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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GREATER PENNSYLVANIA CARPENTERS' PENSION FUND, derivatively on behalf of nominal defendant IMPERVA, INC., Plaintiff Below, Appellant, v. CHARLES GIANCARLO, THERESIA GOUW, SHLOMO KRAMER, STEVEN KRAUSZ, ALBERT PIMENTEL, FRANK SLOOTMAN, DAVID STROHM, JAMES TOLONEN, and IMPERVA, INC. Defendants Below, Appellees.	No. 531, 2015 APPEAL FROM THE OPINION AND ORDER DATED SEPTEMBER 2, 2015 OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN C.A. No. 9833-VCP

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Plaintiff-appellant ("Plaintiff") is a stockholder of nominal defendant Imperva, Inc. ("Imperva" or the "Company"). After conducting a books-and-records investigation under 8 *Del. C.* § 220, Plaintiff filed a derivative action in the Court of Chancery alleging that the then-members of the board of directors of Imperva (the "Board") breached their fiduciary duties to Imperva in connection with the Company's approximately $60 million acquisition of Skyfence Networks, Ltd. ("Skyfence"), a company (a) with no historical customers or sales, (b) that was running out of money, and (c) that was 43%-owned by Imperva's founder, then-CEO, and then-Chairman Shlomo Kramer ("Kramer").

Although Kramer recused himself from Imperva's side of the acquisition (the "Acquisition") process, Kramer's management team at Imperva negotiated the Acquisition while a conflicted and previously-formed acquisitions committee (the "Acquisitions Committee"), without independent legal or financial advisors, purported to oversee the process.

On September 2, 2015, the Court of Chancery issued an oral ruling and order,[1] granting Defendants' motion to dismiss for failure to plead sufficient facts to excuse demand under Court of Chancery Rule 23.1 ("Rule 23.1"). Plaintiff appeals from that judgment.

[1] Attached hereto as Exhibit A.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in holding that demand was not excused under the first prong of *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) even though a majority of Imperva's nine-member demand board of directors (the "Demand Board") was interested in the Acquisition or lacked independence from Kramer. Though the Court of Chancery found that Kramer was interested in the Acquisition, it held that every other member of the Demand Board was independent of him. In so ruling, the Court of Chancery improperly rejected particularized allegations regarding certain directors' past, present, and prospective dealings with Kramer, failed to draw numerous reasonable inferences in Plaintiff's favor, and ignored the context relevant to the directors' affiliations with Kramer.

2. The Court of Chancery further erred in holding that Plaintiff failed to plead a reasonable doubt that the Board's decision to acquire Skyfence was the product of a valid exercise of business judgment. Having determined that Kramer was the only conflicted member of the Board, the Court of Chancery further and erroneously determined that Kramer's subordinate managers, who negotiated the Acquisition, were similarly independent of him. As a result, the Court of Chancery incorrectly analyzed the Acquisition as if it were an arms-length, third-party transaction overseen and negotiated by an informed and fully-independent Acquisitions Committee and Board.

STATEMENT OF FACTS

I. Background of Kramer, Imperva, and the Imperva Board

Kramer is a highly successful serial entrepreneur and angel investor in data security. A22-23, 26-27, 34. In 1993, Kramer founded Check Point, a data security company he grew into a tech giant with a market capitalization of more than $13.5 billion. A34. Check Point's success propelled Kramer within the data security industry. Kramer "has founded or backed six Israeli online-security companies" and "has taken the money earned from the deals and initial public offerings and plowed it back into new startups and technologies." A67 (quoting Gwen Ackerman, David Wainer & Sarah Frier, *Israel Emerging as Cybersecurity Powerhouse with Investor Kramer*, Bloomberg News, Feb. 4, 2014).

In 2002, Kramer founded data security company, Imperva, with Amichai Shulman ("Shulman") and Mickey Boodaei ("Boodaei"). A22, 28. At all relevant times, Kramer was the CEO and Chairman of Imperva. A22.

Between 2002 and 2008, Imperva received four rounds of venture capital funding – totaling $53.7 million – from Accel Partners ("Accel"), U.S. Venture Partners ("U.S. Venture"), Greylock Partners ("Greylock"), Venrock, and Meritech Capital Partners. A25.

In exchange for their venture capital, Accel, U.S. Venture and Greylock (collectively, the "Venture Capital Firms") each received Board representation.

A25-26. Gouw, then a partner at Accel, joined the Board in May 2002. A22, 25-26. Krausz, a Managing Member of U.S. Venture, joined the Board in May 2003. A23, 25-26. In August 2011, Strohm and Slootman, current and former Greylock partners, respectively, joined Greylock partner Asheem Chandna ("Chandna") on the Imperva Board. A24-26.

Imperva raised $90 million its initial public offering ("IPO") in November 2011 by selling 5 million shares for $18 per share. A26. As of April 1, 2012, Kramer owned 15.6% of Imperva's outstanding stock, Accel owned 17.8%, U.S. Venture owned 9.2%, and Greylock owned 6.5%. A26-27. The Venture Capital Firms collectively held nearly 10 million shares. A27. Between April 1, 2012 and April 1, 2013, the Venture Capital Firms sold all or a substantial majority of their holdings, generating hundreds of millions of dollars in proceeds and securing substantial returns on their investments. A27.

At the time of the Acquisition, Kramer and the Venture Capital Firms' representatives – Gouw, Krausz, Strohm, and Slootman – occupied five of the Board's eight seats. A22-24.

Gouw is, according to Kramer, his "go to investor for security," his "collaborator," and a member of his "team long term." A33. As indicated above, Gouw joined the Board in May 2002 as a representative of Accel, whose Imperva investment generated a significant return and established Gouw's reputation in the

venture capital industry. A63. Gouw has since started her own venture capital firm, Aspect Ventures ("Aspect"), which markets Gouw's relationship with Kramer to prospective investors and entrepreneurs. A33, 63. Aspect's website carries the following endorsement from Kramer: "The instant we partnered with Theresia [Gouw] as one of our first investors, I knew I had a collaborator I wanted on my team long term . . . She is our go to investor for security." A33. Gouw's relationship with Kramer has afforded her additional investment opportunities, some even alongside Kramer. In June 2014, Gouw and Kramer jointly participated in a $10 million Series A funding round in big data analytics company Exabeam. A33, 63. This was Gouw's first Series A investment since founding Aspect.[2] A63. Gouw also serves on the board of directors of ForeScout, a network security company in which Kramer was an early investor alongside Accel and for which he serves on the advisory board. A63.

Likewise, Krausz and his venture capital firm, U.S. Venture, have enjoyed a series of successes investing in or alongside Kramer. A33-34, 64-66. These

[2] Kramer and Aspect Ventures are also co-investing in Exabeam's $25 million financing round announced September 30, 2015. *See Exabeam Raises $25 million (PE Hub)*, Aspect Ventures, Sept. 30, 2015, http://www.aspectventures.com/exabeam-raises-25-mln/ ("Exabeam's previous investors – Aspect Ventures, Investor Shlomo Kramer and Norwest Venture Partnes – also participated in the Series B funding"). Gouw is also leading an investment in another of Kramer's ventures, Cato Networks, along with Krausz. Both Gouw and Krausz will also join Cato Networks' board of directors. *Cato Networks Secures $20 Million in Series A Round From U.S. Venture Partners and Aspects Ventures*, Nasdaq Global Newswire, Oct. 27, 2015, http://www.globenewswire.com/news-release/2015/10/27/780393/0/en/Cato-Networks-Secures-20-Million-in-Series-A-Round-From-U-S-Venture-Partners-and-Aspect-Ventures.html.

investments include Check Point, Imperva, and Trusteer, which was acquired by IBM in 2013 for at least $700 million, and in which U.S. Venture and Kramer were the only outside investors. A27, 33-34, 64-65. In an August 15, 2013 *Fortune* interview, Krausz was asked about Trusteer:

> Fortune: How did you hear about Trusteer?
>
> Krausz: "USVP has a long history in the security space, with companies like Check Point Software and Imperva. In fact, I'm still on the board of Imperva with Schlomo Kramer – and another Imperva co-founder is Mickey Boodaei, who co-founded Trusteer. So I knew both of them. Plus, we have [a] very active strategy of investing in Israeli companies, but from the West Coast. So Schlomo invested in Trusteer's Series A, and we came in on the Series B as the company's only VC investor.

A65.

Krausz also serves on Trusteer's board of directors with Kramer and Imperva co-founder, Boodaei, who is the founder and CEO of Trusteer. A34, 64-65. Krausz continues to invest alongside Kramer.[3]

Similarly, Strohm and his venture capital firm, Greylock, have a close business relationship with Kramer. A26-27, 67-69. Strohm has been with Greylock for 34 years. A24, 67. Kramer and Greylock were the founding investors in successful data analytics company Sumo Logic, and co-investors in Palo Alto Networks, in which Kramer was an angel investor and a former member

[3] *See supra* at note 2 (noting a recent investment by Krausz/U.S. Venture in Kramer-affiliated Cato Networks).

of the board of directors. A26, 68. Kramer and Greylock's relationship is well-established. Strohm's partner at Greylock, Chandna, stated in a February 2014 *Bloomberg News* article that:

> [Kramer] is my first call in terms of bouncing ideas and brainstorming in terms of security. He's able to map how these markets are headed. His crystal ball is as strong or as clear as anybody's out there.

A26, 68. Chandna's relationship with Kramer dates back to 1996, when Chandna served as an executive at Check Point. A26. As explained above, Chandna also served on the Imperva Board from 2003 until 2013, and currently serves on the board of directors of another Kramer-affiliated entity, Palo Alto Networks. A26. Moreover, like Gouw's venture capital firm, Aspect, Greylock markets its relationship with Kramer by displaying an endorsement from him on its website. A68-69.

Finally, Slootman is also a prominent angel investor in the "Big Data" sector, having invested in numerous start-ups, including alongside Greylock. A24, 69-70. Slootman was the former CEO of Data Domain, which was backed by Greylock. A24, 69. After taking Data Domain public, and selling it for more than $2 billion, Slootman joined Greylock as a partner in January 2011. In May 2011, Slootman left Greylock to become President and CEO of another Greylock-backed venture, ServiceNow. A24, 69. Slootman served alongside Kramer as an advisor

for Accel's "Big Data" venture funds and continues to expand his angel investing activity. A70.

II. Kramer's Management Team Decides Imperva Should Acquire Skyfence and the Conflicted Acquisitions Committee Oversees the Process

As early as June 20, 2013, Imperva senior executives began discussions with a nascent cloud security company, Skyfence, concerning a potential acquisition. A29-30. Kramer was Skyfence's largest shareholder, owning 43.5% of the company. A22, 28-29. Imperva co-founders Shulman and Boodaei were Skyfence's other largest shareholders. A25, 28-29. Skyfence was still in beta testing and was just beginning to emerge from "stealth mode" (*i.e.*, developing and testing its products in secret). A29. Skyfence had yet to generate any revenue and needed to raise capital by mid-2014 just to continue operating. A29, 57-59.

Three Imperva executives spearheaded discussions with Skyfence: Mark Kraynak ("Kraynak"), Imperva's then-Senior Vice President, Worldwide Marketing; Farzad Tari ("Tari"), Imperva's then-Vice President, Business Development; and Edgar Capdevielle, Imperva's then-Vice President, Product Management and Product Marketing. A29-30. Prior to joining Imperva, Kraynak and Tari held management positions at Kramer's Check Point. A30-31.

On July 29, 2013, or at least one month after discussions with Skyfence began, Kramer's management team informed two members of the Board of their discussions with Skyfence. A31-32.

That day, Kraynak contacted Gouw and Krausz, who comprised two-thirds of a previously-formed Acquisitions Committee that theretofore had included Kramer (A22), about a "potentially fast-moving investment opportunity" to acquire one of several software-as-a-service application firewall ("SAF") companies. A31-32. Kraynak indicated that Skyfence was the "most likely target." A32.

The Acquisitions Committee held a special meeting on July 31, 2013, where Kraynak disclosed that Kramer's management team had already commenced discussions with four SAF companies, including Skyfence. A35-36. Gouw, who was the only member of the Acquisitions Committee or Board in attendance, directed Kraynak to continue talks with Skyfence. A36.

The Acquisitions Committee met with Kramer's management team again on August 15, 2013 and October 2, 2013. A36-37. At the October 2 meeting, the Acquisitions Committee authorized Kraynak to negotiate a non-binding term sheet with Skyfence. A37. The negotiations were handled entirely by Imperva management, without the assistance of any independent Board member or advisor. A37-39.

III. The Board Learns of the Potential Acquisition and Allows Management and the Acquisitions Committee to Remain in Charge of the Process

On October 9, 2013, the full Board met for the first time regarding the then-potential Acquisition. A38. Kraynak led the discussion and provided the Board an overview of management's negotiation of a non-binding term sheet with Skyfence. A38. The Board did not discuss (a) retaining legal or financial advisors, (b) the independence of the Acquisitions Committee in light of Kramer's involvement in the deal, or (c) whether the members of management negotiating with Skyfence, including Tari and Kraynak, suffered potential conflicts of interest. A38-39.

After the October 9, 2013 Board meeting, the Acquisitions Committee remained in charge of the process, while the same members of management continued to negotiate with Skyfence. A39-40. The full Board would not meet again until January 2014. A41.

In the interim, on November 24, 2013, Kramer's managers executed a non-binding term sheet to acquire Skyfence for $60 million. A39. The Acquisitions Committee met three times following the Board's October 9, 2013 meeting, but at no point did it consult an independent legal or financial advisor. A39-40. Rather, it relied solely on information provided by Imperva management. A39-40. Although the only full Board meeting had taken place in October 2013 (A38-40), Acquisitions Committee meeting minutes from January indicated that Board approval of the Acquisition was "anticipated." A40.

IV. The Board Approves the Acquisition

On February 4, 2014, the Board met to approve the Acquisition. A41. An investment bank, Pacific Crest Securities ("Pacific Crest"), presented a fairness opinion to the Board. A41. As indicated above, neither the Board nor the Acquisitions Committee retained an independent financial advisor during the Acquisition process. A31-41. However, the prior month, Imperva's CFO Terry Schmid, who also served at the pleasure of Kramer, recommended that the Acquisitions Committee retain Pacific Crest – the investment bank that co-managed Imperva's IPO – to render a fairness opinion. A40.

Pacific Crest's valuation of Skyfence utilized revenue projections formulated by Imperva and Skyfence managers. A41-42. In its fairness opinion, Pacific Crest stated that it had not verified the accuracy or completeness of the information provided by Kramer's management teams, including the revenue projections that Pacific Crest used for its discounted cash flow analysis. Although Skyfence had yet to generate any revenue, and would not generate any sales prior to the Acquisition, Pacific Crest assumed the company would experience immediate and exponential growth:

	2014E	**2015E**	**2016E**	**2017E**	**2018E**	**2019E**
Total Net Revenues	$800K	$2.5M	$7M	$17.5M	$31.5M	$50.4M
Revenue Growth	N/A	213%	180%	150%	80%	60%

A42.

Pacific Crest also conducted a comparable companies analysis. A42. The analysis compared Skyfence to only publicly-traded companies with market capitalizations exceeding $1 billion, including several companies with equity values greater than $8 billion. A42.

Following Pacific Crest's presentation, the Board approved the Acquisition on the precise terms negotiated by Kramer's management team. A43.

On February 6, 2014, Imperva and Skyfence entered into a share exchange agreement pursuant to which Imperva agreed to acquire all of Skyfence's outstanding common stock in exchange for approximately $60 million. A43. The deal consideration originally consisted of $2.8 million cash, payable to Kramer and Skyfence's other founders with the remainder purposely paid in Imperva stock. A44-45, 77-80.

V. Kramer and Imperva Amend the Acquisition to Avoid a Stockholder Vote

Section 312.03 of the New York Stock Exchange listing rules prohibits the issuance of more than one percent of a listed company's outstanding stock to a related party absent stockholder approval. A46-47. Since the Acquisition resulted in the issuance of more than one percent of Imperva's outstanding common stock to Kramer, but did not receive stockholder approval, the Acquisition violated the listing rules. A46-48.

Rather than put the Acquisition to a stockholder vote, as the listing rule required, Kramer and Imperva management amended the Acquisition "for the purpose of ensuring that" the Acquisition did "not require the approval of Imperva's stockholders." A52-53. The revised terms provided Kramer $16.1 million in cash, or approximately 23% of Imperva's available cash and cash equivalents. A51. The amendment, like the underlying Acquisition, was negotiated entirely by management without the aid of any independent Board members. The Acquisitions Committee approved the amendment on February 18, 2014. A52. The February 18 meeting was the Acquisition Committee's one and only meeting concerning the amendment. The Company publicly announced the amendment on February 21, 2014 in a form 8-K that did ***not*** explain or indicate that the Acquisition (a) as originally structured, required stockholder approval, or (b) had been amended for the sole purpose of avoiding a stockholder vote. A53. Five days later, the Board approved the amendment. A53.

The Court of Chancery summarized the amendment thusly:

> you miss a fairly significant problem when you go out and put out a deal in violation of the New York Stock Exchange rules. And then you come back and you paper it over, still without outside counsel. And the way you paper it over is put more cash into the hands of your CEO.

A166.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN FINDING THAT A MAJORITY OF THE DEMAND BOARD WAS INDEPENDENT AND DISINTERESTED

A. Question Presented

Did the Complaint allege with particularity a reasonable doubt that four members of the Demand Board were independent from Kramer?[4] This issue was preserved for appeal. A60, 62-72, 169-170.

B. Standard of Review

This Court's review of a trial court's grant of a motion to dismiss under Rule 23.1 is *de novo* and plenary. *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000). The Court must accept all well-pleaded allegations as true and draw all reasonable inferences in the plaintiff's favor. *Beam v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004).

C. Merits of Argument

A plaintiff demonstrates demand futility where, "under the particularized facts alleged, a reasonable doubt is created that" at least a majority of the board of directors is disinterested or independent. *Aronson*, 473 A.2d at 814. When

[4] There is no dispute that Kramer was interested in the Acquisition. *See, e.g.*, Ex. A at 7 ("defendants concede that Kramer is interested"); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993), *decision modified on reargument*, 636 A.2d 956 (Del. 1994) ("Classic examples of director self-interest in a business transaction involve either a director appearing on both sides of a transaction or a director receiving a personal benefit from a transaction not received by the shareholders generally").

determining whether a plaintiff has adequately alleged a reasonable doubt regarding a director's independence, a trial court must "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." *Del. Cty. Empls. Ret. Fund v. Sanchez,* 2015 WL 5766264, at *1 (Del. Supr.).

The Demand Board consisted of nine members,[5] including Kramer, who was interested in the Acquisition. A60. Because the Complaint contains particularized allegations that four members of the Demand Board – Gouw, Krausz, Strohm, and Slootman – were not independent of Kramer, demand is excused under the first prong of *Aronson.*

1. The Court of Chancery Erred by Failing to Consider Plaintiff's Independence Allegations in Full Context

Delaware "law requires that all the pled facts regarding a director's relationship to the interested party be considered ***in full context*** in making the, admittedly imprecise, pleading stage determination of independence." *Sanchez*, 2015 WL 5766264, at *3 (emphasis added); *see also Beam*, 845 A.2d at 1049

[5] As indicated above, the Board that approved the Acquisition consisted of only eight members, including Kramer, Gouw, Krausz, Strohm, and Slootman. *See supra* at Statement of Facts ("SOF") § I; A60.

("Independence is a fact-specific determination made in the context of a particular case."). Context is critical in this case.

The Court of Chancery has noted the "web of interrelationships that characterizes the Silicon Valley startup community." *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 54 (Del. Ch. 2013) (citation omitted); *see also* Joseph W. Bartlett & Kevin R. Garlitz, *Fiduciary Duties in Burnout/Cramdown Financings*, 20 J. Corp. L. 593, 601 (1995) ("[T]he venture capital community is small and incestuous, with most managers knowing each other"). "[I]f you are not in the inner ring, you don't get first crack at the best companies." A71. The Complaint alleges that Kramer is in that "inner ring" and that, at least presently, Gouw, Krausz, Strohm, and Slootman are, as well. A22-23, 25-27, 31-35, 63-72. Further, Kramer has provided certain of these directors or their firms a "first crack" at some of his most successful ventures in the data security space. A25-27, 32-35, 63-72. These directors continue to invest in data security, and their and their firms' success depends, at least in part, on continued access to investment opportunities in this space. A22-23, 25-27, 31-35, 63-72.

Kramer is "unrivaled when it comes to information security start-ups." A63-64 (quoting Peter Cohan, *How Israel's Top InfoSec Honcho Picks New Ventures*, Forbes, June 15, 2012); *id.* ("I doubt anyone can rival him when it comes to information security start-up success"). Maintaining relationships with Kramer is

therefore vitally important to Gouw, Strohm, Krausz and Slootman, particularly when "[t]he competition among top VCs is fiercer than ever" as there is so much available capital that "the question . . . is not how do VCs choose startups but, rather, how do entrepreneurs choose investors." A71. Thus, each of these directors would experience a "detriment . . . as a result of the decision" to act adversely to Kramer's interest with respect to a demand. *Beam*, 845 A.2d at 1049. At a minimum, "there is a reasonable doubt that any one of these . . . directors is capable of ***objectively making a business decision*** to assert or not assert a corporate claim against" Kramer. *Id*. (emphasis added).

By failing to adequately consider this context, the Chancery Court erred. Ex. A at 20-32.

2. The Allegations of the Complaint Raise a Reasonable Doubt That Gouw was Capable of Objectively Making a Business Decision to Assert a Corporate Claim Against Kramer

Kramer has described Gouw as his "collaborator," a member of his "team long term," and his "go to investor for security." A33. The Complaint alleges that Gouw and her venture capital firm, Aspect, have invested alongside Kramer, including in data analytics company, Exabeam.[6] Gouw and her firm, with Kramer's permission, market Gouw's relationship with Kramer to investors and

[6] As indicated *supra* at notes 2 and 3, Gouw continues to invest alongside Kramer.

entrepreneurs. A33, 63. Taken together, these allegations are sufficient to raise a reasonable doubt as to Gouw's independence.

The Court of Chancery's holding to the contrary was erroneous because it failed to draw all reasonable inferences in Plaintiff's favor, considered information outside of the pleadings, and ignored the relevant context (*see supra* at § I.C.1). Ex. A at 29-31.

First, as indicated above, Gouw's venture capital firm's website carries an endorsement from Kramer:

> The instant we partnered with Theresia [Gouw] as one of our first investors, ***I knew I had a collaborator I wanted on my team long term***. She has a very deep understanding of data security. She gets how mobile and cloud are transforming our business and offers incisive, measured advice to help us make smart moves. We are thrilled she continues to be on our board after our IPO. ***She is our go to investor for security***."

A33.

Rather than draw the reasonable inference in Plaintiff's favor that Gouw is, as Kramer said, his "collaborator" and part of his "team long term," the Court of Chancery improperly drew an inference in Defendants' favor. Ex. A at 30-31. Specifically, the Court of Chancery found that, irrespective of Kramer's use of first-person singular pronouns "I" and "my," his "repeated use of first-person plural pronouns 'we' and 'our'" meant the endorsement merely highlighted Gouw's relationship with Imperva rather than her relationship with Kramer. Ex. A

at 30. By failing to draw the reasonable inference in Plaintiff's favor, the Court of Chancery erred.[7] *See Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009) ("On a motion to dismiss, the Court of Chancery was not free to disregard that reasonable inference, or to discount it by weighing it against other, perhaps contrary, inferences that might also be drawn.").

The Court of Chancery nevertheless recognized that, even under its incorrect interpretation, Kramer's endorsement of Gouw "communicate[d] to other entrepreneurs her professional strength as an investor in and director of data security start-ups." Ex. A at 30-31. But rather than viewing Kramer's endorsement as probative of Kramer's importance to both Gouw and her venture capital firm, the Court of Chancery compounded its error by discounting Plaintiff's allegations based on information outside of the pleadings. *See* Ex. A at 31 ("The fact that other entities . . . have recognized Gouw's business acumen and talent also counsels against giving too much importance to Kramer's endorsement").[8] *See Gantler*, 965 A.2d at 709; *White v. Panic*, 783 A.2d 543, 548 n.5 (Del. 2001) ("the court may not employ assertions in documents outside the complaint to decide

[7] Additionally, even assuming, *arguendo*, that Kramer's endorsement is merely a reference to Gouw's role with respect to Imperva, the Court of Chancery nevertheless ignored that Imperva ***is Kramer's company***. A22.

[8] The Complaint does not allege or incorporate documents indicating that Gouw has received an endorsement from anyone other than Kramer.

issues of fact against the plaintiff without the benefit of an appropriate factual record.").

Second, the Court of Chancery failed to appreciate the significant of Plaintiff's allegation regarding Gouw's June 10, 2014 investment alongside Kramer in data analytics company, Exabeam.[9] Ex. A at 31; A33, 63. The Court of Chancery appears to have focused on whether that investment was material to Gouw and her firm and whether that investment itself would suffer if Gouw acted adversely to Kramer. Ex. A at 31. But the import of that allegation is that it establishes that Gouw and her firm do in fact invest alongside Kramer, thus futher supporting the reasonable inference that Gouw would jeopardize investment opportunities by choosing to sue Kramer. *In re Limited, Inc. S'holders Litig.*, 2002 WL 537692, at *7 (Del. Ch. Mar. 27, 2002).

3. The Allegations of the Complaint Raise a Reasonable Doubt That Krausz was Capable of Objectively Making a Business Decision to Assert a Corporate Claim Against Kramer

Krausz is the most senior employee at U.S. Venture, which has a "very active strategy of investing in Israeli companies" and "a long history in the [data] security space." A65, 67. The Complaint alleges that Krausz and his firm have had repeated success investing with Kramer, including lucrative investments in Check Point, Trusteer and Imperva. A64-67.

[9] As indicated *supra* at note 2, on September 30, 2015 it was announced that Kramer and Gouw (through Aspect Ventures) have further co-invested in Exabeam.

As of late 2014, in a "clear signal of problems," U.S. Venture was raising its first fund in six years (twice the average interval within the industry), which fund was less than half the size of the firm's last fund. A66 (quoting Joana Glasner, *USVP raising new fund for first time in six years: VCJ*, Reuters PE Hub, Sept. 30, 2014). These problems only magnify the importance of Krausz remaining in the good graces of Kramer, who Krausz has said "can identify a diamond in the rough." A66.; *cf. Gantler*, 965 A.2d at 708 (director not independent where his company was "completely leveraged" and interested party provided source of business).

The Court of Chancery erred by considering Plaintiff's allegations only in isolation, failing to draw reasonable inferences in Plaintiff's favor, and ignoring the relevant context (*see supra* at § I.C.1). Ex. A at 25-29.

The Court of Chancery analyzed Krausz and U.S. Venture's serial investments with Kramer as mere "one-off investments," thus rejecting the reasonable inference that Krausz and his firm, who have a pattern of investing in Kramer-affiliated startups, have a reasonable prospect of access to similar investments in the future.[10] Ex. A at 28; *Gantler*, 965 A.2d at 709.

While the Court of Chancery accepted as "[w]ell-pled" the allegation that "U.S. Venture profited handsomely from its $6 million investment in [Kramer-

[10] Indeed, as indicated *supra* at note 2, Gouw and Krausz are now leading another investment with Kramer, in Cato Networks.

affiliated] Trusteer when IBM purchased the company for $700 million," the Court rejected the reasonable inference that the investment bore any relation to Kramer, noting that "Kramer neither started Trusteer nor owned it." Ex. A at 28. But this ignores that U.S. Venture invested in Trusteer because of, as Krausz explained, its investments in "Check Point Software and Imperva," through which Krausz knew "Kramer – and another Imperva co-founder . . . Mickey Boodaei." A65.

Finally, although the Court of Chancery accepted that Krausz and U.S. Venture's investment in Trusteer was material, the Court of Chancery found that Plaintiff failed to plead the materiality of Krausz and U.S. Venture's investments in Check Point and Imperva. Ex. A at 28. If it is reasonable to infer that U.S. Venture's investment in a company that sold for $700 million (*i.e.*, Trusteer) is material, as the Court did (Ex. A at 28), it is also reasonable to infer that U.S.Venture's investments in Check Point and Imperva – companies worth more than $1 billion (A34-35) – are similarly material (A26-27).

4. The Allegations of the Complaint Raise a Reasonable Doubt That Strohm was Capable of Objectively Making a Business Decision to Assert a Corporate Claim Against Kramer

Strohm and Greylock (Strohm's venture capital firm for the last 34 years) have a long and lucrative relationship with Kramer. A24, 67-71, 158-161. Their investments with Kramer include Imperva, Sumo Logic, and Palo Alto Networks, which went public in 2012. A25, 67-69. The Court of Chancery erred in finding

that Plaintiff failed to adequately allege these investments were material to Strohm or Greylock. (Ex. A at 24). Again, the Court of Chancery ignored the relevant context. "[B]ecause many of these investments will ultimately be written off, VC investors commonly make individual company investments with the expectation that each will produce a 40 to 50 percent projected IRR after accounting for the venture capitalist's fees and compensation." *Trados*, 73 A.3d at 50 n.26 (citation and internal quotations omitted). In other words, it is reasonable to infer that ***all*** of a venture capital firm's investments are material to that firm, as the firm enters each investment with identical expectations. Further, the Court of Chancery failed to address Plaintiff's allegations regarding (a) Kramer's endorsement of Greylock, (b) Greylock partner Chandna's reliance on Kramer for investment advice, and (c) Chandna's previous management position at Kramer's Check Point. Ex. A at 23-25; A25-26, 68-69. Taken together, these allegations are more than sufficient to raise a reasonable doubt regarding Strohm's independence.

5. The Allegations of the Complaint Raise a Reasonable Doubt That Slootman was Capable of Objectively Making a Business Decision to Assert a Corporate Claim Against Kramer

Like Strohm, Defendant Slootman also represented Greylock on the Imperva Board, and he is not independent from Kramer for many of the same reasons. A67-70. Slootman's ties to Greylock – and therefore Kramer – include his prior role as a Greylock general partner, and his prior and current service as CEO of

companies backed by Greylock. A69. Specifically, Slootman was the former CEO of Data Domain, a Greylock-backed company that was sold for $2 billion in 2009. A69. Slootman then served as a general partner of Greylock before moving to ServiceNow, a then-private company backed by Greylock and others. *Id*. Slootman helped take ServiceNow public and continues to serve as its President and CEO. *Id*. Thus, Slootman owes Greylock part of his professional success and his current lofty status in the Silicon Valley venture capital and angel investing communities. Given his valuable and ongoing connections to Greylock, Slootman is no more likely to imperil Greylock's longstanding and lucrative relationship with Kramer than Strohm.[11]

Slootman's lack of independence is compounded by (a) his service alongside Kramer as advisors for Accel's "Big Data" venture funds, and (b) his position as a prominent angel investor within the incestuous "ecosystem" of Silicon Valley. A69-70. This strongly incentivizes Slootman not to take actions contrary to Kramer interests, as doing so would likely jeopardize his (or Greylock's) opportunity to participate in future Kramer ventures. A69.

The Court of Chancery erred by failing to consider these allegations in their full context (*see supra* at § I.C.1). Ex. A. at 21-23.

[11] Slootman's ties with Greylock survived his departure as general partner because he was added to the Imperva Board as a Greylock representative ***after*** he moved from Greylock to ServiceNow. A24-25

II. THE COURT OF CHANCERY ERRED IN RULING THAT PLAINTIFF FAILED TO PLEAD A REASONABLE DOUBT THAT THE ACQUISITION WAS THE PRODUCT OF A VALID EXERCISE OF BUSINESS JUDGMENT

A. Question Presented

Whether the Complaint alleges facts sufficient to rebut the presumption that the Acquisition was the result of a valid exercise of business judgment. This issue was preserved for appeal. A120-35, 174-99.

B. Standard of Review

This Court's review of a trial court's grant of a motion to dismiss under Rule 23.1 is *de novo* and plenary. The Court must accept all well-pled allegations as true and draw all reasonable inferences in Plaintiff's favor. *See supra* at § I.B.

C. Merits of Argument

Demand is excused under the second prong of *Aronson* where particularized allegations give rise to a reasonable doubt that the "the challenged transaction was otherwise the product of a valid exercise of business judgment." *Aronson*, 473 A.2d at 814. "Thus, under the second prong of *Aronson*, a plaintiff may proceed with a suit . . . by alleging a breach of fiduciary duty." *McPadden v. Sidhu*, 964 A.2d 1262, 1269-70 (Del. Ch. 2008).

1. The Complaint Sufficiently Alleges a Breach of the Duty of Loyalty

"[D]irectors are charged with an unyielding fiduciary duty to protect the interests of the corporation." *Cede*, 634 A.2d at 360. They must ensure "that the

best interest of the corporation . . . takes precedence over any interest possessed by a director [or] officer." *Id*. at 361.

Kramer stood on both sides of the Acquisition, rendering it a classic "interested" transaction. *See Cede*, 634 A.2d at 362; A29-30. As Plaintiff alleged and argued below, the Board, aware of Kramer's interest in the Acquisition, made no effort to neutralize Kramer's conflict during the Acquisition process, and therefore violated its "unyielding fiduciary duty." *Id.* at 360; A120-35, 174-99.

The Board – which was not comprised of a majority of independent directors[12] – abdicated Acquisition negotiations to two conflicted members of management, both of whom had worked under Kramer for nearly a decade. A 29-41. Indeed, for months, the full Board was not even aware of the ongoing Acquisition negotiations, and only learned of the potential deal after management had (a) decided the Company should buy Kramer's company and (b) begun negotiating a term sheet. *Compare* A31 (management informed two members of Board in July 2013) *with* A38 (first full Board meeting in October 2013); Ex. A at 12-13. In the interim, the Acquisitions Committee, which was comprised of the two most conflicted members of the Board – Gouw and Krausz (*see supra* at §

[12] *See supra* at SOF § I; § I.C.1-5. *Gentile v. Rossette*, 2010 WL 2171613, at *7 n.36 (Del. Ch. May 28, 2010) ("A board that is evenly divided between conflicted and non-conflicted members is not considered independent and disinterested.").

I.C.2-3) – had overseen the Acquisition process. A31-37.[13] This "lack of oversight by the directors, irremediably taint[ed] the design and execution of the transaction." *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1281 (Del. 1989); *id.* (the presumption of the business judgment rule is rebutted when "the board's own lack of oversight in structuring and directing [a transaction] afforded management the opportunity to indulge in [] misconduct").

When the Board did finally meet, it failed to discuss or address (a) management's conflicts; (b) the Acquisitions Committee's conflicts; or (c) retaining independent legal or financial advisors, despite the lack of any independent sources of information.[14] A38-40. In other words, notwithstanding Kramer's voluntary recusal, the Board did virtually nothing to address or manage the conflicts attendant to the Acquisition. The "Board's virtual abandonment of its oversight functions in the face of [Kramer's and management's] patent self-interest was a breach of its fundamental duties of loyalty . . . More than anything else it

[13] Further, as explained above (*see supra* at SOF § II), Kramer's subordinate managers engaged in discussions with Skyfence for at least one month before the Acquisitions Committee was even aware of the potential transaction. A29-31.

[14] As indicated above, at no point did the Acquisitions Committee or Board have an independent legal advisor. While the Board received a fairness opinion ***the day*** it approved the Acquisition, a financial advisor's "primary role is not giving a fairness opinion. It is everything that precedes the delivery of . . . such an opinion." Leo E. Strine, Jr., *Documenting The Deal: How Quality Control and Candor Can Improve Boardroom Decision-making and Reduce the Litigation Target Zone*, 70 Bus. Law. 679, 684 (2015).

created an atmosphere in which . . . [management] could act so freely and improperly." *Mills*, 559 A.2d at 1284 n.32.

In granting Defendants' motion to dismiss, the Court of Chancery erroneously disregarded the nature and extent of the conflicts associated with the Acquisition, and instead considered Kramer's affiliation with Skyfence as a single, isolated conflict, wholly curable through Kramer's mere recusal. Ex. A at 9-14, 33-37.

First, the Court of Chancery rejected Plaintiff's allegations that the members of management tasked with negotiating the Acquisition lacked independence from Kramer, finding that allegations that management had long professional histories with Kramer and otherwise served at his pleasure, "without more, fail[ed] to raise a reasonable doubt that management was disinterested and independent." Ex. A at 34. But under Delaware law, "an officer/director would be considered to lack independence if . . . the party benefitting from the transaction is in a position 'to exert considerable influence' over the officer/director." *Steiner v. Meyerson*, 1995 WL 441999, at *9-10 (Del. Ch. July 19, 1995) (quoting *Rales v. Blasband*, 634 A.2d 927, 937 (Del. 1993)). As a result, where, as here, a high-ranking officer, such as a CEO or Chairman, is interested in a transaction, that officer's subordinate managers lack independence from the officer. *See, e.g.*, *Rales*, 634 A.2d at 937 (concluding President and Chief Executive Officer not independent of Company

Chairman and Chairman of Executive Committee, respectively, even where "continued employment and substantial remuneration may not hinge solely on his relationship"); *In re Cooper Cos., Inc. S'holders Deriv. Litig.*, 2000 WL 1664167, at *7 (Del. Ch. Oct. 31, 2000) (finding under Rule 23.1 that (a) a CFO and (b) Vice President and General Counsel, respectively, were not independent of CEO even where no allegation that CEO possessed "corporate authority unilaterally to terminate the [the subordinate manager's] employment or otherwise cause [the nominal defendant company] to do so."); *Steiner*, 1995 WL 441999 at *9-10. Accordingly, Plaintiff's allegations that two of the three members of management that spearheaded negotiations were not only Kramer's subordinates, but had worked under Kramer at two of his companies for nearly a decade (A29-31), were more than sufficient to plead management's lack of independence. [15]

Second, having already erroneously found that **e*very single member of the Board*** (other than Kramer) was disinterested and independent (Ex. A at 20), the

[15] Relatedly, the Court of Chancery also drew a strong and improper adverse inference that Imperva management promptly identified the conflicts concerning the Acquisition and acted swiftly to have the Board address and manage them. Specifically, relying on documents neither alleged nor incorporated in the pleadings, the Court of Chancery inferred that Kramer had been recused "[a]lmost immediately" and that management had "com[e] to the [A]cquisition[s] [C]ommittee a bit earlier in the process of developing the business case than they otherwise might have [and] that the team ordinarily would have done more to build a financial model for such a proposal before coming to the acquisition committee, but wanted to engage earlier on that front than normal, based on Kramer's conflict." Ex. A at 10. In doing so, the Court of Chancery improperly (a) considered extrinsic documents not incorporated into the complaint, and (b) "employ[ed] assertions in documents outside the complaint to decide issues of fact against the plaintiff[.]" *White*, 783 A.2d at 548 n.5.

Court of Chancery likewise concluded that the Acquisition process was overseen "by an independent acquisition committee and board." Ex. A at 34, 36-37. But as indicated above, a majority of the Acquisitions Committee lacked independence from Kramer. *See supra* at § I.C.2-3.

Ultimately, the erroneous findings regarding the independence of management, the members of the Acquisitions Committee, and certain members of the Board, caused the Court of Chancery to Chancery incorrectly analyze the Board's decision to approve the Company's payment of approximately $60 million for a company with no customers nor revenues and that was nearly half-owned by Imperva's founder and then-highest ranking officer.

Rather than evaluating the Acquisition as a "debatable decision . . . made by decision-makers who harbor a conflict of interest," where "the decision [could] be attributable to that influence," and where "the business judgment rule may not apply," the Court of Chancery instead assessed the Board's approval as merely a "debatable decision . . . made by impartial fiduciaries with no interest other than making the company more profitable," and where there would be "no fear that the decision was made for an improper reason." Strine, *supra*, at 687; Ex. A at 10-11, 33-44.

Thus, the Court of Chancery discounted, or entirely disregarded, the Board's serial failures to ensure it was protecting the interests of the Company. As

indicated above, these included the Board's failure to (a) oversee the Acquisition process for approximately two months, as conflicted members of management (overseen by conflicted directors comprising the Acquisitions Committee) purportedly negotiated with Kramer (A29-38); (b) upon learning of ongoing deal negotiations with a company affiliated with Kramer, deliberate regarding actual or potential conflicts among management and the members of the Acquisitions Committee (A38-39); (c) retain independent legal or financial advisors during the Acquisition negotiations (A35-40), as "the directors' normal source of advice ha[d] become conflicted," thus requiring them to "seek substitute advice" (Strine, *supra*, at 683);[16] and (d) question Skyfence's unverified revenue projections, which contemplated that Skyfence would, virtually overnight, go from having no customers or revenues to generating millions of dollars in sales (A42-43); and (e) do more than rubberstamp the Acquisition amendment, which had been conceived of, and negotiated entirely by, management and Kramer, and which amendment was effectuated for the express "purpose of ensuring" that the Acquisition did "not require the approval of Imperva's shareholders" (A46-54).

[16] *Contra* Ex. A at 37 (Court of Chancery finding that "even though engaging an independent legal advisor may have been best practices . . . not to use such an advisor was not unreasonable, ***especially where, as here, the transaction was an acquisition . . . and it was overseen by an expert independent acquisition committee and board***") (emphasis added); *Id*. at 36 (Court of Chancery finding that "***[b]ased on the acquisition committee's technical and financial*** expertise and Imperva's clearly identified business reasons for pursuing the acquisition . . . the board reasonably could have determined that an additional financial advisor was unnecessary before the later stages of the acquisition process) (emphasis added).

Viewed collectively, Plaintiff's allegations more than satisfy *Aronson's* second prong. *See, e.g., In re Barnes & Noble S'holders Deriv. Litig.*, C.A. No. 4813-CS, at 147-155 (Del. Ch. Oct. 21, 2010) (TRANSCRIPT) (finding "a host of particular facts which, when put together, create in my mind a reasonable doubt whether there was a breach of fiduciary duty," where such facts included acquisition process involving company's founder, chairman, and former CEO overseen by "oddly formed committee" comprised of directors whose independence was unclear, and allegations of substantive unfairness). [17]

2. At a Minimum, The Complaint Sufficiently Alleges a Breach of the Duty of Care

Even if the Board's conduct did not amount to disloyalty or bad faith, Plaintiff has nevertheless alleged that a majority of the Demand Board violated its duty of care, thus satisfying the second prong of *Aronson*.[18] A197-98; *McPadden*, 964 A.2d at 1274; *see also Khanna v. McMinn*, 2006 WL 1388744, at *25 n.201

[17] Additionally, rather than analyzing Plaintiff's process allegations holistically, the Court of Chancery also appears to have improperly analyzed Plaintiff's process allegations piecemeal, determining that each Board decision – in isolation – did not comprise a breach. *Compare, e.g.*, Ex. A at 36 ("I also do not consider the company's failure to engage an independent legal advisor or later decision to approve the amendment to the exchange agreement to reflect bad faith or to create reasonable doubt that the initial action or the amendment was taken honestly and in good faith, or that the board acted with gross negligence.") *with In re TriQuint Semiconductor, Inc. S'holders Litig.*, 2014 WL 2700964, at *3 (Del. Ch. June 13, 2014) (considering "process allegations . . . separately [and] ***collectively***") (emphasis added); *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 118 (Del. Ch. 2007) ("I must consider the entirety of their actions").

[18] As Plaintiff argued below, while a breach of the duty of care would be exculpated and therefore require dismissal of the members of the Board that approved the Acquisition, Plaintiff's claims against Kramer for breach of the duty of loyalty and unjust enrichment would go forward. A197-98; *McPadden*, 964 A.2d at 1275-76.

(Del. Ch. May 9, 2006) ("the pertinent question" under *Aronson's* second prong "is whether an underlying breach has occurred and not whether a substantial threat of liability exists").

The "fiduciary duty of care requires that directors of a Delaware corporation 'use that amount of care which ordinarily careful and prudent men would use in similar circumstances,' and 'consider all material information reasonably available' in making business decisions." *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 749 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) (internal citations omitted). A plaintiff pleads a violation of the duty of care where he alleges "actions that are ***without the bounds of reason***" (*McPadden*, 964 A.2d at 1274 (emphasis added)), or facts suggesting a "*wide* disparity between the process the directors used . . . and [the process] which would have been rational." *Guttman v. Huang*, 823 A.2d 492, 507 n.39 (Del. Ch. 2003).

The Court of Chancery incorrectly analyzed the Board's compliance with its duty of care, finding that allegations that Kramer "is such a guru" and "so successful" were "self-defeating," leading the Court to ***expressly*** "***infer*** from the facts alleged in the complaint that the defendants perceived th[e Skyfence] acquisition to be a good opportunity for Imperva and its stockholders and one that

fit comfortably within Imperva's plan."[19] Ex. A at 42-43 (emphasis added). Besides constituting an improper adverse inference,[20] the Court of Chancery's finding was also analytically erroneous. "[C]onsiderations of motive are irrelevant to the issue" of due care. *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985). As this Court has made clear, "[d]ue care in the decisionmaking context is *process* due care only." *Brehm*, 746 A.2d at 264 (emphasis in original).

Here, the Board's conduct in connection with the Acquisition "portray[s] a sufficiently wide gulf between what was done and what one rationally would expect a board to do" when considering a conflicted transaction. *In re TIBCO Software Inc. S'holders Litig.*, 2015 WL 6155894, at *23 (Del. Ch. Oct. 20, 2015). At a minimum, a careful and prudent board of directors would have taken steps to identify, address, and manage conflicts associated with the Acquisition, including determining whether the members of management supposedly negotiating the Acquisition, and the members of the Acquisitions Committee overseeing those

[19] At oral argument, the Court of Chancery appeared persuaded by Defendants' argument that Plaintiff's so-called "Mr.-Kramer's-companies-are-always-successful allegations" (A145) are somehow fatal to Plaintiff's breach of fiduciary duty claims." A173-74 (Court of Chancery noting, "I have to admit I had the same thought that [Defendants] mentioned. You've got a superstar here in data security, and especially Israeli data security companies and around, it's like they're being given a gift. They should just certainly go with him. He's a proven winner."). But under Delaware law, directors' fiduciary duties are "***unyielding***." *Cede*, 634 A.2d at 360. That is, irrespective of the Board's faith in Kramer's business acumen, the Board was still required to act "prudently, loyally, and in good faith" in connection with the Acquisition. *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54, 80 (Del. Ch. 2014).

[20] *See, e.g.*, *Gantler*, 965 A.2d at 709 ("On a motion to dismiss, the Court of Chancery was not free to disregard that reasonable inference, or to discount it by weighing it against other, perhaps contrary, inferences that might also be drawn.")

negotiations, suffered conflicts. A careful and prudent board of directors would have also at least deliberated concerning the retention of independent legal and financial advisors. The "failure to make such basic inquiries . . . raise[s] litigable questions over whether the Board acted in a grossly negligent manner and thus failed to satisfy its duty of care." *Id*.

CONCLUSION

For the foregoing reasons, the Court of Chancery's ruling and order, dated September 2, 2015, must be REVERSED.

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