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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE THE WALT DISNEY COMPANY DERIVATIVE LITIGATION,	:	
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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 11 of 11

Third, the Trans Union board had absolutely no documentation before it when it considered the merger agreement.[541] The board was completely reliant on the misleading and uninformed presentations given by Trans Union's officers (Van Gorkom and Romans).[542] In contrast, the compensation committee was provided with a term sheet of the key terms of the OEA and a presentation was made by Russell (assisted by Watson), who had personal knowledge of the relevant information by virtue of his negotiations with Ovitz and discussions with Crystal. Additionally, the testimony and documentary evidence support this conclusion.[543] It is true that the compensation committee did not review and discuss the then-existing draft of the full text of the OEA. This, however, is not required.[544] Nor is it necessary for an expert to make a formal presentation at the committee meeting in order for the board to rely on that expert's analysis, although that certainly would have been the better course of action.[545]

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[541] *Id.*

[542] *Id.* at 874-78.

[543] *But see id.* at 878-80 (defendants' testimony that the availability of a "market test" had been discussed was negated by their inability to produce and identify the original merger agreement and that the minutes of the meeting contained no reference to a discussion of Trans Union's right to a market test; defendants' testimony that they relied on counsel was negated by the failure of that counsel to testify, even though his firm participated in the defense).

[544] *See id.* at 883 n.25.

[545] In *Van Gorkom*, the Trans Union board did not invite the company's investment banker, Salomon Brothers, to attend the board meeting, and Van Gorkom instead had

Furthermore, the Company's compensation committee reasonably and wisely left the task of negotiating and drafting the actual text of the OEA in the hands of the Company's counsel.[546]

Fourth, Trans Union's senior management completely opposed the merger.[547] In contrast, the Company's senior management generally saw Ovitz's hiring as a boon for the Company, notwithstanding Litvack and Bollenbach's initial personal feelings.[548] In sum, although Poitier and Lozano did very little in connection with Ovitz's hiring and the compensation committee's approval of the OEA, they did not breach their fiduciary duties. I conclude that they were informed by Russell and Watson of all *material* information reasonably available, even though they were not privy to every conversation or document exchanged amongst Russell, Watson, Crystal and Ovitz's representatives.

Much has been made throughout the various procedural iterations of this case about Crystal's involvement (or lack thereof) in the compensation

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Trans Union's chief financial officer state that the $55 per share figure was "'in the range of a fair price'" but also that "his studies did not indicate either a fair price for the stock or a valuation of the Company [and] that he did not see his role as directly addressing the fairness issue." *Id.* at 867-68.

[546] *See* Tr. 2530:16-2531:14; 7847:9-7848:15.

[547] *Van Gorkom*, 488 A.2d at 867-68.

[548] *See* Tr. 5276:3-5277:12 (Bollenbach); 5802:14-5804:12 (Nunis); 6040:20-6041:21 (Litvack); 6051:4-6052:9 (Litvack).

committee's deliberations and decisionmaking.[549] Although there are many criticisms that could and have been made (including by Crystal himself) regarding Crystal's failure to calculate *ex ante* the cost of a potential NFT, nothing in the record leads me to conclude that any member of the compensation committee had actual knowledge that would lead them to believe (as to Poitier and Lozano, their understanding of Crystal's advice was based on information relayed by Russell and Watson) that Crystal's analysis was inaccurate or incomplete. Without that knowledge, I conclude that the compensation committee acted in good faith and relied on Crystal in good faith, and that the fault for errors or omissions in Crystal's analysis must be laid at his feet, and not upon the compensation committee.

The compensation committee reasonably believed that the analysis of the terms of the OEA was within Crystal's professional or expert competence, and together with Russell and Watson's professional competence in those same areas, the committee relied on the information, opinions, reports and statements made by Crystal, even if Crystal did not relay the information, opinions, reports and statements in person to the committee as a whole. Crystal's analysis was not so deficient that the

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[549] *See Brehm*, 746 A.2d at 259-62.

compensation committee would have reason to question it.[550] Furthermore, Crystal appears to have been selected with reasonable care, especially in light of his previous engagements with the Company in connection with past executive compensation contracts that were structurally, at least, similar to the OEA. For all these reasons, the compensation committee also is entitled to the protections of 8 *Del. C.* § 141(e) in relying upon Crystal.

Viewed objectively, the compensation committee was asked to make a decision knowing that:[551] 1) Ovitz was a third party with whom Russell negotiated at arms' length;[552] 2) regardless of whether Ovitz truly was "the most powerful man in Hollywood," he was a highly-regarded industry figure;[553] 3) Ovitz was widely believed to possess skills and experience that would be very valuable to the Company, especially in light of the

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[550] Although Crystal testified that he viewed his role as nothing more than a "high-priced calculator," nothing in the record suggests the compensation committee placed such a restriction on Crystal's work or analysis of the OEA. *See* Tr. 3581:12-3582:11; PTE 214 at DD001388. In the parts of the record just cited, Crystal laments that the compensation committee did not follow his recommendations. I believe it is important to understand that the compensation committee relied in good faith on Crystal's report and analysis even though they chose not to follow Crystal's recommendations to the letter. The role of experts under § 141(e) is to assist the board's decisionmaking—not supplant it. An interpretation of § 141(e) that would require boards to follow the advice of experts (substantially? completely? in part?) before being able to claim reliance on those experts would be in conflict with the mandate in § 141(a) that the corporation is to be managed "by or under the direction of a board of directors."

[551] These factors were also known to the board generally when they elected Ovitz to the Company's presidency.

[552] Tr. 7638:23-7639:20.

[553] Tr. 7127:4-20.

CapCities/ABC acquisition, Wells' death, and Eisner's medical problems;[554] 4) in order to accept the Company's presidency, Ovitz was leaving and giving up his very successful business,[555] which would lead a reasonable person to believe that he would likely be highly successful in similar pursuits elsewhere in the industry;[556] 5) the CEO and others in senior management were supporting the hiring;[557] and 6) the potential compensation was not economically material to the Company.[558]

Poitier and Lozano did not intentionally disregard a duty to act, nor did they bury their heads in the sand knowing a decision had to be made. They acted in a manner that they believed was in the best interests of the corporation. Delaware law does not require (nor does it prohibit) directors to take as active a role as Russell and Watson took in connection with Ovitz's hiring. There is no question that in comparison to those two, the actions of Poitier and Lozano may appear casual or uninformed, but I conclude that they did not breach their fiduciary duties and that they acted in good faith in connection with Ovitz's hiring.[559]

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[554] Tr. 7628:19-7630:23.

[555] Tr. 7639:21-7640:3.

[556] Tr. 7127:21-7129:18.

[557] *See supra* note 548.

[558] *See* Tr. 6828:15-6829:23.

[559] Furthermore, the compensation committee did not commit a later breach of fiduciary duty nor act in bad faith (or fail to act in good faith) when the final version of the OEA

5. The Remaining Members of the Old Board[560]

In accordance with the compensation committee's charter, it was that committee's responsibility to establish and approve Ovitz's compensation arrangements.[561] In accordance with the OLA and the Company's certificate of incorporation,[562] it was the full board's responsibility to elect (or reject) Ovitz as President of the Company.[563] Plaintiffs' argument that the full

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was executed without their approval. The resolution passed on September 26, 1995 clearly contemplated that some details had yet to be decided, *see* PTE 39 at WD01170, and as I concluded on Ovitz's motion for summary judgment, no material changes to the OEA were made during Ovitz's tenure as President. *See Disney III*, 2004 WL 2050138, at *4-6; *cf. Van Gorkom*, 488 A.2d at 883-84 (Van Gorkom executed the amendment to the merger agreement in a manner both inconsistent with the authorization given him by the board and detrimental to Trans Union's interests).

[560] The remaining members of the Old Board are: Bollenbach, Litvack, Roy Disney, Nunis, Stern, Walker, O'Donovan, Murphy, Gold, Bowers, Wilson and Mitchell. Even though Bollenbach, Litvack and seemingly Roy Disney were officers of the Company, in electing Ovitz to be President, they were acting in a function that was exclusively directoral according to the Company's certificate of incorporation and, as such, their status as officers is irrelevant. *See* DTE 69 at Article IV, Section 1 (bylaws as of April 26, 1993); PTE 497 at Article IV, Section 1 (bylaws as of April 25, 1994); PTE 2 at Article IV, Section 1 (bylaws as of September 20, 1995); PTE 46 at WD00415 (exhibit to resolution electing officers of the Company on January 22, 1996); PTE 498 at Article IV, Section 1 (bylaws as of April 22, 1996).

[561] *See supra* note 529.

[562] *See* PTE 33; *supra* note 528.

[563] Plaintiffs argue that the nominating committee (Gold, Bowers, Wilson and Mitchell) shirked their duties related to that committee in connection with the OEA approval. The nominating committee's duties and powers include the duty to "[d]evelop and review background information about candidates for director and make recommendations with respect thereto to the Board." PTE 563 at WD08721 (charter as of January 1996, but the charter of that date expressly states that it is "based upon the existing Charter of The Walt Disney Company's Nominating Committee"). *See* DTE 182 at 13 (containing similar language); PTE 47 at WD01212-13 (board minutes approving the charter found in PTE 563 although the charter is not part of PTE 47). This argument is irrelevant for three reasons. First, the August 14 press release indicates

board had a duty and responsibility to independently analyze and approve the OEA is simply not supported by the record. As a result, the directors' actions must be analyzed in the context of whether they properly exercised their business judgment and acted in accordance with their fiduciary duties when they elected Ovitz to the Company's presidency.

The record gives adequate support to my conclusion that the directors, before voting, were informed of who Ovitz was, the reporting structure that Ovitz had agreed to and the key terms of the OEA. Again, plaintiffs have failed to meet their burden to demonstrate that the directors acted in a grossly negligent manner or that they failed to inform themselves of all material information reasonably available when making a decision. They

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that Ovitz would be nominated to the Company's board, but the OLA does not bind the Company to nominate Ovitz or guarantee him a seat on the board. *See* PTE 3; PTE 33; *see also* PTE 7 at ¶ 2 (OEA requires the Company to nominate Ovitz), ¶ 12(a) (Ovitz allowed to terminate the OEA if not retained as President and a director). Second, Ovitz was not actually nominated to the board on September 26, 1995 (nor were the directors under a duty to do so) and, therefore, any failure on the committee's part to meet or for the members of that committee to inform themselves of Ovitz's credentials for being nominated as a director before that date is irrelevant. *See* PTE 29; PTE 39. Third, even if I were to give credence to this argument, and even if it were to prevail, the damages relating to this breach would be zero. Any harm the Company suffered as a result of the OEA stems from Ovitz as an employee/officer. As an insider, Ovitz received no compensation for attending board meetings. Plaintiffs have pointed to nothing relating to Ovitz's status as a director that would allow them to recover based on his actions *qua* director. For these reasons, the nominating committee's actions (or inaction) are not relevant to the instant inquiry. *See* Pre-Trial Stipulation and Order at 7-8 (Plaintiffs' Statement of Issues of Law and Fact to be Litigated is limited to "OEA Approval Violations" and "Ovitz's Receipt of a Full NFT Payout" and is silent as to Ovitz as a director or the nominating committee's role in his becoming a director).

did not intentionally shirk or ignore their duty, but acted in good faith, believing they were acting in the best interests of the Company.

Are there many aspects of Ovitz's hiring that reflect the absence of ideal corporate governance? Certainly, and I hope that this case will serve to inform stockholders, directors and officers of how the Company's fiduciaries underperformed. As I stated earlier, however, the standards used to measure the conduct of fiduciaries under Delaware law are not the same standards used in determining good corporate governance. For all the foregoing reasons, I conclude that none of the defendants breached their fiduciary duties or acted in anything other than good faith in connection with Ovitz's hiring, the approval of the OEA, or his election to the Company's presidency.

D. Eisner and Litvack Did Not Act in Bad Faith in Connection With Ovitz's Termination, and the Remainder of the New Board Had No Duties in Connection Therewith

The New Board[564] was likewise charged with complying with their fiduciary duties in connection with any actions taken, or required to be taken, in connection with Ovitz's termination. The key question here becomes whether the board was under a duty to act in connection with

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[564] The New Board consisted of Eisner, Ovitz, Roy Disney, Gold, Litvack, Nunis, Poitier, Russell, Stern, Walker, Watson, Wilson, Bowers, Lozano, Mitchell, O'Donovan and Murphy.

Ovitz's termination, because if the directors were under no duty to act, then they could not have acted in bad faith by not acting, nor would they have failed to inform themselves of all material information reasonably available before making a decision, because no decision was required to be made. Furthermore, the actions taken by the Company's officers (namely Eisner and Litvack) in connection with Ovitz's termination must be viewed through the lens of whether the board was under a duty to act. If the board was under no such duty, then the officers are justified in acting alone. If the board was under a duty to act and the officers improperly usurped that authority, the analysis would obviously be different.

1. The New Board Was Not Under a Duty to Act

Determining whether the New Board was required to discuss and approve Ovitz's termination requires careful consideration of the Company's governing instruments. The parties largely agree on the relevant language from the Company's certificate of incorporation and bylaws, but as would be expected, they disagree as to the meaning of that language.[565] Article Tenth of the Company's certificate of incorporation states:

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[565] The parties are also in agreement as to the particular versions of the certificate of incorporation (DTE 185) and bylaws (PTE 498) that were in effect at the time of Ovitz's termination.

> The officers of the Corporation shall be chosen in such a manner, shall hold their offices for such terms and shall carry out such duties as are determined solely by the Board of Directors, subject to the right of the Board of Directors to remove any officer or officers at any time with or without cause.[566]

The Company's bylaws state at Article IV:

> Section 1. General. The officers of the Corporation shall be chosen by the Board of Directors and shall be a Chairman of the Board of Directors (who must be a director), a President, a Secretary and a Treasurer.
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> . . . .
>
> Section 2. Election. The Board of Directors at its first meeting held after each Annual Meeting of stockholders shall elect the officers of the Corporation who shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time solely by the Board of Directors, which determination may be by resolution of the Board of Directors or in any bylaw provision duly adopted or approved by the Board of Directors; and all officers of the Corporation shall hold office until their successors are chosen and qualified, or until their earlier resignation or removal. Any officer elected by the Board of Directors may be removed at any time by the Board of Directors with or without cause. Any vacancy occurring in any office of the Corporation may be filled only by the Board of Directors.
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> Section 3. Chairman of the Board of Directors. The Chairman of the Board of Directors shall be the Chief Executive Officer of the Corporation, shall preside at all meetings of the Board of Directors and of stockholders and shall, subject to the provisions of the Bylaws and the control of the Board of Directors, have general and active management, direction, and supervision over the business of the Corporation

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[566] DTE 185 at Article Tenth; *see* 8 *Del. C.* § 142.

> and over its officers. . . . He shall perform all duties incident to the office of chief executive and such other duties as from time to time may be assigned to him by the Board of Directors. He shall have the right to delegate any of his powers to any other officer or employee.
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> Section 4. President. The President shall report and be responsible to the Chairman of the Board. The President shall have such powers and perform such duties as from time to time may be assigned or delegated to him by the Board of Directors or are incident to the office [of] President.[567]

Other relevant language comes from the board resolution that elected Ovitz as President, which states: "RESOLVED, that Michael S. Ovitz be, and hereby is, elected President of the Corporation, effective October 1, 1995, to serve in such capacity at the pleasure of this Board of Directors."[568]

Having considered these documents, I come to the following conclusions: 1) the board of directors has the sole power to elect the officers of the Company; 2) the board of directors has the sole power to determine the "duties" of the officers of the Company (either through board resolutions or bylaws); 3) the Chairman/CEO has "general and active management, direction, and supervision over the business of the Corporation and over its officers,"[569] and that such management, direction and supervision is subject to the control of the board of directors; 4) the Chairman/CEO has the power

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[567] PTE 498 at WD07100-01.

[568] PTE 29 at WD01196.

[569] PTE 498 at WD07101.

to manage, direct and supervise the lesser officers and employees of the Company; 5) the board has the *right*, but not the *duty* to remove the officers of the Company with or without cause, and that right is non-exclusive; and 6) because that right is non-exclusive, and because the Chairman/CEO is affirmatively charged with the management, direction and supervision of the officers of the Company, together with the powers and duties incident to the office of chief executive, the Chairman/CEO, subject to the control of the board of directors,[570] also possesses the *right* to remove the inferior officers and employees of the corporation.[571]

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[570] Care should be taken to not read too much into the phrase, "subject to the control of the board of directors," as this "restriction" is simply a reflection of basic agency principles, and not a limitation on the powers and authority that would otherwise be incident to the office of chief executive. A chief executive officer has authority to govern the corporation subject to the control of the board of directors—that is, the chief executive officer may act as a general agent for the benefit of the corporation and in the manner in which the chief executive officer believes the board of directors desires him to act, but may not act in a manner contrary to the express desires of the board of directors. *See* RESTATEMENT (SECOND) OF AGENCY §§ 33, 39, 73 (1958). More generally, the rule has been stated thusly:

> Implied authority (including 'incidental' and 'inferred' authority) of the agent to act is a natural consequence of the express authority granted. It is implied from what is actually manifested to the agent by the principal. It is obvious that implied authority cannot, by its very nature, be inconsistent with express authority because any expression of actual authority must control.

WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 15 (3d ed. 2001). For example, as it would apply to this case, the chief executive officer possesses the authority to remove inferior employees (including officers) so long as the board of directors does not expressly limit or negate the chief executive officer's implied or inherent authority to do so. No member of the New Board expressed, either contemporaneously or at trial, any objection to Ovitz's termination. Tr. 2586:3-14 (Russell); 3778:1-23 (Gold); 4026:2-7 (Roy Disney); 4096:14-18 (Roy Disney);

The New Board unanimously believed that Eisner, as Chairman and CEO, possessed the power to terminate Ovitz without board approval or

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5785:17-5786:9 (Mitchell); 5810:19-5812:12 (Nunis); 5934:4-5935:15 (Bowers); 6128:12-6129:1 (Litvack); 6720:11-20 (O'Donovan); 6843:23-6844:22 (Wilson); 7144:3-7146:8 (Poitier); 7556:3-7557:15 (T. Murphy); 7642:21-7643:24 (Lozano); 7857:17-7858:20 (Watson); 8158:5-8159:9 (Stern); 8160:15-24 (Stern).

[571] These conclusions conform to the Company's custom and practice. *See* Tr. 6150:6-16 (Litvack) (testifying that "loads" of Company officers were terminated during his tenure as general counsel and that the board never once took action in connection with their terminations). The chief executive officer's non-exclusive (because it is shared with the board) right to employ and terminate inferior officers and employees extends to employees who are also directors. *See* 2 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 499 (perm ed. rev. vol. 1998). The power to terminate inferior officers may be delegated by the board to an officer/agent even though the decision may require "the highest degree of judgment and discretion." *Id.* § 495. Fletcher's treatise also contains language that would indicate that, *under certain circumstances*, the removal of officers must occur by the directors:

> The removal [of directors, other officers and agents] must *ordinarily* be by the body or officer authorized to elect or appoint. . . . Absent express authority, the [presiding officer] of a corporation has no power to remove an officer appointed by the board of directors *where the power of removal is in the board*, but a managing agent of a corporation may be removed from that position, when the term of employment has expired, by the [presiding officer] of the company by whom that agent was appointed.

Id. at § 357 (emphases added and citations omitted). Nevertheless, this same section also indicates that provisions in any particular corporation's governing documents would supercede this general rule: "If the statutes, charter or bylaws place the power of removal in the directors *or other officers*, as is usually the case as to offices that are not directorships, they are the ones to exercise it." *Id.* (emphasis added and citations omitted). The most applicable statement in any of the leading Delaware treatises with respect to the removal of officers comes from Folk's treatise, where conceding a lack of positive law on the issue, it is stated that "[p]resumably, the removal of officers is governed by the same provisions that regulate their election." RODMAN WARD, JR. ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 142.4 (4th ed. 2004). My conclusion here does not contravene the general rule (to the extent it is a recognized rule of Delaware law), but is simply an application of the more specific requirements, guidelines and governance contained in the Company's governing documents.

intervention.[572] Nonetheless, the board was informed of and supported Eisner's decision.[573] The board's simultaneous power to terminate Ovitz, reserved to the board by the certificate of incorporation, did not divest Eisner of the authority to do so, or vice-versa.[574] Eisner used that authority, and terminated Ovitz—a decision, coupled with the decision to honor the OEA, that resulted in the Company's obligation to pay the NFT.[575] Because Eisner unilaterally terminated Ovitz, as was his right,[576] the New Board was not required to act in connection with Ovitz's termination.

Therefore, the fact that no formal board action was taken with respect to Ovitz's termination is of no import. This is true regardless of the fact that Ovitz received a large cash payment and the vesting of three million options

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[572] Tr. 2890:3-2891:15 (Russell); 5598:18-22 (Mitchell); 5813:2-17 (Nunis); 6149:4-6151:11 (Litvack); 6339:22-6343:19 (Litvack); 6720:21-6721:21 (O'Donovan); 6785:15-6793:22 (O'Donovan); 7067:21-7069:8 (Wilson); 7226:7-7227:7 (Poitier); 7560:21-7561:17 (T. Murphy); 7646:11-7647:2 (Lozano). *See id.* at 6126:9-13 (Litvack) (testifying that Pierce did not advise him that a board meeting would be necessary to terminate Ovitz); 8233:5-11 (Stern) (stating that he relied on Litvack to determine the appropriate procedures for Ovitz's termination).

[573] *See supra* note 570.

[574] The delegation of authority by a board to an officer "does not mean that the board has completely abdicated its authority; moreover, the duties and powers of an officer or general manager do not deprive the directors of all stated authority and responsibilities." FLETCHER, § 495, *supra* note 571.

[575] *See* Tr. 4524:11-4526:24; 4584:3-9; 4919:8-4926:17.

[576] That is, Eisner possessed that right unless and until he received contrary instructions from the board, which he did not. *See supra* note 570.

in connection with his termination.[577] The board had delegated to the compensation committee *ex ante* the responsibility to establish and approve compensation for Eisner, Ovitz and other applicable Company executives and high-paid employees.[578] The approval of Ovitz's compensation arrangements by the compensation committee on September 26, 1995 included approval for the termination provisions of the OEA, obviating any need to meet and approve the payment of the NFT upon Ovitz's termination.[579] Because the board was under no duty to act, they did not violate their fiduciary duty of care, and they also individually acted in good faith.[580] For these reasons, the members of the New Board (other than Eisner and Litvack, who will be discussed individually below) did not

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[577] Notwithstanding earlier statements by this Court (*Disney III*, 2004 WL 2050138, at *7 n.64) and the Delaware Supreme Court (*Brehm*, 746 A.2d at 259), I conclude that the NFT was not economically material to the Company. *See supra* notes 533, 558. Those previous judicial statements regarding materiality cannot properly be considered "law of the case" because those statements were made in the context of motions where plaintiffs were afforded all reasonable inferences in support of their arguments and without any factual basis. Now, upon a full factual record, and in my discretion as fact-finder (materiality is a question of fact), I conclude that the NFT payout, even at the inflated valuation calculated by Professor Murphy, was not material to the Company.

[578] *See* PTE 187.

[579] *See* PTE 39 at WD01186-87A.

[580] The New Board could not have acted collectively in good faith because there was no meeting. Nonetheless, after weighing all the evidence in the case, I am not persuaded that the members of the New Board acted in bad faith in connection with Ovitz's termination. Had, for example, they been aware that the Company did have grounds upon which to terminate Ovitz for cause, and still not acted, the calculus would be much different, but based upon this record, I conclude that their non-action was in good faith.

breach their fiduciary duties and did not act in bad faith in connection with Ovitz's termination and his receipt of the NFT benefits included in the OEA.

2. Litvack

Litvack, as an officer of the corporation and as its general counsel, consulted with, and gave advice to, Eisner, on two questions relevant to Ovitz's termination. They are, first, whether Ovitz could or should have been terminated for cause and, second, whether a board meeting was required to ratify or effectuate Ovitz's termination or the payment of his NFT benefits. For the reasons I have already stated, Litvack properly concluded that the Company did not have good cause under the OEA to terminate Ovitz.[581] He also properly concluded that no board action was necessary in connection with the termination.[582] Litvack was familiar with the relevant factual information and legal standards regarding these decisions.[583] Litvack made a determination in good faith that a formal opinion from outside counsel would not be helpful and that involving more people in the termination process increased the potential for news of the impending termination to leak out.[584]

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[581] *See supra* text "Defendants Did Not Commit Waste" at 131.

[582] *See supra* text "The New Board Was Not Under a Duty to Act" at 162.

[583] Tr. 6112:17-6115:21; 6117:5-6121:8; 6131:6-6151:11.

[584] Tr. 6115:22-6116:14; 6130:4-6131:5; 6413:20-6417:1.

I do not intend to imply by these conclusions that Litvack was an infallible source of legal knowledge. Nevertheless, Litvack's less astute moments as a legal counsel do not impugn his good faith or preparedness in reaching his conclusions with respect to whether Ovitz could have been terminated for cause and whether board action was necessary to effectuate Ovitz's termination, as I have independently analyzed the record and conclude that Litvack's decisions as to those questions were correct. First, Litvack's silence at the December 10, 1996 EPPC meeting, when Russell informed the committee that Ovitz's bonus was contractually required, was unquestionably curious, and some might even call it irresponsible.[585] His excuse that he did not want to embarrass Russell in front of the committee is, in a word, pathetic. Litvack should have exercised better judgment than to allow Russell to convince the committee that a $7.5 million bonus was contractually required. Luckily for Litvack, no harm was done because in the end Ovitz's bonus was rescinded.

Second, Litvack's (and Santaniello's) conclusion regarding the potential conflict between the OEA and the terms of the 1990 Plan is certainly questionable, but reasonable in light of the circumstances and not

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[585] Tr. 6153:18-6156:9.

the product of an uninformed decision or bad faith.[586] The language in the 1990 Plan is sufficiently ambiguous—as to whether action by the compensation committee is required in all terminations (both with and without cause) of employees who possess options—to, in my opinion, absolve Litvack and Santaniello for their advice, and the compensation committee for not acting with respect to Ovitz's termination.[587]

In conclusion, Litvack gave the proper advice and came to the proper conclusions when it was necessary. He was adequately informed in his decisions, and he acted in good faith for what he believed were the best interests of the Company.

3. Eisner

Having concluded that Eisner alone possessed the authority to terminate Ovitz and grant him the NFT, I turn to whether Eisner acted in accordance with his fiduciary duties and in good faith when he terminated

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[586] *See* Tr. 6126:14-6127:17; 6149:15-6150:5; 6658:5-6675:3. *Compare* PTE 7 at ¶ 5(e) *with* PTE 41 at WD00125, WD00134.

[587] Again, my conclusion as to the propriety of the defendants' conduct in regard to Ovitz is informed by their custom and practice in other circumstances. Nothing in the record leads me to believe that the compensation committee ever made a determination as to whether a particular termination was with or without cause under any of the Company's stock option plans that would put them on notice that action would be necessary as part of Ovitz's termination. *See* PTE 39; PTE 41; PTE 153.

Ovitz.[588] As will be shown hereafter, I conclude that Eisner did not breach his fiduciary duties and did act in good faith in connection with Ovitz's termination and concomitant receipt of the NFT.

When Eisner hired Ovitz in 1995, he did so with an eye to preparing the Company for the challenges that lay ahead, especially in light of the CapCities/ ABC acquisition and the need for a legitimate potential successor to Eisner. To everyone's regret, including Ovitz,[589] things did not work out as blissfully as anticipated. Eisner was unable to work well with Ovitz, and Eisner refused to let Ovitz work without close and constant supervision. Faced with that situation, Eisner essentially had three options: 1) keep Ovitz as President and continue trying to make things work; 2) keep Ovitz at Disney, but in a role other than President; or 3) terminate Ovitz.

In deciding which route to take, Eisner, consistent with his discretion as CEO, considered keeping Ovitz as the Company's President an unacceptable solution. Shunting Ovitz to a different role within the

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[588] The parties essentially treat both officers and directors as comparable fiduciaries, that is, subject to the same fiduciary duties and standards of substantive review. Thus, for purposes of this case, theories of liability against corporate directors apply equally to corporate officers, making further distinctions unnecessary. For a discussion of the duties and liabilities of non-director corporate officers and how they may differ from those of directors, *see* Lyman P. Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439 (2005); Lawrence A. Hamermesh and A. Gilchrist Sparks, III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865 (2005).

[589] *See* PTE 341; Tr. 1757:15-1758:21.

Company would have almost certainly entitled Ovitz to the NFT, or at the very least, a costly lawsuit to determine whether Ovitz was so entitled.[590] Eisner would have also rightly questioned whether there was another position within the Company where Ovitz could be of use. Eisner was then left with the only alternative he considered feasible—termination. Faced with the knowledge that termination was the best alternative and knowing that Ovitz had not performed to the high expectations placed upon him when he was hired, Eisner inquired of Litvack on several occasions as to whether a for-cause termination was possible such that the NFT payment could be avoided, and then relied in good faith on the opinion of the Company's general counsel.[591] Eisner also considered the novel alternative of whether a "trade" of Ovitz to Sony would solve the problem by both getting rid of Ovitz and simultaneously relieving the Company of the financial obligations of the OEA. In the end, however, he bit the bullet and decided that the best decision would be to terminate Ovitz and pay the NFT.

After reflection on the more than ample record in this case, I conclude that Eisner's actions in connection with the termination are, for the most

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[590] *See* PTE 7 at ¶¶ 10, 11(c), 12(b).

[591] Tr. 4379:23-4381:15; 4419:11-4422:2; 4476:11-4483:7. There being no indication in the record that Eisner was aware that Litvack did not consult with outside counsel in regard to Ovitz's termination, Eisner is entitled to rely on Litvack's assertion that he consulted with outside counsel even though, as explained above, I am not convinced that Litvack did indeed speak with Pierce regarding the cause issue.

part, consistent with what is expected of a faithful fiduciary. Eisner unexpectedly found himself confronted with a situation that did not have an easy solution. He weighed the alternatives, received advice from counsel and then exercised his business judgment in the manner he thought best for the corporation. Eisner knew all the material information reasonably available when making the decision, he did not neglect an affirmative duty to act (or fail to cause the board to act) and he acted in what he believed were the best interests of the Company, taking into account the cost to the Company of the decision and the potential alternatives. Eisner was not personally interested in the transaction in any way that would make him incapable of exercising business judgment, and I conclude that plaintiffs have not demonstrated by a preponderance of the evidence that Eisner breached his fiduciary duties or acted in bad faith in connection with Ovitz's termination and receipt of the NFT.

IV. CONCLUSION

Based on the findings of fact and conclusions of law made herein, judgment is hereby entered in favor of the defendants on all counts.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE THE WALT DISNEY COMPANY DERIVATIVE LITIGATION	))	CONSOLIDATED C.A. No. 15452

ORDER

For the reasons set forth in the Court's Opinion of this date, judgment is hereby entered in the above captioned action against plaintiffs and in favor of defendants on all counts. The parties shall bear their own costs.

IT IS SO ORDERED.

s/ William B. Chandler III

Chancellor

Dated: August 9, 2005

CERTIFICATE OF SERVICE

I, Seth D. Rigrodsky, do hereby certify that on this 24th day of October, 2005, I caused two copies of the foregoing **Appellants' Opening Brief, and this Certificate of Service** to be served by hand delivery upon the following counsel of record:

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