EFiled: Jul 15 2019 04:39PM EDT
Filing ID 63548145
Case Number 181,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LENZA H. MCELRATH, III, derivatively on behalf of UBER TECHNOLOGIES, INC., Plaintiff-Below/Appellant, v. TRAVIS KALANICK, GARRETT CAMP, RYAN GRAVES, ARIANNA HUFFINGTON, YASIR AL-RUMAYYAN, WILLIAM GURLEY and DAVID BONDERMAN, Defendants-Below/Appellees, - and - UBER TECHNOLOGIES, INC., Nominal Defendant-Below/ Appellee.	No. 181, 2019 Court Below: The Court of Chancery of the State of Delaware, C.A. No. 2017-0888-SG

APPELLEES GARRETT CAMP, RYAN GRAVES, ARIANNA HUFFINGTON, YASIR AL-RUMAYYAN, WILLIAM GURLEY AND DAVID BONDERMAN'S ANSWERING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

In the interest of efficiency and to avoid needless duplication, Defendants Below-Appellees Garrett Camp, Ryan Graves, Arianna Huffington, Yasir al-Rumayyan, William Gurley and David Bonderman (collectively, "Director Defendants"), all of whom are current or former directors of Uber Technologies, Inc. ("Uber" or the "Company"), incorporate the Nature of Proceedings contained in the Answering Brief of Nominal Defendant Below-Appellee Uber Technologies, Inc. ("Uber Answering Brief" or "Uber Ans. Br.").

Plaintiff Below-Appellant Lenza H. McElrath, III ("Plaintiff") appeals from dismissal of a derivative suit challenging Uber's acquisition of Ottomotto, LLC ("Otto"). As discussed in the Uber Answering Brief, the Court of Chancery correctly determined that Plaintiff's Verified Amended Stockholder Derivative Complaint ("Amended Complaint") did not plead that demand on Uber's Board of Directors ("Board") was excused. The Board that would have considered a demand had eleven members, six of whom are not parties to this action. Despite two pleading efforts, Plaintiff was unable to allege facts showing that a majority of the relevant Board was incapable of considering a demand by virtue of a disabling interest or lack of independence. *See* Court of Chancery Memorandum Opinion, dated April 1, 2019 ("Opinion" or "Op."), at 25-54.

The Director Defendants moved to dismiss pursuant to Court of Chancery Rule 23.1, joining the arguments made by Uber. The Director Defendants also moved to dismiss pursuant to Rule 12(b)(6) on the basis that the Amended Complaint did not state a claim against them for breach of fiduciary duty or waste. Although those arguments were fully briefed and argued below, the Court of Chancery declined to address them in light of Plaintiff's inability to excuse demand. Op. 54 n.209. If this Court does not affirm the decision below pursuant to Rule 23.1, there is an independent basis under Rule 12(b)(6) for affirming the dismissal of the claims against the Director Defendants.

Because Uber's Restated Certificate of Incorporation precludes duty of care claims against its directors, and there is no suggestion that any Board member was interested in the acquisition underlying the claims in the Amended Complaint, Plaintiff was required to plead that the Director Defendants acted in bad faith. The Amended Complaint was devoid of the "extreme facts" necessary to meet that burden; to the contrary, Plaintiff alleged facts refuting an inference of bad faith. Plaintiff similarly failed to allege facts satisfying the "onerous" standard for pleading corporate waste.

Accordingly, as discussed more fully below, the Court of Chancery's decision should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. For the reasons discussed in the Uber Answering Brief, the Court of Chancery correctly found that the Amended Complaint did not adequately plead demand futility, as required by Court of Chancery Rule 23.1. Op. 25-54. Plaintiff did not allege particularized facts establishing that a majority of the relevant Board faced a substantial likelihood of personal liability for approving the acquisition of Otto (the "Otto Acquisition") in bad faith. *Id*. 31-42, 44-45; Uber Ans. Br. at 17-32.

2. Denied. As explained in the Uber Answering Brief, the Court of Chancery correctly concluded that Plaintiff failed to allege particularized facts sufficient to plead that any director faced a substantial likelihood of personal liability for not terminating the merger agreement with Otto. Op. 42-44. The Amended Complaint did not contain factual allegations sufficient to show that there was any basis for Uber to terminate the transaction, much less that the Board acted in bad faith by permitting the transaction to close. Uber Ans. Br. at 33-35.

3. Denied. In the context of finding that Plaintiff failed to plead demand futility adequately, the Court of Chancery correctly held that the Amended Complaint did not contain particularized factual allegations sufficient to establish that any of the relevant Board members lacked independence from defendant

Travis Kalanick (or any other allegedly interested party). Op. 45-53. For the reasons explained in the Uber Answering Brief, the Court should affirm that ruling. Uber Ans. Br. at 36-44.

4. If the Court were not to affirm the Court of Chancery's determination that Plaintiff failed to plead demand futility, dismissal as to the Director Defendants should be affirmed on the alternative ground that the Amended Complaint did not state a claim against them. Plaintiff did not plead a non-exculpated breach of fiduciary duty by the Director Defendants, either in connection with approval of the Otto Acquisition or the alleged failure to terminate that transaction, and similarly failed to plead a claim for corporate waste.

STATEMENT OF FACTS

The Director Defendants incorporate by reference the Statement of Facts contained in the Uber Answering Brief. Uber Ans. Br. at 8-16.

Four of the Director Defendants were members of Uber's Board when the Otto Acquisition was approved on April 11, 2016: Garrett Camp, one of Uber's co-founders and a director since 2009; Ryan Graves, a director since 2010 who formerly served as CEO and head of global operations; William Gurley, a General Partner at Benchmark Capital, who was an outside director until he resigned from the Board on June 21, 2017; and David Bonderman, a Partner at TPG Capital, who was an outside director until he resigned from the Board on June 13, 2017. A168, ¶¶ 19, 20, 23, 24. The other two Director Defendants, who joined the Board after the Otto Acquisition was approved, are: Arianna Huffington, an entrepreneur who founded *The Huffington Post* and became an Uber director on April 27, 2016; and Yasir Al-Rumayyan, the Managing Director of the Public Investment Fund of Saudi Arabia, who joined Uber's Board on June 1, 2016. A168, ¶¶ 21, 22.

The Amended Complaint alleged that Uber signed a term sheet to acquire Otto (a start-up company focused on developing self-driving technology for automotive vehicles) on February 22, 2016, and the Company's outside counsel, Morrison & Foerster LLP ("Morrison"), retained the investigative firm

Stroz Friedberg ("Stroz") to assist in due diligence efforts. A176-78, ¶¶ 46, 49, 51.[1] The Amended Complaint further alleged that Stroz was hired to investigate whether Otto's founder, Anthony Levandowski, and other employees "took with them or retained confidential and/or proprietary information" or otherwise breached any obligations to their former employer, Google.[2] A177, ¶ 49.

Plaintiff averred that Stroz delivered "preliminary findings" to Morrison, Uber's general counsel, and Otto "in April 2016," but did not specify these "findings" beyond the claim that "Levandowski and others at Otto possessed substantial files containing confidential and proprietary Google information" and supposedly tried to "delete more on the eve of the Stroz interviews." A178-79, ¶¶ 51, 55. The Amended Complaint expressly alleged that those findings were *not* provided to the Director Defendants. A166-67, ¶¶ 11-13; A178-79, ¶¶ 53, 54.

The Board "met on April 11, 2016 and approved" the acquisition. A179, ¶ 55. Notably, the Amended Complaint cited and relied upon testimony

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1 Appellant's Opening Brief ("AOB") suggests that "the Board specifically retained Stroz" (AOB at 29), but that suggestion misstates the allegations in the Amended Complaint. A166-67, ¶¶ 11-13; A176-78, ¶¶ 46, 49, 51.

2 Plaintiff noted below that "[t]he brand under which Google carried out its self-driving research and development has evolved," with the corporation spinning its self-driving car project into a subsidiary called "Waymo" and the parent company changing its name to "Alphabet." A173, ¶ 38 n.3. For simplicity, the Director Defendants (like the Court of Chancery) use the omnibus term "Google" to refer to those affiliated entities. Op. 7 n.26.

from Mr. Gurley that the Board was informed at the April 11 meeting that Uber's due diligence "turned up nothing" and was "clean." A183, ¶ 63; A186, ¶ 75; A158-60; *see also* Op. 31-32. A definitive merger agreement was executed that same day. A163, ¶ 4.

Stroz allegedly completed its work by August 5, 2016 and prepared a final report – but again, Plaintiff did not contend the report or its findings were actually provided to the Board at that time. A179-80, ¶ 56; A185, ¶ 69. To the contrary, the Amended Complaint alleged that the final Stroz report was not furnished to any of the Director Defendants until 2017, long after the Otto Acquisition was completed. A180, ¶ 56 n.4. The transaction closed on August 18, 2016 and was publicly announced that same day. A190, ¶ 84. While Plaintiff characterized the deal as requiring Uber to "pay[] $680 million" (A171, ¶ 34), the upfront payment was only $100,000 and the remaining potential consideration was contingent on, among other things, successful achievement of specific "technical milestones." Uber Ans. Br. at 10, 27-29.

As discussed in the Uber Answering Brief, Google filed suit against Uber and Otto in February 2017 (the "Google Litigation"), alleging that Mr. Levandowski and other Otto employees had misappropriated trade secrets. A

settlement of the Google Litigation was announced in February 2018, shortly after trial had commenced. Uber Ans. Br. at 14.

ARGUMENT

I. THE COURT OF CHANCERY'S DETERMINATION THAT PLAINTIFF FAILED TO PLEAD DEMAND FUTILITY SHOULD BE AFFIRMED.

A. Question Presented.

Did the Court of Chancery properly dismiss the Amended Complaint for failure to plead demand futility pursuant to Court of Chancery Rule 23.1?

B. Scope of Review.

Dismissal of a complaint for failure to plead demand futility pursuant to Court of Chancery Rule 23.1 is subject to review *de novo* on appeal. *White v. Panic*, 783 A.2d 543, 550 (Del. 2001).

C. Merits of Argument.

For the reasons discussed in the Uber Answering Brief, the Amended Complaint did not set forth particularized factual allegations sufficient to plead that a majority of the relevant Board was interested or lacks independence. Uber Ans. Br. at 17-44. Plaintiff thus failed to establish his standing to assert claims on the Company's behalf and, as a result, the Amended Complaint was properly dismissed in its entirety pursuant to Court of Chancery Rule 23.1. *See*, *e.g.*, *Wood v. Baum*, 953 A.2d 136, 140-41 (Del. 2008).

II. THE COURT OF CHANCERY'S DECISION MAY BE AFFIRMED AS TO THE DIRECTOR DEFENDANTS ON THE ALTERNATIVE GROUNDS THAT THE AMENDED COMPLAINT FAILED TO STATE A CLAIM AGAINST THEM FOR BREACH OF FIDUCIARY DUTY OR WASTE.

A. Question Presented.

Alternatively, if this Court were to determine that demand was excused, did the Amended Complaint fail to state a cause of action against the Director Defendants for breach of fiduciary duty or corporate waste? The Director Defendants preserved each of the alternative arguments set forth in this section in the proceedings below. B80-104, B117-B138.[3]

B. Scope of Review.

This Court "may rest its appellate decision on any issue that was fairly presented to the Court of Chancery, even if that issue was not addressed by that court," and may "affirm the judgment of the Court of Chancery on the basis of a different rationale." *Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012); *see also* Sup. Ct. R. 8. Whether a complaint should be dismissed pursuant to Court of Chancery Rule 12(b)(6) is a matter subject to *de novo* review. *See Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 100 (Del. 2013).

[3] Appellees are submitting a joint appendix in support of their respective Answering Briefs, which includes materials from the record below that were not included in Plaintiff's Appendix.

C. Merits of the Argument.

Plaintiff asserted two claims against the Director Defendants: breach of fiduciary duty (for approving the Otto Acquisition and not terminating it later) and corporate waste. A204-07. The Director Defendants moved to dismiss both claims pursuant to Court of Chancery Rule 12(b)(6). B80-104, B117-B138.

Dismissal pursuant to Rule 12(b)(6) is proper if "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 535 (Del. 2011). For purposes of a Rule 12(b)(6) motion, well-pleaded allegations are accepted as true and all reasonable inferences are drawn in plaintiff's favor. *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013). The Court does not, "however, credit conclusory allegations that are not supported by specific facts, or draw unreasonable inferences in the plaintiff's favor." *Id*. Moreover, in assessing the sufficiency of allegations, the Court may consider documents that are integral to a claim and incorporated into a complaint. *Allen*, 72 A.3d at 96 n.2.

1. Plaintiff Failed To Plead A Non-Exculpated Claim For Breach Of Fiduciary Duty Against The Director Defendants.

The Court of Chancery properly found that the Director Defendants are exculpated from duty of care claims by Uber's Restated Certificate of

Incorporation and 8 *Del. C.* § 102(b)(7). Op. 25-26; *see also Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239 (Del. 2009). Plaintiff does not dispute that conclusion.

Because the Amended Complaint did not allege self-dealing or that the Director Defendants were interested in the Otto Acquisition, Plaintiff has recognized that stating a non-exculpated claim required him to plead that those directors acted in bad faith. A312, 319-23; AOB at 22-23; *see also In re MeadWestvaco S'holders Litig.*, 168 A.3d 675, 684-85 (Del. Ch. 2017). Bad faith requires "an extreme set of facts" (*Lyondell*, 970 A.2d at 243), and a plaintiff must plead that "disinterested directors were intentionally disregarding their duties" or "the decision under attack is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *MeadWestvaco*, 168 A.3d at 684 (citations and quotation omitted). Because the Amended Complaint is devoid of non-conclusory allegations that the Director Defendants acted in bad faith by approving the Otto Acquisition or not terminating it, they are "entitled to have the claims against them dismissed." *In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173, 1176 (Del. 2015).

a. Plaintiff Did Not Adequately Allege The Director Defendants Approved The Otto Acquisition In Bad Faith.

Despite alleging below that all directors breached their fiduciary duties in connection with the Board's approval of the Otto Acquisition on April 11, 2016 (A204, ¶ 123), Plaintiff plainly failed to state a claim against Ms. Huffington or Mr. Al-Rumayyan based on that theory. The Amended Complaint conceded that neither was a member of the Board when the acquisition was approved (A163, ¶ 4; A168, ¶¶ 21, 22), and Plaintiff cannot dispute that a director is not liable for actions in which he or she did not participate. *See In re Tri-Star Pictures, Inc. Litig.*, 1995 WL 106520, at *2 (Del. Ch. Mar. 9, 1995); *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2011 WL 227634, at *7 (Del. Ch. Jan. 14, 2011).[4]

Plaintiff also failed to state a claim against the four Director Defendants (Messrs. Camp, Graves, Gurley and Bonderman) who were on the Board at the time. The Amended Complaint asserted that, when the acquisition was approved, the directors either "knew" that Otto employees had "misappropriated … trade secrets and other IP" from Google or "deliberately disregarded the plain evidence of such theft in bad faith." A162, ¶ 2; *see also*

[4] Notably, Plaintiff does not argue on appeal that Ms. Huffington and Mr. Al-Rumayyan face a substantial likelihood of liability for approving the acquisition. *See* AOB at 22-32.

AC166-67, ¶¶ 13, 14; A180, ¶ 57. To plead a non-exculpated claim, Plaintiff was required to allege facts overcoming the presumption that the directors "act[ed] in good faith and in the interest of the [C]ompany" and showing instead that they acted with "scienter." *In re Gen. Motors Co. Deriv. Litig.*, 2015 WL 3958724, at *11-12 (Del. Ch. June 26, 2015), *aff'd*, 133 A.3d 971 (Del. 2016).

In an unsuccessful attempt to satisfy his burden, Plaintiff purported to rely on Stroz's work and "preliminary findings." A166-67, ¶¶ 11-13; A177-80, ¶¶ 49-57. Contrary to Plaintiff's suggestion, though, Stroz *never* concluded – not even in its final report, issued nearly four months *after* approval of the acquisition (A114-45) – that Otto misused Google trade secrets or proprietary information. *See* Uber Ans. Br. at 12-13; *see also City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 56-57 (Del. 2017) ("[P]laintiffs unfairly describe the overall presentation, which we are not required to accept on a motion to dismiss.").

Plaintiff's effort also fails at a more basic level: he *expressly alleged* that Stroz's findings were *not* communicated to the Board before the acquisition was approved. A166-67, ¶¶ 11-13; A178-79, ¶¶ 53, 54. Indeed, he assailed Uber's general counsel for allegedly "*failing to inform the Director Defendants* of the *existence or contents* of preliminary due diligence findings." A166, ¶ 11 (emphasis added). Ignoring those allegations, Plaintiff now tries to change course

and argue it is "reasonable to infer" the general counsel "would have informed . . . the Board about those [preliminary due diligence] results." AOB at 31. Even if Plaintiff's new argument were not contradicted by his own pleading, "Delaware courts have consistently rejected . . . the inference that directors must have known about a problem because someone was supposed to tell them about it." *Horman v. Abney*, 2017 WL 242571, at *13 (Del. Ch. Jan. 19, 2017) (quotation omitted).

Furthermore, the Amended Complaint referred to, and relied upon, testimony in the Google Litigation that the Board was told due diligence "had turned up nothing" and the directors "made a decision that we're going to move forward because the diligence was okay." A183, ¶ 63; A186, ¶ 75; A158-60; *see also* Op. 31-32. Having relied on that testimony in the Amended Complaint, Plaintiff cannot now argue that it should be disregarded. *See Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 818 (Del. 2013) ("[A] plaintiff may not reference certain documents outside the complaint and at the same time prevent the court from considering those documents' actual terms.") (citation omitted).

Equally meritless is the claim that the Board should have been more proactive by "inquir[ing] or press[ing] for details about the results of the Stroz investigation before voting on the deal." A167, ¶ 13. Putting aside that Plaintiff did not plead the Director Defendants were aware of Stroz's "preliminary findings"

or details regarding its work, a purported "lack of diligence or assertiveness" in seeking information is not bad faith. *DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *16 (Del. Ch. Sept. 30, 2013) (committee's failure to obtain information about an agreement insufficient to show bad faith); *see also In re TIBCO Software Inc. S'holders Litig.*, 2015 WL 6155894, at *22 (Del. Ch. July 23, 2015) (failure to ask questions of financial advisor did not state a duty of loyalty claim).

The allegation that directors had "material information available to them, both in the Stroz preliminary findings and in the final Stroz report" (A179-80, ¶ 56), is also unavailing. "[A]ny [alleged] failure in that regard represents at best an exculpated breach of the duty of care." *In re Oracle Corp. Deriv. Litig.*, 2018 WL 1381331, at *14 (Del. Ch. Mar. 19, 2018). In any event, Plaintiff's allegations that Stroz's "preliminary findings" were not provided to the Director Defendants (A166-67, ¶¶ 11-13; A178-79, ¶¶ 53-54), and that the "final report" was not completed until long after the deal was approved (A179-80, ¶ 56), doom his effort to plead bad faith. *See Oracle*, 2018 WL 1381331, at *14 ("Notably, the Complaint does not allege that the Committee's members knew that any of the valuation materials they reviewed were faulty."); *In re Citigroup Inc. S'holders Litig.*, 2003 WL 21384599, at *2 (Del. Ch. June 5, 2003) (directors could not be charged with knowledge of information in memoranda and emails where "[t]here

[was] nothing in the Amended Complaint to suggest or to permit the court to infer that any of these [documents] ever came to the attention of the board . . . or any committee"), *aff'd sub nom. Rabinovitz v. Shapiro*, 839 A.2d 666 (Del. 2003).

Nor do purportedly "atypical" indemnification terms suffice to plead bad faith. A183-84, ¶¶ 65, 66. As discussed in the Uber Answering Brief, Plaintiff mischaracterizes those provisions, which were far more limited than he suggests and imposed severe consequences on Otto if employees engaged in misconduct or misused a former employer's intellectual property. Uber Ans. Br. at 28-30.

Beyond that, "the fact that a particular provision is uncommon does not create a presumption that it was adopted in breach of fiduciary duty." *In re Telecommc'ns, Inc. S'holders Litig.*, 2003 WL 21543427, at *3 (Del. Ch. July 7, 2003). Plaintiff must proffer non-conclusory allegations showing that, when directors approved "atypical" terms, they "consciously acted in a manner contrary to the interests of [the Company] and its stockholders." *See In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 652-53 (Del. Ch. 2008). Thus, merely alleging that indemnification was "discussed during the April 11, 2016 meeting," or that directors had an unspecified discussion at an unstated time about the risk of litigation (A186, ¶ 75; A187, ¶ 78), is insufficient. *See Harold Grill 2 IRA v. Chênevert*, 2013 WL 3014120, at *3 (Del. Ch. June 24, 2013) ("[T]he complaint

only alleges that the board discussed the export violations in . . . meetings, *not* that the board was made aware that the company had made false disclosures and knowingly failed to cause [the company] to correct them.").

Likewise, unfounded speculation that agreeing to "novel contract provisions" means the Board must have known "th[e] deal was corrupt" (A165, ¶ 9) is insufficient. *See In re BioClinica, Inc. S'holder Litig.*, 2013 WL 5631233, at *7 (Del. Ch. Oct. 16, 2013) (court may not indulge allegations of improper motive absent "well-pled facts suggesting bad intentions on behalf of the Board"). To the contrary, Plaintiff is unable to counter the "plausible and legitimate" inference that Uber's disinterested directors agreed to "novel" indemnification terms purportedly favorable to Otto because they believed the provisions were *unlikely* to be triggered. *See MeadWestvaco*, 168 A.3d at 684 ("even one 'plausible and legitimate explanation for the board's decision' would negate" bad faith) (citation omitted). In fact, Plaintiff cited testimony from the Google Litigation making exactly that point: the directors determined the provisions were acceptable because they were told due diligence had not identified any troubling issues. A159.

Plaintiff fares no better with the theory that bad faith can be inferred because "Uber was paying $680 million for a newly formed company." A180, ¶ 57. Not only does Plaintiff misstate the valuation (and contingent nature of the

consideration), but he ignores that: (i) autonomous driving technology was viewed as critical to Uber's future; and (ii) the key from Uber's standpoint was acquiring engineers to develop that technology. A173, ¶ 37; A176, ¶ 47; Op. 40. Without factual allegations to show that the Director Defendants were aware of wrongdoing at Otto, Plaintiff's theory boils down to the contention that the Board "should have been more skeptical about the information it was given" – and that is *not* bad faith. *Oracle*, 2018 WL 1381331, at *14; *see also Lear*, 967 A.2d at 654 ("Courts should therefore be extremely chary about labeling what they perceive as deficiencies in the deliberations of an independent board majority over a discrete transaction as not merely negligence or even gross negligence, but as involving bad faith.").

For all of these reasons, Plaintiff's effort to compare this case to *In re The Walt Disney Co. Deriv. Litig.*, 825 A.2d 275 (Del. Ch. 2003), falls flat. As the Court of Chancery noted, the Amended Complaint and "incorporated documents" suggest "that diligence was, at least minimally, discussed [by the Uber Board] and represented to be 'okay.'" Op. 32. Underscoring that conclusion, Plaintiff argued below (based on Mr. Gurley's testimony) that the Board engaged in "a lot of discussion" regarding the indemnification terms of the merger agreement. A327. The Amended Complaint thus stands in stark contrast to *Disney*, where the

directors "consciously and intentionally disregarded their responsibilities" and deliberately abdicated their duties. *Id*. at 287-89. *See also* Op. 37-38.

Further highlighting Plaintiff's failure to plead bad faith is the absence of any rational explanation for "*why* the directors" would have knowingly approved an acquisition contrary to Uber's interests. *BioClinica*, 2013 WL 5631233, at *6. Indeed, it is illogical to suggest that the Board members – who included Uber's co-founders, its first employee, and representatives of Benchmark and TPG (A167-68, ¶¶ 18-20, 23, 24) – would have acted contrary to their own (and their affiliates') interests by knowingly squandering the Company's assets in a transaction where they received absolutely no benefit. *See Hokanson v. Petty*, 2008 WL 5169633, at *8 (Del. Ch. Dec. 10, 2008) (outside directors' interest in a transaction "would seem to have been aligned with those of other . . . investors" where three directors "and their affiliates were . . . substantial stockholders").

In sum, the Amended Complaint contains no factual allegations to overcome the presumption that the disinterested Director Defendants acted in good faith in connection with approval of the Otto Acquisition. *See Kahn v. Stern*, 2017 WL 3701611, at *11-13 (Del. Ch. Aug. 28, 2017) (claims dismissed where plaintiff failed to plead facts "to negate the good faith of the independent directors approving the Merger"), *aff'd*, 183 A.3d 715 (Del. 2018) (TABLE).

b. Plaintiff Did Not Plead That The Directors Acted In Bad Faith By Not Terminating The Otto Acquisition.

Plaintiff also failed to plead a claim against the Director Defendants for not terminating the Otto Acquisition prior to its closing in August 2016. At the outset, the Amended Complaint did not adequately allege that Uber had any contractual or other basis for refusing to close. Uber Ans. Br. at 33-35. That alone precludes a claim against the Director Defendants. *See Hokanson*, 2008 WL 5169633, at *5-6 (dismissing claims that directors breached the duty of loyalty by not trying to renegotiate the terms of a prior merger agreement, noting plaintiffs "offered no justification that the directors could have cited for deviating from" the valuation dictated by the prior agreement and that "[p]arties cannot repudiate their contracts simply because they wish they had gotten better terms").

Assuming *arguendo* that Plaintiff could somehow clear that initial hurdle, he alleged no facts to suggest that the Director Defendants *knew* Uber had the ability to terminate the acquisition. The most Plaintiff could do was argue that the final Stroz report "indicated" that "Uber had the right not to close the deal" (A189, ¶ 82), but that argument fails for two reasons. *First*, as discussed in the Uber Answering Brief, the Stroz report said no such thing. Uber Ans. Br. at 33-35; *see also* A114-45. *Second*, Plaintiff specifically alleged that the report was *not*

provided to any of the Director Defendants *until 2017*, long after the acquisition closed. A180, ¶ 56 n.4. That allegation, and the absence of well-pleaded facts to show the Director Defendants were otherwise aware of information indicating Uber could walk away from the deal, precludes a claim for bad faith. *See Tilden v. Cunningham*, 2018 WL 5307706, at *17 (Del. Ch. Oct. 26, 2018) ("Plaintiff fails to plead any facts that would allow a reasonable inference that the Board actually *knew* [the company's financial advisor] had manipulated its financial analysis, even assuming he had well-pled that such manipulation had occurred.").

Even if Plaintiff could plead that Uber had a basis for terminating the merger agreement *and* that the Board was aware of that before the acquisition closed, there is still no claim for bad faith. Directors may properly forgo pursuit of legal remedies where potential litigation might be "excessively costly to the corporation or harm its long-term strategic interests." *In re INFOUSA, Inc. S'holders Litig.*, 953 A.2d 963, 986 (Del. Ch. 2007). Decisions to pursue (or not pursue) claims or remedies are within the business judgment of the Board. *See Spiegel v. Buntrock*, 571 A.2d 767, 773-74 (Del. 1990). The Amended Complaint made no attempt to address these principles or show that the Board, in the exercise of its business judgment and based on the information available at the time, could not have determined that it was in the best interest of Uber to proceed with the

acquisition. That conclusion is highlighted by the importance of automated driving technology to the Company, which (according to the Amended Complaint) was a "perceived 'existential' competitive threat to Uber's viability." A172-73, ¶ 37. *See TIBCO*, 2015 WL 6155894, at *22 (despite allegation that acquirer was obligated to pay additional consideration under merger agreement, the board's refusal to seek that amount or renegotiate the contract was not bad faith, especially given the risk that doing so would jeopardize a beneficial transaction).

c. The Amended Complaint Did Not Plead A *Caremark* Claim.

Although the Amended Complaint seemingly attempted to invoke *Caremark*,[5] that effort did nothing to state a claim against the Director Defendants. As this Court has emphasized, a *Caremark* claim is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Good*, 177 A.3d at 55 (quoting *Caremark*, 698 A.2d at 967); *see also Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006). Despite repeatedly incanting the term "red flags,"[6] the Amended Complaint is devoid of factual allegations demonstrating their existence – much less that the Board *knew* of "red flags" and "acted in bad faith by consciously disregarding its duty to address" them. *Okla. Firefighters*

[5] *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. 1996).

[6] A167, ¶ 14; A179, ¶ 54; A180, ¶ 57; A183, ¶ 63; A189-90, ¶ 83.

Pension & Ret. Sys. v. Corbat, 2017 WL 6452240, at *15 (Del. Ch. Dec. 18, 2017) (quotation omitted); *see also Stone*, 911 A.2d at 370.

In opposing the Director Defendants' motion to dismiss, Plaintiff did little more than offer a lengthy disquisition on Uber's purported "law-breaking culture," combined with an unsuccessful attempt to make his scattershot allegations look like *In re Massey Energy Co.*, 2011 WL 2176479 (Del. Ch. May 31, 2011). A315-19. However, as the Court of Chancery found, and as discussed in the Uber Answering Brief, the extraordinary facts in *Massey* bear no resemblance to this case. Op. 33-37; *see also* Uber Ans. Br. at 25 n.5.[7]

Unlike *Massey*, where prior criminal charges and numerous violations of mining safety laws clearly put directors on notice of *the very problems* that led to the mine disaster at issue, the hodgepodge of alleged prior misconduct at Uber – *e.g.*, "flouting of local laws," "greyballing" of local taxi regulators, and unspecified "criminal probes" (A169-71, ¶¶ 29-33) – is entirely unrelated to the challenged

[7] *See also Corbat*, 2017 WL 6452240, at *23-24 (dismissing oversight claim and noting "[t]he facts in *Massey* were extreme"); *Melbourne Mun. Firefighters' Pension Tr. Fund v. Jacobs*, 2016 WL 4076369, at *12 (Del. Ch. Aug. 1, 2016) ("[t]he red flags alleged in *Massey* were far more egregious and indisputable than those alleged here"), *aff'd*, 158 A.3d 449 (Del. 2017); *Horman*, 2017 WL 242571, at *11 & n.64 (distinguishing *Massey* and finding that plaintiffs failed to plead facts to show that directors had consciously disregarded illegal behavior).

Otto Acquisition. *See Corbat*, 2017 WL 6452240, at *20 (the "corporate trauma" at issue "must be sufficiently similar to the misconduct implied by the 'red flags' such that the board's bad faith, 'conscious inaction' proximately caused that trauma") (quotation omitted); *see also* Op. 36, 39-40. Accordingly, Plaintiff did not state a *Caremark* claim against the Director Defendants.

2. Plaintiff Did Not Come Close To Meeting The "Onerous" Standard For A Waste Claim.

The standard for pleading corporate waste is "onerous," and is satisfied only in "rare, unconscionable case[s]." *Freedman v. Adams*, 58 A.3d 414, 417 (Del. 2013) (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 74 (Del. 2006)). Making no real effort to meet this "onerous" standard, the Amended Complaint instead relied on the rote contention that "Uber received essentially nothing of value, and nothing that was legally usable from Otto, in exchange for $680 million." A207, ¶ 134. That conclusory averment is insufficient to "overcome the general presumption of good faith by showing that the board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests." *White*, 783 A.2d at 554 n.36; *see also Criden v. Steinberg*, 2000 WL 354390, at *4 (Del. Ch. Mar. 23, 2000)

("conclusory" allegations that corporation received "no consideration" were "insufficient[] as a matter of law" to plead waste).

Effectively conceding the point, Plaintiff tried to salvage his waste claim below by arguing solely that the Otto Acquisition was "an illegal raid" on Google's assets and that use of Uber's funds therefore constituted waste. A344. Because Plaintiff did not plead the existence of any "illegal" conduct, his argument is unavailing. *See* Uber Ans. Br. at 30-32. Apart from that pleading failure, Plaintiff's argument ignored that the "standards for corporate waste and bad faith by the board are similar." *White*, 783 A.2d at 554 n.36; *see also In re Chelsea Therapeutics Int'l Ltd. S'holders Litig.*, 2016 WL 3044721, at *1 (Del. Ch. May 20, 2016) ("[B]ad faith is similar to the much older fiduciary prohibition of waste, and like waste, is a *rara avis*."). Because the Amended Complaint did not plead that the Director Defendants had any knowledge of illegality or otherwise acted in bad faith in connection with the Otto Acquisition (*see* Sec. II.C.1, *supra*), the waste claim similarly fails as a matter of law.

CONCLUSION

For the foregoing reasons, the Court of Chancery's decision dismissing the Amended Complaint should be affirmed.

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July 15, 2019