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

MEMORANDUM OPINION

Date Submitted: September 8, 2004
Date Decided: September 10, 2004

Joseph A. Rosenthal, of ROSENTHAL, MONHAIT, GROSS & GODDESS, P.A., Wilmington, Delaware; Seth D. Rigrodsky, of MILBERG WEISS BERSHAD & SCHULMAN LLP, Wilmington, Delaware; OF COUNSEL: Steven G. Schulman, Joshua H. Vinik, Jennifer K. Hirsh and Lisa L. Cogan, of MILBERG WEISS BERSHAD & SCHULMAN LLP, New York, New York, Attorneys for Plaintiffs.

David C. McBride and Christian Douglas Wright, of YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware; OF COUNSEL: Mark H. Epstein and Jason L. Haas, of MUNGER, TOLLES & OLSON LLP, Los Angeles, California, Attorneys for Defendant Michael S. Ovitz.

Andre G. Bouchard and Joel Friedlander, of BOUCHARD, MARGULES & FRIEDLANDER, P.A., Wilmington, Delaware, Attorneys for The Walt Disney Company.

Robert K. Payson, Stephen C. Norman and Kevin R. Shannon, of POTTER ANDERSON & CORROON LLP, Wilmington, Delaware, Attorneys for Sanford M. Litvack.

R. Franklin Balotti and Anne C. Foster, of RICHARDS, LAYTON & FINGER, Wilmington, Delaware, Attorneys for Defendants Stephen F. Bollenbach, Reveta F. Bowers, Ignacio E. Lozano, Jr., George J. Mitchell, Thomas S. Murphy, Richard A. Nunis, Leo J. O'Donovan, S.J., Sidney Poitier, Irwin Russell, Robert A.M. Stern, E. Cardon Walker, Raymond L. Watson and Gary L. Wilson.

A. Gilchrist Sparks, III and S. Mark Hurd of MORRIS, NICHOLS, ARSHT & TUNNEL, Wilmington, Delaware; OF COUNSEL: Stephen D. Alexander and Peggy Sasso, of FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, Los Angeles, California, Attorneys for Defendants Roy Disney and Stanley P. Gold.

Lawrence C. Ashby, of ASHBY & GEDDES, Wilmington, Delaware; OF COUNSEL: Gary P. Naftalis, of KRAMER LEVIN NAFTALIS & FRANKEL LLP, New York, New York, Attorneys for Defendant Michael Eisner.

CHANDLER, Chancellor

I. INTRODUCTION

This derivative action already has developed a lengthy and well-documented history. In anticipation of the trial scheduled to begin shortly, defendant Michael S. Ovitz has moved for summary judgment on the ground that the undisputed evidence obtained by plaintiffs is legally insufficient to establish that he violated whatever fiduciary duties he may have owed to the Walt Disney Company and its shareholders. Although Ovitz's motion itself purportedly addresses all three claims pled against Ovitz in the Second Amended Consolidated Derivative Complaint ("Complaint"), the briefs filed in support of his motion only address the fiduciary duty issues and do not address the claim that Ovitz wrongfully caused Disney to engage in waste.

For reasons briefly described later, I conclude that Ovitz is entitled to summary judgment with respect to the First Claim of the Complaint, which alleges that he violated his fiduciary duties in negotiating, arranging, and finalizing the terms of his employment contract because, at the time all material negotiations occurred and alterations were made, Ovitz was not yet a fiduciary of Disney. With respect to the claim of waste and Ovitz's termination and receipt of Non-Fault Termination ("NFT") benefits when his employment with Disney ended, there are genuine issues of material fact to be resolved at trial, and summary judgment in

favor of Ovitz as to those issues is inappropriate. Accordingly, the motion for summary judgment is granted in part and denied in part.

II. STATEMENT OF FACTS

At the outset of this section, the Court should make one thing very clear: The issues raised by Ovitz's motion for summary judgment relate to his alleged malfeasance or nonfeasance, not that of the other defendants.[1] The undisputed facts of greatest relevance for granting, in part, Ovitz's motion for summary judgment are drawn from the voluminous documents produced in this case, especially defendant Michael D. Eisner's[2] August 14, 1995 letter ("OLA")[3] to Ovitz outlining the key points of his employment agreement, and the various drafts and final version of Ovitz's employment agreement ("OEA").

Following the untimely death of Frank Wells, former President of Disney, and the acrimonious exit of Jeffrey Katzenberg, Disney was searching for a new

---

[1] With respect to entering into the OEA, to the extent that plaintiffs, as evidenced by the Preliminary Statement made in their brief in opposition to this motion, contend that Ovitz's motion should be denied because he aided and abetted the other directors in a breach of their fiduciary duties, that argument is made improperly, as a claim for aiding and abetting a breach of fiduciary duty has not been pled, and it is far too late to permit plaintiffs to replead again in order to include such a claim.

[2] Eisner was the Chairman of the Walt Disney Company from 1984-2004, and currently is Disney's Chief Executive Officer ("CEO"), a position he has held since 1984. Eisner Tr. at 9, 28-42; Press Release, The Walt Disney Company, Statement From the Board of Directors of The Walt Disney Company (Mar. 3, 2004) (available from http://disney.go.com/corporate/).

[3] Dep. Ex. 33.

President as part of a long-term succession plan.[4] Effective October 1, 1995, Ovitz filled that position.[5] As of that date, he did not have a finalized and duly executed employment agreement.

The first draft of the OEA was made by the office of Disney's General Counsel, and was sent to Ovitz's attorneys on September 23, 1995.[6] This draft already included several material changes from the OLA.[7] The September 23 draft contained the following language regarding termination for cause: "Termination … for 'good cause' as used in this Agreement shall be limited to gross negligence or malfeasance by Executive in the performance of his duties under this Agreement…."[8]

Sometime between September 23, 1995 and the meeting of the Compensation Committee of Disney's Board of Directors on September 26, 1995,

---

[4] *See* Dep. Ex. 266.
[5] *See* Dep. Ex. 3. The parties argue at length about Ovitz's departure from Creative Artists Agency ("CAA"), but that discussion is largely irrelevant and the Court only addresses those facts as necessary.
[6] *See* Dep. Ex. 112.
[7] The most important changes were: 1) the removal of the guarantee that the three million stock options would be worth at least $50 million, 2) a reduction of the options' exercise price to market price on the day of grant, 3) the addition of a $10 million termination payment if the contract was not renewed following extension to Ovitz of a "Qualifying Offer", and 4) the extension of the exercisability date of the three million options to their normal expiration date in the event of a NFT. *Compare* Dep. Ex. 33 *with* Dep. Ex. 112. Ovitz had almost no control over the extension of the exercisability date because it required shareholder approval, which was received at a special shareholder meeting on January 4, 1996. *See* Disney's Form 8-K, filed with the SEC on Jan. 5, 1996.
[8] Dep. Ex. 112 at WD00020.

additional changes to the OEA were made.[9] When the terms of the OEA were presented to the Compensation Committee on that date, it was preliminarily approved, subject to the final agreement being negotiated by Eisner and then memorialized and approved by the Compensation Committee via unanimous written consent.[10]

Several more drafts of the OEA were exchanged after Ovitz began as President on October 1, 1995.[11] The final agreement was signed on or about December 16, 1995, with an effective date of October 1, 1995.[12] There is only one glaring difference between the pre-October 1 drafts and the final OEA—the date upon which Ovitz's options were to be priced. The September 23 draft would have priced the options on October 2, 1995 (when they were to have been granted), while the final OEA priced them on October 16, 1995 (the date on which the options were actually approved by the Compensation Committee).[13] The final OEA contained the following language regarding termination for cause: "Termination … for 'good cause' as used in this Agreement shall be limited to

---

[9] The most important change was the substitution of $7.5 million for $5 million as the base used to calculate bonuses in the event of a NFT. *Compare* Dep. Ex. 112 *with* Dep. Ex. 39. Dep. Ex. 39 is identical to Dep. Ex. 370.
[10] Dep. Ex. 39 at WD01170, WD01188.
[11] *See* Dep. Ex. 114 (Oct. 3, 1995); 117 (Oct. 10, 1995); 121 (Oct. 16, 1995); 122 (Oct. 22, 1995); 124 (Oct. 24, 1995).
[12] Dep. Ex. 7.
[13] *See* Dep. Exs. 41 and 43.

gross negligence or malfeasance by Executive in the performance of his duties under this Agreement…."[14]

Both sides agree that once he was hired, Ovitz's tenure at Disney was not successful.[15] By the close of business on December 27, 1996, Ovitz was no longer employed with Disney.[16] Ovitz did not resign, nor was he fired. Instead, Ovitz received what the OEA referred to as a "Non-Fault Termination." The NFT provisions of the OEA were triggered by the events of December 27, 1996, and Ovitz received almost $40 million in cash and the immediate vesting of his three million stock options at that time.[17]

There is significant disagreement as to why Ovitz's term at Disney was not a success. Ovitz makes four arguments in this regard: 1) Disney executives resisted Ovitz's ideas; 2) Ovitz never possessed the authority appropriate for his position; 3) Ovitz was not given sufficient time for his efforts to bear fruit; and, 4) Ovitz never achieved the "partnership" with Eisner that allegedly induced Ovitz to come to Disney.[18] Plaintiffs, on the other hand, argue that it was Ovitz who alienated the other Disney executives, that he showed a lack of focus and inattentiveness to his

---

[14] Dep. Ex. 7 at WD00212.
[15] "Ovitz's relationship with Disney was not successful." Opening Br. In Support of Def. Michael Ovitz's Mtn. for Summ. J. at 13. Plaintiffs' brief is rife with derogatory remarks about Ovitz's management.
[16] Dep. Ex. 14.
[17] *Id.*
[18] *See* Eisner Tr. at 312-13.

duties, that he spent Disney funds in violation of company protocol, and that Ovitz was both a liar and untrustworthy.[19]

Ovitz understood that his time at Disney would not last, and he pursued other opportunities for employment. In early October 1996, Ovitz wrote to Eisner requesting permission to negotiate an employment relationship with Sony.[20] Eisner agreed the next day by writing a note to Ovitz and also a note to be sent to Sony's Chairman, granting that permission and expressing a desire that Sony assume Disney's financial obligations under the OEA.[21] By November 1, 1996, the talks with Sony had ended, and Ovitz wrote to Eisner again, this time to "re-commit [himself] to [Eisner] and to Disney."[22] Ten days later, Eisner wrote a much longer note describing Ovitz's flaws and stating that Ovitz needed to make preparations to leave Disney. Although Eisner intended to send Ovitz this letter, he never did so.[23]

Once it was clear to all that Ovitz would be leaving Disney's employ, the question became how that end would be accomplished. Nevertheless, not everyone in Disney management was on the same page, as Ovitz was unanimously

---

[19] Pls.' Br. in Opp. to Michael S. Ovitz's Mtn. for Summ. J. at 30-37.
[20] Dep. Ex. 18.
[21] Dep. Ex. 19.
[22] Dep. Ex. 19 at WD00404.
[23] Dep. Ex. 24. This note was sent in draft form to Bass, Russell and perhaps Litvack, and after conversation with them, Eisner decided not to send the note because "it was too mean." Eisner Tr. at 605-06.

renominated to a three-year term as a director at a board meeting held on November 25, 1996.[24] On December 3, 1996, Eisner met with Ovitz to discuss issues regarding his impending termination, and then Eisner sent Russell a short letter detailing his conversation with Ovitz.[25] Russell thereafter began negotiating the specific language of the letter whereby Ovitz would receive his NFT.[26] On December 12, 1996, Litvack sent Ovitz a letter confirming their agreement that Ovitz would be terminated and receive a NFT.[27] About two weeks later, the above-referenced letter of December 27, 1996, was signed by both Ovitz and Litvack, ending Ovitz's employment immediately.[28] Disney's board did not meet to approve the termination of Ovitz or the payment of his NFT benefits.[29]

III. STANDARD OF REVIEW

Court of Chancery Rule 56 is the basis for motions for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to

---

[24] Dep. Ex. 340 at WD06415. Eisner, Ovitz, Russell, Litvack, and others attended that board meeting. *Id.* at WD06409.

[25] Eisner Tr. at 628-29; Dep. Ex. 326. According to Eisner's letter to Russell, Ovitz had requested that Russell, not Litvack, handle the negotiations on behalf of Disney. Eisner implicitly concurred, and Russell did conduct those negotiations as requested. Dep. Ex. 326 at DD002540.

[26] Dep. Exs. 326, 379-83. Russell, along with Litvack, had opined that Disney did not have grounds upon which to terminate Ovitz for cause. *See* Russell Tr. at 722-23; Litvack Tr. at 550-51. There is some indication that an opinion from outside counsel was sought, but apparently no final opinion was ever rendered and delivered to Disney. *See* Russell Tr. at 856-57.

[27] Dep. Ex. 13.

[28] Dep. Ex. 14.

[29] *See* Russell Tr. at 853 (compensation committee did not meet). In addition, there are no minutes indicating that the full board ever considered Ovitz's termination.

interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."[30] In ruling on the motion, the Court must view the facts in the light most favorable to the non-moving party, and make all reasonable inferences in favor of the non-moving party.[31]

IV. ANALYSIS

A. Ovitz Was Not a Fiduciary Until October 1, 1995

To date, the fiduciary duties of officers have been assumed to be identical to those of directors.[32] With respect to directors, those duties include the duty of care and the duty of loyalty. There has also been much discussion regarding a duty of good faith, which may or may not be subsumed under the duty of loyalty.[33] Ovitz became an officer of Disney on October 1, 1995 when he became President of the corporation,[34] and he became a director on January 22, 1996.[35] Therefore, upon

---

[30] CT. CH. R. 56(c).
[31] *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).
[32] "With respect to the obligation of officers to their own corporation and its stockholders, there is nothing in any Delaware case which suggests that the fiduciary duty owed is different in the slightest from that owed by directors." DAVID A. DREXLER, ET AL., DELAWARE CORPORATION LAW AND PRACTICE § 14.02 (Rel. No. 16, 2003).
[33] *See In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 475-76 n.41 (Del. Ch. 2000); Lyman P. Q. Johnson & Mark A. Sides, *The Sarbanes-Oxley Act and Fiduciary Duties*, 30 WM. MITCHELL L. REV. 1149 (2004); Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456 (2004)
[34] Dep. Ex. 29 at WD01196.
[35] Dep. Ex. 47 at WD01210-11.

becoming an officer on October 1, 1995, Ovitz owed fiduciary duties to Disney and its shareholders.

As this Court previously held, before becoming a fiduciary, "Ovitz did have the right to seek the best employment agreement possible for himself."[36] In fact, that prior ruling implies that it may be the law of the case that Ovitz was not a fiduciary until October 1, 1995.[37] Even if this is not the law of the case, it is the correct result and the Court reaches that conclusion anew.

Plaintiffs claim that once the OLA was executed and Ovitz's hiring was publicly announced in mid-August 1995, his official installation as President and status as a fiduciary was a foregone conclusion. This may be so, but it does not explain why Ovitz would be bound by those fiduciary duties even though he had not yet taken office. Plaintiffs cite two cases for the proposition that Ovitz owed Disney fiduciary duties before he assumed the position of President on October 1, 1995, though neither case supports their argument.[38]

---

[36] *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 290 (Del. Ch. 2003) ("*Disney*").
[37] "Nevertheless, once Ovitz became a fiduciary of Disney on October 1, 1995…." *Id.*
[38] First, plaintiffs cite *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) for the proposition that "a corporate officer assumes fiduciary duties to the corporation and the shareholders, [and] that those duties flow not from the corporate title itself but from the assumption of an equivalent role or function in relation to the company." Pls.' Br. in Opp. to Michael S. Ovitz's Mtn. for Summ. J. at 52 n.30. The Court has been unable to find this particular rule of law in the *Guth* opinion, but even if it were true, it would support Ovitz's argument instead. Although he was to be made President of Disney, Ovitz's duties did not flow from that title or the publicity stemming from his hiring, but from the assumption of his role and function in relation to the company, or in other words, his duties and authority as President, which he did not obtain until October 1, 1995.

Because there is no reason to impose a fiduciary duty upon Ovitz before he obtained fiduciary authority, Ovitz was not a fiduciary before October 1, 1995, and therefore, Ovitz was free to negotiate the OLA and OEA to his greatest advantage until October 1, 1995. If this means that Ovitz took advantage of any personal relationship he might have had with Eisner or Russell during the course of those negotiations, Ovitz would be entitled to do so unless his actions amounted to aiding and abetting a breach of their (Eisner's and Russell's) fiduciary duties, a claim that plaintiffs have not asserted.

Similarly, it is not Ovitz's responsibility to ensure that Eisner had actual authority to extend the offer of employment to Ovitz or to negotiate on behalf of Disney. Ovitz knew that Eisner was Chairman and CEO of Disney, which would be sufficient to give Eisner apparent authority to take those actions.[39] It would be nonsensical to require Ovitz to ignore this fundamental principle of agency law, and as part of his inchoate fiduciary duties, and without any authority vis-à-vis Disney, to verify that Eisner could negotiate on behalf of Disney and that the

---

Secondly, plaintiffs' reference to Justice Jacobs' opinion in *Faraone v. Kenyon*, 2004 Del. Ch. LEXIS 26 at *26 (Del. Ch.), is taken out of context and misleading because Justice Jacobs clearly was discussing relationships that fall outside the well-recognized set of fiduciary relationships, and the fiduciary relationship that an officer or director owes to the corporation and its shareholders has long been recognized in Delaware jurisprudence.

[39] Under Delaware law, an agent, such as a CEO, can bind the principal if the third person with whom that agent is dealing reasonably concludes that the agent is acting on behalf of the principal. *Int'l Boiler Works Co. v. Gen. Waterworks Corp.*, 372 A.2d 176, 177 (Del. 1977).

Disney Board of Directors were complying with their fiduciary responsibilities in connection with Ovitz's hiring.

Finding that Ovitz owed fiduciary duties at some time before October 1, 1995 would lead to significant uncertainty regarding when one becomes a fiduciary.[40] A bright-line rule whereby officers and directors become fiduciaries only when they are officially installed, and receive the formal investiture of authority that accompanies such office or directorship, is a more reasonable and desirable rule.[41] Therefore, because Ovitz did not have any authority at Disney before October 1, 1995, he was not a fiduciary of Disney before that time. It thus follows that any actions taken by him, or negotiations on his behalf with respect to the OEA, before October 1, 1995, cannot subject him to liability for breach of a fiduciary duty that he did not yet have.

---

[40] For example, if a director does not become a fiduciary on the day he or she is installed as a director, when would that person's fiduciary duties begin? When the final results of the directorial election are certified? When the prospective director is placed on a management slate certain to win approval? Similar problems exist in attempting to determine when an officer becomes a fiduciary if not when that person is formally installed and assumes their responsibilities and duties as an officer of the corporation.

[41] Plaintiffs argue that Ovitz wielded some authority before October 1, 1995, perhaps in connection with the extensive remodeling of the Disney executive suite where Ovitz's office was eventually constructed. Even if Ovitz was consulted as to what he desired in an office, others in senior management with authority to approve those expenditures gave consent before work began. *See* Appendix of Exs. To Pls.' Br. in Opp. to Michael S. Ovitz's Mtn. for Summ. J. at tabs D and E. Those documents have the Bates numbers of WD06758-72 and WD06756-57, respectively.

B. Once a Fiduciary, Ovitz Did Not Breach His Fiduciary Duties By Executing the Previously-Negotiated OEA

Because Ovitz was not in a fiduciary relationship until October 1, 1995, he owed no duty until that time. If material changes were made to the OEA after that date, however, Ovitz would be required to act as a fiduciary in making those changes. In deciding the previous motions to dismiss, the Court noted that case law supports the proposition that "an officer may negotiate his or her own employment agreement as long as the process involves negotiations performed in an adversarial and arms-length manner."[42] The Court also concluded, based upon the record at the time and the precise procedural posture of a motion to dismiss, that "the final version of the [OEA] differed significantly from the draft version summarized to the board and to the compensation committee on September 26, 1995."[43]

Then, drawing all reasonable inferences in favor of the plaintiffs, the Court decided that if the allegations relating to the negotiation and execution of the OEA were proven true, that no adversarial or arms-length process occurred and that Ovitz may have breached his fiduciary duties.[44] Today the Court faces the issue anew in light of the facts uncovered through the discovery process and through the

---

[42] *Disney*, 825 A.2d at 290 (emphasis removed).
[43] *Id.*
[44] *Id.*

lens of a summary judgment motion brought by Ovitz. The facts that plaintiffs have produced simply do not support the Court's previous conclusion.

The correspondence between Disney and Ovitz and their respective counsel in regards to the OEA clearly shows what changes were made and when. No material changes to the compensation structure, severance or NFT benefits, or the definition of "good cause" changed between September 23, 1995 and December 12, 1995.[45] That material changes were made between the OLA on August 14 and the final OEA is irrelevant, so long as the changes were made before Ovitz became a fiduciary on October 1, 1995.

Plaintiffs argue vigorously that Ovitz's options were "in the money" on December 12, 1995 when the OEA was signed, and this evidences a *prima facie* case of self-dealing, quoting from the Court's previous decision, which was not made upon a full evidentiary record.[46] Although Ovitz's options were "in the money" on December 12, 1995, this was according to the previously agreed-upon terms of the OEA and the terms of Disney's stock option plan which required that

---

[45] Plaintiffs argue that contract language was added that would grant him the $10 million termination payment between the OLA and October 10 draft of the OEA. Pls.' Br. in Opp. to Michael S. Ovitz's Mtn. for Summ. J. at 56. The provision for the $10 million severance payment was included in the September 23 draft, and the specific language referred to in plaintiffs' brief can be considered mere surplusage—it does not materially change the operation of the $10 million payment because if Ovitz were to receive an NFT the circumstances of Ovitz's imminent departure from Disney would also imply that he would not receive a "Qualifying Offer," the non-receipt of which would entitle Ovitz to the $10 million.

[46] Pls.' Br. in Opp. to Michael S. Ovitz's Mtn. for Summ. J. at 54-55; *Disney*, 825 A.2d at 282.

the options be priced on the day they were approved by the Compensation Committee, in this case, October 16, 1995.[47]

Plaintiffs attempt to impugn Ovitz's actions by arguing that he was absent from the October 16, 1995 meeting of the Compensation Committee even though, according to Disney's bylaws, as President, he was an *ex officio* member of that committee.[48] Plaintiffs thus try to place Ovitz into a no-win situation: either he attends the meeting, possibly in breach of his duty of loyalty, or he does not attend the meeting, possibly in breach of his duty of care. Given the broad language with which the courts of Delaware have described the duty of loyalty,[49] Ovitz made the

---

[47] *See* Dep. Ex. 7; Dep. Ex. 112. Disney's Amended and Restated 1990 Stock Incentive Plan, pursuant to which Ovitz's three million options were issued, required that the exercise price be "determined by the [Compensation] Committee at the time any option is awarded and shall not be less than 100% of the fair market value of the common stock of Disney on the date on which the option is granted." Dep. Ex. 41 at WD00133. Furthermore, the Compensation Committee minutes from October 16, 1995 make it clear that Ovitz's options were granted on that date, subject to the formalities of final execution of the OEA and execution and return of a formal stock option agreement. *Id.* at WD00121-22. Provisions similar to those in the final OEA that would possibly allow repricing based upon future amendments to the plan pursuant to the acquisition of Cap Cities/ABC existed in the September 23 draft. *Compare* Dep. Ex. 7 at WD00205 *with* Dep. Ex. 112 at WD00013-14. In addition, plaintiffs' conjecture that if Disney's stock price had dropped between October and December that Ovitz would have demanded a repricing of his options has no basis in the established record, and such "what ifs" based on events outside of Ovitz's control that did not occur cannot establish a breach of his fiduciary duties.

[48] *See* Pls.' Br. in Opp. to Michael S. Ovitz's Mtn. for Summ. J. at 25.

[49] For example, as this Court previously stated, the "duty of loyalty … imposes an affirmative obligation to protect and advance the interests of the corporation and mandates that [a director] absolutely refrain from any conduct that would harm the corporation. This duty has been consistently defined as '*broad and encompassing*,' demanding of a director '*the most scrupulous observance*.' To that end, a director may not allow his self-interest to jeopardize his *unyielding obligations* to the corporation and its shareholders." *BelCom, Inc. v. Robb*, 1998 WL 229527 at *3 (Del. Ch. 1998) (internal citations omitted and emphasis added).

decision that a faithful fiduciary would make by abstaining from attendance at a meeting where a substantial part of his own compensation was to be discussed and decided upon.

Plaintiffs continue to argue that even if the OEA did not materially change after October 1, 1995, Ovitz, by signing the OEA and accepting its benefits, breached his fiduciary duties to Disney and its shareholders.[50] In support for this proposition, they again cite to *Guth*, the seminal case with respect to usurping a corporate opportunity.[51]

It would make little, if any, sense for the Court to adopt plaintiffs' position, which would, in essence, articulate the following rule: If a person who will become an officer successfully negotiates a compensation package and formally executes that contract before taking office, that person is entitled to negotiate the best deal possible; but, if all the negotiations take place before taking office and the parties begin performance as if the contract was duly executed, because the contract is not formally executed until after the officer assumes his or her position and the fiduciary duties that accompany it, that officer must demonstrate the entire fairness of that contract or be held to have breached his or her fiduciary duties. There is no

---

[50] Pls.' Br. in Opp. to Michael S. Ovitz's Mtn. for Summ. J. at 58.

[51] 5 A.2d at 510. The language that plaintiffs refer to explains that when an officer or director of a corporation usurps a corporate opportunity, a constructive trust should be established for the benefit of the corporation. This result, clearly, is predicated by a finding that the officer or director breached his fiduciary duty. No such corporate opportunity or breach of fiduciary duty has been shown to exist here.

reasonable rationale upon which to base such a rule, which would also conflict with elementary principles of contract law.[52]

Plaintiffs also suggest that after Ovitz became a fiduciary and obtained authority at Disney, he breached his fiduciary duties by failing to conduct an investigation into his hiring to ensure that the proper process was used by Disney and to ensure that the other officers and directors had complied with their fiduciary duties. Although the contours of the so-called "duty to monitor"[53] are unclear, they certainly do not extend to the situation present here, where Ovitz negotiated terms of his employment, as a reasonable person would expect, with the CEO and at least one member of the Compensation Committee. In addition, the Compensation Committee apparently approved the terms of his hiring in a formal resolution, and the full Board of Directors formally appointed him as President of the company.

Because Ovitz was not a fiduciary until October 1, 1995, and because no material changes to the OEA occurred after that date, the Court concludes as a matter of law that Ovitz could not have breached a fiduciary duty he owed by

---

[52] Even though the OEA had not yet been executed, both Eisner and Ovitz had signed the OLA, both parties began performing in accordance with the basic economic terms laid out therein and approved by the Compensation Committee on September 26, 1995 (with the exception of the stock option value guarantee). This would likely be sufficient to prove or, at the very least, to make a colorable argument that some form of contract existed between Ovitz and Disney sufficient to bind both parties by no later than October 1, 1995.

[53] *See Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 833 A.2d 961, 970-72 (Del. Ch. 2003), *aff'd*, 845 A.2d 1040 (Del. 2004); *In re Caremark Int'l Inc. Derivative Litig.,* 698 A.2d 959 (Del. Ch. 1996).

performing under the OEA and by duly executing that document which conformed with the course of performance of the parties.[54] Because Ovitz did not breach his fiduciary duties, irrespective of whether other Disney directors and officers may have done so, Ovitz need not show the entire fairness of the OEA, and he is entitled to summary judgment with respect to the claim that he breached his fiduciary duties by entering into the OEA.

C. Genuine Issues of Material Fact Exist Regarding the Claim of Waste

The parties did not squarely address the claims regarding waste in the briefing or argument on this motion. Because it is unclear whether Disney received "any substantial consideration" and whether there was a "good faith judgment" by the board "that in the circumstances the transaction [was] worthwhile," the claims for waste must remain.[55] Having failed to present undisputed facts that would entitle him to judgment as a matter of law on this claim, Ovitz's motion for summary judgment as to the waste claims is denied.

---

[54] Ovitz's personal, unadvised, and lay conclusions about whether he was legally bound by a handshake or a signature are irrelevant to this conclusion. Whether or not he thought he was bound, he almost certainly was bound based on the OLA, his oral representations, and his performance, and his counsel surely would have advised him thusly had the question been presented.

[55] *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000) (emphasis removed).

D. Genuine Issues of Material Fact Exist Regarding Whether Ovitz Breached His Fiduciary Duties In Receiving A Non-Fault Termination

It is beyond question that Ovitz was a fiduciary of Disney during the discussions and negotiations regarding his termination in the latter part of 1996. Until December 27, 1996, Ovitz was both an officer of Disney and a director of Disney. As such, Ovitz owed to Disney the fiduciary duties of care and loyalty. The question, therefore, is what was the extent and nature of Ovitz's duties during the termination period, and did he comply with them?

Ovitz has argued that so long as he possessed a subjective belief that Disney did not have good cause to terminate him, that he was justified in receiving the NFT, and thus did not breach his fiduciary duties. Delaware law, however, has always taken an objective approach to determining fiduciary duties.[56] Plaintiffs cite a previous decision in this case for the proposition that Ovitz, as a fiduciary, "had an obligation to ensure the process of his … termination was both impartial and fair."[57]

The situation in which Ovitz found himself was certainly undesirable. His severance from Disney was being orchestrated, and it would arguably spell the end of his career in Hollywood. Though Ovitz has attempted to characterize his termination as a unique situation in which "limited" fiduciary duties should apply,

---

[56] *See Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963).
[57] *Disney*, 825 A.2d at 291.

well-established principles of corporate law exist by which the Court may measure Ovitz's and the other Disney fiduciaries' actions.

Section 144 of the Delaware General Corporation Law governs the validity of certain interested transactions.[58] Section 144 provides that interested transactions are not void or voidable solely because they are between the corporation and a director or officer thereof if one of three requirements is met: 1) after full disclosure, a majority of disinterested directors of the board or an authorized committee thereof ratifies the transaction;[59] 2) after full disclosure, a majority of the shareholders, in good faith, approve the transaction; or 3) the transaction is fair as to the corporation.[60] Of course, if the transaction constitutes waste, illegality, fraud, or an *ultra vires* act, not even ratification by disinterested directors or anything less than a unanimous shareholder vote will protect the transaction, or those participating in it.[61]

Ovitz's negotiated separation from the company was an interested transaction within the meaning of section 144 because he, as a director and officer,

---

[58] For a discussion of the application of section 144(a)(2), see the earlier opinion in this case: *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 366-69 (Del. Ch. 1998), *aff'd in part, rev'd in part sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

[59] In fact, case law seems to indicate that not only must disinterested directors ratify the transaction, but that a disinterested party must negotiate on behalf of the company. *See Cooke v. Oolie*, 1997 WL 367034 at *9 (Del. Ch.).

[60] 8 *Del. C.* § 144(a).

[61] *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del.), *modified*, 636 A.2d 956 (Del. 1994); *Schreiber v. Bryan*, 396 A.2d 512, 518 (Del. Ch. 1978).

engaged in a transaction with the corporation for which he was a fiduciary and received a benefit greater than that of Disney's stockholders,[62] and this benefit was material to Ovitz.[63] It was more than merely receiving what he was entitled to under his contract. Ovitz has argued that receiving his NFT was merely a pre-arranged contractual obligation, akin to receiving his salary. It is true that *if* Ovitz received a NFT, that he had a contractual right to receive the payout he did receive. But Ovitz did not have a contractual right to receive a NFT, which distinguishes this situation from the mere receipt of salary. Instead, Ovitz's receipt of a NFT was conditioned upon a one-time determination (to be made by Disney) that was not guaranteed by his contract, and Ovitz appears to have actively engaged in negotiations and decisionmaking that affected Disney's determination to grant the NFT.

Ovitz negotiated his exit from Disney with Eisner, Russell, and others. He made a conscious decision not to resign and to seek the benefits that his contract made available to him only under certain prescribed circumstances. Ovitz allegedly colluded with those on the other side of the bargaining table (and it is still unclear as to who those people were at various times) in bringing about the circumstances that would entitle him to his NFT benefits. In so doing, he allegedly

---

[62] *See Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).
[63] *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1151, 1167 (Del. 1995).

manipulated corporate processes and thereby violated his fiduciary duties to Disney.

Furthermore, it is unclear from the record whether a majority of any group of disinterested directors ever authorized the payment of Ovitz's severance payments.[64] No meetings were held, and no written consents were executed. Similarly, there was no shareholder vote on the issue. Absent a demonstration that the transaction was fair to Disney, that transaction may be voidable at the discretion of the company.[65] Such an event would of course leave Ovitz in the position of insisting upon his various contractual rights under the OEA, as they originally existed. Here plaintiffs contend that Ovitz's abuse of corporate processes amounted to a breach of duty, for which they seek money damages for the company. As there are genuine issues of material fact regarding Ovitz's receipt of the NFT, and the use of his position to obtain the NFT, summary judgment for Ovitz as to this claim is inappropriate.

V. CONCLUSION

In sum, because Ovitz was not a fiduciary before October 1, 1995, prior to which the OEA was negotiated, he need not show the entire fairness of that

---

[64] Though the OEA had been approved by the Compensation Committee before Ovitz's hiring, the magnitude of the NFT, even for a company of Disney's size, would indicate to a reasonable, rational director that some action would be necessary. *See Brehm*, 746 A.2d at 259 ("Certainly in this case the economic exposure of the corporation to the payout scenarios of the Ovitz contract was material, particularly given its large size ….").

[65] I recognize that no party seeks to void the company's determination to grant Ovitz the NFT.

contract. Summary judgment for Ovitz is granted in part as to claims arising from his entering into the OEA.

As mentioned above, the motion for summary judgment as to the claims of waste is denied.

Finally, because the record is unclear as to whether Ovitz abused his fiduciary position so as to cause Disney to grant the NFT, his motion for summary judgment as to that claim must be denied.

IT IS SO ORDERED.