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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-Appellant,	)	
v.	)	No. 181, 2019
TRAVIS KALANICK, GARRETT CAMP, RYAN GRAVES, ARIANNA HUFFINGTON, YASIR AL-RUMAYYAN, WILLIAM GURLEY, and DAVID BONDERMAN,	)	Appeal from the Delaware Court of Chancery, C.A. No. 2017-0888-SG
Defendants-Appellees,	)	
and	)	
UBER TECHNOLOGIES, INC.,	)	
Nominal Defendant-Appellee.	)	

AMENDED ANSWERING BRIEF OF APPELLEE AND NOMINAL DEFENDANT UBER TECHNOLOGIES, INC.

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NATURE OF PROCEEDINGS

This is an appeal from the dismissal of a derivative action filed by a stockholder and former employee of Uber Technologies, Inc. ("Uber" or the "Company"). Plaintiff filed suit against current and former officers and directors of Uber, alleging that they breached their fiduciary obligations and committed corporate waste by approving an agreement to acquire self-driving car startup Ottomotto LLC ("Otto") and/or failing to terminate the acquisition. The Court of Chancery properly refused to remove these claims from control of the Company's Board of Directors under Rule 23.1 because the allegations of Plaintiff's Verified Amended Shareholder Derivative Complaint ("Amended Complaint") showed, at most, that only one director (former CEO Travis Kalanick) faced a risk of liability. All other members of the Board at the time the suit was filed (the "Demand Board") — a majority of whom joined the Board after the acquisition closed — faced no such risk and were capable of exercising independent and disinterested business judgment in responding to a demand.

Plaintiff's Amended Complaint is rife with inflammatory rhetoric, but the Court of Chancery properly concluded that the factual allegations of the Amended Complaint — which Plaintiff filed without first making a Section 220 demand to investigate his claims — fail to demonstrate a substantial likelihood of liability on the part of any of the non-officer directors. Only a minority of Demand Board

members even served on the Board at the time of the acquisition, and Plaintiff's Amended Complaint fails to demonstrate that any of these disinterested Board members acted in bad faith by approving the transaction or permitting it to close.

To the contrary, Plaintiff's own cherry-picked factual record demonstrates that the Board approved the acquisition only after reviewing the material terms; being informed that due diligence into IP issues had been performed by Stroz Friedberg ("Stroz"), a forensic investigator; and obtaining assurances that the diligence was "clean." Op. 13 n.66, 32, 38. These facts directly contradict any claim that the directors were consciously indifferent to the point of bad faith. Plaintiff argues that the Board should *personally* have examined Stroz's findings, but he cites not a single case in which a Delaware court has ever held that it was bad faith — or even a duty-of-care violation — for disinterested directors considering an arm's-length transaction to rely on management reports of due diligence.

Plaintiff tries to fabricate such an obligation by pointing to an alleged history of illegality by Kalanick and at Uber, but the Court of Chancery correctly held that Plaintiff's allegations about Kalanick's involvement in a file-sharing site 20 years ago at a different company, and Uber's alleged violation of taxicab regulations, were not "red flags" that should have caused the Board to distrust management's representations concerning due diligence on the Otto transaction. Moreover, as the Court of Chancery properly found, even if this history somehow suggested that the

Board should personally examine the results of due diligence, its failure to do so would at most plead "a duty of care [violation], which here is an exculpated claim." Op. 33.

Equally unavailing is Plaintiff's argument that Demand Board members face a substantial likelihood of liability for failing to review the final Stroz report and terminate the acquisition based on its findings. Once again, only a minority of the Demand Board is implicated by these allegations; a majority joined after the transaction closed. Even as to the minority, Plaintiff's allegation that they failed to review the final Stroz report "sounds in care, not loyalty." Op. 44. Moreover, Plaintiff's claim that the Stroz report demonstrated a basis to terminate the transaction is entirely conclusory and contradicted by the report. Stroz found no evidence that any IP was misappropriated by Otto; it found only that certain Otto employees possessed confidential information from their prior employment at Google on *personal* devices, which they were instructed never to use at Otto. These facts do not demonstrate a breach of representation *by Otto* or any other ground for terminating the Merger Agreement.

Finally, the Court of Chancery properly found that a majority of Demand Board members are independent. The Demand Board consists of accomplished businesspersons, many with substantial investments in Uber. Plaintiff's attempts to impugn the independence of these directors rely on unsupported theories and

conclusory allegations, ignore Plaintiff's burden to plead particularized facts, and otherwise have no basis in Delaware law.

The judgment of the Court of Chancery should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. Demonstrating that a disinterested board acted in bad faith by approving an arm's-length transaction requires an extreme set of facts showing that the directors were intentionally disregarding their duties or that their decision was inexplicable on any ground other than bad faith. No such facts are pleaded here.

Contrary to Plaintiff's assertion that the transaction was a "thinly-veiled raid on Google's IP," App. Opening Br. ("AOB") 3, the Board had no reason to draw the conclusion that the transaction was "illegal." *Id*. at 10. The acquisition had the legitimate purpose of advancing Uber's efforts to develop autonomous vehicles, and the terms of the transaction actively discouraged any theft of IP, including by withholding indemnification for any post-signing misconduct. Moreover, the Board voted to approve the deal only after being assured that due diligence on IP issues had been conducted by a forensic investigative firm and come back clean.

Plaintiff's argument that the Board should personally have reviewed the results of due diligence, rather than accepting management's representations, is meritless. Plaintiff cites no case law supporting such an obligation, and none of the purported "red flags" cited by Plaintiff establish that any of the independent directors consciously disregarded fiduciary obligations. To the contrary, most of these supposed flags were not red or even yellow. As the Court of Chancery properly

ruled, they do not "convert a plain vanilla duty of care allegation into a persuasive pleading of bad faith . . . ." Op. 36–37.

Nor are Plaintiff's allegations sufficient to establish any risk of liability for corporate waste. As Plaintiff conceded below, Uber paid only $100,000 up front; the balance of consideration consisted of a pool of restricted stock that would vest only upon the achievement of valuable milestones. Agreeing to pay this consideration for a team of engineers that could advance the critical objective of developing a self-driving car does not constitute corporate waste.

2. Denied. The Court of Chancery properly rejected Plaintiff's theory that the Board acted in bad faith when it did not intervene to prevent the transaction from closing. Plaintiff's premise that the Stroz report provided a basis for terminating the acquisition is belied by the report itself, which found no evidence that any proprietary Google data remaining on the *personal devices* of the employees at issue had ever been transferred to Otto. This finding did not demonstrate any misconduct *by Otto* — much less misconduct giving rise to a termination right.

Even if the report had found otherwise, the allegations of the Amended Complaint do not demonstrate that Board members "deliberately buried their heads" in the sand by failing to obtain and review the report. The Amended Complaint pleads no reason why the Board, having previously been assured that Stroz's due diligence was clean, should have elected to revisit this issue by seeking out a copy

of the final report before closing. And even if Plaintiff could establish such an obligation, the Board's failure to personally obtain and review the report would at most state an exculpated claim for breach of the duty of care, as the Court of Chancery properly ruled.

3. Denied. The Court of Chancery correctly determined that Plaintiff's allegations fail to raise a reasonable doubt that a majority of Demand Board members lack independence. Plaintiff's assertion that five Demand Board members (Camp, Graves, Huffington, Thain and Burns) lack independence from Kalanick depends on deficient conclusory allegations and long-since rejected theories, such as the argument that directors are beholden to those who appoint them. Plaintiff's assertion that two Demand Board members (Cohler and Trujillo) lack independence from former director Defendants who voted on the Otto transaction (Gurley and Bonderman) is equally flawed because Gurley and Bonderman face no substantial likelihood of liability. Nor do Plaintiff's thin allegations of professional relationships overcome the presumption of independence.

STATEMENT OF FACTS

The following facts are drawn from the allegations of Plaintiff's Amended Complaint, which are assumed to be true only for purposes of this appeal, and from documents incorporated in the Amended Complaint.

A. Uber Considers an Acquisition of Otto and Conducts Due Diligence.

Uber is a Delaware corporation that operates the world's leading ride-sharing mobile app. *See* A167, ¶¶ 16–17. In 2016, one of Uber's key objectives was to develop self-driving cars. *See* A172–A173, ¶¶ 36–37. Kalanick, Uber's founder and CEO at the time, believed that Uber faced an "existential" threat if one of its competitors developed autonomous vehicles first. *Id.*

Uber thus entered into discussions with Anthony Levandowski, an engineer employed at Google's self-driving vehicle project. *See* A173, ¶ 39.[1] In early 2016, after these discussions began, Levandowski left Google; founded Otto; hired several former Google employees; and signed a term sheet to sell Otto to Uber. A163, ¶ 4.

Uber thereafter proceeded to conduct due diligence. A163, ¶ 5. Uber's counsel at Morrison & Foerster LLP engaged Stroz, a digital forensic investigative firm, to assist. *Id.* Among other things, Stroz investigated whether Levandowski

[1] The opinion below uses the term "Google" to "collectively refer to Google (now known as Alphabet) and Waymo (which has had different names in the past)." Op. 7 n.26. We do the same.

and four other key Otto employees had retained confidential or proprietary information from their employment at Google. *Id.*; *see also* A116.

While the investigation was underway, during a regularly-scheduled status meeting about the transaction, Levandowski informed Kalanick and other Uber executives of his discovery that he still possessed certain proprietary Google information. A123, A177, ¶ 50. Kalanick said that he wanted "nothing to do" with the information and that Levandowski should "do what he needed to do." *Id.* An Uber executive told Levandowski not to destroy the information but to preserve it for record-keeping purposes. A123.

Stroz delivered "preliminary findings" to Uber's outside counsel and general counsel in April 2016. A178, ¶ 51. The Amended Complaint does not allege with specificity what these preliminary findings were, beyond asserting that Stroz found that Levandowski and others at Otto possessed and/or attempted to delete unspecified confidential Google information. *See* A178–A179, ¶¶ 52, 55. Uber's general counsel allegedly expressed "serious reservations" about the findings to Kalanick, A179, ¶ 53, but the Amended Complaint does not elaborate. Nor does it say whether anyone else at Uber was aware of the unspecified findings or shared these "reservations."

B. Uber's Board Approves the Acquisition of Otto for $100,000 and Potential Milestone Payments.

On April 11, 2016, Uber's Board met to consider the Otto acquisition. A179, ¶¶ 54–55. Kalanick and other members of management gave a presentation about the transaction and the proposed Agreement and Plan of Merger (the "Merger Agreement") to the Board. A159; A179, ¶ 54; B3–B7; *see also* A187, ¶ 78 (citing presentation).

As Plaintiff conceded below, A300, the Merger Agreement called for Uber to pay only $100,000 in cash "up-front." Op. at 40 n.174. Otto's employees would also be eligible to receive restricted stock that would vest only on the achievement of certain "technical milestones" tied to the successful development of a self-driving car — specifically, "laser milestones" and milestones based on "overall AV [autonomous vehicle] success." *Id.*; B4. These stock awards were also subject to "time-based and liquidity-based vesting requirements." *Id.*; *see also* A53, § 1.8(a), B4, B40–B43. Plaintiff alleges that the total pool of restricted shares would be worth $680 million if completely vested. *See, e.g.*, A180, ¶ 57. But there is no dispute that the awards were "conditional on milestones being met by 2030." Op. at 40 n.174.

According to the Amended Complaint, the Board knew that Stroz had been engaged to investigate whether Otto employees had retained any proprietary information from their employment at Google. A177, ¶ 50. Although the Board allegedly was not shown a written report of Stroz's preliminary findings, the

diligence was discussed at the Board meeting and represented to be "okay." Op. 31–32. The Board presentation cited in the Amended Complaint reflects that management had received a report from its "forensic expert and outside counsel" and decided to "move forward." B7.

The Board also discussed the proposed indemnification terms of the transaction. A187, ¶ 78; *see also* B6–B7, B11–B35. The indemnification provisions were set forth in the Merger Agreement and an accompanying Indemnification Agreement which Plaintiff conceded were integral to the Amended Complaint. Op. 4 n.2. Under the agreements, Uber would not be entitled to any post-closing indemnification for breaches of representations and warranties by Otto. Op. 13. Certain key Otto employees would, however, obtain limited indemnification rights. These indemnities were structured to encourage full disclosure to Stroz, in order to allow any risk of intellectual property misappropriation to be addressed before the employees started working for Uber, and to discourage post-acquisition misconduct. Specifically, the Indemnification Agreement provided that Uber would indemnify key Otto employees for pre-signing conduct *provided that such conduct had been disclosed to Stroz during its investigation*. B7; B14–B15, § 2.1(b)(ii). Uber would *not* indemnify the employees for undisclosed pre-signing acts *or any post-signing misconduct*, which would render their indemnity rights "null and void and of no further force and effect." B14, § 2.1(a); *see also* Op. 14.

William Gurley, a former director of Uber who served on the Board at the time, testified in a separate litigation about the Board's discussion of the indemnity provisions and due diligence. Op. 12 n.64. In testimony that is incorporated by reference in the Amended Complaint, Gurley explained that the Board was comfortable with the indemnity provisions in light of the diligence:

> In an effort to be as helpful as possible, I'll state generically what happened, and then we can get into esoteric details if we want to. There was a discussion about the indemnity. There was a discussion about it being atypical. That led to questions about why we were okay with that. That led to a discussion about the due diligence that had been done. And we as a group made a decision that we're going to move forward because the diligence was okay.

Id. Following this discussion, the Board approved the Otto acquisition. A179, ¶ 55.

C. The Transaction Closes.

On August 5, 2016, Stroz delivered its final report. Op. 14. Although the Amended Complaint does not identify who received it, the report states that it was provided on an "Outside Counsel & Attorneys Eyes Only" basis. A114–A145.

The report concluded that Levandowski and other Otto employees had retained, accessed, or deleted certain confidential information of Google on their *personal* devices following their departure. *See* A124, A127, A174–A175, ¶ 42; A185, ¶ 71. However, after a detailed forensic examination, Stroz found *no evidence that any such confidential or proprietary information had been transferred to Otto or to Uber*. *See* A114–A145. With respect to Levandowski, the report states:

"While Levandowski retained, and in some cases, accessed Google confidential information after his departure from Google, Stroz Friedberg discovered no evidence indicating that he transferred any of that data to Ottomotto or other third parties." A130.

The transaction closed on August 18, 2016. The Amended Complaint criticizes the Board for allowing the transaction to close despite the findings in the final Stroz report. A186, ¶¶ 74–75. However, the directors allegedly did not read the report, and Plaintiff nowhere claims that they were otherwise presented with "any new information learned after approval of the Merger Agreement regarding IP theft by Otto." Op. 16, 44. It is not even clear from Plaintiff's allegations that Board members knew the report was available. Op. 44.

Plaintiff also does not explain why the Stroz report would have demonstrated a termination right. Although Plaintiff alleges in conclusory fashion that "Otto was in breach of its representations regarding its ownership of IP at the time of closing," A189, ¶ 81, no such finding appears in the Stroz report, which included no "explicit determinations regarding representations in the Merger Agreement." Op. 42 n.177.

To the contrary, Stroz found that, while some residual Google IP remained on *personal* devices of Otto employees who formerly worked at Google, there was no evidence that any of that IP had been transferred to Otto or other third parties. *See, e.g.*, A130. Indeed, Stroz found that employees of Otto were "issued new laptops;"

were "directed not to use personal devices;" and were instructed in "strong language" in their employment letters not to bring "any prior employer data" to Otto." A131.

D. Litigation Ensues.

In February 2017, Google filed suit against Uber and Otto alleging that Levandowski had misappropriated confidential technical data. *See* A190, ¶ 88. Uber and Otto denied the allegations, and the case was ultimately settled during trial pursuant to an agreement under which Google, which already owned Uber shares, received additional equity allegedly valued at $245 million. Op. 17.

While the Google litigation was pending, Plaintiff commenced this action. Op. 19. He did not serve a Section 220 demand before filing. Plaintiff's Amended Complaint asserts claims against seven current or former directors of Uber — Kalanick, Gurley, Garrett Camp, Ryan Graves, Arianna Huffington, Yasir Al-Rumayyan, and David Bonderman (the "Director Defendants") — for allegedly breaching their fiduciary duties and committing corporate waste by approving the Otto acquisition and/or allowing the deal to close. A204–A205, ¶¶ 120–125. The Amended Complaint also alleges that Kalanick and Salle Yoo, Uber's former

General Counsel, breached their fiduciary obligations as officers by withholding information from the Board about Stroz's findings. A205–A206, ¶¶ 126–131.[2]

Plaintiff made no demand on Uber's Board before filing suit. A193, ¶ 100. The Demand Board in place as of the filing of this action had eleven members, only five of whom — Kalanick, Camp, Graves, Huffington, and Al-Rumayyan — are Defendants. A194, ¶ 104. Of these five Director Defendants, only three (Kalanick, Camp, and Graves) voted to approve the Merger Agreement. *See* A167–A168, ¶¶ 18–24. The other two (Al-Rumayyan and Huffington) joined the Board after the Merger Agreement was approved but before the closing. *See id.* Following their appointment, Kalanick resigned as CEO. A202, ¶ 117. Plaintiff asserts that the departure resulted from "pressures" including certain "members of the Board taking action against Kalanick" in the wake of Google's lawsuit. AOB 47–48.

A six-member majority of the Demand Board became directors after the acquisition closed and had no role in the transaction: Wan Ling Martello, Ursula Burns, Dara Khosrowshahi, John Thain, David Trujillo, and Matt Cohler. *See* Op. 25, 46. The Amended Complaint nevertheless alleges that it would have been futile to make a demand because a majority of Demand Board members either face liability

[2] Plaintiff's notice of appeal does not identify Yoo as a party against whom the appeal is taken and thus waives any appeal of the trial court's dismissal of his claim against Yoo. *See* Del. Sup. Ct. R. 7(c)(2) (notice of appeal "shall" identify all "parties against whom the appeal is taken").

in connection with the Otto acquisition or are beholden to individuals who do. Specifically, Plaintiff asserts that (i) Graves, Camp, Huffington, Burns, and Thain are beholden to Kalanick; and (ii) Cohler and Trujillo are, respectively, beholden to Gurley and Bonderman, former directors who purportedly face a substantial likelihood of liability. A194–A203, ¶¶ 107–111, 114–119.

The Defendants moved to dismiss under Court of Chancery Rule 23.1. Op. 20. On April 1, 2019, the Court of Chancery issued a 54-page decision dismissing the Amended Complaint in its entirety pursuant to Rule 23.1. The court held that, even accepting Plaintiff's allegations as true, only one Demand Board member (Kalanick) faced a substantial likelihood of personal liability. *See* Op. 26–45. As for the remaining Director Defendants, Plaintiff's allegations failed to demonstrate bad faith conduct or, indeed, anything more than a "plain vanilla duty of care allegation . . . ." Op. 37. The court also considered the independence of the Demand Board and found "no reasonable doubt that at least seven out of the eleven members of the Demand Board are disinterested and independent." Op. 46.

On April 29, 2019, Plaintiff filed this appeal.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT THE NON-OFFICER DIRECTORS WHO APPROVED THE OTTO ACQUISITION DO NOT FACE A SUBSTANTIAL LIKELIHOOD OF LIABILITY.

A. Question Presented

Did the Court of Chancery correctly determine that Plaintiff failed to plead particularized factual allegations demonstrating that the non-officer directors who approved the Otto transaction face a substantial likelihood of liability for bad faith conduct where those directors were disinterested in the transaction and approved it only after discussing the material terms and receiving a report from management that due diligence was clean?

B. Scope of Review

This Court reviews decisions dismissing complaints pursuant to Rule 23.1 *de novo*. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004). The Court may affirm on any basis "that was fairly presented to the Court of Chancery, even if that issue was not addressed by that court." *Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012).

C. Merits of Argument

Under Rule 23.1, a derivative plaintiff who seeks to wrest control of a corporation's cause of action without first making a demand on the board must plead with "particularity" why a demand would have been futile. *See* Ct. Ch. R. 23.1(a).

Particularity is a "stringent" requirement. *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000). It calls for "particularized factual statements that are essential to the claim." *Id.* Conclusory allegations are insufficient. *Beam*, 845 A.2d at 1048. Moreover, although the court grants "objectively reasonable" inferences to a plaintiff at the pleading stage, those inferences "must logically flow from particularized facts alleged by the plaintiff." *Id.*

Where, as here, a majority of the Board changed between the challenged actions and the lawsuit, the relevant test for demand futility is whether "the particularized factual allegations of [the] complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand." *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993). A director is considered interested if he or she would face a "substantial likelihood" of personal liability based on the complaint's allegations. *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984). Because Uber's Certificate of Incorporation exculpates its directors from monetary liability to the maximum extent permissible under law, Op. 25–26, Plaintiff can demonstrate substantial likelihood of liability only by pleading "a *non-exculpated* claim based on particularized facts." *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008) (citation omitted). A breach of the duty of care, even if grossly negligent, is exculpated and will not suffice. *See Aronson*, 473 A.2d at 812. Instead,

Plaintiff must plead non-exculpated conduct such as bad faith or corporate waste. *See City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 55 (Del. 2017).

The Court of Chancery correctly ruled that the Amended Complaint fails to meet this high bar with respect to the Director Defendants (apart from Kalanick[3]) who served on the Board when the acquisition was approved. As the court explained, the allegations on which Plaintiff bases his breach of fiduciary duty claim do not show bad faith; they at most plead that the directors, who had no personal interest in the Otto acquisition, "violate[d] a duty of care, which here is an exculpated claim." Op. 33. The Amended Complaint also fails to establish any risk of liability for corporate waste. Op. 44–45.

1. The Amended Complaint Fails to Plead that Any Non-Officer Defendant Acted in Bad Faith.

To establish a substantial likelihood of liability for bad faith, a plaintiff must plead "[1] an extreme set of facts to establish that disinterested directors were intentionally disregarding their duties or [2] that 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." *In re MeadWestvaco Stockholders Litig.*, 168 A.3d 675, 684 (Del. Ch. 2017) (citations omitted; alterations in original).

[3] Uber disputes the Court of Chancery's determination that Kalanick faces a substantial likelihood of personal liability based on Plaintiff's allegations, Op. 26–28, but this Court need not reach that question to affirm the trial court's opinion.

The Court of Chancery correctly determined that the Amended Complaint fails to satisfy this standard. Plaintiff does not allege with particularity that any member of the Board (save Kalanick) knew of any wrongdoing before approving the acquisition. Plaintiff argues instead that the Board acted in bad faith by intentionally "keeping itself ignorant." A180, ¶ 57. But, as the Court of Chancery found, Op. 11–13, 38–39, Plaintiff's own allegations show that the Board did not keep itself ignorant. It received a presentation that "clearly explained" the transaction and the Merger Agreement. *See* A159; A187, ¶ 78. It discussed the potential for litigation with Google. A186, ¶ 75. It discussed the due diligence. A159. Directors asked questions. *Id.* There was "a lot of discussion" before the transaction was approved. *Id.*

Directors do not "intentionally disregard" their duties when they undertake this kind of inquiry — overseeing a diligence process that includes engaging an expert, receiving a report from management on that expert's due diligence, and discussing the due diligence before voting to approve a transaction. *See, e.g., City of Birmingham*, 177 A.3d at 59 (plaintiff could not show bad faith where board received management presentations on issue and its remediation); *Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins*, 2004 WL 1949290, at *14 (Del. Ch. Aug. 24, 2004) ("As long as the Board engaged in action that can lead the Court to conclude it did not act in knowing and deliberate indifference to its

fiduciary duties, the inquiry of this nature ends."). The existence of "*some* process" is sufficient to bar a finding of bad faith. *Houseman v. Sagerman*, 2014 WL 1600724, at *7 (Del. Ch. Apr. 16, 2014).

Plaintiff contends that the Board's process was not enough. He suggests that, before voting to approve the acquisition, the directors should have spoken directly to Stroz; obtained a written report concerning its preliminary findings; or sought "clearance" from counsel that the transaction involved no stolen intellectual property. *See* AOB 13, 25–26, 29. But Plaintiff cites no case in which a court concluded that a director's reliance on management representations, and failure to engage directly with persons conducting due diligence, constitutes bad faith or even a breach of the duty of care.

Delaware law is to the contrary. Section 141(e) of the Delaware General Corporation Law provides that Board members "shall . . . be fully protected in relying in good faith . . . upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees . . . ." 8 *Del. C.* § 141(e). The Board was thus entitled to rely "on the opinions and statements of the corporation's officers" concerning due diligence. *In re Citigroup, Inc. S'holder Derivative Litig.*, 964 A.2d 106, 135 (Del. Ch. 2009).

Even if that were not the case, the most Plaintiff's allegations could prove is that the Board undertook an imperfect process. That is a classic duty of care claim;

Plaintiff asserts that the Board's process was inadequate, not that no process existed. "[T]here is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties." *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009). Plaintiff's allegations fall squarely on the former side of this divide because "[a] director's failure to inform herself, [even if] sufficient to amount to gross negligence, still states only an exculpated claim for breach of duty of care." Op. 30.

In keeping with this principle, this Court repeatedly has rejected claims that directors consciously disregarded their duties in bad faith by undertaking an allegedly inadequate process. *See, e.g.*, *Good*, 177 A.3d at 57–59 (plaintiff could not show bad faith because the board had received management presentations about the problems alleged in the complaint); *Stone v. Ritter*, 911 A.2d 362, 372–73 (Del. 2006) (plaintiffs could not show bad faith because the Board had, for example, received compliance reports); *Lyondell*, 970 A.2d at 243 (allegations of a flawed process, such as a failure to take "specific steps," do not demonstrate bad faith). Plaintiff alleges nothing more.

The Court of Chancery was right to reject Plaintiff's flawed analogy to *In re Walt Disney Company Derivative Litigation*, 825 A.2d 275 (Del. Ch. 2003). Op. 37–38. In *Disney*, the board approved a decision to hire a new president before the most material terms of his contract — compensation and termination provisions —

had been negotiated. 825 A.2d at 287–89. The Board then gave the CEO, who was the candidate's "good friend" of many years, carte blanche to negotiate the contract despite the obvious conflict of interest. *Id.* The Court of Chancery correctly found that "[n]othing similar is alleged here." Op. 38.

There are no allegations that Uber's directors "*knew* that they were making material decisions without adequate information and without adequate deliberation." *Disney*, 825 A.2d at 289. To the contrary, the Amended Complaint and the materials it incorporates reflect that the Board received a presentation from management on the transaction, discussed key contract terms, discussed due diligence, and were informed that the diligence was clean before approving the acquisition. *See* Op. 38.[4]

On appeal, Plaintiff attempts to distance himself from the trial testimony he cited in the Amended Complaint concerning the Board's deliberations and quibbles with the trial court's reading of that testimony, *see* AOB 13–14, 29–30, but his criticisms are meritless. The very question and answer from former director Gurley

[4] As the trial court explained, *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752 (Del. Ch. 2016), is similarly distinguishable. Op. 38 (noting that *Amalgamated Bank* involved questions of executive compensation, which "necessarily alert a board to the dangers of deference solely to the judgment of those same executives"); *see also Amalgamated Bank*, 132 A.3d at 783 (noting that the board did not even ask questions about the disputed agreement). *Teachers' Retirement System of Louisiana v. Aidenoff*, which Plaintiff also cites, AOB 26 n.97, is likewise distinguishable, *see* 900 A.2d 654, 668–70 (Del. Ch. 2006) (finding in 12(b)(6) context that complaint adequately pleaded bad faith by alleging that directors kept quiet about known conflicts "for selfish reasons").

that Plaintiff quotes in the Amended Complaint demonstrate that the Board received a presentation on due diligence and was informed that it was "okay." Op. 12 n.64. The Board presentation incorporated in the Amended Complaint corroborates this testimony, reflecting that Uber's management decided to "move forward" after reviewing due diligence conducted by a "forensic expert." *Id.* n.65.

On this record, the Court of Chancery did not err by concluding that the "most favorable" inference that can be drawn for Plaintiff is that the directors breached their duty of care by accepting management's representations and failing to "ask further questions about Stroz's findings . . . ." Op. 12–13. Indeed, such an inference is *generous* to Plaintiff, given the Board's right to rely on representations of management. *See* 8 *Del. C.* § 141(e). The various red herrings that Plaintiff cites — from Uber's alleged history of failing to comply with taxi regulations, to Kalanick's alleged history at Scour, to the provisions of the Merger Agreement — do not even come close to the "extreme set of facts" necessary to demonstrate that disinterested directors "*knew* that they were not discharging their fiduciary obligations." *Lyondell*, 970 A.2d at 240 (citation omitted) (emphasis added).

Taxi Regulations. Plaintiff's disputed allegations about Uber's supposed history of disdain for taxi regulations do not demonstrate that the Board acted in bad faith. In the rare cases in which Delaware courts have found bad faith based on a board's failure to act in the face of past misconduct, they have done so only where

(1) there is a direct connection between the purported prior wrongdoing and the corporate trauma at issue, and (2) the board was aware of that wrongdoing. *South v. Baker*, 62 A.3d 1, 17–18 (Del. Ch. 2012) (rejecting claims based on unconnected "safety incidents" not explained to the board); *In re Dow Chem. Co. Derivative Litig.*, 2010 WL 66769, at *13 (Del. Ch. Jan. 11, 2010) (rejecting claims that directors should have suspected wrongdoing by different members of management in a different country in an unrelated transaction).[5] No such connection or board knowledge is pleaded here. As the Court of Chancery correctly held, alleged violations of taxicab regulations are not warning signs that management may seek to misappropriate intellectual property or mislead the Board. *See* Op. 36, 39 n.173.

Scour. Unable to point to any history of intellectual property violations at Uber, Plaintiff relies heavily on allegations that Kalanick helped found a file-sharing site named Scour that was sued for copyright infringement almost 20 years ago, before Uber existed. *See* AOB 5–6. Plaintiff even goes so far as to embellish those allegations by improperly citing newspaper articles found nowhere in the record. *See* AOB viii, 5–6 & nn.7–8.[6] The allegations do not help Plaintiff.

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[5] *See also* Op. 33–35 (distinguishing *In re Massey Energy Company*, 2011 WL 2176479 (Del. Ch. May 31, 2011), where the defendants knew that management was violating mine safety regulations but did not act, leading to a deadly mining accident of exactly the type those regulations were intended to prevent).

[6] The Court should not consider these newly cited articles for any purpose.

First, there is a vast difference between operating a website on which third parties allegedly shared files in violation of copyright laws and operating a company that seeks for its own purposes to misappropriate a competitor's intellectual property. Even if the Board had been aware of Kalanick's involvement two decades ago with Scour, that would not have constituted a "red flag" that Kalanick's proposal to acquire Otto was designed to steal Google's self-driving car technology. Indeed, it would have been manifestly unreasonable for the Board to draw such a conclusion given Uber's retention of a forensic investigation firm to *prevent* any such misappropriation.

Second, the Court of Chancery correctly dismissed Plaintiff's arguments about Scour because Plaintiff failed to plead that "the Board had knowledge of this, nor would that be a reasonable inference." Op. 36. Plaintiff's argument to the contrary, AOB 27, ignores his burden to plead particularized factual allegations; Plaintiff is not entitled to rely on unpleaded and speculative assertions about what a board *could have* discovered. *See*, *e.g.*, *Beam*, 845 A.2d 1050 (the demand requirement screens out "suspicion expressed solely in conclusory terms" (citation omitted)).

Market Analytics Team. Plaintiff's allegations about the "market analytics team" likewise cannot establish bad faith. *See* AOB 7, 24, 26. The Amended Complaint concedes that the "whistleblower letter" on which these allegations are

based was not publicly disclosed until *after the Otto transaction closed*. *See* A191–A192, ¶ 93. Because Plaintiff nowhere alleges that the Board was aware of these allegations earlier, when it voted to approve the Otto acquisition, his criticism that the trial court "ignored" (AOB at 26) the allegations is meritless. *See Chen v. Howard-Anderson*, 87 A.3d 648, 665 (Del. Ch. 2014) ("defendants' actions must stand or fall based on what they knew and did at the time").

The Otto Transaction. Plaintiff's remaining arguments rest on distortions of Merger Agreement terms, none of which support Plaintiff's assertion that the Board knew the transaction was "a naked grab" of Google's technology. AOB 25.

The acquisition was not "a $680-million purchase of a month-old shell" — a price which Plaintiff implies could only be justified if stolen IP was part of the bargain. AOB 24. Uber agreed to pay only $100,000 up front. Op. 40 n. 174. The balance of *potential* consideration consisted of a pool of restricted stock that was payable *only* upon the achievement of milestones through 2030 and the satisfaction of time- and liquidity-based conditions. *Id.* This incentive-laden agreement was not "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *Kahn v. Stern*, 2017 WL 3701611, at *10, *13 (Del. Ch. Aug. 28, 2017) (bonus agreement conditioned on performance not "inexplicable").

Although Plaintiff argued below that the milestones were illusory, the Amended Complaint does not plead any facts establishing that.[7] Moreover, as the Court of Chancery ruled, "assuming it is true that . . . the conditional nature of the payments above $100,000 is illusory, that fact is irrelevant *unless the Director Defendants knew such to be the case*, which is neither pled in, nor a reasonable inference to be drawn from, the complaint." Op. 40 n.174. There is thus no basis in Plaintiff's allegations to conclude that the sales price put the Board on notice of "a plan to illegally appropriate Google technology." *Id.*

Nor can such an inference be drawn from the indemnification provisions. The provisions were structured to *discourage* the misuse of intellectual property following the acquisition. Any post-signing misconduct caused an employee's indemnity rights to become "null and void." B14, § 2.1(a). If the intent of the provisions had been to facilitate IP theft, then they would have extended to post-acquisition conduct, when misappropriated IP might, in theory, have been useful to Uber. Similarly, pre-signing conduct was indemnified only if disclosed to Stroz.

[7] Although the trial court declined to examine the actual, unredacted milestone provisions, it would have been well within its rights under to consider the full terms of the Merger Agreement and its exhibits, which prove that the milestones were tied to concrete and valuable achievements. A plaintiff may not "reference certain documents outside the complaint and at the same time prevent the court from considering those documents' actual terms." *Winshall v. Viacom Int'l Inc.*, 76 A.3d 808, 818 (Del. 2013) (citations omitted).

See B14–15, § 2.1(b)(ii). If the acquisition had been designed to steal IP, the indemnification provisions would not have incentivized Otto's employees to create a record of such misconduct by disclosing it to a forensic investigator.

Plaintiff's arguments about the absence of post-closing indemnification rights in favor of Uber are no more compelling because they ignore the reality that Uber purchased Otto primarily to acquire engineers who could develop self-driving car technology *in the future*. *See* A176, ¶ 47; Op. 40–41. Because the most valuable aspect of the transaction to Uber was not Otto's existing technology, but its personnel, there was no reason to insist on post-closing indemnity rights for breaches of representations about *existing* IP. Nor would such a demand have been reasonable, given that Uber was paying only $100,000 up-front — not a large price from which it could insist on a holdback for indemnity claims.

Plaintiff's mantra that the indemnification provisions were "unusual" does not alter the analysis. Even assuming the provisions were atypical, "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). Nor was the Board's agreement to allegedly unusual indemnity provisions "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 (citation omitted). As the trial court observed,

"Uber was buying Otto not for its operations, but for its personnel." Op. 40. "Indemnification of those engineers was part of this transaction" and, "[a]bsent knowledge of an intent to steal IP, the fact that the directors agree to indemnification terms that create corporate risk does not imply a breach of a duty of loyalty." *Id.* at 41.

2. Plaintiff's Waste Claims Fails for the Same Reasons.

The Court of Chancery also correctly rejected Plaintiff's argument that the directors who voted to approve the Otto acquisition face a substantial likelihood of liability for waste. Op. 44–45. On appeal, Plaintiff argues that this was error because the Board approved "an illegal transaction knowing it was likely illegal" and devoid of a "legitimate corporate purpose." AOB 31. The argument fails for multiple reasons, including that this was not Plaintiff's contention below.

As the Court of Chancery found, Plaintiff did not "base his argument for director bad faith on a *knowing* violation of law by the Director Defendants (save Kalanick) . . . ." Op. 28 n.143. To the extent any such claim was implied, it was supported only by "conclusory" assertions belied by the factual allegations of the Amended Complaint and the materials it incorporates. *Id.* These materials demonstrate that Board members had every reason to believe that the transaction served the legitimate purpose of advancing Uber's efforts to develop a self-driving car *without* misappropriating any IP. They show, for example, that Otto made

"representations . . . regarding its ownership of IP," Op. 13; that Stroz was hired to address the risk that IP would be transferred, Op. 9; that the Board was assured that the due diligence performed by Stroz was clean, Op. 13 & n.66; and that terms of the transaction discouraged post-acquisition use of Google IP by providing that such conduct would render indemnification rights "null and void," B14, § 2.1(a). Nothing about these facts suggested that the transaction had an illegal purpose.

"[W]aste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." *Brehm*, 746 A.2d at 263 (quoting *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997)). Plaintiff's claim that the Board caused Uber to pay "$680 million" for "essentially nothing of value," A206–A207, ¶¶ 133–134, is contradicted by his own concessions that Uber paid only $100,000 up front, Op. 40 n.174, and received value in exchange, including a team of engineers to advance its critically important self-driving car project. A176, ¶ 47. The milestone structure guaranteed that any future payments would likewise be made only in exchange for value, including the achievement of milestones and time-based employment

conditions. *See supra* 26–27. As a result, no director faces any risk of liability for corporate waste.[8]

[8] Section I of Appellant's Opening Brief discusses the independence of Demand Board members Cohler and Trujillo. We respond to these arguments in Section III.

II. THE COURT OF CHANCERY CORRECTLY REJECTED THE CLAIM THAT BOARD MEMBERS ACTED IN BAD FAITH BY ALLOWING THE TRANSACTION TO CLOSE.

A. Question Presented

Did the Court of Chancery correctly determine that the Amended Complaint lacks particularized factual allegations showing that the Director Defendants face a substantial likelihood of liability for failing to terminate the Otto transaction when Plaintiff's allegations fail to establish that such a termination right existed or that the Board was aware of such a right?

B. Scope of Review

This Court reviews dismissals pursuant to Rule 23.1 *de novo* and may affirm on any basis that was fairly presented below. *See supra* Arg. I.B.

C. Merits of Argument

The Amended Complaint alleges that five members of the Demand Board face a substantial likelihood of liability for failing to terminate the Otto acquisition. According to Plaintiff, if the Board had reviewed the final Stroz report before closing, it would have been compelled to terminate the transaction based on a purported breach of Otto's representations concerning "its ownership of IP." A189, ¶ 81–82. The argument fails for several reasons.

First, the Stroz report does not demonstrate that Uber had a termination right. *See, e.g.*, *Hokanson v. Petty*, 2008 WL 5169633, at *5–6 (Del. Ch. Dec. 10, 2008) (rejecting argument that directors breached fiduciary duties by not repudiating a

contract without justification). As the Court of Chancery observed, Plaintiff nowhere alleges that Stroz made "any explicit determinations" concerning Otto's compliance with representations in the Merger Agreement. Op. 42 n.177.

Nor did Stroz imply that Otto had breached representations concerning IP. While Stroz concluded that certain Otto employees possessed Google information on *personal* devices, it found no evidence that such information had been transferred *to Otto*. To the contrary, Stroz found that employees were "directed not to use personal devices" and *not* to bring "any prior employer data to Ottomotto." A131. The report thus fails to demonstrate any misconduct *by Otto* giving rise to a termination right.

Moreover, Plaintiff's theory that the final Stroz report demonstrated a termination right is belied by the parties' agreement that pre-signing conduct disclosed to Stroz would "be disregarded in determining whether any of the conditions" to closing had been satisfied. A188, ¶ 79. Plaintiff never explains how the Board could have asserted a termination right based on the Stroz report despite this carve-out.

Second, even if grounds for termination could be found in the Stroz report, Plaintiff does not allege that the Board saw the report prior to closing or knew that

it was available.[9] He alleges the opposite: that none of the directors reviewed the report until 2017. A180, ¶ 56 n.4. Directors cannot be held liable for bad faith for failing to exercise a purported termination right grounded in a report that they did not even receive.

Third, while Plaintiff faults the Board for failing to obtain and review the report before closing, the Board was not required to take this step given management's prior representation that the due diligence was clean. As the court below observed, the Amended Complaint does not plead "any new information learned [by Board members] after approval of the Merger Agreement regarding IP theft by Otto," Op. 44 — much less information that should have caused the Board to demand Stroz's final report before closing.

Fourth, even if the Board could be faulted for failing to review the report, this claim that the directors "failed to do all that they should have under the circumstances" would be just another exculpated claim that they "breached their duty of care." *Lyondell*, 970 A.2d at 243. As the Court of Chancery ruled, it would not demonstrate "a conscious breach of duty amounting to bad faith." Op. 43.

[9] Plaintiff asks the Court to infer that because Stroz's final report was provided to Uber's counsel, counsel informed the Board it was available. AOB 37–38. Given Plaintiff's allegation that information about due diligence had previously been withheld from the Board by counsel, A178–A179, ¶¶ 53–54, that inference is not reasonable.

III. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT A MAJORITY OF THE DEMAND BOARD WAS INDEPENDENT.

A. Question Presented

Did the Court of Chancery correctly determine that Plaintiff's allegations fail to raise a reasonable doubt as to the *independence* of a majority of the eleven members of the Demand Board where the allegations are conclusory and rely on unsupported theories and incorrect assumptions about who faces a substantial likelihood of liability?

B. Scope of Review

This Court reviews dismissals pursuant to Rule 23.1 *de novo* and may affirm on any basis fairly presented below. *See supra* Arg. I.B.

C. Merits of Argument

Plaintiff bears the burden of pleading particularized facts showing that a majority of the Demand Board was incapable of exercising "independent and disinterested business judgment" in responding to a demand. *Rales*, 634 A.2d at 934. Unable to allege that the requisite majority faces a substantial likelihood of liability that would render them "interested," Plaintiff attempted to buttress his demand futility allegations by asserting that certain Demand Board members lack independence from Kalanick or other Director Defendants who purportedly face such a risk. These allegations of board dominance are directly contradicted by Plaintiff's assertion that Kalanick was "ousted" as CEO, *see* Op. 18, while most of

these same directors served on the Board. They are also wholly insufficient to raise a reasonable doubt as to the independence of a majority of Demand Board members, as the Court of Chancery correctly ruled.

1. Plaintiff Does Not Allege that Khosrowshahi, Martello, or Al-Rumayyan Lack Independence.

Plaintiff made no effort to challenge the independence of three Demand Board members — Khosrowshahi, Martello, and Al-Rumayyan. As a result, their independence must be presumed. *Beam*, 845 A.2d at 1055 (in "the demand-excusal context, . . . the board is presumed to be independent").

2. Plaintiff's Allegations Fail to Establish that Thain Lacks Independence from Kalanick.

Thain is the former CEO of Merrill Lynch & Co. and the New York Stock Exchange and the former Chairman of CIT Group Inc. *See* A202 n.16. The Court of Chancery correctly ruled that Plaintiff's allegation that Thain was appointed to the Board by Kalanick is insufficient to call into question Thain's independence. Op. 50–51. To overcome the presumption of independence, "it is not enough to charge that a director was nominated by or elected at the behest" of another party because that "is the usual way a person becomes a corporate director." *Aronson*, 473 A.2d at 816.

Nor does Plaintiff's allegation that Thain's appointment was perceived as a "power play" suffice to meet Plaintiff's burden. To excuse demand based on a lack

of independence, a plaintiff must "allege particularized facts manifesting a direction of corporate conduct in such a way as to comport with the wishes or interests" of the allegedly controlling party. *Id.* (citations omitted). There are no allegations demonstrating that Thain ever acted in such a way, and suspicion that he might is not enough. *See Beam*, 845 A.2d at 1050 (demand requirement is designed to "eliminate claims where there is only a suspicion expressed in conclusory terms" (citation omitted)); *In re Synutra Int'l Inc. S'holder Litig.*, 2018 WL 705702, at *4 (Del. Ch. Feb. 2, 2018) (allegation that director was appointed in attempt to "pack" board committee insufficient to overcome presumption of independence), *aff'd sub nom. Flood v. Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018).

Plaintiff's argument that Kalanick has the power to remove Thain adds nothing. *See* AOB 49. The Amended Complaint contains no such allegation. *See* Op. 50 & n.199. Even if it did, the fact that a director may be removed is insufficient to overcome the presumption of independence absent allegations that the director's position or compensation is material to him. *See, e.g.*, *Freedman v. Adams*, 2012 WL 1345638, *6 (Del. Ch. Mar. 30, 2012). There are no such allegations (nor could there be) with respect to Thain, and the Court of Chancery thus correctly rejected Plaintiff's argument that Thain lacks independence.

3. Plaintiff's Allegations Fail to Establish that Graves Lacks Independence from Kalanick.

Graves, an Uber director since 2010, was Uber's first employee and served as an officer at the Company until August 2017. *See* A168, ¶ 20; A195, ¶ 107. Plaintiff argues that Graves lacks independence from Kalanick because he is a friend of Kalanick's who supposedly owes his wealth and position to Kalanick's decision to hire him as Uber's first employee. AOB 45–47. The Court of Chancery correctly ruled that these allegations were insufficient to overcome the presumption of independence. Op. 48–50.

A close relationship may call into question a director's independence, but conclusory allegations of such a relationship are not enough; instead, a plaintiff must plead "with particularity facts indicating that a relationship . . . is so close that the director's independence may *reasonably* be doubted." *Beam*, 845 A.2d at 1051. The allegations must support the inference that the director "would be more willing to risk his or her reputation than risk the relationship with the interested director." *Id.* at 1052. No such facts are pleaded here.

As the Court of Chancery recognized, Plaintiff's allegation that Graves' wealth arises from Uber is insufficient, because Plaintiff has not pled facts suggesting that "Kalanick has any means to deprive Graves of the wealth Graves has accumulated" or of any wealth "that is material to Graves . . . going forward." Op. 49. Allegations that a director has received or expects a financial benefit will not

overcome the presumption of independence unless the allegedly dominant party has the "unilateral power" to withhold the benefit, and it is of such "subjective material importance" to the director as to call into question his ability to evaluate the merits of a corporate transaction objectively. *See Orman v. Cullman*, 794 A.2d 5, 25 n.50 (Del. Ch. 2002).

On appeal, Plaintiff argues for the first time that Graves may be beholden to Kalanick based on past acts that create a sense of obligation. *See* AOB 45–46. Plaintiff waived this argument by failing to raise it below. *See, e.g.*, *Shawe v. Elting*, 157 A.3d 152, 168–69 (Del. 2017). The argument also fails on the merits, because the Amended Complaint pleads no facts supporting the assertion apart from Kalanick's hiring of Graves ten years ago. Without more, professional relationships do not suffice to rebut the presumption of independence. *See, e.g.*, *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 980–81 & n.44 (Del. Ch. 2000) (fifteen-year professional and personal relationship between director and company's chairman and CEO insufficient to demonstrate lack of independence).[10]

[10] The cases Plaintiff cites in an attempt to show otherwise undermine his argument by exemplifying the type of concrete *quid pro quo* not pleaded here. *See In re Limited, Inc. S'holders Litig.*, 2002 WL 537692, at *6 (Del. Ch. Mar. 27, 2002) (director had solicited a $25 million dollar donation and continued to solicit donations from allegedly dominant party); *In re Ply Gem Indus., Inc. S'holders Litig.*, 2001 WL 1192206 (Del. Ch. Oct. 3, 2001), *denying reconsideration of* 2001 WL 755133 (Del. Ch. June 26, 2001) (directors allegedly received substantial consulting and legal fees at defendant's direction).

4. Plaintiff's Allegations Fail to Establish that Camp Lacks Independence from Kalanick.

Plaintiff alleges that Camp and Kalanick are close friends and that they came up with the idea for Uber together at a conference. A196, ¶ 109. This bare allegation of a personal and professional relationship is insufficient to overcome the presumption of independence. *See Apple Comput., Inc. v. Exponential Tech., Inc.*,1999 WL 39547, at *12 (Del. Ch. Jan. 21, 1999) ("The factual predicate, that [the defendant and a director] are cofounders, falls far short of raising a reasonable doubt . . . ."). Instead, Plaintiff must plead particularized facts demonstrating that the relationship is so important to Camp as to make him "more willing to risk his or her reputation than risk" his relationship with Kalanick. *Beam*, 845 A.2d at 1052. Nothing like that is pleaded here. Instead, Plaintiff's allegations are "merely conclusory." Op. 52.

5. Plaintiff's Allegations Fail to Establish that Burns Lacks Independence from Kalanick.

Burns is the former CEO of Xerox Corp. and a senior advisor at a public relations firm. A203, ¶ 119 & n.18. Plaintiff argues that Burns lacks independence because she was appointed to the Board by Kalanick and because Kalanick is a client of the public relations firm at which she is an advisor. The first allegation is insufficient because the mere fact that a director was appointed by another party is not enough to overcome the presumption of independence. *See Aronson*, 473 A.2d

at 815–17; Op. 51. The second allegation is insufficient because the Amended Complaint nowhere pleads that the client relationship between Kalanick and the public relations firm at which Burns is an advisor is in any way material to her — a fatal omission. *See, e.g.*, *Orman*, 794 A.2d at 23.[11]

6. Plaintiff's Allegations Fail to Establish that Huffington Lacks Independence from Kalanick.

Huffington is the founder of the Huffington Post and joined Uber's Board in late April 2016. A196–A198, ¶ 110. Plaintiff's allegations about Huffington, again based largely on media articles, are insufficient to overcome the presumption of independence. While Huffington allegedly visited Kalanick's "family members in the hospital and made him omelettes," these personal interactions alone are not sufficient to call into question her impartiality. *Id.* "Allegations of mere personal friendship or a mere outside business relationship, standing alone, are insufficient to raise a reasonable doubt about a director's independence." *Beam*, 845 A.2d at 1050. Nor does Huffington's defense of Kalanick in the press demonstrate a lack of

[11] *In re INFOUSA, Inc. Shareholders Litigation*, 953 A.2d 963 (Del. Ch. 2007) does not show otherwise. It concerned the "unique relationship between a law firm and its partners." *See* 953 A.2d at 991–92. No allegation here suggests that the relationship between a "senior advisor" and a public relations firm is comparable. Moreover, Plaintiff's new theory that Burns had a "duty" (AOB 43) not to damage Kalanick was not alleged in the Amended Complaint, which asserts only that it would have been "bad for business" for Burns to do so (A203, ¶ 119).

independence, because it is equally consistent with fealty to the Company on whose Board she serves. *See id.* at 1053.

7. Plaintiff's Allegations that Cohler and Trujillo Lack Independence From Gurley and Bonderman Are Irrelevant and Otherwise Insufficient.

Whether a director lacks independence from another party is irrelevant unless the allegedly dominant party faces a substantial likelihood of liability. Op. 47–48; *see also, e.g.*, *Brehm*, 746 A.2d at 258 (declining to analyze director independence for this reason). As discussed above, the Court of Chancery correctly ruled that neither Gurley nor Bonderman faces a substantial likelihood of liability. Consequently, whether Cohler and Trujillo lack independence from Gurley and Bonderman is immaterial; a lack of independence would not call into question their ability to respond to a demand impartially.

Even if Gurley or Bonderman faced a substantial likelihood of liability, however, Plaintiff's allegations would be insufficient to call into question the independence of Cohler and Trujillo. Delaware law presumes the independence of directors. *See, e.g.*, *Aronson*, 473 A.2d at 812. To overcome that presumption, a plaintiff must plead facts supporting the inference that the non-interested director "would be more willing to risk his or her reputation than risk the relationship with the interested director." *Beam*, 845 A.2d at 1052. The allegations against Cohler and Trujillo do not meet this standard.

Plaintiff alleges that Cohler would not agree to any lawsuit against Gurley because they are partners in a private equity fund and because Gurley recruited him and served as his mentor. Plaintiff's claims against Trujillo are even more generalized. Without more, such allegations of professional relationships do not suffice to overcome the presumption of independence. *See, e.g.*, *F5 Capital v. Pappas*, 856 F.3d 61, 85 (2d Cir.) (applying Delaware law) (rejecting argument that director lacked independence from fellow member in two private equity funds), *cert. denied*, 138 S. Ct. 473 (2017); *Dow*, 2010 WL 66769, at *9 ("That directors of one company are also colleagues at another institution does not mean that they will not or cannot exercise their own business judgment . . . ."). The cases Plaintiff cites serve only to illustrate the sort of particularized facts missing here[12] or are otherwise distinguishable.[13]

[12] *See Sandys v. Pincus*, 152 A.3d 124, 130–31 (Del. 2016) (addressing claims of independence among close family friends who co-owned private jet and others who were not independent under NASDAQ rules).

[13] *In re Orchard Enters., Inc. Stockholder Litig.*, 88 A.3d 1, 21–22 (Del. Ch. 2014) (considering whether proxy statement misrepresented relationship in question); *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 54–55 & n.30 (Del. Ch. 2013) (director lacked independence because he had testified without credibility at trial about the relationships in question); *In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 261 n.45 (Del. Ch. 2006) (applying more liberal pleading standard of Rule 12(b)(6)); *Goldman v. Pogo.com, Inc.*, 2002 WL 1358760, at *3–4 (Del. Ch. June 14, 2002) (same).

CONCLUSION

For the foregoing reasons, demand was not excused, and the Court of Chancery's order dismissing the Amended Complaint should be affirmed.

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Respectfully submitted,

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