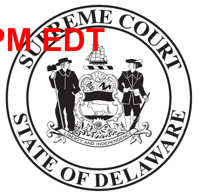
EFiled: Mar 26 2024 04:51PM EDT
Filing ID 72608775
Case Number 30,2024



IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITY OF HIALEAH EMPLOYEES' RETIREMENT SYSTEM, Derivatively on Behalf of Nominal Defendants nCINO, INC. (f/k/a Penny HoldCo, Inc.) and nCINO OpCo, Inc. (f/k/a nCino, Inc.), Plaintiff, v. INSIGHT VENTURE PARTNERS, LLC, INSIGHT HOLDINGS GROUP, LLC, JEFFREY L. HORING, PIERRE NAUDÉ, SPENCER G. LAKE, STEVEN A. COLLINS, JON DOYLE, PAM KILDAY, WILLIAM RUH, and GREG ORENSTEIN, Defendants, and nCINO, INC. (f/k/a Penny HoldCo, Inc.) and nCINO OpCo, Inc. (f/k/a nCino, Inc.), Nominal Defendants.	No. 30, 2024 COURT BELOW: COURT OF CHANCERY C.A. No. 2022-0846-MTZ **PUBLIC VERSION as filed on March 26, 2024**

APPELLANT'S OPENING BRIEF

Gregory V. Varallo (Bar No. 2242)
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
500 Delaware Avenue, Suite 901
Wilmington, Delaware 19801
(302) 364-3601

Thomas Curry (Bar No. 5877)
SAXENA WHITE P.A.
824 N. Market Street, Suite 1003
Wilmington, Delaware 19801
(302) 485-0483

Dated: March 11, 2024

Peter B. Andrews (Bar No. 4623)
Craig J. Springer (Bar No. 5529)
David M. Sborz (Bar No. 6203)
Andrew J. Peach (Bar No. 5789)
Jackson E. Warren (Bar No. 6957)
ANDREWS & SPRINGER LLC
4001 Kennett Pike, Suite 250
Wilmington, Delaware 19807
(302) 504-4957

Counsel for Plaintiff Below / Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 4

STATEMENT OF FACTS 5

A. Insight Dominates nCino 5

B. A Board Majority, Including Naudé, Lake, and Collins, Lack Independence or Were Interested in the Transaction 6

1. Naudé 6

2. Lake 7

3. Collins 9

C. Following nCino's Discussions with SimpleNexus, Insight Quadruples Its Investment and Secures a Controlling Stake 10

D. nCino and SimpleNexus Expedite a Deal, Swiftly Approved by nCino's Board with Minimal Financial Scrutiny 12

E. The Board Approves the Highly Material Deal with Limited Meetings and a Reverse-Engineered Fairness Analysis 16

ARGUMENT 20

I. THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF FAILED TO PLEAD BAD FAITH 20

A. Question Presented 20

B. Scope of Review 20

C. Merits of Argument 20

1. Extreme Disparity: Transaction Price versus SimpleNexus's Implied Valuation 22

2. The Board's Failure to Negotiate Price 27

3. The Board's Failure Regarding the Double Dummy Tax Structure 33

II. THE TRIAL COURT ERRED IN FINDING PLAINTIFF FAILED TO PLEAD A MAJORITY OF THE NCINO BOARD LACKED INDEPENDENCE FROM INSIGHT 38

A. Question Presented 38

B. Scope of Review 38

C. Merits of Argument 38

1. Naudé 39

2. Lake 42

3. Collins 48

CONCLUSION 53

Ex. A: Memorandum Opinion, dated Dec. 28, 2023 (Dkt. 62)

Ex. B: Order Granting the Insight Defendants' Motion to Dismiss (Dkt. 63)

Ex. C: Order Granting the nCino Defendants' Motion to Dismiss (Dkt. 64)

Ex. D: Transcript of Telephonic Bench Ruling on Defendants' Motion to Dismiss in *Fishel v. Liberty Media Corp., et al*., dated Nov. 1, 2022 (Del. Ch. C.A. No. 2021-0820-KSJM)

Ex. E: Transcript and Rulings of Oral Argument on Defendants' Motion to Dismiss in *Ladjevardian v. Bergamo, et al*., dated July 13, 2015 (Del. Ch. C.A. No. 10237-VCL)

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. El Paso Pipeline GP Co., L.L.C.,
113 A.3d 167 (Del. Ch. 2014) 21

Allen v. Encore Energy P'rs, L.P.,
72 A.3d 93 (Del. 2013) 21, 26

Berteau v. Glazek,
2021 WL 2711678 (Del. Ch. June 30, 2021)....................34

Box v. Box,
1996 WL 73575 (Del. Ch. Feb. 15, 1996), *aff'd*, 687 A.2d 572
(Del. 1996) 30, 35

Brehm v. Eisner,
746 A.2d 244 (Del. 2000) 45

Brinckerhoff v. Enbridge Energy,
159 A.3d 242 (Del. 2017) 26, 32, 33

In re Columbia Pipeline Grp., Merger Litig.,
299 A.3d 393 (Del. Ch. 2023) 30

In re Cysive, Inc. S'holders Litig.,
836 A.2d 531 (Del. Ch. 2003) 51

Del. Cnty. Emps. Ret. Sys. v. Sanchez,
124 A.3d 1017 (Del. 2015) 3, 40, 42, 47

In re Dell Techs. Inc. Class V S'holders Litig.,
300 A.3d 679 (Del. Ch. 2023) 31

Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.,
624 A.2d 1199 (Del. 1993) 21

In re Digex, Inc. S'holders Litig.,
789 A.2d 1176 (Del. Ch. 2000) 36

In re eBay, Inc. S'holders Litig.,
2004 WL 253521 (Del. Ch. Jan. 23, 2004)..44

In re Emerging Commc'ns, Inc. S'holders Litig.,
2004 WL 1305745 (Del. Ch. May 3, 2004, revised June 4, 2004)...............39, 40

In re Ezcorp Inc. Consulting Agreement Deriv. Litig.,
2016 WL 301245 (Del. Ch. Jan. 25, 2016)...41, 50

FrontFour Cap. Grp. LLC v. Taube,
2019 WL 1313408 (Del. Ch. Mar. 11, 2019) 30

In re Gen. Motors (Hughes) S'holder Litig.,
897 A.2d 162 (Del. 2006) 51

Goldstein v. Denner,
2022 WL 1671006 (Del. Ch. May 26, 2022)...39

Hughes v. Xiaoming Hu,
2020 WL 1987029 (Del. Ch. Apr. 27, 2020)...35

IBEW Loc. Union 481 Defined Contribution Plan & Tr. v. Winborne,
301 A.3d 596 (Del. Ch. 2023) 21, 26, 32, 37

Kahn v. Portnoy,
2008 WL 5197164 (Del. Ch. Dec. 11, 2008)...39

Kahn v. Stern,
183 A.3d 715, 2018 WL 1341719 (Del. 2018)...20

Kahn v. Tremont Corp.,
694 A.2d 422 (Del. 1997) 39

Klein v. H.I.G. Cap., L.L.C.,
2018 WL 6719717 (Del. Ch. Dec. 19, 2018)...44

Lebanon Cnty. Emps.' Ret. Fund v. Collis,
2023 WL 8710107 (Del. Dec. 18, 2023) 45

In re Limited, Inc.,
2002 WL 537692 (Del. Ch. Mar. 27, 2002) 43, 44

In re Loral Space & Commc'ns Inc.,
2008 WL 4293781 (Del. Ch. Sept. 19, 2008)..51

Morris v. Spectra Energy P'rs (De) GP, LP,
2017 WL 2774559 (Del. Ch. June 27, 2017)..26, 27

In re MultiPlan Corp. S'holders Litig.,
268 A.3d 784 (Del. Ch. 2022) 39

In re Netsmart Techs., Inc. S'holders Litig.,
924 A.2d 171 (Del. Ch. 2007) 30

In re Oracle Corp. Deriv. Litig.,
2018 WL 1381331 (Del. Ch. Mar. 19, 2018) 39

Orman v. Cullman,
794 A.2d 5 (Del. Ch. 2002) 44

In re Primedia, Inc. S'holders Litig.,
67 A.3d 455 (Del. Ch. 2013) 37

Rales v. Blasband,
634 A.2d 927 (Del. 1993)..39, 43

Reith v. Lichtenstein,
2019 WL 2714065 (Del. Ch. June 28, 2019)..51

Sandys v. Pincus,
152 A.3d 124 (Del. 2016)..41, 42, 47

Savor, Inc. v. FMR Corp.,
812 A.2d 894 (Del. 2002)..24, 29

Steiner v. Meyerson,
1995 WL 441999 (Del. Ch. July 19, 1995) 43

Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou,
2020 WL 5028065 (Del. Ch. Aug. 24, 2020)..35

In re Tilray, Inc. Reorg. Litig.,
2021 WL 2199123 (Del. Ch. June 1, 2021)..36

United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg,
262 A.3d 1034 (Del. 2021)...40

Voigt v. Metcalf,
2020 WL 614999 (Del. Ch. Feb. 10, 2020)..*passim*

Weinberger v. UOP, Inc.,
457 A.2d 701 (Del. 1983)...34

Wood v. Baum,
953 A.2d 136 (Del. 2008)..20, 38

Statutes & Other Authorities

8 *Del. C.* § 216(3)..51

Del. Ct. Ch. Rule 23.1..39, 47

Leo E. Strine, Jr., *Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone*, 70 BUS. LAW. 679 (2015).......................................31

Lucian Bebchuk & Jesse Fried, *Pay Without Performance: The Unfulfilled Promise of Executive Compensation*5 (2004)..................................50

NATURE OF PROCEEDINGS

This is a double-derivative action challenging the acquisition of SimpleNexus LLC ("SimpleNexus") by nCino Inc. ("nCino" or the "Company") for $1.2 billion in cash and stock (the "Transaction"). The Transaction was set in motion by the Company's largest stockholder, venture capital fund Insight Partners ("Insight"), which was also a substantial SimpleNexus investor. In the years and months leading up to the Transaction, Insight and another sophisticated investor acquired sizeable stakes in SimpleNexus, which investments implied a $169 million valuation for SimpleNexus. With a headline value of $1.2 billion, the Transaction was the largest in the Company's history, more than sextupling those relatively recent implied valuations and generating a considerable return for Insight. For nCino and its unaffiliated stockholders, however, the Transaction proved an unmitigated disaster.

In those circumstances, one would expect disinterested and independent nCino fiduciaries acting in good faith to have bargained hard, scrutinizing and negotiating the transaction price with the assistance of independent advisors. Instead, the Company's board of directors (the "Board")—comprising individuals with considerable historical ties to Insight—took the opposite tack. The Board locked in SimpleNexus's $1.2 billion asking price at the first meeting convened to discuss the substance of the Transaction, without the benefit of independent financial

advice. The Board ignored the valuations implied by Insight's recent investments in SimpleNexus. And the Board agreed to structure the Transaction in a manner benefitting SimpleNexus stockholders—principally Insight—from a tax perspective without even asking for anything in return for nCino. The Board's decisions strayed beyond the questionable into the indefensible. Viewed holistically, and in connection with the Board's thick historical ties to Insight, it is reasonably conceivable that the Board acted in bad faith in approving the Transaction.

Notwithstanding these egregious facts supported by particularized allegations, the Trial Court dismissed the operative complaint (the "Complaint") for failure to adequately plead demand futility. In so doing, the Trial Court erred in several notable respects.

First, the Trial Court erred in concluding that the Board did not face a substantial likelihood of liability for having approved the Transaction in bad faith. In so concluding, the Court erred in several key respects. Notwithstanding the valuation implied by Insight's relatively recent SimpleNexus investments, the Trial Court drew defense-friendly inferences and relied on litigation-driven Board minutes to undermine Plaintiff's particularized allegations. The Trial Court likewise ignored binding Delaware Supreme Court precedent crediting allegations of bad faith at the pleading stage where recent precedent transactions indicated a massive

overpayment. Perhaps viewed in isolation, the Board's decisions and omissions are simply questionable, even perplexing. But when view holistically—as the Trial Court was required to—otherwise baffling decisions give rise to a pleading stage inference of bad faith.

Second, the Trial Court viewed the particularized facts pled by Plaintiff about the relationships between the director defendants and Insight in isolation from each other and impermissibly drew defense-friendly inferences.[1] Doing so denuded the demand futility inquiry of its core function: to assess whether a Board majority could impartially consider whether to sue Insight.

[1] *See Del. Cnty. Emps. Ret. Sys. v. Sanchez*, 124 A.3d 1017, 1019 (Del. 2015).

SUMMARY OF ARGUMENT

1. The Trial Court erred in holding that Plaintiff failed to plead that a Board majority faced a substantial likelihood of liability by approving the Transaction in bad faith.

2. The Trial Court erred in holding that Plaintiff failed to plead that Naudé, Lake, and Collins lacked independence from Insight.

STATEMENT OF FACTS

A. Insight Dominates nCino

Since 2015, venture capital firm Insight has dominated nCino, a cloud-based banking software company.[2] Insight led nCino's "Series B" financing round with a $29 million investment in 2015 and increased its stake to greater than 50% through subsequent tender offers in 2017 and 2018.[3]

Following nCino's July 2020 initial public offering ("IPO"), Insight remained its *de facto* controller.[4] nCino's IPO Prospectus stated that Insight would "hold 42.6%" of the Company's outstanding common stock and voting power post-IPO, giving Insight "the ability to influence the outcome of corporate actions requiring stockholder approval[.]"[5] Insight has remained the Company's largest stockholder post-IPO, maintaining 32-38% ownership and wielding significant influence over all of nCino's corporate elections.[6] At nCino's 2021 and 2022 annual meetings,

---

[2] A049-51, ¶¶32-39.

[3] A050, ¶33.

[4] A050, ¶34.

[5] A050, ¶¶34-36.

[6] A051, ¶38.

Insight commanded over 41% and 43% of votes cast, respectively.[7] Plaintiff alleges a majority of nCino's directors maintain substantial ties to Insight.[8]

B. A Board Majority, Including Naudé, Lake, and Collins, Lack Independence or Were Interested in the Transaction

As of the filing of the Complaint, the Board comprised seven directors.[9] Of those seven, at least five lacked independence from Insight or were interested in the Transaction.[10]

1. Naudé

nCino's CEO Pierre Naudé lacks independence from Insight. Naudé co-founded nCino in 2012 and served as CEO during Insight's 2015 initial $29 million investment and nCino's 2020 IPO.[11] From 2019 to 2021, Naudé received

---

[7] A051, ¶38.

[8] A040-A043, ¶¶14-17; A045-A046, ¶¶ 20-21.

[9] Jeffrey L. Horing, Pierre Naudé, Spencer G. Lake, Steven A. Collins, Jon Doyle, Pam Kilday, and William Ruh.

[10] The Trial Court did not reach the question of Ruh's independence. Memorandum Opinion, issued Dec. 28, 2023 (Dkt. 62) ("Op."; attached hereto as Exhibit A) at 24. The Complaint alleged that Horing used material, non-public information about nCino's discussions with SimpleNexus to acquire a majority stake in SimpleNexus, which allegations Defendants did not move to dismiss. If this Court finds that only two of the three following directors lacked independence, the matter of demand futility should be remanded to the Trial Court to determine Ruh's independence.

[11] A041 ¶¶15; A085-86, 105-106.

$14,108,124 in total CEO compensation.[12] Given its 32-38% ownership post-IPO, Insight can exercise considerable influence over Naudé, particularly considering his significant interest in maintaining his officer role and considerable salary.[13] Naudé is not "independent" under Nasdaq rules.[14]

Insight, as nCino's then-controller, played a pivotal role in the Company's IPO, and Naudé profited handsomely from Insight's participation, selling over ***$49 million*** of nCino stock post-IPO.[15]

2. Lake

Lake lacks independence from Insight. Lake joined the Board in April 2017, as Insight increased its nCino stake through tender offers in January 2017 and July 2018, when it obtained control.[16] Lake was rewarded with a lucrative nCino consulting agreement in May 2017.[17] In additional to receiving $30,000 in annual consulting fees, Lake received 49,750 nCino stock options over four years at a $4.98 per share strike price.[18] At nCino's September 19, 2022 closing stock price, those

---

[12] A085, ¶106.

[13] A087, ¶110.

[14] A086, ¶108.

[15] A085, ¶106.

[16] A050, ¶33; A088, ¶112.

[17] *Id.*

[18] A088, ¶114.

options held a face value of *$1,492,003*.[19] Since 2017, Lake's consulting and director fees (including director compensation of $275,000 in 2021 and $245,037 in 2022) total approximately *$2.5 million*.[20]

Lake leverages his relationship with Insight for personal gain. In December 2019, Lake co-founded Element Ventures, a venture capital firm investing in "software-as-a-service" companies—Insight's domain.[21] On its website, Element Ventures emphasizes Lake's relationships with other Insight portfolio companies, leveraging Lake's ties with Insight to attract new investment.[22]

Lake's relationship with Insight also led to board seats with at least two private companies. In 2015, Insight acquired a controlling stake in Fenergo; Lake joined Fenergo's board in 2016, serving as Vice Chairman alongside two Insight managing directors and left Fenergo's board in 2021 after Insight sold its stake.[23] Similarly, Lake joined Duco's board in September 2018, alongside two other Insight

---

[19] *Id.*

[20] *Id.*

[21] A089, ¶115.

[22] A089-A091, ¶¶115-17.

[23] A092, ¶¶119-20.

managing directors, following Insight's January 2018 Duco investment and left Duco's board in July 2021 after Insight exited its position.[24]

3. Collins

Similarly, Collins has a longstanding professional relationship with Insight and has received material director compensation from nCino.

Since 2011, Collins and Insight have collaborated on at least five ventures: ExactTarget, nCino, Instructure, Shopify, and Cherwell.[25] From 2011 until 2014, Collins served as Executive Vice President and CFO of Insight portfolio company, ExactTarget.[26] Insight owned 35% of ExactTarget in 2009 and sold that company to Salesforce in June 2013; Collins left ExactTarget shortly thereafter (February 2014).[27] For just three years' work, Collins received $3.67 million in golden parachute compensation and $6.6 million in stock options.[28] From 2014 until 2020, Collins served on the board of private company, Instructure.[29] Insight invested in Instructure in late 2014, after Collins joined its board.[30] Collins also served as

---

[24] A092-93, ¶¶121-22.

[25] A096-A098, ¶¶133-36.

[26] A096, ¶133.

[27] *Id*.

[28] *Id*.

[29] A097, ¶135.

[30] *Id*.

director of privately held Insight portfolio company, Shopify, from 2014 until 2019, in which Insight invested $100 million in 2013.[31] From 2015 until 2018, Collins sat on the advisory board of Insight portfolio company Cherwell.[32] Collins resigned several months after Insight sold most of its stake in that private company.[33]

Collins is a professional director.[34] In 2021, approximately 35% of his total director compensation came from nCino.[35] Between 2020 and 2022, Collins received $1,279,037 in director compensation from nCino.[36] Collins has no other employment than his directorships.[37]

C. Following nCino's Discussions with SimpleNexus, Insight Quadruples Its Investment and Secures a Controlling Stake

Around November 2020, nCino initiated discussions with SimpleNexus—a private Insight portfolio company—involving a potential "partnership."[38] Insight

---

[31] A098, ¶136.

[32] A097, ¶134.

[33] *Id.*

[34] A094, ¶128.

[35] *Id.*

[36] *Id.*

[37] A094-A095, ¶¶128-30.

[38] A053, ¶¶43-44.

was the then-largest stockholder in both nCino and SimpleNexus and had previously invested $20 million in SimpleNexus.[39]

Insight unquestionably knew of these "partnership" discussions. In a November 2021 interview, Naudé disclosed that Horing—Insight's co-founder, managing director, and investment committee chair, as well as an nCino director—had actively participated in talks "about a year" prior.[40] Horing withdrew only *after* discussions shifted toward a potential SimpleNexus acquisition by nCino.[41]

With full knowledge of these discussions, Horing and Insight seized the opportunity to realize a windfall by increasing Insight's investment in SimpleNexus.[42] On January 5, 2021, amid ongoing partnership discussions, but before nCino proposed to acquire SimpleNexus, Insight invested another $83 million in SimpleNexus, spearheading the Company's $108 million Series B funding round.[43] This investment elevated Insight's ownership to 62%, implying a $169 million total valuation for SimpleNexus's equity in January 2021.[44] Private equity

---

[39] *Id.* ¶44.

[40] *Id.* ¶45.

[41] A053-A054, ¶¶45-46.

[42] A054, ¶47.

[43] A055, ¶48.

[44] A055-A058, ¶¶48-55.

fund TVC Capital ("TVC"), which also participated in this Series B round, acquired roughly 14% of SimpleNexus through its $25 million investment.[45]

D. nCino and SimpleNexus Expedite a Deal, Swiftly Approved by nCino's Board with Minimal Financial Scrutiny

Shortly after Insight gained control over SimpleNexus, what had begun as "partnership" discussions evolved into a potential acquisition by nCino.[46] By June 30, 2021, SimpleNexus had presented to nCino's technical team, overseen by Naudé's daughter—an nCino employee.[47]

The Board first discussed the "SimpleNexus acquisition opportunity" on August 25, 2021.[48] During the same meeting, the Board was reminded of Insight's "ownership interests in SimpleNexus."[49] Inferably, the Board—comprised of Insight loyalists and industry insiders with extensive investing experience—knew Insight had invested in SimpleNexus and would profit from the proposed acquisition.[50] Although Horing attended the meeting, there is no indication he informed the Board of the valuation of SimpleNexus implied by Insight's recent

---

[45] A055, ¶¶48-49.

[46] A060, ¶60.

[47] *Id.*

[48] A061, ¶63.

[49] *Id.*

[50] *Id.*

investments or explained how much Insight stood to profit from a potential SimpleNexus acquisition.[51] Nor is there any indication that the Board ever asked.

nCino management began engaging in price negotiations with SimpleNexus before the Board retained a financial advisor.[52] On September 8, 2021, Greg Orenstein—nCino's Chief Corporate Development and Strategy Officer—scheduled a Board call for 10:30 a.m. on September 10 to discuss the potential acquisition.[53] But Orenstein did not circulate materials for that call until nearly 4:00 p.m. on September 9.[54] Those materials included a preliminary financial analysis comprising a SimpleNexus management forecast that only went out to 2022 and a one-page worksheet that included a $1.2 billion "Deal Cost."[55] Those materials contained no meaningful analysis supporting the $1.2 billion valuation.[56] Remarkably, the one-page worksheet omitted that, just months earlier, Insight had

---

[51] *Id.*

[52] A062, ¶66.

[53] *Id.*

[54] A062, ¶67.

[55] *Id.*

[56] *Id.*

acquired a controlling equity position in SimpleNexus at an implied valuation of *less than $200 million*—just a sixth of the stated "Deal Cost."[57]

At 9:37 a.m. on September 10—only 53 minutes before the Board discussion—Orenstein forwarded the Board a draft Indication of Interest ("IOI").[58] This draft—which appeared to reflect significant prior negotiations between nCino management and SimpleNexus—contemplated nCino acquiring SimpleNexus for $1.2 billion in stock (75%) and cash (25%).[59] Notably, the IOI represented that "nCino will in good faith pursue a structural approach to the transaction that would allow the shares of its Common Stock to be received on a tax deferred basis," a "double dummy" structure uniquely benefitting existing SimpleNexus stockholders, especially Insight.[60]

The Board met at 10:30 a.m. on September 10.[61] The minutes do not reveal an ending time, but the brevity of the minutes (one half page) suggest the meeting was short.[62] The Board still had not retained a financial advisor to help it unpack the

---

[57] *Id.*

[58] A063, ¶68.

[59] *Id.*

[60] *Id.*

[61] A063, ¶69.

[62] A064, ¶69.

scant financial analysis it had received fewer than 24 hours earlier.[63] The minutes reflect no discussion or inquiry regarding the fairness of the $1.2 billion asking price or SimpleNexus's prior equity sales and the far lower valuations they implied.[64] Instead, Naudé and Orenstein led the discussion, conveying that, "following price discussions with SimpleNexus's co-founder Matt Hansen and CFO Kevin McKenzie, it was their belief that SimpleNexus would not sell for less than $1.2 billion" and would require at least 25% cash consideration.[65] There is no indication nCino management attempted to negotiate a lower price.[66]

After this short briefing, with minimal financial analyses and no investment banker, the Board nonetheless authorized management to proceed with the draft IOI.[67] This solidified the $1.2 billion asking price and made subsequent price negotiations exceedingly unlikely.[68] This gambit was surprising given the relative magnitude of the potential transaction. As of September 10, the Company held a

---

[63] A066, ¶72.

[64] A064, ¶70. Beginning with this meeting, Horing recused himself from Transaction-related discussions. A064 ¶ 69; A071, ¶ 81.

[65] A064, ¶70.

[66] *Id.*

[67] A066, ¶72.

[68] *Id.*

$7 billion market capitalization and roughly $400 million in cash.[69] On those terms, the proposed acquisition was valued at nearly 20% of nCino's market capitalization and likely would consume most of its available cash.[70] The Section 220 record nonetheless contains no record of any subsequent price negotiations by nCino's Board or management.

E. The Board Approves the Highly Material Deal with Limited Meetings and a Reverse-Engineered Fairness Analysis

After locking in the $1.2 billion valuation, the Board enlisted advisors to validate it and went through the motions to approve the proposed transaction.[71] The Board did not meet again until October 7, 2021.[72] Those minutes reveal no discussion of price negotiations, efforts to reassess the $1.2 billion valuation, or the "double dummy" tax structure that would uniquely benefit SimpleNexus stockholders—primarily Insight.[73] Although the Board received a presentation containing valuation materials, that presentation omitted the most relevant datapoint—the valuation of SimpleNexus implied by Insight's recent investments.[74]

---

[69] A065, ¶71.

[70] *Id.*

[71] A067, ¶75.

[72] A068, ¶76.

[73] *Id.*

[74] A068, ¶77.

On November 15, 2021, the Board convened to approve the deal.[75] The Board's financial advisor, Bank of America ("BofA"), presented a fairness opinion that—when viewed in connection with the lack of price negotiations—appears to have been manufactured to justify the pre-baked $1.2 billion initial valuation.[76] The Complaint explains in detail why BofA's discounted cash flow and comparable companies analyses contain myriad errors and questionable assumptions—including changing historical financial information concerning a precedent transaction between presentations—that would raise red flags to any director acting in good faith.[77] But, most glaringly, BofA's materials confirm that no one considered the sub-$200 million valuation implied by Insight's January 2021 SimpleNexus investment.[78]

After the November 15 meeting, the Board approved the Transaction.[79] Insight's 62% ownership of SimpleNexus netted it roughly $744 million—a 700%

---

[75] A071, ¶81.

[76] A072, ¶83.

[77] A072-A074, ¶¶83-86.

[78] A072, ¶82.

[79] A074, ¶87.

return on investment.[80] Insight also secured millions in tax-deferral benefits through the double dummy structure, discussed above.[81] This elaborate structure required nCino to, among other actions, suspend its shares from Nasdaq trading, establish a new parent holding company, change its name, merge the old company into a new entity, and issue new shares from the holding company to Insight.[82] Without this restructuring, Insight would have faced a 20% capital gains tax of $128 million (assuming an all-cash deal).[83] Despite the significant organizational overhaul to achieve these benefits, nCino fiduciaries made no attempt to leverage this benefit for additional consideration.[84]

Insight's windfall came at the expense of nCino and its public stockholders. Upon the Transaction's announcement, nCino's market value plummeted—from $70.89 on November 16, to $60.29 by November 23, and just $42.59 by January 18,

---

[80] *Id.* The total Transaction consideration amounted to $933.595 million—comprising $286.086 million in cash and $647.509 million in stock. The consideration fell below $1.2 billion given the decline in nCino's share price between November 12, 2021 and the January 7, 2022 closing. A075, ¶87, n.17.

[81] A076, ¶91.

[82] *Id.*

[83] A077, ¶92.

[84] A075, ¶90.

2022—a near-30% decline, shaving $1.5 billion off nCino's market capitalization.[85] nCino has never recovered from Insight's self-interested transaction. During motion-to-dismiss briefing, nCino's stock plunged to $23.04 and its market capitalization, including SimpleNexus, was approximately $2.6 billion and remains depressed today.

[85] A035, ¶3; A079, ¶95. For perspective, the Russell 3000 and Nasdaq remained relatively flat. A035, ¶3; A080, ¶96.

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF FAILED TO PLEAD BAD FAITH

A. Question Presented

Did the Trial Court err in holding that Plaintiff did not sufficiently plead a Board majority faced a substantial likelihood of liability for approving the Transaction in bad faith?

The question was raised below[86] and considered by the Trial Court.[87]

B. Scope of Review

"[R]eview of a Court of Chancery decision dismissing a derivative suit under Court of Chancery Rule 23.1 is *de novo* and plenary."[88]

C. Merits of Argument

Plaintiff established that a Board majority faced a substantial likelihood of liability by approving the Transaction in bad faith. At the pleading stage, a plaintiff need only "plead[] facts that support a rational inference of bad faith," not "facts that rule out any possibility other than bad faith[.]"[89] "[B]ecause it may be virtually impossible for a [] plaintiff to sufficiently and adequately describe the defendant's

---

[86] A105, ¶156; A317-A325 at 53-61.

[87] Op. at 14-21.

[88] *Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008).

[89] *Kahn v. Stern*, 183 A.3d 715, 2018 WL 1341719, at *1 (Del. 2018) (TABLE).

state of mind at the pleadings stage,"[90] "a trial judge only can infer a party's subjective intent from external indications."[91] One such "objective indici[um] that a trial court can consider is how extreme the decision appears to be."[92] "[I]f the pled facts indicate that [] the terms of the transaction were extreme, then those facts are 'logically relevant' to making a subjective determination of bad faith."[93] Alternatively, a plaintiff may plead bad faith by identifying "indications that the directors acted with a purpose other than that of advancing the best interests of the corporation and its stockholders."[94]

Here, Plaintiff alleged myriad particularized facts indicating the Board's bad faith, including that: (i) the Transaction price was significantly higher than valuations implied by prior SimpleNexus investments; (ii) the Board utterly failed to negotiate the price for the Company's most significant acquisition; and (iii) the Board failed to recoup any value in exchange for the double dummy tax structure.

---

[90] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208 (Del. 1993).

[91] *Allen v. El Paso Pipeline GP Co., L.L.C.*, 113 A.3d 167, 178 (Del. Ch. 2014).

[92] *IBEW Loc. Union 481 Defined Contribution Plan & Tr. v. Winborne*, 301 A.3d 596, 620 (Del. Ch. 2023).

[93] *Id*. (quoting *Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 107 (Del. 2013)).

[94] *Id*. at 623.

Viewed holistically, and together with Plaintiff's independence allegations,[95] these objective indicia "support a rational inference of bad faith" at the pleading stage.[96]

1. Extreme Disparity: Transaction Price versus SimpleNexus's Implied Valuation

Plaintiff's allegation that nCino grossly overpaid for SimpleNexus arises from particularized factual allegations regarding SimpleNexus's implied valuations from relatively recent, real-world investments. Notably, on January 5, 2021, Insight and TVC announced respective $83 and $25 million investments in SimpleNexus's Series B round.[97] These investments—post-dating nCino and SimpleNexus's partnership discussions and only months before nCino management began discussing price in September 2021—implied a *$169 million* valuation for SimpleNexus when considered with Insight's 2018 investment of $20 million.[98] The Board knew of Insight's "ownership interests in SimpleNexus,"[99] but inexplicably failed to inquire about or consider this critical information—including the

---

[95] *See id.* at 623, 626.

[96] *See Kahn*, 2018 WL 1341719, at *1.

[97] A055, ¶48.

[98] A055-A059, ¶¶48-56; A062, ¶66. Insight and TVC had invested $128 million in SimpleNexus by January 5, 2021 ($20 million in 2018, $108 million in 2021). A055, ¶49. This aggregated to a 76.1% stake. A059, ¶56. $128 million is 76.1% of approximately $169 million.

[99] A061, ¶63.

corresponding implied SimpleNexus valuation.[100] BofA similarly neglected to do so.[101] Simply put, this crucial failure gives rise to a reasonable inference of bad faith.

Despite initially crediting Plaintiff's particularized allegations,[102] the Trial Court ultimately deemed the ten-figure delta between the *$169 million* implied valuation and *$1.2 billion* Transaction price insufficient to demonstrate bad faith at the pleading stage. That determination comprised several errors.

First, the Trial Court inappropriately drew defense-friendly inferences by dismissing Plaintiff's implied $169 million valuation as "insufficiently reliable."[103] That error was compounded by impermissibly weighing evidence at the pleading stage.[104] The Trial Court deemed Plaintiff's well-plead allegations regarding SimpleNexus's relatively recent implied valuation "unreasonable" based on "the

---

[100] A064, ¶70; A112, ¶182.

[101] A072, ¶82.

[102] Op. at 2-3.

[103] *Id*. at 18.

[104] *See Voigt v. Metcalf*, 2020 WL 614999, at *9 (Del. Ch. Feb. 10, 2020) ("The incorporation-by-reference doctrine does not enable a court to weigh evidence on a motion to dismiss.").

record."[105] But that "record" consists solely of an undated, unattributed four-page draft "Briefing Document" that nowhere addressed SimpleNexus's valuation.[106]

Furthermore, the Briefing Document does not contradict Plaintiff's particularized allegations.[107] Rather, it observes, "[c]onsumers now expect to engage with their financial institution ('FI') in a more convenient, digital, seamless experience that is tailored to the specific product or products they are interested in acquiring[,]" which "has become / is becoming a 'table-stakes' element of all market-leading solutions in our space."[108] Although this may align with the Trial Court's general observation that the "pandemic drove changes in how consumers interacted with financial institutions, increasing the importance of SimpleNexus's technology,"[109] it does not directly speak to SimpleNexus's valuation. Thus, the Briefing Document does not support the Trial Court's defense-friendly inference that SimpleNexus's valuation increased by roughly 610% in a matter of months,

---

[105] Op. at 18.

[106] A247-A250; *see also Voigt*, 2020 WL 614999, at *9 ("If there are factual conflicts in the [Section 220] documents or the circumstances support competing interpretations, and if the plaintiff had made a well-pled factual allegation, then the allegation will be credited.") (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896 (Del. 2002)).

[107] A247-A250.

[108] *Id*. at 1-2 (cited in Op. at 18).

[109] Op. at 18.

especially considering Plaintiff's particularized allegations concerning real-world investments in SimpleNexus.[110]

Similarly, the Trial Court's criticism that Plaintiff should have assumed SimpleNexus's valuation radically increased between 2018 and 2021 is both defense-friendly and unfounded.[111] *In 2021*, Insight and TVC invested $108 million in SimpleNexus.[112] Dismissing the billion-dollar delta requires assuming an astronomical return on Insight's initial 2018 $20 million investment, dwarfing the equity impact of the 2021 $108 million investment. Even if the Court were to *double or triple* the valuation implied by Insight's own investments—increasing $169 million to $338 million or $507 million—nCino would still have overpaid by approximately $700 to $900 million. In making this defense-friendly inference, the Trial Court ignored the Company's substantial stock price decline after the announcement of the Transaction.

Second, the Trial Court erroneously characterized this real-world valuation as one "data point" and framed the Board's ignorance of that real-word valuation as a

---

[110] *See Voigt*, 2020 WL 614999, at *9.

[111] *See* Op. at 18 ("Plaintiff assumes SimpleNexus's valuation was the same in 2018 and 2021.").

[112] A055, ¶¶48-49.

care violation.[113] As this Court has explained, however, "if the pled facts indicate that [] the terms of the transaction were extreme, then those facts are 'logically relevant' to making a subjective determination of bad faith."[114] In *Brinckerhoff v. Enbridge Energy*, this Court held the plaintiff sufficiently pled bad faith where facts supported an inference that the general partner caused the partnership to repurchase assets for $200 million more than its initial purchase six-months earlier.[115] Subsequent Court of Chancery decisions are in accord.[116] Here, the Complaint contains particularized allegations that nCino paid $1.2 billion for an asset recently

---

[113] Op. at 17-18.

[114] *Winborne*, 301 A.3d at 620 (quoting *Encore*, 72 A.3d at 107).

[115] 159 A.3d 242, 247, 257, 259-61 (Del. 2017). Plaintiff identified *Enbridge* in briefing, but the Trial Court failed to consider it. *See* A318-A320, A322. Although *Enbridge* considered a "good faith" standard under a limited partnership agreement provision, the Court drew upon common law principles relevant here. *See* 159 A.3d at 252 (applying "definition of bad faith that is commonly used in our entity law and incorporated into the Enbridge LPA").

[116] *See, e.g.*, *Winborne*, 301 A.3d at 626 (concluding "the stark contrast between the valuation of $175.3 million for the TRA Liability in GoDaddy's audited financial statements and the $850 million payment in the TRA Buyout" was "so glaring as to support … an inference of bad faith on that basis alone"); *Morris v. Spectra Energy P'rs (De) GP, LP*, 2017 WL 2774559, at *14 (Del. Ch. June 27, 2017) (finding pleading-stage inference of bad faith where "well pled allegations … show that an asset's market value is $1.5 billion, specific allegations demonstrate that the [controller] knew of that implied value, and the Complaint alleges that the asset was surrendered for less than $1 billion in consideration").

valued in real-world investments at roughly one-sixth that amount.[117] The Trial Court was bound but failed to draw "all reasonable inferences in favor of the Plaintiff" and acknowledge that Plaintiff "made adequate allegations showing that under reasonably conceivable circumstances a facially unreasonable gap in consideration exists sufficient to infer subjective bad faith."[118]

2. The Board's Failure to Negotiate Price

Plaintiff's allegations give rise to the reasonable inference that the Board failed to negotiate the price of the largest acquisition in nCino's history. The Board's substantive involvement in price discussions only commenced on September 10, 2021. The day before, Orenstein shared a financial analysis with the Board, including an "nCino M&A Worksheet" reflecting a $1.2 billion "Deal Cost" but without meaningful substantiation for that valuation.[119] Less than an hour before the scheduled Board meeting, Orenstein sent the draft IOI contemplating a $1.2 billion SimpleNexus valuation.[120] During that meeting—the first Board-level discussion of details of the Transaction —Naudé and Orenstein expressed "their belief that

---

[117] *See supra* pp. 12, 23-24 & n.98.

[118] *See Spectra*, 2017 WL 2774559, at *16.

[119] A062, ¶67.

[120] A063, ¶68.

SimpleNexus would not sell for less than $1.2 billion."[121] At that valuation, the Transaction would have constituted nearly 20% of nCino's market capitalization and likely depleted most of its available cash.[122] One would reasonably expect an independent board—considering the largest acquisition in a company's history—to engage in price negotiations or at least preserve to its ability to do so until it had engaged independent advisors. Instead, the Board authorized management to proceed with the draft IOI, effectively locking in the $1.2 billion valuation.[123]

The Trial Court rejected Plaintiff's particularized factual allegations demonstrating that the Board simply accepted the $1.2 billion valuation from Naudé and Orenstein without further inquiry or negotiation. Instead, the Trial Court characterized the Complaint as alleging that "the Board did not discuss the [Transaction] price or otherwise engage on the issue of price" and concluded that the September 10 minutes "reflect the opposite."[124] That was in error. Plaintiff alleged that the Board first learned of SimpleNexus's $1.2 billion asking price on

---

[121] A064, ¶70. Given the relative brevity of the minutes, the meeting appears not to have lasted long. A064, ¶69.

[122] A065, ¶71.

[123] A066, ¶72.

[124] Op. at 16.

September 10.[125] Without input from independent advisors (which the Board had not yet retained), the Board accepted that price and failed to preserve its ability to negotiate.[126]

The Trial Court also erred in relying on the September 10 minutes to support its defense-friendly inference that the Board had in fact engaged on price.[127] Those minutes support no such inference. They only state that Orenstein and Naudé "updated the Board regarding discussions with SimpleNexus," about the draft IOI (provided under an hour earlier) and "communicated … their belief that SimpleNexus would not sell for less than $1.2 billion."[128] The minutes reflect no discussion regarding the fairness of the $1.2 billion price, how it compared to precedent transactions, or if nCino management had attempted to negotiate a lower price.[129] The Trial Court thus erred in interpreting those minutes in a defense-friendly manner and not crediting Plaintiff's particularized allegations.[130]

---

[125] A064-A066, ¶70, ¶72.

[126] A064-A067, ¶¶70-74.

[127] Op. at 16.

[128] A251.

[129] A064, ¶70.

[130] *See Voigt*, 2020 WL 614999, at *9 (citing *Savor*, 812 A.2d at 896).

The Trial Court further erred in giving conclusive weight to those minutes—finalized nearly six-months after the meeting, and after Plaintiff had served its Section 220 demand.[131] Delaware courts have treated retroactively prepared minutes—especially those prepared during ongoing litigation—with understandable skepticism.[132] Although "regularly prepared corporate minutes might be accorded th[e] effect" of "prima facie evidence of the meeting and the action taken," non-contemporaneous minutes "provide scant support to their draftsman's position[.]"[133] This skepticism is warranted here, where Defendants are "well-represented by sophisticated law firms who are trying to craft a record that causes the litigation to

[131] *Compare* A251 (September 10, 2021 Board minutes approved March 9, 2022) *with* A184 at 6 (confidentiality stipulation dated March 3, 2022).

[132] *See, e.g.*, *In re Columbia Pipeline Grp., Merger Litig.*, 299 A.3d 393, 449 (Del. Ch. 2023) (concluding post-trial that "minutes … not prepared contemporaneously … undercut[] their evidentiary value"); *FrontFour Cap. Grp. LLC v. Taube*, 2019 WL 1313408, at *10, n.98 (Del. Ch. Mar. 11, 2019) (declining post-trial to credit minutes finalized after litigation commenced as "contemporaneous evidence" or give them "any presumptive weight"); *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 184, 191 (Del. Ch. 2007) (observing that "tardy, omnibus consideration of meeting minutes" approved after litigation commenced "is, to state the obvious, not confidence-inspiring" and criticizing minutes that failed to reflect "supposed[ly] important decision[s]").

[133] *Box v. Box*, 1996 WL 73575, at *10 (Del. Ch. Feb. 15, 1996), *aff'd*, 687 A.2d 572 (Del. 1996).

fail at the outset."[134] In fairness, the Trial Court acknowledged that "many of the relevant board of directors meeting minutes were approved months after the meeting dates" and stated they would not be used "to dislodge any of Plaintiff's affirmative allegations."[135] But the Trial Court went on to do just that, using the inferably litigation-driven September 10 minutes to discredit Plaintiff's particularized allegations. That was error.

The Trial Court further erred in concluding the "Board reasonably relied on management's opinion, informed by negotiations, that $1.2 billion was the floor."[136] Plaintiff's particularized allegations—that executives Orenstein and Naudé, upon whom the Board ostensibly relied, were influenced by Insight—should have informed the bad-faith inquiry,[137] which can consider "indications of interestedness that are not disqualifying in themselves but which nevertheless color the actions that

---

[134] *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679, 709 (Del. Ch. 2023) (citing Leo E. Strine, Jr., *Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone*, 70 BUS. LAW. 679 (2015)).

[135] Op. at 4, n.6.

[136] *Id*. at 16.

[137] A041, ¶15; A046, ¶21; A085-A087, ¶¶105-110. Orenstein has served as an nCino officer since 2015 and derives his entire income from nCino, rendering him beholden to Insight. A046, ¶21.

the board took."[138] Even assuming Naudé's conflicts were not independently disabling for demand-futility purposes and Orenstein, as an officer, was not beholden to Insight, Plaintiff's particularized allegations should still be considered holistically with the inferably brief meeting, lack of independent financial advice, and substantial delta between the implied value of SimpleNexus and the proposed Transaction price.[139]

The Trial Court's defense-friendly inference that the "fairness of that price was later supported by [BofA]'s fairness opinion"[140] was also in error. "[T]he financial terms were fully baked by the time [BofA] appeared on the scene to render a fairness opinion"[141] two months later.[142] BofA's presentation confirms neither it nor the Board ever considered the sub-$200 million valuation implied by Insight's prior SimpleNexus investments.[143] That neither the Board nor BofA considered

---

[138] *Winborne*, 301 A.3d at 626.

[139] *See id.* at 630 ("Issues like the failure to ask questions, the length of the meeting, or the failure to have an advisor present typically only would relate to the issue of care," but when "combine[d] with the directors' knowledge of the disparity between the value of the TRA Liability and the price to be paid in the TRA Buyout," "provide another ingredient for the mulligan stew and contribute to the inference of bad faith.").

[140] Op. at 16.

[141] *See Enbridge*, 159 A.3d at 261.

[142] A072, ¶82.

[143] A072, ¶83.

what Plaintiff credibly alleges to be "the most relevant precedent transaction" gives rise to the reasonable pleading-stage inference that the Board could not have relied on BofA's opinion in good faith.[144]

3. The Board's Failure Regarding the Double Dummy Tax Structure

Insight secured a roughly $128 million benefit when the Board agreed to structure the Transaction to defer tax on Insight's stock.[145] Despite meticulously structuring the Transaction to provide Insight this unique benefit,[146] the Board sought and received nothing for nCino in return. The Board did not even engage in any meaningful discussion concerning this "double dummy" structure until a brief conversation at its final meeting.[147] In conjunction with the Board's other shortcomings, this failure underscores a lack of good faith at the pleading stage.

The Trial Court did not dispute Plaintiff's particularized allegations that Insight received a valuable non-ratable tax benefit that the Board largely failed to discuss, let alone seek anything as reciprocal consideration. Instead, the Trial Court

---

[144] *See Enbridge*, 159 A.3d at 261.

[145] A075-A077, ¶¶89-92.

[146] A076, ¶91.

[147] A068, ¶76; A070, ¶79; A071, ¶81. The Trial Court acknowledged the minutes "do not reflect what the Company received in exchange" for the double-dummy tax structure. Op. at 19, n.79.

concluded —in a footnote—that the "fact that an identified benefit to a counterparty is not specifically coupled to a benefit to the Company does not constitute a particularized allegation of bad faith."[148] This was error.

First, the Trial Court drew an improper and unreasonable defense-friendly inference. The November 15 minutes—the sole record of any Board discussion of the double dummy structure—state only that the Board's legal advisor "reviewed the 'Double Dummy' tax structure with the Board."[149] Beyond the general disclosure that unspecified "Board members asked questions and there was a discussion of the information reviewed and presented,"[150] the minutes do not indicate the Board sought—or received—anything in exchange for this valuable tax benefit.[151] Had the Board considered doing so, "it is logical to assume that these carefully drafted minutes would disclose it."[152] The five-month gap between the

---

[148] *Id.*

[149] A245-A246.

[150] *Id.* *Compare id. with Berteau v. Glazek*, 2021 WL 2711678, at *24 n.179 (Del. Ch. June 30, 2021) (finding "record relied upon by Defendants…replete with gaps, inconsistencies, and the use of passive voice seemingly designed to avoid describing certain important events and identifying decisionmakers and speakers" and holding "the minutes of the meetings of the Special Committee do not undermine the inferences that I draw in Plaintiff's favor").

[151] The nCino Defendants conceded as much, citing *nothing* supporting the argument that it "was in nCino's interest" to agree to the double dummy structure. A141 n.8.

[152] *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 709 (Del. 1983).

meeting and finalization of the minutes, post-Section 220 demand,[153] strengthens the inference.[154] It is thus reasonable to infer the Board never sought anything in return.[155]

Second, the Trial Court erred by failing to credit Plaintiff's allegations concerning the Board's failure to use leverage. It is axiomatic that "[c]orporations and their boards have limited time and resources and are not generally in the business of providing gratuitous benefits to other corporations or stockholders."[156] Recently, Chancellor McCormick sustained a challenge to a board's failure to leverage its position when approving a tax sharing agreement allegedly granting non-ratable tax benefits to the controller.[157] Chancellor McCormick likewise sustained claims

---

[153] *See* n.131, *supra*.

[154] *Compare* A245-A246 (November 15, 2021 minutes approved on March 9, 2022) *with Box*, 1996 WL 73575, at *10 ("While regularly prepared corporate minutes might be accorded [prima facie evidence of the meeting and the action taken], these minutes provide scant support to their draftsman's position here.").

[155] *See, e.g.*, *Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou*, 2020 WL 5028065, at *24 (Del. Ch. Aug. 24, 2020) ("Plaintiff is entitled to the inference that the Board never discussed the subpoena due to its absence from the Board's minutes."); *Hughes v. Xiaoming Hu*, 2020 WL 1987029, at *2 (Del. Ch. Apr. 27, 2020) (failure to "produce any minutes evidencing any meetings addressing" topics identified in Section 220 demand entitled plaintiff "to the reasonable inference that no earlier meetings took place at which those topics were addressed").

[156] *Fishel v. Liberty Media. Corp.*, C.A. No. 2021-0820-KSJM, at 44 (Del. Ch. Nov. 1, 2022) (TRANSCRIPT) (Ex. D).

[157] *Id*. at 46.

against controllers seeking a unique benefit by avoiding federal taxes, where the board's approval of a reorganization and downstream merger was necessary to obtain that benefit; it was reasonably conceivable the board failed to exert leverage to the detriment of the company and its minority stockholders.[158] And Chancellor Chandler previously held that plaintiffs were likely to succeed on the merits of their Section 203 claims where the Digex board, lacking independence from Digex's controller (Intermedia), approved Intermedia's request for a Section 203 waiver.[159] The Chancellor reasoned the waiver request presented "Digex with bargaining leverage against Intermedia" and that the "leverage simply was not used."[160] These cases are "in line with the foundational precept of Delaware law that corporate boards must act for the benefit of the corporation and its residual claimants"[161]—here, nCino and its unaffiliated stockholders, rather than Insight.

Third, the Trial Court erred by not considering the Board's failure to use leverage holistically with the surrounding indicia of bad faith. Even assuming the Board's failure to extract anything from Insight in exchange for valuable tax benefits

---

[158] *In re Tilray, Inc. Reorg. Litig.*, 2021 WL 2199123, at *1, *3, *15 (Del. Ch. June 1, 2021).

[159] *In re Digex, Inc. S'holders Litig.*, 789 A.2d 1176, 1214 (Del. Ch. 2000).

[160] *Id.*

[161] *Fishel*, Tr. at 44.

might not amount to bad faith *per se*, the inquiry is holistic.[162] "Generally speaking, an unaffiliated third party that possesses a litigable claim will seek to extract something in exchange," and "[a]rmed with leverage, a third party will use its leverage."[163] Despite Insight's unique interests demanding a complex transactional structure to capitalize on its idiosyncratic tax desires, the Board wholly failed to act as an unaffiliated third party and even attempt to employ its leverage to recover anything. Particularly given the majority of nCino's Board lacked independence,[164] it is reasonable at this stage to infer the Board's bad faith.

---

[162] *Winborne*, 301 A.3d at 623.

[163] *In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 471 (Del. Ch. 2013).

[164] *See* §II, *infra*.

II. THE TRIAL COURT ERRED IN FINDING PLAINTIFF FAILED TO PLEAD A MAJORITY OF THE NCINO BOARD LACKED INDEPENDENCE FROM INSIGHT

A. Question Presented

Whether the Trial Court erred in finding Plaintiff failed to plead that nCino directors Naudé, Lake, and Collins lacked independence from Insight.

The issue was preserved.[165]

B. Scope of Review

"[R]eview of a Court of Chancery decision dismissing a derivative suit under Court of Chancery Rule 23.1 is *de novo* and plenary."[166]

C. Merits of Argument

The Complaint asserts that, at filing, at least five of nCino's seven directors lacked independence from Insight.[167] Defendants conceded Horing's interestedness.[168] Plaintiff adequately alleged that Naudé, Lake, Collins, and Ruh could not impartially consider a demand against Insight and their fellow directors.[169] Demand is therefore excused. The Trial Court erred in ruling otherwise.

---

[165] A041-A043, ¶¶15-17; A287-A301 at 23-37.

[166] *Wood*, 953 A.2d at 140.

[167] Op. at 15 & n.62.

[168] *Id*. at 13-14.

[169] Because the Trial Court did not reach the question of Ruh's independence, Plaintiff does not address Ruh. *See* Op. at 24.

1. Naudé

The Trial Court erred in ruling that "Plaintiff has failed to disturb the presumption that Naudé is independent."[170]

First, the Trial Court incorrectly found that "Plaintiff has not pled with particularity that Naudé is dependent on his CEO salary."[171] The Trial Court acknowledged that an executive's salary is generally material under Rule 23.1.[172] And Plaintiff pled that, as nCino's president and CEO, Naudé received over $14 million in the three-year period from 2019 to 2021[173]—a facially material amount.[174]

---

[170] *Id*. at 25.

[171] *Id*. at 24.

[172] *Id*. (quoting *Goldstein v. Denner*, 2022 WL 1671006, at *42 (Del. Ch. May 26, 2022)).

[173] A085, ¶106.

[174] *See Kahn v. Tremont Corp.*, 694 A.2d 422, 430 (Del. 1997) (finding post-trial director beholden to interested party from prior one-year consultancy during which he received more than $445,000); *Rales v. Blasband*, 634 A.2d 927, 937 (Del. 1993) (inferring compensation of $300,000 was material at pleading stage); *In re MultiPlan Corp. S'holders Litig.,* 268 A.3d 784, 813 (Del. Ch. 2022) ("A greater than half-million-dollar payout is presumptively material at the motion to dismiss stage."); *In re Oracle Corp. Deriv. Litig.*, 2018 WL 1381331, at *17 (Del. Ch. Mar. 19, 2018) (same for director fees of $468,645); *Kahn v. Portnoy*, 2008 WL 5197164, at *8–9 (Del. Ch. Dec. 11, 2008) (same for director fees of $160,000); *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *34 (Del. Ch. May 3, 2004, revised June 4, 2004) (finding post-trial consulting and director fees totaling $150,000 in one year and $170,000 in another were material).

The Trial Court nevertheless inferred that Naudé's $49 million in post-IPO stock sales rendered his multi-million-dollar annual compensation immaterial.[175] That Defendant-friendly inference[176] was unreasonable. Even were Naudé not indebted to Insight from his IPO windfall, Plaintiff is entitled to the reasonable inference that $14 million in compensation, comprising nearly 22% of Naudé's nCino-related income ($14 million + $49 million) was material to him.[177]

Plaintiff also pled with particularity that Naudé is indebted to Insight for his post-IPO stock sales. The Trial Court reduced Plaintiff's allegations to the following: "that Insight invested heavily in nCino before its IPO, that Insight took nCino public, and that Naudé later sold nCino stock for $49 million."[178] But without

---

[175] Op. at 24.

[176] *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1048 (Del. 2021) ("When considering a motion to dismiss a complaint for failing to comply with Rule 23.1, the Court does not weigh the evidence, must accept as true all of the complaint's particularized and well-pleaded allegations, and must draw all reasonable inferences in the plaintiff's favor.").

[177] *See Sanchez*, 124 A.3d at 1020–21 (inferring at pleading stage that director fees of $165,000 were material when constituting 30% to 40% of defendant's total *annual income*); *Emerging Commc'ns*, 2004 WL 1305745, at *34 (finding director beholden from $400,000 in consulting fees (*22.5% of income from 1993-95*) plus $145,000 in director fees); *see also* A085, ¶106 ("nCino is Naudé's sole employer, from which he has received compensation that is material to him.").

[178] Op. at 24.

Insight having taken nCino public after significant investment, Naudé could not have monetized his previously illiquid private holdings at a substantial personal profit. These particularized allegations lead to the reasonable inference that Naudé is indebted to Insight for the generational wealth their nCino investment afforded him.

Second, the Court erred in disregarding Plaintiff's myriad other particularized allegations that, when viewed holistically, undermine Naudé's independence. Among other things, Plaintiff alleged that: (i) "nCino's public filings recognize that Naudé is *not* 'independent' as defined by the 'rules of the Nasdaq Global Select Market'"[179]; (ii) "nCino currently employs three of Naudé's immediate family members"[180]; and (iii) "Naudé is featured as a 'Growth Guru' on Insight's website"

---

[179] A086, ¶108; *see Sandys v. Pincus*, 152 A.3d 124, 131–32 (Del. 2016) (holding "the criteria NASDAQ has articulated as bearing on independence are relevant under Delaware law and likely influenced by our law" and that a director lacks independence under NASDAQ "who accepted any compensation from the Company in excess of $120,000 during any period of twelve consecutive months within the three years preceding the determination of independence").

[180] A086, ¶108; *see In re Ezcorp Inc. Consulting Agreement Deriv. Litig.*, 2016 WL 301245, at *38 (Del. Ch. Jan. 25, 2016) ("Delaware decisions similarly have taken a realistic approach to the ability of a director to consider a litigation demand when moving forward with the litigation would have an adverse interest on an individual who could control or significantly influence the future employment of a close family member.").

and "gave a glowing review of Insight's involvement with nCino."[181] The Trial Court erred in not considering these allegations holistically, which confirm that Plaintiff adequately alleged Naudé's lack of independence.[182]

2. Lake

The Trial Court erred in ruling that "Plaintiff has failed to plead that Lake lacks independence from Insight."[183]

First, the Trial Court erred in holding that Plaintiff did not allege Lake's dependence on Insight for his nCino consulting agreement.[184] The Trial Court inferred Lake could only depend on Insight for the consulting agreement if Insight were a *de jure* controller at the time.[185]

---

[181] A086, ¶109; *see Sandys*, 152 A.3d at 134 ("[P]recisely because of the importance of a mutually beneficial ongoing business relationship, it is reasonable to expect that sort of relationship might have a material effect on the parties' ability to act adversely toward each other.").

[182] *Sanchez*, 124 A.3d at 1019 ("[I]t is important that the trial court consider all the particularized facts pled by the plaintiffs about the relationships between the director and the interested party in their totality and not in isolation from each other, and draw all reasonable inferences from the totality of those facts in favor of the plaintiffs.").

[183] Op. at 29.

[184] *Id*. at 27.

[185] *Id*.

This defense-friendly inference overlooks the Complaint's well-pled allegations and is contrary to Delaware law. Plaintiff alleged that, when Lake joined the Board (April 2017) and entered into the consulting agreement (May 2017), Insight was nCino's largest stockholder, having invested $29 million in 2015 and completed its first tender offer in January 2017.[186] Plaintiff is entitled to the reasonable inference that Insight's substantial holdings enabled it to "exert considerable influence" over Lake and his consulting agreement, even absent numerical control.[187] Indeed, Insight gained hard control over nCino in July 2018—one year and two months into the five-year consulting agreement.[188] Under ample

---

[186] A041, ¶16; A050, ¶33; A088, ¶114.

[187] *See, e.g., Rales*, 634 A.2d at 937; *Steiner v. Meyerson*, 1995 WL 441999, at *9-10 (Del. Ch. July 19, 1995) (holding interested party could "exert considerable influence" over company's president, COO, and CFO despite lack of numerical control); *In re Limited, Inc.*, 2002 WL 537692, at *5 (Del. Ch. Mar. 27, 2002) (holding director who was president and CEO of a subsidiary was not independent of The Limited's chair, president, and CEO who owned 25% of the company's stock).

[188] A050, ¶33.

Delaware authority, it is reasonable to infer from those well-pled facts that Lake depended on Insight for the consulting agreement's *ongoing* material benefits.[189]

Second, the Trial Court erred in holding that "Plaintiff has not alleged Lake's director compensation is material at all or in light of his economic circumstances."[190] Plaintiff alleged that, in additional to $30,000 in annual consulting fees, Lake received stock options with a face value of *$1,492,003* at nCino's September 19, 2022 closing stock price.[191] Since 2017, Lake's consulting and director fees (including director compensation of $275,000 in 2021 and $245,037 in 2022) total approximately *$2.5 million*.[192] Such amounts are facially material,[193] particularly

---

[189] A292, at 28 n.101; *see also Klein v. H.I.G. Cap., L.L.C.,* 2018 WL 6719717, at *11 (Del. Ch. Dec. 19, 2018) ("This court has found that a 'consulting agreement suggests a lack of independence' for purposes of examining demand futility. … [I]t is reasonable to infer that a Bain-controlled Surgery Partners could have chosen to renew Doyle's consulting contract, impairing his ability to act independently of Bain."); *Orman v. Cullman*, 794 A.2d 5, 30 (Del. Ch. 2002) (finding "director Bernbach was controlled by the Cullman Group because he was beholden to the controlling shareholders for future renewals of his consulting contract"); *Limited*, 2002 WL 537692, at *6 (finding a director as "beholden to" a controlling stockholder "for the continuation of the consulting services").

[190] Op. at 27.

[191] A088, ¶114; *see also In re eBay, Inc. S'holders Litig.*, 2004 WL 253521, at *2–3 (Del. Ch. Jan. 23, 2004) (inferring at pleading stage option awards worth "potentially millions of dollars" dependent on whether defendant "retains his position as a director" were material).

[192] A088, ¶114.

[193] *See* n.174, *supra*.

where, as here, "[s]pecific information about the wealth of particular individuals is not generally available and is also not something that can usually be obtained using Section 220."[194] In those circumstances, a plaintiff can allege that "the magnitude of the remuneration [an individual] has received is sufficiently large to support an inference of materiality at the pleading stage."[195] Plaintiff did just that, citing *nine* Delaware cases finding similar consulting and director fees material.[196] The Trial Court disregarded all nine.

Third, the Trial Court erred in holding "Plaintiff failed to plead any particularized facts attributing Lake's appointment to Duco's board to Insight."[197] This holding confuses the pleading of particularized facts, which Plaintiff has done, with drawing reasonable inferences in Plaintiff's favor, which the Trial Court must do.[198] Plaintiff pled—but the Trial Court ignored—that:

---

[194] *Voigt*, 2020 WL 614999, at *15; see *also Brehm v. Eisner*, 746 A.2d 244, 268 (Del. 2000) (J. Hartnett concurrence) ("Plaintiffs must not be held to a too-high standard of pleading because they face an almost impossible burden when they must plead facts with particularity and the facts are not public knowledge.").

[195] *Voigt*, 2020 WL 614999, at *15 .

[196] A292, at 28 nn.101-102.

[197] Op. at 28.

[198] *See Lebanon Cnty. Emps.' Ret. Fund v. Collis*, 2023 WL 8710107, at *21 (Del. Dec. 18, 2023) ("This argument conflates a reasonable inference drawn from the pleaded facts with the pleaded facts themselves. The plaintiffs were not required to plead all inferences.").

- Insight invested in Duco in January 2018;
- Lake joined Duco's board in September 2018, serving alongside Insight managing director Peter Sobiloff and principal Jared Rosen;
- Insight and its co-investors sold a controlling interest in Duco in July 2021;
- Lake, Sobiloff, and Rosen exited soon afterward; and
- Duco announced in April 2022 that Lake had rejoined Duco's board "following [his] prior [Duco board] tenure with Duco's former investors," including Insight.[199]

This sequence—in which Lake's tenure on the Duco board mirrored Insight's investment in Duco—gives rise to the reasonable inference that Insight appointed Lake to Duco's board.

Fourth, the Trial Court erred in holding that "Plaintiff offers no facts to support this extension from [Lake's firm Element Ventures] 'co-investing' alongside Insight to being dependent upon Insight."[200] Again, this holding confuses pleading particularized facts with drawing reasonable inferences from those facts. Plaintiff pled—and the Trial Court ignored—that:

- "Element Ventures operates in the same technology space as Insight";
- Element Ventures co-invested with Insight into Fenergo, nCino, and Duco; and

[199] A092-A093, ¶¶120-23.

[200] Op. at 29.

- "Lake leverages his relationship with Insight and other Insight portfolio boards to attract new investment opportunities for Element Ventures," emphasized on Element Ventures' website.[201]

Those particularized facts give rise to the reasonable inference that Lake enjoys an extensive business relationship with Insight that he would be unwilling to jeopardize by suing Insight.[202]

Fifth, the Trial Court erred in failing to treat Plaintiff's allegations holistically, instead addressing them serially and in isolation.[203] Plaintiff alleged a constellation of facts demonstrating that Lake cannot independently consider a demand against Insight, including his material director fees and lucrative consulting agreement, his appointment to the Fenergo[204] and Duco boards by Insight, and his professional relationship with Insight by way of Element Ventures.[205] Considered holistically, those allegations suffice to infer Lake lacked independence from Insight.[206]

---

[201] A089-A091, ¶¶115-17.

[202] *See Sandys*, 152 A.3d at 131 (inferring two directors lacked independence from controller under Rule 23.1 where they had "a mutually beneficial network of ongoing business relations" based on past investments and board service).

[203] *See* Op. at 27-29.

[204] The Court acknowledged that Plaintiff pled Insight controlled Fenergo and appointed Lake to its board, where he served alongside Insight affiliates. Op. at 28.

[205] *See* Statement of Facts, §B.2, *supra*.

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

3. Collins

The Trial Court erred in holding that "Collins is independent of Insight."[207]

The Trial Court first erred in failing to consider Plaintiff's allegations concerning Collins' numerous longstanding affiliations with Insight portfolio companies holistically. The Complaint documents Collins' affiliation with *five* Insight portfolio companies: ExactTarget (CFO), Cherwell (advisory board member), Instructure (director), Shopify (director), and nCino (director).[208] Collins received approximately $10 million in golden parachute compensation and stock options when Insight and TVC sold ExactTarget in June 2013—a material indebtedness.[209] Although Cherwell, Instructure, and Shopify are private, Collins' appointments and departures from these companies aligned with Insight's investments and exits,[210] giving rise to the reasonable inference that Collins served at Insight's behest.

Rather than holistically evaluating the alleged pattern resulting from five Insight portfolio company affiliations, the Opinion dismissed each in succession and

---

[207] Op. at 31.

[208] A043, ¶17; A096-A098, ¶¶133-37.

[209] A096, ¶132.

[210] A096-A098, ¶¶133-37.

isolation. But even within that improper framework, the Opinion mischaracterized the Complaint and made defense-friendly inferences.

The Trial Court found it "unreasonable to infer that Insight selected Collins for his roles absent allegations of control or other particularized facts."[211] For the above reasons, however, control is not the threshold for exercising "considerable" or "significant influence" over a director.[212] Moreover, the Trial Court found an absence of "other particularized facts" only by mischaracterizing the $10 million golden parachute and stock options as "compensation for [Collins'] services,"[213] while failing to credit Plaintiff's well-pled allegation that this payment was directly linked to Insight and TVC's sale of ExactTarget.[214]

The Trial Court also erred in concluding that "Plaintiff did not plead that Collins was paid for his role" at Cherwell, despite acknowledging "it is reasonable to infer Insight had some role in appointing Collins given its majority stake."[215] There are several problems with this conclusion. *First*, Cherwell is a private company, making it impossible (and unnecessary) for Plaintiff to specify Collins'

---

[211] Op. at 29.

[212] *See* n.187, *supra*.

[213] Op. at 29.

[214] A101, ¶149.

[215] Op. at 30.

remuneration.[216] *Second*, Collins is a professional director who relies on his director fees as his sole source of income. The Trial Court should have afforded Plaintiff the reasonable inference that Collins was paid for his Cherwell board service. *Third*, looking past remuneration, "a board seat often provides directors with prestige and with valuable business and social connections."[217] The Trial Court failed to draw that reasonable inference and consider that Collins enjoyed non-monetary benefits bestowed by Insight.

Relating to its failure to properly consider the import of Collins's Insight-affiliated directorships, the Trial Court also erred in holding that "Plaintiff has not pled Insight has the power to remove Collins or substantially affect his role as a director, so Collins is not beholden to Insight by virtue of his income."[218] This holding overlooks Plaintiff's well-pled allegations and runs contrary to Delaware law.

As for removal power, Plaintiff alleged that "Insight controlled more than 41% of all votes cast at nCino's 2021 annual meeting and more than 43% of all votes

---

[216] *See* n.210, *supra*.

[217] *Ezcorp*, 2016 WL 301245, at *20 n.10 (quoting Lucian Bebchuk & Jesse Fried, *Pay Without Performance: The Unfulfilled Promise of Executive Compensation*, at 25 (2004)).

[218] *Id*. at 30-31.

cast at nCino's 2022 annual meeting."[219] The standard for director election under 8 *Del. C.* § 216(3), which governs nCino,[220] is "a plurality of votes of the shares." Without Insight's 41-43% of the vote, Collins faced the practical impossibility of cobbling together a plurality of the remaining votes.[221] Likewise, Insight could "substantially affect [Collins'] role as a director" given its substantial stockholdings. "Based on the math alone, large blocks at levels of 35% and below carry significant influence" and give their "owner additional rhetorical cards to play in the

---

[219] A051, ¶38.

[220] *See* nCino, Inc., Schedule 14A, filed May 28, 2021, at 4, *available at* https://investor.ncino.com/static-files/96765bdd-1dce-4e35-a11d-6f8eae80e836 ("Our Amended and Restated Bylaws provide for a plurality voting standard for the election of directors."). "This Court has recognized that, in acting on a Rule 12(b)(6) motion to dismiss, trial courts may consider hearsay in SEC filings 'to ascertain facts appropriate for judicial notice under [Delaware Rule of Evidence] 201.'" *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006) (citation omitted).

[221] *Voigt*, 2020 WL 614999, at *18 (calculating, for majority vote with typical 80% turnout, "if the holder of a 35% block favors a particular outcome at a meeting, then the blockholder will win as long as holders of 1-in-7 shares vote the same way. The opponents must garner over 90% of the unaffiliated shares to win"); *In re Cysive, Inc. S'holders Litig*., 836 A.2d 531, 551-52 (Del. Ch. 2003) ("In practical terms, Carbonell holds a large enough block of stock [35%] to be the dominant force in any contested Cysive election."); *Reith v. Lichtenstein*, 2019 WL 2714065 at *8 (Del. Ch. June 28, 2019) (finding 35.62% stake "a large enough block of stock to be the dominant force in any contested election"); *In re Loral Space & Commc'ns Inc*., 2008 WL 4293781, at *21 (Del. Ch. Sept. 19, 2008) (same for 36%); *Ladjevardian v. Bergamo*, C.A. No. 10237-VCL (Del. Ch. July 13, 2015) (TRANSCRIPT) (Ex. E) (same for 30%).

boardroom[.]"[222] It is reasonably inferable that Insight could effectively remove Collins by withholding its support for him or otherwise influence his behavior as a director on matters of significance to Insight, *viz.*, the Transaction.

In sum, Plaintiff has sufficiently pled Collins is indebted to and lacks independence from Insight.

[222] *Voigt*, 2020 WL 614999, at *19.

CONCLUSION

Plaintiff respectfully requests reversal of the Trial Court's dismissal of the Complaint.

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ Gregory V. Varallo
Gregory V. Varallo (Bar No. 2242)
500 Delaware Avenue, Suite 901
Wilmington, Delaware 19801
(302) 364-3601

SAXENA WHITE P.A.
Thomas Curry (Bar No. 5877)
824 N. Market Street, Suite 1003
Wilmington, Delaware 19801
(302) 485-0483

ANDREWS & SPRINGER LLC
Peter B. Andrews (Bar No. 4623)
Craig J. Springer (Bar No. 5529)
David M. Sborz (Bar No. 6203)
Andrew J. Peach (Bar No. 5789)
Jackson E. Warren (Bar No. 6957)
Jacob D. Jeifa (Bar No. 7070)
4001 Kennett Pike, Suite 250
Wilmington, Delaware 19807
(302) 504-4957

Counsel for Plaintiff-Below/Appellant

Of Counsel:

Jeroen van Kwawegen
Thomas G. James
Maria Nudelman
James Janison
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, New York 10020
(212) 554-1400

David Wales
SAXENA WHITE P.A.
10 Bank Street, 8th Floor
White Plains, New York 10606
(914) 437-8551

Adam Warden
SAXENA WHITE P.A.
7777 Glades Road, Suite 300
Boca Raton, FL 33434

Dated: March 11, 2024