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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.,	)	
Plaintiffs Below, Appellants,	)	No. 531, 2015
v.	)	
CHARLES GIANCARLO, THERESIA GOUW, SHLOMO KRAMER, STEVEN KRAUSZ, ALBERT PIMENTEL, FRANK SLOOTMAN, DAVID STROHM, JAMES TOLONEN, and IMPERVA, INC.,	)	Court Below: Court of Chancery of the State of Delaware Consol. C.A. No. 9833-VCG
Defendants Below, Appellees.	)	

ANSWERING BRIEF OF DEFENDANTS BELOW - APPELLEES

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Dated: December 16, 2015

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NATURE OF PROCEEDINGS

Plaintiff appeals from a final order of the Court of Chancery dismissing a stockholder derivative action based on a failure to plead demand futility. At issue was the acquisition of Skyfence Networks, Ltd. ("Skyfence"), a privately held Israeli start-up company, by Nominal Defendant Imperva, Inc. ("Imperva" or the "Company") for Imperva common stock and cash valued at just over $58 million. As alleged in the amended complaint, A13-84 (the "Complaint"), defendant Shlomo Kramer, Imperva's then-Chief Executive Officer, owned about 43% of Skyfence at the time it was acquired. A22, 28-29. Plaintiff alleges that Mr. Kramer is "unrivaled" in the field of data security, possesses the "Midas touch," and that companies with which he has been associated have been enormously successful. A64 n.21, 67-68, 144, 172-73. Notwithstanding this history of success, plaintiff claims Imperva overpaid for Skyfence to benefit Mr. Kramer.

The Skyfence transaction was approved by Imperva's Board of Directors (the "Board") without Mr. Kramer's participation. *See* A94; B97. At the time of suit, the Board was comprised of eight outside directors and Mr. Kramer. A60. Three of the directors (Charles Giancarlo, Theresia Gouw and Steven Krausz) took the lead as an acquisitions committee in evaluating the transaction, which was also considered and ultimately approved by the full Board. Mr. Kramer was recused from all consideration and approval of the acquisition or alternatives by

management, the acquisitions committee and the Board. A31-32, 43.

The transaction was the result of an eight-month process, during which the acquisitions committee or the full Board (with Mr. Kramer recused) met at least ten times to consider Skyfence or other potential companies and their technologies. A35-43. Although Imperva was a buyer, not a seller, and despite the deep experience among the Board members in evaluating start-ups, Pacific Crest Securities ("Pacific Crest") was engaged to provide certain advice and analyses and, in a furnished opinion, advised the Board that the transaction was fair to Imperva and its stockholders from a financial point of view. A40-43. There is no claim that the directors did not understand Skyfence's business or strategic fit or were unaware of Mr. Kramer's stake in Skyfence. Nor is there any allegation that the Skyfence acquisition has been anything but a success or has caused Imperva harm. Indeed, plaintiff concedes the transaction was immaterial. *See* A35 n.10.

Against this backdrop, the Court of Chancery correctly held that the Complaint failed to allege particularized facts raising a reasonable doubt that a majority of the directors were independent or that the Skyfence deal was otherwise the product of a valid business judgment. *See* Appellant's Opening Brief ("POB"), Ex. A (Court of Chancery transcript opinion, hereinafter "Op.") at 31-45. Accordingly, pre-suit demand was not excused under Rule 23.1.

On appeal, plaintiff urges reversal on two principal grounds. ***First***, plaintiff asserts that four of the directors – Messrs. Slootman, Krausz, Strohm and Ms. Gouw – lack independence from Mr. Kramer, relying on the same contentions that the Court of Chancery considered and properly rejected as insufficient. POB at 14-24; Op. at 20-32. Directors are presumed to be independent. *Beam v. Stewart*, 845 A.2d 1040, 1048-49 (Del. 2004). Only where particularized facts show a director is so dominated by a controlling party that "[the director's] discretion would be sterilized" is the presumption overcome. *In re MFW S'holders Litig.*, 67 A.3d 496, 509 (Del. Ch. 2013), *aff'd sub nom. Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014), *quoting Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993). The pleaded facts must give rise to the reasonable inference that each challenged director would sooner risk his or her reputation than jeopardize ties to Mr. Kramer, and such ties must be material to each director. *See Beam*, 845 A.2d at 1052; *Kahn*, 88 A.3d at 649.

As the Court of Chancery held, plaintiff does not meet this standard. Op. at 20-32. Instead, plaintiff suggests that the four directors lack independence based on prior business ties to Mr. Kramer or the speculative theory that they would not want to "jeopardize their chance to participate in what could be [Mr.] Kramer's next multi-billion technology start-up." POB 16-24; A62-72, 109. The Court below found nothing in the allegations of past, attenuated or possible future

business relationships to be "particularized, material or disabling." Op. at 25. And no facts suggested the directors were more willing to risk their reputations than their relationship with Mr. Kramer. *Id*. at 31-32. Nor were there any allegations that any supposed ties to Mr. Kramer were material to each director. *Id*. at 23-32. Indeed, the challenged directors held almost $11.4 million in Imperva stock at the time of the Skyfence transaction, thereby aligning their interests with those of the Company's stockholders. A152; B100.

As to Mr. Slootman, the CEO of a public company (ServiceNow, Inc.), plaintiff claims he could not objectively evaluate a demand because he is an "angel investor," serves on Accel's "Big Data" advisory board alongside Mr. Kramer, and because he "owes" Greylock Partners (a venture capital firm that invested in Imperva) for his "professional success" in Silicon Valley. POB 24. As the Court correctly found, an advisory role with a venture fund and generalized allegations of a "loose historical relationship with Greylock" do not raise an inference of "self-dealing and influence" calling Mr. Slootman's independence into question. Op. at 22-23. Because plaintiff needs to prevail as to each challenged director, this pleading failure as to Mr. Slootman means demand was required.

Likewise, the Court rejected allegations that Mr. Krausz, Mr. Strohm and Ms. Gouw were beholden to or under Mr. Kramer's control based on prior (often attenuated) business connections or conclusory claims that they needed to stay in

Mr. Kramer's "good graces" so that they (and their venture capital firms) would have "continued access to investment opportunities." POB 16-17; A63-69. As the Court found, the "existence of some financial ties, without more, is not disqualifying." Op. at 24. Addressing the allegations as to each director in turn, the Court found nothing to support the unreasonable assumption that these directors would risk the reputations on which they and their firms depend by disregarding their fiduciary duties. Op. at 25-32. For all these reasons, plaintiff's effort to invoke the first prong of *Aronson* fails.

Second, plaintiff attempts to assail the Skyfence acquisition under the second prong of *Aronson*, based on the alleged theory that it was approved in bad faith or was otherwise not protected by the business judgment rule. A derivative plaintiff seeking to challenge an acquisition approved by disinterested and independent directors bears a heavy burden. Op. at 32-33. In light of the exculpatory clause barring damage claims contained in Imperva's corporate charter (B115), plaintiff needed to plead particularized facts showing that the Board's decision was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *Parnes v. Bally Entm't Corp*., 722 A.2d 1243, 1246 (Del. 1999) (quotation omitted).

Here, the pleaded facts (as opposed to plaintiff's pejorative characterizations) show quite the opposite: (1) Mr. Kramer was recused entirely

from the process from the outset; (2) the acquisitions committee and full Board met ten times over an eight-month period to evaluate the possible acquisition as well as alternatives; (3) the Board determined that ownership of the technology was important, and that Skyfence's technology was a good fit within Imperva's data security offerings; (4) the acquisitions committee members who led the process had extensive data security knowledge and were experienced at assessing start-ups; (5) the Board engaged a financial advisor familiar with the Company, and received its opinion that the purchase of Skyfence was fair from a financial point of view to Imperva's stockholders; and (6) the acquisition was timed to coincide with the Company's announcement of a new, integrated three-fold strategy for enhancing the Company's data security offerings, with the Skyfence technology serving as the first prong of that strategy. *See* Op. at 9-17, 36. Indeed, tellingly absent from the Complaint is any allegation that the Skyfence acquisition has been unsuccessful or has harmed the Company in any manner.

Given the process, the Court was correct in holding that plaintiff's allegations under the second prong of *Aronson* were inadequate. Op. at 32-38. Plaintiff's allegations amount to no more than efforts to second-guess the decisions the Board made, conclusory assertions that the price paid was too high because Skyfence was a start-up company without historic revenues, or garden-variety criticisms of the work of Pacific Crest. As the Court held, such allegations do not

amount to bad faith. *Id*. at 33-36. Similarly, plaintiff failed to plead facts showing that the post-closing amendment to the acquisition agreement, made to ensure compliance with NYSE listing standards, was approved in bad faith or caused the Company any harm. *Id*. at 36-39.

Apparently recognizing these deficiencies, plaintiff now argues on appeal that the Board's conduct amounted to gross negligence, in violation of the duty of care. While plaintiff concedes that the claims against the directors are exculpated and could not proceed on that basis, it argues that the claim against Mr. Kramer can somehow proceed (despite the demand requirement and that no directors face a substantial likelihood of liability). *See* POB 32 at n.18. Plaintiff, however, did not plead this claim (the words "gross negligence" appear nowhere in the Complaint), nor did plaintiff brief the issue below. Instead, plaintiff raised it for the first time during oral argument. A197-99. Putting aside that plaintiff waived the claim, the Court nevertheless considered it, found that facts giving rise to an inference of gross negligence were absent, and properly rejected that argument. Op. 40-43.

The judgment of the Court of Chancery should be affirmed.

SUMMARY OF ARGUMENT

1. *Denied*. The Court of Chancery correctly held that the allegations of the Complaint were insufficient to excuse demand under the first prong of *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). The Complaint's speculative and conclusory allegations regarding business relationships between certain of the Company's directors and its then-CEO fall far short of the standard required to raise a reasonable doubt as to the independence of a majority of the Board.

2. *Denied*. The Court of Chancery correctly held that the Complaint failed to plead that the Board's decision to acquire Skyfence was not the product of a valid exercise of business judgment. The Court of Chancery also correctly held that the Complaint failed to plead particularized facts raising a reasonable doubt that the directors acted honestly and in good faith or that the directors were not adequately informed in making their decisions. Having failed to plead facts suggesting the Board knowingly and deliberately engaged in a flawed process with respect to the Skyfence acquisition, the Court of Chancery correctly concluded that demand was not excused under the second prong of *Aronson*.

COUNTER-STATEMENT OF ALLEGED FACTS

The Company and Its Business

Imperva, a Delaware corporation based in Redwood Shores, California, was co-founded by Mr. Kramer in 2002, and went public in November 2011. The Company's enterprise data security solutions are designed to deal with evolving modern threats facing today's companies, providing the visibility and control needed to neutralize hacker attacks, theft and fraud, mitigate risk and streamline compliance. As of September 30, 2014, the Company had over 3,500 customers in more than 90 countries. B245. Even before the Skyfence acquisition, Mr. Kramer owned about 3.6 million shares of Imperva's common stock (or 15.6% of the Company), thus his interests were highly aligned with those of the stockholders. *See* A27-28.

Imperva's Board

At the time of suit, Imperva's Board had nine members, with Mr. Kramer the sole inside director. A22-24, 93 n.1. The other directors named as defendants are: *Charles Giancarlo,* a Senior Advisor to, and prior managing director of, Silver Lake Partners, the former Executive Vice President and Chief Development Officer of Cisco Systems and a director of Accenture plc and Avaya, Inc.; *Theresia Gouw,* a partner at Aspect Ventures and previously at Accel Partners; *Steven Krausz,* a managing member of U.S. Venture Partners; *Albert Pimentel,* President of Global Markets & Customers of Seagate Technology and prior COO and CFO

of McAfee, Inc.; *Frank Slootman*, the CEO of ServiceNow, Inc. who previously held a senior executive position at EMC Corporation and was CEO of Data Domain, Inc.; *David Strohm*, a partner at Greylock Partners (who had already publicly announced his planned exit from the Board at the time this suit was filed); and *James Tolonen*, the former CFO of Business Objects, S.A., IGN Entertainment, Cybermedia, and Novell, Inc. *See* A22-24; B65-67, 290. In addition, non-defendant *Greg Clark*, the CEO of Blue Coat Systems, Inc., was on the Board when suit was filed. *See* A60; B290.

The Skyfence Opportunity and Acquisition

In late July 2013, Imperva's Senior Vice President of Worldwide Marketing emailed Ms. Gouw and Mr. Krausz (members of the acquisitions committee) about a strategic proposal to invest in or acquire Software-as-a-Service ("SaaS") application firewall ("SAF") technology (products designed to ensure cloud applications and data remain secure from external and inside threats). A28-30; B309, 555-56; Op. at 9-10. The email described the strategic rationale, management's assessment of the landscape of possible external partners, and discussions to date with four such SAF companies, one of which was Skyfence. B555-59; A36.[1] Because of his interest in Skyfence, the email advised that Mr. Kramer had recused himself from any role in the evaluation process from the

[1] Although management identified six potential candidates, only four indicated they were open to discussions with Imperva. *See* B564.

outset, and the directors were being brought in to assess opportunities earlier than in the normal course. Op. at 9-11; B120, 555-56. Thereafter, the acquisitions committee (Ms. Gouw and Mr. Krausz, later joined by Mr. Giancarlo), took the lead in providing oversight and direction to Imperva's senior management team in evaluating the various SAF candidates, their technologies, and the potential strategic fit within the Company's product and service solutions. A31; B71, 97.

On July 31, 2013, at an acquisitions committee meeting, the directors were provided an overview of the SAF market and discussions to date and directed management to review proposals for at least two SAF companies and report back. A35-36. The committee met again on August 15 and October 2, 2013 to receive updates on the review of potential SAF strategic opportunities and thereafter authorized management to negotiate a non-binding term sheet with Skyfence. A36-37. On October 9, 2013, the full Board met to discuss Skyfence and another target and asked management to continue its review of strategic opportunities. A38-39.

The acquisitions committee then met three more times – on October 29 and December 16, 2013 and on January 10, 2014 – to monitor management's progress. A39-40. At the December meeting, the terms of a potential Skyfence acquisition and the retention of a financial advisor were discussed. A40. At the January meeting, the acquisitions committee decided to retain Pacific Crest. *Id*.

Subsequently, the full Board met twice more to consider the proposed

acquisition of Skyfence – on January 14 and again on February 4, 2014 – at which time Pacific Crest presented its opinion that the transaction was fair from a financial point of view to Imperva and its stockholders. A41; B120. Following the February meeting, the Board approved the acquisition of Skyfence. A43.

Under the terms of the transaction, Imperva agreed to acquire all of the securities of Skyfence for about $58.2 million – $2.8 million in cash to Skyfence's two founders and the rest comprised of 1,163,092 shares of Imperva common stock priced at $47.64 per share (the 60-day average). B329. Mr. Kramer would receive 532,263 shares of Imperva stock for his interest in Skyfence. *See* A45, 47-48.[2]

The Skyfence acquisition was announced on February 6, 2014, timed to coincide with Imperva's strategic acquisition of the remaining interest in another company (Incapsula, Inc.), and introduction of a new cloud web application firewall product. B437-41. This three-fold "[c]ombination creates industry-leading cloud security and compliance offerings while filling dangerous security gaps," and formed an integrated strategy to advance Imperva's offerings and satisfy customer needs. *Id.* As the first component in that strategy, it was Imperva's express belief that Skyfence's "Software as a Service (SaaS) delivery models for internally facing corporate applications will substantially change the landscape for data center security and compliance." *Id.* The transaction closed February 7, 2014,

[2] Not all shares were to be distributed at closing – more than half were to be held back for two years to secure certain Skyfence indemnification obligations. A44; *see also* B329, 119-20.

at which time Skyfence became a wholly-owned Imperva subsidiary. A46.

The Amendment to the Skyfence Transaction

Shortly after the acquisition was complete, Imperva determined that the issuance of 532,263 shares to Mr. Kramer overlooked a NYSE listing rule requiring prior stockholder approval for the issuance of more than 1% of a company's outstanding common stock to a related party. After discussing the matter with the NYSE, the parties agreed to amend the agreement "in order to ensure compliance with the rules and regulations of the [NYSE]." B119. The amendment reduced the share distribution to Mr. Kramer (to 252,699 shares) and substituted cash for the surrendered shares at the same valuation (for a total of $13.3 million, half of which was subject to the indemnity holdback). B120.[3] Pacific Crest confirmed that its fairness opinion would not have been adversely affected. *Id*. As the Court of Chancery noted, had the issue been focused on sooner, the deal could have been structured this way from the outset. Op. at 37-38. There is no allegation of harm resulting from the amendment.

The acquisitions committee approved the amendment on February 18, 2014 (A48 n.14, 195-96) and it was signed the next day and publicly announced on February 21, 2014. A20. The full Board ratified the amendment at its next meeting on February 26, 2014. *See* A53, 195-96.

[3] Imperva paid Mr. Kramer cash at the original $47.64 valuation even though the share price had climbed to $59.81 by the time of the amendment. A50. In other words, Mr. Kramer received $3.4 million less than if the surrendered shares were valued at the then-prevailing market price.

ARGUMENT

I. THE COMPLAINT FAILS TO ALLEGE PARTICULARIZED FACTS OVERCOMING THE PRESUMPTION OF DISINTERESTEDNESS AND INDEPENDENCE AS TO A MAJORITY OF THE BOARD.

A. Question Presented

Did the Complaint allege particularized facts sufficient to overcome the presumption of independence as to the four challenged directors? *See* B9, 11-12, 28-39, 498-500, 502-16; A151-62, 201-02.

B. Scope of Review

The Court's review on this issue is *de novo* and plenary. *See Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008). The Court must draw all reasonable inferences in plaintiff's favor, but only if they "logically flow from particularized facts alleged by the plaintiff. Conclusory allegations are not considered as expressly pleaded facts or factual inferences. Likewise, inferences that are not objectively reasonable cannot be drawn in the plaintiff's favor." *See id.* (internal quotations omitted).

C. Merits of the Argument

A stockholder asserting derivative claims must "allege with particularity" any pre-suit demand on the board of directors or the reasons why demand is excused. Ct. Ch. R. 23.1(a). It is "[a] cardinal precept . . . that directors, rather than shareholders, manage the business and affairs of the corporation." *Aronson*, 473 A.2d at 811. This includes the decision to initiate litigation on the Company's behalf. *See Spiegel v. Buntrock*, 571 A.2d 767, 773 (Del. 1990).

Pre-suit demand will be excused only in those rare instances where demand is futile – *i.e.*, where facts show a majority of the board cannot exercise its independent business judgment in deciding whether to pursue litigation. *Beam*, 845 A.2d at 1048; *Rales*, 634 A.2d at 934. Absent such facts, a stockholder lacks standing to sue and derivative claims must be dismissed. *Wood*, 953 A.2d at 143-44.

The burden of pleading demand futility is a heavy one. The law presumes that directors are able to exercise independent business judgment in response to a demand (*Beam*, 845 A.2d at 1048-49) and that presumption is not overcome "by conclusory statements or mere notice pleading." *Brehm*, 746 A.2d at 254. Instead, particularized facts must show that a majority of the Board is interested or lacks independence. *Rales*, 634 A.2d at 934. The question is analyzed as of the time the complaint is filed (*Highland Legacy Ltd. v. Singer*, 2006 WL 741939, at *4 (Del. Ch. Mar. 17, 2006)) on a "director-by-director" and "transaction-by-transaction" basis. *See Khanna v. McMinn*, 2006 WL 1388744, at *14 (Del. Ch. May 9, 2006).

Here, plaintiff challenges the independence of four of the outside directors at the time of suit – Messrs. Slootman, Krausz, Strohm and Ms. Gouw, who themselves collectively held almost $11.4 million worth of Imperva shares or options – claiming they lack independence from Mr. Kramer. A failure to make that showing as to *any one of them* means a majority of the Board is disinterested

and independent and demand is not excused. *See, e.g.*, *In re Citigroup, Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 121 n.36 (Del. Ch. 2009). In challenging independence, plaintiff must raise a reasonable inference that the directors are so dominated by or "'beholden' to [Mr. Kramer] . . . that [their] discretion would be sterilized." *See Kahn*, 88 A.3d at 648-49. In other words, the facts must show these directors were "more willing to risk [their] reputation[s] than risk the relationship with [Mr. Kramer]." *Beam*, 845 A.2d at 1051-52.

Plaintiff's allegations must also satisfy a materiality standard. *Kahn*, 88 A.3d at 649. This standard is met only if "the director in question had ties to the person whose proposal or actions he or she is evaluating that are sufficiently substantial that he or she could not objectively discharge his or her fiduciary duties." *Id.*; *see Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 363 (Del. 1993) *decision modified on reargument*, 636 A.2d 956 (Del. 1994) (facts must show "the materiality of a director's self-interest to the given director's independence").

The Court of Chancery evaluated plaintiff's allegations and correctly found that they failed to overcome the presumption of independence as to each challenged director. Op. at 31-32.

1. The Court of Chancery Correctly Held That Mr. Slootman Is Independent

The Complaint fails to plead particularized facts sufficient to overcome the presumption of independence as to Mr. Slootman, the CEO of ServiceNow.

Although plaintiff asserts that Mr. Slootman is a "prominent angel investor," there is no claim that he ever invested (or ever sought to invest) in any company associated with Mr. Kramer. A69. As such, the claim that Mr. Slootman could not objectively evaluate a demand because it might "jeopardize his chance to participate as an investor in Kramer's next data security start-up" (A70) is not a well-pleaded factual allegation, but an unfounded speculative theory that could be leveled at any "angel" investor.

In fact, despite the requirement that any claimed ties be material, the only alleged link between Mr. Slootman and Mr. Kramer (beyond Imperva) is the innocuous fact that both are advisors to Accel Partners' "Big Data" venture funds. A70. But plaintiff pleads no details on what service as an "advisor" entails, how it is conceivably material to either Mr. Slootman or Mr. Kramer, or how that advisory role renders him dominated by or beholden to Mr. Kramer such that he is incapable of discharging his duties. As the Court of Chancery found, such a highly attenuated connection is insufficient to overcome the presumption of independence necessary to excuse demand. Op. at 23. *See also Kahn*, 88 A.3d at 647-48 (receipt of pay for advisory work insufficient to overcome presumption of independence); *Khanna*, 2006 WL 1388744, at *15-16 (service on "Advisory Board" fails to establish lack of independence).

Though plaintiff also alleges loose historical ties between Mr. Slootman and Greylock Partners (his service as a Greylock partner for three months in early 2011 and in his role as CEO of public companies "backed by Greylock") (A69), those assertions are unavailing to establish a lack of independence.[4] According to plaintiff, Greylock has a "longstanding and lucrative relationship with Kramer" (POB at 24) and Mr. Slootman lacks independence because he "owes" Greylock for his "professional success and his current lofty status" in Silicon Valley and would not want to imperil "Greylock's preferred status within Kramer's inner circle." A118, 120. But remote ties do not render a duly elected director incapable of exercising his business judgment. *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 821-24 (Del. Ch. 2005) (directors' investments in companies which conducted business with defendant insufficient to establish lack of independence), *aff'd*, 906 A.2d 766 (Del. 2006).

Putting aside speculation about the supposed "motives" of Greylock itself, there is no authority – and plaintiff has cited none – suggesting that Greylock's supposed interests would actually influence Mr. Slootman to disregard his fiduciary duties. No allegations suggest Mr. Slootman has any economic interest in Greylock, that Greylock is represented on ServiceNow's board or is even a stockholder thereof, let alone that Greylock controls Mr. Slootman. In short, the

[4] Plaintiff also claims (for the first time on appeal) that Mr. Slootman joined the Board as a Greylock designee. A26; POB 24 at n.11. No facts are offered for that unpleaded assertion.

Complaint is devoid of facts reasonably suggesting that Mr. Slootman would risk his reputation to preserve his (or Greylock's) relationship with Mr. Kramer. *Beam*, 845 A.2d at 1052.

Because plaintiff's allegations directed to Mr. Slootman fail, demand was required on that basis alone, as a majority of Imperva's nine directors at the time of suit were disinterested and independent.

2. The Court of Chancery Correctly Held That Mr. Strohm, Mr. Krausz and Ms. Gouw Are Independent

Claims regarding the other challenged directors – Messrs. Strohm and Krausz and Ms. Gouw – fall far short of what Delaware law requires to overcome the presumption of independence. Op. at 32. Plaintiff's theory is that these directors are loyal to Mr. Kramer, and incapable of fairly evaluating a demand, because they are (or were) affiliated with venture capital firms that invested in Imperva and allegedly profited once the Company went public (by distributing shares to investors). A26-27, 62.

Such allegations could apply in virtually all instances where a successful venture-backed company goes public. There is no authority for the proposition that a duly elected director who happens to work for a venture capital firm somehow becomes "beholden" to the CEO merely because his or her firm made money on its investment. *See Orman v. Cullman*, 794 A.2d 5, 23-24, 30 (Del. Ch. 2002) (demand not excused as to director who sold shares in a merger because

price increase was a benefit shared by all stockholders).

Moreover, the notion that these directors would forsake their fiduciary duties because they did not have a "stake" in the Company is directly contradicted by their personal Imperva holdings. A34-35. At the time of the Skyfence transaction, the challenged directors collectively held shares or near-term exercisable options worth almost $11.4 million. B33, 100.[5] Thus, the interests of these directors were at all times aligned with those of the Company and its stockholders.

The Court of Chancery properly concluded that the facts failed to demonstrate any material disqualifying ties between the directors and Mr. Kramer. Op. at 24, 28-29, 31-32. Among other deficiencies, no facts were offered to show that the directors *personally* profited as part of historical distributions by the venture capital firms (if at all), much less that any such amounts were material to them in any way. Op. at 24, 28-30. By failing "to compare the actual economic circumstances of the directors . . . to the ties [plaintiff] contend[s] affect their impartiality," plaintiff ignores "a key teaching of our Supreme Court, requiring a showing that a specific director's independence is compromised by factors material to her." *See In re MFW S'holders Litig.*, 67 A.3d at 510; *In re Limited, Inc. S'holders Litig.*, 2002 WL 537692, at *3 (Del. Ch. Mar. 27, 2002) (rejecting

[5] At the time of the Skyfence acquisition on February 6, 2014. Mr. Slootman's interest in Imperva was worth approximately $1,547,177; Mr. Krausz's interest was worth approximately $672,991; Mr. Strohm's interest was worth approximately $4,543,577; and Ms. Gouw's interest was worth approximately $4,623,554. A152; B100.

challenge where no material financial benefit alleged).

a. No Particularized Facts Show Mr. Strohm Lacks Independence

Plaintiff does not allege that Mr. Strohm has any personal involvement with Mr. Kramer outside of Imperva. While plaintiff alleges that Mr. Strohm has been with Greylock Partners for 34 years, plaintiff never explains how that fact is relevant to determining his ability to act independently of Mr. Kramer. A67. Instead, plaintiff alleges that Greylock (not Mr. Strohm specifically) and Mr. Kramer were both past investors in two other companies, Sumo Logic and Palo Alto Networks. A68. Common investments are a far cry from the "bias-producing" relationships needed to show that Mr. Strohm lacks independence from Mr. Kramer. *See J.P. Morgan*, 906 A.2d at 821-22.

Plaintiff also pleads no facts suggesting that Mr. Strohm (or his firm) are materially dependent on Mr. Kramer. Instead, plaintiff relies on the blanket assertion that "all of a venture capital firm's investments are material to that firm" POB at 23. If anything, that sentiment highlights that Greylock's success (and reputation) is built on many high quality portfolio companies with *no connection whatsoever* to Mr. Kramer (*e.g.*, Facebook, Instagram, Dropbox, LinkedIn, Airbnb, Pandora and numerous others). B538-42.

Likewise, claims that another Greylock partner, Asheem Chandna (a non-party), has complimented Mr. Kramer ("His crystal ball is as strong or as clear as

anybody's out there") and that Mr. Kramer thinks highly of Mr. Chandna (calling him "one of the savviest investors in enterprise") do not suggest that *Mr. Strohm's* independence is compromised. A68-69. Public acknowledgment of Mr. Kramer's undisputed success in data security by one Greylock partner does not convert another (*Mr. Strohm*) from an independent director into one incapable of fairly evaluating a demand. *See Beam*, 845 A.2d at 1051-52; *Litt v. Wycoff*, 2003 WL 1794724, at *5-6 (Del. Ch. Mar. 28, 2003) (business relationships insufficient to excuse demand). Here, where no facts suggest material financial or other ties between Mr. Strohm (or his firm) and Mr. Kramer, nothing reasonably calls Mr. Strohm's independence into doubt. *See* Op. at 24-25.

b. No Particularized Facts Show Mr. Krausz Lacks Independence

Plaintiff does not overcome the presumption of independence as to Mr. Krausz based on the allegation that his firm, U.S. Venture Partners, has invested in "Israeli companies" in the "security space" on a handful of occasions. A65; Op. at 26. Nor does plaintiff satisfy its burden by claiming Mr. Krausz is incapable of objectively evaluating a demand because he (and his firm) are "just one of many investors . . . fighting for the opportunity to invest in the next big thing," and Mr. Krausz has stated that Mr. Kramer "can identify a diamond in the rough.'" A66, 114. The Court below correctly rejected these allegations as conclusory. Op. at 25-29.

A director employed by a venture capital firm does not lack independence merely because the firm made money (in unspecified amounts) on its investment. The hope of a profit is, after all, why venture capital firms invest in companies. It does not follow, however, that such a director would be unwilling to protect the interests of the company – and thereby risk harm to the reputation he and his firm have spent decades building – merely because a demand was made involving the company's former CEO. *See Kahn*, 88 A.3d at 674 (allegation of "longstanding and lucrative business partnership" in which defendants made "a significant amount of money" insufficient to show director lacked independence to evaluate merger); *MFW*, 67 A.3d at 514 ("the profit that [director] realized from coinvesting with [defendant] nine years before the transaction at issue in this case does not call into question his independence"). Thus, even if Mr. Krausz led U.S. Ventures' investments in Check Point and Imperva (or, *alongside* Mr. Kramer, invested in and served on the board of Trusteer, a company plaintiff admits Mr. Kramer did not start or own) (A34, 64-65; POB 22), those facts establish little more than that Mr. Krausz is a venture capitalist, not that he lacks independence. *See Khanna*, 2006 WL 1388744, at *15, 20 n.153 (investment in several start-ups with defendant insufficient to establish lack of independence).

Claims that U.S. Ventures hit a "rough patch" following the 2008 credit crisis, or took longer than the industry average to raise a new fund thereafter

(A66), do not save plaintiff's otherwise deficient allegations.[6] No particularized facts suggest that U.S. Ventures depends on Mr. Kramer's "next big thing" for its success, much less that Mr. Krausz would sacrifice his hard-earned reputation to stay in Mr. Kramer's "good graces." A66, 114-15; POB 21. As the Vice Chancellor held, this is especially true absent any facts establishing that the firm's prior investments in Kramer-affiliated companies were even material (to the firm or to Mr. Krausz personally). Op. at 26-29.

c. No Particularized Facts Show Ms. Gouw Lacks Independence

Plaintiff challenges Ms. Gouw's independence because the website for Aspect Ventures (her venture capital firm), includes favorable comments about her from Mr. Kramer (among several other founders and CEOs). Mr. Kramer is quoted as saying Ms. Gouw "gets how mobile and cloud are transforming our business and offers incisive, measured advice to help us make smart moves …[s]he is our go to investor for security." A33; B544-51. As the Court below found, the fact that Mr. Kramer respects Ms. Gouw's business acumen does not mean she is beholden to him. Op. at 29-31. Indeed, the site also notes that *Time* magazine named Ms. Gouw one of 2012's ten most influential women in tech and

[6] Reliance on *Gantler v. Stephens*, 965 A.2d 695, 708 (Del. 2009) (POB 21) is misplaced. That case alleged an "economically significant" loss of a "major client" by a director of "modest means" at a company with "few major assets." *Id.* No such similar facts are alleged here as to Mr. Krausz or his firm (which has a long history of success entirely unrelated to Mr. Kramer).

Worth.com recognized her as one of Silicon Valley's most powerful investors in 2015. B544-51. In other words, companies wishing to raise money *seek out* Ms. Gouw because of her business acumen. Her stellar reputation would be injured, not advanced, by disregarding her directorial duties. The Court also rejected as conclusory plaintiff's allegation that she would risk that reputation just to avoid "jeopardiz[ing] her chance to participate in what could be Kramer's next multi-billion dollar . . . [security] startup." Op. at 29; A64; *Beam*, 845 A.2d at 1052 & n.32.[7]

Finally, allegations that Aspect and Mr. Kramer both invested in Exabeam, an unaffiliated company, fall flat. A63; POB 20. As the Court below found, that fact fails to show Ms. Gouw could not objectively discharge her duties. Op. at 31. This is especially true absent facts suggesting the investment was material to Aspect (or Ms. Gouw) or would suffer if Ms. Gouw took action adverse to Mr. Kramer. *See In re Dow Chem. Co. Deriv. Litig.*, 2010 WL 66769, at *9 (Del. Ch. Jan. 11, 2010) ("[t]hat directors of one company are also colleagues at another . . . does not mean that they will not or cannot exercise their own business judgment").[8]

[7] Contrary to plaintiff's assertion (POB at 18-19 & n.8), the Complaint quotes from and incorporates statements from the Aspect Ventures website and thus the full context of the site and those statements (B544-51) was appropriately considered by the Court below. *See* Op. at 31; A33.

[8] On appeal, plaintiff offers materials not in the record regarding a recent investment by Aspect and U.S. Ventures in another company affiliated with Mr. Kramer, Cato Networks. POB at 5 n.2 Plaintiff makes no allegation that these investments, a year-and-a-half after the Complaint was

2. The Independence Allegations Were Fully Considered

Finally, plaintiff's claim that the Court failed to view the independence allegations "in full context," POB at 15-17, is belied by extensive discussion of each of plaintiff's allegations as to each challenged director. *See* Op. at 23-25, 28-29, 31-32. Plaintiff's reliance on innuendo based on the "web of interrelationships" and "incestuous" venture capital community (A107; POB 16) are not particularized facts showing *these* directors were incapable of investigating alleged wrongdoing in *this* case. Such allegations do not overcome the presumption of independence afforded directors under Delaware law. *See Beam*, 845 A.2d at 1048-49.

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filed, were contemplated or discussed, much less influenced in any way the directors' ability to objectively consider a demand, at time of suit.

II. THE COMPLAINT FAILS TO ALLEGE PARTICULARIZED FACTS RAISING A REASONABLE DOUBT THAT THE TRANSACTION WAS PROPERLY THE PRODUCT OF BUSINESS JUDGMENT

A. Question Presented

Did the Complaint allege particularized facts sufficient to overcome the presumption that the Skyfence acquisition resulted from a valid exercise of business judgment? B9-10, 12-15, 25, 40-48, 500-01, 516-30.

B. Standard of Review

The Court's review on this issue is *de novo* and plenary. *See Wood*, 953 A.2d at 140. The Court must draw all reasonable inferences in plaintiff's favor, but only if they "logically flow from particularized facts alleged by the plaintiff. Conclusory allegations are not considered as expressly pleaded facts or factual inferences. Likewise, inferences that are not objectively reasonable cannot be drawn in the plaintiff's favor." *See id.* (internal quotations omitted).

C. Merits of the Argument

Directors are presumed to have "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson*, 473 A.2d at 812. To rebut the presumption, plaintiff bears a "heavy burden" and must plead facts raising "a reasonable doubt that the board's decisions were 'the product of a valid exercise of business judgment.'" *White v. Panic*, 783 A.2d 543, 551 (Del. 2001). Only in the rare circumstance where "the decision under attack is so far beyond the bounds of reasonable judgment that it

seems essentially inexplicable on any ground other than bad faith" is that burden carried. *Parnes*, 722 A.2d at 1246 (internal quotations omitted).

Here, nothing suggests actions "outside the bounds" of reasonable business judgment, much less that this is an "extreme case" involving non-exculpated claims based on an "intentional dereliction of duty." *See In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 649 (Del. Ch. 2008) (rejecting claim where directors regularly met to discuss transaction developments and negotiations); *see also Ryan v. Gifford*, 918 A.2d 341, 354 (Del. Ch. 2007) (business judgment undermined only where facts show a conscious disregard of director responsibilities).

To the contrary, there is no dispute that, in connection with the Skyfence acquisition (1) Mr. Kramer was recused from the process from the outset; (2) the acquisitions committee and full Board met ten times over an eight-month period to evaluate the possible transaction as well as alternatives; (3) the Board determined that Skyfence's products were a good fit within Imperva's data security offerings, (4) the acquisitions committee members who led the process had extensive data security knowledge and were experienced at assessing start-ups; (5) although obtaining a fairness opinion was not required, particularly as a buyer of a company that plaintiff characterizes as "small," the Board nevertheless engaged Pacific Crest and received its opinion that the transaction was fair from a financial point of view to Imperva's stockholders; and (6) the acquisition was timed to coincide with the

Company's announcement of a new firewall technology and acquisition of the remaining interest of another company (Incapsula) as part of an integrated three-fold strategy for enhancing the Company's data security offerings and business. A31, 35-43, 94; B19-21, 118-22, 420-24, 555-56; Op. at 9-17, 36.

1. Plaintiff Fails to Allege a Breach of the Duty of Loyalty

In light of the Board's actions, absent from the Complaint are the "extreme set of facts" necessary to "sustain a disloyalty claim." *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009). Indeed, plaintiff appears to abandon its claim that the directors acted in bad faith (A61-62, 121-23, 126, 129-30, 135), and makes no effort to show that they consciously disregarded their duties or that the Skyfence transaction – which is not to alleged to have been unsuccessful – was so disadvantageous as to be inexplicable on grounds other than bad faith. *See Parnes*, 722 A.2d at 1246. And while plaintiff references a purported "lack of oversight" (POB at 27), its central argument appears to be based on "gross negligence" – a theory it did not plead in the Complaint or brief below, and which it raised for the first time at oral argument. *See* A197-99. *See* Section II.C.2, *infra*.

In any event, the Complaint's allegations concerning any supposed lack of oversight or bad faith are wholly unavailing, and were properly rejected by the Court below. Plaintiff's main process claims are predicated on the notion that certain directors, including two on the acquisitions committee (Ms. Gouw and Mr.

Krausz), lack independence from Mr. Kramer, but the Court properly rejected that argument under the first prong of *Aronson*. In fact, the Court found the directors were highly experienced, with considerable expertise relevant to evaluating Skyfence. Op. at 11-12, 35-36.[9]

Likewise, plaintiff's argument that management was "conflicted" is equally unavailing. Plaintiff does not dispute that Imperva's management had the requisite expertise to evaluate the Company's technological needs, whether to develop its own technology or acquire it from a third party, and its strategic fit within the Company's offerings. Plaintiff's suggestion that management was "tainted" merely because Mr. Kramer was the CEO was conclusory, particularly since there was no allegation that Mr. Kramer was involved in the acquisition process or influenced the Skyfence transaction in any respect. A94, 98-102; Op. at 10, 34-35, 41. Indeed, from the very outset, management advised the directors of Mr. Kramer's ownership interest in Skyfence, described five other alternatives being evaluated, and indicated that they were coming to the Board sooner than they ordinarily would as a result, so that the Board could start its oversight sooner. B555-56; Op. at 9-11. In any event, as the Court found, plaintiff's allegations

[9] Plaintiff tries to disguise this argument as a "process" claim by asserting that the Board should have specifically made independence determinations when evaluating Skyfence. POB at 34-35. But this ignores the Company's annual proxy statement, which explicitly states that all directors (other than Mr. Kramer) meet NYSE independence standards. B67. There was therefore no need to reiterate that determination. In any event, the Court below correctly found that plaintiff's allegations were inadequate in this regard. Op. at 20-32, 34-35

regarding management were not only conclusory, but they were also misplaced: the relevant question is whether a majority of the Board suffered from a disabling conflict, not the management team. Op. at 33-34.[10]

Plaintiff's remaining arguments, both here and below, amount to nothing but efforts to second-guess the Board's business judgments. The fact that management was authorized to negotiate non-binding terms with Skyfence in October 2013 for the Board to consider further – which it did over the course of four additional months – hardly suggests bad faith. Likewise, the decision to retain Pacific Crest, which was familiar with the Company and had been involved in its IPO, to render a fairness opinion was consistent with a board acting in good faith. Op. at 33, 36; *see In re Alloy, Inc. S'holder Litig*., 2011 WL 4863716, at *10 (Del. Ch. Oct. 13, 2011). While plaintiff made the now standard allegations concerning putative deficiencies in Pacific Crest's work (its reliance on projections and selection of comparable companies), it pleads no facts suggesting that the directors viewed Pacific Crest's work as deficient and deliberately elected to rely on it anyway, as is needed to show bad faith. *See id.* at *11; *In re BioClinica, Inc. S'holder Litig*.,

[10] The July 29, 2013 email from management (B555-56) is expressly referenced and quoted in the Complaint (A31-32), and was discussed *by both sides* at oral argument. A163-64, 175-76. It was therefore properly before the Court, and plaintiff made no objection to the Court's consideration of it. *See In re Santa Fe Pac. Corp. S'holder Litig*., 669 A.2d 59, 69-70 (Del. 1995). Moreover, by not objecting below, plaintiff waived its right to do so on appeal. *See* Supr. Ct. R. 8. In fact, plaintiff's tactical effort to do so now, only because the Court below referenced the email in its decision (Op. at 9-11), rings especially hollow given that plaintiff submitted a binder of documents to the Court for the first time during oral argument. *See* A191-96.

2013 WL 5631233, at *6 (Del. Ch. Oct. 16, 2013).[11]

At its heart, plaintiff's real claim is that Imperva allegedly "overpaid" for Skyfence because it was a start-up with no historical revenues, and it questions the projections relating thereto. As the Court below noted, there is nothing unusual about robust projections for a start-up with promising technology, and plaintiff pleaded no basis for the Court to determine that the price paid was irrational or the product of bad faith. Op. at 42-44. Indeed, Skyfence was being purchased for its technology and strategic fit (and potential future financial contribution), rather than for an existing revenue stream. *Id*. The strategic rationale for the transaction was clearly explained, and there is no allegation that the directors did not believe that strategy was sound, much less that it was tantamount to squandering Company assets. *See In re Walt Disney Co. Deriv. Litig*., 906 A.2d 27, 74 (Del. 2006).

As the Court below further held, equally absent were facts creating a reasonable inference that the amendment to the transaction was made in bad faith. Op. at 37-38. The Skyfence transaction closed on February 7, 2014. Had the Company focused on the NYSE listing requirement at that time, it would have simply structured the transaction to comply with that requirement by reducing the

[11] Plaintiff misconstrues Pacific Crest's comparable company analysis by suggesting that its use of companies with market capitalizations over $1 billion rendered it deficient. POB at 12. In reality, what the analysis shows is that Pacific Crest selected companies based on their industry (data security and software-as-a-service) and growth rates in order to assess the prospects for Skyfence as owned by Imperva. The fact that these public companies were much larger than Skyfence was obvious to anyone reading the analysis, but was hardly the basis for their selection. *See* B569-603.

number of shares issued to Mr. Kramer (below the 1% threshold) and substituting cash for the surrendered shares. Op. at 37; *see also* B22-23, 45-48, 528-30. That is what the Company promptly did after identifying the issue and consulting with the NYSE. There is no allegation that the directors approved the deal "knowing" that it ran afoul of any listing rule (only to promptly fix it), and hence plaintiff's reliance on cases that involved intentional violations of stock option plans are inapposite. *See Ryan*, 918 A.2d at 358. Moreover, there is no allegation that the amendment harmed the Company, much less that entering into it was "so far beyond the bounds of reasonable judgment" that it is tantamount to bad faith. *Parnes*, 722 A.2d at 1246.[12]

2. Plaintiff Fails to Allege a Breach of the Duty of Care

Plaintiff did not plead gross negligence below and concedes duty of care claims are exculpated.[13] Raised *for the first time* at oral argument as a putative basis for excusing demand for a derivative claim against Mr. Kramer (A197-99), that issue was not fairly presented below and should not be presented on appeal.[14] The Court of Chancery nonetheless addressed due care in its ruling and properly

[12] The circumstances of Skyfence do not compare to those in *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989). *See* POB at 27-28. That case involved the auction of a company, where directors have an obligation to obtain the best price available, and alleged conduct raising serious concerns about the integrity of the process. *See Mills*, 559 A.2d at 1280-83. The facts here are not remotely similar, not least because Imperva was *buying* Skyfence, and there are no facts alleged suggesting management misconduct of any kind.

[13] Imperva's certificate of incorporation includes an exculpatory provision. B115; 8 *Del. C.* § 102(b)(7); POB 32 at n.18.

[14] *See* Supr. Ct. R. 8; *see also Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("a party waives an argument by not including it in its brief.")

rejected the claim. Op. at 40-43. Directors are presumed to act with the requisite degree of care. *See Beam*, 845 A.2d at 1048-49. Thus, it was plaintiff's burden to plead particularized facts establishing directors acted in a grossly negligent manner. *See, e.g.*, *Aronson*, 473 A.2d at 812; *see also Brehm*, 746 A.2d at 259. The facts must show "a wide disparity between the process the directors used … and that which would have been rational." *Guttman v. Huang*, 823 A.2d 492, 507 n.39 (Del. Ch. 2002); *see In re Caremark Int'l, Inc. Deriv. Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996).

The Skyfence transaction was approved by outside directors with no interest in the acquisition. They, like every board, faced myriad choices regarding how to review and structure the acquisition and the manner in which the Board made those choices was rational. As the Court of Chancery noted, the process need not be "perfect" to comport with the duty of care, and did not constitute gross negligence. Op. at 40-43.[15] Moreover, since the claim is exculpated as to the directors, they would not face the substantial likelihood of personal liability generally required to excuse demand as to any corporate claim (including any against Mr. Kramer). *See Aronson*, 473 A.2d at 815. Accordingly, demand was not excused.

[15] As the Court held, plaintiff's reliance on *McPadden v. Sidhu*, 964 A.2d 1262 (Del. Ch. 2008) is misplaced, as in that case the interested officer was actually involved in the negotiation process and deliberately manipulated the sale of the company to himself at a low price (and subsequently sold it for a substantial profit). Op. at 40-41. Here, there are no such facts, as Mr. Kramer was recused from the process. *Id*.

CONCLUSION

The judgment of the Court of Chancery should be affirmed.

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