IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ORACLE CORPORATION DERIVATIVE LITIGATION	) CONSOLIDATED) C.A. No. 2017-0337-SG

MEMORANDUM OPINION

Date Submitted: March 11, 2022
Date Decided: May 20, 2022

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GLASSCOCK, Vice Chancellor

This action—in Reader's Digest abridgement—alleges that the founder, board chairman and CTO of Oracle Corporation, Defendant Larry Ellison, for personal financial reasons wished Oracle Corporation ("Oracle") to acquire another company in which he was interested, NetSuite, Inc. ("NetSuite"), and that Ellison, aided by his confederate, co-fiduciary and co-Defendant, Oracle co-CEO Safra Catz, caused Oracle to acquire NetSuite in an unfair and conflicted transaction. The transaction was negotiated by a Special Committee of Oracle's board of directors (the "Special Committee"), chaired by a third Defendant, Renée James. At the motion to dismiss stage, I found James to lack independence from Ellison, and that allegations against her for breach of fiduciary duty in way of the NetSuite acquisition stated a claim. Discovery ensued.

Before me now is James's motion for summary judgment (the "Motion"). James argues that, based on what is now a developed record, the Plaintiffs—Oracle stockholders proceeding derivatively—can point to no genuine disputes of material fact , and that based upon the undisputed facts, I should find as a matter of law that she was independent of Ellison. There is no allegation that she has an interest in *the challenged acquisition*. Accordingly, per James, she is entitled to a judgment in her favor on the breach of fiduciary duty claims because she was independent.

In addition, the Plaintiffs in the current complaint (the "Complaint") contend that James's actions regarding the acquisition demonstrate bad faith, an independent

allegation of breach of the duty of loyalty. James moves for summary judgment here as well, arguing again that the Plaintiffs have not shown evidence sufficient to sustain a claim of bad faith, as a matter of law.

Taking these two heads of the Motion in reverse order, I find that James is entitled to a judgment in her favor on the bad faith claim. The Plaintiffs' theory rests, substantially, on James's reliance on statements made by Catz to the Special Committee, outlining Catz's (supposedly) anodyne discussions with NetSuite management regarding the potential acquisition before the Special Committee negotiations took place. James appears to have accepted Catz's representations as true, in spite of an assertion to the contrary by a NetSuite stockholder in a letter, which was made available to the Special Committee. As a result, per the Plaintiffs, the Special Committee failed to learn that discussions between Catz and the NetSuite Chief Executive Officer put in place a price collar that subsequently controlled merger negotiations. I find that this, and other facts pointed to by the Plaintiffs, falls short of demonstrating the scienter necessary to a finding of bad faith on the part of *James,* however, even in light of the non-movant-friendly inferences that I must employ on a motion for summary judgment. A misplaced reliance on statements of management by a director—without more—does not imply bad faith. I thus grant James's Motion in part.

The remaining claim—that James lacked independence from Ellison, who stood on both sides of the transaction, and that she acted to facilitate his interests—is supported by reasonable inferences from the evidence. While it is not proved on this record—that is, a hypothetical motion for summary judgment by the Plaintiffs on this issue would be denied as well—I cannot say, under the facts of record, that James was independent of Ellison as a matter of law, as the current Motion advocates.

While the facts are legion and laid out more fully below, most pertinent is this: At the time she served as chair of the Special Committee, James was pursuing an investment in a technology company on behalf of her then-employer, the Carlyle Group. Evidence is sufficient that I may reasonably infer that James wanted to be a Chief Executive Officer of a technology company, that she saw the investment as a vehicle to that end, and that Ellison and Catz were key to Oracle's potential investment in the deal, which would advance James's interest. I may further infer that James was aware that Catz and Ellison had an interest in Oracle acquiring NetSuite, which she was in a position to—and did—facilitate as head of the Special Committee. Again, other evidence exists, and contrary inferences may reasonably be drawn, but together with the other facts addressed below, as well as the plaintiff-friendly standard I must apply here, I also deny James's Motion in part.

My rationale follows a fuller, but still abridged, statement of the facts, below.

I. BACKGROUND

This Memorandum Opinion addresses only James's Motion; the following factual background is limited to a consideration of her instant Motion. For a fuller description of the facts underlying the pertinent transaction, I will, once again, refer interested readers to my Memorandum Opinions of March 19, 2018 and June 22, 2020.[1]

The sole pending claim against James is for breach of fiduciary duty stemming from her actions in connection with Oracle's 2016 acquisition of NetSuite (the "Merger").[2] The Plaintiffs' case against James attempts to establish a non-exculpated breach of the duty of loyalty claim under *Cornerstone*, arguing primarily that James was not independent and acted to further the interests of Larry Ellison, who was interested in the Merger due to personal and familial ownership interests in NetSuite. Secondarily, the Plaintiffs forward the proposition that James acted in bad faith in connection with the Merger.

I address each of these theories, below, and ultimately grant the Motion in part and deny the Motion in part.

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[1] *See In re Oracle Corp. Deriv. Litig.*, 2018 WL 1381331 (Del. Ch. Mar. 19, 2018) [hereinafter "*Oracle I*"]; *In re Oracle Corp. Deriv. Litig.*, 2020 WL 3410745 (Del. Ch. June 22, 2020) [hereinafter "*Oracle III*"]. I note that these factual overviews, while still pertinent, are based upon earlier iterations of the Complaint.

[2] *See* Co-Lead Pls. Firemen's Retirement System of St. Louis and Robert Jessup's Verified Fifth Am. Derivative Compl. ¶ 233, Dkt. No. 484 [hereinafter "Compl."].

A. Factual Background[3]

1. The Defendants

Defendant Renée James is a director of Oracle and served as the chair of the Special Committee created to evaluate Oracle's 2016 acquisition of NetSuite.[4] James joined the Oracle board of directors (the "Board") in December 2015 as an independent director under the New York Stock Exchange ("NYSE") listing standards.[5]

The other remaining defendants, Larry Ellison and Safra Catz, have not moved for summary judgment.[6] At the pertinent times, Catz was one of two Oracle co-Chief Executive Officers, and Ellison—Oracle's founder—was the Oracle Chief Technology Officer and Chairman of the Board.[7]

[3] The facts, except where otherwise noted, are drawn from parties' papers submitted in connection with the Motion. Citations in the form of "Hahn Decl. —" refer to the Transmittal Decl. of David Hahn Supp. Pls.' Answering Br. Opp'n Def. Renée J. James's Mot. Summ. J., Dkt. No. 653. Citations in the form of "Hahn Decl., Ex. —" refer to the exhibits attached to the Hahn Decl., Dkt. Nos. 653–58. Citations in the form of "Will Decl. —" refer to the Transmittal Decl. Pursuant to 10 *Del. C.* § 3927 of Thomas P. Will Supp. Opening Br. Supp. Def. Renée J. James Supp. Mot. Summ. J., Dkt. No. 646. Citations in the form of "Will Decl., Ex. —" refer to the exhibits attached to the Will Decl., Dkt. Nos. 646–48.

[4] *See* Pls.' Answering Br. Opp'n Def. Renée J. James's Mot. Summ. J. at 2, 27–28, 30, Dkt. No. 652 [hereinafter "AB"].

[5] *Id.* at 21; *see* Will Decl., Ex. 62, at 23–24.

[6] AB 6.

[7] *See id.* at 2; *see also Oracle I*, 2018 WL 1381331, at *2 (identifying Catz as co-CEO).

The other two Oracle Special Committee members, Panetta and Conrades,[8] have been voluntarily dismissed from this action with prejudice.[9]

2. James's Background

Prior to Oracle, James had been the President of Intel Corporation ("Intel") from 2014 to 2016.[10] Her service as Intel's President capped off a career of over twenty years in the technology industry.[11] James was considered a finalist for the position of Intel's Chief Executive Officer (all Chief Executive Officer positions in this Memorandum Opinion being referred to as "CEO") in 2015, but was not selected.[12] Also in 2015, Intel put out a press release, indicating that James was leaving Intel to "pursue an external CEO role," but that she would stay on until January 2016 to help Intel's leadership transition.[13]

While President of Intel, James gave a speech at an Oracle conference in 2014, and was introduced by Catz as a "close friend" prior to the speech.[14] The Plaintiffs have sought to cast Catz and James into a mentor-mentee relationship, but have not been able to provide significant facts to support this allegation. Catz testified at her

[8] Opening Br. Supp. Def. Renée J. James's Mot. Summ. J. 6, Dkt. No. 645 [hereinafter "OB"].
[9] *See* Granted (Notice and [Proposed] Order of Dismissal as to Certain Defs., Pursuant to Ct. of Chancery Rules 41(a)(1)(i) and 23.1(c)), Dkt. No. 304.
[10] OB 7; *see also* Will Decl., Ex. 6.
[11] *See, e.g.*, Will Decl., Ex. 6.
[12] OB 7.
[13] *See* Hahn Decl., Ex. 3.
[14] *See, e.g.*, *id.* at Ex. 2, ¶ 30; AB 49 (identifying James as the President of Intel at the pertinent time).

deposition that she and James "would have dinner maybe twice a year," and would talk about "[w]omen's career issues."[15] Based on the limited portions of the deposition transcript provided to me, Catz did not specify whether she would dispense advice, or whether James would seek advice, during these conversations.[16] For her part, James testified that she "did ask [Catz] for advice on some of the things that I was asked to interview for from time to time."[17] The Plaintiffs' papers also state that Catz asked James to join the Oracle Board; the citation is to an email from Michael Boskin (an Oracle director), which reads in part: "Safra [Catz] spoke with Renee [James] and established that she would like to join us . . . ."[18] The Plaintiffs point to no evidence that any personal interest of Catz's underpinned the request for James to join the Board.

The Plaintiffs have provided certain quotes from James, discussing her view of the relationship between a board of directors and a company's CEO. For example, she stated to the Stanford Graduate School of Business that she had learned that "people do what they think the CEO wants, even if they know it's wrong. And that's a very dangerous phenomenon."[19] James said in a separate speech to the Stanford Graduate School of Business that "when you're CEO, it's all about the board. If you

[15] *See* Hahn Decl., Ex. 7, 21:18–22:13.
[16] *See id.* at Ex. 7, 21:18–22:13.
[17] *See* Will Decl., Ex. 7, 48:2–10.
[18] *See* AB 4; Hahn Decl., Ex. 38.
[19] *See* Hahn Decl., Ex. 1.

have a dysfunctional board, and a board that, you know, isn't supportive, or that has their own internal dynamic and politics, like, that's just—life's too short for that."[20]

Having established context for James's actions in connection with the Merger, I turn to a discussion of the transaction.

3. The Merger

As mentioned above, Ellison had an interest in NetSuite prior to the Merger. Ellison co-founded NetSuite, and he and his immediate family owned 47% of NetSuite's common stock as of February 2016.[21]

In January 2016, "Oracle Management" suggested to Oracle's Board that it consider a transaction with NetSuite.[22] The Board then formed the Special Committee in March 2016 to "evaluate, negotiate, and approve the Transaction."[23] James was appointed chair of the Special Committee.[24] Counsel for James indicated at oral argument that James was aware of Ellison's interest in NetSuite.[25]

[20] *Renee James, former President of Intel: "Everybody Who Takes Risks Fails*," Feb. 10, 2016, YouTube, https://www.youtube.com/watch?v=ShGs_mou3Do (pertinent statement at timestamp 13:55).
[21] *See* AB 7.
[22] OB 5–6.
[23] *Id.* at 6.
[24] *E.g.,* AB 30.
[25] Tr. of 3-11-2022 Oral Arg. on Renée J. James's Mot. Summ. J., 15:23–16:5, Dkt. No. 677 [hereinafter "MSJ Tr."].

The Special Committee held thirteen meetings to discuss the Merger during spring and summer 2016.[26] James also attended an in-person due diligence meeting between the two companies on May 5, 2016.[27]

The Special Committee also retained Moelis & Company ("Moelis") as a financial advisor in connection with the Merger.[28] Moelis's engagement included a $17 million fee that would be due if Oracle in fact consummated the Merger,[29] although pertinent Special Committee minutes note that both Moelis and a second potential financial advisor had proposed a "very similar fee structure and dollar amounts, a large portion of which would be contingent on the consummation of a transaction."[30] James signed the Moelis engagement letter on behalf of the Special Committee.[31] The Plaintiffs suggest that Moelis's advice was less than perfect, and that James "[a]cted to [a]dvance Ellison's [s]elf-[i]nterest"[32] by both electing[33] to retain Moelis and by accepting their advice without "demand[ing]" additional

[26] OB 6; *Oracle I*, 2018 WL 1381331, at *6.
[27] AB 30.
[28] *Id.* at 33; *Oracle I*, 2018 WL 1381331, at *6.
[29] AB 33–34.
[30] Will Decl., Ex. 19, at ORACLEDEL00162144.
[31] *See* AB 33.
[32] *Id.* at 57.
[33] The minutes of the pertinent Special Committee meeting indicate that a "consensus emerged" that Moelis should be the financial advisor hired; no dissent is reflected. *See* Will Decl., Ex. 19, at ORACLEDEL00162145.

information, such as competitive information and more up-to-date financial information.[34]

After the diligence meeting James attended in May 2016, Oracle's head of mergers and acquisitions told NetSuite that Oracle wanted to move forward with the acquisition.[35] On May 27, 2016, Oracle management—the Plaintiffs specifically attribute this action to Catz—suggested to the Special Committee that the initial offer be made for $100 per share.[36] NetSuite countered; the Special Committee made a second, slightly higher offer at $106, the figure suggested by "Management" per the Special Committee minutes.[37]

NetSuite countered again.[38] The Special Committee met, and the minutes reflect that, although "this was clearly a decision to be made by the Special Committee, Management would be supportive of, and recommend, a 'no counter'

[34] *See* AB 35–37, 57, 59–60.
[35] *Id.* at 24, 43.
[36] *Id.* at 44; *see also* Will Decl., Ex. 27, at ORACLEDEL00162388 (emphasis added) ("***Management recommended*** an initial proposal of $100.00 per share in cash for each outstanding share of [NetSuite] common stock.").
[37] AB 44; Will Decl., Ex. 29, at ORACLEDEL00162396 (emphasis added) ("***Management suggested*** that the Special Committee consider countering at $106 per share."). The Plaintiffs again attribute this action only to Catz, but they do not cite anything outside of the meeting minutes, which themselves define "Management" as six different people. *See id.* at Ex. 29, at ORACLEDEL00162395; *see also* AB 44.
[38] AB 44.

response . . . ."[39] After Management had left the meeting, the Special Committee discussed and determined that they would not make a counterproposal.[40]

Communication between NetSuite and the Special Committee stopped for approximately two weeks,[41] and the deal appeared moribund, a conclusion supported by the fact that the Special Committee's lead banker went on vacation during this time.[42]

Shortly, however, and following market volatility, NetSuite's financial advisor reached out to Moelis to reopen negotiations.[43] The Special Committee then conducted additional due diligence on NetSuite before reiterating its offer of $106 per share.[44] NetSuite countered at $111, "with some positioning around $110," and the Special Committee offered $109, which was accepted.[45]

In September 2016, after the proposed Merger had been publicized,[46] a large shareholder of NetSuite wrote a letter to the independent members of the NetSuite board of directors (the "T. Rowe Price Letter"), expressing its belief that the tender

[39] Will Decl., Ex. 30, at ORACLEDEL00162391. Again, the Plaintiffs attribute this recommendation solely to Catz in their brief. AB 44.
[40] Will Decl., Ex. 30, at ORACLEDEL00162391.
[41] *See* OB 17 (identifying June 28, 2016 as the date communications began again); AB 44 (identifying June 14 as the no-counter date).
[42] OB 17–18.
[43] *Id.* at 18; AB 44–45.
[44] *See* OB 18–19.
[45] AB 45.
[46] Compl. ¶ 174 (stating that the public announcement of the merger was on July 28, 2016).

offer price of $109 was *too low*.[47] The T. Rowe Price Letter also indicated that Zach Nelson, the CEO of NetSuite, had engaged in a "loose, pre-due-diligence, exploratory conversation" with Catz at which "a price range of $100-$125 was discussed."[48]

The Special Committee received a copy of the T. Rowe Price Letter on September 6.[49] James testified that the Special Committee did not do anything in reaction to the T. Rowe Price Letter, on the basis that it wasn't addressed to them, "so it wasn't ours to do anything with."[50] Her position was that Catz had given the Special Committee a summary of the discussions with NetSuite prior to the Special Committee's formation, and that whether the T. Rowe Price Letter conflicted with that summary was "not our problem, really."[51]

In October, the Special Committee confronted the fact that the Merger might not succeed due to a failure to secure the required majority tender.[52] At a meeting on October 4, Management recommended that the Special Committee extend the tender offer, but with messaging that the extension would be the final extension.[53] Once Management left the meeting, the Special Committee discussed "whether to

[47] OB 21; *see* Hahn Decl., Ex. 53, at PANETTA_00000704.
[48] Hahn Decl., Ex. 53, at PANETTA_00000704.
[49] AB 46.
[50] Will Decl., Ex. 7, at 199:12–23.
[51] *See id.* at Ex. 7, at 200:11–21.
[52] OB 22.
[53] Will Decl., Ex. 42, at ORACLEDEL00162044.

increase the offer price from the current price of $109," and ultimately decided against an increase.[54] The Special Committee did, though, consistent with Management's recommendation, make a final extension of the tender offer.[55]

T. Rowe Price sent a second letter to James and the Special Committee on October 27, 2016, indicating that it would tender its shares if the price were raised to $133 per share.[56] No such price increase occurred. Nonetheless, sufficient shares were ultimately tendered, and the Merger closed on November 7, 2016.[57]

The Plaintiffs' papers and oral argument both made much of the competitive landscape surrounding the Merger.[58] I need not reiterate these facts in detail here.

4. The Carlyle Group Investment Opportunities

James became an operating executive for the Carlyle Group in "early 2016"—around the same time the Merger was being evaluated.[59] As part of her work for the Carlyle Group in 2016, James assisted in reviewing various investment opportunities in the semiconductor market.[60] These opportunities were in a particular segment of the semiconductor market that caters to cloud service providers, including Oracle.[61]

[54] *Id.* at Ex. 42, at ORACLEDEL00162045.
[55] *Id.* at Ex. 42, at ORACLEDEL00162045.
[56] *Id.* at Ex. 43, at CONRADESDEL_00002934.
[57] AB 50; *see also* Will Decl., Ex. 46.
[58] *See generally* AB; *see generally* MSJ Tr.
[59] AB 20.
[60] *Id.* at 4.
[61] *See id.*

One such opportunity for the Carlyle Group arose in May 2016 (the "2016 Potential Investment"), contemporary with the Oracle Special Committee's consideration of the acquisition that eventually became the Merger.[62] A Carlyle Group executive, Patrick McCarter, emailed James regarding the 2016 Potential Investment, noting that he did not think the company in question was for sale, but that he thought "they would take a meeting."[63] James responded affirmatively on May 17, 2016, noting some potential flaws with the company but ultimately concluding "a meeting would be interesting. For sure. What the heck. Let's do it !"[64]

The introductory meeting for the 2016 Potential Investment took place on June 6.[65] McCarter described the introductory meeting to a colleague as "an intro meeting for Renee . . . . It does not make sense on the surface but she has a thesis (that may be too risky) we are investigating."[66] Following the June 6 meeting, McCarter mentioned to James that, if they continued pursuing the 2016 Potential Investment, they could propose "putting in on a milestones gradually alongside a strategic investor (assuming it checks out). We can get the [Carlyle Group] committee there with something like that (maybe without the strategic investor even)."[67]

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[62] *Id.* at 38.
[63] *Id.*; *see also* Hahn Decl., Ex. 70.
[64] Hahn Decl., Ex. 70.
[65] *Id.* at Ex. 71 (dated Thursday, June 2, and noting that the "intro meeting" was on Monday).
[66] *Id.* at Ex. 71.
[67] *Id.* at Ex. 72.

As of June 23, 2016, James was booked for both a follow-up meeting with the subject company of the 2016 Potential Investment (scheduled for June 28), and for dinner with Catz on July 6 (the "July 6 Dinner").[68] It appears from the papers that the June 28th meeting was scheduled before the July 6 Dinner.[69]

The July 6 Dinner was initiated by James, who reached out to Catz via email on June 20 to "find some time to have dinner - or 1 :1 if no time for dinner before the next board meeting . . . . Just want to catch up on things and talk about plans etc."[70] The email chain progresses to what appear to be James and Catz's assistants scheduling the dinner in question.[71] James, at her August 2021 deposition, was asked whether she had set up the July 6 Dinner; she answered that she did not recall.[72] She also did not recall the status of the 2016 Potential Investment as of July 2016 when asked at deposition.[73]

A slide deck was compiled detailing the 2016 Potential Investment, which had been sent to James among others.[74] The slides suggest the appointment of James as Chairman of the company in connection with the investment.[75] The broader

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[68] *Id.* at Ex. 74 (email from Liz Logan providing James with "Weekly Update 6/25").
[69] *See id.* at Ex. 73. Plaintiffs' Exhibit 73 is an email chain with the Carlyle Group beginning June 18 referring to the June 28th meeting. *Id.* By contrast, James did not reach out to Catz to schedule the July 6 Dinner until June 20. *See* Will Decl., Ex. 60, at JAMESDEL_00000909.
[70] Will Decl., Ex. 60, at JAMESDEL_00000909.
[71] *See id.* at Ex. 60, at JAMESDEL_00000909.
[72] *Id.* at Ex. 7, at 43:9–13.
[73] *Id.* at Ex. 7, at 48:24–49:2.
[74] *Id.* at Ex. 56.
[75] *See id.* at Ex. 56, at CARLYLE_ORACLE00007147.

investment itself was sketched out as an initial $100 million investment, with secondary investments from "key customers."[76] Oracle was among the names floated by the presentation as potential secondary investors (although notably fifth in priority).[77]

The 2016 Potential Investment did not come to pass.[78] James testified that she "was pretty clear with" McCarter that she had concerns about the "compute" business and whether the company in question was "technologically where they represented they were at."[79] She also testified that despite the slide deck, she "specifically told Patrick [McCarter] I am not committing to be the chairman of this company."[80] Instead, the company in question was acquired by MACOM Technology Solutions Holdings, Inc. ("MACOM").[81]

MACOM soon announced that it would divest the "Compute" business as part of its acquisition[82]—which the Plaintiffs identified as "the circuit design business that had appealed to James."[83] By July 2017, James and the Carlyle Group were pursuing the Compute business again, and had a draft summary of terms in hand.[84]

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[76] *See id.* at Ex. 56, at CARLYLE_ORACLE00007134.
[77] *See id.* at Ex. 56, at CARLYLE_ORACLE00007147.
[78] *See* OB 27 n.9.
[79] Will Decl., Ex. 7, at 71:22–72:3.
[80] *Id.* at Ex. 7, at 75:25–76:8.
[81] OB 27 n.9.
[82] Hahn Decl., Ex. 78.
[83] AB 42.
[84] Hahn Decl., Ex. 79. The draft terms are dated as of June 26, 2017; the email circulating the terms is dated as of July 5, 2017. *See id.*

A simultaneous slide from Evercore identifies James as "overtly excited about the deal and [willing to] be chairman of the business[.]"[85] An Evercore email identified that the Carlyle Group predicated its interest in the deal on "[f]inding an investment partner . . . they are focused on Foxconn and Softbank[.]"[86]

James testified that the Carlyle Group reached out to Oracle in summer 2017 about participation in the new deal as a strategic investor,[87] but the exact date was not specified. A July 2017 email chain from the Carlyle Group confirmed the general timeframe, indicating that James was working on "[g]oing back to Safra [Catz] / Oracle about commitment."[88] A Carlyle Group slide deck dated August 2017 indicates that "Renee [James] was instrumental in getting [Oracle's] commitment and involvement in the deal," citing her "close relationships" with "both Larry Ellison and Safra Catz."[89] When Oracle voted to invest in the transaction, on October 18, 2017, the Board did so with the "anticipat[ion]" that James would be appointed Chairman and CEO of the new company.[90]

The 2017 deal did in fact go through, and James is the CEO of the company, called Ampere.[91] Oracle's independence committee determined that upon Oracle's

[85] *Id.* at Ex. 79.
[86] Will Decl., Ex. 58.
[87] *Id.* at Ex. 7, at 58:23–59:1.
[88] Hahn Decl., Ex. 80.
[89] *Id.* at Ex. 4, at CARLYLE_ORACLE00008749.
[90] Will Decl., Ex. 53.
[91] OB 2.

original investment in Ampere, James was no longer an independent director of Oracle under the NYSE rules.[92]

B. Procedural History

This is my sixth memorandum opinion in the instant case,[93] which was originally filed on May 3, 2017.[94] The operative Complaint is now the fifth amended Complaint, filed on December 11, 2020.[95] The Plaintiffs' claims against James survived a motion to dismiss following the Complaint's filing.[96] The remaining claims are those levied against Ellison and Catz as officers and directors of Oracle, for breach of fiduciary duty,[97] and a claim for breach of fiduciary duty against James (predicated on different facts and pled separately).[98]

James moved for summary judgment in December 2021, after which briefing followed.[99] I held argument with respect to the Motion on March 11, 2022.[100]

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[92] Will Decl., Ex. 53, at ORACLEDEL00162758–59.
[93] *See Oracle I*, 2018 WL 1381331; *In re Oracle Corp. Deriv. Litig.*, 2019 WL 6522297 (Del. Ch. Dec. 4, 2019); *Oracle III,* 2020 WL 3410745; *In re Oracle Corp. Deriv. Litig.*, 2020 WL 3867407 (Del. Ch. July 9, 2020); *In re Oracle Corp. Deriv. Litig*., 2021 WL 2530961 (Del. Ch. June 21, 2021) [hereinafter "*Oracle V*"].
[94] Verified Shareholder Derivative Compl. for Breach of Fiduciary Duty, Dkt. No. 1.
[95] *See* Compl.
[96] *See Oracle V*, 2021 WL 2530961.
[97] Compl. ¶¶ 223–31; *see also Oracle V*, 2021 WL 2530961 (granting Henley and Hurd's motions to dismiss).
[98] Compl. ¶¶ 232–35.
[99] Def. Renée J. James's Mot. Summ. J., Dkt. No. 644.
[100] *See* MSJ Tr.

II. ANALYSIS

For the Plaintiffs' claim against James to survive, they must establish a non-exculpated breach of the fiduciary duty of loyalty claim, as Oracle's charter includes an exculpation clause for breaches of the duty of care.[101] *In re Cornerstone Therapeutics, Inc. Stockholder Litigation* identifies three avenues for establishing such a claim,[102] two of which are argued here.[103] Most seriously, the Plaintiffs argue under *Cornerstone* prong (2) that James "acted to advance the self-interest of an interested party from whom [she] could not be presumed to act independently" ("*Cornerstone* Prong 2").[104] The Plaintiffs also argue under *Cornerstone* prong (3) that James acted in bad faith ("*Cornerstone* Prong 3").[105]

Cornerstone Prong 2 requires a showing that the director in question both lacked independence from an interested party, *and* that the director took actions to advance the self-interest of that same interested party.[106] At least one Delaware case, *In re Dell Technologies Inc. Class V Stockholders Litigation*, has extended this test to reach cases where the director in question has a compromising relationship with

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[101] *See Oracle I*, 2018 WL 1381331, at *10.
[102] 115 A.3d 1173, at 1179–80 (Del. 2015).
[103] *Cornerstone* discussed these methods for establishing a non-exculpated claim for breach of fiduciary duty at the pleadings stage. *Id.* at 1179–80. They remain applicable at the summary judgment stage. *See, e.g.*, *In re BGC Partners, Inc. Deriv. Litig.*, 2021 WL 4271788 (Del. Ch. Sept. 20, 2021).
[104] *Cornerstone,* 115 A.3d at 1180.
[105] *Id.*
[106] *See In re BGC Partners,* 2021 WL 4271788, at *10.

a "close advisor or other associate" of the interested party, as opposed to the interested party itself.[107]

The independence inquiry is fact-specific, and allegations levied against a director's independence "must be viewed holistically."[108] Directors are presumed to be independent.[109] "To show that a director is not independent, a plaintiff must demonstrate that the director is 'beholden' to the controlling party 'or so under [the controller's] influence that [the director's] discretion would be sterilized.'"[110] Making such a showing requires satisfaction of a materiality standard.[111] That is, the Court must find, applying a subjective standard, that the director had "sufficiently substantial" ties to the interested party such that the director "could not objectively discharge his or her fiduciary duties."[112]

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[107] *See In re Dell Techs. Inc. Class V S'holders Litig*., 2020 WL 3096748, at *37 (Del. Ch. June 11, 2020) ("The defendants fail to cite any authority that requires a director to have a compromising relationship with the controller himself as opposed to a close advisor or other associate. Drawing such a distinction makes little sense when the advisor acts as the controller's agent.").

[108] *Id.* at *36.

[109] *See In re BGC Partners*, 2021 WL 4271788, at *12 (citation omitted) ("[R]ather, 'independent directors are presumed to be motivated to do their duty with fidelity.'").

[110] *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 648–49 (Del. 2014), *overruled in part by Flood v. Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018) (quoting *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993)).

[111] *Id.* at 649.

[112] *Id.* The second prong of *Cornerstone* also requires proof that the director in question acted to advance the interests of the interested party. *See In re BGC Partners,* 2021 WL 4271788, at *10. Given my finding, *infra*, that James lacked independence, and in light of her position as Special Committee chair, I may infer that this part of the analysis is met at the summary judgment phase.

An "extreme set of facts" is required to sustain a claim of breach of duty of loyalty predicated upon bad faith,[113] and such findings are "rare."[114] A director acts in bad faith where he or she "intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his [or her] duties."[115] Such a showing requires "acts or omissions taken against the interest of [the company], with scienter."[116] "[T]here is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties."[117]

I am mindful that the standards above will apply to a post-trial record. The claim against James is before me here, however, on a summary judgment standard. The path to summary judgment under Rule 56 is well-worn. I must assess the evidence of record, and determine if any dispute of material fact exists. If so, the Motion must be denied. Additionally, if the undisputed facts allow a reasonable inference in favor of a judgment for the non-movant, I am not to weigh competing inferences, but should address those in light of a trial record. Finally, I note, issues of a party's motivations and intentions are particularly suited to evaluation of their

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[113] *In re BJ's Wholesale Club, Inc. S'holders Litig*., 2013 WL 396202, at *7 (Del. Ch. Jan. 31, 2013) (quoting *Lyondell Chem. Co. v. Ryan,* 970 A.2d 235, 243 (Del. 2009)).
[114] *In re Pattern Energy Grp. Inc. S'holders Litig*., 2021 WL 1812674, at *49 (Del. Ch. May 6, 2021) (citation omitted).
[115] *Van der Fluit v. Yates*, 2017 WL 5953514, at *8 (Del. Ch. Nov. 30, 2017) (quoting *Lyondell Chem. Co.,* 970 A.2d at 243).
[116] *In re USG Corp. S'holder Litig*., 2020 WL 5126671, at *26 (Del. Ch. Aug. 31, 2020) (quoting *Morrison v. Berry*, 2019 WL 7369431, at *14 (Del. Ch. Dec. 31, 2019)).
[117] *Lyondell Chem. Co. v. Ryan,* 970 A.2d at 243.

testimony.[118] In other words, I should enter a summary judgment only where I find that the moving party is entitled to judgment as a matter of law.[119] The Plaintiffs, as the non-movants, receive the benefit of the inferences.[120]

Delaware courts have decided issues of director independence at the summary judgment stage,[121] though "there is no absolute right to summary judgment."[122] "[I]f from the evidence produced there is a reasonable indication that a material fact is in dispute or if it appears desirable to inquire more thoroughly into the facts," summary judgment should not be entered.[123] However, the existence of a "scintilla of evidence" supporting the non-moving party's position is insufficient to avoid summary judgment.[124]

I also note the context-specific inquiry I will need to undertake to address *Cornerstone* Prong 2—dealing, as it does in part, with director independence. Much of our caselaw handling matters of director independence was created in the context of a pleading-stage demand futility analysis. This case differs factually, and the

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[118] *See In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, 2014 WL 2768782, at *8 (Del. Ch. June 12, 2014) (citation omitted).
[119] *In re BGC Partners*, 2021 WL 4271788, at *5.
[120] *See id.*
[121] *Kahn*, 88 A.3d at 649.
[122] *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 443 (Del. 2005).
[123] *Id.* at 444 (citation omitted).
[124] *In re BGC Partners*, 2021 WL 4271788, at *5 (citation omitted).

difference is of concern in treating the inquiry appropriately.[125] Pleading-stage demand futility inquiries consider the director's ability to vote to cause the corporation to exercise a litigation asset, often against other directors. By contrast, this instant Motion requires me to assess director James's ability to act independently of Ellison and/or Catz[126] for purposes of negotiating and evaluating *a transaction*, the Merger. *Sciabacucchi v. Liberty Broadband Corporation* undertakes a review of the independence analysis in various contexts, ultimately determining that it must be easier for a plaintiff to show a director's lack of independence in the demand futility context than for a plaintiff to show a director's lack of independence when voting upon a transaction.[127] "The ultimate factual burden upon a plaintiff to prove a director's lack of independence at trial will vary accordingly."[128]

Mindful of my role here, I start with the allegations of bad faith.

A. Assessing Cornerstone Prong 3

The Plaintiffs argue that James fails *Cornerstone* Prong 3—arguing that James acted in bad faith.[129] A director acting in bad faith has breached his duty of

[125] *See, e.g.*, *Marchand v. Barnhill*, 212 A.3d 805, 819 (Del. 2019) ("[P]recedent recognizes that the nature of the decision at issue must be considered in determining whether a director is independent.").
[126] As I will discuss further below.
[127] *Sciabacucchi v. Liberty Broadband Corp.*, 2022 WL 1301859, at *13–15 (Del. Ch. May 2, 2022). *Sciabacucchi* did not, however, involve an assessment of a special committee member's independence, as that transaction lacked a special committee. *See generally id.*
[128] *Id.* at *14.
[129] I note that I did not address James's good or bad faith at the pleading stage under *Cornerstone* Prong 3, and instead found it reasonably conceivable that she both lacked independence and had

loyalty to the company. A finding of bad faith, therefore, would be sufficient to overcome Oracle's exculpation clause and find James liable for resulting damages. Here, I examine the record, resolving any issues of fact in favor of the Plaintiffs, and according them the benefit of any inference I may reasonably draw, as well. Nonetheless, I find as a matter of law that the record does not support an inference that James acted in bad faith.

The Plaintiffs' allegation of bad faith, I note, was made more forcefully at oral argument than in the papers, although the theory of *Cornerstone* Prong 3 presented at oral argument pivoted sharply from that briefed. Nonetheless, in the interest of addressing the Motion squarely on its merits, I consider the discussion at oral argument.

There it was argued that James's bad faith was shown in her response, or lack thereof, to the T. Rowe Price Letter sent to the NetSuite directors, a copy of which was provided to James and the Special Committee.[130] Particularly, in her deposition, James was asked about the portion of the letter which identified a "loose,

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acted to further Ellison's interests. *See Oracle V*, 2021 WL 2530961, at *8–9. Generally, for a bad faith claim to be established, plaintiffs must plead particularized facts that demonstrate that the directors acted with scienter. *See United Food & Com. Workers Union v. Zuckerberg*, 250 A.3d 862, 900 (Del. Ch. 2020) ("Under *Cornerstone*, [the director] would be entitled to a pleading-stage dismissal because the plaintiff has not pled facts supporting an inference that [the director] acted with *scienter*."); *see also Lenois v. Lawal*, 2017 WL 5289611, at *10 (Del. Ch. Nov. 7, 2017). I did not make a determination as to whether sufficiently particularized facts were pled at the pleadings stage in order to make out a claim of bad faith against James. *See generally Oracle V*, 2021 WL 2530961. The claim fails at the summary judgment stage regardless.

[130] *See supra* notes 47–49 and accompanying text; *see also* Hahn Decl., Ex. 53.

pre-due-diligence, exploratory conversation" wherein a price range to purchase NetSuite was purportedly discussed between Oracle and NetSuite executives.[131]

James acknowledged that she read the T. Rowe Price Letter, but that she was not "concerned" about it, as she "[didn't] believe anything like that happened."[132] The Plaintiffs' counsel pursued the point, asking whether James made any inquiries about the letter, and James noted that the Special Committee had asked Catz about any preliminary conversations she had had prior to the Special Committee's formation, that Catz had provided a summary, and that no further inquiries were made.[133] James was then asked: "if [NetSuite executive] Zach Nelson is saying something different, would that be of concern to you?"[134] James responded that she was not concerned with "what NetSuite was doing," had no knowledge of what NetSuite was doing, and that it was "not our problem, really."[135]

The crux of the Plaintiffs' argument is that James's lack of inquiry establishes her bad faith under *Cornerstone* Prong 3 such that the Plaintiffs' breach of duty of loyalty claim against her may survive. Essentially, the Plaintiffs ask me to infer that James's lack of inquiry establishes that she "intentionally act[ed] with a purpose other than that of advancing the best interests of the corporation,"[136] or that she

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[131] *See* Will Decl., Ex. 7, at 199:1–200:21; *see also* Hahn Decl., Ex. 53, at PANETTA_00000704.
[132] Will Decl., Ex. 7, at 200:3–21.
[133] *Id.* at Ex. 7, at 200:8–15.
[134] *Id.* at Ex. 7, at 200:16–21.
[135] *See id.* at Ex. 7, at 200:16–21.
[136] *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 66 (Del. 2006).

"intentionally fail[ed] to act in the face of a known duty to act, demonstrating a conscious disregard for her duties."[137] In other words, James must have known her fiduciary duty required her to pursue the allegation of undisclosed negotiations by Catz with NetSuite, and in light of that known duty, inexplicably chose to do nothing. If so, James would have been acting against Oracle's interest, with scienter. I cannot draw such an inference on this record.

It is clear that James regarded, with perhaps less-than-optimal curiosity, the T. Rowe Price Letter as NetSuite's "problem."[138] That is undoubtedly because the thrust of the letter is that the Oracle Special Committee had done *too good* a job, negotiating an *underpayment* for NetSuite. Of course, the T. Rowe Price Letter alleges an undisclosed contact between NetSuite and Catz, suggesting agreement to a price collar. Catz had previously informed the Special Committee that no such contact had occurred. James appeared content, in this situation, to rely on the candor of Catz.

This is not the vigor ideal to the chair of a Special Committee. I cannot on these facts draw a reasonable inference that James's actions demonstrate scienter, however.

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[137] *Id.*
[138] *See id.* at Ex. 7, at 200:16–21.

The Delaware Supreme Court, in *Disney*, rejected the argument that "gross negligence (including a failure to inform one's self of available material facts), without more, can . . . constitute bad faith."[139] The facts before me, at most, allow an inference of a negligent torpor, supporting, perhaps, an inference of a breach of the duty of care; they do not extend to support an inference finding bad faith. While James's decisions may not have been ideal at every step, there is nothing to indicate that she *intentionally* abdicated any duties to Oracle, or *intentionally* acted with a purpose inimical to Oracle's best interests. Rather, the undisputed evidence, with plaintiff friendly-inference, suggests that James considered the letter, determined it to be a third-party's report of a conversation inconsistent with the report of the co-CEO, and declined to pursue it further. This is not a "decision . . . so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[140] As noted previously, Oracle's charter provides an exculpation clause for care violations,[141] so the Plaintiffs cannot prevail on a claim of breach of the duty of care, even assuming I could infer one from these facts.

I find as a matter of law that the Plaintiffs cannot on the facts of record demonstrate a non-exculpated duty of loyalty claim under *Cornerstone* Prong 3.

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[139] *Id.* at 64–65.
[140] *See In re J.P. Stevens & Co. S'holders Litig.*, 542 A.2d 770, 780–81 (Del. Ch. 1988); *see also In re BJ's Wholesale Club,* 2013 WL 396202, at *7 (citation omitted).
[141] *See Oracle I*, 2018 WL 1381331, at *10.

B. Assessing Cornerstone Prong 2

The Plaintiffs' argument with respect to *Cornerstone* Prong 2 can be summarized as follows: James had ambitions in the technology industry going forward, including serving as a CEO for a company;[142] she was friends with Catz, a woman presently in the position of co-CEO at a technology company, and James discussed her career with Catz, at least once seeking advice; James was aware that Catz, and, by inference, Ellison, wanted the Merger to go forward in 2016; and finally, James was aware that Catz and Ellison could frustrate—or advance—her future ambitions to become a CEO in the technology industry, and James was therefore conflicted in carrying out her fiduciary duties.[143]

There is, I believe, a degree of difficulty in the Plaintiffs' syllogism. The Plaintiffs must show that James lacks independence from Ellison. The majority of the Plaintiffs' briefing and argument focuses not on the nexus between Ellison and James, however, which appears to be relatively minimal. In essence, the facts connecting Ellison and James are merely that Ellison is a powerfully influential figure in the industry in which James works, and in which she might expect to achieve her goal of becoming a CEO. Instead, the Plaintiffs focus on the nexus between *Catz* and James. As noted above, if Catz were presented as a "close advisor

[142] The parties at least facially dispute whether James was truly retired as of the beginning of 2016. OB 7–8; AB 20.
[143] *See generally* AB.

or other associate" of Ellison's under *Dell*, such nexus *might* give rise to a finding of lack of independence from Ellison on James part.[144] But this is a bank-shot; it requires an inference that the interests of Catz are sufficiently intertwined with Ellison so that lack of independence of one applies to the other. That inference, I think, is not unassailable on the record as presented to me,[145] but is justified given the non-movant-friendly standard. That is, the Plaintiffs' theory of the case, not before me here (although subject to proof at trial), is that Catz breached her duty of loyalty, knowingly aiding Ellison's self-interest for Oracle to acquire NetSuite. I turn, therefore, to an analysis of the facts supporting James's lack of independence from Catz *and* Ellison.[146]

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[144] *Dell*, 2020 WL 3096748, at *37. I note that *Dell* made this determination with respect to a controller, rather than a mere interested party. *See id*. I need not affirmatively decide here whether this theory should extend to a non-controller; I note, however, that such an extension would appear doctrinally sound, given sufficient facts. *Dell* was also a pleadings-stage case. *See generally id.*

[145] I also note that the record before me is necessarily tailored to James's Motion.

[146] The Plaintiffs pursued two additional factual arguments I do not analyze in depth. First, the Plaintiffs point to quotes they allege outline James's view of the interplay between boards of directors and CEOs. Per her statements to the Stanford Graduate School of Business, James viewed it as appropriate for a board of directors to support a CEO—see *supra* notes 19 and 20 and accompanying text—but I do not think James's statements can be fairly read to suggest that she would, or any board member should, support a CEO (or a CTO like Ellison) in breach of fiduciary duties. Next, the Plaintiffs suggest that the Special Committee's decision to obtain Moelis as a financial advisor—including a large fee to be paid to Moelis if the Merger was consummated—supports a finding of lack of independence for James, particularly because she and the Special Committee never asked Moelis to provide competitive information or up-to-date financial information. But directors are entitled to rely in good faith upon expert advice, and the Special Committee's good faith in relying upon Moelis's advice has not been challenged. Therefore, I find this line of argument unpersuasive.

The presumption of our law is that directors are disinterested and independent. At trial, the burden will be on the Plaintiffs to show James lacked independence. To make such a showing, the challenged director must be demonstrated to have "sufficiently substantial" ties to the interested party that he cannot objectively discharge his fiduciary duties.[147] Such a fiduciary would be so beholden to the interested party or so under his influence as to have sterilized the challenged director's discretion.[148]

I first consider the personal relationship between Catz and James, who were friends. The friendship described does not, to my mind, rise to the level of substantiality necessary, on its own, to sterilize James's discretion. James and Catz certainly had ties—those of a Board member and co-CEO who enjoyed one another's company enough to get dinner together upon occasion, and the demographical ties of being women in leadership in the technology industry. But the Plaintiffs have had the benefit of discovery and cannot point to more. These facts are not comparable to the types of "very warm and thick personal ties of respect, loyalty, and affection" as found to demonstrate lack of independence in *Marchand v. Barnhill*.[149] In that case,[150] a host of other supporting facts were pled—

[147] *Kahn*, 88 A.3d at 649.
[148] *See, e.g.*, *id.* at 648–49.
[149] 212 A.3d at 818–19.
[150] Notably in the different procedural posture of assessing demand futility. *See id.*

that the director in question had been mentored and given opportunities by the interested party's family over the course of twenty-eight years, culminating in a Chief Financial Officer position, a seat on the pertinent company board, and the interested party's arranging to have a collegiate facility named after the director.[151] By comparison, here the facts are that Catz had invited James to serve on the Oracle Board; had had dinner with James on multiple occasions; and had referred to her, presumably in public and as part of a speech introduction, as a "close friend."[152] This relationship goes to a holistic evaluation of potential lack of independence, but does not on its own demonstrate such.[153]

The strongest indication of lack of independence, to my mind, involves James's pursuit of the 2016 Potential Investment on behalf of her employer, the Carlyle Group, contemporaneous with her service as Special Committee chair for Oracle. Making plaintiff-friendly inferences, as I must, the facts support a finding that James was serving on the Oracle Board and working for the Carlyle Group while pursuing a personal goal of becoming a CEO. At that time, she was evaluating and negotiating a transaction for Oracle to acquire NetSuite; I may infer that she knew both Ellison and her friend Catz desired this transaction be consummated. She knew

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[151] *See id.*
[152] *See supra* Section I.A.2.
[153] I note that James's disregard of the allegation in the T. Rowe Price Letter of Catz's undisclosed negotiation with NetSuite, while not indicative of bad faith, does bear on James's independence from Catz.

that Ellison, given his position in the industry, could help or hinder her CEO ambitions. Simultaneously, she was pursuing an acquisition of a technology entity for the Carlyle Group; I may infer that she hoped the outcome of that pursuit would include her being made CEO of the entity.[154] Oracle, she knew or was in a position to know,[155] was a potential secondary investor in the 2016 Potential Investment, and as such could influence the outcome of that acquisition. Thus, James was dependent on Ellison and Catz to further her ambitions at the same time her fiduciary duties were in potential conflict with the desires of Ellison and Catz. This raises the inference that she was not independent of Ellison and Catz in undertaking actions in connection with the Merger, and in fact acted to further their interests.

I find this inference plausible at the pre-trial stage. It may prove, after trial, that I will find the actual circumstances of the relationships among James, Catz, and Ellison insufficient to rebut the presumption of independence, and unlikely to have overborne James's integrity as a fiduciary.[156] Certainly, the weight to be given the

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[154] This inference, or fact, is genuinely disputed and given my syllogism above, is likely material. *See* Reply Br. of Def. Renée J. James Supp. Mot. Summ. J. 8–11, Dkt. No. 669 (referencing James's testimony about "what she did not like about the company" associated with the 2016 Potential Investment); AB 54–55 (noting that James ended up becoming the CEO of an entity holding the "same assets" she was interested in as part of the 2016 Potential Investment). The Plaintiffs' argument is not *solely* argument; it is supported by facts, such as the Intel press release publicizing James's departure from the company, which *stated* that she was leaving to pursue an external CEO position. *See supra* note 13 and accompanying text. The dispute here is genuine.

[155] James was in possession of the slide deck which identified Oracle as a potential secondary investor. *See* Will Decl., Ex. 56.

[156] I note that the record contains evidence that I need not recount further here, involving the negotiating actions of the Special Committee, that does *not* support a finding that James lacked independence.

evidence will be clearer after trial. My job considering a motion for summary judgment is not to weigh the inferences. Because the evidence of record is sufficient to support a reasonable inference in the non-movant's favor, I deny the Motion.

III. CONCLUSION

For the foregoing reasons, the Motion is DENIED in part and GRANTED in part. The parties should submit an appropriate form of order.