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IN THE

Supreme Court of the State of Delaware

CITY OF HIALEAH EMPLOYEES' RETIREMENT SYSTEM, Derivatively on Behalf of Nominal Defendants nCINO, INC. (f/k/a Penny HoldCo, Inc.) and nCINO OpCo, Inc. (f/k/a nCino, Inc.),

Plaintiff Below/Appellant,

v.

INSIGHT VENTURE PARTNERS, LLC, INSIGHT HOLDINGS GROUP, LLC, JEFFREY L. HORING, PIERRE NAUDÉ, SPENCER G. LAKE, STEVEN A. COLLINS, JON DOYLE, PAM KILDAY, WILLIAM RUH, and GREG ORENSTEIN,

Defendants Below/Appellees,

-and-

nCINO, INC. (f/k/a Penny HoldCo, Inc.) and nCINO OpCo, Inc. (f/k/a nCino, Inc.),

Nominal Defendants Below/Appellees.

No. 30, 2024

COURT BELOW:

COURT OF CHANCERY
OF THE STATE OF DELAWARE
C.A. No. 2022-0846-MTZ

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NATURE OF PROCEEDINGS

This case concerns the January 2022 acquisition of SimpleNexus LLC ("SimpleNexus") by nCino, Inc. ("nCino"). Venture capital firm Insight Venture Partners ("Insight") was a significant investor in both nCino and SimpleNexus.

In September 2022, Plaintiff-Appellant ("Plaintiff") filed an initial complaint challenging the acquisition ("Transaction"). Plaintiff did so without making a litigation demand of nCino's Board of Directors ("Board"). In January 2023, Plaintiff filed an Amended Complaint asserting double-derivative claims against nCino's directors and officers and against Insight. Defendants moved to dismiss.

The Court of Chancery determined that demand would not have been futile, and thus dismissed the action pursuant to Court of Chancery Rule 23.1. The trial court concluded that Plaintiff had not adequately alleged bad faith or that a majority of the directors lack independence from Insight.

Plaintiff filed its Notice of Appeal on January 25, 2024 and its opening brief on March 11, 2024. On appeal, Plaintiff contends that the trial court erred in finding that Plaintiff did not plead bad faith. With respect to independence, Plaintiff no longer presses its primary argument in the trial court—that Insight was a *de facto* controller of nCino. Instead, Plaintiff attacks the trial court's independence determination with respect to three of nCino's seven directors: Naudé, Lake, and Collins. This is the Defendants' answering brief.

SUMMARY OF ARGUMENT

1. Denied. The trial court correctly held that Plaintiff failed to meet the high bar necessary to plead bad faith such that a majority of the Board could face a substantial likelihood of liability for approving the Transaction. Plaintiff's bad faith argument rests almost entirely on the premise that a prior investment in SimpleNexus implied a valuation of $169 million, but Plaintiff cannot establish bad faith in light of the allegation that the Board did not know about the valuation. Plaintiff's alleged implied valuation is also flawed, relying on incomplete information and unreasonable assumptions, and its other criticisms of the negotiation and diligence process are contradicted by Plaintiff's own allegations and documents incorporated into the Amended Complaint.

2. Denied. The trial court correctly held that Plaintiff failed to plead that Naudé, Lake, and Collins lack independence from Insight. Plaintiff's arguments asserting a hodgepodge of allegations about prior business dealings, some demonstrably false, do not plead a lack of independence. Moreover, even if the Court were to find that Plaintiff successfully pleaded lack of independence as to two of these Directors, this Court should affirm on the alternative ground that Director Ruh is independent of Insight, meaning that at least four of the seven members of the Board were independent at the relevant time.

STATEMENT OF FACTS

A. nCino and Its Board

nCino is a publicly traded technology company that provides cloud-based software for financial institutions. ¶ 22.[1] Pierre Naudé co-founded nCino in 2012. ¶ 15. At the time this action was filed, nCino's board of directors (the "Demand Board") had seven members: Naudé, the company's Chairman and Chief Executive Officer; Jon Doyle; Pam Kilday; William Ruh; Spencer Lake; Steven Collins; and Jeffrey Horing, co-founder and managing director of the venture capital firm Insight Venture Partners ("Insight"). ¶¶ 14–20.

nCino's Certificate of Incorporation includes a provision, pursuant to 8 *Del. C.* § 102(b)(7), providing that "[n]o director of the Corporation shall be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except to the extent such exemption from liability or limitation thereof is not permitted under the DGCL, as it presently exists or may hereafter be amended from time to time."[2]

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[1] Citations of "¶ _" refer to the paragraphs of the Verified Amended Stockholder Derivative Complaint, which appears in the record at A32–A121.

[2] B7. Delaware courts may take judicial notice of certificates of incorporation filed with the Secretary of State on a motion to dismiss under Rule 23.1. *Zucker v. Andreessen*, 2012 WL 2366448, at *1 n.1 (Del. Ch. June 21, 2012).

B. Insight and Its Relationship to nCino

Insight first invested in nCino in 2015, when nCino was a private company. ¶¶ 14, 33. Eventually, in 2017 and 2018, Insight increased its stake to more than 50% of nCino's equity. *Id.* nCino conducted its IPO in July 2020. ¶ 34. After the IPO, Insight owned approximately 42% of nCino's common stock. ¶ 35. Since then, Insight's percentage ownership has decreased. *See* ¶ 38; *see also* OB 7 (acknowledging Insight's loss of control by calling Insight "nCino's then-controller"). At the time of nCino's acquisition of SimpleNexus, Insight owned 32.7% of nCino's equity. ¶ 82 n.16. Insight appointed only one director of nCino (Horing) prior to nCino's IPO, and it no longer has any contractual right to appoint (or remove) any directors. ¶ 14.

C. Insight's Investment in SimpleNexus

Insight was an investor in SimpleNexus. Insight made its first investment in SimpleNexus in 2018, and after its Series B investment announced in January 2021 (but actually completed in November 2020), Insight owned a majority of SimpleNexus's equity. ¶¶ 44, 48. Plaintiff makes certain assumptions to infer that the value of SimpleNexus implied by Insight's investment was $169 million, but as the trial court recognized, those assumptions are unreasonable. Op. 18. Plaintiff based its $169 million calculation on its allegations that Insight and another entity (TVC) invested a total of $128 million in SimpleNexus at various times and

purchased 76.1% of SimpleNexus. ¶¶ 49–56. But because these investments were made beginning in 2018, a much earlier stage in the life of SimpleNexus, they cannot simply be aggregated to compute the value as of the time of the Series B investment announced in January 2021.

D. The Challenged Transaction

Plaintiff challenges nCino's acquisition of SimpleNexus, which closed in January 2022. ¶¶ 43, 77–78. nCino was interested in SimpleNexus in part because nCino's existing product offerings for banks did not address mortgage lending to consumers. SimpleNexus's product, which allows consumers to apply for loans online, including by using mobile devices, filled that need. A247–50.

nCino and SimpleNexus began discussing some form of partnership in the first half of 2021, well after Insight's November 2020 Series B investment in SimpleNexus. *Id.* By August 2021 the discussions had turned to a possible acquisition. ¶ 62. Because Insight was the majority owner of SimpleNexus, Horing recused himself from these discussions. *See* ¶ 69. Throughout the process, nCino was careful to treat Horing and Insight as "on the other side of the wall" for all purposes related to the Transaction. A245; *see also* B15.

The nCino Board (minus Horing) discussed the potential transaction five times, beginning on August 25, 2021. *See* ¶¶ 63, 66, 69.[3] In a meeting on September 10, 2021, Naudé and nCino's chief corporate development and strategy officer, Greg Orenstein, informed the Board that "following price discussions with SimpleNexus's co-founder Matt Hansen and CFO Kevin McKenzie, it was their belief that SimpleNexus would not sell for less than $1.2 billion." ¶ 70. Management also told the Board that "SimpleNexus originally requested a 50/50 cash/stock deal but subsequently expressed a willingness to accept a 25/75 cash/stock deal, which would alleviate the need for the Company to raise cash in order to acquire SimpleNexus, should the Company decide to proceed." A251. The Board then authorized management to submit a non-binding Indication of Interest to SimpleNexus, which proposed an acquisition that would include 75–80% nCino stock, plus the balance in cash, with a value of $1.2 billion based on the then-current price of nCino stock. ¶¶ 71–72.

On September 27, 2021, Orenstein informed the Board that nCino had retained BofA Securities ("BofA") as investment banker for the potential acquisition; Ernst & Young to assist with financial and tax due diligence; Accenture to assist with "market, competition and product functionality diligence";

[3] Plaintiff misstates the record when it asserts that Horing attended the August 25, 2021 board meeting. OB 12. The Minutes of that meeting, which were incorporated into the Amended Complaint, reflect that "Mr. Horing was not at the meeting." B22.

Cornerstone Advisors to advise on the "market opportunity in the U.S. community bank and credit union market"; and Sidley Austin to provide legal advice. ¶ 75.

The Board (again without Horing) next met on October 7, 2021. ¶ 76. Accenture reported on its evaluation of SimpleNexus's market position and product capabilities. B27. BofA provided a transaction overview, including a strategic rationale for the transaction, relevant precedent transactions, and a process timeline. *Id.* Sidley Austin covered the structure of the transaction. *Id.* Finally, the Board reviewed the due diligence activities and workstreams, and then authorized management to proceed with due diligence and efforts to negotiate the acquisition. B28.

The Board next met on November 1, 2021 (again without Horing), shortly after the Directors had two conference calls with SimpleNexus's then-CEO and its founder. B30, B33. Orenstein provided an update on the negotiations with SimpleNexus and the due diligence process. *Id.* The Board then reviewed a model of SimpleNexus's financials that nCino management had prepared. This model [redacted] B37.

Due diligence continued, and management informed the Board about progress between meetings. B47. Negotiations with the selling shareholders also continued, and, significantly, they agreed to accept 80% of the consideration in nCino stock,

rather than the 50/50 split they initially sought. B15. Equally significant was that Insight agreed to a lockup restriction on its ability to sell the nCino stock it would receive. A209.

The Board (again without Horing) next met on November 15, 2021. It reviewed the "double-dummy" transaction structure, the details of the merger documentation, and other details. A245. BofA then presented its opinion that, subject to the relevant assumptions, "the Closing Stock Consideration … and such other consideration to be paid and issued by Parent in connection with the Transactions, including the Mergers, is fair to the Company from a financial point of view." B16.

At the end of the meeting, the seven participating Directors unanimously approved the transaction. A245. Sidley Austin noted that "the transaction had been unanimously approved by the disinterested directors following active engagement and deliberation by all disinterested directors on the substantive merits of the transaction." A245–46.

nCino announced the acquisition on November 16, 2021; the acquisition closed on January 10, 2022. ¶¶ 94–95.

E. Procedural History

Plaintiff served a demand for records under 8 *Del. C.* § 220 on January 19, 2022, and nCino made productions totaling more than 1,100 pages on March 18 and

April 15, 2022. Plaintiff did not make a litigation demand on nCino's Board before filing this suit on September 21, 2022. The Complaint asserted six claims: (1) breach of fiduciary duty against the nCino directors and Orenstein; (2) misuse of confidential information against Horing, on the theory that Horing caused Insight to increase its investment in SimpleNexus based on inside information[4]; (3) insider trading against Ruh[5]; (4) breach of fiduciary duty against Insight as an alleged controlling stockholder; (5) aiding and abetting breach of fiduciary duty against Insight, for allegedly aiding and abetting Horing's breach of fiduciary duty; and (6) unjust enrichment against Insight. All these claims were derivative in nature.[6]

The nCino Defendants moved to dismiss, as did Insight and Horing (collectively, the "Insight Defendants"), on demand grounds as well as for failure to state a claim under Court of Chancery Rule 12(b)(6). Plaintiff responded by filing

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[4] As the Defendants pointed out in their motions to dismiss below, this allegation was based on a misunderstanding of the relevant chronology and was therefore meritless. That issue, however, is not before this Court.

[5] This claim, too, was based on incorrect assumptions and was without merit, as Defendants pointed out in their motions to dismiss, but that issue also is not before this Court.

[6] Plaintiff asserts that it is bringing this suit double-derivatively. ¶ 99. Under that theory, the claim is against the directors of the current nCino, Inc., which is the parent of the pre-transaction corporation (now called nCino OpCo) for failing to enforce nCino OpCo's purported claims against the defendants. *See Lambrecht v. O'Neal*, 3 A.3d 277, 282 (Del. 2010). Therefore, the correct demand board for purposes of this motion is the board of the current nCino, Inc. at the time this suit was filed.

an Amended Complaint on January 27, 2023, asserting the same six claims. Defendants again moved to dismiss. On December 28, 2023, the trial court granted the motion and dismissed the Complaint for failure to plead demand futility.

The trial court first determined that Plaintiff failed to plead that a majority of the Demand Board faces a substantial likelihood of liability for approving the Transaction in bad faith. Op. 14–21. The court rejected Plaintiff's argument that nCino acquiesced to SimpleNexus's price demand without negotiation, relying on Plaintiff's allegations that nCino management engaged in "significant" negotiations. *Id.* at 15–16. The trial court also found that Plaintiff's disagreement with the BofA fairness opinion, even if well-founded, "falls far short of showing [the opinion] was so facially flawed" as to suggest bad-faith reliance by nCino's Board. *Id.* at 16–17. The trial court next determined that bad faith was not shown by Plaintiff's allegation of a gap between the Transaction price and an earlier implied valuation of SimpleNexus. Leaving aside that the alleged valuation relied upon an "unreasonable" assumption that SimpleNexus did not grow between 2018 and 2021, Plaintiff alleged that the Board did not know of the alleged valuation, and thus the allegation "sounds in the duty of care" rather than bad faith. *Id.* at 17–18. The trial court concluded this analysis with a holistic discussion of the Board's extensive due diligence process, which rendered "unreasonable" any inference that the Directors "had their heads in the sand." *Id.* at 19–20.

Next, the trial court determined that Plaintiff failed to plead that a majority of the Demand Board lacks independence from Insight. *Id.* at 21–31. It held that, even assuming Insight were nCino's controller, Insight's ability to appoint or remove Directors does not render the Directors beholden to Insight. *Id.* at 22. That disposed of Plaintiff's only argument concerning Kilday, and the trial court also determined that Doyle is independent of Insight, which Plaintiff does not challenge here. *Id.* at 23, 25–26. With regard to Naudé, the court found that Plaintiff had not alleged facts permitting an inference that his CEO salary or $49 million sale of nCino stock rendered him beholden to Insight. *Id.* at 24–25. With regard to Lake, the court found that Plaintiff did not allege facts permitting an inference that Insight was responsible for Lake's directorship or consulting agreement with nCino, or that Lake's independence would otherwise be impacted by scattered business dealings with companies in which Insight invested. *Id.* at 27–29. And with regard to Collins, the trial court similarly concluded that Plaintiff failed to allege facts suggesting that he is beholden to Insight either because of his nCino director compensation or due to past business dealings with companies in which Insight invested. *Id.* at 29–31.

As a result, the trial court found that Plaintiff had failed to plead demand futility as to the Transaction-related claims (Counts I, IV, V, and VI). *Id.* at 32–33. Count II, alleging misuse of confidential information by Horing, failed too in light of the lack of any allegation that the Demand Board either received a material

personal benefit from the alleged misuse of information or faces a substantial likelihood of liability in connection with this claim. *Id.* at 32–33. And Count III, alleging insider trading by Ruh, similarly failed: Plaintiff did not allege that the Demand Board either received a material benefit from Ruh's trading or lacks independence from Ruh. *Id.* at 33.[7]

[7] Plaintiff does not pursue on appeal its argument that Ruh cannot consider demand as to the counts challenging the Transaction because he faces a substantial likelihood of liability on Count III. *Compare* A302 (arguing Ruh "cannot disinterestedly investigate the Transaction because he faces a substantial likelihood of liability for insider trading"), *with* OB 6 n.10, 38 n.169 (raising only "the question of Ruh's independence" from Insight).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED THE COMPLAINT BECAUSE PLAINTIFF FAILED TO PLEAD DEMAND FUTILITY.

A. Question Presented

Did the trial court correctly hold that Plaintiff failed to plead particularized facts showing demand would have been futile?

B. Scope of Review

This Court's review of decisions of the Court of Chancery applying Rule 23.1 is *de novo* and plenary. *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1047 (Del. 2021) ("*Zuckerberg*").

C. Merits of Argument

The trial court correctly held that Plaintiff failed to meet the high pleading standards to establish that demand was excused. The Amended Complaint pleaded neither a basis for believing that a majority of nCino's Demand Board faced a substantial likelihood of liability, as required to satisfy *Zuckerberg* Prong Two, nor that a majority of nCino's Demand Board lacked independence from Insight, as required to meet *Zuckerberg* Prong Three.

1. Governing Legal Standards

It is "'[a] cardinal precept' of Delaware law" that directors, not shareholders, manage the business and affairs of the corporation, including whether to file

lawsuits. *Id.* at 1047 (citation omitted). If no pre-suit demand is made on the Board (as here), Court of Chancery Rule 23.1 requires that the plaintiff "allege with particularity ... the reasons for ... not making the effort." *Id.* at 1048 (quoting Ct. Ch. R. 23.1(a)). Rule 23.1 imposes "stringent requirements of factual particularity that differ substantially from ... permissive notice pleadings." *Id.* (quoting *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000)).

To establish futility of demand on a director, the plaintiff must show: (1) "the director received a material personal benefit from the alleged misconduct"; (2) "the director faces a substantial likelihood of liability" on a claim in the litigation; or (3) "the director lacks independence from someone who received a material personal benefit from the alleged misconduct ... or who would face a substantial likelihood of liability on any of the claims." *Id.* at 1059. Only if the plaintiff makes one of these particularized showings as to at least half of the demand board (*i.e.*, the board in place at the time a demand would have been made) may demand be excused. *Id.* Plaintiff here raises no issue under Prong One of the *Zuckerberg* standard.

As to Prong Two, where, as here, the corporation's certificate of incorporation includes a § 102(b)(7) provision, there is a substantial likelihood of liability only if the plaintiff can plead an unexculpated claim based on particularized facts. *Id.* at 1053–54. In this case, because a majority of the Demand Board is not conflicted (*see* Section I.C.3, *infra*), Plaintiff must overcome the Demand Board's business

judgment rule protection by showing bad faith on the part of a majority of the directors. *See United Food & Com. Workers Union v. Zuckerberg*, 250 A.3d 862, 890 (Del. Ch. 2020), *aff'd*, 262 A.3d 1034 (Del. 2021). As the trial court recognized, "[p]leading bad faith is a difficult task and requires that a director acted inconsistent with his fiduciary duties and, most importantly, that the director *knew* he was so acting." Op. 15 (quoting *McElrath v. Kalanick*, 224 A.3d 982, 991–92 (Del. 2020)).

As to Prong Three, to show a lack of independence, "a derivative complaint must plead with particularity facts creating a reasonable doubt that a director is ... so beholden to an interested director ... that his or her discretion would be sterilized." *Zuckerberg*, 262 A.3d at 1060 (internal quotation marks and citation omitted). The plaintiff "must allege that 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.* at 1061 (internal quotation marks and citation omitted). Allegations of "outside business relationships" or "financial ties" are "without more … not disqualifying." *Id.* (citation omitted).[8]

[8] Demand futility must be assessed on a claim-by-claim basis, but Plaintiff fails to delineate between its claims.

2. Plaintiff Fails To Plead Bad Faith.

The Amended Complaint does not plead particularized facts showing bad faith on the part of a majority of the Demand Board in approving the Transaction.

a. The Alleged Implied Valuation Does Not Show Bad Faith Because Plaintiff Alleges the Board *Did Not Know* the Valuation.

Plaintiff's bad faith argument rests on its oft-repeated allegation that nCino paid $1.2 billion for SimpleNexus even though an earlier investment by Insight implied a valuation of $169 million. *E.g.*, OB 1, 11, 22 & n.98, 23, 25. Remarkably, however, Plaintiff addresses only in passing the trial court's primary basis for rejecting this argument: the Amended Complaint does not plead ***knowing*** misconduct given its allegation that the Board ***did not know*** about the alleged valuation. Op. 17–18. As the trial court found, "a failure to become informed about a data point for valuing an acquisition sounds in the duty of care," not knowing misconduct. *Id.* Indeed, Plaintiff's own brief uses similar language, asserting that nCino and its advisor BofA each "neglected" to inquire about this information. OB 22–23.

Plaintiff nonetheless insists that the trial court was bound to infer bad faith if the Amended Complaint included sufficiently "extreme" allegations. *Id.* at 26. But Plaintiff does not plead that the $1.2 billion Transaction price is on its face "so extreme as to suggest waste." *IBEW Loc. Union 481 Defined Contribution Plan &*

Tr. ex rel. GoDaddy, Inc. v. Winborne, 301 A.3d 596, 622 (Del. Ch. 2023). Instead, according to Plaintiff, it is the alleged "[d]isparity" between the Transaction price and the supposed implied valuation that is extreme, and the Board's failure to learn of that disparity that "gives rise to a reasonable inference of bad faith." OB 22–23. Put differently, Plaintiff's allegations turn on the Board's knowledge, *Winborne*, 301 A.3d at 622, and it cannot establish knowing misconduct in light of its allegation that the Board ***did not know*** the purportedly "extreme" information, *Lenois ex rel. Erin Energy Corp. v. Lawal*, 2017 WL 5289611, at *18–19 (Del. Ch. Nov. 7, 2017) (allegation that "Special Committee *did not know* that Lawal/Allied only paid $100 million of the $250 million agreed price .... would only state a duty of care claim").[9]

Plaintiff's cases miss the mark for the same reason: each involved a valuation gap that was ***known*** by the defendants. OB 26 & nn.115–16; *Winborne*, 301 A.3d at 626 (defendants approved $850 million buyout "in the face of" a dramatically lower valuation that they had themselves calculated); *Morris v. Spectra Energy Partners (DE) GP, LP*, 2017 WL 2774559, at *14 (Del. Ch. June 27, 2017) ("specific allegations demonstrate that the General Partner and its Conflicts Committee knew

[9] Plaintiff alleges that the Board "consciously decided to remain uninformed" about the implied valuation, ¶ 9, but that allegation does not equate to a "conscious disregard" of directorial duties, *see In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006), in this context, where Plaintiff's main theory of bad faith is that the Board delivered a windfall to Insight. One could not accomplish that goal without knowing the valuation implied by Insight's earlier investments in SimpleNexus.

of that implied value" and approved a sale worth far less); *Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 260 (Del. 2017) (defendants "knew when approving" the company's repurchase of a joint-venture interest from a related party that the company had sold the same interest to the same related party for a lower price previously).[10]

The alleged valuation is also flawed on its face. The Amended Complaint arrives at this mistaken $169 million figure as follows: (1) in June 2018, Insight and another investor "made a $20 million growth capital investment in SimpleNexus" in exchange for an unidentified stake in the company (¶ 44); (2) in January 2021, Insight and the other investor made an additional $108 million investment, after which they held a combined 76% stake (¶ 49); and (3) by conflating the 2018 and 2021 investments—and the stakes received in exchange for each investment—Plaintiff extrapolates that a $128 million total investment for a 76% stake implies a valuation of $169 million in 2021 (¶ 48). Thus, the $169 million implied valuation is based on incomplete data, lacking the amounts contributed by, and stakes received by, each investor in connection with the 2018 "growth capital" investment.

As the trial court found, this valuation is "insufficiently reliable to anchor a bad faith claim," because Plaintiff's alleged valuation depends on the

[10] *Brinckerhoff* also applied an objective standard of good faith dictated by contract, *see* 159 A.3d at 260 & n.62, rather than the subjective standard that applies here.

"unreasonable" assumption that SimpleNexus's valuation did not increase between 2018 and 2021. Op. 18. What Plaintiff characterizes as adopting a "defense-friendly inference" (OB 25) is actually the opposite: it is an express rejection of Plaintiff's "unreasonable" inference of a valuation based on incomplete data. Op. 18; *see, e.g.*, *Shabbouei v. Potdevin*, 2020 WL 1609177, at *11 (Del. Ch. Apr. 2, 2020) (rejecting plaintiff's inferences because they were insufficiently supported by factual allegations). And Plaintiff here confirms the unreliability of its alleged valuation when it argues that nCino would have overpaid "[e]ven if the Court were to double or triple the valuation[,] ... increasing $169 million to $338 million or $507 million." OB 25. Having thrown one dart and missed the board entirely, Plaintiff cannot save its claims by throwing two more darts blindly.

Documents incorporated into the Amended Complaint confirm the unreliability of Plaintiff's assumption that the value of SimpleNexus did not appreciate between 2018 and 2021, as the trial court noted. Op. 18 (citing A247–48). The nCino briefing memo cited by the trial court reflects [redacted] A247–48. [redacted] B274. Again, what Plaintiff mischaracterizes as "impermissibly weighing evidence" (OB 23) is in fact the trial court properly relying on documents

incorporated by reference to "ensure that … any inference the plaintiff seeks to have drawn is a reasonable one." *In re CBS Corp. S'holder Class Action & Deriv. Litig.*, 2021 WL 268779, at *18 (Del. Ch. Jan. 27, 2021), *as corrected*, (Del. Ch. Feb. 4, 2021) (citation omitted).

Finally, Plaintiff's valuation allegation fails to account for SimpleNexus's acquisition of LBA Ware, which took place in October 2021—well after Insight's Series B investment in SimpleNexus. B117. The $1.2 billion valuation assumed the closing of that acquisition (B25), making any view of SimpleNexus's valuation pre-dating the acquisition less relevant.

b. nCino Engaged in Extensive Negotiations and Due Diligence Prior to the Transaction.

Plaintiff's contention that bad faith is shown by the Board's "fail[ure] to negotiate the price" of the Transaction is meritless. As Plaintiff itself alleged, it was nCino's ***management*** that engaged in "significant prior negotiations" with SimpleNexus before reporting to the Board that $1.2 billion was the lowest price SimpleNexus would accept. ¶¶ 68–70; *see also id.* ¶ 69 ("significant discussions between nCino management and SimpleNexus had already occurred … and on the basis of those discussions, nCino management contemplated paying $1.2 billion"). To be sure, in its briefing below, Plaintiff tried to walk back those allegations, arguing that there were "no price negotiations" whatsoever between nCino and SimpleNexus, and that nCino "simply paid the price SimpleNexus … wanted."

A266; *see also* A322, A325, A333–34, A337. But the trial court properly credited the Amended Complaint's allegations to the contrary, finding that the Board "reasonably relied on management's opinion, ***informed by negotiations***, that $1.2 billion was the floor." Op. 16 (emphasis added).

As a result, Plaintiff now changes tack again, admitting that nCino management "engag[ed] in price negotiations" but faulting the Board for accepting management's view that SimpleNexus would not sell for less than $1.2 billion because Naudé and Orenstein were allegedly under Insight's "influence." OB 28, 31–32. But as discussed in more detail below (*infra* § I.C.3), Plaintiff has now backed away from the argument on which it relied in the trial court, that Insight controlled nCino—and thus Naudé and Orenstein—at the time of the Transaction. Nor has it identified any other basis to doubt the Board's ability to rely on management to negotiate the Transaction. *See Wisconsin Inv. Bd. v. Bartlett*, 2000 WL 238026, at *4 (Del. Ch. Feb. 24, 2000). In fact, Plaintiff's negotiation-related allegations against Naudé and Orenstein were so cursory that Plaintiff hardly attempted to defend them in the trial court. Op. 25 n.97 (finding Plaintiff waived its argument that Naudé faces a substantial likelihood of liability for his negotiation efforts, because Plaintiff only "devotes one sentence of its brief to the argument").

In addition, Plaintiff concedes that significant negotiations also occurred with Board involvement, further precluding any inference of bad faith. At the time

management informed the Board about the initial negotiations, SimpleNexus was insisting on between 25% and 50% cash, but following Board discussions, nCino persuaded SimpleNexus to accept 20%. OB 6, 9. The trial court recognized the significance of this concession, Op. 20, which resulted in nCino providing consideration worth hundreds of millions less than $1.2 billion, ¶ 87 n.17. The trial court also recognized the significance of a lock-up agreement with Insight that nCino secured in November 2021, well after the Board became involved. Op. 20 (citing ¶ 93). Without that agreement, Insight "could freely sell its stock immediately upon closing," Op. 9, potentially depressing nCino's share price. Instead, Insight continues to hold the vast majority of its stake to this day.[11] These facts speak for themselves.

The Board's extensive due diligence efforts also preclude any inference of bad faith. nCino retained multiple reputable advisors. *Id.* ¶ 75. The Board met five times over three months to discuss the Transaction, and it spoke with SimpleNexus's founder and CEO on separate calls. B30. It considered not only SimpleNexus's financial projections but also separate projections by nCino management, which

[redacted]

[11] These facts also render Plaintiff's entire theory of the case nonsensical: that Insight negotiated a windfall for itself at nCino's expense, when that purported windfall came mostly in the form of ***nCino stock that Insight agreed to lock up and largely still owns***.

[redacted] B37. It also reviewed interviews of SimpleNexus customers, B50–62 (nCino board package); financial and tax due diligence by Ernst & Young, B63–136; legal due diligence, B197–232; due diligence of LBA Ware, which SimpleNexus had just acquired, B137–55; and a fairness opinion by BofA that determined the Transaction "is fair to the Company from a financial point of view," B16, B233–303.

Plaintiff makes a half-hearted attempt to call BofA's fairness opinion into question, arguing that the trial court erred by finding that the opinion supported the fairness of the Transaction. OB 32–33. After devoting many pages of its opposition brief below to nitpicking BofA's methodology, A277–79, A323–25, Plaintiff can only muster a single paragraph here. OB 32–33. For good reason: as the trial court found, "quibbling with or criticizing a financial analysis falls far short of showing it was so facially flawed as to rebut the presumption that the directors relied on it in good faith." Op. 17. Plaintiff has not "plead[ed] non-conclusory facts creating the reasonable inference that the board purposely relied on analyses that were inaccurate for some improper reason." *In re Paramount Gold & Silver Corp. S'holders Litig.*, 2017 WL 1372659, at *15 (Del. Ch. Apr. 13, 2017) (citation omitted).[12]

[12] Plaintiff's only remaining contention, that BofA's fairness opinion "confirms neither it nor the Board ever considered the sub-$200 million valuation implied by Insight's prior SimpleNexus investments," OB 32, fails for the reasons discussed *infra* at Section I.C.2.a.

c. The Double-Dummy Transaction Structure Does Not Indicate Bad Faith.

Plaintiff's criticisms of the Transaction's "double-dummy" structure similarly miss the mark. Plaintiff alleges that "the Board never sought anything in return" for agreeing to this structure, which provided tax benefits to SimpleNexus shareholders, and thus the Board must have sought to benefit Insight at nCino's expense. OB 34–35. This inference falls apart under even the slightest scrutiny.

At the outset, Plaintiff incorrectly assumes that if the minutes do not expressly identify a benefit to nCino, no such benefit exists. OB 34. But as the trial court recognized, "the fact that an identified benefit to a counterparty is not specifically coupled to a benefit to the Company does not constitute a particularized allegation of bad faith." Op. 19 n.79. Plaintiff relies on the simplistic assumption that complex negotiations involve an issue-by-issue give-and-take—that, as to each deal point, one party receives a benefit, and then other party receives a corresponding benefit of equivalent value, and so on. *See* OB 34. There is no basis for such an assumption. *See In re MeadWestvaco S'holders Litig.*, 168 A.3d 675, 685–86 (Del. Ch. 2017) (rejecting plaintiff's criticism of isolated aspects of acquisition when record reflected significant give-and-take on multiple issues). Ironically, Plaintiff faults the trial court for considering this issue in isolation, while in the same breath asking this Court to consider the double-dummy structure in isolation, without regard to the myriad other points on which the parties compromised. OB 36–37.

Plaintiff also wrongly assumes that a benefit cannot be mutual. In other words, just because SimpleNexus shareholders received a tax benefit from the deal structure, it does not follow that nCino did not also receive a corresponding benefit. *See In re Vaxart, Inc. S'holder Litig.*, 2021 WL 5858696, at *22 (Del. Ch. Dec. 1, 2021) ("even if Vaxart received no monetary consideration for the Amendments .... [i]t would not be unreasonable for the Directors to believe" that they would help the company raise capital). As nCino has explained, a deal structure that imposed significant tax liability on SimpleNexus shareholders "would necessarily incentivize the shareholders to sell shares to pay the liability, creating downward pressure on nCino's stock price." B315. Plaintiff cannot dispute this intuitive point.

Plaintiff's reliance on *Fishel v. Liberty Media Corp.* is misplaced. OB 35–36. First, *Fishel* involved an undisputedly controlling shareholder that held at least 77% of the company's shares. OB, Ex. D at 8–9; *see also id.* at 48 (undisputed that shareholder "has hard control"). Even if Plaintiff had not abandoned its Insight control argument, Insight's roughly 32% stake is not remotely close to the stake at issue in *Fishel*. Second, and most obviously, *Fishel* involved a board's unilateral action to increase a share repurchase program, which purposefully provided unique benefits to its controller—not, as here, an arm's length transaction between two parties involving a multifaceted give-and-take, in which a tax benefit was received by ***all*** SimpleNexus shareholders. *Id.* at 36. The court in *Fishel* inferred a conflicted

transaction because the controller provided the company ***nothing*** in return for significant "gratuitous benefits," *id.* at 44, while here the Amended Complaint identifies significant concessions made, and benefits provided, by SimpleNexus—not only the reduced cash consideration and Insight's lock-up agreement, but the acquisition of SimpleNexus itself.[13]

In sum, the Board's agreement to a mutually beneficial tax structure, as part of its agreement to a broader set of terms, was entirely proper. Plaintiff did not argue below that the double-dummy structure could be a standalone basis for inferring bad faith, and its suggestion to that effect now is meritless.

d. Plaintiff's Bad Faith Allegations Are Just as Deficient in the Aggregate.

Plaintiff faults the trial court for "view[ing] in isolation" its allegations of bad faith, OB 2–3, but the court's opinion reflects exactly the opposite. Rather than addressing each argument in separate subsections, the trial court considered all bad-faith arguments in tandem, leading up to a holistic summary of the Board's process. Op. 14–20 (concluding by rejecting Plaintiff's assertion that that the directors "had

[13] Plaintiff's other cases are similarly distinguishable. *In re Digex, Inc. S'holders Litig.*, 789 A.2d 1176, 1208, 1211, 1213 (Del. Ch. 2000) (finding "few substantive reasons" for board's waiver of statutory protections, which was controlled by interested directors who had a "clear conflict of interest"); *In re Tilray, Inc. Reorganization Litig.*, 2021 WL 2199123, at *9, *11 (Del. Ch. June 1, 2021) (board approved corporate reorganization in order to provide controllers unique benefit of avoiding "massive tax liability").

their heads in the sand"); *see also MeadWestvaco*, 168 A.3d at 685 (rejecting bad faith claim where board was "actively engaged" in a pre-acquisition due diligence process similar to that here).

Specifically, the trial court (1) relied on Plaintiff's own allegations to reject the argument that nCino "simply accepted SimpleNexus's $1.2 billion offer" without price negotiations (Op. 16); (2) found that Plaintiff's "quibbling" with BofA's fairness opinion—even assuming, without deciding, it was well-founded in the first place—"falls far short" of rebutting the presumption of good faith (*id.* at 17); (3) relied on Plaintiff's own allegation that the Board did not know the alleged implied valuation, such that it could not establish knowing misconduct (*id.* at 17–18); (4) rejected Plaintiff's alleged valuation as relying on an "unreasonable" assumption (*id.* at 18); and (5) rejected the inference that nCino received nothing for the double-dummy structure (*id.* at 19 n.79). In other words, a string of zeroes adds up to zero.

3. The Trial Court Correctly Held That Directors Naudé, Collins, and Lake Are Independent of Insight.

After spilling much ink below arguing that Insight controlled nCino at the time of the Transaction and when demand should have been made—despite holding only one Board seat and far less than a majority stake—Plaintiff has abandoned that argument here. *Compare, e.g.*, A266, A286, A322–23, A326–34, *with* OB 5 ("significant influence"), OB 7 ("considerable influence"), OB 31 ("influence[]");

Supr. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal."). Plaintiff does assert that Insight remained a *de facto* controller when it held 42.6% of nCino shares in July 2020, but after Insight's ownership later dropped to 32%-38%, it merely "remained the Company's largest shareholder" and retained "significant influence," not control. OB 5. Plaintiff's characterization of Insight as "nCino's then-controller" as of July 2020 confirms that it has abandoned the argument that Insight remained a controller at the relevant times. *Id.* at 7.

That is a significant concession for purposes of the independence analysis, as many of Plaintiff's arguments rested on its control allegation. The trial court correctly found that Plaintiff failed to rebut the presumption of director independence ***without even reaching the control issue.***[14] With Plaintiff having conceded both that issue and the independence of Doyle and Kilday, this Court's analysis is even easier.[15] Miscellaneous allegations of past business dealings

[14] Because Plaintiff has abandoned its control arguments and because the trial court did not need to reach the control issue, the Insight Defendants separately note only that they presented additional bases for dismissal below.

[15] The trial court did not reach the issue of Ruh's independence, and this Court need not do so either if it affirms the court's conclusions as to Naudé, Lake, and Collins. If, however, the Court were to disagree as to two of those Directors, the result should not change, because the allegations as to Ruh did not show that he lacked independence. *See infra* at § I.C.3.d.

involving Insight and vague inferences of "owingness" fall far short of impugning the independence of Naudé, Lake, or Collins.

a. Naudé

Plaintiff cannot dispute that Naudé owns more than 500,000 shares of nCino stock and thus has a very substantial personal interest in not harming nCino just to benefit Insight. *See In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 356–57 (Del. Ch. 1998), *aff'd in part, rev'd in part and remanded sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *2, *12 (Del. Ch. May 22, 2000) (no basis to find that director who owned "substantial equity" in company would favor allegedly controlling shareholder over it). Instead, Plaintiff simply elides that fact.

Plaintiff attacks the trial court's finding that "Plaintiff has not pled with particularity that Naudé is dependent on his CEO salary," OB 39 (quoting Op. 24), but it fails to address its underlying concession that Insight does not control nCino. Given that Insight cannot unilaterally remove Naudé as CEO, any dependence on his nCino salary is irrelevant to the analysis. *See Flannery v. Genomic Health, Inc.*, 2021 WL 3615540, at *16 (Del. Ch. Aug. 16, 2021) (rejecting allegation that company executive lacked independence from "significant stake[holder]" where allegations "say[] nothing of the [stakeholder's] control over the Board or any of its members"); *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 177 (Del. Ch.

2005), *aff'd,* 906 A.2d 114 (Del. 2006) ("This Court will not find a director beholden unless the purported controlling person has 'unilateral' power to substantially affect the director." (quoting *Telxon Corp. v. Meyerson*, 802 A.2d 257, 264 (Del. 2002)). Put differently, even if Naudé were dependent on ***nCino*** for his CEO salary, that would have no bearing on Plaintiff's allegation that he lacks independence from ***Insight***.

Plaintiff also identifies no reason to question the trial court's determination that Naudé's $49 million stock sales made him financially independent. Op. 24–25. Although it points out that Naudé received compensation worth $14 million between 2020 and 2022, which if considered in isolation would be material, it fails to address that Naudé's considerable wealth means he has no need for additional compensation. Plaintiff also fails to acknowledge that the vast majority (82%) of that additional compensation came in the form of nCino stock. A222. Far from demonstrating dependence on Insight, this compensation only bolsters Naudé's independence, creating greater incentives to benefit nCino over Insight. *Walt Disney Co.*, 731 A.2d at 356–57.

Next, Plaintiff makes little effort to challenge the trial court's rejection of the argument that Naudé is somehow indebted to Insight for taking nCino public. Op. 24–25. After all, Plaintiff has not alleged that Insight was responsible for Naudé's holdings of stock that he sold—only that Naudé "could not have monetized

his previously illiquid private holdings" without Insight's support for the IPO. OB 41. That is an exceptionally thin reed. *See Zuckerberg*, 262 A.3d at 1063 (vesting of director's company stock irrelevant to independence analysis). Plaintiff offers no legal support for this argument, which has sweeping consequences: by Plaintiff's logic, anyone who held nCino shares at the time of the IPO would be forever indebted to Insight, merely because it had a role in the IPO. *See* A313 (making the same argument of IPO-related "indebtedness" as to Ruh).

Finally, Plaintiff argues that "myriad" other allegations holistically establish Naudé's lack of independence, OB 41, but Plaintiff did not bother to raise them in its briefing in the trial court, A287–91. That Naudé is not "independent" under Nasdaq rules does not establish the same under Delaware law, *Teamsters Union 25 Health Services & Insurance Plan ex rel. Orbitz Worldwide, Inc. v. Baiera*, 119 A.3d 44, 61 (Del. Ch. 2015), and in any event, this goes to whether Naudé is independent ***from nCino***, not whether he is independent ***from Insight***. The same is true for the allegation that nCino employs three of Naudé's family members—any indebtedness runs to nCino, not Insight. OB 41. And the mere fact that Insight and Naudé speak highly of one another (*id.* at 40–41), if accepted as a basis to undermine independence, would disqualify scores of directors from ever considering demand involving anyone with whom they have ever worked (or paid a compliment).

b. Lake

Plaintiff fails to impugn Lake's independence from Insight. Its reliance on Lake's directorship and consulting agreement with nCino is unavailing, particularly given the lack of factual allegations connecting that agreement to Insight. Op. 27. Plaintiff now concedes that Insight did not control nCino when Lake became a director in April 2017, nor when he entered the consulting agreement the following month. OB 43. In the trial court, Plaintiff misleadingly argued that these events happened "around the time that Insight acquired control of nCino," A291, but the trial court correctly found otherwise, Op. 27.

Plaintiff misconstrues the trial court as finding Insight's lack of control dispositive, *id.* at 42, when in fact the trial court also correctly noted the lack of any other well-pled allegations that Insight is responsible for Lake's position with nCino, Op. 27. Plaintiff does not dispute the latter point, instead insisting that Insight's stake in nCino, ***standing alone***, demonstrates that Insight is responsible for Lake's continued nCino tenure. OB 43–44. The opposite is true. Lake became an nCino director and consultant before Insight held a controlling stake, kept those roles while Insight held a controlling stake, and retained them after Insight no longer held a controlling stake. *See id.* The only logical inference is that Lake's nCino tenure has never depended on Insight, and Plaintiff offers no well-pleaded allegations to the contrary.

Even assuming otherwise would not impugn Lake's independence, either as a result of past "owingness" or a fear of future retribution. *McElrath*, 224 A.3d at 996 (without more, "appointment to the board is an insufficient basis for challenging [a director's] independence"); *Benihana of Tokyo*, 891 A.2d at 177. Further, Plaintiff does not allege that Lake's compensation was unusual or excessive, and thus it is "insufficient to create a reasonable doubt" as to his independence. *Simons v. Brookfield Asset Mgmt. Inc.*, 2022 WL 223464, at *15 & n.100 (Del. Ch. Jan. 21, 2022) (citing *Walt Disney Co.*, 731 A.2d at 360). Instead, Plaintiff engages in creative math to suggest excessiveness, aggregating all compensation received since 2017 and valuing stock options at their eventual, in-the-money face value rather than their value at the time of issuance. OB 44. Even accepting that hindsight math, Plaintiff's headline number ("*$2.5 million*") amounts only to roughly $350,000 per year for both consulting and director work. *See id.*

Plaintiff also acknowledges that much of Lake's compensation from nCino came in the form of nCino stock and options, not cash. OB 44; *see also* A211. Plaintiff fails to recognize, however, that this confirms Lake's alignment of interests with nCino, not Insight. *Walt Disney Co.*, 731 A.2d at 356–57. Like Naudé, Lake owns significant nCino shares, undermining any inference that he would benefit Insight at nCino's expense. B12. Thus, even if Lake's compensation were material, the form of that compensation ensures his independence from Insight.

Lake's service on the boards of Duco and Fenergo do not help Plaintiff either. *McElrath*, 224 A.3d at 995–96. As for Duco, Plaintiff alleges only that Lake joined the Duco board eight months after Insight made an unidentified investment in the company, and that he left some unspecified amount of time "soon afterward" Insight exited its investment. OB 46. Plaintiff characterizes these allegations as showing that the timing of Lake's tenure "mirrored" Insight's investment, such that the Court should infer that Insight appointed Lake. *Id.* Aside from the chronological inaccuracy, Plaintiff fails to come to grips with the fact that Lake re-joined the Duco board after Insight's exit and remains a Duco investor. *Id.* This undermines any possible inference that Insight was responsible for Lake's involvement with Duco; an inference that Plaintiff bases on timing alone.

The same is true for Fenergo. Plaintiff alleges that Insight took a controlling stake in Fenergo in July 2015 and that Lake joined the board sometime the following year; it also alleges that Insight exited its investment in May 2021 and that Lake left the board some unspecified amount of time "[s]hortly thereafter." ¶¶ 119–20. As with Duco, Plaintiff acknowledges that Lake remains a Fenergo advisor and investor even though Insight exited its investment years ago. *Id.* Plaintiff nonetheless insists illogically, based on timing alone, that Insight was responsible for Lake's Fenergo tenure.

Although nCino respectfully disagrees with the trial court that Plaintiff adequately pleaded Insight "appointed Lake to the Fenergo board in 2016," Op. 28, the fact that the trial court nonetheless affirmed Lake's independence is devastating to Plaintiff's argument. In other words, even assuming Insight placed Lake on a board eight years ago, and even assuming it did so once more six years ago, that does not "disturb the presumption that he is independent today." *Id.*[16] Plaintiff alleges nothing unusual about either directorship, such that any "owingness" as a result of two ordinary-course business interactions years ago could reasonably cause Lake to violate his fiduciary duties to nCino, particularly in light of his substantial nCino stock holdings. *McElrath*, 224 A.3d at 995–96; *Walt Disney Co.*, 731 A.2d at 356–57. Put differently, Plaintiff has fallen far short of pleading that Lake—or any other nCino director—"owe[s his] success" to Insight. *In re Match Grp., Inc. Deriv. Litig.*, 2024 WL 1449815, at *18 (Del. Apr. 4, 2024) (director beholden

[16] *See DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *12-13, *23 (Del. Ch. Sept. 30, 2013) (allegations that director had served on board of controlling stockholder's portfolio companies insufficient to plead lack of independence); *Franchi v. Firestone*, 2021 WL 5991886, at *5 (Del. Ch. May 10, 2021) (nomination to other boards by alleged controlling stockholder did not show lack of independence); *In re Dow Chem. Co. Deriv. Litig.*, 2010 WL 66769, at *9 (Del. Ch. Jan. 11, 2010) ("That directors of one company are also colleagues at another institution does not mean that they will not or cannot exercise their own business judgment with regard to the disputed transaction.").

because he spent 13 years as controller's CFO and earned over $4.5 million serving as director of controller-affiliated companies).[17]

By the same token, the allegations that Element Ventures "operates in the same technology space" and "co-invested" alongside Insight in three companies merit little attention. OB 46–47. That Lake's firm merely does business alongside a "fellow investor/traveler" does nothing to impugn his independence. *Flannery*, 2021 WL 3615540, at *16; *see also Zuckerberg*, 262 A.3d at 1063 (allegations of unspecified "deal flow" insufficient where complaint failed to identify a single such "deal").

Finally, Plaintiff falls back to its repeated mantra that the trial court failed to consider Plaintiff's arguments "holistically." OB 47. Again, the trial court's opinion reflects otherwise: it wholly rejected the arguments related to the nCino directorship and consulting agreement; it considered the Duco and Fenergo arguments ***in tandem*** and, even crediting Plaintiff's strained inference as to Fenergo, found that it did not impugn independence; and it wholly rejected the argument that "co-investing" somehow creates (or even suggests) dependence. Op. 28–29. Plaintiff cannot

[17] *In re Match Group* is also distinguishable because that case involved application of the entire-fairness standard of review in a direct claim, which "stand[s] apart" from this Court's "demand review precedent" in derivative suits. *Id.* at *16.

transform a hodgepodge of unreasonable inferences into a viable argument simply by piling them on top of each other.

c. Collins

Plaintiff follows the same failed playbook as to Collins: (1) asserting that Collins' nCino compensation renders him dependent on Insight, despite Insight lacking control; (2) insisting that scattered business dealings years ago somehow make Collins indebted to Insight today; and (3) complaining that the trial court failed to consider these deficient allegations "holistically." OB 48–49.

Plaintiff's arguments concerning Collins' alleged dependence on his nCino compensation fail for the same reasons as to Naudé and Lake. *Supra* §§ I.C.3.a-b. Plaintiff alleges that Collins was an executive at several other corporations, including The Walt Disney Company for nine years, and that he received more than $10 million in compensation from his work at ExactTarget. ¶¶ 132–33. These allegations indicate that his nCino compensation is not material to him, but even assuming otherwise, Insight does not have the unilateral ability to remove Collins as director and deprive him of this compensation. *Benihana of Tokyo*, 891 A.2d at 177.[18] In any event, as discussed, Delaware law generally treats director fees as

[18] Plaintiff makes the heavily caveated argument that it is "reasonably inferable" that Insight could "effectively" remove Collins, because it would be difficult for Collins to "cobbl[e] together" enough votes without Insight's. OB 51–52. But Delaware courts demand unilateral removal power, refusing to infer dependence based solely on the possibility of removal. *Benihana of Tokyo*, 891 A.2d at 177.

insufficient to overcome the presumption of independence. *See, e.g.*, *Simons*, 2022 WL 223464, at *15 ("serving as a director on the board of a Delaware corporation is not a pro bono gig"). Finally, only $54,000 of the annual director fee was in cash, with the balance being equity awards, *see* A211, which aligns Collins's interest with those of shareholders and incentivizes him to protect nCino. *See Walt Disney Co.*, 731 A.2d at 356-57.

With regard to alleged "owingness" as a result of past business dealings, Plaintiff first relies on a $10 million "golden parachute" that Collins allegedly received "when Insight and TVC sold ExactTarget [to Salesforce] in June 2013." OB 48. But as shown by judicially noticeable SEC filings cited in the complaint, Salesforce purchased ExactTarget not from these two companies but through a public tender offer, and a different company called *TCV* (not SimpleNexus investor TVC) was an investor in ExactTarget.[19] ExactTarget's Prospectus dated September 2012 also does not list Insight as one of its principal stockholders holding more than

[19] ExactTarget, Inc., Schedule 14D-9 at 1 (June 3, 2013), *avail. at* https://www.sec.gov/Archives/edgar/data/1420850/000119312513255538/d548389dsc14d9.htm; ExactTarget, Inc., Form S-1 at 112 (Nov. 23, 2011), *avail. at* https://www.sec.gov/Archives/edgar/data/1420850/000119312511320915/d256812ds1.htm.

5% of its common stock.[20] That Plaintiff persists with these demonstrably false arguments in this Court, OB 48-49, after being apprised of their falsity in the court below, is telling.

More fundamentally, Plaintiff has not alleged that Insight controlled ExactTarget ***at any time***, let alone after its IPO or when Salesforce purchased it. *Id.* (alleging Insight held 35% interest in 2009, two years prior to IPO and four years prior to the Salesforce acquisition). Nor has Plaintiff alleged any other factual basis to "tie Collins's position at ExactTarget to Insight." Op. 29. There is no basis to infer that Collins is indebted to Insight for his CFO position or an exit package, such that more than ten years later he would be beholden to an ExactTarget investor.

With regard to Collins' tenure on an advisory board at Cherwell between 2015 and 2018, the trial court recognized that there are no particularized allegations allowing an inference that this tenure would create any "owingness" today. Op. 30. Plaintiff did not plead that Collins was even compensated for this role. *Id.* Plaintiff complains that Cherwell is a private company, so the trial court should have assumed compensation—despite no allegation to that effect—relying on the general proposition that directors typically are compensated and receive intangible benefits

[20] ExactTarget, Inc., Form 424B4 at 110 (Sept. 11, 2012), *avail at* https:// https://www.sec.gov/Archives/edgar/data/1420850/000119312512388723/d377364d424b4.htm#tx377364_15.

like prestige. OB 49–50. But Plaintiff did not allege that Collins sat on Cherwell's Board of Directors—merely an "advisory board" about which it provides no other factual allegations. It would not be reasonable to infer that Collins, as a result of this advisory board stint years ago, would violate fiduciary duties to nCino and benefit Insight over his own financial interests. *McElrath*, 224 A.3d at 995–96; *Walt Disney Co.*, 731 A.2d at 356–57.

Plaintiff hardly mentions its allegations concerning Instructure and Shopify, which is unsurprising in light of how sparse they are. ¶¶ 135–36. Plaintiff argues here only that these companies are "private" and that "Collins' appointments and departures from [them] aligned with Insight's investments and exits," such that the trial court should have inferred Collins served at Insight's behest. OB 48. Not true. Collins allegedly joined Instructure's board six months ***before*** Insight invested, and there are no allegations concerning any purported "exit[]" by Insight, let alone one that "aligned" with Collins' exit in March 2020. ¶ 135. Shopify is no different. Although Plaintiff alleges that Collins joined Shopify's board seven months after Insight's investment, it again alleges nothing concerning any purported "exit[]" by Insight, let alone one that "aligned" with Collins' exit in May 2019. ¶ 136.

Likewise, Plaintiff quibbles about whether it must plead "control" or "significant influence," OB 49, but it pleads ***nothing*** about the size of Insight's investment in either company, such that this Court could infer any connection at all

between Insight and Collins' board service there. Op. 30. Even if that were not so, these years-ago directorships are not alleged to be anything more than ordinary-course business dealings, and thus fall far short of pleading such significant indebtedness as to overcome the presumption of Collins' independence today. *McElrath*, 224 A.3d at 995–96; *Walt Disney Co.*, 731 A.2d at 356–57.

Finally, once again, the trial court did consider these allegations "holistically" and simply found them wanting. Op. 29–30. Plaintiff seems to believe that because it vaguely alleged "five Insight portfolio company affiliations," the trial court was bound to ignore the vagueness and infer a lack of independence. OB 48. But the trial court explained exactly why each alleged "affiliation" did not include sufficient factual allegations to allow a reasonable inference of indebtedness, individually or in the aggregate. Op. 29–30. Plaintiff does not identify any error in those findings, individually or in the aggregate.

d. Ruh

Even if Plaintiff could succeed in disqualifying two of Naudé, Lake, or Collins (it cannot), the Court should still affirm the decision below because Plaintiff did not plead facts raising a reasonable doubt as to Ruh's independence. Although Plaintiff requests remand to allow the trial court to decide this issue, OB 6 n.10, this Court may affirm on this ground even though the trial court did not reach it. *Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012).

Plaintiff does not plead that Ruh has any connection to Insight. ¶¶ 20, 138–48. It acknowledges that Ruh became an nCino director years before Insight's first investment, and that Ruh remained a director after Insight no longer held a controlling stake. *See* ¶¶ 14, 20. It does not allege that Ruh's "significant experience in financial services and private equity" involving other companies has anything to do with Insight. ¶¶ 20, 139. Rather, its contention that Ruh is dependent on Insight is premised on the bare-bones assertion that Ruh benefited from Insight's role in bringing about an IPO, which allowed for Ruh's subsequent stock sales. A313. As discussed as to Naudé (*supra* § I.C.3.a), an IPO that created a public market for the shares of all then-existing nCino shareholders—not just Ruh or Naudé—is far too tenuous to create any reasonable doubt as to Ruh's independence.

Nor is there any other basis to question Ruh's ability to consider a demand. Plaintiff argued below that Ruh was disqualified because he "faces a significant likelihood of liability for breaching his fiduciary duties" for insider trading, A301, but as discussed above, Plaintiff has not raised this issue in its brief. In any event, demand futility is determined on a claim-by-claim basis, and the SimpleNexus acquisition was a separate transaction from the alleged insider trading; the claims based on those separate transactions involve different alleged misconduct and different legal theories. The alleged insider trading therefore is not relevant to Ruh's

ability to consider a demand on the Transaction-related claims. *See Vaxart*, 2021 WL 5858696, at *19-22.

CONCLUSION

This Court should affirm the trial court's dismissal of this action.

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CERTIFICATE OF SERVICE

I, Garrett B. Moritz, hereby certify that on April 25, 2024, I caused a true and correct copy of the *PUBLIC VERSION of Appellees' Answering Brief* to be served through File & Serve*Xpress* upon the following counsel of record:

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