taken for a wild ride, and most of it was in the dark. Additionally neither the EPPC nor the compensation committee had a vote on the matter, and it seems as though they had yet to have a substantive discussion of whether Ovitz could be terminated for cause. Many directors believed that Eisner had the power to fire Ovitz on his own and that he did not need to convene a board meeting to do so.<sup>328</sup> Other directors believed that if a meeting was required to terminate Ovitz, that Litvack, serving as corporate counsel, would have advised them that was the case and he would have made sure one was called.<sup>329</sup> Litvack believed that Eisner had the power to fire Ovitz on his own accord and, therefore, did not believe it was necessary to convene a meeting.<sup>330</sup> Litvack also stated that he did not call a meeting because not only did he believe that Eisner was empowered to fire Ovitz on his own, but

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<sup>328</sup> Tr. 2587:1-7 (Russell); 5733:3-5734:17 (Mitchell); 6721:8-21 (O'Donovan); 7067:21-7069:8 (Wilson); 7561:9-13 (Murphy); 8233:5-16 (Stern).

<sup>329</sup> Tr. 2889:10-2892:3 (Russell); 6720:21-6721:7, 6785:1118-6786:15 (O'Donovan); 7227:2-7 (Poitier); 7561:14-17 (Murphy); 7466:11-7467:2 (Lozano).

<sup>330</sup> Tr. 6149:4-6151:11.

Litvack believed that all the directors were up to speed and in agreement that Ovitz should be terminated.<sup>331</sup> Although there was no meeting called to vote on or even discuss Ovitz's termination, it is clear that most, if not all, directors trusted Eisner's and Litvack's conclusion that there was no cause and that Ovitz should still be terminated without cause even though this entailed making the costly NFT payment.<sup>332</sup>

During the week that Ovitz was terminated (December 11-16), articles began appearing in the press with quotes from Ovitz or his representatives describing why Ovitz left Disney and detailing to some extent the size of his

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<sup>331</sup> *Id.*

<sup>332</sup> Tr. 2574:5-2576:21 (Russell) (stating that he believed that Eisner and Litvack had done sufficient research and trusted their judgment that there was no cause to terminate Ovitz, that he was unaware of anything that would constitute cause to fire Ovitz, and that he was aware that Ovitz would receive the NFT payment); 3775:12-3778:18 (Gold) (stating that he was aware of the size of the NFT payment, that after asking Litvack about his conclusions concerning cause he believed that Litvack had done and was continuing to do sufficient research and Gold trusted his and Eisner's conclusions, and that Gold also had no knowledge of any act that would have constituted cause to fire Ovitz); 5597:18-5598:13 (Mitchell) (stating that he relied on and trusted Litvack's determination that there was no cause and Mitchell knew of nothing that would have constituted cause); 5813:2-24 (Nunis) (stating that he believed that if Eisner and Litvack could have avoided paying the NFT that they would have done so); 5933:4-5934:24 (Bowers) (agreeing with Eisner's decision, that Disney would honor the terms of the OEA and make a large payment to Ovitz including a large cash payment and acceleration of the options); 6781:18-6782:9 (O'Donovan) (stating that he was not aware of the value of Ovitz's payment and relied on Litvack entirely to make the cause determination); 7557:2-15 (Murphy) (stating that he believed that if there was a way that Eisner could have avoided paying Ovitz he would have and he therefore trusted Eisner's judgment on the issue of cause); 7867:2-7868:2 (Watson) (stating that he did not believe that Ovitz was grossly negligent or malfeasant and that therefore he could not be fired for cause); 8160:2-8161:16 (Stern) (stating that he believed that Ovitz never lied to him, and that Stern trusted Eisner's judgment because he had a reputation for being "a tough buck," and if Eisner could have avoided paying Ovitz he would have).

severance package.<sup>333</sup> For example, a December 14 article in the Baltimore Sun reported that “Resigning Disney President Michael Ovitz said yesterday through a representative that Disney is giving him a \$90 million severance package.”<sup>334</sup> Other articles describing Ovitz’s frustrations at Disney stated that Ovitz “wasn’t game to struggle against a bad situation,”<sup>335</sup> and that “Ovitz was frustrated by his poorly defined role, Eisner’s reluctance to share power and repeated clashes with other senior Disney executives . . . notably [Litvack] and [Bollenbach],”<sup>336</sup> and that “the reality was that Eisner did not let go . . . [and that] Eisner thwarted [Ovitz] by not giving him detailed responsibilities or the power to manage the various Disney divisions.”<sup>337</sup> The articles also stated that Ovitz’s departure was mutual,<sup>338</sup> and some went so far as to state that Ovitz’s departure was his own idea.<sup>339</sup> Additionally, it was reported that Ovitz had hired a public relations consultant named Steven Rivers to put a positive spin on the termination for Ovitz.<sup>340</sup> Ovitz, however,

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<sup>333</sup> DTE 243.

<sup>334</sup> DTE 243 at 13-14; *see also id.* at DD002077, DD002068.

<sup>335</sup> *Id.* at DD002075.

<sup>336</sup> *Id.* at DD002077.

<sup>337</sup> *Id.* at DD002068.

<sup>338</sup> *Id.* at DD002075.

<sup>339</sup> *Id.* at DD002084.

<sup>340</sup> Tr. 4432:20-4433:1 (Eisner) (testifying that, when he confronted Ovitz about these articles, Ovitz admitted to hiring Rivers); *see also* DTE 243 at DD002076, DD002084, DTE 243 at 12, 14.



testified that he did not employ Rivers or any other PR firm at this time.<sup>341</sup>

Eisner believed that he had been generous in his treatment of Ovitz, as well as his agreement to make the termination seem mutual, and felt that these articles were:

an incredible betrayal not of a contract, not of any kind of written agreement, but that I had bent over backwards, and not because he was my friend. I would do it with anybody that was leaving under these circumstances, and he just, you know, threw it right in the company's face. And I was reading every single day about what idiots we were, the Disney Company, and how he had done this enormous feat.<sup>342</sup>

On December 16, Eisner reacted to these stories by sending an e-mail to John Dreyer, Disney's communications chief, which among other things stated that Ovitz was a "psychopath" and "totally incompetent."<sup>343</sup> Eisner described the letter as his effort at "venting" and that "although [he] didn't know what the words meant, [he] was just so angry."<sup>344</sup>

Following the official termination, the EPPC met on December 20 with the sole purpose of rescinding Ovitz's \$7.5 million bonus. Litvack stated that after the December 10 EPPC meeting, he had questioned Russell as to whether the bonus was mandatory, and that Russell had sent Litvack a

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<sup>341</sup> Tr. 2090:17-2091:6.

<sup>342</sup> Tr. 4433:2-4433:14.

<sup>343</sup> PTE 20.

<sup>344</sup> Tr. 4433:15-21.

memo (which had been drafted almost a year earlier as an introduction to the OEA) on December 18, and in that document it became apparent that the bonus was not in fact mandatory.<sup>345</sup> Russell also had a discussion with Gold on December 18 during which he told Gold that his recommendation that Ovitz be paid a bonus was stupid and that he was worried that members of the EPPC were under the mistaken belief that the bonus was contractual.<sup>346</sup> Gold testified that within a week of the December 10 meeting, Litvack and Russell came to him “sheepishly, and said ‘we’ve made a mistake.’”<sup>347</sup> On December 20 a special telephonic meeting of the EPPC was convened with the purpose of rescinding Ovitz’s \$7.5 million bonus, which the EPPC had voted in favor of just ten days earlier.<sup>348</sup> Gold, Lozano, Russell, Watson, Eisner and Litvack attended the meeting.<sup>349</sup>

Russell’s self-prepared agenda for the meeting outlines what was discussed before revoking Ovitz’s bonus, including that it would be “illogical and impossible to justify any bonus one day and fire him the next, [and that] Committee members [could not] be asked to try to justify it based

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<sup>345</sup> PTE 180; *see also* Tr. 6159:20-6161:5.

<sup>346</sup> Tr. 2589:12-2591:1; *see also* PTE 384 (Russell’s notes of his meeting with Gold).

<sup>347</sup> Tr. 3799:15-3800:7.

<sup>348</sup> PTE 53.

<sup>349</sup> *Id.*

on good performance.”<sup>350</sup> The EPPC then revoked Ovitz’s bonus. After the revocation, Gold questioned Litvack if he had not also made a mistake as to whether Ovitz could be terminated for cause and Litvack told Gold that he was sure that he had not. Gold also contends that Litvack said his view was supported by outside counsel.<sup>351</sup> Litvack denies ever having made this representation.

After Ovitz’s bonus was rescinded, Eisner, in a December 27 letter, accelerated Ovitz’s departure date from January 31, 1997, to December 27, 1996, and Ovitz’s tenure as both an executive and director of Disney ended on that date.<sup>352</sup> Similar to the December 12 letter, this letter states that Ovitz’s termination “will for all purposes of the Employment Agreement be treated as a ‘Non-Fault Termination.’” There was no mention in this letter of Ovitz serving as a consultant to the board, however.<sup>353</sup> The letter, unlike the December 12 letter, contained specific details of Ovitz’s payout and stated Ovitz would immediately receive roughly \$38 million in cash and that the first tranche of three million options would vest immediately.<sup>354</sup> Litvack is the signatory on this letter and Ovitz cosigned. Litvack, however, testified

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<sup>350</sup> PTE 93; *see also* Tr. 2591:15-2592:2; 3797:14-3799:14.

<sup>351</sup> Tr. 3796:1-18; 6167:20-6168:14.

<sup>352</sup> PTE 14.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

that he signed the letter agreement because no one else was available to do so during the holidays and that he had no role in drafting it.<sup>355</sup>

As previously mentioned, Disney also chose to withhold \$1,000,000 of Ovitz's NFT payment "pending final settlement of [Ovitz's] accounts."<sup>356</sup> Ovitz has stated that his agreement to the holdback was a condition to "Disney honoring its contractual obligations."<sup>357</sup> Eisner, however, testified that it was common for executives at Disney to be behind on their expenses up to six months, so it made sense to holdback \$1 million in case of lingering expenses.<sup>358</sup> Besides Eisner, Litvack, and perhaps Russell, no defendant even saw the December 27 letter before it was signed.<sup>359</sup> Additionally, neither the full board nor any committee thereof met to discuss the acceleration of Ovitz's departure or the \$1 million holdback.<sup>360</sup> Shortly after Disney paid Ovitz what he was owed under the OEA for an NFT (minus the \$1 million holdback), plaintiffs filed the current action.

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<sup>355</sup> Tr. 6170:14-19; 6586:18-6587:5.

<sup>356</sup> *Id.* At the time that Eisner ordered the holdback, he did not know that Price Waterhouse would be called in to do a full audit of Ovitz's expenses. Tr. 5147:15-5150:11.

<sup>357</sup> Ovitz Post Trial Br. at 13.

<sup>358</sup> Tr. 4400:21-4402:4.

<sup>359</sup> *See, e.g.*, Bowers 336:20-24; Lozano 213:19-214:2; Mitchell 40:13-23; T. Murphy 106:14-21; Nunis 80:3-5; O'Donovan 119:23-120:4; Poitier 176:24-177:18; Stern 192:9-23; Watson 442:16-19; Wilson 125:25-126:8; Roy Disney 190:11-24.

<sup>360</sup> Tr. 3943:19-3944:22.

The full board next met on January 27, 1997. By this time, the board was aware of the negative publicity that the Ovitz termination and NFT payment had received. There was an extensive discussion of Ovitz's termination at this meeting and the pending lawsuit. Litvack, addressing the full board for the first time concerning the cause issue, notified the board that in his opinion there had been no gross negligence or malfeasance and, thus, Ovitz could not be terminated for cause.<sup>361</sup> Litvack stood by his decision at trial, stating he had learned nothing since 1996 that made him reconsider his original advice to the board that Disney could not fire Ovitz for cause.<sup>362</sup>

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<sup>361</sup> Tr. 2599:10-2600:9 (Russell) (stating that Litvack had explained about the lawsuit and that he stated that "we had acted properly and that there would not have been a basis to claim that there was good cause under the employment agreement ... with respect to the discharge of Michael Ovitz."); 4444:8-4446:12 (Eisner) (stating that the board was fully informed of all the details of Ovitz's termination and that Litvack explained the cause question "to the point that everybody was getting tired of me saying, "Okay, Sandy, say it once again. Who did you talk to? Are you sure? Did we do the right thing?"); 5936:13-5939:15 (Bowers) (stating that Litvack advised the board that there was no gross negligence or malfeasance to terminate Ovitz and that they had to pay him and that she also recalls Litvack stating that he had received outside counsel at this point); 6181:11-6183:11 (Litvack) (stating that he set out the whole Ovitz situation for the board and that he told the board that he did not believe there was gross negligence or malfeasance and hence no way to terminate Ovitz for cause) Litvack also stated that he did not recall saying that he had the advice of outside counsel, but that if he was asked he would have responded that he did. *Id.*; *see also* PTE 799.

<sup>362</sup> Tr. 6693:1-12.