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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GREATER PENNSYLVANIA CARPENTERS' PENSION FUND, derivatively on behalf of nominal defendant IMPERVA, INC., Plaintiff Below, Appellant, v. CHARLES GIANCARLO, THERESIA GOUW, SHLOMO KRAMER, STEVEN KRAUSZ, ALBERT PIMENTEL, FRANK SLOOTMAN, DAVID STROHM, JAMES TOLONEN, and IMPERVA, INC. Defendants Below, Appellees.	No. 531, 2015 APPEAL FROM THE OPINION AND ORDER DATED SEPTEMBER 2, 2015 OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN C.A. No. 9833-VCP

APPELLANT'S REPLY BRIEF

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I. THE COMPLAINT RAISES A REASONABLE DOUBT THAT A MAJORITY OF THE DEMAND BOARD IS DISINTERESTED OR INDEPENDENT

Plaintiff established in its Opening Brief ("OB") that demand is excused because four members of the nine-member Demand Board[1] – Gouw, Krausz, Strohm, and Slootman – are not independent of a fifth director, Kramer, who no one disputes was interested in the Acquisition. Specifically, Plaintiff alleges important context, which includes (a) the four directors' backgrounds in the highly-competitive and incestuous Silicon Valley venture capital community (A70-71), and (b) Kramer's status as a preeminent entrepreneur and investor within a specific segment of that community in which each of these directors or their affiliated firms invest (A22-27, 32-35, 63-70). Plaintiff further alleges that the four directors or their affiliated firms have enjoyed significant past success with Mr. Kramer, which has coalesced into a demonstrated pattern of continued investments in or alongside Kramer. A27, 34, 63-65, 67, 68, 69. Finally, Plaintiff alleges that certain of these disabling relationships are magnified by public statements by Kramer, the directors, or the directors' colleagues attesting to the importance of their business relationships with Kramer. A63-66, 68-69. When viewed

[1] Unless otherwise defined herein, all capitalized terms have the same meaning as in Plaintiff's Opening Brief. Citations of "Answering Brief" or "AB" refer to the Answering Brief of Defendants Below-Appellees.

holistically, as is required under Delaware law, there is at least a reasonable, pleadings-stage inference that each of the four directors is incapable of making an objective business decision to initiate litigation against Kramer in connection with the Acquisition.

In their Answering Brief, Defendants assert various arguments that at bottom ignore this Court's teaching that Plaintiff's allegations must be considered both "in full context," and "in their totality and not in isolation from each other." *Del. Cty. Empls. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1019, 1022 (Del. 2015). Just as the Court of Chancery did below, Defendants atomize Plaintiff's independence allegations, mischaracterize or sidestep them entirely, and improperly divorce the allegations from their relevant context.[2]

Defendants assert that "Plaintiff's theory" is that Gouw, Krausz, Strohm, and Slootman "are loyal to Mr. Kramer . . . because they are (or were) affiliated with venture capital firms that invested in Imperva and allegedly profited once the Company went public[.]" AB at 19; *see also id*. at 3, 19-20. But Plaintiff has never asserted that past business dealings alone, like those rejected by this Court in *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*"), and which

[2] Defendants also rely upon numerous extrinsic documents (B55-458, 537-51) that may not be considered on a motion to dismiss since they are neither (a) incorporated into the Complaint and integral to Plaintiff's claims, nor (b) being introduced for any purpose other than to prove the truth of the matters asserted therein. *See In re Santa Fe Corp. Pac. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995); *Orman v. Cullman*, 794 A.2d 5, 15-16 (Del. Ch. 2002).

Defendants seek to analogize to this case (AB at 17, 21, 22-23), excuse demand. *But see In re Limited, Inc.*, 2002 WL 537692, at *7 (Del. Ch. Mar. 7, 2002) ("One may feel 'beholden' to someone for past acts as well.") (citation omitted).

In *MFW*, the plaintiff alleged only that one director's "business dealings with [the interested party] nine years earlier," and another director's "limited prior engagements [with the interested party's company], which were inactive by the time" of the challenged transaction, cast doubt regarding their independence. *MFW*, 88 A.3d at 647. By contrast, Plaintiff alleges more significant past business dealings between each of these directors or affiliated firms and Kramer, as well as ongoing relationships with Kramer that go beyond Imperva and that promise future benefits to each of the four directors. A25-27, 32-35, 63-72.

Nor is Plaintiff alleging, as Defendants contend, (a) a "speculative theory" that these four directors are beholden to Kramer because they do not want to jeopardize an opportunity to participate in Kramer's "next big thing" (AB at 3, 24), or (b) supposition and "innuendo based on . . . [the] 'incestuous' venture capital community" as a substitute for "particularized facts showing *these* directors were incapable of investigating alleged wrongdoing" (*id.* at 26) (emphasis in original).[3]

[3] If this were an accurate characterization of Plaintiff's allegations, Plaintiff most certainly would be alleging that Demand Board member Charles Giancarlo ("Giancarlo"), who is Senior Advisor to, and former managing director of, Silicon Valley investment firm Silver Lake Partners (B17) – one of the world's largest technology investment firms – lacks independence from Kramer. But Plaintiff does not impugn Giancarlo's independence. That is because, contrary to Defendants'

To the contrary, Plaintiff alleges important context, a factor the Supreme Court has repeatedly stated is critical to independence determinations,[4] and which Defendants urge this Court to disregard. AB at 26. That context includes the Court of Chancery's observation regarding the thickness of relationships in "the Silicon Valley startup community," *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 54 (Del. Ch. 2013) (citation omitted) (*see also* A70-71), and Plaintiff's well-pleaded allegations that, presently, successful entrepreneurs like Kramer dictate venture capital firms' investment opportunities (A71). Within that context, Plaintiff further alleges past, present, *and* prospective ties between Kramer and each of the four challenged directors or their affiliated firms that prevent these directors from acting impartially and objectively with respect to a demand. *Cf. In re INFOUSA, Inc. S'holders Litig.*, 953 A.2d 963, 991 (Del. Ch. 2007) (noting "unique" nature of director's business which, *inter alia*, disabled director from considering demand). These include, but are not limited to:

- **Gouw's** position as Kramer's "collaborator," "go to investor for security," and member of Kramer's "team long term," and her co-investments with Kramer on behalf of her new firm, Aspect (A33, 63-64);

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assertions, Plaintiff is not advancing a categorical rule that every single Silicon Valley investor or investment firm lacks independence from every single Silicon Valley entrepreneur.

[4] *Sanchez*, 124 A.3d at 1022; *see also Beam v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004) ("Independence is a fact-specific determination made in the context of a particular case").

- **Krausz's** and his firm's serial, successful investments in Israeli-startups and data security companies affiliated with Kramer, and Krausz's acknowledgment that Kramer is the reason for those successful investments (A33-34, 64-67);
- **Strohm's** and his firm Greylock's successive, successful investments in or alongside Kramer, and Strohm's partner Chandna's relationship with Kramer—specifically Kramer's vetting of investments for Chandna and Greylock (A67-69); and
- **Slootman's** affiliation with Greylock, where Slootman was a partner, and which firm, for the last decade-plus, appears to have backed every company where Slootman has held a board or management position (A69-70).[5]

Defendants' efforts to diminish these allegations are unavailing. As they did below, Defendants mischaracterize Kramer's endorsement of Gouw as mere "favorable comments about her . . . business acumen." AB at 24. Defendants then reference documents not contained in the pleadings to further minimize Kramer's statements. *See* AB at 24-25 & n.7. But at the pleading stage, Plaintiff is entitled to all reasonable inferences flowing from its allegations, *Beam*, 845 A.2d at 1048,

[5] Defendants claim that Plaintiff failed to plead that Greylock designated Slootman to Imperva's Board. AB at 18 n.4. Defendants are wrong. Plaintiff alleges that Greylock's investment in Imperva entitled the firm to Board representation and, as a result, Slootman (as well as current partners of Greylock, Strohm and Chandna) received Board seats. A26.

and it is improper for Defendants to offer "assertions in documents outside the complaint to decide issues of fact against the plaintiff[.]" *White v. Panic*, 783 A.2d 543, 548 n.5 (Del. 2001). Here, to the extent it constitutes an inference at all (rather than simply a well-pleaded allegation), the reasonable inference is that Gouw is precisely what Kramer says she is: his "collaborator," "go to investor for security," and a member of his "team long term." A33, 63.

With respect to Krausz, Defendants generally argue that Plaintiff's allegations "establish little more than Mr. Krausz is a venture capitalist," that Krausz has said Kramer can "identify a diamond in the rough," and that Krausz's "firm made money (in unspecified amounts) on its investment" in Imperva. AB at 22-23. Plaintiff alleges much more. Krausz has expressly stated that his firm has "a long history in the security space," and a "very active strategy of investing in Israeli companies."[6] A65. Plaintiff has further alleged that Krausz's firm has invested in three such companies because of their affiliation with Kramer, and that all three companies turned into huge successes. *Id*. Based on those facts, the reasonable inference is that Krausz's relationship with Kramer is material to Krausz and that he could not make an objective business decision to act contrary to Kramer's interests. The "clear signal of problems" presented by U.S. Venture's delayed launch of a small fund only magnifies this reasonable inference. A66.

[6] Kramer is known for his success with "Israeli online-security companies." A67 n.22.

Defendants also distort Plaintiff's allegations regarding Strohm. Defendants minimize Greylock's repeated successes with Kramer as mere "[c]ommon investments," and then characterize statements by Krausz's partner Chandna (who served on the Board with Kramer for a decade (A26 n.3)) regarding their firm's relationship with Kramer as simply "[p]ublic acknowledgment of Mr. Kramer's undisputed success" (AB at 21-22). Again, Plaintiff alleges far more. Plaintiff has alleged that Greylock has had at least three successes investing in or alongside Kramer, including investments in Imperva, Sumo Logic, and Palo Alto Networks. A27, 68. Further, statements that Defendants dismiss as mere compliments reveal that Greylock utilizes Kramer to vet investment ideas. A68 ("[Kramer] is my first call in terms of bouncing ideas and brainstorming in terms of security."). The importance of this relationship is underscored by the fact that, like Gouw's firm, Greylock's firm website features an endorsement from Kramer. A68-69.

Defendants' arguments regarding Slootman fare no better. Among other things, Defendants mischaracterize Slootman's and Greylock's relationship as "loose historical ties." AB at 18. In addition to Slootman's prior role as a partner of Greylock, Plaintiff has alleged that every board or executive position Slootman has held in the past ten years has been with a Greylock-backed company. A24, 69-70. Moreover, as indicated above, Greylock has enjoyed repeated successes with Kramer and at least one of Greylock's partners (Chandna) relies on Kramer to vet

the firm's investments, making Kramer a highly-valuable resource to the firm. Thus, there is a reasonable inference that by taking action adverse to Kramer, Slootman would harm his important relationship with Greylock.

Finally, Defendants' argument that Plaintiff has failed to allege that the four directors' ties to Kramer are material is unavailing. Plaintiff alleges that the Venture Capital Firms, with which each of the four directors are or were affiliated, generated hundreds of millions of dollars in stock proceeds after the Imperva IPO. A27. *But cf. Limited, Inc.*, 2002 WL 537692, at *7 ("'there can be no 'bright-line'" test for materiality). Plaintiff also alleges that Kramer has had similar, if not even greater, success in numerous other companies, including Check Point, Trusteer, and Sumo Logic. A34, 68. In turn, Plaintiff has alleged that each of the four directors largely are professionals that depend on their affiliated firms making profitable technology investments, and that Kramer provides (and will continue to provide) them access to such investments.[7] Thus, the reasonable inference is that Gouw's, Krausz's, Strohm's, and Slootman's ties to Kramer are material.[8,9]

[7] The materiality of the four directors' relationships with Kramer is not limited to potential investments involving Kramer. For example, Gouw publishes on her firm's website an endorsement from Kramer that describes their professional relationship, creating the reasonable, pleadings-stage inference that her relationship with Kramer is important enough that she would advertise it to entrepreneurs and prospective investors. A33. The same reasonable inference applies to Strohm's and Greylock's advertisement of Greylock partner Chandna's relationship with Kramer on Greylock's website. A68-69. If Chandna's affiliation with Kramer were immaterial to Greylock's and Chandna's business, Greylock and Chandna would not advertise it.

[8] Whether these directors have directly, "*personally* profited" (AB at 20 (emphasis in original)) from investments with Kramer is of no moment. *See, e.g., Limited, Inc.*, 2002 WL 537692, at *7

II. THE COMPLAINT RAISES A REASONABLE DOUBT THAT THE BOARD'S APPROVAL OF THE ACQUISITION CONSTITUTED A VALID EXERCISE OF BUSINESS JUDGMENT

Plaintiff established in its Opening Brief that pre-suit demand is excused under the second prong of *Aronson* because Plaintiff has alleged with particularity that a majority of the Demand Board breached its fiduciary duties. OB at 25-35. In their Answering Brief, Defendants raise legally erroneous arguments for why certain of Plaintiff's allegations should not be considered, mischaracterize many of Plaintiff's allegations, and fail to even respond to others.

A. Plaintiff Need Only Have Alleged a Breach of the Duty of Loyalty or Care for Demand to be Excused

Defendants suggest that Plaintiff needs to have alleged a breach of the duty of loyalty, such as bad faith conduct, for demand to be excused. AB at 5, 7, 27-28, 33-34. According to Defendants, because Imperva's charter contains an

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(university president beholden to interested party for significant charitable donation even though "gift was not to [director] personally" and no allegation that director profited from donation); *INFOUSA*, 953 A.2d at 991 (attorney director not independent as a result of payment of legal fees where fees were a "miniscule proportion of the total revenues of [director's] firm" and there was no allegation that director personally profited from such fees).

[9] The Court should disregard Defendants' assertion that the four directors' independence is somehow bolstered because they purportedly, "collectively held almost $11.4 million worth of Imperva shares." AB at 4, 15; *see also* Ex. A. at 11 (Court of Chancery finding below that "[c]ollectively, the shares owned by the four challenged directors were worth almost $12.7 million."). This information is not in the pleadings, AB at 4 (citing oral argument transcript and proxy statement), and therefore cannot be considered on a motion to dismiss. *See Santa Fe*, 669 A.2d at 69-70. In any event, the directors' stockholdings are immaterial to the question of whether they can impartially and objectively consider a demand. If anything, to the extent the value of the directors' Imperva stockholdings is attributable to Kramer's leadership of Imperva, their stockholdings would presumably make them less, as opposed to more, likely to take actions adverse to Kramer. *See Limited, Inc.*, 2002 WL 537692, at *7 ("One may feel 'beholden' to someone for past acts").

exculpatory provision, Plaintiff must plead a non-exculpated claim. *See id.* at 5, 27-28, 34. Defendants also claim that Plaintiff somehow waived any argument that the Demand Board breached its duty of care. *Id*. at 7, 33. Both arguments miss the mark.

"[T]he pertinent question" under the second prong of *Aronson* "is whether an underlying breach has occurred and not whether a substantial threat of liability exists." *Khanna v. McMinn*, 2006 WL 1388744, at *25 n.201 (Del. Ch. May 9, 2006). Thus, whether Plaintiff's allegations sound in loyalty or due care is irrelevant. *See McPadden v. Sidhu*, 964 A.2d 1262, 1269-70 (Del. Ch. 2008) (excusing demand under *Aronson*'s second prong based on board's gross negligence notwithstanding corporation's 102(b)(7) charter provision); *see also* Ex. A at 32-33 (Court of Chancery explaining Plaintiff can satisfy the second prong of *Aronson* by pleading particularized facts that demonstrate the Board acted with gross negligence).[10]

Additionally, Defendants' contention that the Court should disregard Plaintiff's duty of care claim because it was not "fairly presented" below is simply

[10] Defendants' reliance on *Parnes v. Bally Entertainment Corp.*, 722 A.2d 1243 (Del. 1999), for a contrary proposition is misplaced. AB at 27-28. In *Parnes*, this Court did not apply *Aronson* (because the plaintiff's claims were direct), let alone hold that the plaintiff was required to plead a non-exculpated claim to excuse demand. 722 A.2d at 1245-46. Further, while the exculpatory provision in Imperva's charter may insulate members of the Board for breach of the fiduciary duty of care, it would not shield Kramer from liability as an officer of the Company for unjust enrichment or breach of fiduciary duty. *See* 8 *Del. C.* § 102(b)(7).

incorrect. AB at 7, 33. Supreme Court Rule 8 prohibits parties from "advanc[ing] arguments for the first time on appeal." *Del. Elec. Coop., Inc. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997). Plaintiff pleaded a care claim[11] and advanced arguments in support of that claim during the hearing on Defendants' motion to dismiss. A197-98, 210; *see N. River Ins. Co. v. Mine Safety Appliances Co*., 105 A.3d 369, 382-83 (Del. 2014) (holding issue raised by appellant during oral argument was fairly presented); *see also Watkins v. Beatrice Cos., Inc*., 560 A.2d 1016, 1020 (Del. 1989) ("[T]he mere raising of the issue is sufficient to preserve it for appeal."). Moreover, as Defendants acknowledge (AB at 33-34), the Court of Chancery considered and decided the issue (Ex. A at 40-43), thus cementing its appealability. *See Sergeson v. Del. Tr. Co*., 413 A.2d 880, 881-82 (Del. 1980) (explaining "issue was 'fairly presented' to the Court below . . . and properly before us on appeal" even where Vice Chancellor considered but rejected argument "'in passing'").[12]

[11] Defendants' argument that Plaintiff did not "plead gross negligence" is similarly incorrect. AB at 7, 29, 33. Count I of the Complaint asserts a derivative claim for breach of fiduciary duty, including a breach of the duty care. A72. If Defendants are arguing that a plaintiff must state the words "gross negligence" in a pleading in order to allege a breach of the duty of care, they are wrong. *See generally Feeley v. NHAOCG, LLC*, 62 A.3d 649, 664 (Del. Ch. 2012) ("Gross negligence is the ***standard*** for evaluating a breach of the duty of care.") (emphasis added). In any event, Defendants cite no authority for this novel proposition.

[12] Defendants' citation of *Emerald Partners v. Berlin*, 2003 WL 21003437 (Del. Ch. Apr. 28, 2003), for the proposition that Plaintiff's duty of care claim is waived, is misplaced. AB at 33 n.14. *Emerald Partners* is a Court of Chancery decision in which the court declined to consider a "new argument" advanced by plaintiff during post-trial oral argument following a remand by

B. Plaintiff Pleaded with Particularity Bad Faith and Grossly Negligent Conduct

According to Defendants, directors of Delaware corporations tasked with evaluating and approving a conflicted transaction satisfy their fiduciary duties if (a) regardless of any other attendant conflicts, the financially interested fiduciary – here, the founder, Board Chairman, CEO, and largest stockholder of the Company – recuses himself from the company's side of the process (AB at 1-2, 5-6, 28 30, 34 n.15); (b) the interested fiduciary has a very successful track-record, thus conceivably leading the directors to believe the subject transaction could also be successful (*id*. at 1); (c) the board or committee of the board meets several times (*id*. at 2, 6, 28) and is comprised of knowledgeable individuals (*id*. at 6, 28, 30); and (d) the board receives a fairness opinion (*id*. at 2, 28, 31-32). As Plaintiff explained in its Opening Brief, however, when directors are evaluating a transaction involving their company's founder, Chairman, CEO, and largest stockholder, they do not satisfy their "unyielding fiduciary duty to protect the interests of the corporation" by ceding control of the process to conflicted managers and directors, ostensibly forming a subjective belief that the transaction could be a "good opportunity,"[13] attending a few meetings, and receiving an

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the Supreme Court, where the plaintiff did not even raise the argument on appeal, and in a case that had then "been pending for fifteen years." *Emerald P'rs*, 2003 WL 21003437, at *43.

[13] As explained in Plaintiff's Opening Brief, Defendants proffered, and the Court of Chancery embraced, the argument that Kramer's previous success meant that these directors must have

eleventh-hour rubber-stamp from an investment bank, which relies entirely upon unverified financial projections furnished by the conflicted fiduciary and his subordinate officers. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993), *modified*, 636 A.2d 956 (Del. 1994). Nor does such conduct constitute a rational process satisfying the duty of care. *Guttman v. Huang*, 823 A.2d 492, 507 n.39 (Del. Ch. 2003).

Rather than fully address Plaintiff's arguments, Defendants mischaracterize "'Plaintiff's allegations [as] no more than efforts to second-guess the decisions the Board made, [and] conclusory assertions that the price paid was too high because Skyfence was a start-up company without historic revenues[.]" AB at 6; *see also id*. at 32 ("At its heart, plaintiff's real claim is that Imperva allegedly 'overpaid' for Skyfence").[14]

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believed the Acquisition was a "good opportunity" and therefore the directors could not have breached their fiduciary duties. *See, e.g.*, Ex. A at 33; A173-74. But "under Delaware's common law, 'the objective elements of good faith dominate the subjective element[.]'" *In re Atlas Energy Res., LLC*, 2010 WL 4273122, at * 12 (Del. Ch. Oct. 28, 2010) (citing *Desimone v. Barrows*, 924 A.2d 908, 951 (Del. Ch. 2007)) (additional citation omitted). Thus, whether the Board formed a subjective belief that the Acquisition presented a "good opportunity" does not answer whether the Board acted completely in good faith or otherwise satisfied its fiduciary duties.

[14] While Plaintiff alleges far more than an "overpayment" by Imperva (A41-42, A54-59), Defendants' acknowledgment that Plaintiff alleges such overpayment (AB at 32) belies their repeated, counterfactual assertions that Plaintiff fails to allege that the Acquisition "caused Imperva harm." AB at 2; *id*. at 6 ("tellingly absent from the Complaint is any allegation that the Skyfence acquisition has . . . harmed the Company in any manner"). While Defendants criticize Plaintiff for failing to allege that the "Skyfence acquisition has been anything but a success" (AB at 2, 6), the unfairness of a transaction is not based on subsequent events. *See McPadden*, 964 A.2d at 1272 ("Fairness of a price for selling assets must be judged in the light of conditions as

First, Defendants never substantively address Plaintiff's allegations that a majority of the Acquisitions Committee, which included Kramer's "collaborator" and "go to investor for security," Gouw (A33), and which undertook the task of overseeing the Acquisition process, lacked independence from Kramer (AB at 29-30). Instead, Defendants rely on the Court of Chancery's erroneous finding, under the first prong of *Aronson*, that Gouw and Krausz are purportedly independent of Kramer and possessed experience and expertise relevant to the Acquisition. *Id.* Thus, if this Court determines that the Court of Chancery's findings below regarding Gouw's and Krausz's independence were incorrect, Defendants have no answer. *Id*. Presumably, Defendants fail to meaningfully respond to these allegations because they recognize that if a conflicted committee oversaw the Acquisition, it would taint the process.

Second, Defendants also have no answer for Plaintiff's allegations that conflicted members of management were placed in charge of the Acquisition, handled all negotiations, and served as the Board's sole source of information throughout the process. Without citing any legal authority, Defendants assert that "Plaintiff's suggestion that management was 'tainted' merely because Mr. Kramer was the CEO was conclusory, particularly since there was no allegation that Mr. Kramer was involved in the acquisition process or influenced the Skyfence

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they exist at the time of sale disregarding subsequent events.") (citation and internal quotation marks omitted).

transaction in any respect." AB at 30. This argument strains credulity.

As a matter of Delaware law, Kramer's subordinates lacked independence from him. *See* OB 28-29 (citing *Rales v. Blasband*, 634 A.2d 927, 937 (Del. 1993); *In re Cooper Cos., Inc. S'holders Deriv. Litig.*, 2000 WL 1664167, at *7 (Del. Ch. Oct. 31, 2000); *Steiner v. Meyerson*, 1995 WL 441999, at *9-10 (Del. Ch. July 19, 1995)).[15] Further, though Kramer's status as CEO alone was sufficient to impugn management's independence, Defendants' assertion that he was "merely" the Company's CEO is misleading. AB at 30. In addition to co-founding Imperva (A22, 28), at the time of the Acquisition, he was Board Chairman (A22) and the Company's largest stockholder (A26-27). Kramer was also a member of the very Acquisitions Committee responsible for overseeing the Company's strategic acquisitions (A31-32), though he purportedly recused himself at the beginning of the Acquisition process. Additionally, Plaintiff avers that management's conflicts were deeper than those generally suffered by subordinates, since the two Imperva executives tasked with leading the Acquisition process – Kraynak and Tari – had served under Kramer for nearly a decade, dating back to Kramer's first successful start-up, Check Point. A29-31.

Rather than responding to Plaintiff's allegations, Defendants suggest, again without citing any legal authority, that management's independence is irrelevant

[15] Defendants do not even attempt to (and in any event cannot) distinguish these cases. AB at 30.

since the Board approved the Acquisition. AB at 30-31. According to Defendants, a board's decision to rely solely upon conflicted fiduciaries to conduct an interested party transaction process and provide information to the board has no legal relevance. That notion is simply contrary to well-established principles of Delaware corporate law. *See, e.g., Mills Acq. Co. v. Macmillan, Inc*., 559 A.2d 1261, 1281 (Del. 1989) (the presumption of the business judgment rule is rebutted when "the board's own lack of oversight in structuring and directing [a transaction] afforded management the opportunity to indulge in [] misconduct")[16]; *Steiner*, 1995 WL 441999, at *2 ("[I]t is essential . . . that means exist to monitor and check any tendency to employ [management's] discretion so as to advantage management at a cost to the firm."); *McPadden*, 964 A.2d at 1271 (finding board's decision to delegate sale process to conflicted officer "egregious"); *id*. (explaining information pertaining to management's conflict was material to transaction); Leo E. Strine, Jr., *Documenting The Deal: How Quality Control and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone*, 70 Bus. Law. 679, 683 (2015) ("When the directors' normal source of advice has

[16] Defendants argue that *Mills* is inapposite because, *inter alia*, "[t]hat case involved the auction of a company, where directors have an obligation to obtain the best price available," whereas, here "Imperva was *buying* Skyfence." AB at 33 (citation omitted and emphasis in original). The notion that the Imperva Board owed different or fewer duties than they otherwise might in a sale context is contrary to Delaware law. *See, e.g., RBC Capital Mkts., LLC v. Jervis*, 2015 WL 7721882, at *22 (Del. Nov. 30, 2015) (a sale of control does "not change the nature of the fiduciary duties owed by directors") (citing *Malpiede v. Townson*, 780 A.2d 1075, 1083–84 (Del. 2001)).

become conflicted, the directors must scramble to seek substitute independent advice").[17]

Third, Defendants ignore the crux of Plaintiff's allegations regarding the Board's decision to rely on Pacific Crest's fairness opinion in connection with the Board's approval of the Acquisition. AB at 31-32. Entirely absent from Defendants' Answering Brief are responses to Plaintiff's allegations that: (a) the Acquisition Committee retained Pacific Crest (A40) seven months after management initiated the transaction process (A29), two months after Imperva entered into a term-sheet (A39), and after Board approval was anticipated (A40); (b) Pacific Crest was selected by the Company's CFO (*id.*), who served at the pleasure of, and lacked independence from, Kramer; and (c) rather than actually rendering advice, Pacific Crest merely performed simple arithmetic using financial projections furnished by a conflicted fiduciary and his subordinate officers, and

[17] Citing the Supreme Court's decision in *Santa Fe* and Supreme Court Rule 8, Defendants incorrectly argue that portions of an email (B555-57), which were not incorporated into the Complaint but that the Court of Chancery utilized to draw an adverse inference that management swiftly addressed Kramer's conflicts (Ex. A at 9-11), were "properly before the Court" and that "by not objecting below, plaintiffs waived its right to do so on appeal." AB at 31 n.10. Far from endorsing full-scale consideration of documents referenced in pleadings, *Santa Fe* holds that documents referred to in a complaint may only be considered "for carefully limited purposes" and certainly not for the "truth of the matters contained therein." 669 A.2d at 69-70. Moreover, neither *Santa Fe* nor Supreme Court Rule 8 states that a party waives its right to contest a trial court's error that occurs when the decision is issued (*i.e.*, considering material outside of the pleadings). Finally, equally unavailing is Defendants' argument that Plaintiff's objection is "tactical" or "rings especially hollow" (AB at 31 n.10) merely because Plaintiff showed the Court *other* documents at oral argument for the sole purpose of demonstrating the veracity of Plaintiff's allegation (A192 (**"**I just want . . . the Court to understand that we are not . . . misrepresenting what occurred")).

which projections neither Pacific Crest nor anyone else sought to independently verify (A41-42).[18] Plaintiff's allegations therefore are not, as Defendants suggest, conclusory, "garden-variety criticisms" of Pacific Crest's work (AB6), but rather further indicia of a "knowing or deliberate indifference . . . to act faithfully and with appropriate care" in that the Board was consciously "making material decisions without adequate information and without adequate deliberation." *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 289 (Del. Ch. 2003).

Fourth and finally, Defendants' argument that the Board "like every board, faced myriad choices regarding how to review and structure the acquisition" (AB at 34) and that Plaintiff is merely "second-guess[ing] the Board's business judgments" (*id*. at 6) is simply wrong. Among other things, Defendants' argument

[18] Defendants also proffer the nonsensical argument that "Plaintiff misconstrues Pacific Crest's comparable company analysis" – which compared Skyfence (a pre-revenue startup) with only companies with market capitalizations in excess of $1 billion (A42) – because the companies were selected "based on their industry . . . and growth rates" and "[t]he fact that these public companies were much larger than Skyfence was obvious to anyone reading the analysis[.]" (AB at 32 n.11). While Plaintiff agrees that the incomparability of these companies should be "obvious to anyone reading the analysis" (*id*; B583), that these companies are in the same industry as Skyfence and have experienced tremendous growth hardly renders them comparable to a startup with no customers or sales, and which was in immediate need of a cash infusion (A29, 57-59). *See also In re Radiology Assocs., Inc. Litig*., 611 A.2d 485, 490 (Del. Ch. 1991) ("The utility of the comparable company approach depends on the similarity between the company . . . and the companies used for comparison. At some point, the differences become so large that the use of the comparable company method becomes meaningless for valuation purposes."). Plaintiff's allegations therefore are nothing like the "garden variety criticisms" proffered in cases Defendants seek to analogize to this one (AB31-32). *See In re Alloy, Inc. S'holder Litig*., 2011 WL 4863716, at *3, 10 (Del. Ch. Oct. 13, 2011) (finding board reliance on financial advisor's fairness opinion following "several introductory and due diligence meetings" was in good faith); *In re BioClinica, Inc. S'holder Litig*., 2013 WL 5631233, at *6 (Del. Ch. Oct. 16, 2013) (rejecting plaintiff's "purely conclusory" claim that the board committed bad faith by relying on financial advisor's opinion).

presupposes that the Board actually made informed, deliberate choices throughout the Acquisition process. The particularized allegations of the Complaint tell a very different story.

Plaintiff alleges that for at least two months the Board was unaware that Kramer's subordinates were engaged in negotiations with Kramer's company. A29-38. Throughout that period, Kramer's subordinates in management were overseen solely by the Acquisitions Committee, which even after Kramer's purported recusal, was majority-comprised of the most conflicted members of the Board other than Kramer (*i.e.*, Gouw and Krausz). *Id*. The Acquisition Committee, which was formed prior to any contemplated acquisition of Skyfence and originally included Kramer, remained in charge.[19] A31-32.

The Board never discussed actual or potential conflicts regarding management or the Acquisitions Committee, or retaining independent legal or financial advisors to address conflicts of interest. A38-39, 41. Defendants also appear to now concede that the Board failed to discuss applicable regulatory

[19] Defendants argue the Board did not need to consider the independence of the Acquisitions Committee "when evaluating Skyfence" since "all directors (other than Mr. Kramer) [met] NYSE independence standards." AB at 30 n.9. This argument is nonsensical. Taken to its logical conclusion, it would mean that a board of directors has no obligation to even consider director conflicts for a particular transaction, including an interested transaction, so long as the board had purportedly, previously determined that directors met the independence requirements under exchange listing rules. In any event, as Chancellor Bouchard recently held in *Teamsters Union 25 Health Services & Insurance Plan v. Baiera*, 119 A.3d 44, 61 (Del. Ch. 2015), "a board's determination of director independence under the NYSE Rules is qualitatively different from, and thus does not operate as a surrogate for . . . independence under Delaware law."

requirements regarding the Acquisition. AB at 32 ("Had the Company focused on the NYSE listing requirement at that time, it would have simply structured the transaction to comply with that requirement"). A consequence of that failure was that, as the Court of Chancery recognized, the Board "miss[ed] a fairly significant problem" when it approved "a deal in violation of the New York Stock Exchange rules." A166. When the Company determined to amend the Acquisition for the sole "purpose of ensuring" that the Acquisition did "not require the approval of Imperva's shareholders," the Board was not even involved, even though the Amendment caused the Company to expend nearly one-quarter of the Company's available cash. A46-54. Rather, the Board approved the Amendment after it had already been executed and publicly announced. A53.

* * *

In sum, Plaintiff has alleged with particularity that the Board made series of decisions that, when considered together, demonstrate a "[k]nowing or deliberate indifference . . . to act faithfully and with appropriate care" in connection with the Board's approval of the Acquisition. *Disney*, 825 A.2d at 289. Accordingly, Demand should be excused.

CONCLUSION

For the foregoing reasons, and the reasons explained in Plaintiff's Opening Brief, the Court of Chancery's ruling and order should be reversed.

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CERTIFICATE OF SERVICE

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