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Case No. 2017-0575-SG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BENCHMARK CAPITAL PARTNERS VII, L.P., a Delaware limited partnership, Plaintiff, v. TRAVIS KALANICK, Defendant, and UBER TECHNOLOGIES, INC., a Delaware corporation Nominal Defendant.	)	C.A. No. 2017-0575-SG

PLAINTIFF BENCHMARK CAPITAL PARTNERS VII, L.P.'S REPLY IN FURTHER SUPPORT OF MOTION FOR EXPEDITED PROCEEDINGS AND FOR ENTRY OF A STATUS QUO ORDER

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PRELIMINARY STATEMENT[1]

1. Travis Kalanick's facile response to Benchmark's motion for expedition and entry of a status quo order in this Section 225 action (the "**Opp**.") completely ignores the merits of Benchmark's well-pleaded claims. Crucially, Mr. Kalanick's papers do not dispute the overwhelming factual basis for Benchmark's allegations that Mr. Kalanick committed fraud and breached fiduciary duties in connection with the 2016 stockholder vote that created the three Board seats at issue.

2. Specifically, at the time of the vote, Mr. Kalanick was aware of numerous material issues—including that the founder of a start-up Mr. Kalanick sought to acquire had taken thousands of files from his former employer, and that Mr. Kalanick had allegedly reviewed the personal medical records of an Uber passenger who was brutally raped in India—that he intentionally failed to disclose to Benchmark or the Board. Nothing in Mr. Kalanick's papers challenges the factual premises of Benchmark's Complaint. Instead, Mr. Kalanick simply seeks to divert Benchmark's claims into private arbitration, a move that should be rejected for the reasons set forth in Benchmark's answering brief in opposition to Mr. Kalanick's motion to dismiss.

1 Capitalized terms not defined herein have the meanings stated in Benchmark's opening brief or the Complaint.

3. Benchmark's requested status quo order has two principal elements. First, the requested order would prevent Mr. Kalanick from attempting to fill the two disputed Board seats that are currently vacant. That measure is necessary because Mr. Kalanick has not agreed to refrain from filling those disputed seats while this action is pending. Second, the requested order would ensure that Mr. Kalanick—who holds the third disputed seat—does not cast the decisive vote on any Board matter. This measure is necessary to ensure the integrity of Uber's Board's decision-making, including the ongoing CEO search, where the new CEO must be approved by a majority of the Board; indeed, Mr. Kalanick does not seriously dispute that he has already interfered with that search.

4. The Court should expedite this summary action and enter Benchmark's requested status quo order.

SUPPLEMENTAL BACKGROUND

5. While Mr. Kalanick's purported "Statement of Facts" is largely irrelevant, several points warrant correction.

6. *First*, Mr. Kalanick's contention that Benchmark's fraud allegations are "stale" (Opp. ¶ 4) is false. As but one example, at the time of the stockholder vote, Benchmark could not have known that ex-Google engineer Anthony Levandowski told Mr. Kalanick months earlier that he had "Google 'stuff' in his possession" (Complaint ¶ 38). That information—which ultimately

led to a lawsuit against Uber for theft of trade secrets—was only revealed this summer. Nor was there any unreasonable delay between Mr. Kalanick's resignation as CEO in late June 2017 and Benchmark's filing of this action on August 10: during that time, Benchmark understandably worked to explore alternatives before bringing suit (and, for most of that time, believed Mr. Kalanick would honor his commitment as to the disputed Board seats, as discussed below).

7. *Second*, Mr. Kalanick does not seriously attempt to justify his failure to honor his express written commitment on June 20, 2017 to appoint only independent, experienced, unbiased, and diverse individuals to two of the three Board seats he purports to control.[2] The facts show that despite Mr. Kalanick's personal tragedy and statement that he was taking personal leave, he continued to give directions and remained extensively involved with Uber, including in determining Uber's strategy with respect to Covington & Burling LLP's report concerning pervasive sexual harassment and gender discrimination at Uber. Indeed, Mr. Kalanick was in Chicago to interview candidates for the Chief Operating Officer position when he was presented with the letter signed by Benchmark and four other major investors representing approximately 40% of Uber's voting power. (Opp. ¶¶ 15-16).

2 The Court should summarily reject Mr. Kalanick's contention that Benchmark somehow "acknowledged" the validity of the seats by obtaining Mr. Kalanick's express commitment—one that Mr. Kalanick has now disavowed and reneged upon. (*See* Opp. ¶¶ 14, 16).

8. Mr. Kalanick's failure to honor his commitment in the June 20 letter only confirms that he is trying to "clear the path for his eventual return as CEO" (Complaint ¶ 1), underscoring the need for expedition and status quo relief. Working with the Board, Benchmark is focused on selecting Uber's new CEO as quickly as possible and without improper interference by Mr. Kalanick. Expediting this action and entering a status quo order are necessary to ensure Uber is protected from Mr. Kalanick's corrosive influence and can promptly obtain the new leadership it needs to move forward.

ARGUMENT

I. EXPEDITED PROCEEDINGS ARE APPROPRIATE

9. Mr. Kalanick's argument against expedition rests on his motion to dismiss or stay in favor of arbitration (the "**Arbitration Motion**"), which asserts that an arbitration clause in a Voting Agreement requires all of Benchmark's claims to be arbitrated and prevents them from being heard in this Court.

10. As explained in Benchmark's opposition to the Arbitration Motion (which Benchmark incorporates here), Mr. Kalanick's argument fails. Benchmark's Section 225 claims, which allege that the 2016 stockholder vote that amended Uber's certificate of incorporation was tainted by Mr. Kalanick's fraudulent nondisclosures, do not depend in any way on the Voting Agreement and are not within the sweep of its arbitration clause.

11. Arbitrability aside, Mr. Kalanick does not dispute that Benchmark's Section 225 claims are colorable. As explained above, Benchmark's Complaint describes a litany of material matters that Mr. Kalanick knew, but intentionally failed to disclose to stockholders, in connection with the vote. Mr. Kalanick does not dispute the underlying facts as to his nondisclosure. And while Mr. Kalanick argues in passing that "Benchmark has failed to allege a colorable fraud claim" (Opp. ¶ 4), he makes no meaningful effort to back up that assertion, effectively conceding that Benchmark's allegations meet the colorability standard. *Renco Grp., Inc. v. MacAndrews AMG Hldgs. LLC*, 2013 WL 209124, at *1 (Del. Ch. Jan. 18, 2013) (burden on plaintiff "is not high"). As explained below, Benchmark has also shown a possibility of threatened irreparable injury. This action should therefore proceed on an expedited basis.

II. THE COURT SHOULD ENTER BENCHMARK'S REQUESTED STATUS QUO ORDER

12. Mr. Kalanick appears to agree that the legal standard for a status quo order focuses "primarily upon the injury to plaintiff that is threatened and the possible injury to defendant if the remedy is improvidently granted." *Cottle* v. *Carr*, 1988 WL 10415, at *2 (Del. Ch. Feb. 9, 1988). While Mr. Kalanick argues that Benchmark must also show "imminent . . . irreparable injury" (Opp. ¶ 23), "in 225 actions [courts] have not . . . required a showing of irreparable damage," recognizing that uncertainty regarding the status of a corporate director

or officer is sufficient threatened injury. Transcript of Argument on Plaintiffs' Application for A Temporary Restraining Order at 27-28, *Credit Lyonnais Bank Nederland, N.V.* v. *Pathe Commc'ns Corp.*, C.A. No. 12150 (Del. Ch. July 9, 1991).

13. Benchmark satisfies all applicable standards for status quo relief.

14. *First*, to the extent it is required, Benchmark has shown immediate and irreparable harm. Such harm is not "rank, impermissible speculation" (Opp. ¶ 24), since Mr. Kalanick continues to interfere with critical decisions at Uber, including the ongoing CEO search. It has been widely reported that Mr. Kalanick's behavior has caused potential CEO candidates to withdraw from consideration. (Complaint ¶ 62). Mr. Kalanick's actions are chilling the search process and threatening harm to Uber (and Benchmark's investment) by keeping Uber a "leaderless, and therefore foundering, corporation." *Atkins v. Hiram*, 1993 WL 545416, at *5 (Del. Ch. Dec. 23, 1993).

15. Further, while Mr. Kalanick suggests no status quo order is necessary because he does not control a majority of the Board (*see* Opp. ¶ 25), his contention that status quo orders are unavailable where a minority of seats are disputed is without support and contrary to Delaware authority. *See, e.g.*, *Williams v. Calypso Wireless, Inc.*, 2012 WL 424880, at *5 (Del. Ch. Feb. 8, 2012)

(discussing entry of status quo order pending determination of whether single individual was validly removed as director).

16. *Second*, as to the "balancing of harms," Mr. Kalanick's conclusory assertion that he would be harmed by a temporary limitation of his purported "rights and power as a director" (Opp. ¶ 22 n.2) should be rejected. On Mr. Kalanick's theory, no director's authority could ever be limited during a Section 225 action. To the contrary, "reasonable restrictions" are regularly imposed. Transcript at 27-28, *Credit Lyonnais*, C.A. No. 12150. Mr. Kalanick will suffer no meaningful harm from Benchmark's requested order that his vote—as a director in one of the seats that is challenged—not be the decisive vote.

17. *Third*, as to Mr. Kalanick's contention that Benchmark has not shown a likelihood of success on the merits (Opp. ¶¶ 26-27), Benchmark need only show "colorable" claims. *ACE Ltd. v. Capital Re Corp.*, 747 A.2d 95, 102 (Del. Ch. 1999) (quoting *Cottle*, 1988 WL 10415, at *3). As set forth above (at ¶¶ 2, 6, 11), Benchmark clearly meets this standard.

18. *Finally*, Mr. Kalanick's cursory challenges to the terms of Benchmark's requested order should be rejected. As explained below, each proposed term of Benchmark's requested order is warranted and appropriate.

19. The provisions that would prevent Mr. Kalanick from filling the two disputed Board seats that are currently vacant or otherwise changing the

current size or composition of the Board (Paragraphs 2(a)-(b)) are customary, and Mr. Kalanick does not address them. Indeed, Mr. Kalanick emphasizes that to date, he has not filled two of the disputed Board seats (Opp. ¶ 9), and never explains why he should be permitted to do so before resolution of this action.

20. The provision that would prevent Mr. Kalanick from casting the decisive Board vote (Paragraph 2(c)) is also appropriate to ensure the validity of Board actions taken while this action is pending. *See, e.g.*, *Oracle P'rs v. Biolase, Inc.*, 2014 WL 2120348, at *1 n.5 (Del. Ch. May 21, 2014) (status quo order provided board actions must be approved by at least three of four directors whose appointments were not disputed). Other than suggesting such a scenario is not "likely" (Opp. ¶ 25 n.3), Mr. Kalanick does not seriously argue against this provision.

21. The provision that would prevent Mr. Kalanick from disrupting the management of Uber's business by its current Board in the ordinary course (Paragraph 2(d)) is not "impermissibly vague" or overbroad. (Opp. ¶ 29). Rather, it is necessary to end Mr. Kalanick's disruptive involvement in the CEO search and other material decisions now facing Uber. And contrary to Mr. Kalanick's suggestion, gamesmanship would be more likely with a status quo order that attempted to anticipate every future action Mr. Kalanick might take. Under

Benchmark's proposed order, any borderline cases (of which we expect few or none) can be raised with the Court.

CONCLUSION

22. For all of the foregoing reasons, Benchmark respectfully requests that the Court enter Benchmark's proposed orders expediting these proceedings and preserving the status quo during the pendency of this action.

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