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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 MAY 10, 2024**

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Defendants' Answering Brief ("AB") ignores key facts and arguments, cherry-picks from documents to plead new facts, repeatedly strays outside the record, and improperly seeks defense-friendly inferences. Defendants cannot fix the errors in the Opinion.

As to bad faith, Defendants refuse to engage in the holistic inquiry Delaware law requires. The Complaint alleges that the directors, with deep ties to Insight: (i) knew of Insight's controlling ownership interest in SimpleNexus; (ii) relied on the "belief" of an executive beholden to Insight (Naudé) that "SimpleNexus would not sell for less than $1.2 billion"; (iii) locked in a purchase price months before retaining a financial adviser, at a price that would earn Insight a 700% return on its investment; and (iv) agreed to a double-dummy structure that would uniquely benefit Insight and received nothing in exchange. Viewed holistically, these allegations support an inference that the Board "acted with a purpose other than that of advancing the best interests of the corporation."[1]

Defendants' efforts to fix the Trial Court's errors respecting independence fare no better. As an initial matter, Defendants incorrectly argue Plaintiff abandoned its argument that Insight was a *de facto* controller. Not so.

[1] *IBEW Loc. Union 481 Defined Contribution Plan & Tr. v. Winborne*, 301 A.3d 596, 622 (Del. Ch. 2023).

Naudé lacks independence because Insight was a numerical controller that took nCino public, enabling him to sell $49 million worth of stock. Despite arguing that Naudé's $14 million in compensation is not material because his stock sales render him financially independent, Defendants concede that his current nCino holdings worth $15.1 million (virtually the same as his compensation) is a "very substantial personal interest." Defendants cannot have it both ways.

Lake too lacks independence. Defendants argue that Insight had little to do with Lake's appointment to the board, even though he served on the board of another Insight-controlled company at the time and Insight was the Company's largest stockholder. Defendants assert his consulting agreement with nCino was not dependent on Insight, ignoring that one year into the term, Insight became nCino's numerical controller and his consulting agreement continued for years. Moreover, in an effort to make Lake's annual nCino compensation seem immaterial (despite numerous cited opinions to the contrary), Defendants incorrectly calculate that income figure.

Collins lacks independence based on his twelve-year relationship with Insight at five portfolio companies, which Defendants dismiss as an uncanny series of coincidences. Defendants also improperly cite documents that were not before the Trial Court seeking to save Collins's independence.

The Trial Court's dismissal warrants reversal.

ARGUMENT

I. PLAINTIFF HAS ADEQUATELY ALLEGED BAD FAITH

A. Bad Faith is a Holistic Inquiry; Extreme Valuation Disparity Forms One Part

"At the pleading stage, the test [for bad faith] is whether the complaint alleges a constellation of particularized facts which, when viewed holistically, support a reasonably conceivable inference that an improper purpose sufficiently infected a director's decision to such a degree that the director could be found to have acted in bad faith."[2] Plaintiff satisfied this test, pleading a constellation of allegations including the substantial delta between the Transaction price and valuations implied by prior investments, the Board's immediate acceptance of the headline Transaction price anchoring price negotiations, and the Board's failure to recoup value for the double-dummy tax structure. Given Plaintiff's independence allegations, these objective indicia support a rational pleading-stage inference of bad faith.[3]

Defendants—like the Trial Court—relegate the good-faith inquiry to "a residual category, devoid of content and with no work to do."[4] Defendants' revisionist history notwithstanding, the Trial Court failed to consider Plaintiff's

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

[3] *See Kahn v. Stern*, 183 A.3d 715 (Del. 2018) (Table).

[4] *Winborne*, 301 A.3d at 625.

independence allegations holistically with Plaintiff's sale process allegations.[5] So do Defendants, who bury their argument concerning Plaintiff's bad-faith allegations in the "aggregate" in the last subsection.[6]

But Defendants cannot ignore the staggering delta between the Transaction price and the implied valuation of SimpleNexus. Instead, they insist "the Amended Complaint does not plead *knowing* misconduct given its allegation that the Board *did not know* about the alleged valuation."[7] But "act[ing] with scienter, meaning [directors] had actual or constructive knowledge that their conduct was legally improper" is only "[o]ne … way that a plaintiff can plead bad faith …."[8] This case exists in the "middle subset of possibilities" where directors may not have "acted with malicious intent" but nonetheless appear to have "acted with a purpose other than that of advancing the best interests of the corporation and its stockholders."[9]

[5] *See id*. at 626 ("The good faith inquiry can consider … indications of interestedness that are not disqualifying in themselves but which nevertheless color the actions that the board took.").

[6] *See* AB §I.C.2.d.

[7] AB at 16.

[8] *Winborne*, 301 A.3d at 622 (quoting *McElrath v. Kalanick*, 224 A.3d 982, 991 (Del. 2020)).

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

Plaintiff alleged a majority of the Board consisted of individuals with thick ties to Insight.[10] Plaintiff further alleged that, by the time it approved the IOI, the Board:

- Knew of Insight's "ownership interests in SimpleNexus";
- Heard Naudé's—beholden to Insight—"belief that SimpleNexus would not sell for less than $1.2 billion";
- Considered a transaction that was the largest in nCino's history and would likely deplete most of its available cash;
- Did not engage an independent financial advisor; and
- Agreed to "pursue a structural approach to the transaction that would allow the shares of its Common Stock to be received on a tax deferred basis," uniquely benefitting existing SimpleNexus stockholders, especially Insight, in return for nothing.[11]

Viewed holistically, these allegations are enough to make it reasonably conceivable that Defendants acted with something other than the Company's best interests at the forefront of their deliberations.[12] That is sufficient.

Likewise, Defendants wrongly assume that an inference of bad faith requires the Board to have precise knowledge of the exact valuation delta. As Plaintiff's Opening Brief explained, however, "objective indicia" relevant to assessing a

[10] A041-46, 85-101, ¶¶¶15-20, 105-48.

[11] A061-64, ¶¶63, 68, 70-72.

[12] *See Winborne*, 301 A.3d at 623 (directors may "have acted in bad faith if a purpose other than pursuing the best interests of the corporation and its stockholders tainted their actions").

director's mental state include "how extreme the decision appears to be."[13] The focal point of scrutiny is the transaction terms themselves: "[I]f the pled facts indicate that that *the terms of the transaction* were extreme," they are "logically relevant" in determining subjective bad faith.[14] And the "extent to which a business decision appears extreme under the circumstances" is simply "a factor that a court can consider when assessing mental state."[15] The defendants in *Winborne* "approved the Company paying $850 million" for what they "*knew* was worth $175.3 million," which was so extreme as to support "a claim of waste" and "alone establishe[d] an inference of bad faith" sufficient to "render demand futile."[16]

Framed properly, the ten-figure delta between the *$169 million* implied valuation and *$1.2 billion* Transaction price, when considered holistically alongside Plaintiff's other allegations, supports an inference of bad faith. Defendants fairly note that the "implied valuation is based on incomplete data"[17] but draw the wrong conclusions. The Trial Court was required to accept all well-pled allegations as true

[13] *Id*. at 620.

[14] *Id*. (emphasis added) (quoting *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 107 (Del. 2013)).

[15] *Winborne*, 301 A.2d at 621.

[16] *Id*. at 627 (cited in AB at 17).

[17] AB 18.

and draw all reasonable inferences in Plaintiff's favor,[18] including those respecting the value implied by prior SimpleNexus investments.

Defendants' attempts to revise the Trial Court's conclusions and undermine Plaintiff's well-pled allegations fail. Plaintiff's Opening Brief explained how the Trial Court erroneously dismissed allegations regarding SimpleNexus's recent implied valuation as "unreasonable," based on "the record," which consisted solely of an undated, unattributed draft briefing document that nowhere addressed SimpleNexus's valuation.[19] Now, Defendants seek to introduce new evidence—"SimpleNexus's financials" presented to the Board on November 15, 2021 and "SimpleNexus's acquisition of LBA Ware" in October 2021[20]—that the Trial Court *never cited* to bolster their defense-friendly inferences. This Court, however, is bound to accept all "well-pleaded allegations" as true and not "weigh evidence."[21]

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[18] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

[19] OB 23-24.

[20] AB 19-20 (citing B117 and B274). Regardless, these documents postdated the IOI, in which the Board locked in the $1.2 billion headline Transaction price. Defendants likewise ignore that [redacted] (B165), which hardly fill the valuation gap. Likewise, Defendants selectively cite [redacted] (AB 19) [redacted] (B274)

[21] *Lebanon Cnty. Emps.' Ret. Fund v. Collis*, ---A.3d---, 2023 WL 8710107, at *13 (Del. Ch. Dec. 18, 2023).

Defendants' reliance on documents the Trial Court did not rely on betray the weakness of their argument.

B. The Board's Failure to Negotiate Price

The Board locked in the $1.2 billion headline Transaction price during its first substantive meeting concerning the Transaction. Plaintiff's Opening Brief carefully outlined the Trial Court's numerous errors, including misinterpreting board minutes, drawing defense-friendly inferences, and giving conclusive weight to *post hoc* minutes.[22] Ignoring those arguments, Defendants focus on just one of the Trial Court's erroneous conclusions, arguing that "the Board 'reasonably relied on management's opinion, informed by negotiations, that $1.2 billion was the floor.'"[23] But as Plaintiff's Opening Brief explained, the Trial Court erred in failing to consider Plaintiff's particularized allegations that Orenstein and Naudé were influenced by Insight holistically in connection with the broader bad-faith inquiry.[24] And the Trial Court mistakenly divorced those allegations from Plaintiff's additional well-pled allegations concerning the brevity of the meeting, the lack of independent financial

[22] OB 28-31.

[23] AB 21 (quoting Op. 16).

[24] OB 31-32 & nn.137-39. As discussed below, Plaintiff has never "backed away from" the argument that Insight controlled nCino. *See* AB 21.

advice, and the substantial delta between SimpleNexus's implied valuation and the Transaction price.[25]

Defendants next overstate the "extensive due diligence efforts" the Board undertook *after* locking in the $1.2 billion headline price.[26] Defendants emphasize BofA's belated retention but pass over the fact that "the financial terms were fully baked by the time [BofA] appeared on the scene to render a fairness opinion"[27] two months post-IOI. And Defendants tacitly concede that BofA failed to consider the sub-$200 million valuation implied by Insight's prior SimpleNexus investments,[28] "the most relevant precedent transaction …."[29] Defendants likewise emphasize the "diligence" the Board ostensibly reviewed,[30] but refer this Court to documents *cited nowhere* in the Opinion.

Defendants also emphasize what they describe as "significant negotiations"[31] occurring *after* the Board locked in the $1.2 billion Transaction price. But Defendants ignore that accepting the $1.2 billion offer "set the field of play for

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[25] *See Winborne*, 301 A.3d at 630.

[26] AB 22.

[27] *See Brinckeroff v. Enbridge Energy Co.*, 159 A.3d 242, 261 (Del. 2017).

[28] *See* AB 23, n.12.

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

[30] AB 23 (citing B37 & B50).

[31] AB 21-22.

the economic negotiations to come by fixing the range in which offers and counteroffers might be made."[32] Having anchored itself to SimpleNexus' first offer, the Board hamstrung its ability to effectively negotiate price.[33] Critically, the Board caved on price before engaging independent financial advisors and receiving only cursory valuation materials 24 hours before agreeing to the IOI.[34] Viewed holistically, these allegations give rise to an inference of bad faith.

Defendants' suggestion that "nCino persuaded SimpleNexus to accept 20%" in cash consideration rather than up to 50% "after Board involvement"[35] is misleading as the IOI already provided for 25% cash consideration.[36] Likewise, Defendants' reliance on the lock-up agreement[37] ignores Plaintiff's allegations that the lock-up—excluding 12.72 million shares, almost the same number nCino issued in the Transaction (12.76 million)—was illusory.[38]

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[32] *See Olenik v. Lodzinski*, 208 A.3d 704, 717 (Del. 2019).

[33] *See id*. at 717 n.65 (describing "anchoring" as "the phenomenon in which a starting value biases future adjustments toward that initial value" (citation omitted).

[34] *See* OB 27-28.

[35] AB 7-8, 22.

[36] A063-64, ¶68.

[37] AB 22.

[38] A077-8, ¶93; A058, n.10.

C. The Double-Dummy Structure

In its landmark opinion in *Match*, this Court credited allegations that a board "squandered negotiating leverage by acceding to pre-negotiation acts by Old IAC to protect the tax-free treatment of the Separation without any consideration to" the subject company in an entire fairness action.[39] Nonetheless, Defendants ask this Court to believe that the nCino Board was "in the business of providing gratuitous benefits to" Insight in the form of the double-dummy tax structure.[40] Defendants are wrong.

The facts concerning the "negotiation" of the double-dummy structure are indisputable. The Board committed to "pursue a structural approach to the transaction that would allow the shares of its Common Stock to be received on a tax deferred basis"—*i.e.*, the "double-dummy" structure— when it entered the IOI on September 10.[41] The Board did not discuss the double-dummy structure until a brief conversation at its final meeting.[42] The Trial Court acknowledged that those minutes "do not reflect what the Company received in exchange" for the double-dummy

[39] 2024 WL 1449815, at *17 n.159.

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

[41] A063, ¶68. The relevant minutes reflect no discussion of the double-dummy structure. A066, ¶73.

[42] A068, ¶76; A070, ¶79; A071, ¶81.

structure.[43] As Plaintiff's Opening Brief explained, the only reasonable inference from these facts is that the Board recouped nothing in return.[44]

Faced with these well-pled allegations and logical inferences, Defendants speculate that the Board *may* have obtained something in return for the double-dummy structure, which the minutes simply fail to reflect.[45] But, had the Board sought anything in return, "it is logical to assume that [its] carefully drafted minutes would disclose it."[46] The absence of such a record entitles Plaintiff to an inference those discussions never happened.[47] Defendants' further speculation that the Board *may* have obtained value for the double-dummy structure in some "give-and-take on multiple [unspecified] issues"[48] lacks record support, as does Defendants' conjecture that nCino *may* have "also receive[d] a corresponding benefit" for the double-dummy structure.[49]

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[43] Op. 19, n.79.

[44] OB 34-35.

[45] *See* AB 24.

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

[47] *See* OB 35 n.132 (collecting cases).

[48] AB 24.

[49] *Id*. at 25 (citing *In re Vaxart, Inc. S'holder Litig.*, 2021 WL 5858696, at *22 (Del. Ch. Dec. 1, 2021)). Defendants cited *nothing* supporting their argument below that it "was in nCino's interest" to agree to the double-dummy structure. A141 n.8.

Defendants' attempts to distinguish Plaintiff's authorities fail. The transaction at issue in *Fishel*—a board's decision to increase a *pro rata* stock repurchase program—nominally benefited *all* stockholders who could participate but provided additional unique benefits to the controller.[50] Defendants' below-the-line distinctions of *Tilray* and *Digex* are equally makeweight.

[50] *See* OB Ex. D at 34-40 (considering and rejecting the "argu[ment] that the unique benefit test is not satisfied when a controller receives incidental benefits from a pro rata transaction").

II. NAUDÉ, LAKE, AND COLLINS LACK INDEPENDENCE FROM INSIGHT

In attacking demand futility, Defendants misdirect and obfuscate. Defendants' lead argument insists Plaintiff "abandoned" its argument that Insight was nCino's *de facto* controller.[51] Incorrect. Count IV—not considered by the Trial Court beyond demand futility—states a claim against Insight as nCino's *de facto* controller.[52] Similarly, Plaintiff's Opening Brief argues Insight controlled nCino, stating, "[s]ince 2015, venture capital firm Insight has dominated nCino" and "[f]ollowing nCino's July 2020 initial public offering…, Insight remained its *de facto* controller."[53] Plaintiff also pled and continues to argue that Insight retained sufficient voting power to unilaterally determine director elections.[54]

On appeal, Plaintiff does not expressly frame its argument as one for *de facto* control. And for good reason. Director independence hinges on Insight's power to

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[51] AB 27-28.

[52] A110-14, ¶¶176-87.

[53] OB 5, citing, *e.g.*, A051-52, ¶39 ("At all relevant times, Insight has also continued to dominate the affairs of the Company through its Board, which is stocked with Insight loyalists."). Defendants' claim that Plaintiff's description of Insight as "nCino's then-controller" as of July 2020 "confirms that it has abandoned the argument" (AB 28) mischaracterizes Plaintiff's Opening Brief, which clarifies that phrase means "then-numerical-controller." *See, e.g.*, OB 5 ("[Insight] increased its stake to greater than 50% through subsequent tender offers in 2017 and 2018."), 43 ("Insight gained hard control over nCino in July 2018 ….").

[54] OB 50-52.

"substantially affect the director," as Defendants' own authority states.[55] Plaintiff has sufficiently alleged Insight has that power.[56] And Defendants concede that the separate issue of *de facto* control need not be reached on appeal.[57] Properly evaluated, Defendants offer nothing to rescue the Trial Court's erroneous futility findings.

A. Naudé

Building on their flawed "Plaintiff abandoned control" premise, Defendants attempt to rescue Naudé's independence with arguments the Trial Court rejected. Defendants claim that, to plead Naudé relies on and is indebted to Insight for his $14 million nCino CEO compensation, Plaintiff must demonstrate Insight (i) controls nCino and (ii) can "unilaterally remove" Naudé.[58] The Trial Court rightly rejected

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[55] AB 29-30. Defendants repeatedly (and incorrectly) cite *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 177 (Del. Ch. 2005), for the proposition that a plaintiff must allege the "unilateral ability to remove" directors to plead a lack of director independence. *See* AB 29, 30, 37 n.18. Rather, *Benihana* states: "This Court will not find a director beholden unless the purported controlling person has 'unilateral' power to *substantially affect the director*," 891 A.2d at 177 (emphasis added). Insight easily satisfies that standard considering nCino's plurality-based director elections.

[56] OB 5-6.

[57] *See* AB 28 n.14.

[58] AB 29-30.

this mischaracterization of Delaware law, observing "that a blockholder as significant as Insight can have influence over a company's executives."[59]

Moreover, the Trial Court did not question Naudé's dependence on Insight for his nCino CEO salary; rather, it inferred he did not "depend[] on" that large salary given his IPO winnings.[60] On that point, both the Trial Court and Defendants are mistaken. At the pleading stage, Plaintiff is entitled to the reasonable inference that Naudé's *$14 million* salary—nearly 22% of his entire nCino-related income—is *material* to him.[61] Indeed, Defendants effectively admit as much. Again going outside the record,[62] Defendants now claim "Naudé owns more than 500,000 shares of nCino stock and thus has a *very substantial personal interest* in not harming nCino just to benefit Insight" and thus has "no need" for the $14 million he receives in CEO compensation.[63] As of the date of filing, 500,000 nCino shares trade for

[59] Op. 24 (citing *In re Ltd., Inc. S'holders Litig.*, 2002 WL 537692, at *5 (Del. Ch. Mar. 27, 2002)).

[60] Op. 24.

[61] *See* OB 40 n.177 (citing cases).

[62] The Complaint never alleges Naudé's current shareholdings, and Defendants cite *nothing* for this new fact.

[63] AB 29. Defendants advance the same two-step dodge with Lake and Collins—denying the materiality of their nCino compensation while emphasizing their "substantial nCino stock holdings" that purportedly align their interests with nCino. *See* AB 33, 35, 37-38.

approximately $15.1 million.[64] Defendants' suggestion that $14 million is immaterial but $15.1 million is "a very substantial personal interest" defies logic.

Defendants also dispute Naudé's indebtedness to Insight for his IPO windfall because "by Plaintiff's logic, anyone who held nCino shares at the time of the IPO would be forever indebted to Insight, merely because it has a role in the IPO."[65] This strawman collapses under its own weight. Naudé is not "anyone who held nCino shares"; he profited by almost *$50 million*.[66] And Insight did not merely "ha[ve] a role in the IPO"; it was the Company's numerical controller who took nCino public—the traditional IPO path.[67] There would be no "sweeping consequences"[68] from such a ruling, as Defendants decry. A plaintiff would still be required to plead the materiality of a defendant's IPO winnings with particularity.

Finally, Defendants argue Plaintiff's further allegations—that Naudé lacks independence under Nasdaq rules and nCino currently employs three of his immediate family members—only show Naudé's dependence upon nCino, not Insight.[69] But this overlooks Insight's substantial nCino holdings, which enable it

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[64] nCino's closing price as of April 24, 2024 was $30.17.

[65] AB 31.

[66] OB 7.

[67] OB 5.

[68] AB 31.

[69] *Id.*

to "exert considerable influence" over nCino's officers even absent numerical control.[70] This provides sufficient reason to doubt Naudé's independence at the pleading stage.[71] Defendants simply ignore these cases.

B. Lake

Defendants attempt to salvage Lake's independence by asking this Court to draw a series of defense-friendly inferences distancing Lake from Insight. Procedural impropriety notwithstanding, the well-pled facts show otherwise.

Plaintiff more than adequately alleged Insight's influence over Lake's ascension to the nCino Board. Insight invested $29 million in nCino in 2015 and completed its first tender offer in January 2017, making Insight the Company's largest stockholder.[72] Lake—while serving on the board of another Insight-controlled company (Duco)—was appointed to the nCino Board three months after

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[70] OB 7.

[71] OB at 43 & n.187 (collecting cases). That these facts were not argued below misses the point; these facts were clearly pled in the Complaint (A041, ¶15 and A086-87, ¶¶108, 110). *See Kaufman v. Belmont*, 479 A.2d 282, 284 (Del. Ch. 1984) ("In response to the motion to dismiss for failure to make a pre-suit demand, *it is necessary to review the complaint in detail* to ascertain if the plaintiff has alleged with particularity facts which show that a pre-suit demand for redress of the alleged wrongs would have been futile.") (emphasis added). And Plaintiff responded below to Defendants' generic argument—the only one leveled at these allegations—that they merely go to Naudé's independence from nCino, not Insight. *See* AR034; A170; AB 24-26.

[72] A050, ¶33.

the January 2017 tender offer.[73] Insight also cast 41% and 43% of the director election votes in the plurality-based 2021 and 2022 elections, respectively.[74] Notwithstanding these well-pled allegations, Defendants ask this Court to infer that "Lake's nCino tenure has never depended on Insight."[75] Defendants' conclusion is unreasonable.

Unsurprisingly, Defendants are mum on the Trial Court's failure to credit Plaintiff's well-pled allegations that Insight acquired numerical control one year and two months into Lake's five-year consulting agreement.[76] That oversight led the Trial Court to further err in failing to find Lake depended on Insight for the *continuation* of his consulting agreement.

Plaintiff further established that Lake's consulting and director fees were material to him by citing *nine* Delaware decisions finding similarly sized fees material.[77] Defendants—like the Trial Court—disregard all nine and resort to misdirection. First, Defendants cite inapposite decisions holding that usual or non-excessive *director fees standing alone* do not impugn independence, ignoring that

[73] A042-43, ¶16.

[74] A051, ¶38; OB 50-51.

[75] AB 32.

[76] Op. 27.

[77] A292, 28 nn.101-02.

none of these decisions considered *additional consulting fees*.[78] Second, Defendants claim Lake's nCino-related compensation "amounts only to roughly $350,000 per year for both consulting and director work,"[79] wrongly implying a seven-year term. The actual timeframe is about five-and-a-half years.[80] Correcting Defendants' error yields around $455,000 per year—a facially material sum.[81]

Defendants' attempts to neutralize Lake's service on the boards of two private companies—Fenergo and Duco—fare no better. The Trial Court correctly credited Plaintiff's well-pled allegations that "Insight appointed Lake to the Fenergo board in 2016" and that "Lake served alongside Insight affiliates at Fenergo."[82] Plaintiff also pled that Lake exited his Fenergo seat after Insight sold down its position.[83] As to Duco, Plaintiff pled that Insight invested in January 2018; Lake joined the board in September 2018; Lake served alongside Insight representatives; Insight and its co-investors sold their controlling interest in July 2021; and Lake and the Insight

[78] AB 33 (citing *Simons v. Brookfield Asset Mgmt. Inc.*, 2022 WL 223464, at *15 (Del. Ch. Jan. 21, 2022) ("[W]hen *director fees* are not excessive, mere allegations of payment of *director fees* are insufficient to create a reasonable doubt as to the director's independence." (emphasis added)).

[79] AB 33.

[80] *See* A088-89, ¶114 (May 2017 to December 2022).

[81] *See* OB 39 n.174 (collecting cases).

[82] Op. 28.

[83] A092, ¶120.

representatives left soon after.[84] Duco itself described Lake's 2018-21 term as a "tenure with Duco's former investors," including Insight.[85]

For Defendants, those facts show "timing alone" and do not sufficiently point to Insight appointing Lake to the Fenergo or Duco boards.[86] This misconstrues Plaintiff's burden—to plead specific facts *from which the Court is to draw reasonably conceivable inferences*.[87] As discussed above, Plaintiff met its burden and the Trial Court erred by failing to draw reasonable inferences.

Defendants' attempt to deflate the relationship between Insight and Lake's firm, Element Ventures, likewise fails. Defendants' analogy to *Zuckerberg*, where this Court found multi-billionaire Peter Thiel was independent of Mark Zuckerberg and Facebook based on generally pled "deal flow,"[88] misses critical context. Unlike in *Zuckerberg*, Plaintiff identified three co-investments between Insight and Element Ventures, as well as specific promotion of the Insight relationship by Lake's firm.[89]

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[84] OB 46.

[85] *Id*.

[86] AB 34. *Cf. In re New Valley Corp. Deriv. Litig.*, 2001 WL 50212, at *7 (Del. Ch. Jan. 11, 2001) (finding director lacked independence, for demand futility purposes, who previously received $30,000 from controller for agreeing to be a director nominee in the controller's unrelated proxy bid several years prior).

[87] *See* OB 45 & n.198.

[88] AB 36.

[89] *See, e.g.*, *Caspian Select Credit Master Fund Ltd. v. Gohl*, 2015 WL 5718592, at *7 (Del. Ch. Sept. 28, 2015) (finding reason to doubt independence where defendant

The better case is *Sandys v. Pincus*—ignored by Defendants and the Trial Court—where this Court appropriately inferred two directors lacked independence from a controller based on "a mutually beneficial network of ongoing business relations" grounded in past investments and board service.[90]

C. Collins

Defendants characterize Collins' dozen-year relationship with at least five Insight portfolio companies as an uncanny series of coincidences.[91] But at this stage, Defendants cannot enjoy that unlikely inference.

Collins indisputably: (i) has enjoyed business relationships since 2011 with *five* Insight portfolio companies—four as a director and one as executive; (ii) became CFO of ExactTarget in 2011, after Insight became a 35% stockholder in 2009; (iii) was appointed to Cherwell's advisory board when Insight was its majority stockholder and left shortly after Insight sold its majority stake; (iv) was appointed to the Shopify board at most seven months after Insight's investment; (v) served on the Instructure board while Insight was an investor; and (vi) serves alongside an

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"appointed Campion ... to many boards of directors" and Campion "lack[s] independence because of [his] 'past business dealings with Wayzata Partners and [his] expectations of future business dealings with Wayzata Partners, given that [he] and Wayzata Partners *are in the same business*").

[90] 152 A.3d 124, 131 (Del. 2016).

[91] AB 37 ("scattered business dealings years ago"), 41.

Insight managing director at Paycor. Collins is a professional director receiving a material portion (36%) of his annual income from nCino, with total compensation of $1,279,037 between 2020 and 2022. And Collins cannot, practically speaking, be re-elected to the nCino Board without Insight's support.[92] Those facts cast doubt on Collins' independence from Insight.[93]

Dissatisfied with the well-pled facts, Defendants improperly plead their own. Plaintiff pled that Insight, along with Technology Crossover Ventures,[94] sold its interests in ExactTarget to Salesforce in June 2013, and that, in connection with the sale, Lake received $10 million in golden parachute payments.[95] Defendants now claim this allegation must be false because Salesforce acquired ExactTarget through a tender offer.[96] Further, citing an ExactTarget prospectus never cited by Plaintiff,

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[92] A043-44, ¶17; A094-98, ¶¶127-36.

[93] *See, e.g.*, *Kahn v. Portnoy*, 2008 WL 5197164, at *12 (Del. Ch. Dec. 11, 2008) (finding reason to doubt director's independence where he "is a director of TA and a trustee of HRPT. For 2007, he was paid $88,980 in fees as a director of TA and $73,600 in fees as a trustee of HRPT. Donelan is also a trustee of the ILC, an organization to which he and the other TA directors make regular financial contributions").

[94] The Complaint inadvertently abbreviated this name to "TVC," the abbreviation of another company "TVC Capital" that co-invested with Insight in SimpleNexus.

[95] A096-97, ¶133 & nn.40-41.

[96] AB 38.

Defendants *plead* Insight could not have been a principal stockholder in ExactTarget as of the merger.[97]

Defendants' counternarrative is inappropriate for several reasons. To begin, Defendants are incorrect. A company like ExactTarget can of course be acquired from substantial stockholders through a tender offer, which is exactly what happened: Salesforce entered into a support agreement with Insight and other substantial stockholders to acquire ExactTarget.[98] Accordingly, Plaintiff's arguments are not "demonstrably false"[99] as Defendants claim. Regardless, it is improper for Defendants to present their own allegations from documents outside the Complaint.[100]

To convince the Court that Collins' affiliations with five Insight companies over thirteen years is pure coincidence, Defendants inappropriately seek irrational inferences. Conceding Insight appointed Collins to the Cherwell advisory board,

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[97] AB 38-39 & n.20.

[98] *See, e.g.*, https://www.marketscreener.com/quote/stock/SALESFORCE-COM-INC-12180/news/Salesforce-com-Inc-completed-the-acquisition-of-ExactTarget-Inc-NYSE-ET-from-a-group-of-shareho-39009692/; *see also* A096-97, ¶133 ("Insight, along with TVC, sold ExactTarget to Salesforce in June 2013.").

[99] AB 39. Nor did the "court below" ever address the issue, as Defendants suggest. *See* Op. 29.

[100] *Blue v. Fireman*, 2022 WL 593899, at *2 n.1 (Del. Ch. Feb. 28, 2022) (ignoring "extraneous references offered to rewrite the Complaint" on a motion to dismiss).

Defendants ask the Court to infer this position was unpaid.[101] Conceding Collins was appointed to the Shopify board seven months after Insight's investment, Defendants ask the Court to infer no connection.[102] Conceding Collins' affiliation with five Insight companies, Defendants ask the Court to infer these directorships are "not alleged to be anything more than ordinary-course business dealings"[103]—as if it is "ordinary course" to be affiliated with *five* portfolio companies of one investment firm.[104]

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[101] *Simons*, 2022 WL 223464, at *15 ("Generally, serving as a director on the board of a Delaware corporation is not a pro bono gig; Delaware law recognizes that directors will be paid a fair and reasonable amount."); *see also* AB 38 (quoting *Simons* for same).

[102] *In re Carvana Co. S'holders Litig.*, 2022 WL 2352457, at *13 (Del. Ch. June 30, 2022) ("But the procedural posture requires the court to draw plaintiff-friendly inferences. Drawing such inferences here, it is reasonable to infer that, but for Platt's relationship with the Garcias, Platt's son would not have been given the same opportunities as an intern.").

[103] AB 40-41. *City of Pittsburgh Comprehensive Mun. Pension Tr. Fund v. Conway*, C.A. No. 2022-0664-MTZ, at 12, 19 (Del. Ch. Jan. 22, 2024) (TRANSCRIPT) (Ex. F) (accepting plaintiff's inference that "Rubenstein helped facilitate Welters' membership in the American Academy of Arts and Sciences" "based on timing and a 'web of relationships'").

[104] *In re BGC Partners, Inc. Deriv. Litig.*, 2019 WL 4745121, at *11 (Del. Ch. Sept. 30, 2019) (finding reason to doubt independence where "Moran and Lutnick's professional relationship spans approximately twenty years, during which Moran has served with Lutnick on the boards of *four* Cantor-affiliated companies"); *see also* Jesse M. Fried & Mira Ganor, Agency Costs of Venture Capitalist Control in Startups, 81 N.Y. UNIVERSITY L. REV. 967, 989 (2006) (arguing many "independent directors" will side with venture capitalists in conflicts due to long-term professional ties and future board appointments).

Plaintiff has pled a "constellation of facts" providing sufficient reason to doubt Collins' independence from Insight.[105] As Yogi Berra quipped, "That's too coincidental to be coincidence."

[105] *Del. Cnty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1019 (Del. 2015) ("[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.") (emphasis added).

III. RUH'S INDEPENDENCE SHOULD BE REMANDED TO THE TRIAL COURT IF DEMAND FUTILITY REMAINS IN DISPUTE

Although the Trial Court did not analyze or decide Ruh's independence,[106] Defendants urge this Court to do so.[107] Defendants' lone authority, involving the dismissal of a books-and-records action where a plaintiff concededly failed to include statutorily-required evidence of stock ownership, is inapposite.[108] This Court routinely declines to rule on fact-intensive issues in the first instance, remanding them to the trial courts, whose core role is fact-finding.[109]

Should this Court find two of Naudé, Lake, or Collins conflicted, it should remand the issue of Ruh's independence to the Trial Court. Plaintiff's arguments below regarding Ruh's independence invoked all three *Zuckerberg* prongs and raised fact-intensive issues related to the timing of Ruh's alleged insider trading.[110] Respect for the Trial Court's province favors remand.

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[106] Op. 24.

[107] AB 41-43.

[108] *Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (2012).

[109] *Kroll v. City of Wilmington*, 276 A.3d 476, 479 (Del. 2022) (remanding factual issue because "the Court of Chancery should have the opportunity to address the Appellees' arguments in the first instance"); *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 724 (Del. 2020) (similar); *Appel v. Berkman*, 180 A.3d 1055, 1065 n.44 (Del. 2018) (declining to decide argument "fairly raised in the Court of Chancery" but "never addressed by that court").

[110] A301-13.

CONCLUSION

For the reasons set forth above and in the Plaintiff's Opening Brief, the Court should reverse the Trial Court's dismissal.

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