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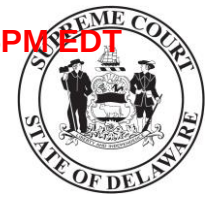

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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, DAVID BONDERMAN and UBER TECHNOLOGIES, INC., Defendants-Below/Appellees.	No. 181, 2019 Court below: Court of Chancery C.A. No. 2017-0888-SG

APPELLANT'S REPLY BRIEF

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GLOSSARY

Al-Rumayyan	Yasir Al-Rumayyan – Uber director since June 1, 2016
Board	The Board of Directors of Uber at relevant times discussed herein
Bonderman	David Bonderman – Uber director from 2011 through June 13, 2017
Burns	Ursula Burns – Uber director since September 29, 2017
Camp	Garrett Camp – Uber director since the Company's founding
CEO	Chief Executive Officer
Cohler	Matt Cohler – Uber director who replaced Gurley in June 2017
Demand Board	The Board of Directors of Uber at the time Plaintiff filed its Complaint on December 13, 2017, comprised of Travis Kalanick, Ryan Graves, Garrett Camp, Arianna Huffington, Matt Cohler, David Trujillo, Ursula Burns, John Thain, Yasir Al-Rumayyan, Wan Ling Martello and Dara Khosrowshahi
Google	Google LLC
Graves	Ryan Graves – Uber director from 2010 through August 10, 2017
Gurley	William Gurley – Uber director from 2011 through June 21, 2017
Huffington	Arianna Huffington – Uber director since April 27, 2016
IDAB	Appellees Garret Camp, Ryan Graves, Arianna Huffington, Yasir Al-Rumayyan, William Gurley and David Bonderman's Answering Brief On Appeal
IP	Intellectual Property
Kalanick	Travis Kalanick – CEO of Uber from December 2010 through June 20, 2017 and member of the Uber Board from the Company's founding through present
Levandowski	Anthony Levandowski – Founder of Otto

Merger Agreement	The Agreement and Plan of Merger between Uber and Otto, dated April 11, 2016
Opinion or "Op."	Court of Chancery Memorandum Opinion, dated April 1, 2019, Transaction ID # 63118589
Otto	Ottomotto LLC
POB	Appellant's [Corrected] Opening Brief
Scour	Kalanick's venture which offered peer-to-peer file sharing of files, videos, movies, and images, which was shut down in November 2000 for copyright infringement and declared bankruptcy in October 2000
Stroz	Stroz Friedberg, LLC – a Computer Forensic Investigation Firm
Stroz Report	Investigative report prepared by Stroz for Uber to determine whether Levandowski and others stole IP from Google, dated August 5, 2016
Thain	John Thain – Uber Director since September 29, 2017
Transaction	Uber's Acquisition of Otto
Trujillo	David Trujillo – Uber Director who replaced Bonderman in June 2017
UAB	Answering Brief of Appellee and Nominal Defendant Uber Technologies, Inc.
Uber	Uber Technologies, Inc.
Waymo Action	Waymo LLC v. Uber Technologies, Inc; Ottomotto LLC and Otto Trucking LLC (USDC NDCA – C.A. No. 3:17-cv-00939)

INTRODUCTION

Defendants rely on smoke and mirrors to distract from the fact that the Chancery Court erred in its analysis and conclusion that demand was not futile. Five directors—Kalanick, Camp, Graves, Gurley, and Bonderman—faced a substantial likelihood of liability in connection with their decision to approve the Transaction despite glaring red flags that it was nothing more than a grab of Google's pilfered IP. An additional two directors—Huffington and Al-Rumayyan—faced a substantial likelihood of liability for allowing the Transaction to close despite glaring red flags that the Transaction was illegal. And seven directors—Huffington, Burns, Camp, Graves, Thain, Cohler, and Trujillo—lacked independence from Board members who face a substantial likelihood of liability due to complex business and personal relationships that taint their respective abilities to impartially consider a demand. Because at least six of the eleven-member Demand Board could not independently and disinterestedly consider Plaintiff's demand, the Chancery Court erred in holding demand was not futile.

ARGUMENT

I. THE CHANCERY COURT ERRED IN FINDING THAT THE DIRECTORS WHO APPROVED THE TRANSACTION DID NOT FACE A SUBSTANTIAL LIKELIHOOD OF LIABILITY

A. THE COMPLAINT ADEQUATELY ALLEGES BAD FAITH

Defendants paint this case as a duty of care claim.[1] Not only are Defendants wrong, but they ignore the standard on a motion to dismiss. Plaintiff need not ***prove*** anything. Rather, a plaintiff need only allege facts supporting a reasonable inference to "imply that the defendant directors knew that they were making material decisions without adequate information and without adequate deliberation, and that they simply did not care if the decisions caused the corporation and its stockholders to suffer injury or loss."[2]

The Complaint adequately alleges that the Board approved the Transaction in bad faith by "fail[ing] to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities."[3] Defendants argue that the Board conducted extensive due diligence prior to approving the Transaction, but the narrative they present is fiction. Most of the "diligence" Defendants point to, in reality, was Kalanick's secret scheming with Levandowski to bring Google's stolen

[1] UAB(21).

[2] *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 289 (Del. Ch. 2003).

[3] *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

IP to Uber.[4] The Transaction was so suspicious on its face that Stroz was hired to determine whether Levandowski and his key people "took with them or retained confidential and/or proprietary information" from Google or breached non-solicitation, non-compete, or fiduciary obligations in connection with their move from Google to Otto.[5] But no one on the Board bothered to find out the results of that investigation, nor was the investigation complete before the Transaction was approved.[6] Even after the Stroz Report was finalized, no one on the Board bothered to look at it or ask about the results, despite the fact that a number of indemnifications in the Merger Agreement were tied to those results and Levandowski's false representations concerning Otto's IP ownership provided grounds for terminating the Transaction.[7] This was not a situation where the Board was not sufficiently "skeptical about the information it was given" because it was not given ***any*** information about the investigation. Given the issues known to the Board, this is quintessential bad faith.[8]

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[4] POB(SOF§B).

[5] POB(SOF§C).

[6] POB(SOF§E).

[7] POB(SOF§§F-G).

[8] *See Marchand v. Barnhill*, __A.3d __, 2019 WL 2509617, at *13 (Del. June 19, 2019) ("When a plaintiff can plead an inference that a board has undertaken no efforts to make sure it is informed of a compliance issue intrinsically critical to the company's business operation, then that supports an inference that the board has not made the good faith effort that *Caremark* requires.").

This case is akin to *In re The Walt Disney Co. Deriv. Litig.*, 825 A.2d 275 (Del. Ch. 2003), where the board approved the hiring of a new company president but did not "s[eek] to review, nor did they review, the final agreement" and "failed to meet in order to evaluate the final agreement before it became binding on Disney."[9] The facts here are even worse than those in *Disney* because in that case "no expert was retained to advise" the board,[10] whereas here the Board retained Stroz but never deigned to learn Stroz's findings. They ***knew*** they did not know the content of Stroz's report because no director ever bothered to ask to read it.

In re Massey Energy Co. Deriv. & Class Litig., 2011 WL 2176479 (Del. Ch. May 31, 2011) is equally applicable. The Board's knowledge of Kalanick's disdain for and flouting of laws and regulations applicable to Uber's core business and Kalanick's history at Scour closely parallel the facts in *Massey*: "the [Massey] Board and management were aware of a troubling continuing pattern of non-compliance in fact and of a managerial attitude suggestive of a desire to fight with and hide evidence from the company's regulators."[11] None of the cases cited by Defendants warrant a contrary conclusion.[12]

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[9] *Disney*, at 288.

[10] *Id*.

[11] *Massey*, at *21.

[12] *Melbourne Mun. Firefighters' Pension Tr. Fund v. Jacobs*, 2016 WL 4076369, at *12 (Del. Ch. Aug. 1, 2016), has no application here, as it "is not one in which the company pled guilty to criminal charges – as in *Massey* – or was advised by its

B. THE ALLEGATIONS IN THE COMPLAINT MUST BE VIEWED HOLISTICALLY AND ALL REASONABLE INFERENCES DRAWN IN PLAINTIFF'S FAVOR

Defendants' critical failure is their disregard of the requirement to view the Complaint's allegations holistically and to draw all reasonable inferences in Plaintiff's favor.[13] Their "divide and conquer" tactics must be rejected.

1. Defendants' Story About Diligence Is Fiction

Defendants point to materials purportedly incorporated by reference into the Complaint to challenge Plaintiff's allegations that the directors knowingly approved the Transaction without adequate information, consciously ignoring Stroz's investigation.[14] To do this, they point to a single management presentation from April 2016, and selectively quote the trial testimony of Gurley in the *Waymo* Action. The management presentation does not identify Stroz or provide any summary of its investigation, preliminary or final.[15] And their citation to Gurley's testimony for the

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general counsel that its business plan included potentially illegal conduct – as in *Pyott*." Here, Scour and Uber both paid hefty sums to settle suits alleging IP misappropriation, and the Board knew that Stroz was investigating whether Otto employees stole IP. *Oklahoma Firefighters Pension & Ret. Sys. v. Corbat*, 2017 WL 6452240, at *24 (Del. Ch. Dec. 18, 2017), is equally distinguishable, as "there [were] no allegations suggesting that any of Citigroup's officers or directors viewed themselves (or Citigroup) as above the law." Plaintiff's Complaint is replete with descriptions of Kalanick's disdain for and flouting of laws and regulations.

[13] *Delaware Cty. Empls. Ret, Fund v. Sanchez*, 124 A.3d 1017, 1019 (Del. 2015).

[14] UAB(24).

[15] B7.

factual proposition that the Board determined that "the due diligence was okay"[16] is both improper and incorrect.

First, Defendants cannot rely on documents outside of the pleadings to resolve factual disputes in their favor.[17] Second, the supposedly "incorporated" documents do not, in fact, refute the allegations of the Complaint. The management presentation actually ***confirms*** Plaintiff's allegations that the Board knew Stroz was retained and never bothered to read the Report. Similarly, Plaintiff's Complaint referenced Gurley's testimony merely for his acknowledgement that the indemnification provisions were "atypical"[18] and that diligence was "remarkably critical to the transaction."[19] Defendants, however, use Gurley's testimony not to dispute either point, but affirmatively to establish a ***different*** purported "fact"—*i.e.*, that the directors supposedly determined "that the due diligence was okay."[20] This is not only improper, but it actually raises a factual question that would not have been appropriate for resolution even in the context of summary judgment. Gurley's

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[16] UAB(12,24); IDAB(15).

[17] *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) ("If defendants are permitted to present their own version of the facts at the pleading stage—and district courts accept those facts as uncontroverted and true—it becomes near impossible for even the most aggrieved plaintiff to demonstrate a sufficiently 'plausible' claim for relief.")

[18] A183(¶63).

[19] A186(¶75).

[20] Op.12, 32; UAB(11-12,24); IDAB(15).

testimony, ignored by the Chancery Court, revealed that he had no specific recollection of any alleged discussions, could not identify any actual substance, and, at most, the Board was "left with a generic opinion" about the due diligence process.[21] Such generic, unsubstantiated testimony does not establish that the Board had all material information when it approved the Transaction.[22]

Defendants cite *Official Comm. of Unsecured Creditors of Integrated Health Services, Inc. v. Elkins*, 2004 WL 1949290 (Del.Ch. Aug. 24, 2004), but this case actually supports Plaintiff's position. Although the court dismissed claims where, unlike here, the directors "commissioned a compensation consultant report, discussed his report, and implemented a program based on that report[,]"[23] the court ***denied*** the motion to dismiss claims alleging that the board approved certain loans "without consideration, deliberation or advice from any expert[,]" noting that "directors of a public corporation must exercise more than blind faith."[24] None of Defendants' other cases fare any better.[25]

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[21] POB(13-14); A159(953:10-954:22).

[22] *See Smith v. Van Gorkam*, 488 A.2d 858, 875 (Del. 1985), *overruled on other grounds*, *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009)(directors not entitled to business judgment deference where they approved merger based on oral representations without any substantiating documentary reports).

[23] *Elkins*, at *13.

[24] *Id.* at *15.

[25] All of Uber's cited cases are inapposite because the boards in those cases actually ***received*** the presentations, reports, and advice about the contested matter at issue,

2. Defendants Misrepresent Stroz's Conclusions

Defendants claim that Stroz never determined that Google's IP had been "transferred to" or "misused" by Otto.[26] That is false and beside the point. Stroz was tasked with determining whether the Otto employees "took with them or retained confidential and/or proprietary information from their former employer, Google …"[27] Stroz concluded that Levandowski and others at Otto had done just

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whereas here the Board did not. *See, e.g., City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 59 (Del. 2017); *Houseman v. Sagerman*, 2014 WL 1600724, at *7-8 (Del. Ch. Apr. 16, 2014); *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 244 (Del. 2009); *In re MeadWestvaco Stockholders Litig.*, 168 A.3d 675, 684, 687 (Del. Ch. 2017). The Individual Defendants' cases are also irrelevant. *See Horman v. Abney*, 2017 WL 242571, at *13 (Del. Ch. Jan. 19, 2017) (plaintiff failed to plead facts supporting inference that the directors knew about violations of a compliance agreement); *In re Oracle Corp. Deriv. Litig.*, 2018 WL 1381331, at *14 (Del. Ch. Mar. 19, 2018) (the board received and relied upon the valuation materials at issue); *In re Citigroup Inc. S'holder Litig.*, 2003 WL 21384599, at *2 (Del. Ch. June 5, 2003) (documents circulated at corporate subsidiary level did not raise inference that they ever came to the attention of the board).

[26] *See* UAB(12);IDAB(14). Uber selectively cites page 17 of the Stroz Report, but this very section rebuts Defendants' argument. A130-132,134 (finding Ron "forwarded some Google e-mails to his personal Gmail account," "accessed a Google Drive account from his iPhone 6S and his MacBook Laptop," "accessed, along with Levandowski and other Ottomotto employees, and Ottomotto team site on the Slack collaboration platform," "used his MacBook Laptop to access Google's corporate intranet ... well after he left Google, and that he stored potentially relevant data on several of his devices including his iPhone 6S, MacBook Laptop, MacBook Air Laptop, iPhone 5S, and iPad," and deleted "Google data on the verge of his Stroz Friedberg interview," "including a Google-related document entitled 'Chauffeur win plan.docx."). Numerous other sections of the Stroz Report further demonstrate that those employees stole Google's IP and accessed it while they were at Otto. *See* A123-124.

[27] A116.

that. Given the admitted importance of self-driving car technology to Uber and the fact that Uber ultimately paid a $245 million settlement to Google in the Waymo Action for fraud allegations,[28] there is a reasonable inference that Levandowski and his team stole IP from Google for the sole purpose of bringing it to Otto to use at Uber.

Defendants' efforts to discern some difference between Levandowski's personal devices and Otto is semantics.[29] Levandowski ***was*** Otto. Additional Otto employees were storing and accessing Google's IP while employed at Otto.[30] Otto had no corporate offices (outside of Levandowski's home), so any "personal" computers and other devices ***were*** the Otto corporate devices.[31]

Finally, Defendants' efforts to minimize the conclusions of the Stroz Report ignores that Federal District Judge William Alsup referred the case to the Department of Justice "for investigation of possible theft of trade secrets" to

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[28] UAB(14).

[29] Defendants ignore their own argument that the Transaction was really an acquisition of personnel. UAB(29).

[30] POB(15).

[31] The purported issuance of "new laptops" and directions "not to use personal devices" did not prevent the Otto employees from storing and accessing Google's IP. UAB(13-14).

determine whether criminal charges were justified against Levandowski, Kalanick, Uber and others.[32]

3. The Complaint Adequately Alleges That Defendants Disregarded Unmistakable "Red Flags"

Defendants' arguments that the myriad red flags identified in the Complaint did not put the Uber Board on notice of the likelihood that the Transaction was designed by Kalinick as a raid on Google's IP fall flat. Each of the red flags identified implicate Kalinick's schemes to grow Uber's business illegally and together provide clear notice to the Board of potential illegal conduct that the Directors were duty-bound to prevent.[33] The allegations of the Complaint present a reasonable inference that the Board "knew that they were not discharging their fiduciary obligations."[34]

Prior Misconduct At Uber. Plaintiff is not required to plead "a direct connection between the purported prior wrongdoing and the corporate trauma at issue."[35] The misconduct alleged in the Complaint relates to the illegal promotion of

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[32] A191(¶90).

[33] POB(SOF§§A-G). *See City of Hialeah Emps. Ret. Sys. v. Begley*, 2018 WL 1912840, at *4 (Del. Ch. Apr. 20, 2018) (reasonable to infer that board "knowingly permitted" false and illegal marketing campaign); *Shaev v. Baker*, 2017 WL 1735573, at *11-12 (N.D.Cal. May 4, 2017) (red flags supported inference of board knowledge of ongoing illicit creation of millions of accounts without customers' knowledge).

[34] *Lyondell*, 970 A.2d at 240.

[35] UAB(25).

Uber's core operations.[36] If Kalinick was willing to flout laws and regulations governing Uber's core taxi service (such that the Company was branded as "the most ethically challenged company in Silicon Valley")[37] and the directors were aware of Uber's illegal program to conceal misconduct from regulators,[38] it is not unreasonable to infer that such misconduct constituted "red flags" that Kalanick may willingly violate IP laws with the Transaction—particularly where the Board recognized Google's self-driving technology to present an "existential threat" to the Company's core operations.[39]

Scour. Uber claims that Plaintiff relies on "speculative assertions about what a board *could have* discovered" regarding Kalanick's sordid past at Scour.[40] That is false: Defendants do not dispute that Kalanick's copyright infringement at Scour, and Scour's subsequent demise, were widely reported, nor do Defendants deny that

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[36] POB(6-7).

[37] A171(¶33).

[38] A170-171(¶32) ("Graves was aware of the Greyball program while an executive at the Company").

[39] Uber's cases are inapposite and involve completely different claims from those alleged here. *See South v. Baker*, 62 A.3d 1, 17 (Del. Ch. 2012) (directors not told about safety incidents); *In re Dow Chem. Co. Deriv. Litig.*, 2010 WL 66769, at *12 (Del. Ch. Jan. 11, 2010) (plaintiffs merely alleged that "bribery may have occurred").

[40] UAB(26).

they knew about Scour.[41] The Chancery Court had absolutely no basis to spontaneously infer Board ignorance about Scour, nor was there any reason to deny that anyone who knew anything about the Company knew about Kalanick's history.[42]

Uber's strained argument that there is a "vast difference" between operating a website that facilitates IP theft and misappropriating another company's IP directly makes no sense.[43] The similarities overwhelm any differences: both Scour and Uber (through Otto) engaged in IP theft; Kalanick ran both companies; both companies were sued for hundreds of millions of dollars for violating IP laws. Only Scour avoided liability by declaring bankruptcy. Uber's argument that it would be unreasonable to suspect Kalanick would continue his past practice of IP misappropriation because Stroz was hired "to prevent" such misappropriation[44] distorts the purpose of Stroz's retention. Stroz was not retained to ***prevent*** misappropriation of IP but to determine whether such misappropriation had ***already occurred*** (which it did).[45] Moreover, there was sufficient suspicion about possible

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[41] *See* POB(27). Defendants fail to address Plaintiff's argument that "[i]t is completely reasonable to presume that a corporate board has some general familiarity with the CEO's employment history." POB(27 n.101).

[42] *See* Op. 26.

[43] UAB(26).

[44] *Id*.

[45] A116.

IP misappropriation to prompt the Company to retain Stroz in the first place, as management could not be trusted to do the investigation itself.

Market Analytics Team. Uber contends that the Board could not be aware of the internal market analytics team because "the 'whistleblower letter' on which these allegations are based was not publicly disclosed until after the Otto transaction closed."[46] But this internal espionage team was established and was "gather[ing] trade secrets, code and other information about Uber's competitors" long before the whistleblower letter was sent.[47] Since the Board knew about Kalanick's *modus operandi* of stealing IP and violating the law with respect to Uber's central business model, the inference of Defendants' knowledge of this Uber espionage operation is imminently reasonable.

The Otto Transaction. Uber claims that Plaintiff's "arguments rest on distortions of Merger Agreement terms."[48] Not so.

First, Uber's focus on the cash component of the deal price ignores the 1% of Uber's equity that was provided in the deal.[49] The Transaction was publicly touted as a $680 million deal since its inception, and Uber has never disputed that valuation

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[46] UAB(26-27).

[47] A191-192(¶93). It is also a reasonable inference that the Company received the letter well before it was publicly disclosed.

[48] UAB(27).

[49] *Id*.

until this litigation.[50] Although the cash component of the deal was $100,000, the restricted stock component awarded Levandowski and his team with approximately 1% of Uber's equity, which at the time was publicly-reported to be valued at $680 million.[51]

Defendants' focus on the supposedly "conditional" nature of the equity grant ignores that the supposed earn-outs were "structured such that [they were] 'virtually assur[ed] to vest.'"[52] As the Chancery Court noted, there is no evidence that the directors knew that any portion of the total purchase price was conditional.[53] Thus, the acquisition price was "assured" to be $680 million and the Board knew that.[54] The notion that the Transaction was a "$100,000 deal" is a false narrative designed to mislead the Court from the fact that this Transaction was the largest deal in Uber's history at the time.[55]

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[50] A300.

[51] A300(n.78).

[52] A300.

[53] Op. 40 n.174.

[54] *Kahn v. Stern*, 2017 WL 3701611, at *11 (Del. Ch. Aug. 28, 2017) is distinguishable, as plaintiff there did not plead the materiality of the "Side Deals," whereas here Plaintiff explained the materiality of the purchase price.

[55] A162(¶1);A176(¶47);A180(¶57).

Next, Uber contends that the indemnification provisions "discourage[d] the misuse of intellectual property following the acquisition."[56] This argument is a red herring because the IP theft had already occurred ***before the Transaction closed***.[57] Given what the Board already knew or suspected prior to signing the Merger Agreement, the unusual indemnification provisions provided an atypical level of protection to Levandowski and his team.

Uber argues that "pre-signing conduct was indemnified only if disclosed to Stroz."[58] This misses the point. While Otto employees would lose indemnification if they lied to Stroz,[59] the Board ***approved indemnification for stealing Google's IP in the first place***.[60] This indemnification is highly unusual[61] and implores a Board acting in good faith to fully vet and explore the nature of that indemnification before agreeing to pay for it.[62] The Board, however, knowingly ignored this diligence.

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[56] UAB(28).

[57] POB(SOF§§B-G).

[58] UAB(28).

[59] B14(§2.1(b)(ii)).

[60] POB(11-13).

[61] Gurley's testimony rebuts Defendants' apparent contention that the provisions were not atypical. A158(948:1-7);A181(¶58). None of the cases cited are relevant here. *See Harold Grill 2 Ira v. Chênevert*, 2013 WL 3014120, at *4 (Del. Ch. June 24, 2013) (directors had no reason to know disclosures were false); *In re Telecommunications, Inc. S'holders Litig.*, 2003 WL 21543427, at *3 (Del. Ch. July 7, 2003) (directors had no reason to know the control premium was extraordinary).

[62] The Individual Defendants contend that it is "plausible" to infer that the Board agreed to indemnification provisions because they thought them "unlikely to be

Taking all of the allegations in the Complaint as a whole and drawing all reasonable inferences in Plaintiff's favor, the Chancery Court erred in finding Defendants Camp, Graves, Gurley, and Bonderman did not act in bad faith and did not face a substantial likelihood of liability for approving the Transaction.

C. PLAINTIFF HAS ADEQUATELY ALLEGED A WASTE CLAIM

Defendants apparently concede that if Plaintiff has adequately alleged the Defendants' bad faith, then the standard for pleading waste has been met as well.[63] Because the Complaint pleads, at a minimum, that Defendants paid $680 million for an illegal Transaction involving stolen IP, Plaintiff has adequately alleged a waste claim.[64]

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triggered." IDAB(18). Aside from being unsupported by any facts, it is Plaintiff, not Defendants, who are entitled to reasonable inferences at this stage. *Sanchez*, 124 A.3d at 1019.

[63] IDAB(26);UAB(30).

[64] *See Michelson v. Duncan*, 407 A.2d 211, 217 (Del. 1979).

II. THE CHANCERY COURT ERRED IN FINDING THAT THE DIRECTORS WHO ALLOWED THE TRANSACTION TO CLOSE DID NOT FACE A SUBSTANTIAL LIKELIHOOD OF LIABILITY

Defendants curiously claim that they cannot be liable for allowing the Transaction to close because they never saw the Stroz Report and, therefore, did not know they could terminate the deal. But this is precisely the point. Defendants knew Stroz was retained to investigate whether the Otto employees had taken Google's IP, yet willingly buried their heads in the sand despite glaring issues.[65] The Individual Defendants cite to *DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *16 (Del. Ch. Sept. 30, 2013), but there, "the Special Committee was unable to acquire the information it sought through no fault of its own." Here, there was no impediment to obtaining Stroz's results, and the Board's deliberate failure to acquire the information was its own fault.

Uber argues that "the Stroz report does not demonstrate that Uber had a termination right."[66] That is false. Stroz concluded that Levandowski and others at Otto had taken Google IP and accessed Google's technology while they were at Otto.[67] Section 2.8 of the Merger Agreement represented that Otto had not

[65] POB(SOF§§C-G).

[66] UAB(33). Uber's claim that Plaintiff failed to allege that Stroz made any findings regarding Otto's compliance with the Merger Agreement mischaracterizes the scope of Stroz's engagement. A116.

[67] POB(SOF§F);A114-146.

"violat[ed] … any Intellectual Property rights of any Third Party."[68] Thus, Section 2.8 was not true at closing, and Section 6.1 (requiring Otto's representations and warranties to be true at closing) was not satisfied, so Uber was not required to close the Transaction.[69]

Incredibly, Defendants contend that there can be no bad faith where directors decide against pursuing "excessively costly" litigation.[70] But here, that issue was never "decided." Defendants never considered whether to terminate the Merger Agreement or pursue litigation or any other course of action because they never bothered to look at the Stroz Report.[71] Moreover, the ultimate cost of the Waymo Action far exceeded what it would have cost to terminate the Transaction.[72]

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[68] A57.

[69] POB(SOF§G).

[70] IDAB(22).

[71] *In re INFOUSA, Inc. S'holders Litig.*, 953 A.2d 963, 986 (Del. Ch. 2007) and *Spiegel v. Buntrock*, 571 A.2d 767, 773-74 (Del. 1990) are inapposite because the issue was whether the boards properly determined not to initiate litigation pursuant to a stockholder demand. *Tilden v. Cunningham*, 2018 WL 5307706, at *17 (Del. Ch. Oct. 26, 2018) is equally irrelevant, as that plaintiff "fail[ed] to plead any facts that would allow a reasonable inference that the Board actually *knew* [its financial advisor] had manipulated its financial analysis." The court refused to "second-guess the Board's informed decision" based on its reliance on its financial advisor, whereas here the Board was not informed about Stroz's findings at all.

[72] *Compare* POB(SOF§H) ($245 million settlement, plus cost of litigation) *with* A86(§8.2) ("Except as provided for in this Section 8.2(b), no Party shall have any Liability with respect to this Agreement or the transactions contemplated by this Agreement in the event this Agreement is terminated.").

III. THE CHANCERY COURT ERRED IN FINDING THAT A MAJORITY OF THE DEMAND BOARD IS INDEPENDENT

"When it comes to life's more intimate relationships concerning friendship and family, our law cannot 'ignore the social nature of humans' or that they are motivated by things other than money, such as 'love, friendship, and collegiality.'"[73] The standard for assessing independence at the motion to dismiss stage "is well balanced, requiring that the plaintiff plead facts with particularity, but also requiring that this Court draw all reasonable inferences in the plaintiff's favor."[74] The Chancery Court failed to conduct this inquiry.[75]

A. HUFFINGTON WAS NOT INDEPENDENT OF KALANICK

Defendants ignore the plethora of allegations demonstrating the very close personal and business relationships that reasonably give rise to Huffington's lack of independence,[76] and their attempt to assess each allegation separately must fail.[77] Huffington has a long-standing personal and business relationship with Kalanick,

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[73] *Marchand*, 2019 WL 2509617, at *10, fn.87 (citing *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 938 (Del. Ch. 2003)) ("Delaware law should not be based on a reductionist view of human nature that simplifies human motivations on the lines of the least sophisticated notions of the law and economics movement."); *Sanchez*, 124 A.3d at 1022.

[74] *Marchand*, 2019 WL 2509617, at *10.

[75] POB(Arg.III.C).

[76] POB(39-42).

[77] *Sanchez*, 124 A.3d at 1019.

has been by his side and publicly supported him throughout numerous scandals at Uber, and regularly served as Kalanick's proxy on the Board.[78] Further, contrary to Defendants' assertions, Huffington's defense of Kalanick in the press is not "equally consistent with fealty to the Company on whose Board she serves."[79] Huffington defended allegations that Kalanick engaged in sexual harassment at Uber and created horrible working conditions for other employees at the Company. This conduct does not demonstrate fealty to Uber—she was protecting Kalanick at the expense of the Company. The Chancery Court agreed.[80]

B. BURNS WAS NOT INDEPENDENT OF KALANICK

The Complaint alleges that Burns was hand-selected by Kalanick to serve his interests on the Board during an intense power struggle at the Company and that Burns' PR firm was specifically hired to rehabilitate Kalanick's tarnished image.[81] Defendants' continued efforts to pick off allegations one-by-one, instead of looking at them holistically, must fail.[82] Moreover, Defendants miss the point regarding Kalanick's relationship with Burns' PR firm. It is reasonable to infer that Burns and her PR firm would not do anything to damage the reputation of one of their high-

[78] POB(39-42).

[79] UAB(43).

[80] Op. 46,53.

[81] A202-203(¶¶117-119).

[82] *Sanchez*, 124 A.3d at 1019.

profile clients, such that Burns could not make an impartial decision to sue Kalanick.[83] Again, the Chancery Court agreed.[84]

C. CAMP WAS NOT INDEPENDENT OF KALANICK

Defendants are wrong that Plaintiff's allegations regarding Camp's relationship with Kalanick are insufficient to establish a lack of independence.[85] Defendants' myopic focus on "reputational risk" ignores this Court's admonition that the question of independence requires a holistic analysis.[86] As this Court recently noted, "lack of independence turns on 'whether the plaintiffs have pled facts from which the director's ability to act impartially on a matter important to the interested party can be doubted because that director may feel either subject to the interested party's dominion or beholden to that interested party.'"[87] Camp ***co-founded Uber*** with Kalinick and was a personal friend for many years.[88] Viewed under the correct standard,[89] the Complaint gives rise to a reasonable inference that Camp is not independent of Kalanick.[90]

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[83] POB(42-43).

[84] Op. 46,51.

[85] UAB(41).

[86] *Marchand*, 2019 WL 2509617, at *10.

[87] *Marchand*, 2019 WL 2509617, at *10

[88] A196(¶109)

[89] *Sanchez*, 124 A.3d at 1019.

[90] POB(44-45).

D. GRAVES WAS NOT INDEPENDENT OF KALANICK

Both Defendants and the Chancery Court are wrong that Plaintiff was required to plead that Kalanick had the ability to deprive Graves of his wealth now or in the future.[91] Recently, in *Marchand v. Barnhill*, the Chancery Court found a lack of independence where, like Graves, a director had close personal ties and owed his career to the interested party.[92] Not only did Graves owe his career to Kalanick, but a reasonable inference of allegiance to Kalanick arises from the fact that all of Graves' personal wealth is the direct result of Kalanick bestowing him with his lucrative position at Uber.

Defendants' assertion that Plaintiff waived its arguments regarding Graves' independence also fails. The Chancery Court specifically addressed the independence of Graves.[93] Plaintiff's appeal challenges the sufficiency of that determination. Plaintiff also specifically alleged in the Complaint, *inter alia*, that Graves lacked independence because he "is beholden to, and not independent from, Kalanick because Kalanick made Graves the Company's first employee, a position

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[91] POB(46).

[92] 2018 WL 4657159, at *15 (Del. Ch. Sept. 27, 2018), *rev'd on other grounds,* 2019 WL 2509617 (director who had "either worked for or been affiliated with Blue Bell for his entire work life" and "owes his career to the Kruse family and has close personal relationships with several members of the Kruse family" was enough to infer lack of independence).

[93] Op. 48-50.

that is responsible for effectively all of Graves' wealth."[94] Plaintiff is entitled to all reasonable inferences in its favor based on the allegations set forth in the Complaint, which includes the reasonable inference that Graves is beholden to Kalanick out of a sense of obligation.[95] Nothing has been waived.

E. THAIN WAS NOT INDEPENDENT OF KALANICK

Contrary to Defendants' spin, the allegations in the Complaint with respect to Thain were not simply that Kalanick appointed him as a director. Plaintiff alleges far more regarding the unique circumstances under which Thain was appointed. Indeed, after Kalanick was sued for fraud in connection with the Otto Transaction and Benchmark sought to oust him from the Company, Thain was hand-selected by Kalanick to occupy one of Kalanick's controlled seats on the Board, reneging on his prior agreement to give up those seats in an effort to maintain his foothold on the Board.[96] This was not mere "suspicion" that Thain was serving at Kalanick's behest. Kalanick brought Thain onto the Board for a very calculated purpose during a tumultuous power struggle and that purpose was recognized both internally and by the public at large.[97] Given the circumstances of his appointment, Kalanick also had

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[94] A195(¶107).

[95] *Sanchez*, 124 A.3d at 1022.

[96] A202(¶117).

[97] A202-203(¶¶117-118). The cases cited by Defendants do not help their cause. For example, in *In re Synutra Int'l Inc. S'holder Litig.*, 2018 WL 705702, at *4 (Del. Ch. Feb. 2, 2018), the director in question was elected to a long-vacant board seat

the power to remove Thain as a director, which is a reasonable inference that can be drawn from the allegations in the Complaint.

F. COHLER AND TRUJILLO LACKED INDEPENDENCE FROM GURLEY AND BONDERMAN

Cohler's and Trujillo's independence is not irrelevant, as the Chancery Court erroneously concluded that Gurley and Bonderman did not face a substantial likelihood of liability in connection with the Transaction.[98] Cohler and Trujillo are not just "colleagues" with Gurley and Bonderman, nor just "fellow members" of their respective firms—they were ***partners***. This distinction is critical because partners are essentially in a financial marriage with one another and collectively share not only in the profits of a firm, but also the reputational damage and client relations problems caused by litigation against a partner of their firm. Such damage is compounded where the litigation ensues as a direct result of one partner initiating litigation against another.[99] These are all reasonable inferences drawn by the facts alleged in the Complaint, and Cohler and Trujillo are not independent.

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and the court held that the "timing and circumstances" of his appointment, "without more" did not support the notion that the director was conflicted. Here, the Complaint alleges far more than Thain was appointed at Kalanick's behest; rather, he was appointed to Kalanick's controlled Board seats for the express purpose of serving his interests during a power struggle at the Company.

[98] *See* Arg.I, *supra*; POB(Arg.I.C).

[99] This is particularly true where Cohler and Gurley were two of only five partners at Benchmark. A200(¶115).

CONCLUSION

For all of the foregoing reasons, the Court of Chancery's decision granting Defendants' motion to dismiss should be reversed.

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Respectfully submitted,

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