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Case No. 2017-0888-SG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LENZA H. MCELRATH, III, derivatively on behalf of UBER TECHNOLOGIES, INC., Plaintiff, v. TRAVIS KALANICK, GARRETT CAMP, RYAN GRAVES, ARIANNA HUFFINGTON, YASIR AL-RUMAYYAN, WILLIAM GURLEY, DAVID BONDERMAN, and SALLE YOO, Defendants, -and- UBER TECHNOLOGIES, INC., Nominal Defendant.	C.A. No. 2017-0888-SG

VERIFIED AMENDED STOCKHOLDER DERIVATIVE COMPLAINT

Plaintiff Lenza H. McElrath III ("Plaintiff"), derivatively on behalf of nominal defendant Uber Technologies, Inc. ("Uber" or the "Company"), brings the following Verified Amended Stockholder Derivative Complaint (the "Complaint") against Uber directors Travis Kalanick ("Kalanick"), Garrett Camp ("Camp"), Ryan Graves ("Graves"), Arianna Huffington ("Huffington"), Yasir Al-Rumayyan ("Al-Rumayyan"), William Gurley ("Gurley") and David Bonderman ("Bonderman", collectively the "Director Defendants") and Uber executive officers Kalanick and Salle Yoo ("Yoo") (in such capacities, the "Officer Defendants") for breaches of fiduciary duties and corporate waste. The allegations

of the Complaint are based on the knowledge of Plaintiff as to himself, and on information and belief, including the investigation of counsel and review of publicly available information, including court filings.

INTRODUCTION

1. Uber operates the world's dominant "ride sharing" mobile app, generating $7.5 billion in revenue in 2017. Through its acquisition of Ottomotto LLC ("Otto") – the largest acquisition in Uber's history – Uber sought to leapfrog its primary competitor, Google, in the race to launch self-driving vehicles by stealing Google's confidential trade secrets and intellectual property ("IP") and hiring a fleet of Google engineers.

2. This case arises from the bad faith actions of, and breaches of fiduciary duties by, the Director Defendants in approving and proceeding with Uber's $680 million acquisition of Otto. The Director Defendants either knew that Otto's founder, Anthony Levandowski ("Levandowski"), had deliberately and criminally misappropriated massive amounts of trade secrets and other IP from his former employer Waymo, the self-driving technology subsidiary of the parent company of Google, or they deliberately disregarded the plain evidence of such theft in bad faith.

3. The transaction's timing alone was extraordinarily suspicious and sufficient in and of itself to raise a red flag. Levandowski formed the company

that became Otto on January 15, 2016, while he was still employed by Google. He left Google on January 27, 2016. Less than a month later, on February 22, 2016, Levandowski signed the initial term sheet to be acquired by Uber.

4. Thus, in the span of less than one month, Levandowski resigned from Google's self-driving division; started Otto; hired over a dozen former Google employees to join him; and signed a term sheet to sell Otto to Uber. The Agreement and Plan of Merger dated April 11, 2016 ("Merger Agreement") was approved by the Uber board of directors (the "Board") less than two months later. This rapid sequence of events constituted a red flag of warning to the Director Defendants that Uber's acquisition of Otto was an improper and potentially criminal raiding of Google's assets.

5. The Director Defendants, in fact, must have realized the likelihood of illegality because Uber took the unusual step of retaining a computer forensic investigation firm, Stroz Friedberg ("Stroz"), to conduct due diligence before consummating the Otto transaction. The retention of Stroz was known to the Director Defendants as it was specifically referenced in the agreements the Director Defendants approved in connection with the Merger Agreement. Stroz was specifically tasked with determining whether Levandowski and other Otto employees "took with them or retained confidential and/or proprietary information from their former employer, Google."

6. Stroz discovered that Levandowski and others with Otto ***had in fact taken a massive amount of confidential and proprietary information***, including trade secrets and IP, when they left Google. Stroz also discovered that Uber executives were well aware of the misappropriation.

7. Not surprisingly, the Director Defendants' approval of the acquisition of Otto led directly to Waymo's litigation against Uber, which in turn led to damages to Uber in excess of a quarter billion dollars (between the amount Uber was forced to pay in settlement and the massive attorneys' fees it incurred) and a federal criminal investigation.

8. Further, because of the Director Defendants' faithless breaches of fiduciary duties, Uber has no recourse against Otto or Levandowski because it agreed to *indemnify them* for any of their bad acts. In contract provisions that even Director Defendant Gurley admits were "atypical," the indemnification provisions in the Merger Agreement and ancillary documents caused Uber to suffer additional financial harm. In this regard, the indemnification provisions were structured specifically to account for the fact that the sellers might be crooks, but instead of putting the risk of liability on the crooks (Otto and Levandowski), the Director Defendants saw fit to put that risk of liability directly on Uber through unusual indemnification provisions intended to protect Otto and Levandowski from suits by Google.

9. In addition, the Merger Agreement approved by the Board required Uber to forego the typical post-closing indemnification rights of the buyer in the event that Otto's representations and warranties regarding its ownership of IP turned out to be false. Knowing that these representations and warranties were false, and that the true purpose of the Uber-Otto Transaction was little more than a raid on Google's assets, the Director Defendants caused Uber to waive post-closing indemnification against Levandowski when it turned out that he did not actually own what he was purporting to sell to Uber. The inclusion of these novel contract provisions make it obvious to any observer, especially the sophisticated Director Defendants who, among them, have been involved in dozens, if not hundreds, of transactions in the technology space, that this deal was corrupt.

10. Kalanick, for his part, knew that Levandowski had stolen Waymo's technology, trade secrets and IP. Why else would Kalanick have Uber pay $680 million dollars for a couple dozen Google engineers to come and work at Uber. Levandowski (who asserted his 5th Amendment rights in refusing to testify in the Waymo-Uber litigation) told Kalanick exactly what Uber was getting for its $680 million. Despite this knowledge, and also despite the knowledge that Kalanick himself learned from the Stroz preliminary investigation, Kalanick went through with the Otto purchase.

11. The behavior of Uber's internal and external legal counsel also played a troubling role in the breaches of fiduciary duties by the Director Defendants. Uber's General Counsel, defendant Yoo, was intimately involved with the due diligence of Otto and learned in the days before the approval of the transaction by the Board on April 11, 2016, that external investigators at Stroz had turned up evidence showing that Otto had likely misappropriated Google trade secrets and IP. Despite this knowledge, and her reported concerns about the transaction, Yoo breached her fiduciary duties by failing to share the information she had learned, and by failing to inform the Director Defendants of the existence or contents of preliminary due diligence findings. In this way, Yoo breached her own fiduciary duties and aided and abetted the breaches of fiduciary duties by the Director Defendants.

12. Uber's outside counsel at Morrison & Foerster ("MoFo") was also intimately involved with Stroz and similarly was complicit in not sharing the preliminary due diligence findings that were gathered under their direct supervision with the Director Defendants.

13. Despite its knowledge of the Stroz investigation and its purpose – and with Yoo, MoFo, and Kalanick failing to provide the Board with details concerning the Stroz findings – the Board deliberately sat with its head in the sand

and, in bad faith, did not bother to inquire or press for details about the results of the Stroz investigation before voting on the deal.

14. In the face of so many red flags, no reasonable Board, acting in good faith, could have approved this deal. Thus, in addition to the various breaches of fiduciary duties alleged herein, this case represents one of those factual circumstances where there is reason to doubt whether any business judgment was brought to bear on this critical corporate decision.

15. This action seeks monetary damages to be paid to Uber to remedy the breaches of fiduciary duties and corporate waste detailed herein.

THE PARTIES

16. Plaintiff, a California resident, is a stockholder of Uber and has been a stockholder of Uber at all material times alleged in this Complaint.

17. Nominal defendant Uber is a privately held company which operates the world's dominant ride-sharing mobile app. It was founded in 2009 by Camp and Kalanick. Uber is incorporated in the State of Delaware with its corporate headquarters located at 555 Market Street, San Francisco, California 94105.

18. Defendant Kalanick has served as an Uber director since the Company's founding. Kalanick was the Company's CEO from December 2010 until his resignation on June 20, 2017. Immediately after his resignation as CEO, Kalanick appointed himself to a vacant Board seat.

19. Defendant Camp has served as an Uber director since the Company's founding.

20. Defendant Graves has served as an Uber director since 2010. Graves became the first Uber employee in 2010, served as the Company's first CEO in 2010, and was subsequently Uber's head of global operations until his resignation on August 10, 2017.

21. Defendant Huffington, a close personal friend of Kalanick, has served as an Uber director since April 27, 2016.

22. Defendant Al-Rumayyan has served as an Uber director since June 1, 2016. Al-Rumayyan is the managing partner of Saudi Arabia's Public Investment Fund ("PIF"), an Uber stockholder.

23. Defendant Gurley served as an Uber director from 2011 through his resignation on June 21, 2017. Gurley is a Partner of Benchmark Capital Partners VII, L.P. ("Benchmark"), an Uber stockholder.

24. Defendant Bonderman served as an Uber director from 2011 through his resignation on June 13, 2017. Bonderman is a Partner of TPG Capital L.P. ("TPG"), an Uber stockholder.

25. The defendants listed in paragraphs 18 through 24 above are collectively referred to herein as the "Director Defendants."

26. Defendant Yoo was Uber's first in-house lawyer and was its General Counsel until May 2017 and its Chief Legal Officer until November 2017.

SUBSTANTIVE ALLEGATIONS

A. "The Most Ethically Challenged Company in Silicon Valley"

27. Kalanick has a long history of disregarding the law and the rights of others as an entrepreneur. One of Kalanick's early ventures, called "Scour" was similar to Napster, the illegal music-sharing site that was eventually shut down for violating copyrights. Kalanick's venture offered not only music but also illegal copies of theatrical film releases.

28. Kalanick and Scour's copyright violations added up to around $250 billion of damages from the copyright holders. Scour declared bankruptcy.

29. Kalanick co-founded Uber in 2008, but had not learned to respect the law in the meantime. Kalanick set the tone from the top at Uber. Under his watch, Uber has been characterized by its sharp business practices, flouting of local laws, and mocking its competitors in a race to expand as quickly as possible. Both its internal culture and its external business practices have exposed Uber to repeated lawsuits over the years, and the Company is reportedly now the subject of at least five criminal probes from the United States Department of Justice.

30. The role of a board of a Delaware corporation is to act as a check on such behavior by a chief executive, but Uber had a culture of pushing performance

at the expense of legal or ethical accountability. This was a culture that Uber's Board facilitated. Kalanick and the Board created an atmosphere of unaccountability, as revealed by whistleblowers. For example, Kalanick and the Board applied no scrutiny to "[m]embers of the group, called the A-Team" who were "composed of executives who were personally close to Mr. Kalanick" and "were shielded from accountability over their actions."

31. As Uber's valuation rose, the Director Defendants were apparently happy to turn a blind eye to improper behavior and practices. Kalanick made no secret of his disrespect for local law. He spoke about it in public and it was known to the Director Defendants. It has been reported that Kalanick directed Uber employees to take the position that if local regulations that would impinge on Uber's business were not being enforced, they were as good as nonexistent. In the warped Uber world created by Kalanick, of which the Board knew and approved, the lack of approval for Uber to operate was called "tacit approval" and the Company behaved as if it had actual approval. Among the greatest hits that this approach led to came in 2014 when the Republic of South Korea indicted Kalanick and Uber.

32. The Company also created a program called "Greyball" that was specifically designed to facilitate the Company's violations of local taxi service laws by "greyballing" local regulators posing as customers and providing them

with false information. Developed in 2014, Defendant Graves was aware of the Greyball program while an executive at the Company.

33. Although many Silicon Valley companies have profited by "pushing the envelope," Uber has been in a different class entirely in its reckless and lawless behavior. From its inception, Uber and the Board have built a reputation for "flout[ing] laws and regulations to gain an edge."[1] Peter Thiel, a prominent venture capitalist with experience in a wide variety of companies, described Uber as "the most ethically challenged company in Silicon Valley."

34. The corrupt incentive to disregard lawful business practices and Uber's history of the same should have been, and undoubtedly was, something of which the Board was intimately aware leading up to Uber's acquisition of Otto. Accordingly, the Board should have had a heightened awareness to closely scrutinize the legality of Uber's acquisition of Otto, including whether (i) the deal was legal or Uber was paying $680 million for unusable, stolen trade secrets and IP, and (ii) the deal exposed Uber to additional severe liabilities.

[1] Mike Isaac, *How Uber Deceives the Authorities Worldwide*, N.Y. TIMES, Mar. 3, 2017.

B. Uber Induces Levandowski to Leave Waymo and Start Otto

35. Levandowski began working at Google in April 2007. In 2011, Google promoted him to Engineering Manager of its "Chauffeur Project," which was Google's self-driving vehicle project.

36. Kalanick was motivated by a desperate desire to catch up to Google in self-driving vehicle technology without regard to the legal rights of others, the violation of which could, and did, ultimately harm Uber. While Google had developed its own LiDAR (Light Detection and Ranging) technology, in 2016 Uber was still relying on a third-party LiDAR system.[2] In late 2015 and early 2016, Uber was believed to be years behind Google in the race to develop technology for self-driving vehicles that could compete in the marketplace with Google's.

37. Kalanick described the threat of being left behind in the race for an autonomous vehicle as "basically existential for us." Whether justified or not, Kalanick expressed concern that if a competitor "rolls out a ride-sharing network

[2] On a self-driving car, the LiDAR sensor is a spinning cylinder that usually sits on the roof. By bouncing a laser off an object and measuring the time of flight, LiDAR can tell how far away something is. Thanks to the spinning, these sensors can "see" in 360 degrees. Most self-driving car solutions use LiDAR as the major sensor, giving the car a "big picture" view of the world so it can see pedestrians and other vehicles. *See Google's Waymo invests in LIDAR technology, cuts costs by 90 percent*, ARS Technica (Jan. 9, 2017) (at https://arstechnica.com/cars/2017/01/googles-waymo-invests-in-lidar-technology-cuts-costs-by-90-percent/).

that is cheaper or far higher-quality than Uber's, then Uber is no longer a thing." Similarly, co-founder and Director Defendant Camp reflected that "[i]n a highly competitive market it is easy to become obsessed with growth, instead of taking the time to ensure you're on the right path." The combination of this perceived "existential" competitive threat to Uber's viability, whether real or imagined by top Uber executives, and Uber's law-breaking culture, was toxic and led directly to an illicit deal, with no fiduciary check by the Director Defendants.

38. In the months leading up to the Uber acquisition of Otto (the "Uber-Otto Transaction"), Kalanick and others at Uber colluded with Levandowski in a scheme to misappropriate trade secrets and other confidential and proprietary information regarding Google's self-driving vehicles,[3] including source code, production process pictures, and circuit board designs for Google's LiDAR system.

39. Uber executives began recruiting Levandowski in June 2015 to leave Google and join Uber. At one of the meetings, Levandowski asked an Uber executive what Uber would be willing to pay for the entire Google self-driving staff. This foreshadowed Levandowski's founding of Otto which consisted of little

[3] The brand under which Google carried out its self-driving research and development has evolved over time from Chauffeur Project to Waymo, and Google's parent company's name is now Alphabet. For simplicity, this Complaint refers to any of this family of companies as "Google."

more than a pre-packaged misappropriation of Google's self-driving business and assets.

40. Kalanick knew what Levandowski was engaged in because he communicated with Levandowski extensively from the time he was first approached in June 2015 until Levandowski finally left Google on or about January 27, 2016. Levandowski later told Uber's outside forensic investigators that he and Kalanick exchanged more than 200 text messages during the recruitment period. Kalanick described the relationship between him and Levandowski as extremely close. "I feel like we're brothers from another mother," Kalanick reportedly said and Kalanick and Levandowski discussed the acquisition of Otto "during a series of 10-mile night walks."

41. In the litigation between Google and Uber, it was revealed that Kalanick and other Uber executives had extensive secret communications during the lead up to the Otto transaction on technology platforms that were purpose-built to hide and destroy evidence of wrongful behavior.

42. Levandowski prepared for his scheme to sell Google assets to Uber by downloading tens of thousands of files containing Google technology, trade secrets and IP before resigning. The misappropriated files include:

(a) Technical drawings and diagrams: this includes figures depicting radar technology at Google, the production processes, and electronic and hardware components for self-driving vehicles.

(b) Texts and notes: Levandowski stored notes on his personal smartphone he wrote demonstrating his intent to join Uber with misappropriated information. On September 17, 2015, for example, he wrote a note regarding "doing business for Uber" and "how can it not have Google IP in it."

(c) Emails: Levandowski downloaded approximately 50,000 Google work emails onto his personal computer in September 2014. Levandowski accessed ten of the emails between September 1, 2015 and January 28, 2016.

(d) Source code files: Levandowski downloaded 734 source code files onto his personal devices or accounts. A Google employee Levandowski recruited to join Otto was found to possess 174,311 source code files on his personal devices.

(e) Pictures and videos: Levandowski took and stored pictures onto his smartphone of the construction process of Google self-driving vehicles and parts, whiteboard pictures, figures depicting radar technology, video of the self-driving test, and a flowchart of Chauffeur software architecture.

43. Levandowski stored the misappropriated files on personal devices, such as laptops and smartphones, as well as disks and other storage devices in his possession.

44. About two weeks before he left Google, Levandowski met with Uber officials in San Francisco on January 14, 2016. The next day, while still employed at Google, he founded 280 Systems, the precursor to Otto. Levandowski resigned from Google less than two weeks later on January 27.

45. Kalanick's close involvement and direct knowledge of Levandowski's activities continued after Levandowski left Google. Levandowski continued to text

Kalanick to update him on Otto's status and the poaching of Google employees to join his startup, who made up more than half of Otto's personnel.

46. On February 22, 2016, Otto and Uber signed a Term Sheet for Uber's acquisition of Otto.

47. Otto had no real operations before its acquisition. Otto was operated out of Levandowski's house before Uber acquired it. Kalanick testified that the acquisition was not really a true acquisition of a company that had any product or service, but that "[w]e basically were hiring him and his team, but getting some – like a sort of small acquisition along with it." The "small" acquisition was the largest Uber had attempted to date.

48. While Levandowski was still at Google, he and Kalanick had already discussed transacting in this manner with Levandowski setting up a company that would be quickly acquired before it really began operating. Given the amount of money being paid ($680 million) the transaction could not be justified based on the value of the hiring of Levandowski's team (an "acqui-hire"). As Uber executives recognized, "that's a LOT of money for 25 people. A lot." Thus, in reality, everyone at Uber, including the Director Defendants, knew the $680 million purchase price was justified not by the hiring of 25 people, but because Uber was also obtaining misappropriated Google trade secrets and IP as well. Otherwise, the

transaction price was so obviously exorbitant that no rational business person would believe it to be legitimate.

C. Stroz Discovers Massive Misappropriation During Due Diligence

49. As part of its due diligence, Uber retained Stroz in March 2016 to conduct an independent investigation, under the supervision of outside counsel at MoFo, about whether certain Otto employees – including Levandowski – took with them or retained confidential and/or proprietary information from Google's Waymo. Stroz was also tasked to investigate whether the Otto individuals took any other actions which may have breached non-solicitation, non-compete, or fiduciary obligations in connection with their move from Google to Otto.

50. The Board was aware of the reasons why Stroz was hired and what it was tasked to investigate. Kalanick and other Uber executives were fully aware of Levandowski's raid on Google's trade secrets and confidential and proprietary information from an early stage. At a March 11, 2016 meeting, Levandowski told Kalanick and other Uber executives that he possessed source code, design files, laser files, engineering documents, and other proprietary and confidential information about Google's self-driving vehicle technology on disks in his personal Drobo 5D storage device. One Uber official told Levandowski not to destroy the disks. Kalanick told Levandowski that he "wanted nothing to do with the disks" and told Levandowski to "do what he needed to do."

51. Stroz delivered preliminary findings to MoFo, Yoo and Otto in April 2016 before the Board authorized the Uber-Otto Transaction. MoFo directly oversaw Stroz's work for Uber and appears to have facilitated the misappropriation orchestrated by Otto's Levandowski and Uber's Kalanick.

52. The preliminary findings and forensic analyses that Stroz provided covered a number of key subjects, including memoranda prepared by Stroz investigators of interviews with Levandowski and other Otto employees, forensic metadata and "last access reports" pertaining to all Otto employees personal devices, "last access reports" of all Google data self-identified by Otto employees in their interviews, and an oral report by Stroz concerning their preliminary fact-finding pertaining to the alleged disposal of certain Google data by Otto employees in March 2016.

53. Yoo was Uber's General Counsel at this time, and MoFo reported directly to her. According to information from the Waymo and Uber trial, Yoo was made aware of Stroz's preliminary findings no later than April 10, 2016, prior to the signing of the Merger Agreement the next day. Despite knowing the purpose of the Stroz investigation, none of the Director Defendants asked about the results of Stroz's investigation before approving the Merger Agreement and other transaction documents on April 11, 2016. Despite not being asked by the Board, Yoo had an obligation to inform the Board of what she knew regarding Stroz's

preliminary findings, and by failing to do so, she breached her fiduciary duties. According to reports, Yoo did express her "serious reservations" to Kalanick regarding the acquisition after being briefed on the Stroz preliminary findings.

54. As Kalanick presented the transaction to the Board on April 11, 2016, he too failed to present the preliminary findings of the Stroz investigators to the Board, but more importantly, the Board, in bad faith, did not bother to ask to see the results. Under the circumstances, and in the face of numerous red flags and atypical deal provisions that extended indemnity to the sellers for lies and "bad acts," the Board had an absolute obligation to inform itself of the results of the Stroz investigation. The Board deliberately buried its head and abdicated in bad faith to Kalanick, despite its knowledge that forensic investigators from Stroz had been commissioned to investigate the potential illegality of the deal.

55. Despite the preliminary findings by Stroz that Levandowski and others at Otto possessed substantial files containing confidential and proprietary Google information, and surreptitiously tried to delete more on the eve of the Stroz interviews, the Board met on April 11, 2016, and approved the Otto transaction. Stroz continued its investigation and delivered its full report on August 5, 2016 (the "Stroz Report"), before the transaction closed.

56. The Director Defendants, in bad faith and in breach of their fiduciary duty of loyalty, made themselves willfully ignorant about the material information

available to them, both in the Stroz preliminary findings and in the final Stroz Report delivered on August 5, 2016 prior to closing. The final Stroz Report (detailed below in Sect. E) was particularly damning, so much so that Defendant Gurley admitted that he would not have approved the Otto acquisition if he had bothered to read the Stroz Report or otherwise learn of Stroz's findings concerning Levandowski's actions.[4]

D. Uber's Board Approves a Bizarre Merger Agreement

57. Despite the array of bright red flags – of which the Board knew or should have known if it was not acting in bad faith and deliberately keeping itself ignorant – including the suspicious timing of the transaction, the alarming findings in Stroz's preliminary and final reports, and the fact that Uber was paying $680 million for a newly formed company that was "headquartered" in Levandowski's house, the Board approved Uber's entering into the Merger Agreement on April 11, 2016, whereby Uber would acquire Otto and appoint Levandowski the head of Uber's self-driving vehicle operations. At $680 million, the Otto acquisition was the largest acquisition Uber had made to that date.

[4] According to testimony and filings from the Waymo and Uber trial, it was only when Google filed a motion for preliminary injunction in connection with its complaint that the Director Defendants did ask for the final Stroz Report, which was then provided to them.

58. The Director Defendants set up, approved and carried through to closing the Uber-Otto Transaction using a transaction structure specifically designed to facilitate an illicit transaction, with various "atypical" deal features that demonstrate the Board had knowledge that this was likely a corrupt transaction. In doing so, the Director Defendants not only facilitated the raid on Google's assets, but created even more financial risk and liability for Uber.

59. In this regard, the Director Defendants agreed to structure the transaction to exclude post-closing indemnification for breaches of "representations and warranties" by the seller. Even though such indemnification provisions are uniformly obtained in private company acquisitions, the Uber Board instead agreed to the exact opposite: that *Uber would pay* to protect Levandowski when Google sued him and Uber for stealing its trade secrets and IP.

60. In a legitimate private company transaction, the buyer is provided post-closing indemnification as a matter of course, with negotiated details such as how much of the consideration will be held back in escrow for satisfaction of such indemnification claims.[5] This provides the buyer with clear recourse against the

[5] In addition to being common knowledge, counsel for the Defendants has written as much. Fenwick & West, Mergers & Acquisitions for High Technology Companies, at 8 (describing negotiations over the consideration to be held in escrow to satisfy post-closing indemnities as one of the "Key Deal Issues"); *id.* at 13 (describing the dynamics when a representation turns out to be false and noting

seller if it turns out that the representations underlying the transaction are false and typically also allows the wronged party to recover their attorneys' fees and collect directly against escrowed consideration.

61. In a legitimate transaction, one would also expect to find indemnification in favor of Uber for third-party claims of exactly the type that Google ultimately brought. Often indemnification is provided even for mere allegations by a third party that the buyer is in breach of some third party's rights in connection with the acquisition of the target. When there is an area of especially high risk, such as where there is some doubt that a company owns the IP that constitutes a substantial portion of its value, one would also expect to see a special indemnification provision that deals specifically with that particularly high risk area.

62. Here, the Merger Agreement contains customary representations regarding Otto's ownership of IP, but it omits any post-closing indemnification remedy for Uber. Contrary to what is customary, Uber is not indemnified for breaches of representations and warranties nor is it indemnified for any species of third party claims. The Merger Agreement also lacks a specific provision for the especially high risk area of Otto's ownership of its IP and related issues.

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that "LargeCo [the acquiror] **will expect** TechCo's [the target's] shareholders to indemnify it.") available at https://www.fenwick.com/FenwickDocuments/MA.pdf.

63. The omission of any indemnification remedy, in a $680 million transaction with bright red flags of potential illegality, is highly unusual and the Director Defendants were specifically made aware of it. Defendant Gurley testified that the Director Defendants were made aware and that he understood the terms to be "atypical." Of course, the omission of indemnification going in favor of Uber makes perfect sense when the true purpose of the transaction is a known and illegal raid on Google's assets.

64. Uber and the Director Defendants knew they could not ask Levandowski and Otto for post-closing indemnification because such a request would run counter to the transaction's very purpose. Providing for indemnification in an agreement makes it clear that the seller should bear all follow-on consequences for breaching its representations and warranties, not merely what one would be entitled to in a strict breach of contract action, and intense negotiation takes place over the parameters of how the seller will make the buyer whole. But here the known purpose of the transaction was for Uber to acquire key personnel, assets, technology, trade secrets and other IP that Otto had taken from Google's Waymo.

65. Additional particular facts make it clear that the transaction was structured around the fact that Otto was raiding Google. First, the Director Defendants went a step well beyond failing to indemnify Uber for Otto's breaches

of representations and warranties. At the same time, the Director Defendants approved side agreements that ***provided indemnification to Levandowski*** (and other Otto employees) for suits by Google for theft of IP. Uber agreed to indemnify Levandowski and other former Google employees[6] for any "Pre-Signing Bad Acts committed by or on behalf of any member of the [Otto family of companies]" that "reasonably arises or results from any facts, circumstances, activities or events contained or disclosed on the face of" the final report of Stroz (which would not be final for four months after the Board approved the Indemnification Agreement).

66. This is the exact opposite of the way a typical, legitimate transaction would be structured and further demonstrates that the Director Defendants knew exactly what they were doing was in bad faith. These facts demonstrate that the transaction was not the product of a valid exercise of business judgment.

67. Second, as discussed in more detail below, the Director Defendants approved proceeding to closing under the Merger Agreement even though the Stroz Report showed that Otto could not satisfy the Merger Agreement's closing condition requiring Otto's representations (including as to IP ownership) to be materially true at closing.

[6] The Otto employees who formerly worked for Google and were indemnified by Uber are: Levandowski; Lior Ron; Soren Juelsgaard; Colin Sebern; and Don Burnette.

68. The Stroz Report was finalized before closing and it was available to the Director Defendants who then, if the transaction was legitimate and not a known raid on Google, would have refused to close because Otto was in material breach of its representations and warranties and Uber was relieved of its obligation to close by virtue of Section 6.1 of the Merger Agreement as discussed below.

E. Stroz Delivers a Damning Final Report

69. The final Stroz Report was delivered on August 5, 2016.

70. The scope of misappropriation by Levandowski and other Otto individuals discovered by Stroz was breathtaking. Very early on, for example, Otto was poaching Google engineers, who also brought with them internal Google data and materials. One Google employee that Levandowski recruited to join Otto was found to possess 174,311 source code files on his personal devices.

71. Levandowski himself had downloaded more than 14,000 Waymo documents that contained trade secrets or confidential/proprietary information about Google's self-driving vehicle technology shortly before he resigned from Google.

72. Levandowski was also not forthcoming with Stroz. He initially told Stroz that there were no or few Google emails on his laptop, but Stroz uncovered the truth. Stroz subsequently discovered approximately 50,000 Google work emails downloaded onto his computer. Further undermining his credibility,

Levandowski had recently accessed ten of the emails. Stroz concluded that "[i]t is difficult to believe that Levandowski was not, prior to his interview, fully aware of the extent of the data that he had retained."

73. Stroz also found that Levandowski had searched for instructions on securely wiping files from his computer shortly before his interview with Stroz investigators. He also attempted to empty the trash folder on his computer during one of his Stroz interviews.

F. The Director Defendants Charge Ahead Through Closing

74. The Director Defendants' stories differ as to why the Board plowed ahead with the Otto acquisition instead of refusing to close on account of the findings in the Stroz Report. Under any of the varying stories, the Board breached its fiduciary duty of loyalty and committed waste.

75. The Director Defendants knew about and discussed the risk that Google would sue if it found out about what Levandowski had done. Kalanick testified that the topic of "whether or not Google would bring an action based on IP theft or solicitation of employees" was discussed. Gurley described the diligence as "remarkably critical to the transaction, in light of the presence of the indemnity and all those things." Yet, in bad faith, the Director Defendants in the face of the Stroz Report, went forward with closing the purchase of Otto.

76. The Stroz Report contained material information about, among other things, whether Otto and Levandowski had stolen Google IP and technology, whether Levandowski was an ethical business person to entrust with the management of a key division, and whether Otto was in breach of its representations in the Merger Agreement such that Uber was relieved of its duty to close the Merger. Given the non-market terms in the Merger Agreement including the reverse indemnification regarding theft of trade secrets and glaring lack of customary post-closing indemnification from Otto, the Director Defendants were on notice of the risks and liabilities they were putting on Uber.

77. Given the atypical Merger Agreement and reverse indemnification, the Board was presented squarely with the known duty to ensure that they were informed of all reasonably available material information regarding Otto's IP ownership and failed to act in the face of that known duty. The very structure of the transaction was set up and approved by the Director Defendants so as to facilitate a raid on Google's proprietary assets.

78. The atypical indemnification provisions were clearly explained in the presentations to the Board regarding the transaction, which included a heading entitled "Detailed indemnity summary," and Kalanick testified that the indemnification agreement with Levandowski and others was discussed during the April 11, 2016 meeting during which the Merger Agreement was approved.

79. The closing conditions to the Merger Agreement underscored once again that the Director Defendants approved a Merger Agreement that was specifically crafted around the fact that Otto was stealing from Google. The lead-in language to the closing conditions provides that the "Pre-Signing Bad Acts" – if fully and truthfully disclosed to Uber before signing the Merger Agreement – could not be used by Uber to refuse to close the transaction. In particular, the Merger Agreement provides in relevant part:

> The obligations of Parent, Purchaser and Merger Sub to effect the Merger and otherwise consummate the transactions contemplated by this Agreement are subject to the satisfaction (or, to the extent permitted, waiver by Purchaser), at or prior to the Closing, of each of the following conditions; ***provided*, that any Pre-Signing Bad Act (whether or not the subject of a Specified Claim) shall be disregarded in determining whether any of the conditions set forth in this Section 6 have been satisfied:** (emphasis added).
>
> . . .
>
> Bad Acts. "Bad Acts" shall mean (a) **fraud committed by or on behalf of the Company and/or committed by any Employee**, (b) **willful, intentional or deliberate conduct by an Employee or the Company that constitutes or directly leads or contributes to the infringement (direct or indirect) or misappropriation by an Employee or the Company of any Patents, Copyrights, Trademarks or Trade Secrets of such Employee's Former Employer**, including, without limitation, taking, removing and/or copying software, product plans, or invention disclosures, in electronic or tangible form that are owned by such Employee's Former Employer, (c) willful and/or intentional breach by the Company or any Employee of any fiduciary duty or duty of loyalty to such Former Employer and/or (d) willful and/or intentional breach by the Company or any Employee of any lawful and enforceable non-solicitation, noncompetition, confidentiality or other similar restrictive

> covenant or agreement between any Employee and such Employee's Former Employer.

80. The inclusion of such provisions – tailor-made to account for the fact that the transaction was an illegal raid on Google's assets – leave no doubt that the Director Defendants knew the illicit purpose of the transaction.

81. According to the Stroz Report, Levandowski was not forthcoming and truthful with Stroz. In fact, he engaged in almost cartoon-like misbehavior such as emptying his trash bin on his computer during a meeting with Stroz. Because of Levandowski's deceit, Uber and the Director Defendants had another chance to refuse to close the deal even though the closing condition proviso highlighted above severely narrowed what would be typical in such situations. Otto was in breach of its representations regarding its ownership of IP at the time of closing. Thus, Uber was relieved of its duty to close the merger pursuant to Section 6.1 of the Merger Agreement.

82. The results of the Stroz Report indicated that Uber had the right not to close the deal and, in fact, that pressing on through closing would violate Google's rights. The Director Defendants were obligated to inform themselves of the reasonably available, material information – including the contents of the Stroz Report – and to ensure that they and Uber were not breaking the law.

83. Despite the array of red flags, including the ones on the face of the agreements the Board approved that were engineered around the fraud, the Stroz

Report and the facial implausibility of Levandowski building a $680 million company from nothing in one month, the Director Defendants pressed forward with the illicit acquisition of Otto.

84. The parties announced the deal after it had closed on August 18, 2016.

G. Google Uncovers the Fraud and Sues Uber and Otto

85. As everyone had expected, Google was more than a bit suspicious of the remarkably quick purchase of Otto by Uber only weeks after Levandowski had left his employment at Waymo.

86. Google's suspicions that something improper was afoot were confirmed on December 13, 2016, when a Google employee inadvertently was copied on an email from one of its LiDAR-component vendors. The email was titled OTTO FILES and its recipients included an email alias indicating that the thread was a discussion among members of the vendor's "Uber" team. But for this errant email, the Defendants here might have succeeded in operating Uber in an unlawful manner for a longer period of time.

87. The email attached a machine drawing of an Otto circuit board that Google believed bore a striking resemblance to its own LiDAR circuit board – the design of which had been downloaded by Levandowski before his resignation.

88. Google filed suit against Uber and Otto on February 23, 2017, in the U.S. District Court for the Northern District of California.

89. Uber fought to prevent disclosure of Stroz's reports, causing Google to file a motion to compel on May 1, 2017. Federal District Judge William Alsup granted the order on June 8 and compelled production of the reports.

90. Demonstrating the gravity of what the documents revealed, Judge Alsup took the rare step of referring the case to the U.S. Attorney's Office in May 2017 "for investigation of possible theft of trade secrets" to determine whether criminal charges were justified against Levandowski, Kalanick, Uber, and others.

91. Levandowski (who is not a party in the Google litigation) sought to enjoin disclosure of the Stroz reports by attempting to assert his rights under the 5th Amendment against self-incrimination. The Federal Circuit Court of Appeals upheld Judge Alsup's order requiring production on September 13, 2017.

92. Uber finally disclosed the Stroz Report on or around September 16, 2017, along with numerous other documents concerning its scheme. Judge Alsup noted that "to say that this volume is surprising is an understatement. It's shocking. It's unbelievable."

93. He ordered a continuance of trial, which was to begin on December 4, 2017. But before the delayed trial could begin, still more wrongdoing came to light. The U.S. Attorney's office in Northern California made Judge Alsup aware of a whistleblower letter detailing Uber's efforts to gather information from its competitors and cover its tracks in doing so. An internal group at Uber called the

"market analytics team" was set up to gather trade secrets, code and other information about Uber's competitors. The letter also reportedly indicated that Uber hired someone "to help recruit employees of competitors to steal trade secrets" and communications about these efforts took place in a manner to "ensure there was no paper trail that would come back to haunt the company in any criminal or civil litigation."

94. Due to Levandowski's purported non-cooperation with Uber's litigation efforts and the increasingly bad publicity arising from the litigation, Uber terminated Levandowski's employment on May 30, 2017.

H. The Defendants' Breaches of Fiduciary Duty Led to the Google Litigation

95. Had the Director Defendants complied with their fiduciary duties by acting with loyalty and in good faith to protect the Company and ensure it was operating legally, Uber (i) would never have paid and wasted $680 million to knowingly acquire a startup built upon stolen trade secrets and IP, (ii) would have avoided a $245 million settlement with Google, and (iii) would have avoided the expenditure of massive amounts of attorneys' fees to defend itself, and its officer and directors, from Google's claims and federal criminal investigations.

DERIVATIVE ALLEGATIONS

96. Plaintiff brings this action derivatively to redress injuries suffered by the Company as a direct result of breaches of fiduciary duties by the Defendants.

97. Plaintiff currently owns Uber stock and has owned Uber stock continuously during the relevant period.

98. Plaintiff will adequately and fairly represent the interests of Uber and its stockholders in enforcing and prosecuting their rights, and has retained counsel competent and experienced in stockholder derivative litigation.

DEMAND ON THE BOARD IS EXCUSED AS FUTILE

99. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

100. Plaintiff has not made any demand on the Uber Board to institute this action against the Director Defendants. Such demand would be futile. The Otto acquisition was not the product of a valid exercise of business judgment by the Board, including the Director Defendants who acted with a lack of good faith and without informing themselves of reasonably available facts.

101. Moreover, as a result of their disloyalty, the Director Defendants face a substantial likelihood of personal liability and those on the Board that would have considered demand cannot consider a demand on its merits.

102. Further, a majority of the Board that would have considered a demand is not independent.

103. The Uber Board that would have considered a demand (the "Demand Board") is comprised of eleven (11) members, at least eight (9) of whom are

incapable of impartially considering whether to enforce the claims alleged herein for breaches of fiduciary duties committed by the Director Defendants because of their relationships with Uber executives, their relationships with Director Defendants, or because they themselves face a substantial likelihood of liability.

104. The Demand Board is made up of following eleven members: Kalanick, Ryan Graves ("Graves"), Garrett Camp ("Camp"), Arianna Huffington ("Huffington"), Matt Cohler ("Cohler"), David Trujillo ("Trujillo"), Ursula Burns ("Burns"), John Thain ("Thain"), Yasir Al-Rumayyan ("Al-Rumayyan"), Wan Ling Martello ("Martello"), and Dara Khosrowshahi ("Khosrowshahi"). Of these eleven, the nine conflicted directors who are incapable of impartially considering demand are Kalanick, Graves, Camp, Huffington, Al-Rumayyan, Cohler, Trujillo, Burns, and Thain.

105. Kalanick was on the Board for the approval and signing of the Merger Agreement through to the closing of the Uber-Otto Transaction. As detailed above, he was also the CEO of Uber and the chief protagonist that led Uber into this illegal transaction with Otto and Levandowski. Kalanick faces a particularly high risk of liability because he was the driving force behind the Otto acquisition despite having direct knowledge of Levandowski's illicit actions, and knowing the Stroz due diligence findings were highly material and devastating to the legitimacy

of the deal. Because Kalanick faces a substantial likelihood of liability, he is incapable of impartially considering a demand.

106. In addition to facing a substantial risk of liability because of their own activity, Graves, Camp and Huffington, are also incapable of impartially considering a demand because they lack independence from, or are beholden to, Kalanick.

107. Graves is beholden to, and not independent from, Kalanick because Kalanick made Graves the Company's first employee, a position that is responsible for effectively all of Graves' wealth. On Uber's website, Kalanick recounts "[w]e were also interviewing a General Manager candidate – a super sharp guy out of Chicago (working for GE of all places!) named Ryan Graves. Funny story how we brought him in. I was hitting Craigslist, Twitter, and other channels looking for the right candidate. What resulted was the Awesomest job post and response I've ever seen." Graves was "relatively inexperienced before his serendipitous start at Uber." He served as the Company's first CEO in 2010 and then became Uber's general manager when Kalanick became CEO in December 2010, a move that both say was a friendly one. Graves reaped millions of dollars in compensation over the years at Uber that he otherwise would not have received had it not been for Kalanick.

108. Graves and Kalanick, moreover, have a close personal relationship. Graves is frequently described as a confidant and close ally of Kalanick. Graves therefore could not independently consider suing Kalanick for his breaches of fiduciary duties, nor would he impartially consider suing himself in a situation where he faces a substantial likelihood of liability.

109. Camp is also beholden to, and not independent from, Kalanick as the Company's co-founder and close personal friend. The two conceived of the idea for Uber "on a snowy Paris evening in 2008, [when Kalanick and Camp] had trouble hailing a cab," according to Uber's website.[7] Kalanick states that "Camp and I were hanging out in Paris for a week at Loic and Geraldine LeMeur's LeWeb conference. Amongst the amazing food, the copious amounts of wine and inevitable nightlife crawls there were all kinds of discussions about what's next."[8] Camp could not independently consider suing Kalanick for his breaches of fiduciary duties, nor would he impartially consider suing himself in a situation where he faces a substantial likelihood of liability.

110. Huffington – who Kalanick unilaterally appointed to the Board on April 27, 2016 – is beholden to and not independent of Kalanick due to their business relationship and close personal friendship which preceded her

[7] Our Trip History (at https://www.uber.com/our-story/).

[8] Uber's Founding, Dec. 22, 2010 (at https://newsroom.uber.com/ubers-founding/).

appointment. Kalanick and Huffington collaborated prior to her appointment on projects to promote Huffington's book "The Sleep Revolution."[9] Once she came on board at Uber, she started promoting her own wellness business, including receiving consulting fees her company was later forced to return.[10] Huffington has stood by Kalanick despite the controversies at Uber, championing a "Travis 2.0" to lead the Company,[11] and assuring reporters that Kalanick would improve his behavior.[12] As Kalanick's misbehavior became public, Huffington defended him in the press and in the boardroom and insisted that he would remain as CEO. Huffington used her reputation as an executive focused on the human side of business to shield Kalanick from scrutiny and defend his ability to change and maintain leadership of Uber. In the wake of some of the early sexual harassment allegations at Uber, Huffington defended Kalanick by "initially den[ying] sexual

[9] Arianna Huffington joins Uber's board of directors, April 27, 2016 (at https://www.recode.net/2016/4/27/11586456/arianna-huffington-joins-ubers-board-of-directors).

[10] Eric Newcomer and Brad Stone, *The Fall of Travis Kalanick Was a Lot Wierder and Darker Than You Thought*, BLOOMBERG BUSINESSWEEK (Jan. 18, 2018), *available at*: https://www.bloomberg.com/news/features/2018-01-18/the-fall-of-travis-kalanick-was-a-lot-weirder-and-darker-than-you-thought

[11] Can Uber's Travis Kalanick be redeemed? Arianna thinks so. (Me, not so much.), June 20, 2017 (at https://www.recode.net/2017/6/20/15834156/uber-travis-kalanick-arianna-huffington-lawsuit-investigation-culture-silicon-valley-tech).

[12] Mike Guy, *Uber's Travis Kalanick, Defender by Arianna Huffington, Will Remain CEO*, THEDRIVE (March 22, 2017), available at: http://www.thedrive.com/tech/8522/ubers-travis-kalanick-defended-by-arianna-huffington-will-remain-ceo

harassment was 'systemic' at Uber" before finally having to admit that was the case. She has been considered his "staunchest ally."[13] In fact, Uber executives and Board members suspected that Huffington was "serving as his proxy" when Kalanick was absent and when the rest of the Board discussed potentially firing Kalanick as CEO, Huffington defended him.[14] The relationship between Kalanick and Huffington is reportedly so close that Huffington visited Kalanick's family members in the hospital and made him omelettes.

111. Huffington (along with Kalanick, Graves, Camp, and Al-Rummayyan), moreover, was one of five Demand Directors who were on the Board when it agreed to close and consummate the Uber-Otto Transaction. As such, Huffington faces a substantial likelihood of liability for actions and inactions in approving the Uber-Otto Transaction without reference to the Stroz Report or insisting upon a thorough explanation of the Stroz Report's findings.

112. Al-Rummayan, like Kalanick, Graves, Camp and Huffington, was on the Board when it agreed to close and consummate the Uber-Otto Transaction. As

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[13] Eric Newcomer and Brad Stone, *The Fall of Travis Kalanick Was a Lot Wierder and Darker Than You Thought*, BLOOMBERG BUSINESSWEEK (Jan. 18, 2018), *available at*: https://www.bloomberg.com/news/features/2018-01-18/the-fall-of-travis-kalanick-was-a-lot-weirder-and-darker-than-you-thought.

[14] Eric Newcomer and Brad Stone, *The Fall of Travis Kalanick Was a Lot Wierder and Darker Than You Thought*, BLOOMBERG BUSINESSWEEK (Jan. 18, 2018), *available at*: https://www.bloomberg.com/news/features/2018-01-18/the-fall-of-travis-kalanick-was-a-lot-weirder-and-darker-than-you-thought.

such, Al-Rummayan faces a substantial likelihood of liability for actions and inactions in approving the Uber-Otto Transaction without reference to the Stroz Report or insisting upon a thorough explanation of the Stroz Report's findings.

113. Each of the above five Demand Directors (Kalanick, Graves, Camp, Huffington, and Al-Rummayan) were aware of myriad and bright red flags surrounding Otto and Levandowski detailed above. These signals gave Huffington, Kalanick, Graves, Camp, and Al-Rummayan reason to believe that Otto's employees had knowingly broken the law by intentionally stealing Google's technology, trade secrets, and IP. These Board members acted disloyally when they approved the closing of the Uber-Otto transaction because they either ignored the Stroz Report – which signaled such illegality was afoot – or they intentionally disregarded it in bad faith. Furthermore, even without Stroz's expertise, it was so obvious that Otto would not have been a viable company for Uber to buy for $680 million within mere weeks after its founding, and only bad faith, illegal and unethical business practices could have led these Board members to disregard Otto's blatant violation of Google's legal rights.

114. Two additional directors on the Demand Board, Matt Cohler ("Cohler") and David Trujillo ("Trujillo"), are incapable of impartially considering a demand because of their close personal and business relationships with Director

Defendants whose wrongdoing is the subject of this Complaint and who both face a substantial likelihood of liability as a result.

115. Cohler is a partner of Benchmark. He replaced his fellow partner at Benchmark (Director Defendant Gurley) on Uber's Board when Gurley resigned in June 2017. Cohler cannot impartially consider a demand because he is beholden to and not independent from Gurley, who faces a substantial likelihood of liability. Because Gurley and Cohler are both partners at Benchmark, Cohler would not authorize a suit against his partner Gurley for breach of fiduciary duty regardless of the merits. According to an article in FORTUNE magazine, Gurley helped to recruit and mentor Cohler at Benchmark and according to FORBES they are two of only 5 partners of the small firm.[15] If Cohler were to authorize a suit against Gurley, it would not only likely devastate an important relationship, it would also cause damage to Benchmark and the personal interests of Cohler as a partner in that firm. Investors in Benchmark would likely raise questions regarding the faithfulness of Gurley in overseeing their investments if he was alleged, by his own partner, of engaging in knowing unlawful behavior that constitutes a breach of the fiduciary

[15] *See* http://fortune.com/2013/02/11/tech-star-bill-gurley/ (describing how Gurley recruited and mentored Cohler at Benchmark); https://www.forbes.com/sites/alexkonrad/2015/03/25/benchmark-makes-other-firms-look-outmatched/#1fdcef514006 (describing the minimalist structure of Benchmark with only five total partners in 2015, with Gurley and Cohler among them).

loyalty. Cohler could expect severe consequences not only vis-a-vis Gurley, but also in relation to the other partners at Benchmark and its clients. Accordingly, Cohler could not impartially consider a demand.

116. Trujillo has been a partner of TPG Capital since 2006 and cannot impartially consider a demand because he is beholden to and not independent of Director Defendant Bonderman, who is himself a partner (and co-founder) at TPG, and faces a substantial likelihood of liability. Trujillo replaced Bonderman in June 2017, after Bonderman made a sexist joke about fellow board member Huffington when discussing issues concerning rampant allegations of sexual harassment at Uber. Trujillo would not authorize a suit against Bonderman for breach of fiduciary duty regardless of the merits on account of their close personal and professional relationship. If Trujillo was to authorize a suit against Bonderman, it would not only likely devastate an important relationship, it would also cause damage to TPG and to Trujillo's personal interests as a partner in that firm. Investors in TPG would likely raise questions regarding the faithfulness of Bonderman in overseeing their investments if he was alleged, by his own partner, of engaging in knowing unlawful behavior that constitutes a breach of the fiduciary loyalty. Trujillo could expect severe consequences not only vis-a-vis Bonderman, but also in relation to the other partners at TPG and its clients. Accordingly, Trujillo could not impartially consider a demand.

117. Two other Demand Directors – Ursula Burns and John Thain, the Company's two most recently named directors – are beholden to Kalanick. The circumstances leading to their appointment to the Board demonstrate why they cannot impartially consider demand. Kalanick appointed Burns and Thain during a power struggle within Uber. In the summer of 2017, Benchmark sued Kalanick, alleging that he had engaged in fraud (in part related to alleged misrepresentations regarding the Uber-Otto Transaction). This followed Kalanick's ouster as CEO, which Benchmark and Gurley had pushed. Kalanick was then threatened with losing even more power if the Board determined to approve a transaction that would result in Kalanick losing his disproportionate voting power. When Kalanick resigned, he had promised to give up his Board seat along with two other seats that he controlled, but now that he saw his voting power being threatened, he reneged on that agreement. He held onto his own seat and, in a blunt show of force, he appointed Burns and Thain with one clear purpose: to bolster and preserve Kalanick's power on the Board. The appointment of Burns and Thain, therefore, was the result of an overt powerplay by Kalanick and it was understood to be a move "to reassert [Kalanick's] control."[16]

[16] Katie Benner and Mike Isaac, *In Power Move at Uber, Travis Kalanick Appoints 2 to Board*, N.Y. Times (Sept. 29, 2017) available at https://www.nytimes.com/2017/09/29/technology/uber-travis-kalanick-board.html.

118. Kalanick unilaterally appointed both Thain and Burns to the Board on September 29, 2017, over the objection of the other Board members during a time at which Kalanick was desperate to shore up his power over, and support on, the Board. Underscoring that Burns and Thain were not expected to be ordinary Board members, Kalanick's successor as Uber's CEO, Dara Khosrowshahi, characterized the appointments as "disappointing news" and "highly unusual" in a note to staff.[17] A corporate governance expert said that Burns and Thain "seem to be walking in the door with a button that says Team Travis, instead of Team Shareholder."[18]

119. Burns, moreover, is further beholden to Kalanick due to her employment with Teneo Holdings, a high-priced public relations firm that Kalanick retained to manage his image after the controversies which enveloped him and Uber in 2017. Given the degree of Kalanick's troubles, this engagement is likely material, and it would be bad for business for Burns to sue the CEO whose image she has been retained and paid to improve.

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[17] Uber CEO Dara Khosrowshahi says Travis Kalanick's board move is 'disappointing' and 'unusual,' Sept. 30, 2017 (at https://www.recode.net/2017/9/30/16391392/dara-khosrowshahis-letter-uber-staff).

[18] Meet the High-Powered New Uber Directors Representing 'Team Travis,' Oct. 3, 2017 (at https://www.thestreet.com/story/14327008/1/kalanick-uber-director-appointees.html).

COUNT I

DERIVATIVE CLAIM FOR BREACHES OF FIDUCIARY DUTIES AGAINST THE DIRECTOR DEFENDANTS

120. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

121. The Director Defendants, as Uber directors, owe the Company the fiduciary duties of loyalty and good faith.

122. The Director Defendants knowingly and in bad faith facilitated the acquisition of stolen or misappropriated technology, IP, and trade secrets from Google, or decided to bury their heads in the sand and deliberately failed to inform themselves concerning a critical corporate decision despite the knowable and grave risks raised in the Stroz reports.

123. The Director Defendants breached their fiduciary duties of loyalty to the Company by approving the illegal Otto transaction and closing the deal in bad faith in the face of known illegal activity.

124. The risks to Uber that the Director Defendants' breaches of fiduciary duties have caused – as any reasonable person, not acting in bad faith, could have predicted – have now materialized. In addition to the waste of $680 million for a now-worthless, illegal acquisition, Uber was also exposed to the Google litigation, in which it was forced to pay a settlement with a $245 million value and pay

gigantic attorneys' fees. Thus, the damages to the Company on account of the bad faith actions and inactions of the Director Defendants detailed herein, in breached their fiduciary duties, amount to a loss in excess of $1 billion.

125. As a consequence of the Director Defendants' breaches of their fiduciary duties, the Company has been harmed.

COUNT II

DERIVATIVE CLAIM
FOR BREACH OF FIDUCIARY DUTY
AGAINST THE OFFICER DEFENDANTS

126. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

127. The Officer Defendants, as Uber officers, owed the Company the fiduciary duties of due care, loyalty and good faith.

128. The Officer Defendants knowingly and in bad faith facilitated the acquisition of stolen or misappropriated technology, IP and trade secrets from Google, or decided to withhold material information from the Board regarding the the knowable and grave risks raised in the Stroz reports.

129. The Officer Defendants breached their fiduciary duties of loyalty, and care, acting in bad faith, by causing Uber to engage in an illegal transaction with Otto in the face of known illegal activity.

130. The risks to Uber that the Officer Defendants' breaches of fiduciary duties have caused – as any reasonable person, not acting in bad faith, could have predicted – have now materialized. In addition to the waste of $680 million for a now-worthless, illegal acquisition, Uber was also exposed to the Google litigation, in which it was forced to pay a settlement with a $245 million value and pay gigantic attorneys' fees. Thus, the damages to the Company on account of the bad faith actions and inactions of the Officer Defendants detailed herein, in breached their fiduciary duties, amount to a loss in excess of $1 billion.

131. As a consequence of the Officer Defendants' breaches of their fiduciary duties, the Company has been harmed.

COUNT III

DERIVATIVE CLAIM
FOR CORPORATE WASTE
AGAINST ALL DEFENDANTS

132. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

133. Despite knowing that Uber-Otto Transaction was illegal and involved a raid on Google's proprietary technology, trade secrets, IP and other corporate assets, the Defendants acted in bad faith by causing Uber to pay $680 million to acquire Otto.

134. Uber received essentially nothing of value, and nothing that was legally usable from Otto, in exchange for $680 million. Thus, what Uber received was so inadequate that no person of ordinary, sound business judgment would deem the transaction to be a fair exchange or to be worth what Uber has paid.

135. No reasonable director or officer of Uber, acting in a good faith pursuit of corporate interests, would have agreed to such one-sided economic and other transaction terms, or to such disproportionately small consideration.

136. Uber has been damaged as a result of the defendants' corporate waste.

RELIEF REQUESTED

WHEREFORE, Plaintiff demands judgment as follows:

A. Finding that demand on the Demand Board is excused as futile;

B. Finding that the Director Defendants failed to exercise their business judgment under the circumstances and committed waste;

C. Finding the Director Defendants liable for breaching their fiduciary duties of loyalty;

D. Finding the Officer Defendants liable for breaching their fiduciary duties of loyalty and care;

E. Finding all Defendants liable for corporate waste;

F. Awarding the Company compensatory damages, together with pre- and post-judgment interest;

G. Awarding Plaintiff the costs and disbursements of this action, including attorneys', accountants' and experts' fees; and

H. Awarding such other and further relief as is just and equitable.

Dated: April 3, 2018

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