**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 10 of 11

duties on behalf of the Company's shareholders while taking the actions that brought Ovitz to the Company. For the future, many lessons of what not to do can be learned from defendants' conduct here. Nevertheless, I conclude that the only reasonable application of the law to the facts as I have found them, is that the defendants did not act in bad faith, and were at most ordinarily negligent, in connection with the hiring of Ovitz and the approval of the OEA. In accordance with the business judgment rule (because, as it turns out, business judgment *was* exercised), ordinary negligence is insufficient to constitute a violation of the fiduciary duty of care. I shall elaborate upon this conclusion as to each defendant.

1. Eisner

Eisner was clearly the person most heavily involved in bringing Ovitz to the Company and negotiating the OEA. He was a long-time friend of Ovitz and the instigator and mastermind behind the machinations that resulted in Ovitz's hiring and the concomitant approval of the OEA. In that aspect, Eisner is the most culpable of the defendants. He was pulling the strings; he knew what was going on. On the other hand, at least as the duty of care is typically defined in the context of a business judgment (such as a decision to select and hire a corporate president), of all the defendants, he

was certainly the most informed of all reasonably available material information, making him the least culpable in that regard.

This dichotomy places the Court in a somewhat awkward position. By virtue of his Machiavellian (and imperial) nature as CEO, and his control over Ovitz's hiring in particular, Eisner to a large extent is responsible for the failings in process that infected and handicapped the board's decisionmaking abilities.[487] Eisner stacked his (and I intentionally write "his" as opposed to "the Company's") board of directors with friends and other acquaintances who, though not necessarily beholden to him in a legal sense, were certainly more willing to accede to his wishes and support him

---

[487] It is precisely in this context—an imperial CEO or controlling shareholder with a supine or passive board—that the concept of good faith may prove highly meaningful. The fiduciary duties of care and loyalty, as traditionally defined, may not be aggressive enough to protect shareholder interests when the board is well advised, is not legally beholden to the management or a controlling shareholder and when the board does not suffer from other disabling conflicts of interest, such as a patently self-dealing transaction. Good faith may serve to fill this gap and ensure that the persons entrusted *by shareholders* to govern Delaware corporations do so with an honesty of purpose and with an understanding of whose interests they are there to protect. In a thoughtful article, Professor Lyman Johnson has written about the richer historical and literary understanding of loyalty and care, beyond their more narrow "non-betrayal" and "process" uses in contemporary jurisprudence. Professor Johnson's description of a more expansive duty of loyalty to encompass affirmative attention and devotion may, in my opinion, fit comfortably within the concept of good faith (or vice versa) as a constituent element of the overarching concept of faithfulness. *See* Lyman P. Q. Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. LAW 27 (2003).

unconditionally than truly independent directors.[488] On the other hand, I do not believe that the evidence, considered fairly, demonstrates that Eisner actively took steps to defeat or short-circuit a decisionmaking process that would otherwise have occurred.

Eisner had demonstrated a desire to bring Ovitz to the Company before mid-1995. His efforts to actually hire Ovitz became more intense in the summer of 1995, culminating in the signing of the OLA on August 14 of that year, together with the press release issued that same day. Eisner obtained no consent or authorization from the board before agreeing to hire Ovitz, before agreeing to the substantive terms of the OLA, or before issuing

---

[488] Some of this deference may be due, at least in part, to Eisner's success at the Company's helm in the eleven years preceding these events. Tr. 4131:20-4133:1. Nevertheless, the board's collective kowtowing in regard to Ovitz's hiring is also due to Eisner's desire to surround himself with yes men. *See* 3845:20-3847:3 (Gold) (testifying that he believes that Bowers, Poitier, Stern, Watson and Mitchell are not competent as board members). As examples of Eisner's success at surrounding himself with non-employee directors who would have sycophantic tendencies: Russell was Eisner's personal attorney, Tr. 2650:10-2651:7; Mitchell was hand-selected by Eisner to serve on the board, Tr. 5627:18-5628:2, and now serves as chairman, a position which provides Mitchell with substantial remuneration worth about $500,000 annually, Tr. 5629:9-24; Reveta Bowers is an administrator of a private school in West Hollywood, California, Tr. 5901:11-5903:9, that was attended by three of Eisner's children, Tr. 5944:24-5945:8, and to which Eisner and entities related to the Company have made substantial contributions, Tr. 5945:9-5947:16; O'Donovan was president of Georgetown University from 1989 to 2001, Tr. 6710:7-6711:15, (Eisner served on Georgetown University's board of directors from 1985 to 1991, Tr. 6712:16-24) where Eisner's son attended college until 1992, Tr. 6712:16-6713:3, and to which Eisner made a $1 million donation in 1996 at O'Donovan's request, Tr. 6713:4-16.

the press release.[489] Indeed, outside of his small circle of confidantes, it appears that Eisner made no effort to inform the board of his discussions with Ovitz until after they were essentially completed and an agreement in principle had been reached.

As a general rule, a CEO has no obligation to continuously inform the board of his actions as CEO, or to receive prior authorization for those actions.[490] Nevertheless, a reasonably prudent CEO (that is to say, a reasonably prudent CEO with a board willing to think for itself and assert itself against the CEO when necessary) would not have acted in as unilateral a manner as did Eisner when essentially committing the corporation to hire a

---

[489] Nevertheless, I do not doubt that Eisner was entirely convinced that the board would support him in this decision.

[490] In a corporation of the Company's size and scope, the only logical way for the corporation to operate is that the everyday governance should be "under the direction" of the board of directors rather than "by" the board. More than twenty years ago, this Court wrote (and it is even more true today):

> A fundamental precept of Delaware corporation law is that it is the board of directors, and neither shareholders nor managers, that has ultimate responsibility for the management of the enterprise. Of course, given the large, complex organizations though which modern multi-function business corporations often operate, the law recognizes that corporate boards, comprised as they traditionally have been of persons dedicating less than all of their attention to that role, cannot themselves manage the operations of the firm, but may satisfy their obligations by thoughtfully appointing officers, establishing or approving goals and plans and monitoring performance. Thus Section 141(a) of DGCL expressly permits a board of directors to delegate managerial duties to officers of the corporation, except to the extent that the corporation's certificate of incorporation or bylaws may limit or prohibit such a delegation.

*Grimes v. Donald*, 402 A.2d 1205, 1211 (Del. Ch. 1979) (quoting *Abercrombie v. Davies*, 123 A.2d 893, 899 (Del. Ch. 1956)), *aff'd sub nom. Harrison v. Chapin*, 415 A.2d 1068 (Del. 1980).

second-in-command, appoint that person to the board, and provide him with one of the largest and richest employment contracts ever enjoyed by a non-CEO. I write, "essentially committing," because although I conclude that legally, Ovitz's hiring was not a "done deal" as of the August 14 OLA,[491] it was clear to Eisner, Ovitz, and the directors who were informed, that as a practical matter, it certainly was a "done deal."[492]

After August 14, the record seems to indicate that Eisner's role in Ovitz's hiring lessened, as Russell continued the substantive negotiations with Ovitz while Santaniello worked on drafting the OEA. Eisner did not attend the portion of the compensation committee meeting on September 26 where Ovitz's hiring and the key terms of the OEA were discussed and voted upon,[493] but he did lead the discussion in the full board meeting that same day with respect to Ovitz's election as President of the Company.[494]

---

[491] The OLA's opening paragraph stated, "This will confirm our arrangement under which you will become employed by [the Company]. *Subject to the formal approval of the Company's Board of Directors and its Compensation Committee*, we have agreed that . . . ." PTE 60 at DD002932 (emphasis added). The footnote in the summary judgment opinion in this case, *Disney III*, 2004 WL 2050138, at *6 n.54, that Ovitz was likely legally bound by the OLA as of October 1, 1995, is not contradicted by my conclusion here that the Company was not legally bound until at least September 26, 1995.

[492] Tr. 2807:13-23; 3572:3-23; 3708:7-17; 6827:8-19; 7693:24-7694:6; 8198:5-21.

[493] PTE 39 at WD01170.

[494] PTE 29 at WD01196.

Eisner's involvement in the final stages of drafting and executing the OEA were minimal.

Because considerations of improper motive are no longer present in this case,[495] the decision to hire Ovitz and enter into the OEA is one of business judgment, to which the presumptions of the business judgment rule apply. In order to prevail, therefore, plaintiffs must demonstrate by a preponderance of the evidence that Eisner was either grossly negligent or acted in bad faith in connection with Ovitz's hiring and the approval of the OEA.

As I mentioned earlier, Eisner was very much aware of what was going on as the situation developed. In the limited instances where he was not the primary source of information relating to Ovitz, Russell kept Eisner informed of negotiations with Ovitz. Eisner knew Ovitz; he was familiar with the career Ovitz had built at CAA and he knew that the Company was in need of a senior executive, especially in light of the upcoming CapCities/ABC merger. In light of this knowledge, I cannot find that plaintiffs have demonstrated by a preponderance of the evidence that Eisner

---

[495] *See Brehm*, 746 A.2d at 257-58 & n.42 (holding "that the Complaint fails to create a reasonable doubt that Eisner was disinterested in the [OEA]," and concluding that further inquiry into the independence of the other directors would be unnecessary, and that plaintiffs would not be permitted to relitigate this claim after amending the complaint).

failed to inform himself of all material information reasonably available or that he acted in a grossly negligent manner.

Notwithstanding the foregoing, Eisner's actions in connection with Ovitz's hiring should not serve as a model for fellow executives and fiduciaries to follow. His lapses were many. He failed to keep the board as informed as he should have. He stretched the outer boundaries of his authority as CEO by acting without specific board direction or involvement. He prematurely issued a press release that placed significant pressure on the board to accept Ovitz and approve his compensation package in accordance with the press release. To my mind, these actions fall far short of what shareholders expect and demand from those entrusted with a fiduciary position. Eisner's failure to better involve the board in the process of Ovitz's hiring, usurping that role for himself, although not in violation of law,[496] does not comport with how fiduciaries of Delaware corporations are expected to act.

Despite all of the legitimate criticisms that may be leveled at Eisner, especially at having enthroned himself as the omnipotent and infallible monarch of his personal Magic Kingdom, I nonetheless conclude, after

---

[496] Eisner's authority to take these actions was not restricted in any way by statute, the Company's certificate of incorporation, bylaws, or a board resolution.

carefully considering and weighing all the evidence, that Eisner's actions were taken in good faith. That is, Eisner's actions were taken with the subjective belief that those actions were in the best interests of the Company—he believed that his taking charge and acting swiftly and decisively to hire Ovitz would serve the best interests of the Company notwithstanding the high cost of Ovitz's hiring and notwithstanding that two experienced executives who had arguably been passed over for the position (Litvack and Bollenbach) were not completely supportive.[497] Those actions do not represent a knowing violation of law or evidence a conscious and intentional disregard of duty. In conclusion, Eisner acted in good faith and did not breach his fiduciary duty of care because he was not grossly negligent.

2. Russell

Apart from Eisner, Russell, who was familiar with the Company's compensation policies and practices from his service as chairman of the Company's compensation committee, was the next most heavily involved director in hiring Ovitz, as he was the main negotiator on behalf of the

[497] Eisner's stellar track record as the Company's Chairman and CEO over the preceding eleven years (from 1984 to 1995) bolsters his belief that his decisions generally benefit the Company and its shareholders.

Company.[498] Russell was also closely involved with Watson and Crystal in shaping and extensively analyzing Ovitz's proposed compensation.[499] Russell spoke to Poitier on two occasions in mid-August 1995 to discuss the terms of Ovitz's compensation, and he knew that Watson would speak with Lozano.[500] Additionally, on September 26, 1995, Russell led the discussion at the compensation committee meeting regarding the proposed terms for the OEA, and then reported on that meeting during the full board meeting shortly thereafter.[501]

The compensation committee's charter indicates that the committee has the power to "establish the salaries" of the Company's CEO and COO/ President, together with benefits and incentive compensation, including stock options, for those same individuals.[502] In addition to this power, the committee's charter charges it with the duty to "approve employment contracts, or contracts at will," for "all corporate officers who are members of the Board of Directors regardless of salary."[503]

---

[498] Tr. 2314:20-2384:13; 2391:9-2516:8.

[499] Tr. 2425:14-2435:4; 2441:10-2445:16; 2453:5-2476:14; 2485:22-2502:17.

[500] Tr. 2445:12-2451:19; 2453:5-18.

[501] PTE 39 at WD01170; PTE 29 at WD01197; Tr. 2517:7-2536:23.

[502] PTE 187 (charter as of May 1, 1993); PTE 465 (essentially duplicative of PTE 187); PTE 47 (charter as of Jan. 19, 1996).

[503] PTE 187; PTE 47.

Plaintiffs have argued that Russell exceeded the scope of his authority as chairman of the compensation committee by negotiating with Ovitz on behalf of the Company.[504] Although it is true that nothing in the compensation committee's charter specifically grants authority to the committee to negotiate (as opposed to simply approve) employment contracts, there is no language in the charter that would indicate that the committee does not have this power. Indeed, the contrary appears to be the case. The charter distinguishes between "establish[ing]" salaries for the CEO and COO/President and "approv[ing]" salaries for those individuals, together with many others.[505]

---

[504] *See* Tr. 2676:11-2678:19. Although it would have been ideal if the other members of the compensation committee were more substantively involved in those negotiations, it would certainly be unwieldy as a practical matter to require the entire committee, together and as a whole, to negotiate on the Company's behalf.

[505] PTE 187; PTE 47. The very definition of "establish" contemplates some form of negotiation or molding where "approve" does not. Black's defines establish as including the following definitions:

> . . . To make or form; . . . To found, to create, to regulate . . . .
>
> . . . .
>
> To bring into being; to build; to constitute; to create; to erect; to form; to found; to found and regulate, to institute, to locate, to make; to model; to organize; to originate; to prepare; to set up.

BLACK'S LAW DICTIONARY 642-43 (Rev. 4th ed. 1968). Approve is defined as "[t]o be satisfied with; to confirm, ratify, sanction, or consent to some act or thing done by another; to sanction officially; to ratify; to confirm . . . ." *Id.* at 132. These definitions lead me to believe that it would be perfectly reasonable for Russell and others to believe that it was appropriate for the compensation committee to negotiate with Ovitz the terms of his employment. Nevertheless, Russell did testify that it was not normally the compensation committee's role to negotiate. Tr. 2906:6-2907:10.

In negotiating with Ovitz, Russell became privy to a great deal of information with respect to Ovitz. Ovitz's representatives relayed some of that information to Russell. General information about Ovitz also was common knowledge to those in the entertainment industry. Russell did not independently and objectively verify the representations made by Ovitz's negotiators that his income from CAA was $20 to $25 million annually because Russell, based upon his pre-existing knowledge, believed that representation to be accurate.[506] Nonetheless, I conclude that Russell negotiated with Ovitz at arms' length.

Would the better course of action have been for Russell to have objectively verified Ovitz's income from CAA? Undoubtedly, yes. Would it have been better if Russell had more rigorously investigated Ovitz's background in order to uncover his past troubles with the Department of Labor?[507] Yes. Would the better course of action have been for someone other than Eisner's personal attorney to represent the Company in the negotiations with Ovitz? Again, yes. Have plaintiffs shown by a preponderance of the evidence that Russell's actions on behalf of the

---

[506] Tr. 2352:3-2363:13; 2402:6-21; 2755:2-2757:10.

[507] *See* PTE 151 at DD000460. This article reports that the news of Ovitz's problems with the Department of Labor, although reported publicly, was swept under the rug by the press, essentially making that information less reasonably available to Russell. *See also* PTE 8 at DD002131.

Company were *grossly* negligent (in that he failed to inform himself of all material information *reasonably* available in making decisions) or that he acted in bad faith? No. I conclude that Russell for the most part knew what he needed to know, did for the most part what he was required to do, and that he was doing the best he thought he could to advance the interests of the Company by facilitating a transaction that would provide a legitimate potential successor to Eisner and provide the Company with one of the entertainment industry's most influential individuals.

3. Watson

Watson's main role in Ovitz's hiring and his election as President of the Company was helping Russell evaluate the financial ramifications of the OEA.[508] Watson is a past Chairman of the Company's board, and served in that position when Eisner and Wells were hired in 1984.[509] Watson was familiar with Crystal, having worked with him on Eisner's and Wells' contracts in 1984 and again in 1989.[510]

Watson conducted extensive analyses of Ovitz's proposed compensation package, sharing those analyses with Crystal and Russell at

---

[508] Tr. 7822:1-7823:7. Russell phoned Watson on several occasions beginning on August 2, 1995. *See* DTE 120 at WD07493-95.

[509] Tr. 7803:8-7813:6.

[510] Tr. 7825:18-7827:8.

their meeting on August 10, and in their later discussions stemming from that meeting.[511] He was also involved in determining how to replace the proposed option guarantee with the extended exercisability of Ovitz's options (together with other features).[512] He also spoke with Lozano (although the date is unclear) sometime before the September 26, 1995 compensation committee meeting in order to inform him somewhat of his and Russell's analyses and discussions.[513] Watson attended the September 26, 1995 compensation committee meeting and voted in favor of the resolution approving the terms of the OEA.[514]

Watson was familiar with making executive compensation decisions at the Company. Nothing in his conduct leads me to believe that he took an "ostrich-like" approach to considering and approving the OEA. Nothing in his conduct leads me to believe that Watson consciously and intentionally disregarded his duties to the Company. Nothing in his conduct leads me to believe that Watson had anything in mind other than the best interests of the Company when evaluating and consenting to Ovitz's compensation package. Finally, nothing in his conduct leads me to believe that Watson failed to

---

[511] Tr. 7827:17-7829:15.

[512] Tr. 7836:5-7846:2.

[513] Tr. 7833:11-7834:2; 8082:12-8088:9.

[514] PTE 39 at WD01170.

inform himself of all material information reasonably available before making these decisions. In short, I conclude that plaintiffs have not demonstrated by a preponderance of the evidence that Watson either breached his fiduciary duty of care or acted in anything other than good faith in connection with the hiring of Ovitz and the approval of the economic terms of the OEA.

4. Poitier and Lozano

Poitier and Lozano were the remaining members of the compensation committee that considered the economic terms of the OEA. It is not disputed that they were far less involved in the genesis of the OEA than were Russell, and to a lesser extent, Watson. The question in dispute is whether their level of involvement in the OEA was so low as to constitute gross negligence and, therefore, a breach of their fiduciary duty of care, or whether their actions evidence a lack of good faith. As will be shown, I conclude that neither of these men acted in a grossly negligent manner or in bad faith.

Poitier is a man celebrated for his work both within and outside the entertainment industry.[515] Poitier was elected to the Company's board of directors in 1994, and attended his first board meeting during January of

[515] *See* Tr. 7101:19-7116:20; 7118:8-7119:8; 7122:1-7123:5.

1995.[516] Lozano was the publisher of the nation's largest Spanish language daily newspaper, is the former chairman of the board of that entity, and also served as the United States' ambassador to El Salvador.[517] Lozano had a long tenure on the Company's board of directors, serving from the early 1980s until 2001.[518] Lozano also has experience on the compensation committees of other corporations.[519]

There is no question that Poitier and Lozano's involvement in the process of Ovitz's hiring came very late in the game. As found above, Poitier received a call from Russell on August 13 (and another the next day), during which they discussed the terms of the proposed OLA.[520] Lozano spoke with Watson regarding this same subject. It appears that neither Poitier nor Lozano had any further involvement with the hiring process, apart from these phone calls, until the September 26, 1995 compensation committee meeting.

At that meeting, both Poitier and Lozano received the term sheet that explained the key terms of Ovitz's contract, and they were present for and participated in the discussion that occurred. Both then voted to approve the

---

[516] Tr. 7123:6-7124:15.
[517] *See* Tr. 7623:5-7624:14.
[518] Tr. 7624:15-7625:3; 7628:3-7.
[519] Tr. 7628:11-15.
[520] *See* Tr. 2445:22-2447:13.

terms of the OEA, and both credibly testified that they believed they possessed sufficient information at that time to make an informed decision.[521] Plaintiffs largely point to two perceived inadequacies in this meeting (and in Poitier and Lozano's business judgment)[522]—first, that insufficient time was spent reviewing the terms of Ovitz's contract and, second, that Poitier and Lozano were not provided with sufficient documentation, including Crystal's correspondence, Watson's calculations, and a draft of the OEA.[523] These arguments understandably hearken back to *Van Gorkom*, where the Supreme Court condemned the Trans Union board for agreeing to a material transaction after a board meeting of about two

---

[521] Tr. 7136:23-7137:3; 7634:18-23; 7636:2-10.

[522] Because I have rejected plaintiffs' argument that Ovitz's hiring was legally a "done deal" as of August 14, 1995 because the OLA was expressly subject to the approval of the board and compensation committee, the amount of contact that Poitier and Lozano did or did not have with Russell and Watson before September 26, 1995, is immaterial. *But see Van Gorkom*, 488 A.2d at 884 (concluding that Trans Union's press release of October 9, *together with* the amendments to the merger agreement executed October 10, "had the clear effect of locking Trans Union's Board into the Pritzker Agreement"). Poitier and Lozano made a decision on September 26, 1995 when they voted to approve the terms of his contract. As a result, their level of knowledge or involvement before that date is only relevant insofar as it informs the Court as to their accumulated knowledge on September 26, 1995, when the business judgment was made. For this reason, it is also irrelevant that Poitier and Lozano did not attend the meeting between Russell, Watson and Crystal on August 10; nor is their failure to attend the meeting (or even be invited) evidence that Russell or Watson were shirking their duties by working by themselves without the other two members of the committee. Certainly the more ideal scenario would have been for Poitier and Lozano to have been both better qualified and more involved, but again, defendants' conduct is not measured against the best practices of corporate governance.

[523] The upcoming discussion would apply with equal force to Russell and Watson, and the conclusions made herein are implicit in the conclusions reached above with regard to their actions.

hours and without so much as a term sheet of the transaction as contemplated.[524] Although the parallels between *Van Gorkom* and this case at first appear striking, a more careful consideration will reveal several important distinctions between the two.

First and foremost, the nature of the transaction in *Van Gorkom* is fundamentally different, and orders of magnitude more important, than the transaction at issue here. In *Van Gorkom*, the Trans Union board was called into a special meeting on less than a day's notice, without notice of the reason for the meeting, to consider a merger agreement that would result in the sale of the entire company.[525] As footnoted above,[526] Delaware law, *as a matter of statute*, requires directors to take certain actions in connection with a merger of the corporation, as was being contemplated by Trans Union.[527] No statute required the Company's board to take action in connection with Ovitz's hiring. The Company's governing documents provide that the officers of the corporation will be selected by the board of directors,[528] and

---

[524] 488 A.2d at 868-69 (the board meeting lasted "about two hours," the board's decision was solely based upon oral statements and presentations, and copies of the proposed merger agreement were not available). Those oral representations and presentations were materially misleading and not consistent with the executed merger agreement. *Id.* at 870, 875, 879-80.

[525] *Id.* at 867.

[526] *See supra* note 460.

[527] *See* 8 *Del. C.* § 251(b).

[528] DTE 184 at Article Tenth; PTE 1 at Article Tenth; DTE 185 at Article Tenth.

the charter of the compensation committee states that the committee is responsible for establishing and approving the salary of the Company's President.[529] That is exactly what happened.[530] The board meeting was not called on short notice, and the directors were well aware that Ovitz's hiring would be discussed at the meeting as a result of the August 14 press release more than a month before.[531] Furthermore, analyzing the transactions in terms of monetary value, and even accepting plaintiffs' experts' bloated valuations for comparison purposes, it is beyond question that the $734 million sale[532] of Trans Union was material and significantly larger than the financial ramifications to the Company of Ovitz's hiring.[533]

---

[529] PTE 187; PTE 47.

[530] PTE 39 at WD01170; PTE 29 at WD01196.

[531] The directors were also aware generally that, for some time, the Company had been looking for an executive to replace Wells.

[532] 13,357,758 shares outstanding, multiplied by $55 per share. 488 A.2d at 864, 869. The reader should bear in mind that the $734 million figure is a nominal one almost twenty-five years old—expressed in 1995 dollars, that number would be higher.

[533] Eisner's decision to enter into the OLA with Ovitz, and the compensation committee's later decision to approve the economic terms of the OEA on September 26, 1995, have to be understood in context. In fiscal 1996, the Company had almost $19 billion in revenues, and more than $3 billion in operating income. PTE 442 at WD02085. Roth, below both Eisner and Ovitz in the chain of command, had authority to budget the development and marketing of feature films, apparently without prior authorization from Eisner, Ovitz or the board. *See supra* note 149. According to a contemporary memorandum written by Eisner, an average live-action feature film cost $33 million to develop and another $19 million to market and distribute, for a total cost of $52 million per film. PTE 558 at WD08652. Disney had budgeted thirty such live-action feature films for fiscal 1996, though Eisner expected that number to decline by one-third in the coming years. *Id.*; PTE 587 at WD10772. Eisner also believed that Roth was responsible for losses of $60 million attributable only to three films, and that his expenditures were $90 million "more than what was prudent." PTE 67 at

Second, the Trans Union board met for about two hours to discuss and deliberate on this monumental transaction in the life of Trans Union. A precise amount of time for the length of the compensation committee meeting, and more specifically, the length of the discussion regarding the OEA, is difficult to establish. The minutes of the compensation committee's meeting and the full board's meeting indicate that the compensation committee meeting convened at 9:00 a.m., and that the full board's meeting c onvened at 10:00 a.m., leaving no more than an hour for the compensation committee to meet.[534] Lozano, although he had little recollection of the meeting, believed that the compensation committee meeting ran long—until 10:30 a.m.[535] As I found above, the meeting lasted about an hour. Russell testified that the discussion of the OEA took about 25-30 minutes,[536] significantly more time than the brief discussion reflected in the minutes

---

DD002980; *see* PTE 587 at WD10767 (two box office failures alone resulted in a $45 million negative variance to profit forecasts). The big-budget summer blockbuster, *The Rock*, was expected to cost $122.9 million ($67 million in development, and another $55.9 million in distribution and marketing), and *Ransom*, to be released just two weeks after *The Rock*, was expected to cost $126 million ($68.6 million in production, and $57.4 in distribution and marketing). *Id.* at WD10772. Between these two motion pictures alone, Roth had the authority to spend almost $250 million, with an expected profit of ten percent. *Id.* If Roth had this much authority, the proposition that Eisner, the Company's chief executive officer, entered into the OLA without prior board authorization, or that the compensation committee approved Ovitz's contract based upon a term sheet and upon less than an hour of discussion, seems eminently reasonable given the OEA's (relatively small) economic size.

[534] PTE 29 at WD01194; PTE 39 at WD01167; Tr. 7188:17-7211:3.

[535] Tr. 7641:16-7642:2; 7714:12-24.

[536] Tr. 2857:10-2863:18.

would seem to indicate.[537] Lozano believed that the committee spent "perhaps four times as much time on Mr. Ovitz's contract than we did on Mr. Russell's compensation."[538]

I am persuaded by Russell and Lozano's recollection that the OEA was discussed for a not insignificant length of time.[539] Is that length of time markedly less than the attention given by the Trans Union board to the merger agreement they were statutorily charged with approving or rejecting? Yes. Is that difference probative on the issue of whether the compensation committee adequately discussed the OEA? Not in the least. When the Trans Union board met for those two hours, it was the very first time any of those directors had discussed a sale of the company.[540] Here, all the members of the committee were aware in advance that Ovitz's hiring would be discussed, and the members of the committee had also previously had more than minimal informal discussions amongst themselves as to the *bona fides* of the OEA before the meeting ever occurred. Furthermore, as mentioned above, the nature and scope of the transactions are fundamentally different.

---

[537] Tr. 2535:10-2536:23; 2838:8-2851:2; 2854:16-2857:4.

[538] Tr. 7638:13-22.

[539] It would have been extremely helpful to the Court if the minutes had indicated in any fashion that the discussion relating to the OEA was longer and more substantial than the discussion relating to the myriad of other issues brought before the compensation committee that morning.

[540] *See* 488 A.2d at 875.