

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vestergaard v. Destiny Media  
Technologies Inc.*,  
2025 BCSC 2093

Date: 20251024  
Docket: S178293  
Registry: Vancouver

Between:

**Steven Eric Vestergaard**

Plaintiff

And

**Destiny Media Technologies Inc., Destiny Software Productions Inc., Sonox  
Digital Inc., MPE Distribution Inc., Hyonmyong Cho, S. Jay Graber and  
Fredrick Vandenberg**

Defendants

Before: The Honourable Justice Tucker

## Reasons for Judgment

The Plaintiff appearing in person:

S.E. Vestergaard

Counsel for Defendants:

N. Mitha, KC  
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Place and Date of Trial/Hearing:

Vancouver, B.C.  
November 25-29,  
December 2-6, 9-13, and  
19-20, 2024

Place and Date of Judgment:

Vancouver, B.C.  
October 24, 2025

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**I. Introduction**

[1] The claim in this matter alleges civil conspiracy, defamation, and wrongful dismissal. The alleged conspiracy, however, turns on the reasons for the decision to dismiss. The defamation claim rests on a statement that the dismissal occurred and is alleged to include or imply certain bases for the dismissal. The central factual question in all three claims involves the reasons for the dismissal. If the Court finds that the plaintiff was dismissed in good faith, in service of the companies' best interests, and with just cause as alleged, then none of the claims can succeed.

[2] As set out below, I find that the plaintiff, Steven Vestergaard, was dismissed in good faith, in the interests of the corporate defendants, and with just cause. The claims in the notice of civil claim are dismissed accordingly.

**II. Parties**

[3] In these reasons, I will refer to the corporate defendants, collectively, either as the "Destiny Companies" or simply as "Destiny".

[4] The Destiny Companies are:

- a) Destiny Media Technologies Inc. ("Destiny Media"), a US corporation incorporated in Nevada and publicly traded on the OTC and TSX Venture exchanges;
- b) Destiny Software Productions Inc. ("Destiny Software"), a BC company, and a wholly-owned subsidiary of Destiny Media;
- c) MPE Distribution Inc. ("MPE"), a Nevada company, and a wholly-owned subsidiary of Destiny Media; and
- d) Sonox Digital Inc. ("Sonox"), a shell BC company, and a wholly-owned subsidiary of Destiny Media.

[5] As of June 22, 2017, Destiny Media's board of directors ("Board") had three members: Hyonmyong Cho, S. Jay Graber, and Mr. Vestergaard. Mr. Cho and

Mr. Graber were both first elected to the Board on February 28, 2017.

Mr. Vestergaard was a continuing Board member.

[6] Until June 28, 2017, Mr. Vestergaard was employed as the President and Chief Executive Officer (CEO) of the Destiny Companies. Mr. Vestergaard had founded Destiny Software in 1991. He was serving as Destiny Software's President and CEO, pursuant to an oral contract of employment, when Destiny Software was purchased by Destiny Media (then named Euro Industries Ltd.) in 1999. Following the 1999 purchase, Mr. Vestergaard became the President and CEO of Destiny Media under his existing terms and conditions of employment. When MPE and Sonox were added to the Destiny group, Mr. Vestergaard's President and CEO responsibilities extended to those companies as well.

[7] Mr. Vestergaard was suspended as President and CEO of the Destiny Companies by vote of the Board on June 22, 2017, and then terminated by vote of the Board on June 28, 2017. Mr. Cho and Mr. Graber, as a majority of the Board, voted in favour of the suspension and termination.

[8] Prior to June 22, 2017, Mr. Vestergaard was the director of Destiny Software, MPE, and Sonox. He was also removed from those directorships by vote of the Board on June 22, 2017. Mr. Cho replaced him as the director of Destiny Software and MPE, and Fred Vandenberg replaced him as the director of Sonox.

[9] Prior to June 28, 2017, Mr. Vandenberg was the Chief Financial Officer (CFO) of the Destiny Companies. On June 28, 2017, the Board appointed Mr. Vandenberg as the new President and CEO for Destiny. Mr. Vandenberg has served in that capacity ever since.

[10] In February 2018, Mr. Vestergaard's term as a Board director expired.

[11] There is a non-party who also warrants an early introduction. Zashan Dove became a Destiny Software employee in 2009. Like Mr. Vestergaard, Ms. Dove was terminated for cause on June 28, 2017.

**III. Summary Outline of Positions**

[12] Mr. Vestergaard asserts that his case should not be viewed as a wrongful dismissal with associated claims, but rather as a conspiracy to carry out what was effectively “the theft of a company”, with his termination being but one step in that plot.

[13] The notice of civil claim alleges that:

- a) Mr. Vestergaard was terminated without just cause from his employment as President and CEO of the Destiny Companies. The wrongful dismissal claim includes allegations of breaches of the duties of honesty, good faith and fair dealing, with those duties being alleged implied terms of his employment contract;
- b) Messrs. Cho, Graber and Vandenberg conspired to remove him from his employment without cause and (due to an alleged failure to provide proper notice of the June 22, 2017 Board meeting and an alleged failure to permit Mr. Vestergaard to participate in the June 28, 2017 Board meeting) removed him without lawful authority;
- c) Mr. Vestergaard was defamed by the publication of a Form 8-K public corporate filing stating that the Board had suspended and then dismissed him from his employment as President and CEO of Destiny Media; and
- d) aggravated and punitive damages are warranted.

[14] In their response, the defendants deny any wrongdoing and allege that Mr. Vestergaard, among other things:

- a) failed to comply with the requests and directions of the Board;
- b) was unreasonably absent from the office;
- c) failed to dedicate appropriate time and attention to carrying out his employment obligations; and

- d) permitted and encouraged Ms. Dove to perform work for his private interests during Ms. Dove's Destiny hours of work.

[15] In short, Mr. Vestergaard alleges the defendants conspired to wrest control of the Destiny Companies away from him, while the individual defendants say that Mr. Vestergaard's termination was the justified result of their discharge of the fiduciary duties they owed to the corporate defendants.

[16] Plainly, much will turn on findings of credibility.

#### **IV. Reliability and Credibility**

[17] In the oft-cited *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.), the Court of Appeal stated:

The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[18] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, Madam Justice Dhillon stated at para. 186:

Credibility involves an assessment of the trustworthiness of a witness' testimony based on the veracity or sincerity of a witness and the accuracy of the evidence that the witness. The art of assessment involves the examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with the independent evidence that has been accepted, whether the witness changes his testimony (during direct and cross-examination), whether the witness' testimony seems unreasonable, impossible or unlikely, whether the witness has a motive to lie, and the demeanor of the witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.

[19] Mr. Vestergaard was the sole witness in the plaintiff's case.

[20] The defendants called six witnesses:

- a) Mr. Vandenberg;
- b) Mr. Cho;
- c) Mr. Graber;
- d) Rick Ramsey. Mr. Ramsey is a former Destiny Software employee. He was employed in the position of Director of Product Development, PlayMPE and Clipstream, including in 2016 and 2017. Mr. Ramsey voluntarily left Destiny in March 2019 to take other employment;
- e) Allen Vitasovic. Mr. Vitasovic was a Destiny Software employee for the years 2009 through 2022. He left in 2022, but rejoined in October 2024. During the years 2016 and 2017 he was in the position of Manager of PlayMPE Operations; and
- f) Paula Boddie, an independent workplace investigator.

[21] I found that each of the defendants' witnesses gave their testimony in a straightforward, candid, and fair manner. The testimony given by each of the defendants' witnesses was internally consistent, consistent with one another, and consistent with contemporaneous and near-contemporaneous documentation in evidence. I am also satisfied that the conduct of Messrs. Cho, Graber and Vandenberg and the reasons given by them in explanation for that conduct were logical and sensible in the circumstances that existed.

[22] On the other hand, I am quite satisfied that Mr. Vestergaard must be considered an unreliable narrator.

[23] I will discuss these findings further below.

**V. The Witnesses**

[24] Mr. Vestergaard was an unsatisfactory and difficult witness. He persistently evaded questions, employing a variety of means. Often, he criticized or parsed the question, rather than respond to it. At other times, he would entirely disregard the question asked, and simply expound on points favourable to him. The Court was repeatedly called upon to direct him to answer the question that was asked.

[25] Mr. Vestergaard's version of the facts was ever-shifting, constantly subject to revision in response to points and evidence raised to his attention during cross-examination. At one point in cross-examination, he sought to "withdraw" his initial testimony (as opposed to conceding that it was false or inaccurate).

[26] Mr. Vestergaard repeatedly sought to resile from admissions he had made during his discovery. On many occasions, he sought to do so by offering a markedly improbable interpretation of the question posed at discovery, and then attributing his response to his (mis)understanding. I found this explanatory tack consistently unpersuasive.

[27] Mr. Vestergaard also attempted to parse his way out of corners he found himself in during cross-examination. For example, he testified with respect to a specific period that he had actually continued to do some work as President and CEO even though he had qualified for short-term disability. When it was put to him that he did not have short-term disability insurance, Mr. Vestergaard replied that he had not said that he had applied, only that he was "qualified."

[28] There are parts of Mr. Vestergaard's testimony that beggar belief outright. For example, when presented with the June 22, 2017, Board meeting minutes in cross-examination, he testified that he was seeing the minutes "for the first time." I found that to be an incredible assertion given the centrality of that meeting and the minutes to his case. In the end, it was shown by his discovery transcript that he had not only been shown the minutes at the discovery, he had been asked to comment on the accuracy of the minutes as a discovery request.

[29] As an example of credibility issues, the defendants produced a document logging the use of individual electronic access cards to enter and leave the Office during the time material to the wrongful dismissal claim. Mr. Vestergaard testified that he had charge of the spare access cards for the Office, that he kept these spare cards in his desk drawer, and that he often used any card at hand as opposed to using his assigned card.

[30] There is documentary evidence showing Mr. Vestergaard asking Mr. Vandenberg to provide him with a temporary card for use because Mr. Vestergaard could not find his assigned card. That document aligns with Mr. Vandenberg's testimony that he (Mr. Vandenberg) was responsible for the spare access cards and kept them in his office. Further, when Mr. Vestergaard was suspended, Mr. Vandenberg cancelled only Mr. Vestergaard's assigned card pursuant to his suspension. That is also consistent with Mr. Vandenberg's testimony that he was in possession of the spare cards.

[31] I accept Mr. Vanderberg's evidence that Mr. Vanderberg was the person who kept possession of all the spare Office cards, and I reject Mr. Vestergaard's conflicting evidence. Further, I am satisfied that Mr. Vestergaard's testimony about his possessing and using multiple cards was fabricated in order to undermine the evidentiary value of the electronic access log.

[32] As a further example, Mr. Vestergaard was asked on cross-examination whether he had drawn up a design for a parking lot for another business during a Destiny management meeting. He denied having done so. Mr. Vestergaard was then shown an email he had sent to a partner in the other business about the parking design and in which he wrote, "I doodled out my thoughts in our management meeting today." Mr. Vestergaard's response upon being shown that document was: "I didn't know I would be cross-examined on it."

[33] I found Mr. Vestergaard's testimony to be rife with unexplained conflicts. For example, at his discovery he testified that he and Ms. Dove had previously been romantically involved, but had a platonic relationship now. At trial, however, he

insisted, emphatically, that they had never been romantically involved.

Mr. Vestergaard did not provide any credible explanation for having said the opposite at his discovery. Further, I am satisfied on the evidence that Mr. Vestergaard and Ms. Dove, whatever their present relationship might be, were in fact romantically involved in the past.

[34] As to reliability, Mr. Vestergaard did not generally display an ability to recall dates, events or documents accurately.

[35] I also found Mr. Vestergaard's cross-examination of defence witnesses quite illuminating with respect to Mr. Vestergaard's own reliability. When cross-examining witnesses, Mr. Vestergaard repeatedly put statements to witnesses in which he purported to restate earlier testimony (either the witness' own or the testimony of a different witness). In doing so, Mr. Vestergaard regularly and seriously misrepresented the testimony that had actually been given. When objections were made in this respect, Mr. Vestergaard often responded by insisting that his summary of the evidence given was accurate and fair. In my view, this was a real-time demonstration of Mr. Vestergaard's unreliability as a narrator. He suffers, at minimum, from a pronounced tendency to hear whatever he wishes to hear.

[36] I note that Mr. Vestergaard's misrepresentations regarding statements made in the courtroom were not limited to witness testimony. He also wrote and sent a letter to Mr. Cho and Mr. Graber, mid-trial, in which he attributed statements to the Court that were most definitely not made.

[37] In contrast, Mr. Vanderberg was a careful witness who sought to testify fully and fairly. Notably, on several occasions, he gave an initial response to a question and then, on his own initiative, added further detail to ensure his response was fair to Mr. Vestergaard. He demonstrated good recall for details and for the order of events, and his evidence about Destiny's business and operations was detailed and demonstrated deep knowledge of the facts and financial circumstances.

[38] Mr. Ramsey and Mr. Vitasovic both presented as very straightforward witnesses. Notably, Mr. Ramsey, having successfully moved on to a desirable position elsewhere, had no direct interest in the outcome of the litigation.

[39] Mr. Cho and Mr. Graber were both very candid and direct witnesses. They had no difficulty making reasonable concessions or in acknowledging Mr. Vestergaard's contributions where they saw due. Further, their real-time thinking on matters was often reflected in email exchanges between them. Contrary to Mr. Vestergaard's assertions, I am satisfied that neither took any pleasure in terminating Mr. Vestergaard. To the contrary, both impressed the Court as genuinely regretful that matters had proceeded to the point of his termination. Mr. Cho and Mr. Graber were cross-examined at length by Mr. Vestergaard and, in my view, their answers on cross-examination only strengthened their testimony in direct.

[40] Finally, I accept Ms. Boddie's testimony. Ms. Boddie's involvement in the matters was in her professional capacity as an independent investigator. She was serving as a neutral at the time of her interactions with Mr. Vestergaard. She had good reason to pay careful attention and make an accurate record of her dealings with Mr. Vestergaard.

[41] Overall, the testimony of the defendant's witnesses was internally and externally consistent and logical, and in harmony with the significant contemporaneous documentary evidence. Wherever Mr. Vestergaard's testimony is in conflict (which it is frequently and seriously) with of the defendants' witnesses, I prefer the latter.

## **VI. Findings**

[42] The findings set out below represent my findings upon consideration of all the evidence, including the testimony of Mr. Vestergaard. As I have already stated, I have accepted the testimony of the defendants' witnesses in preference to that given by Mr. Vestergaard wherever there is conflict. While some rejected evidence is specifically identified below, that is by way of illustration. I do not propose to inventory all of the testimony that I have rejected.

**A. Destiny's Business**

[43] Mr. Vestergaard started Destiny Software in 1991 as a video game company. Over time, Destiny Software developed software that allows audio and video content to be securely shared over the internet (PlayMPE).

[44] Destiny's primary business continues to be the development and operation of the PlayMPE platform for use by music industry participants. Users can upload content (such as music and artist information) to PlayMPE, select desired recipients, and share content securely. Generally, the paying customers are the senders of information. Senders pay for the PlayMPE service based on the amount of content they upload and the number of recipients they select.

[45] PlayMPE recipients are generally key actors in the music industry dealing with new music (e.g., radio station programmers, music reviewers). Destiny curates and maintains lists of potential recipients and their contact information ("Lists"). The Lists are a critical component of PlayMPE's service to senders.

[46] Turning to Destiny's business, in 2017, approximately 99% of Destiny's revenue was earned through PlayMPE. However, PlayMPE required fixes and upgrades to address issues that had surfaced over time. From 2011 through 2016, the revenue earned from PlayMPE had been declining. By the second quarter of 2017, Destiny had lost money in ten of its eleven previous quarters. During that same period (2011-2016), Destiny invested resources into a proposed product known as Clipstream. (There was a first-generation version, and the 2011-2016 investment was actually into developing a "Clipstream G2" product. As the generation is irrelevant here, I will simply refer to "Clipstream".)

[47] Clipstream was intended to allow users to upload their own streaming video to the internet. As of 2017, Clipstream remained an imperfect product having at least two serious design problems.

[48] In early 2017, Destiny had some funds on hand. The funds on hand had not been generated as revenue, but rather had been raised from other sources.

[49] As Mr. Vandenberg explained in testimony, by early 2017, Destiny had hit a financial point where it would have to either use its resources to fix and improve PlayMPE (and revive declining PlayMPE revenue) or to continue developing Clipstream. To weigh those options, Destiny needed to know what it would take, in terms of time and money, to get Clipstream to generate revenue.

[50] Another issue at play in late 2016 and early 2017 related to the lease for Destiny's space. Maintaining the status quo was not an option, as there would be changes under the head lease. Destiny needed to decide whether to renew in the same building, but in a different configuration under a new head lease, or to take space in another building. Renovation costs, increased rent, moving arrangements, and moving costs were all considerations, making the decision both financially and operationally consequential for Destiny.

**B. Employment at Destiny**

[51] As President and CEO of Destiny, Mr. Vestergaard's duties included managing the Destiny Companies, overseeing their affairs and managers. He made strategic and operational decisions for the Destiny Companies and oversaw their financial reports and other financial matters.

[52] One of Mr. Vestergaard's responsibilities was to ensure Destiny Media complied with applicable securities rules and requirements. As part of this, he was responsible for preparing and issuing press releases, publishing Destiny Media's earnings and other financial information. In testimony, Mr. Vestergaard acknowledged that these press releases were important as they were how Destiny Media communicates with its shareholders.

[53] Destiny operates from a leased office space ("Office") in downtown Vancouver. As President and CEO, Mr. Vestergaard had an office in the Office.

[54] In 2009, Ms. Dove was hired to be Destiny's "List Manager". As the job title suggests, the primary responsibility is to curate the Lists: e.g., adding new relevant individuals and positions and updating names and contact information.

[55] The Office had regular hours from 8:30 a.m. to 5:00 p.m., Monday through Friday (“Company Hours”). There was some flexibility to shift one’s hours 30 minutes or so in either direction with managerial approval, and accounting employees occasionally worked irregular hours to meet deadlines.

[56] During the years relevant to the claims, Destiny employees were generally required to physically attend the Office to perform their work. On occasion, specific employees were given temporary permission to work remotely, but this was exceptional and subject to a formal and pre-approved arrangement with management.

[57] Ms. Dove was expected to perform her work at the Office. Ms. Dove was also required to work during Company Hours. While the List Manager might make calls to Australia/New Zealand outside of Company Hours at times, this was not a daily or even monthly task, and it did not form a significant portion of the work required in the position.

[58] Mr. Vestergaard testified that “Company Hours” did not apply to him as the President and CEO. This was certainly so in that the President and CEO position was not premised on a forty-hour work week. Mr. Vestergaard was expected to put in such additional hours of work, above and beyond Company Hours, as were required to effectively discharge his duties and responsibilities. Mr. Vestergaard’s own testimony aligns with the existence of an employment obligation to that effect.

[59] In terms of being required to work during Company Hours and to be in the Office during Company Hours, I am satisfied that it was understood by Mr. Vestergaard and Destiny that these requirements were of general application to Mr. Vestergaard in his role as President and CEO, but not of strict application. The Office attendance requirements for his position were also obviously subject to the understanding that Mr. Vestergaard’s responsibilities could include performing Destiny work outside of the Office, both within and outside of Company Hours (e.g., attending meetings, attending business lunches, travelling to Board meetings).

[60] Mr. Vestergaard's own conduct and the documentary evidence both indicate that Mr. Vestergaard recognized these requirements as generally applicable to him in his employment. For example, he did fill out vacation forms and account for days off specifically as vacation, but did not always do so prior to taking them. Similarly, while he was not always in the Office during Company Hours, his conduct demonstrates that he understood and accepted that it was generally incumbent upon him to provide an explanation for the fact.

[61] At discovery, Mr. Vestergaard testified that he rarely worked on anything other than Destiny business during "company time" (which I am satisfied has the same meaning as "Company Hours"). I prefer his discovery evidence over his trial testimony. At trial, he testified that doing work for outside businesses during Company Hours was an accepted (and even encouraged) practice at Destiny. I do not accept that. I find that working on Destiny matters during Company Hours was generally expected of all employees, including Mr. Vestergaard.

[62] There was a senior management group for Destiny Software, and it held a standing meeting ("Management Meeting") every Tuesday at 10 a.m. I do not accept Mr. Vestergaard's evidence that the Management Meetings were ad hoc or that they took place only when and if he convened one. While Management Meetings could be rescheduled for good reason, in the absence of such, they were expected to take place and group members were expected to attend.

[63] The senior management group consisted of:

- a) Mr. Vestergaard (CEO);
- b) Mr. Vandenberg (CFO);
- c) Mr. Ramsey (Director of Product Development); and
- d) Darren Martz (Director of Product Management).

[64] I reject Mr. Vestergaard's testimony that the sole function of the Management Meetings was for the other attendees to report to him. Rather, as indicated in the

testimony of Mr. Vandenberg and Mr. Ramsey, each member would update the others on their respective spheres. The purpose of the Management Meetings was to keep all of the group members up-to-date and operating in sync.

**C. Events of 2016/2017**

[65] In 2016, Mr. Vestergaard purchased a 50% interest in a company called Broughton & Broughton, the remaining 50% being held by Craig Doherty. Broughton & Broughton owned and operated a cafe and general store located in Lions Bay and later opened a liquor store and a propane dispensary there as well. In these Reasons for Judgment, I will refer to the Lions Bay business operations owned by Broughton & Broughton as either the “LB Businesses” or “LB”.

[66] By the end of 2016, Mr. Vandenberg had informally observed that Mr. Vestergaard was frequently absent from the Office and was behind in or failing to discharge some of his duties as President and CEO. Mr. Vandenberg also noted that Ms. Dove was frequently absent from the Office, and often in conjunction with Mr. Vestergaard’s absences. Mr. Vandenberg began paying closer attention to when they were and were not at the Office.

[67] Mr. Vandenberg testified that Mr. Vestergaard forgot about a Destiny earnings press release was supposed to be issued on January 13, 2017. Mr. Vestergaard admitted that he forgot about the press release in a contemporaneous email. At trial, Mr. Vestergaard maintained that he was busy on other Destiny business on January 13, 2017, and that it was up to him whether to send the press release out that day or later. I do not accept that testimony. It may well have been up to Mr. Vestergaard to set the day for release in the first place, but his email acknowledges that the day had been scheduled and that he forgot about it. The press release was released late. Mr. Vandenberg prepared that press release, a task he had never done before.

[68] Mr. Vandenberg testified that Mr. Vestergaard’s failure to issue the January press release as scheduled, and his having missed recent meetings, including but not limited to Management Meetings, led him to start keeping an informal log of Mr. Vestergaard and Ms. Dove’s attendance and the reasons given for absences.

[69] Mr. Vandenberg and Mr. Ramsey were involved in making the leasing decision for Destiny. They both testified that Mr. Vestergaard failed to attend scheduled meetings related to the leasing and failed to attend viewings set up to look over potential spaces. Mr. Vestergaard testified that he was involved, but often dealt directly with the leasing agent and that he and the agent viewed spaces separately from the others involved in the decision-making. Mr. Vestergaard was unable to provide any credible specifics regarding dates, times, buildings, building locations, or spaces that he viewed with the leasing agent. It also makes no practical sense to view spaces, but fail to attend meetings to discuss the options. I do not accept Mr. Vestergaard's evidence that he was working on the leasing matters independently.

[70] Mr. Vandenberg testified that he, along with Mr. Ramsey and Mr. Martz, undertook the work of viewing possible spaces and renovations and the weighing of Destiny's options. In December 2016, Mr. Vestergaard sent Mr. Vandenberg emails saying that he intended to "step back" or "step out" of the leasing discussions. I find that Mr. Vestergaard did eventually step out entirely (seemingly in late January), leaving the decision and negotiations to be addressed by Messrs. Vandenberg, Ramsey and Martz.

[71] Destiny Media had a general meeting scheduled for February 28, 2017. In late 2016, Mr. Vestergaard asked Mr. Cho (a significant and active Destiny Media shareholder) to stand for election to the Board at the meeting. Mr. Cho testified that he was reluctant, but eventually agreed on the condition that Mr. Vestergaard produce a Clipstream business plan. Mr. Cho testified that he made that stipulation because he thought Destiny had to decide whether to reinvest in PlayMPE or invest yet more in Clipstream. Although Mr. Vestergaard did not provide a Clipstream business plan to him before the meeting, Mr. Cho nonetheless stood for election. He testified that he did so with the expectation he would be seeing a Clipstream business plan imminently.

[72] Mr. Cho and Mr. Graber both have significant corporate and business experience, including as directors, and both were elected to the Board on February 28, 2017. A resolution appointing them both to the Audit, Executive Compensation, and Corporate Governance and Nominating Committees of the Board was then passed on March 1, 2017.

[73] Mr. Cho and Mr. Graber testified that after the election, they requested, on multiple occasions, that Mr. Vestergaard provide them a Clipstream business plan for review. The documentary evidence (in particular, various group email exchanges) is consistent with this. In fact, although Mr. Cho and Mr. Graber were collegial in tone (as would be expected given that Mr. Vestergaard is also a director), on any reasonable reading of the email exchanges, Mr. Cho and Mr. Graber *directed* Mr. Vestergaard to provide them with a Clipstream business plan. This is particularly so when the emails are viewed in the context of Mr. Cho's pre-election stipulation.

[74] Later in March, having received nothing responsive, Mr. Cho and Mr. Graber had a sidebar email discussion about incentivizing Mr. Vestergaard to create business plans for Destiny and the Destiny products. They discussed tying the production of business plans to granting stock bonuses. Mr. Graber agreed to try this, but expressly commented that he did not like using incentives to get Mr. Vestergaard to do what he ought to do anyway.

[75] In April 2017, Mr. Vandenberg again prepared Destiny Media's earnings press release, again because Mr. Vestergaard had not done one. At this point, Mr. Vandenberg felt obliged to report his concerns with Mr. Vestergaard and Ms. Dove's attendance and work performance to Mr. Cho and Mr. Graber. After he advised them of his concerns, Mr. Cho and Mr. Graber occasionally asked Mr. Vandenberg for updates.

[76] On April 27, 2017, Mr. Cho emailed a memorandum dated April 17, 2017 ("April Memo") to Mr. Vestergaard (copied to Mr. Graber and Mr. Vandenberg). The April Memo followed upon the previous month's incentive discussions between

Mr. Cho and Mr. Graber. The April Memo contemplated a set of stock options being granted, and linked the grants to the production of a set of business plans.

[77] The April Memo described what Mr. Cho and Mr. Graber were seeking: (1) an overall corporate business plan for the Destiny Companies; (2) a PlayMPE business plan, and (3) a Clipstream business plan. The April Memo set out descriptions and requirements for each under a separate heading. The specifics set out for the Clipstream business plan stipulated that it address: “minimum viable product” (a definition of the end product, with an estimate of the time and costs required to reach it); “marketing and channel costs” (an estimate of the marketing operation cost specifically addressing who would be hired and at what cost); and set out defined “development milestones” (a schedule of product features and the estimated dates for the completion of those features).

[78] The April Memo closed by acknowledging that developing the business plan documents could be a collaborative process, and offered Mr. Cho’s assistance in shaping the requested information into bullet points or slides for presentation.

[79] On May 19, 2017, Mr. Vestergaard sent a memo (“Talking Points Memo”) to Mr. Cho and Mr. Graber. In testimony, Mr. Vestergaard repeatedly described the Talking Points Memo as being itself a business plan. That description is inconsistent with the email he sent attaching it (which reads “talking points” in the subject line), and with the opening words of the document: “The purpose of this document is to serve as a starting point for future discussions aimed at developing a business plan and budget for Clipstream in fiscal 2018”.

[80] Mr. Cho and Mr. Graber testified that they did not consider the Talking Points Memo to be responsive to the April Memo, nor to be a document that could be described as a “business plan” (even for Clipstream alone). In my view, their assessment is fair. The Talking Points Memo is an informal document providing some general and background information about Clipstream. It does not address the points or subjects stipulated by the April Memo. On its own terms, the Talking Points

Memo does no more than contemplate the eventual creation of a business plan at some point in the future.

[81] Mr. Cho responded to the Talking Points Memo with an email reading: “I hope this is just the start of the business plan”. Mr. Cho again outlined a series of minimum requirements and provided further notes explaining them. In closing, Mr. Cho observed that his email seemed redundant given their “last several telephone calls,” and stated that he hoped “it” could be put together “shortly.” Mr. Graber then contributed further comments adding to that same email chain. He added that he and Mr. Cho needed to get a “good handle on risk/benefit” and “hence the request for a detailed business plan.”

[82] Multiple email chain discussions between Messrs. Cho, Graber, and Vestergaard (and at times Mr. Vandenberg) occurred after Mr. Vestergaard sent the Talking Points Memo. The tone of these was increasingly taut.

[83] On May 20, 2017, Mr. Vestergaard characterized the Talking Points Memo as “a starting point” and said he anticipated having a “solid plan by Sept. 1, our new fiscal year”. On May 22, 2017, Mr. Cho wrote back that the Board needed to see development milestones and a schedule, and that if Mr. Vestergaard did “not have the time for it”, he (Mr. Cho) could do it himself. Mr. Vestergaard responded that Mr. Cho was undermining him as CEO, and that Mr. Cho should “step back” and “let Clipstream succeed.” On May 23, 2017, Mr. Graber stepped into that fraught email exchange, and commented that they all owed fiduciary duties to Destiny, and that “every successful company” needs a clear business plan and a mapped budget. Mr. Graber stressed that this was why he and Mr. Cho wanted the information they were seeking.

[84] Notwithstanding, Mr. Vestergaard never produced a set of business plans as contemplated by the April Memo, nor a separate business plan for Clipstream, PlayMPE, or Destiny. There is no documentary evidence of Mr. Vestergaard’s having provided any documents at all further to the Talking Points Memo.

[85] Mr. Ramsey testified that Mr. Vestergaard did not, at any time in 2017, tell Mr. Ramsey that he was working on a business plan, nor seek any assistance from Mr. Ramsey in relation to a business plan. Mr. Ramsey testified that he had been asked to contribute to all earlier business plans for Destiny and that he would expect to be asked to, at the very least, contribute information for the creation of any business plans for Destiny.

[86] This is how matters stood when, on June 7, 2017, Mr. Vestergaard emailed Messrs. Cho and Graber demanding a significant raise in his salary (“June Email”). Mr. Vestergaard wrote that he needed money to deal with “bank stuff” and that being given stock would not suffice. In the June 7 Email, Mr. Vestergaard also stated that he was considering terminating Mr. Vandenberg and Mr. Ramsey’s employment.

[87] Mr. Cho and Mr. Graber testified that they were astounded by the June Email. Mr. Cho testified that he was surprised in part because people seeking a raise generally point to recent achievements, whereas Mr. Vestergaard had just ignored the April Memo. Mr. Cho testified that he was alarmed by the threatened terminations, in part because he saw Mr. Vandenberg and Mr. Ramsey as important employees to continued operations, but also because he thought triggering major departures was effectively “burning down the business”.

[88] Mr. Vestergaard testified that the June Email was a follow-up to a discussion he and Mr. Cho had about a raise, and that Mr. Cho had asked him, after the conversation, to send an email. I do not accept Mr. Vestergaard’s evidence on this point. The June Email contains no reference to an earlier discussion nor to a request for an email. The demand for a raise is not even the lead issue in the June Email; the termination of Mr. Vandenberg’s employment is the first point addressed. Finally, it was not put to Mr. Cho during his cross-examination that there had been an earlier discussion or a request for an email. I find that Mr. Cho was, in fact, taken aback by the entirety of the June Email.

[89] Mr. Cho and Mr. Graber both testified that after receiving the June Email, they discussed its implications, particularly the risk posed by the threatened terminations,

and agreed they had to act immediately to protect Destiny's interests. In a conference call, they directed Mr. Vandenberg to get legal advice for Destiny about BC employment law. Mr. Graber then emailed Mr. Vandenberg to confirm those instructions in writing. Legal advice was sought and obtained by Mr. Vandenberg, after which Mr. Cho and Mr. Graber opted to have a workplace investigation done. Mr. Vandenberg was instructed to make the necessary arrangements.

[90] Ms. Boddie was retained to do the investigation. In her report, she distilled the scope of investigation down to two key issues: (1) whether Mr. Vestergaard was devoting appropriate time to his employment duties and/or had failed to establish (and/or had discouraged) monitoring and management of staff attendance (Boddie Report, p. 5); and (2) the issue of Mr. Vestergaard's use of Destiny resources, including Ms. Dove's time (Boddie Report, p. 6).

[91] After obtaining corporate legal advice for Destiny, Mr. Cho and Mr. Graber called a Board meeting. They intended to move at the Board meeting to remove Mr. Vestergaard from his directorships with Destiny Software, MPE and Sonox, and to put him on paid administrative suspension from his employment while Ms. Boddie conducted the investigation.

[92] On June 20, 2017, in a group email exchange between Messrs. Cho, Graber and Vestergaard, Mr. Cho requested to schedule a Board meeting for Thursday (June 22, 2017) at approximately 3:00 p.m. Mr. Graber emailed his agreement to the proposal. Mr. Vestergaard then emailed his concurrence. Mr. Cho concluded the group exchange by confirming there was agreement to meet on Thursday at "3 pm in the Destiny offices for the board meeting."

[93] The three directors met in the Office at 3:00 p.m. on June 22, 2017 ("June 22 Meeting"). I find, based on the evidence of Mr. Cho and Mr. Graber, that the June 22 Meeting minutes accurately reflect the events of the meeting. I reject Mr. Vestergaard's testimony about the meeting, including in relation to the planning and conduct of the meeting, wherever it conflicts with the testimony of Mr. Cho and Mr. Graber.

[94] At the June 22 Meeting, by majority vote of the Board (Mr. Cho and Mr. Graber), Mr. Vestergaard was:

- a) replaced by Mr. Cho as the chair of the Board (but remained on the Board as a Destiny Media director);
- b) removed as director for Destiny Software, Sonox, and MPE; and
- c) placed on a paid administrative suspension from his employment as President and CEO.

[95] Following the June 22 Meeting, Mr. Vestergaard was advised, in writing, not to report to work or perform duties during his suspension. He was directed to meet with Ms. Boddie on June 23, 2017, and to cooperate with her investigation. He was expressly cautioned that failing to meet with Ms. Boddie would be considered insubordination.

[96] Ms. Dove was placed on administrative suspension that same day, and she was also directed to meet with Ms. Boddie on June 23, 2017.

[97] Mr. Vestergaard attended the meeting venue on June 23, 2017, and spoke with Ms. Boddie for about 15 minutes. He asked her why he was there, and then told her that he would not be interviewed without his legal counsel present. Mr. Vestergaard then left without participating in the planned interview. Ms. Dove, who arrived at and left the meeting venue in Mr. Vestergaard's vehicle, also left without being interviewed.

[98] After Mr. Vestergaard left, Mr. Cho wrote him by email (to his LB email address) and by text, advising that Mr. Vestergaard did not have a right to insist on his legal counsel attending, and advising him to return and be interviewed by Ms. Boddie. I find that Mr. Vestergaard did, in fact, have access to the LB email address that Mr. Cho emailed. In any event, Mr. Vestergaard read and replied in real time to Mr. Cho's text message. After reading the text, Mr. Vestergaard failed to return for an interview with Ms. Boddie.

[99] On June 23, 2017, Oliver Hanson, identifying himself as legal counsel for Mr. Vestergaard and Ms. Dove, wrote to Destiny advising that Mr. Vestergaard and Ms. Dove would not participate in an internal investigation, and alleging that Destiny Media's conduct was unlawful, improper and oppressive. Mr. Hanson wrote that his clients intended to report to work on Monday, and that if their Destiny email accounts and access cards were not reactivated immediately, legal proceedings would be initiated against Destiny Media, Mr. Vandenberg, Mr. Cho and Mr. Graber for "oppression, conspiracy and other wrongful corporate conduct."

[100] On June 25, 2017, Mr. Cho responded to Mr. Hanson. In his letter, Mr. Cho advised that his clients' suspensions and the investigation would continue, and went on to say:

[5] We have decided to give Mr. Vestergaard and Ms. Dove a final opportunity to cooperate with the investigation. Please advise immediately, and no later than 9:00 am Monday June 26, 2017, if Mr. Vestergaard and Ms. Dove are willing to cooperate with the investigation and meet alone with the investigator and a meeting will be arranged. Please note that, if they continue to refuse to participate in the investigation, we will have no choice but to conclude the investigation without their input.

[101] Mr. Vestergaard and Ms. Dove again declined to cooperate. Ms. Boddie concluded her investigation without their participation, submitting a report on June 28, 2017. Her report was unfavourable to Mr. Vestergaard in respect of both key issues framed for investigation.

[102] On June 28, 2017, the Board held another meeting ("June 28 Meeting"), during which the majority (Mr. Cho and Mr. Graber) voted to terminate Mr. Vestergaard's employment for cause.

[103] Again, Mr. Vestergaard gave testimony regarding the conduct of the June 28 Meeting. Wherever Mr. Vestergaard's testimony differs from that given by Mr. Cho and Mr. Graber, I accept the latter. I also find that the June 28 Meeting minutes accurately reflect the events of that meeting. In particular, I find that Mr. Vestergaard did have an opportunity to participate in the Board meeting.

**D. Dove Litigation**

[104] As noted, Ms. Dove was also terminated for cause on June 28, 2017. Ms. Dove filed a wrongful dismissal action against Destiny Software and Destiny Media. Her claim was dismissed by Justice Branch, who found that her performance of LB work during Destiny work hours constituted just cause for termination: *Dove v. Destiny Media Technologies Inc.*, 2023 BCSC 1032.

**E. LB Business-related Emails**

[105] After Mr. Vestergaard was suspended, Mr. Vandenberg went through Mr. Vestergaard's Destiny email account. His review revealed that Mr. Vestergaard routinely used his Destiny email account for non-Destiny matters, including correspondence regarding the LB Businesses. Mr. Vandenberg separated the emails addressed or copied to Mr. Doherty and/or Ms. Dove into a subset ("Vestergaard LB Emails").

[106] The defendants obtained, in this proceeding, an order requiring Ms. Dove to disclose emails sent and received from a specific email ("LBV Address"). In his testimony, Mr. Vestergaard suggested that the LBV Address was a general purpose LB email address. I reject that suggestion. Ms. Dove is the entered contact name for the LBV Address in Mr. Vestergaard's account. The LBV Address emails in evidence, in context and in content, are consistent with having been authored by Ms. Dove. Mr. Vestergaard did not identify any specific email as potentially having been written by anyone other than Ms. Dove. I am satisfied that Ms. Dove used the LBV Address as a personal address.

[107] Mr. Vestergaard was shown and spoke to a significant number of emails in the course of his testimony, and these emails and/or email chains were identified and entered as separate exhibits. However, the defendants also sought to enter the Vestergaard LB Emails and LBV Emails *qua* collection (the "Collections"). The defendants did not seek to rely on the Collections for the truth of any statements contained in the emails, but rather as demonstrating the overall volume (length and number) and density of the correspondence between Ms. Dove and Mr. Vestergaard

regarding LB matters during the material period as shown by reference to the dates and times shown on the emails. I am satisfied that the Collections were sufficiently authenticated and identified to be relied upon for the purposes of use proposed by the defendants.

## VII. Analysis

### A. Wrongful Dismissal – Legal Framework

[108] A helpful summary was provided by Justice Adair in *Kirk v. Nanaimo Literacy Association*, 2018 BCSC 1217 at paras. 98-106:

[98] The basic principles applicable where (as here) an employer asserts it has terminated an employee for cause are not in dispute.

[99] Generally, absent a fixed term contract or contractual notice provision, it is an implied term of the employment contract that an employer may dismiss an employee by giving the employee reasonable notice or payment in lieu. However, if the employer shows cause, the employee may be dismissed without notice or payment in lieu. See *Ansari v. British Columbia Hydro and Power Authority* (1986), 1986 CanLII 1023 (BC SC), 2 B.C.L.R. (2d) 33 at 36 (S.C.), aff'd (1986), 55 B.C.L.R. (2d) xxxiii (C.A.).

[100] If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with the employee's duties or prejudicial to the employer's business, or if the employee has been guilty of willful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee: see *R. v. Arthurs, Ex parte Port Arthur Shipbuilding*, 1967 CanLII 30 (ON CA), [1967] 2 O.R. 49, 62 D.L.R. (2d) 342 at 348 (C.A.), rev'd on other grounds 1968 CanLII 29 (SCC), [1969] S.C.R. 85.

[101] Whether an employee's conduct is such as to warrant dismissal requires an analysis of the particular circumstances surrounding the employee's behaviour. Factors such as the nature and degree of the misconduct, and whether it violates the "essential conditions" of the employment contract or breaches an employer's faith in an employee must be considered in drawing conclusions concerning the existence of just cause for termination. See *McKinley v. BC Tel*, 2001 SCC 38, at para. 39.

[102] A finding of misconduct does not, by itself, give rise to just cause. Just cause can only be determined through an inquiry into: (a) whether the evidence demonstrated employee misconduct; and (b) whether, in the circumstances, such misconduct justified the employee's termination without notice. See *McKinley*, at paras. 33, 35 and 49.

[103] The test described in *McKinley* requires an assessment of whether the employee's misconduct gave rise to a breakdown in the employment relationship justifying dismissal, or whether the misconduct could be reconciled with sustaining the employment relationship by imposing a more

“proportionate” disciplinary response (*McKinley*, at paras. 48, 53 and 57). A “contextual approach” governs the assessment of the alleged misconduct at this stage of the test (*McKinley*, at para. 51). That assessment includes a consideration of the nature and seriousness of the misconduct, the surrounding circumstances in which the misconduct occurred, the nature of the particular employment contract, and the position of the employee (*McKinley*, at paras. 48-57). The ultimate question to be decided is whether the employee’s misconduct “was such that the employment relationship could no longer viably subsist” (*McKinley*, at para. 29).

[104] Disobedience may constitute cause: see *Stein v. British Columbia (Housing Management Commission)* (1992), 1992 CanLII 4032 (BC CA), 65 B.C.L.R. (2d) 181 (C.A.), at pp. 185-186. However, in order for disobedience to constitute cause, the direction disobeyed must be clear and lawful, and the act of disobedience must be willful and one of substance: see *Ernst v. Destiny Software Productions Inc.*, 2012 BCSC 542, at para. 122 (citing *Panton v. Everywomen’s Health Centre Society* (1988), 2000 BCCA 621 (CanLII), 82 B.C.L.R. (3d) 364, at para. 33).

[105] The trial judge is not obligated to formally balance the length and quality of service with the nature and severity of the misconduct in determining whether there was just cause to dismiss, although it may be appropriate on the facts of a particular case to engage in just such an analysis. The framework adopted by the Court in *McKinley* focuses on the nature and severity of the misconduct in relation to its impact on the employment relationship; it is not a balancing exercise between the value of the employment to the individual and the severity of the misconduct. See: *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127, at paras. 28-29.

[106] The burden of proving that the employer had just cause to dismiss the employee rests with the employer: *Ernst*, at para. 124.

[109] An employer is entitled to expect a higher standard of conduct from a senior employee who, for example, works with autonomy, is entrusted with discretion, or owes fiduciary duties as a result of the nature and degree of responsibility involved in their position: see, for example, *Böhmer v. Burns Lake Native Logging Ltd.*, 2018 BCSC 1052 at paras. 37-38. Further, the greater the autonomy of an employee, the more fundamental trust is as an element of the employment relationship: see *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127 at para. 9.

[110] Finally, an employer may justify a dismissal with facts learned after the dismissal (or even on grounds differing from those alleged at the time of dismissal): *Lake Ontario Portland Cement Co. Ltd. v. Groner*, 1961 CanLII 1 (SCC), [1961] S.C.R. 553, at pp. 563-564. The question for the court is whether grounds for

dismissal existed at the time of the dismissal, not whether those grounds were known or fully known by the employer at that time.

**B. The Allegation of Just Cause**

[111] It is asserted that Mr. Vestergaard engaged in multiple kinds of employee misconduct. The Destiny Companies say that he:

- a) routinely worked on LB Business matters to the detriment of the discharge of his employment duties and responsibilities at Destiny;
- b) failed to diligently discharge his duties and responsibilities as President and CEO, including by:
  - i. failing to produce business plans, including a Clipstream business plan;
  - ii. failing to produce and release earning reports as Destiny Media press releases in January and April 2017; and
  - iii. cancelling and failing to attend Management Meetings.
- c) breached his fiduciary duty and other duties owed to Destiny by:
  - i. knowingly permitting Ms. Dove to perform LB work during her paid Destiny paid time;
  - ii. permitting Ms. Dove to perform LB work while aware that she was behind in the discharge of her Destiny duties;
  - iii. permitting Ms. Dove to use Destiny resources for LB work, including by enlisting a Destiny employee to assist with LB graphic design work; and
  - iv. improperly claiming non-Destiny-related expenses as Destiny work expenses.

d) was insubordinate in refusing to be interviewed by Ms. Boddie.

[112] While the outline above raises additional points, I find it appropriate to concentrate the defendants' position into three central allegations for purposes of considering the issues. Those central allegations are that he:

- a) condoned Ms. Dove performing LB work during paid Destiny time to the benefit of Broughton & Broughton and the detriment of Destiny ("Dove Allegation");
- b) failed to discharge his own employment performance obligations ("Shirking Allegation"); and
- c) refused to be interviewed by Ms. Boddie ("Insubordination Allegation").

[113] Destiny submits that, as outlined in *Böhmer* and *Steel*, a higher standard of conduct applied to Mr. Vestergaard in his employment. I agree. As President and CEO, Mr. Vestergaard was Destiny's most senior employee. He reported directly to the Board (of which he was a member). The remaining Board members – Mr. Cho and Mr. Graber – resided in the United States and were rarely in Vancouver, let alone the Office. As President and CEO, Mr. Vestergaard had significant autonomy and was subject to minimal oversight.

[114] I am also satisfied that the higher standard of conduct owed by Mr. Vestergaard is relevant to all three central allegations.

***i. The Dove Allegation***

[115] Although some of the findings made in this section will be of equal or primary relevance to the Shirking Allegation, I find it convenient to address the Dove Allegation first.

[116] I am satisfied that Mr. Vestergaard and Ms. Dove spent minimal time in the Office over the material period.

[117] I accept Mr. Vandenberg's evidence that this was readily observable to him and that, when he began keeping an informal log, the log conformed with his observation. The log is significantly supported by contemporaneous emails and messages (including ones sent by Mr. Vestergaard himself). I find Mr. Vandenberg's informal log sufficiently reliable to be given some weight, particularly as evidence of a trend over time.

[118] I also accept the testimony of Mr. Ramsey and Mr. Vitasovic that they rarely saw Mr. Vestergaard or Ms. Dove in the Office during the material period. I also accept their evidence regarding the size and layout of the Office itself. Thus, I accept that the number of employees are relatively small, and that persons, such as Messrs. Vandenberg, Ramsay and Vitasovic, present in the Office on any given day generally have a reliable awareness of who else is present.

[119] The evidence (including messages to and from Mr. Vestergaard) also establishes that Mr. Vestergaard took significant sick time during the material period (e.g., a two-week period in February). I note that no supporting medical evidence for these absences was adduced at trial.

[120] I also accept Mr. Vandenberg's testimony that both Mr. Vestergaard and Ms. Dove took significant vacation time during January-June 2017. This is consistent with emails sent to Mr. Vandenberg by Mr. Vestergaard discussing the amounts of his own and Ms. Dove's vacation days to date, and with Mr. Vestergaard's reply email. It is also consistent with Ms. Dove's vacation forms in evidence, which were often filled out only after the time sought had already been taken. I also find that Ms. Dove was effectively "overdrawn" as against her vacation entitlement during the material period.

[121] Further, the evidence supports a finding that Mr. Vestergaard and Ms. Dove spent much of that respective vacation time together (e.g., there is an email from Mr. Vestergaard to Mr. Vandenberg in which Mr. Vestergaard advised Mr. Vandenberg that he, himself, had just taken 18 days while Ms. Dove had taken 19). Further, since they live at the same residence, and generally drive to and from

the Office together, I find Mr. Vestergaard would have been aware whether Ms. Dove had or had not gone into the Office on any given day.

[122] I am also satisfied that Ms. Dove and Mr. Vestergaard spent significant amounts of time during the period of January-June 2017, including time encompassed by Company Hours, working on LB matters.

[123] The emails in evidence show that Mr. Vestergaard was closely involved in the low-level management and day-to-day operation of the LB Businesses. They show him contributing extensively to ongoing discussions of LB matters, including such prosaic matters as the stocking of specific items, the ordering and arrangement of store shelving, and the placement of small appliances. These emails are fundamentally inconsistent with Mr. Vestergaard's characterization of himself as a "silent partner" and his claim of having been involved only in high-level management.

[124] The volume and detail of the email exchanges indicate that these would have taken significant time to read, digest and respond. Mr. Vestergaard agreed during cross-examination that he could receive 5-30 LB-related emails on any given day.

[125] The emails show that Ms. Dove was deeply involved in day-to-day management and operations for the LB Businesses. They indicate, for example, that she had primary responsibility for alcohol selection and was performing point of sale (or "POS") system reviews. I find that Ms. Dove was effectively the person in charge of various areas of significance to the LB operations.

[126] I am satisfied that Mr. Vestergaard was well aware of the nature and volume of LB work that Ms. Dove was doing. For example:

- a) On May 15, 2017, Mr. Vestergaard emailed Mr. Doherty, stating as follows regarding Ms. Dove and her LB work:

She's living and breathing inventory – it actually gets annoying as it is all she talks about, but she is spending a lot of time talking to people to get the right product mix... She's also pushing for us to rip out the shelves and put in adjustable steel racks, which would allow us to have four rows instead of three. She is sourcing a wine rack for the red. ...

b) That same email string shows that Ms. Dove emailed Mr. Vestergaard earlier that day, attaching an information flyer and advising that she intended to go to the upcoming trade and media wine show in the flyer, which was shown as scheduled for 2-5:00 p.m. on May 25, 2017 (a weekday).

c) On May 16, 2017, Mr. Vestergaard emailed Mr. Doherty noting that: Zashean has been going through the POS meticulously to correct mistakes.

d) On June 25, 2017, Mr. Vestergaard emailed Mr. Doherty saying:

We need someone (I think Zashean) to do big purchases. ... Can you find out what the maximum total credit is for us to allocate? I'm thinking \$25,000 for Zashean, \$2500 for the rest of us – with Zashean buying capital items and inventory....

[127] In his trial testimony, Mr. Vestergaard repeatedly sought to minimize Ms. Dove's involvement in LB operations. His starting point at trial was the assertion that Ms. Dove did very little. As he was taken through documents, he steadily conceded the extent of her involvement. His initial assertion that she did very little cannot be attributed to any lack of appreciation or misapprehension: most of the emails shown to him during cross-examination were sent to or copied to him in real time.

[128] A similar line of cross-examination appears to have been undertaken during discovery. At the conclusion of it, Mr. Vestergaard testified as follows:

Q Okay. So, sir, I suggest to you that Ms. Dove was intimately involved in managing various aspects of the business on an ongoing and regular basis.

A So the POS system was just over a couple-week period. But she was involved in choosing new inventory to add to the system. And so she's using the POS reports to figure out which ones were selling and which ones were making us a profit.

Q So this is an ongoing overview of what's doing well, what isn't, reporting to you, emailing, dealing with staff, dealing with purchases. She was doing all that?

A Yes, up front.

Q She was spending many hours a week

A Yes.

Q -- right from January to June?

A Yes.

Q More than 20 hours a week?

A I don't know how many hours.

Q But that would be reasonable, wouldn't it?

A Yes.

[129] It is evident from the times and dates on the emails dealing with LB matters that a great many of those sent by Ms. Dove to Mr. Vestergaard were sent and received during Company Hours. Further, many of the emails sent by Mr. Vestergaard to Ms. Dove were sent to her during Company Hours. Mr. Vestergaard often knew, from the emails he received, including those that were in response to his own, that Ms. Dove was writing them during Company Hours. Further, in sending emails to her during Company Hours, Mr. Vestergaard was at least contemplating, if not expecting, that Ms. Dove would read his LB emails during Company Hours. Aside from the time spent corresponding, Ms. Dove's LB emails to Mr. Vestergaard often indicated on their face that she was in the midst of doing other LB work (e.g., reporting that she was searching for shelves or researching refrigeration units) during Company Hours.

[130] Mr. Vandenberg testified that Ms. Dove was behind on her work for Destiny during the material period. There are emails that provide support for his testimony. One of the most significant tasks that she failed to perform was a specific request for information regarding the List work. On April 28, 2017, Mr. Vandenberg emailed Ms. Dove that the Board had requested a process description for the 2018 budget ("List Management Document"). He told her what was needed, asked for a draft by May 19, and asked her to advise if there would be any problem meeting the May 19 deadline. She never provided a draft. There is a subsequent email from Mr. Vandenberg to Ms. on June 21, 2017 (just prior to her termination), asking her to just submit whatever she had done to date. Mr. Vandenberg's testimony is that nothing was ever provided by Ms. Dove.

[131] There are emails in evidence establishing that it was brought to Mr. Vestergaard's attention that Ms. Dove was behind in or failing to perform her duties at Destiny during the material period, including both with respect to the List Management Document and approval of her assistant's hours for payroll. For example, on April 19, 2017, Mr. Vandenberg emailed Mr. Vestergaard reporting that he had unsuccessfully emailed Ms. Dove five times, asking her to approve her assistant's February hours. Mr. Vandenberg further commented that Ms. Dove had not been in the Office for a month. (Ms. Dove subsequently filed – after the fact of having taken the time – a form seeking authorization for 18 days vacation.)

[132] Mr. Vandenberg testified that he also told Mr. Vestergaard at least twice about the fact that Ms. Dove had not provided a List Management Document even though he gave her firm deadlines.

[133] I find that Mr. Vestergaard was aware, at a minimum, that Ms. Dove was putting in something akin to 20 hours a week performing LB work during January through June 2017, including during Company Hours, while also aware that she had been absent from the Office, including without obtaining pre-approval to take vacation time, and was behind on time-sensitive Destiny work.

[134] I am satisfied that Mr. Vestergaard condoned and encouraged Ms. Dove's conduct in this regard. I further find that Mr. Vestergaard facilitated Ms. Dove's priority performance of LB work over Destiny work, including during Company Hours, in declining to take any corrective action notwithstanding her attendance and work performance issues having been brought to his attention.

[135] By this conduct, Mr. Vestergaard breached his fiduciary duties to Destiny. He allowed, encouraged, and facilitated Ms. Dove's redirection of her paid time (a Destiny resource) to LB and, in so doing, benefitted personally through his interest in Broughton & Broughton. This conduct constitutes a breach of his duty of loyalty as well as a breach of trust in terms of conflict of interest.

***ii. The Shirking Allegation***

[136] As set out above, Mr. Vestergaard's assertion that the requirement to work at the Office during Company Hours, perform Destiny Work during Company Hours and adhere to the vacation policy (collectively, the "Attendance Policies") did not strictly apply to him has merit. The evidence suggests that the prior Board allowed Mr. Vestergaard this flexibility. There is no evidence that Mr. Vestergaard was ever given notice by the present Board that his employment now required strict adherence to the Attendance Policies.

[137] I have found that there were understood expectations (as found above) regarding the general application of the Attendance Policies. These expectations make it fair to have regard to the Attendance Policies *as a guidepost* in evaluating Mr. Vestergaard's general attendance and work performance, but non-compliance with the Attendance Policies cannot be considered *per se* misconduct.

[138] In any event, the testimony of Mr. Cho or Mr. Graber does not suggest that Mr. Vestergaard's personal non-compliance with the Attendance Policies was in any way the root of their concerns regarding his conduct as an employee. Their concern, first and at all times foremost, was his *non-performance* of his duties in relation to the requests for a Clipstream business plan and, subsequently, under the April Memo, the request for a set of Destiny business plans.

[139] Mr. Cho and Mr. Graber were clear about what information they wanted from Mr. Vestergaard and about the fact that they wanted it in a timely fashion. In my view, there should have been no doubt in Mr. Vestergaard's mind that there was urgency to the requests set out in the April Memo, especially given Mr. Cho's pre-election stipulation. However, even if there was, Mr. Cho's subsequent email made it clear that the Board wanted a response shortly. Similarly, in my view, there should have been no question about the fact that the Talking Points Memo was not itself sufficient, given the specificity of the April Memo. However, even if there was, the subsequent emails again made it clear that more was expected. Finally, while the April Memo made reference to collaboration and Mr. Cho assisting with putting the

required information into a particular form, it was clear that the Board was looking to Mr. Vestergaard to provide all of the information that had been requested, not contemplating a back and forth process where different people would add information over the course of several months.

[140] It was Mr. Vestergaard's duty and responsibility as President and CEO to provide the Board with information regarding the business. Mr. Vestergaard's failure to provide business plans was a failure to perform an evidently fundamental employment obligation. Further, Mr. Vestergaard failed to provide information requested by Board directors to the Board in circumstances where it was readily apparent that the lack of information would stymie the Board's proper operation.

[141] I find that Mr. Vestergaard failed to perform the work assigned to him by the April Memo. He did not produce any document further to the Talking Points Memo. Further, I am satisfied by Mr. Ramsey's evidence that Mr. Vestergaard never made any genuine attempt to comply with the April Memo. This failure was notwithstanding Mr. Cho and Mr. Graber's having explained the importance of the information and having expressed the Board's consideration of the matter as an issue of fiduciary obligation. Accordingly, Mr. Vestergaard persistently failed to attempt to discharge an employment duty that ought properly to have been his highest priority. I accept that that was a serious and fundamental breach of his employment contract.

[142] More than that, I find that Mr. Vestergaard, by such conduct, demonstrated himself to essentially be ungovernable as an employee. While not alleged as an instance of such, there is more than a whiff of insubordination in Mr. Vestergaard's failure to provide Mr. Cho and Mr. Graber with information that they required, as Board directors, in order to direct Mr. Vestergaard in his employment capacity. Notably, the consequence of failing to empower Mr. Cho and Mr. Graber to make an informed decision, was that Mr. Vestergaard was effectively determining Destiny's business priorities all by himself.

[143] I am also satisfied that Mr. Vestergaard routinely prioritized LB matters over Destiny matters while at the same time failing to diligently discharge his obligations

to Destiny. The defendants canvassed a considerable number of examples. In my view, two will suffice to illustrate the point.

[144] As noted, Destiny’s leasing situation in late 2016 and early 2017 gave rise to significant cost and operational issues. Notwithstanding, on January 18, 2017, Mr. Vestergaard cancelled a space viewing scheduled with Destiny’s leasing agent. I find that he cancelled that meeting, at the last minute, in order to meet with LB’s accountant and then attend a lunch meeting with Mr. O’Neill, a lawyer, regarding LB matters.

[145] While Mr. Vestergaard testified that the meeting with Mr. O’Neill related to a possible Destiny business spin-out, I do not accept that. I accept Mr. Vandenberg’s evidence that the spin-out had already been considered and definitively rejected in 2016. Mr. Neill’s invoice to Broughton & Broughton shows 1.6 billable hours of work done on January 18, 2018. There is no documentary evidence that Mr. O’Neill was working on any Destiny matters. I find that the meeting with Mr. O’Neill was about LB matters. As already noted, Mr. Vestergaard subsequently stepped away from the leasing decision altogether, leaving it to the others to address.

[146] As another example, as already noted, Mr. Vestergaard “forgot” about the Destiny earnings press release that was scheduled to go out on January 13, 2017. While Mr. Vestergaard suggested in testimony that he was busy with other Destiny matters, the evidence shows that he sent and received 17 LB-related emails during Company Hours on January 13, 2017, and scheduled a meeting at the LB café for 3:00 PM.

[147] The key restriction on Mr. Vestergaard’s ability to dedicate his time to working on LB matters is not rooted in the Attendance Policies, but rather in it being an implied term of his employment contract, informed by the nature of his employment position and supported by the fiduciary duties it engaged, that completing his Destiny work in a diligent and productive manner would be Mr. Vestergaard’s priority interest in terms of time allocation.

[148] Mr. Vestergaard was not discharging his employment obligations to Destiny in a diligent and productive manner, and yet Mr. Vestergaard was prioritizing LB matters above Destiny matters. He cancelled the meeting with Destiny's viewing agent to meet with LB's accountant and lawyer, and he forgot about the January press release because he at home working on LB matters. He took vacation time, when he had outstanding obligations to Destiny, and then spent that vacation time working on LB matters. Assuming for purposes of argument that Mr. Vestergaard was sick for periods during the January-June 2017 period, the impact of that was to lessen his overall time to work, making it even more important that he give priority to completing his Destiny duties.

[149] In my view, Mr. Vestergaard fundamentally breached his employment contract when he failed to provide the Board with the business plans that had been requested. That fundamental breach is, however, seriously aggravated by the breaches of loyalty and conflicts of interest arising from his prioritization of LB matters over his obligations to Destiny.

***iii. The Insubordination Allegation***

[150] Wilful disobedience is a ground upon which an employer may dismiss without notice, where the direction disobeyed was clear and lawful, and the act of disobedience wilful and of substance: *Panton v. Everywoman's Health Centre Society*, 2000 BCCA 621 at para. 33.

[151] At para. 33 of *Panton*, Saunders J.A. (writing for the Court), endorsed the following statement of Mr. Justice MacKinnon, in *Heyes v. First City Trust Co.*, (4 December 1981), Vancouver C812809 (B.C.S.C.), 12 A.C.W.S. (2d) 105, at p. 9, as an accurate description of disobedience as cause for dismissal:

Wilful disobedience is, of course, a ground upon which an employer may dismiss without notice. In order to justify the dismissal on those grounds there is an onus upon the defendant to establish there were acts willfully carried out by the employee in defiance of clear and unequivocal instructions of a superior or refusal to carry out policies or procedures well known by the employee as being necessary in the fulfillment of the employer's objectives.

[152] Destiny relies on Mr. Vestergaard's refusal to cooperate in Destiny's investigation – and more specifically, his refusal to be interviewed by Ms. Boddie, as the relevant act of defiance. Destiny stresses the fact that Mr. Vestergaard was given clear instructions and multiple opportunities.

[153] Mr. Vestergaard was given not one but several clear and unequivocal directions, and he had been expressly warned that a failure to cooperate would be considered insubordination. Mr. Vestergaard's first response was to place conditions on his participation. He was advised that he had no right to have counsel present, and was given an opportunity to return. The direction to return was clear and unequivocal. Mr. Vestergaard disregarded it.

[154] After time to reflect and opportunity to speak with counsel, Mr. Vestergaard was extended another opportunity when Mr. Cho wrote to Mr. Hanson. Mr. Vestergaard pre-emptively declined (and did so in adamant and aggressive terms).

[155] In my view, the evidence readily establishes willful defiance as a ground on terms that meet the requirements outlined in *Heyes*.

**C. Just Cause**

[156] By way of summary, on three central allegations, I find that:

- a) Mr. Vestergaard persistently failed to discharge a core employment duty in failing to provide business plans as requested by the Board;
- b) in breach of his fiduciary duties, Mr. Vestergaard prioritized LB matters over the discharge of his employment obligations to Destiny;
- c) in breach of his fiduciary duties, Mr. Vestergaard condoned Ms. Dove's performance of LB work during Company Hours and in priority to her Destiny duties; and

- d) in failing to participate in an interview with Ms. Boddie, Mr. Vestergaard was willfully disobedient in a manner that constitutes insubordination.

[157] As noted by the Court, again by Justice Branch, in *Scorpio Security Inc. v. Jain*, 2018 BCSC 978 at para. 49:

[49] Just cause is behaviour that is seriously incompatible with the employee's duties. It is conduct which goes to the root of the contract, and fundamentally strikes at the heart of the employment relationship. The test is an objective one, viewed through the lens of a reasonable employer taking account of all relevant circumstances: *Roe v. British Columbia Ferry Services Ltd.*, 2015 BCCA 1 at para. 35.

[158] Having engaged in the misconduct outlined above, I find that Mr. Vestergaard has engaged in misconduct of a nature and degree that warrants dismissal in all the circumstances. Not only is dismissal proportionate, in the totality of the circumstances, it is the only appropriate response.

[159] Further, and in any event, in my view, Mr. Vestergaard has, by his conduct, demonstrated an essential ungovernability, and has made it impossible for the trust and confidence necessary to this particular employment relationship to be restored. Taken as a whole, Mr. Vestergaard's conduct has rendered a continuation of his employment as President and CEO of Destiny untenable: *Jewitt v. Prism Resources Limited* (1981), 1981 CanLII 535 (B.C.C.A.) at paras. 34-35; *Obeng v. Canada Safeway Limited*, 2009 BCSC 8.

[160] That said, if a warning that employment was in jeopardy were to be found to be required, I would conclude that such a warning was given with respect to both the failure to produce business plans and the refusal to participate in an interview:

- a) The corporate context informs the circumstances and reasonable expectations here. Mr. Cho and Mr. Graber expressly articulated the need for business plans as a matter for fiduciary obligation for them as directors. Any reasonable person with corporate experience would appreciate that failure to address such a need could have serious repercussions, up to and including termination.

- b) Mr. Vestergaard was expressly warned that failure to cooperate with Ms. Boddie's investigation would be treated as insubordination. Mr. Vestergaard was already on suspension at the time he was given that warning. In the circumstances, potential further adverse consequences for insubordination could only reasonably be understood to extend to possible termination.

[161] The wrongful dismissal claim is dismissed.

#### **D. Conspiracy**

[162] The elements of the tort of civil conspiracy are as summarized by the Court of Appeal in *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.*, (1993), 96 B.C.L.R. (2d) 156, 1993 CanLII 6870 (B.C.C.A.) at paras. 4-5:

[4] [T]he tort of conspiracy exists if:

- (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
- (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

[5] Accordingly, the following elements must be proved:

1. an agreement between two or more persons;
2. concerted action taken pursuant to the agreement;
3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;  
(ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
4. actual damage suffered by the plaintiff.

[163] The decision to suspend and then terminate Mr. Vestergaard's employment was made by Mr. Cho and Mr. Graber. I am satisfied that it was a decision they made with regret, not with the intent to cause damage to Mr. Vestergaard. I find that Mr. Cho and Mr. Graber genuinely apprehended that their fiduciary obligations to

Destiny required them to suspend and terminate Mr. Vestergaard given the circumstances. I am satisfied that this was their sole motivation.

[164] Mr. Vandenberg was Destiny's CFO. I am satisfied that Mr. Vandenberg's actions throughout the material period were taken with and for the predominant purpose of protecting the interests of the Destiny Companies. I accept his testimony that he initially raised his concerns about Mr. Vestergaard's attendance and work performance to Mr. Cho and Mr. Graber's attention because of his own fiduciary duties to Destiny.

[165] After that, Mr. Cho and Mr. Graber asked him for updates. The steps taken by Mr. Vandenberg to obtain legal advice regarding Mr. Vestergaard's removal, suspension and termination, and in arranging Ms. Boddie's engagement, he took on Destiny's behalf and at the express instruction of Mr. Cho and Mr. Graber in their capacity as Board directors.

[166] Mr. Vandenberg did not have any authority to decide whether Mr. Vestergaard would be suspended or terminated. Nor did Mr. Vandenberg have the authority to determine when or how Board meetings were called or conducted. Those were Board matters and they were decided by Mr. Cho and Mr. Graber as directors.

[167] I also find that Mr. Vestergaard has failed to establish that there was anything unlawful about the conduct of the June 22 or June 28 Meetings:

- a) The evidence is that Mr. Cho and Mr. Graber formed a majority of all the relevant Board committees, as per their March 1, 2017, appointments.
- b) Pursuant to the resolutions passed at the June 22 Meeting, Mr. Cho was the sole director of Destiny Software at the time of Mr. Vestergaard's termination. Regardless of whether the right to terminate Mr. Vestergaard's employment rested with the Board of Destiny Media or the Board of Destiny Software, or both, the suspension and termination were done with lawful authority.

- c) The notice given for the June 22 Meeting complied with the corporate bylaws. Destiny Media's bylaws permit notice of special meetings to be provided by email and, in any event, state that attendance at a special meeting without raising an express objection regarding notice at the outset of the meeting operates as a waiver of non-compliant notice.
- d) I do not accept Mr. Vestergaard's evidence that he was precluded from participating. As set out earlier, I find on the evidence that the minutes from the June 22 and June 28 Meetings accurately reflect the events that took place.

[168] Accordingly, the conspiracy claim cannot succeed. The claim is dismissed.

### **E. Defamation**

[169] The law of defamation protects a person's reputation from defamatory falsehoods. A publication is considered defamatory if it tends to lower the plaintiff's reputation in the estimation of reasonable persons in the community. In *Weaver v. Corcoran*, 2017 BCCA 160 at para. 62, the Court of Appeal articulated the function of the law of defamation as follows:

[62] The function of defamation law is to protect and vindicate reputation from harm that is unjustified. A good reputation fosters one's sense of self-worth and, as an aspect of personality, is related to the innate worthiness and dignity of the individual, an underlying value of the Canadian Charter of Rights and Freedoms. Once tarnished, good repute is hard to regain, with sometimes devastating consequences, particularly in a professional context. However, its protection must be balanced and reconciled with the Charter guarantee of freedom of expression, a recognised pillar of modern democracy.

[Citations omitted]

[170] At para. 70 of *Weaver*, the Court of Appeal stated that in order to succeed on a defamation claim, a plaintiff must prove, on a balance of probabilities, that the impugned words:

- a) were defamatory;

- b) referred to the plaintiff; and
- c) were published, in that they were communicated to at least one person aside from the plaintiff.

[171] Under the notice of civil claim, the alleged statement (“Statement”) plead to have been libellous and to have been published on the internet in the form of Destiny Media’s Form 8-K (“Form 8-K”) is said to read as follows:

**Departure**

On and effective as of, June 29, 2017, the board of directors (the “Board”) of Destiny Media Technologies Inc. (the “Company”) dismissed Steve Vestergaard as President and Chief Executive Officer of the Company.

The Board had earlier, on June 22, 2017, placed Steve Vestergaard on administrative suspension, with pay, for each of his roles as President and Chief Executive Officer of the Company, and replaced Mr. Vestergaard as the chairman of the Board.

[172] No version of the Form 8-K was introduced into evidence at trial. In fact, Mr. Vestergaard provided no evidence in support of any of the elements of defamation. I agree with the defendants that Mr. Vestergaard has failed to prove publication and thus his claim cannot succeed. There is no need to address any further elements of the tort.

[173] The defamation claim is dismissed.

**VIII. Summary**

[174] The plaintiff’s action against the defendants is dismissed.

[175] The defendants are entitled to their costs as the successful parties. If parties wish to make further submissions regarding costs, they have leave to do so, subject to further direction from the Court.

“Tucker J,”