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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re Pinterest Derivative Litigation

Lead Case No. 3:20-cv-08331-WHA

PLAINTIFFS' OPPOSITION TO PINTEREST'S MOTION TO DISMISS THE VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT

Hearing: August 26, 2021
Time: 8:00 a.m.
Location: Courtroom 12 – 19th Floor
Judge: Hon. William Alsup

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ISSUE TO BE DECIDED

1) Whether the Court should deny the motion to dismiss based on demand futility where the Verified Shareholder Derivative Consolidated Complaint ("Complaint"), taken as a whole and affording all reasonable inferences to Plaintiffs,[1] gives rise to a reasonable doubt that a majority of the Board can either (a) exercise independent and disinterested judgment in considering a demand or (b) faces a substantial likelihood of liability?

INTRODUCTION

To appeal to its primarily female user base, Pinterest crafted a public image as a "nice" tech business that celebrated women and people of color.[2] But beginning in June 2020, Pinterest stockholders learned the truth: Pinterest condoned systemic workplace discrimination and retaliation by paying women and people of color less than their White male counterparts, assigning them lower job levels, limiting their roles and opportunities, and minimizing their contributions.

As set forth in the Complaint, the discriminatory culture emanated from the top: founder, CEO, and Board Chair Ben Silbermann ("Silbermann") protected himself from accusations of serious misconduct by surrounding himself with a clique of White, male executive yes-men and a Board of Directors ("Board") that deferred to him. A majority of Pinterest's Board, including Silbermann, was directly involved in and tacitly endorsed illegal discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, among other laws, and in total abdication of their duties.[3] In an extreme example, a majority of the Board knowingly approved a discriminatory compensation package for Pinterest's Chief Operating Officer ("COO") Francoise Brougher, paying her a fraction of what her male counterpart received. After Brougher complained about her unequal

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[1] Capitalized terms not defined in this brief have the meanings assigned in the Complaint (ECF 65). Citations to "¶" are to the Complaint. Unless otherwise stated, all emphasis is added, and internal quotation marks and citations are omitted.

[2] Pinterest recognizes that a diverse and inclusive workplace is a business imperative, stating that "building a product that reflects our diverse" users requires "a team with all kinds of different perspectives, experiences, and backgrounds." ¶72.

[3] Board members Benjamin Silbermann, Evan Sharp, Jeffrey Jordan, Jeremy Levine, Gokul Rajaram, Fredric Reynolds, Michelle Wilson, and Leslie Kilgore are the "Director Defendants," with Chief Financial Officer ("CFO") Todd Morgenfeld they are the "Individual Defendants" (¶¶34-64), and together with Pinterest, Inc., the "Defendants."

treatment, Silbermann led a campaign of further discrimination and retaliation against her – preventing her from performing her job by excluding her from critical pre-initial public offering ("IPO") fundraising meetings and cutting off her access to the Board. Even though Brougher successfully doubled Pinterest's revenue base, the Director Defendants did nothing to stop Silbermann. Then, when the situation escalated to Silbermann wrongfully terminating Brougher (and asking her to lie about it), the Director Defendants failed to perform the most basic diligence regarding the circumstances of Brougher's termination. Instead, to cover up the material risk created by their discrimination and retaliation, Board members signed off on a Proxy Statement that, among other violations of the federal securities laws, misled investors about Brougher's euphemistically phrased "departure" and about the material risks the Company faced as a result of their discriminatory treatment of Brougher. Ultimately, Brougher sued, and the Company was forced to settle her sex discrimination lawsuit for ***$22.5 million – the largest publicly known individual gender discrimination settlement in history***.

Brougher's experience was not an outlier. Plaintiffs' investigation, corroborated by several news outlets' investigations and reports presented to the Audit Committee, revealed that discrimination and retaliation are systemic at Pinterest. Emblematic are the experiences of Ifeoma Ozoma ("Ozoma") and Aerica Shimizu Banks ("Banks"), two senior-level, Black women on Pinterest's public policy team. As with Brougher, the Company publicly lauded Ozoma and Banks, while contemporaneously underpaying them relative to a White man doing the same work. The Company also intentionally ignored threats to Ozoma's safety, despite being on notice of a dangerous doxxing attack.

The allegations concerning the Board's active involvement in the Company's unlawful treatment of Brougher alone demonstrate that demand is futile. By approving discriminatory compensation and then failing to do *anything* after Brougher suddenly and without explanation disappeared, the Board "failed to exercise appropriate attention to potentially illegal corporate activities" which subjects them to "a substantial likelihood of liability." *In re Veeco Instruments, Inc. Sec. Litig.*, 434 F.Supp.2d 267, 278 (S.D.N.Y. 2006). Myriad other facts in the Complaint also demonstrate that Plaintiffs adequately allege demand futility, including Silbermann's repeated admissions that the Company mistreated employees, the fact that discrimination and retaliation were

widespread and well-known (including by Silbermann, a key figure in the Company's success), the Company's repeated statements about the supposed business importance of diversity and inclusion, and the Board's failure to act for years after Brougher's complaints. This case is thus similar to *In re Wynn Resorts Derivative Litigation*, where demand was excused because a majority of the board faced a substantial likelihood of liability for "knowingly failing to take action" in the face of the CEO's workplace misconduct. *See* Exhibit A, No. A-18-769630-B, Slip Op. at 5 (Clark Cty. Dist. Ct. Nev. Sept. 5, 2018) ("*Wynn Resorts*").

Defendants Silbermann, Sharp, Levine, Jordan, Wilson, Reynolds, Rajaram, and Kilgore's knowledge of the lack of, and their failure to institute, effective internal controls to prevent illegal discrimination and retaliation at Pinterest has significantly harmed the Company. In addition to Brougher's $22.5 million settlement, Pinterest has paid other settlements and suffered repeated bad press, reputational injury, and a diminished ability to recruit and retain the best employees.

Further, the Board is incapable of independently considering a demand because Defendants Silbermann, Sharp, Levine, and Jordan control the Board. Silbermann alone controls 24.77% of Pinterest's outstanding shares; given his voting power, Pinterest admits he will continue exercising significant influence *even if he is terminated*. These four Defendants together own 62.07% of outstanding shares and have "the ability to control the outcome of matters submitted to our stockholders for approval, including the election of our directors." Silbermann even explained the Board's passivity as arising from the fact that he "chose" the directors.

Finally, demand is excused because a majority of the Board lacks independence due to close and long-standing professional and personal ties.

Defendants argue demand futility has not been adequately alleged because the Board supposedly took "swift action" when concerns were raised. Def. Br. at 14-15. This is false; Silbermann and the Board were aware of the serious issues alleged in the Complaint with Brougher and others for months or years before taking ***any*** action. It also ignores the Board's failure to ensure independent investigations were performed, and the Audit Committee's decision to receive *less* information about serious discrimination complaints. Even now, Defendants continue to protect Silbermann at the expense

of the Company, refusing to admit he fired Brougher, instead euphemistically referring to her "departure." Def. Br. at 20. Shareholders have the right to pursue meaningful remedies to protect the Company from further harm.

Because Plaintiffs satisfy the standard for demonstrating demand futility, the only basis on which Defendants move for dismissal, the Motion to Dismiss should be denied.

STATEMENT OF FACTS

A. Diversity and Inclusion Are Key Business Imperatives for Pinterest

Pinterest is branded to engage women and attract advertisers targeting that demographic. ¶¶66-75. Pinterest has repeatedly recognized that workplace diversity and inclusion is central to its business and reputation; stating regularly that its success depends on "building a product that reflects our diverse population" of users and that to achieve that goal "***we need a team with all kinds of different perspectives, experiences, and backgrounds.***" ¶72. Similarly, co-founder Defendant Sharp agreed that diverse teams "produce the best outcomes" for users. ¶73.

B. Pinterest's Rapid Growth Is Fueled By a Controlling Group of Shareholders

Investment from venture capital firms Andreessen Horowitz and Bessemer Ventures ("BVP") fueled Pinterest's rapid growth, and in exchange, secured those firms seats on Pinterest's Board filled by Defendants Jordan and Levine, respectively. ¶67. Through the IPO, Silbermann, Sharp, Levine, and Jordan collectively gained control of 62.07% of Pinterest stock, giving them veto power over director elections.[4] ¶¶319-335. This control created a Board that defers to Silbermann; when Brougher asked Silbermann why the Board was so submissive, Silbermann tellingly responded "***I chose them***." ¶332.

C. The Individual Defendants Engage In and Tacitly Endorse Discrimination and Retaliation

Despite recognizing a diverse and inclusive workplace as a business imperative, the Individual Defendants knew and failed to address that Pinterest's tone at the top and "broken" culture devalued and discriminated against women and people of color by bringing them into the Company at lower levels than their White male counterparts, paying them unfairly, limiting their roles, and minimizing

[4] Pinterest's dual-class voting structure with Class B shares representing twenty votes and no sunset provision has been criticized for impairing effective governance and oversight. ¶¶321, 330.

their contributions. ¶¶2, 6, 13, 165, 245, 277. Only 4% of Pinterest's employees and 1% of its leadership is Black; women comprised only 25% of its leadership. ¶245. Data uncovered by a Finance Team member showed Black employees were materially underpaid relative to their White colleagues. ¶217.

Pinterest's discriminatory pay practices persisted across the Company. Ozoma and Banks are Black women hired as the second and third members of Pinterest's public policy team. ¶¶90, 91, 103. Though they played critical roles in devising Pinterest's disinformation policies, both were paid substantially less than their White male colleague. ¶¶97-100, 105-106. In July 2019, Ozoma filed a complaint alleging discrimination and retaliation; Banks filed a complaint in January 2020. ¶¶135,152. Ozoma and Banks were repeatedly targeted and retaliated against for having raised these concerns. ¶¶102, 107-110, 113-151. Indeed, after the Company enacted a policy to block content from an extremist organization, Ozoma and Banks warned a doxxing attack was imminent, but the Company ignored them. ¶¶112-133. Silbermann conceded to Ozoma that he was "***personally concerned that when these risks were raised, we didn't take the right steps***" (¶128) but as was typical for him, he did nothing to ensure meaningful change.

Pay disparities and retaliation even reached the C-suite. Silbermann, with the Board's approval, hired Brougher as the Company's first COO because she had the relevant experience to take Pinterest public. ¶¶79, 175. Defendants Silbermann, Levine, Jordan, Wilson, and Reynolds – a majority of the Board – approved Brougher's compensation; the package underpaid Brougher relative to CFO Todd Morgenfeld, a White man who was her closest peer, by providing less shares and backloading her shares so she received 63% fewer shares in the IPO. ¶¶179-181. Despite Brougher's success doubling ad revenue, after challenging her discriminatory compensation, she was retaliated against: Silbermann and Morgenfeld cut her out of decision-making and blocked her from performing her job duties. ¶¶176, 184, 187, 242, 332. In March 2020, Silbermann fired Brougher after she raised concerns and he asked her to cover-up her termination. ¶195. Brougher refused to lie. *Id.* The Board wholly deferred to Silbermann; not a single Board member protected Pinterest by performing even the most basic diligence of speaking to Brougher about her termination. ¶334. On August 11, 2020, Brougher sued Pinterest for discrimination and retaliation. ¶173.

The pattern of discrimination and retaliation was known to the Director Defendants. In addition to the Board's role approving Brougher's discriminatory compensation package and its tacit endorsement of Brougher's disappearance from her job duties and then her termination, Board committees received information revealing the pattern of misconduct at the Company. The Compensation Committee – including Defendants Wilson and Kilgore – was aware of the pay disparities at the Company, noting "[h]istorical inconsistency in programs and practices," but the Committee failed to act to ensure the Company stopped its unlawful and discriminatory pay practices. ¶271. The Audit Committee – including Defendants Wilson, Kilgore, and Reynolds – similarly knew about discrimination and retaliation, having received Compliance Update reports at each meeting from May 2019 to November 2020 documenting burgeoning discrimination and harassment claims, as high as 72.7% in one quarter, and requiring recruitment of a new investigator to "support growing caseload." ¶¶257-267. Rather than address these problems, the Audit Committee elected to instead make the reporting of discrimination allegations to it optional, and failed to ensure independent investigations were conducted. ¶¶259, 266-267. The Director Defendants' failure to monitor and intervene in the face of known illegal conduct and to ensure adequate systems were in place to prevent discrimination and protect employees from retaliation harmed and continues to harm the Company.

LEGAL STANDARD

To survive a motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 1008 (9th Cir. 2018). The Court must consider allegations "in their totality and not in isolation" and "draw all reasonable inferences" in favor of the plaintiffs." *In re McKesson Corp. Derivative Litig.*, No. 17-cv-01850-CW, 2018 WL 2197548, *4 (N.D. Cal. May 14, 2018).

"[T]he purpose of the derivative action is to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of faithless directors and managers." *Rosenbloom v. Pyott*, 765 F.3d 1137, 1147 (9th Cir. 2014) ("*Allergan*"). A plaintiff must either demand that the corporation's board of directors take action, or show such a demand would be futile. *Id.* Defendants do not dispute the relevant Board for assessing demand futility

has ten members (¶315); thus, Plaintiffs must show that demand was futile as to five of those members. *In re Tyson Foods, Inc.*, 919 A.2d 563, 582 (Del. Ch. 2007).

Under Delaware law, a director is disqualified from considering a demand where there is reasonable doubt that the director is either "disinterested" or "independent." *Rales v. Blasband*, 634 A.2d 927, 935-37 (Del. 1993). Delaware law has distinct tests for a derivative suit challenging a Board decision (*Aronson v. Lewis*, 473 A.2d 805 (Del. 1984)) or something other than a conscious Board decision (*Rales*, 634 A.2d 927). A claim the Board knew or should have known about illegal conduct and chose "to turn a blind eye can be characterized either as a *Caremark*-type oversight claim or as an *Aronson* type allegation of considered board action." *Allergan*, 765 F.3d at 1151; *see also* Def. Br. at 8, 11 (applying *Caremark* framework). But whether to apply *Aronson* or *Rales* "does not matter" so long as the plaintiff puts forth "particularized allegations [that] create a reasonable doubt as to whether a majority of the board of directors faces a substantial likelihood of personal liability for breaching the duty of loyalty." *Allergan*, 765 F.3d at 1150. The duty of loyalty is violated "where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities and failing to discharge the non-exculpable fiduciary duty of loyalty in good faith."[5] *Id.*

Additionally, demand is futile where a board is controlled by a member or members, or lacks independence. *See Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 251 (Del. 2019); *In re Oracle Corp. Derivative Litig.*, No. 2017–0337–SG, 2018 WL 1381331, at *15 (Del. Ch. Mar. 19, 2018).

ARGUMENT

A. Demand Is Excused Because a Majority of the Board Faces a Substantial Likelihood of Liability for Engaging in and Tacitly Endorsing Illegal Conduct

The Complaint's demand futility allegations, supported by internal documents Plaintiffs obtained from Pinterest pursuant to shareholder inspection demands, demonstrate that a majority of the Board faces a substantial likelihood of liability for engaging in and tacitly endorsing systemic discrimination at Pinterest in violation of state and federal law, and for approving a false and misleading Proxy Statement to cover up illegal conduct. This case is similar to *Wynn Resorts*, where demand was

[5] Notably, 8 Del. C. § 102(b)(7) does not bar claims against officers. *See Gantler v. Stephens*, 965 A.2d 695, 709 n.37 (Del. 2009); *Chen v. Howard-Anderson*, 87 A.3d 648, 686 (Del. Ch. 2014).

excused because a majority of the board "knowingly fail[ed] to take action" despite knowledge of the CEO's workplace misconduct. No. A-18-769630-B, Slip Op. at 5. The *Wynn Resorts* court found allegations the CEO settled a claim and was engaged in a "pattern" of misconduct sufficiently alleged the board's actual knowledge of illegal conduct, and also credited circumstantial evidence including the CEO's importance to the company; the misconduct's magnitude; the "well-known" nature of the misconduct; and the board's failure to take meaningful action after news coverage. *Id.* at 5-6.

Additionally, though this action involves a different subject matter, it is fundamentally similar to *Allergan* and *Wells Fargo*, where demand was excused because the boards faced a substantial likelihood of liability for knowing of and failing to address a major compliance risk. In *Allergan*, plaintiff alleged the board monitored off-label Botox sales and received FDA warnings; in light of Botox's importance and the wrongdoing's magnitude and duration, the Ninth Circuit found "an inference of Board knowledge and intentional disregard" of illegal off-label marketing. *Allergan*, 765 F.3d at 1151-54. Similarly, in *Wells Fargo*, demand was excused where a board "consciously disregarded their fiduciary duties despite knowledge [of] widespread illegal account-creation." *Shaev v. Baker*, No. 16-cv-05541-JST, 2017 WL 1735573, at *13 (N.D. Cal. May 4, 2017) ("*Wells Fargo*"). Purely circumstantial evidence including employee complaints and lawsuits supported an inference of defendants' knowledge of systemic unauthorized practices and inadequate oversight systems. *Id.*

Indeed, the inference of knowledge is stronger here than in *Wynn Resorts*, *Allergan*, and *Wells Fargo* because a majority of the relevant Board not only failed to investigate, but also engaged in illegal activity by approving Brougher's discriminatory compensation. Plaintiffs have put forward sufficient particularized allegations that the Director Defendants, and in particular Compensation and Audit Committee members Wilson, Kilgore, and Reynolds, face a substantial likelihood of personal liability.

1. Defendants Participated In, Tacitly Endorsed, and Knew of Systemic Discrimination Against Brougher

Typically, demand futility is established through circumstantial evidence creating "an inference of conscious inaction"; the plaintiff need not present a "smoking gun of Board knowledge." *Allergan*, 765 F.3d at 1155-56; *Wells Fargo*, 2017 WL 1735573 at *13. But here, the Complaint *does* allege a "smoking gun" – the Board's approval of Brougher's discriminatory compensation. Pinterest's full

Board is responsible for setting executive compensation. *See* ¶79. Defendants Silbermann, Levine, Jordan, Wilson, and Reynolds, who constitute a majority of the relevant Board for assessing demand futility, were on Pinterest's Board when Brougher was hired and so were actively involved in and responsible for approving Brougher's pay.[6] ¶¶79, 179. Those five Defendants awarded Brougher 500,000 fewer shares than Morgenfeld, a man who was her closest peer, rendering her compensation package 63% less than Morgenfeld's. ¶¶179-180. At the time of the IPO, Morgenfeld's compensation was valued at three times the amount of Brougher's – a difference of nearly $10 million. ¶180. Additionally, though the Board represented that all executives receive backloaded equity grants, Brougher later discovered this was a lie – her equity grant was backloaded so she was unable to access these shares completely until year ten, but Morgenfeld's stock award had no backloading.[7] ¶¶179-180. Setting inequitable pay and vesting terms as between two peer executives where the terms differ because of sex is an unlawful decision; the five Individual Defendants who made that decision face a substantial likelihood of liability for failing to act in the face of a known duty to act. *See Allergan*, 765 F.3d at 1150-51; *see also Wells Fargo*, 2017 WL 1735573, at *13. Defendants' irreconcilable conflict of interest due to their involvement in this illegal act prevents them from considering a demand objectively, and thus demand is excused.

In addition, after Brougher's pay discrimination complaints, the Board tacitly endorsed illegal discrimination and retaliation against her. Tacit endorsement of discrimination and retaliation is illegal. *See, e.g.*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). Brougher did well for Pinterest; in less than two years, she more than doubled ad revenue from $500 million to $1.1 billion and increased

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[6] Additionally, Defendants Wilson and Kilgore serve on the Compensation Committee, which is charged with overseeing executive compensation, but failed to ensure Brougher was paid fairly or made whole. ¶¶84, 268.

[7] Defendants contend that "Plaintiffs challenge only the timing" of Brougher's vesting. Def. Br. at 16. But Plaintiffs also challenge the amount of Brougher's compensation relative to Morgenfeld. *See* ¶¶180, 182. Further, Defendants' attempt to controvert these allegations through judicial notice of Exhibit G should be rejected. *See* Plaintiffs' Opposition to Pinterest's Request for Consideration of Documents (filed concurrently); *Khoja*, 899 F.3d at 999-1001; *see also Elburn v. Albanese*, No. 2019-0774-JRS, 2020 WL 1929169, at *9 (Del. Ch. Apr. 21, 2020) (rejecting argument a quid pro quo did *not* exist when it was sufficiently alleged); *Voigt v. Metcalf*, No. 2018-0828-JTL, 2020 WL 614999, at *9 (Del. Ch. Feb. 10, 2020) (crediting well-pled allegations even where documents present factual conflicts). Moreover, the cited page does not appear to contain the information about Brougher and Morgenfeld's RSU grants represented in Defendants' brief. Def. Br. at 15-16; Ex. G at 26.

the advertiser base from 10,000 to 80,000. ¶176. Nonetheless, top executives prevented Brougher from doing her job. Silbermann excluded Brougher from the pre-IPO fundraising roadshow despite the Company having hired her specifically because of her IPO experience. ¶¶175, 184, 187. Silbermann cut Brougher out of product meetings, interfering with her ability to further increase ad revenue. ¶¶176, 185. Though at the start of her tenure Brougher attended every Board meeting, after making discrimination complaints, Silbermann and the Board abruptly disinvited her with no explanation. ¶¶188, 332-333. Following Silbermann's example, Morgenfeld disparaged Brougher and undermined her in front of colleagues, made a sexist comment in her performance review, hung up on her when she tried to discuss the comment, and then refused to speak to her or acknowledge her in meetings, making it impossible for her to do her job. ¶¶189-192. When Brougher raised Morgenfeld's misconduct to Silbermann, he mocked her concerns and sent her to the Human Resources ("HR") Department, which did nothing. ¶191.

Just weeks after Brougher complained about Morgenfeld, Silbermann suddenly fired her. ¶194. Incredibly, Silbermann instructed Brougher to transfer her responsibilities to *Morgenfeld* – choosing the man who discriminated and retaliated over Brougher. ¶194. The Director Defendants again tacitly endorsed the misconduct, deferring to Silbermann and declining to perform the most basic diligence to protect Pinterest of speaking to Brougher about the termination. ¶¶333-334.

Thus, Defendants "did not make a good faith effort to ensure that [Pinterest] complied with its legal obligations" or to "respond to numerous red and yellow flags by aggressively correcting the management culture"; instead "the Board allowed itself to continue to be dominated by" Silbermann. *In re Massey Energy Co.*, No. 5430-VCS, 2011 WL 2176479, at *19 (Del. Ch. May 31, 2011).[8] These allegations implicate a majority of Pinterest's ten-member Board: Defendant Silbermann as main

[8] *See also Teamsters Local 443 Health Servs. & Ins. Plan v. Chou*, No. 2019-0816-SG, 2020 WL 5028065, at *17 (Del. Ch. Aug. 24, 2020) ("board knew of evidence of corporate misconduct – the proverbial red flag – yet acted in bad faith by consciously disregarding its duty to address that misconduct.") ("*AmerisourceBergen*"); *Wynn Resorts*, Slip Op. at 6-7 (noting board knowledge of a settlement, CEO's "pattern" of misconduct, and other circumstantial evidence and finding "that the Board had actual knowledge of serious allegations" of illegal conduct and thus "faces a substantial likelihood of liability for its knowing and conscious inaction.").

perpetrator and Defendants Sharp, Levine, Jordan, Wilson, Reynolds, Rajaram, and Kilgore tacitly endorsing the misconduct. This caused a grave corporate harm; the Company settled Brougher's lawsuit within months for $22.5 million – the largest individual gender discrimination settlement in history.

Defendants raise numerous arguments as to why the Brougher allegations do not create a substantial likelihood of liability.[9] None carries the day.

First, Defendants argue that they face no substantial likelihood of liability because Brougher's compensation was modified after she complained. *See* Def. Br. at 16. This is a red herring. The discriminatory treatment had already occurred. Moreover, Brougher was still "not made whole" (¶183), as is clear from the magnitude of her historic settlement. To the contrary, Brougher's early complaint was a major red flag demonstrating that "the Board was on notice" of legal risk and so "later red flags [are] all the more consequential." *AmerisourceBergen*, 2020 WL 5028065, at *20.

Second, Defendants argue that their unlawful award of discriminatory pay to Brougher is entitled to deference. Def. Br. at 16. Defendants' cases are inapposite; they challenge whether a board's decision to compensate a departing executive was excessive and/or amounted to corporate waste but *none* involve a board compensation decision that was itself illegally discriminatory. *See White v. Panic*, 793 A.2d 356, 369 (Del. Ch. 2000); *Brehm v. Eisner*, 746 A.2d 244, 265-66 (Del. 2000). Just as a board's decision to engage in an illegal bribery scheme would not be deferred to, its decision to engage in illegal pay discrimination is not deferred to.

Third, Defendants argue that they do not face a substantial likelihood of liability for Brougher's "no-fault settlement." Def. Br. at 17. But Plaintiffs do not challenge the Board's entry into the settlement; instead, they challenge the Board's participation in and endorsement of the misconduct that

[9] Defendants briefly argue Plaintiffs do not have standing to challenge pre-IPO misconduct. Def. Br. at 5 n.3. That is wrong. Plaintiffs have standing because Brougher's discriminatory pay, exclusion from her job duties, and termination are wrongful "acts . . . so inexorably intertwined that there is . . . one continuing wrong." *Fredrick Hsu Living Trust v. ODN Holding Corp.*, No. 12108–VCL, 2017 WL 1437308, at *43 (Del. Ch. Apr. 14, 2017). Plaintiffs owned stock "*during any time*" of the continuing wrong, and so have standing. *Chirlin v. Crosby*, No. 6632, 1982 WL 17872, at *1 (Del. Ch. Dec. 7, 1982); *see also Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 117 (Del. 2002). Additionally, red flags prior to stock ownership are relevant to the Individual Defendants' "predisposition to ignore warnings." *Orlando Police Pension Fund v. Page*, 970 F. Supp. 2d 1022, 1028 (N.D. Cal. 2013).

required the settlement. Further, as in *Wynn Resorts*, settlements and internal complaints are red flags demonstrating actual knowledge of illegal conduct.[10] *See* No. A-18-769630-B, Slip Op. at 6-7.

Defendants also argue that the amount of Brougher's settlement has no relevance. Def. Br. at 6, 17. To the contrary, Brougher's substantial settlement is a predictable result of discriminating against a highly paid and key executive, and the material risk to the Company of that illegal conduct. Defendants cite various cases involving large settlements or penalties (Def. Br. at 6), but none involve allegations of Board knowledge as compelling as pled here, with board members who were party to the alleged illegal conduct (Defendants' Silbermann, Levine, Jordan, Wilson, and Reynolds approving discriminatory compensation), or a board wholly failing to monitor or investigate (Defendants' Silbermann, Sharp, Levine, Jordan, Wilson, Reynolds, Rajaram, and Kilgore's failure to undertake *any effort* to investigate and ensure Brougher was not being discriminated against).[11]

For these reasons, Plaintiffs' allegations regarding Brougher alone establish that a majority of the Board faces a substantial likelihood of liability, thereby excusing demand.

2. Defendants Approved a False and Misleading Proxy Statement to Cover Up Discrimination Against Brougher and the Resulting Material Risk to Pinterest

To cover up their unlawful discrimination and retaliation against Brougher, Defendants approved a false and misleading Proxy Statement that concealed their illegal conduct and the attendant material risk to the Company. To succeed under a Section 14(a) claim, Plaintiffs must demonstrate that (1) a proxy statement's "misstatement or omission was made with the requisite level of culpability" and (2) the proxy statement was an "essential link in the accomplishment of the proposed transaction." *In re Wells Fargo & Co. S'holder Derivative Litig.*, 282 F. Supp. 3d 1074, 1101 (N.D. Cal. 2017).

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[10] Defendants also argue that the settlement was a good deal because Brougher's unvested RSUs reverted when she was fired, and the settlement amount was less than the RSUs' value. Def. Br. at 17. Again, this is an improper attempt to ask the Court to decide a disputed factual issue. *See* pp. 9 n.7.

[11] Defendants try to minimize Morgenfeld's illegal conduct, calling it a "workplace disagreement" that Silbermann handled. Def. Br. at 13-14. Defendants ignore that Silbermann first inappropriately likened Morgenfeld's misconduct to an old couple fighting over who made coffee, referred the issue to the HR Department which did nothing, and then fired Brougher. ¶¶191-194. Because Silbermann is Board Chair, his knowledge of these events is imputed to the Board. *See, e.g., Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1273 (Del. 2014) ("reasonable inference" that individuals with a reporting obligation "passed the information" to directors).

Negligent conduct is sufficient to plead a Section 14(a) claim; knowing or conscious disregard of misconduct need not be shown. *See Varjabedian v. Emulex Corp.*, 888 F.3d 399, 401, 407-08 (9th Cir. 2018) (because "Section 14(e) is devoid of any suggestion that scienter is required" it requires only negligence); *In re Maxim Integrated Prods., Inc., Derivative Litig.*, 574 F. Supp. 2d 1046, 1066 (N.D. Cal. 2008) ("state of mind for a § 14(a) violation is that of negligence."). Regardless of the standard, the Complaint pleads a substantial likelihood of Defendants' liability since a majority of Pinterest's Board (Defendants Silbermann, Jordan, Kilgore, Levine, Reynolds, Rajaram, and Wilson) issued the Proxy Statement after engaging in or endorsing the misconduct at issue, or sitting on relevant Board committees. *See, e.g., In re Zoran Corp. Derivative Litig.*, 511 F. Supp. 2d 986, 1015-16 (N.D. Cal. 2007) (committee membership was sufficient to show knowledge or negligence in not knowing).

a. The Proxy Statement Contained False and Misleading Statements

Brougher's Termination. The Proxy Statement stated "Francoise Brougher left the Company effective April 7, 2020 and Todd Morgenfeld, our Chief Financial Officer, assumed her responsibilities," omitting the highly material facts that Silbermann *terminated* Brougher after Brougher was the victim of discrimination and retaliation for speaking up about discriminatory compensation. ¶¶202-203. Defendants argue this is not misleading because Brougher had not yet filed suit. Def. Br. at 20-21. But Defendants do not deny that Brougher was *terminated*, as opposed to having merely "left," or that Silbermann tried to cajole her into saying her departure was voluntary. Further, Brougher's disparate pay and discriminatory and retaliatory treatment created a material risk that Defendants were required to disclose before soliciting shareholder votes. *Wells Fargo*, 282 F. Supp. 3d at 1103 (failure to disclose business practice that "put the company at material risk" is an actionable omission under Section 14(a)); *In re Countrywide Fin. Corp. Derivative Litig.*, 554 F. Supp. 2d 1044, 1076-77 (C.D. Cal. 2008) (failure to disclose "that Countrywide abandoned its underwriting standards, thus exposing itself to an undisclosed level of heightened risk" was actionable).

Discriminatory Pay Practices. The Proxy also solicited votes in favor of a "Say on Pay" proposal with false statements regarding how compensation is determined. The Proxy represented that the Board granted Brougher a 2019 RSU award that considered "her past performance, expected future

contributions and the criticality of her role to Pinterest, and expected contributions, as well as the total unrealized value of her outstanding equity awards and their vesting terms relative to our compensation peer group data and other Pinterest executives."[12] ¶200. These statements were materially misleading since the Company's compensation practices discriminated against women (including Brougher) and people of color, failing to pay them in accordance with their roles and responsibilities as represented. Further, the Proxy omitted that Brougher's RSUs were assigned in a discriminatory fashion that did not reflect the stated factors. *See Wells Fargo*, 282 F. Supp. 3d at 1103-04 (representations regarding compensation practices that were not actually followed are actionable); *Zoran*, 511 F. Supp. 2d at 1015-16 (same); *Emps' Ret. Sys. of St. Louis v. Jones*, No. 2:20-cv-04813, 2021 WL 1890490, at *17 (S.D. Ohio May 11, 2021) ("*FirstEnergy*") (similar representations regarding compensation while concealing illegal lobbying efforts were actionable).

Ineffectiveness of Internal Controls. The Proxy stated that the Audit Committee "reviewed and discussed with management the audited financial statements for the fiscal year ended December 31, 2019." ¶¶205-206. It represented that the Audit Committee discussed the effectiveness of the Company's internal controls with its auditor and determined the controls were effective. This was false. As the Director Defendants (particularly the Audit Committee members) knew, Pinterest's internal controls were ineffective at preventing discrimination and retaliation. *See Zoran*, 511 F. Supp. 2d at 1015-16. As of the Proxy date, Brougher, Ozoma, Banks, and others had spoken out about pay inequities and retaliation; the Audit Committee had received years of Compliance Reports showing serious discrimination problems; the Board failed to exercise meaningful oversight and instead was passive to Silbermann, declining to challenge him or ask difficult questions; and the Board allowed General Counsel Christine Flores to advise the Board on legal compliance even though she personally

[12] The Proxy further stated: "the majority of our [Named Executive Officers'] target total direct compensation is linked to the value of our stock" and "the compensation committee considers" Company performance plus "each named executive officer's individual contribution to that performance"; the Compensation Committee considers "roles and responsibilities, qualifications, knowledge, skills, experience, and tenure"; and "performance of each of our named executive officers, based on a qualitative assessment of his or her contributions to our overall performance, ability to lead his or her business unit or function, ability to collaborate across the company and potential to contribute to our long-term financial, operational and strategic objectives." ¶199.

was engaging in retaliation by launching aggressive investigations into employees who complained about discrimination at the Company. ¶¶87, 108, 117-133, 139-148, 169, 332.

Moreover, the Proxy represented that the Board was exercising effective oversight of management despite Silbermann serving as both Chairman and CEO because a lead independent director "***serve[d] as an effective balance to a combined chair and CEO***." ¶¶197-198. These statements were false; controls had been rendered ineffective in preventing discriminatory and retaliatory practices because of the lack of truly independent directors and the Board's passive deference to Silbermann. *Wells Fargo*, 282 F. Supp. 3d at 1103-04 (holding that omission of ineffective internal controls was actionable under Section 14(a)); *Zoran*, 511 F. Supp. 2d at 1015-16.

b. Plaintiffs Adequately Alleged an Essential Link

Section 14(a) requires "that the proxy solicitation itself" be the "essential link in the accomplishment of the transaction." *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 385 (1970). Plaintiffs allege that Pinterest made misleading statements that were an essential link in shareholders heeding Pinterest's recommendations to re-elect Defendants Jordan, Levine, and Rajaram and provide advisory approval of executive compensation. ¶¶373-374. The statements regarding compensation practices and internal controls, as well as the lack of candor concerning Brougher's termination, were material to the shareholders' vote; had the true facts been disclosed, the directors would not have been re-elected and advisory approval of executive compensation would not have been secured. ¶375-376. *See Wells Fargo*, 282 F. Supp. 3d at 1103 (had defendants disclosed a known fraudulent business practice presenting a material risk, shareholders would not have voted to reelect board members who facilitated the scheme); *Countrywide*, 554 F. Supp. 2d at 1076 (finding actionable false statements that executive compensation policies and programs were effective); *Zoran*, 511 F. Supp. 2d at 1016 (allegations "that the directors used the proxy solicitations to maintain their positions on Zoran's board" provided essential link); *FirstEnergy*, 2021 WL 1890490, at *17 (allegations that false and misleading proxy materials were used to re-elect Board members engaged in a bribery scheme provided essential link). This Court's rejection of the essential link alleged in *In re Diamond Foods, Inc. Derivative Litig.*, No. C 11–05692 WHA, 2012 WL 1945814 (N.D. Cal. 2012), is inapposite. Here, as in *Wells Fargo*, Plaintiffs pled that

the statements soliciting approval of Pinterest's compensation plans did not accurately describe the compensation program and that Defendants Jordan, Levine, and Rajaram who were seeking re-election violated laws and policies. 282 F. Supp. 3d at 1105.

3. Circumstantial Evidence Supports an Inference of Board Knowledge of Systemic Discrimination and Retaliation at Pinterest

The specific examples of illegal conduct regarding Brougher and the Proxy Statement lie on a backdrop of other red flags of illegal conduct that the Court must consider holistically, drawing all "reasonable inferences" in Plaintiffs' favor. *Allergan*, 765 F.3d at 1150-561; *see also Wells Fargo*, 2017 WL 1735573, at *13 ("Defendants ignore the bigger picture by addressing each of these red flags in piecemeal fashion.").

a. Silbermann Has Repeatedly Admitted the Company's Misconduct

In response to Ozoma, Banks, and Brougher's allegations, Silbermann and Pinterest have repeatedly admitted that he and the Company were wrong:

- On the day that Ozoma was doxxed, she raised concerns to Silbermann and he responded, "*I'm personally concerned that when these risks were raised, we didn't take the right steps*." ¶128;
- After Ozoma and Banks came forward and Pinterest began receiving bad press, Silbermann said "*parts of our culture are broken*," "*I'm truly sorry for letting you down*," and "*I'm embarrassed to say that I didn't understand the depth of the hardship and hurt many of our team members have experienced. I need to do better*." ¶165;
- On August 11, 2020, the day Brougher filed suit, Pinterest stated the Company needed to change its culture so "*all of our employees feel included and supported*," implicitly acknowledging it had failed to do so in the past. ¶210; and
- In an August 14, 2020 *New York Times* article, Silbermann acknowledged changes needed to be made at Pinterest, including fixing compensation, and he said he would fire people for not adhering to the new culture, implicitly recognizing that executives' discriminatory conduct was, historically, tolerated at the Company. ¶215.[13]

[13] Just days ago, Silbermann "*acknowledged that until recently the company hadn't focused enough on diversity and inclusiveness . . . .*" Sarah E. Needleman, *Pinterest Vows to Add More Female*

These repeated admissions of Pinterest's failure to respond to wrongdoing demonstrate Silbermann's and the Board's knowledge of illegal conduct.

b. Discrimination and Retaliation at Pinterest Was Widespread, Well-Known, and Reported to Senior Executives

"[A]n inference of board knowledge and conscious inaction" is also supported by the fact that illegal discrimination and retaliation were "widespread" across teams and divisions, "well-known," and reported to senior executives and the Board. *See Wynn Resorts*, No. A-18-769630-B, Slip Op. at 6; *In re Intuitive Surgical S'holder Derivative Litig.*, 146 F. Supp. 3d 1106, 1119 (N.D. Cal. 2015).

In addition to Brougher's experience, detailed above, these factors are clearly demonstrated through allegations regarding Ozoma and Banks, two Black women who as senior-level employees were materially underpaid relative to Charlie Hale, a White man with whom they shared work and who was a member of Silbermann's inner circle. ¶¶90-96, 101-105, 134-136. After persistently challenging this pay discrimination, Ozoma and Banks were retaliated against, with Ozoma receiving a negative performance review from Hale for a policy recommendation she made to end promotion of slave plantations as wedding venues, and Banks being berated and then demoted by General Counsel Flores for a policy recommendation that she made regarding holiday pay for contractors. ¶¶138-140, 150-151. It is clear these adverse actions were retaliation with no connection to the substance of Ozoma or Banks' work because the Company accepted these recommendations and even credited Ozoma's work for boosting Pinterest's reputation (and thus valuation) immediately before the IPO. *Id.* Additionally, just a week after Ozoma said she was taking her pay discrimination concerns to court, Flores launched a highly invasive investigation targeting Ozoma and Banks. ¶¶142-147. In one of the most dangerous manifestations of systemic discrimination and retaliation at Pinterest, Company leaders ignored Ozoma and Banks's warnings of an imminent doxxing attack targeting certain employees because of policy decisions they made on Pinterest's behalf. ¶¶112-124. These leaders' refusal to trust these two Black women put employees' physical safety in jeopardy; Ozoma received death threats and rape threats, and

Executives, Workers of Color, The Wall Street Journal (May 18, 2021), https://www.wsj.com/articles/pinterest-vows-to-add-more-female-executives-workers-of-color-11621335601. Silbermann also admitted "*we need to do better and mak[e] changes*" and that he was "*trying to personally set that better tone*," implicitly acknowledging he previously failed to do so. *Id.*

was forced to obtain her own private security because the Company failed to protect her. ¶¶125-127. Ozoma and Banks elevated their concerns to senior executives including Hale, Flores, Silbermann, and Anthony Falzone, but they were ignored. ¶¶96, 117-118, 128.

National news reporting corroborates Brougher, Ozoma, and Banks's stories and further demonstrates the widespread and well-known nature of the illegal conduct. Kara Swisher of *The New York Times* reported numerous current and former female executives describing being "[s]idelined" and "[l]eft out" of the "[h]omegrown boys club"; one said Pinterest has "a nepotism that favors those who cozy up and say yes to power . . . the same small group of men." ¶214. *The Washington Post*, *Business Insider*, *The Verge*, and other outlets reported similar stories based on interviews with collectively dozens of employees: Black employees were materially underpaid relative to White colleagues; men receiving outsized equity grants relative to female colleagues; Black employees exceeded performance goals but nonetheless had accounts reassigned to White colleagues or were abruptly fired without explanation; a Pinterest executive referred to a Black employee as a "servant" at a work event; and multiple employees received negative performance reviews shortly after complaining to the HR Department. ¶¶132, 164-172, 216-219, 222-223, 224, 227. Four Confidential Witnesses similarly shared their own consistent personal stories of discrimination and retaliation at the Company. *See* ¶¶107-110, 119-120, 130-132, 144-148, 222-230.

Silbermann and senior executives are at the center of the misconduct, with Swisher vividly describing Pinterest as a "***mirror-tocracy – reflecting only those who look just like themselves.***" ¶215. Another news outlet quoted a former employee agreeing the "culture starts from the top with Ben which is reinforced by his small band of male cronies." ¶211.

The Complaint additionally alleges that numerous employees raised concerns about discrimination and retaliation to Board members Silbermann and Sharp, and to other senior executives through written complaints, oral complaints, and in internal pulse surveys. ¶¶242, 274-283.

Further, Defendants Wilson, Kilgore, and Reynolds as members of the Audit Committee, received regular reports cataloguing the many discrimination and retaliation claims against the Company and that the top complaint was for discrimination. ¶¶255-267. The Audit Committee was

advised at each meeting from May 2019 to November 2020 of burgeoning discrimination and harassment claims, reflecting over 52% of outstanding investigations in six out of the seven meetings during the relevant time period and ranging as high as 72.7% in one quarter and, troublingly, complaints of retaliation reported by as many as 15.3% of those requesting investigations. ¶¶257-267. By August 13, 2020, the volume of harassment, discrimination, and retaliation claims required "[r]ecruiting new investigator to support growing caseload." ¶263. Regardless, the Audit Committee abdicated its responsibilities; it made the reporting of discrimination allegations to the Audit Committee optional and failed to ensure independent investigations were conducted for discrimination and retaliation claims. ¶¶259, 266-267. Additionally, pay disparities were known to the Director Defendants who approved Brougher's discriminatory compensation and particularly to Defendants Wilson and Kilgore as members of the Compensation Committee, which observed "[h]istorical inconsistency in programs and practices," but failed to take steps to ensure Pinterest's pay practices complied with the law. ¶271.

Defendants argue that the Board's knowledge of these many *discrimination complaints* does not create Board knowledge of *actual discrimination*. Def. Br. at 12. Just as the *Wynn* court recognized that complaints and settlements support an inference of Board knowledge of actual illegal conduct (No. A-18-769630-B, Slip Op. at 5-7), so too, should this Court, particularly in light of Brougher's historic settlement.

Defendants also argue that these indicia of knowledge should be disregarded because they fulfilled their fiduciary duty to establish and oversee reporting systems by receiving reports of discrimination complaints and advice from members of the legal and compliance team. *See* Def. Br. at 8-9, 13, 17. But there is no indication that Audit Committee members Defendants Wilson, Kilgore, and Reynolds or any other Board member ever asked *any* questions, requested any additional information, or did *anything* in response to that information. Rather, the Board relied entirely on Flores and members of the Legal and Compliance teams who were *themselves* accused of retaliation, including endangering employees' safety by failing to take seriously the threatened doxxing attack. ¶169. Though a Board may rely in good faith upon the reports of management and experts, courts do not accept "blind deference to and complete dependence on management". *Hughes v. Hu*, No. 2019-0112-JTL, 2020 WL

1987029, at *16 (Del. Ch. Apr. 27, 2020). The board cannot simply "defer[] to management" particularly when "management's actions suggested that it was either incapable of accurately reporting on" the particular issue "or actively evading board-level oversight" (*id.* at *15) as was the case here, or where the very people advising the Board were also retaliating against employees. Even after widespread public reporting of discrimination at Pinterest, the Audit Committee chose to *decrease* its ability to monitor this material legal risk, revising the Escalation Protocol so the Audit Committee receives *less* information and the General Counsel and Chief Human Resources Officer have greater discretion to decide whether to escalate significant harassment or discrimination complaints to the Committee or leave the Committee in the dark. ¶267. Defendants Wilson, Kilgore, and Reynolds' decision to decrease the Audit Committee's ability to monitor and oversee this legal risk reflects a failure to establish and monitor reporting systems in violation of their fiduciary duties.

Together, these allegations demonstrate that discrimination and retaliation claims were not random or isolated; rather, the illegal conduct was widespread across divisions and levels, well-known, and both perpetrated and known by senior executives as well as Board members. *See Allergan*, 765 F.3d at 1154 (noting that illegal conduct spanned multiple divisions so it would be "surprising, to say the least" if the misconduct "passed unnoticed"). Given these allegations, in the context of Silbermann's role in the misconduct and his control of the Board, the Director Defendants' failure to intervene is more reasonably seen as a product of their fealty to Silbermann than their lack of knowledge.

c. The Centrality of Diversity and Inclusion to Pinterest

"In demand futility cases, courts have repeatedly emphasized that it is especially plausible to infer board interest in and knowledge of developments relating to a [person or] product that is critical to a company's success or is otherwise of special importance to it." *Allergan*, 765 F.3d at 1154.[14] Diversity and inclusion are central to Pinterest's business and reputation. Its success is the result of its appeal to its two-thirds female user base and the advertisers seeking to target women, and the Company

[14] *See also In re Biopure Corp. Derivative Litig.*, 424 F. Supp. 2d 305, 307-08 (D. Mass. 2006) (where the "primary product or service is in jeopardy" courts will "impute that knowledge to the company's officers and directors"); *Countrywide*, 554 F. Supp. 2d at 1081 (directors assumed to know about "fundamental part" of the company); *Teamsters Local 443*, 2020 WL 5028065, at *18 (demand was futile where alleged misconduct was "directly inimical" to business's "central purpose").

admits its success depends on a diverse workforce that can relate to its users' experience. ¶¶66-75. The centrality of diversity and inclusion to Pinterest's success bolsters the inference of knowledge that Pinterest not only failed to achieve that goal, but that its top executives acted directly contrary to it.

d. The Centrality of Silbermann to Pinterest

As in *Wynn Resorts*, the fact that the illegal conduct involves the Company's most important employee supports an inference of Board knowledge. *See* No. A-18-769630-B, Slip Op. at 5-6. Silbermann is Pinterest's co-founder, CEO, and Board Chair and is the reason Pinterest's early investors supported the Company. ¶¶34, 67. He is also the primary alleged perpetrator of discrimination against Brougher and set the insular "boys club" tone that allowed discrimination and retaliation to run rampant. Because of his perceived importance, the Director Defendants improperly deferred to Silbermann, even when that meant "consciously disregard[ing] their fiduciary duties and allow[ing] widespread illegal . . . practices to continue."[15] *Wells Fargo*, 2017 WL 1735573, at *13.

e. Defendants' Failure to Act Swiftly or Effectively

The Defendants' failure to take meaningful action for years after a major warning sign further supports an inference of Board knowledge. *See Wynn Resorts*, No. A-18-769630-B, Slip Op. at 6-7.

The first major warning sign of illegal conduct was not Ozoma and Banks' June 2020 public revelations but rather Brougher's 2018 complaint regarding pay discrimination. Defendants thus did not act swiftly, as they claim.[16] Def. Br. at 4-5; 14-15. Further, their purported remedial process is defective. Even now, Defendants refuse to acknowledge Silbermann fired Brougher; instead, their brief euphemistically claims Brougher "depart[ed]." *See* Def. Br. at 20. Additionally, the Special Committee includes the very directors who participated in and tacitly endorsed discrimination. Even if it had been independent, that neutrality was abandoned by allowing the full Board (including Silbermann) to weigh

[15] Brougher noted the Board's passivity: "Unlike in her prior roles where the Board members were active, engaged participants who asked probing questions, Pinterest's Board members were 'cordial, nodding their heads at my proposals and rarely asking difficult questions.'" ¶332.

[16] Defendants also argue that they promptly and properly handled the doxxing incident (Def. Br. at 15 n.5) but do not address that Ozoma had to obtain her own security and that no structural changes were made. The absence of any new policies in the Section 220 production suggests none were created. *See China Agritech*, 2013 WL 2181514, at *20 (failing to produce new policies suggests none exist); *In re Tyson Foods, Inc.*, 919 A.2d 563, 578 (Del. Ch. 2007) (the more reasonable inference is that exculpatory documents would be provided than withheld).

in and thus shape its investigation and preliminary recommendations. ¶¶252-253. These allegations are not "second-guess[ing] . . . the Board's response, as Defendants claim (Def. Br. at 15); to the contrary, they reveal a "sham" investigation used to cover up breaches of fiduciary duty and support a finding of demand futility. *In re China Agritech, Inc. S'holder Derivative Litig.*, No. 7163–VCL, 2013 WL 2181514, at *23 (Del. Ch. May 21, 2013).

* * *

For the foregoing reasons, Plaintiffs sufficiently alleged that a majority of the Board had "actual or constructive knowledge of violations of the law" but chose not to investigate or take action, and so "violated its duty of loyalty and faces a substantial likelihood of liability." *Allergan*, 765 F.3d. at 1151.

B. Demand Is Excused Because Defendants Silbermann, Sharp, Levine, and Jordan Control the Board

At this stage, Plaintiffs "do not need to prove" a controlling stockholder but rather must simply "plead facts raising the inference that [certain defendants] *could* control [the company]." *In re Tesla Motors, Inc. Stockholder Litig.*, No. 12711-VCS, 2018 WL 1560293, at *13 n.215 (Del. Ch. Mar. 28, 2018). "A stockholder could be found a controller under Delaware law: where the stockholder (1) owns more than 50% of the voting power of a corporation or (2) owns less than 50% of the voting power of the corporation but exercises control over the business affairs of the corporation." *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 251 (Del. 2019). "[M]ultiple stockholders together can constitute a control group" when "connected in some legally significant way . . . to work together toward a shared goal." *Id.* at 251-52. No "absolute percentage of voting power" is required. *Tesla*, 2018 WL 1560293, at *14. Courts conduct a "highly fact specific inquiry" to determine whether a group has "the ability to dominate the corporate decision-making process." *Id.* at *13 n.214, 14; *Calesa Assocs., L.P. v. Am. Capital, Ltd.*, No. 10557–VCG, 2016 WL 770251, at *11 (Del. Ch. Feb. 29, 2016). As a result, the issue of control is "a difficult question to resolve on the pleadings." *Tesla*, 2018 WL 1560293, at *13.

Here, the Complaint alleges that Silbermann alone controls 24.77% of Pinterest's voting power and that together Silbermann, Sharp, Levine, and Jordan own ***over 62.07%*** of Pinterest's voting power, giving them "complete voting control and veto power over the election of all directors, as well as virtually all other corporate matters involving a shareholder vote." ¶¶34, 319. Pinterest admits that its

dual-class stock structure gives Class B shareholders including co-founders Silbermann and Sharp and major pre-IPO investors (Levine, on behalf of BVP, and Jordan, on behalf of Andreessen Horowitz) "the ability to control the outcome of matters submitted to our stockholders for approval, including the election of our directors." ¶321; *see also* ¶326. Pinterest's Form 10-K further admits that the dual class voting structure "concentrate[es] voting control" with pre-IPO stockholders like Silbermann, Sharp, BVP, and Andreessen Horowitz and "will limit or preclude [other shareholders'] ability to influence corporate matters." ¶325. Further, Silbermann and his long-time allies control appointment and removal of directors. Jordan and Levine constitute the majority of the Nominating and Corporate Governance Committee and make these recommendations in consultation with Defendant Silbermann who, admittedly, chooses deferential directors. ¶¶329, 332.

And *even if Silbermann was terminated*, he would still maintain powerful influence. Pinterest admits that Silbermann would "continue to have the ability to exercise significant voting power" even after termination. ¶327. It is difficult to imagine an allegation that more powerfully demonstrates the futility of making a demand on Pinterest related to Silbermann's discriminatory conduct than the fact that Silbermann will continue to wield powerful influence over Pinterest – including Board member selection – even if he is terminated.

Thus, Plaintiffs have adequately alleged that Silbermann, Sharp, Jordan, and Levine have "the ability to dominate the corporate decision-making process" and so can be considered a "control group." *Tesla*, 2018 WL 1560293, at *14, 14 n.220.[17] Plaintiffs' allegations are even stronger than in *In re Zhongpin Inc. Stockholders Litigation*, where the CEO and chairman of the board owned approximately 17.3% of the company's stock, together with certain affiliated directors owned 26% of the company's stock, and the company's public filings acknowledged that the CEO "has significant influence over our management and affairs." 2014 WL 6735457, at *7-9. Here, Plaintiffs similarly allege that Silbermann personally controls a larger percentage of voting power (24.77%) and Pinterest's public filings admit

[17] Defendants suggest the group is not sufficiently connected. But the Complaint alleges an "agreement" or some "other arrangement . . . to work together toward a shared goal" (*Sheldon*, 220 A.3d at 251-52. Silbermann, Shar) because BVP (via Levine), and Andreessen Horowitz (via Jordan) are parties to an Investor Rights Agreement, and they work together towards the shared goal of maintaining Silbermann's domination of Pinterest and its Board (¶322).

he would continue to wield significant influence even if terminated; Silbermann, Sharp, Levine, and Jordan together control a majority (62.07%); Pinterest's corporate filings acknowledge their collective significant influence; and the control group dominates director selection through roles on the Nominating and Corporate Governance Committee. Together, these facts are more than sufficient to demonstrate, at the pleading stage, a control group.

C. Demand Is Excused Because a Majority of the Board Lacks Independence

"A plaintiff may establish that a director lacks independence by alleging with particularity that the director is sufficiently loyal to, beholden to, or otherwise influenced by an interested party to undermine the director's ability to judge the matter on its merits." *In re Oracle Corp. Derivative Litig.*, No. 2017–0337–SG, 2018 WL 1381331 at *15 (Del. Ch. Mar. 19, 2018); *see also Sandys v. Pincus*, 152 A.3d 124, 128 (Del. 2016).

1. Silbermann and Sharp

Defendants Silbermann and Sharp are two of Pinterest's three co-founders and have a decade-long close business relationship. ¶66. Those close ties along with their significant responsibilities as CEO/Board Chairman and Chief Design & Creative Officer and substantial compensation (each earning over $46 million in 2019), demonstrate they cannot evaluate a demand to sue each other in a disinterested and independent manner, thus excusing demand as to both. ¶¶34, 40, 66, 234. *See In re Oracle Corp. Derivative Litig.*, 2018 WL 1381331, at *16 n.226; *Countrywide*, 554 F. Supp. 2d at 1080-81 & n.40. Additionally, the Company admitted Silbermann and Sharp are not "independent" under New York Stock Exchange listing rules (¶337), which is a "relevant" factor. *Sandys*, 152 A.3d at 131-32; *see also In re EZCORP Inc. Consulting Agreement Derivative Litig.*, No. 9962-VCL, 2016 WL 301245, at *42-43 (Del. Ch. Jan. 25, 2016).

2. Levine and Jordan

BVP and Andreessen Horowitz are Pinterest's major investors. Levine is a partner at BVP and the firm's designee to the Board since 2011 and directed BVP's $10 million Series A investment in Pinterest just weeks after he met Silbermann. ¶¶48, 67. Jordan is a General Partner of Andreessen Horowitz and the firm's designee to the Board since 2011; Pinterest was one of Jordan's first venture capital investments, and its IPO his first as an investor. ¶¶45, 67. Jordan and Levine's professional

reputations would be negatively impacted by a scandal involving Silbermann or Sharp given their employers' substantial long-term investment in the Company and their own roles in that investment. ¶¶67, 338. Thus, Jordan and Levine cannot evaluate a demand to sue either Silbermann or Sharp in a disinterested and independent manner, excusing a demand as to both. *See, e.g.*, *Oracle*, 2018 WL 1381331, at *16-20 (demand excused for director with "multiple layers of business connections" with company and director with personal and business ties with controlling shareholder).

3. Rajaram

Delaware law recognizes "that when a director is employed by or receives compensation from other entities, and where the interested party who would be adversely affected by pursing litigation controls or has substantial influence over those entities, a reasonable doubt exists about that director's ability to impartially consider a litigation demand." *EZCORP*, 2016 WL 301245, at *36. Rajaram is a member of DoorDash's executive team; Andreessen Horowitz is a major investor in DoorDash. ¶340. Were Rajaram to authorize a lawsuit against Jordan, Andreessen Horowitz's designee, there is a reasonable inference that this might jeopardize his continued employment. Thus, demand against Rajaram is excused. *See EZCORP*, 2016 WL 301245, at *36; *Sandys*, 152 A. 3d at 134 ("reasonable to expect" that a "mutually beneficial ongoing business relationship" with another director would discourage suing that person).

CONCLUSION

For these reasons, the Court should deny Defendants' Motion to Dismiss. If the Court is inclined to grant the motion, Plaintiffs request leave to amend. *See Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

Dated: May 27, 2021

By: */s/ Julie Goldsmith Reiser*

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DISTRICT COURT
CLARK COUNTY, NEVADA

IN RE WYNN RESORTS, LTD. DERIVATIVE LITIGATION	Lead Case No. A-18-769630-B Dept. No.: XVI **ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND GRANTING LEAD PLAINTIFFS' MOTION TO STRIKE**

AUG 23 2018

This matter came before the Court on August 9, 2018, for hearing on (1) the Motion to Dismiss filed jointly by Defendants J. Edward Virtue, Clark T. Randt, Jr., Robert J. Miller, D. Boone Wayson, John J. Hagenbuch, Jay L. Johnson, Patricia Mulroy, and Alvin A. Shoemaker (collectively, the "Board" or the "Director Defendants"), Matt Maddox, Kimmarie Sinatra, and Stephen A. Wynn (together with the Board, "Defendants"); and (2) Lead Plaintiffs, Thomas P. DiNapoli, Comptroller of the State of New York, as Administrative Head of the New York State and Local Retirement System and Trustee of the New York State Common Retirement Fund ("NYSCRF"), and the NYC Funds'[1] Motion to Strike Defendant Kimmarie Sinatra's Reply on Order Shortening Time. Appearing were Don Springmeyer, Esq., and Julie G. Reiser, Esq., for Lead Plaintiffs; Alex L. Fugazzi, Esq., and Matthew Solum, Esq., for Defendants D. Boone Wayson, John J. Hagenbuch, Ray R. Irani, Jay L. Johnson, Robert J. Miller, Patricia Mulroy, Clark T. Randt, Jr., Alvin V. Shoemaker, J. Edward Virtue, Matthew Maddox, and Nominal Defendant Wynn Resorts, Limited; J. Colby Williams, Esq., and Colleen C. Smith, Esq., for Defendant Stephen A. Wynn; Erika Pike Turner, Esq., and James Kramer, Esq., for Defendant Kimmarie Sinatra; and Will Kemp, Esq. and Michael J. Gayan, Esq., for Plaintiff C. Jeffrey Rogers.

The Court, having read the pleadings and papers filed by the parties, reviewed the exhibits attached to the briefing, and considered the oral arguments of counsel, including the graphic handout accepted by the Court, finds and concludes as follows:[2]

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[1] The NYC Funds are: New York City Employees' Retirement System, New York City Police Pension Fund, Police Officer's Variable Supplements Fund, Police Supervisor Officers Variable Supplements Fund, New York City Fire Pension Fund, Fire Fighters' Variable Supplements Fund, Fire Officers' Variable Supplements Fund, Board of Education Retirement System of the City of New York, Teachers' Retirement System of the City of New York, and New York City Teachers' Variable Annuity Program.

[2] Any factual findings that are more properly characterized as legal conclusions, and vice versa, are to be understood as such.

I. MOTION TO DISMISS

A. Standard

A plaintiff seeking to assert claims derivatively on behalf of a corporation must either demand that the corporation's board of directors take the action the plaintiff desires, or show that making such a demand would be futile. *See Shoen v. SAC Holding Corp*, 137 P.3d 1171, 1179–85 (Nev. 2006). To adequately plead demand futility, *Shoen* instructs Nevada courts to "examine whether particularized facts demonstrate: (1) in those cases in which the directors approved the challenged transactions, a reasonable doubt that the directors were disinterested or that the business judgment rule otherwise protects the challenged decision", *id.* at 641 (adopting standard from *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984)); or "(2) in those cases in which the challenged transactions did not involve board action or the board of directors has changed since the transactions, [whether there is] a reasonable doubt that the board can impartially consider a demand." *Id.* (adopting standard from *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993)). "In practice, the *Aronson* and *Rales* 'disinterested and independent' tests often amount to the same analysis—i.e., whether directorial interest in the challenged act or the outcome of any related litigation negates impartiality to consider a demand." *Id.* at 641 n.62. The question of whether to apply *Aronson* or *Rales* "does not matter" so long as plaintiffs' allegations raise a "reasonable doubt" as to whether a majority of the board faces a "substantial likelihood of liability" for failing to act in the face of a known duty to act. *Rosenbloom v. Pyott*, 765 F.3d 1137, 1150 (9th Cir. 2014) ("*Allergan*") ("Under either approach, demand is excused if Plaintiffs' particularized allegations create a reasonable doubt as to whether a majority of the board of directors faces a substantial likelihood of personal liability for breaching the duty of loyalty.") (citing, *inter alia, Guttman v. Huang*, 823 A.2d 492, 501 (Del. Ch. 2003)).

Under Nevada law, the failure to act must be intentional or knowing. *Fosbre v. Matthews*, No. 3:09-CV-0467-ECR-RAM, 2010 WL 2696615, at *6 (D. Nev. July 2, 2010) (under NRS § 78.138, plaintiffs must plead particularized facts showing that the acts or omissions of the defendant directors involved "intentional misconduct, fraud or a knowing violation of the law").

However, plaintiffs need not show a "smoking gun of Board knowledge"; instead, plaintiffs may rely on inferences drawn from circumstantial evidence. *Allergan*, 765 F.3d at 1155-56 (citing cases).

"To show…'a substantial risk of liability,' the plaintiff does not have to demonstrate a reasonable probability of success on the claim." *See La. Mun. Police Emps.' Ret. Sys. v. Pyott*, 46 A.3d 313, 351 (Del. Ch. 2012) ("*Pyott*"), *rev'd on other grounds*, 74 A.3d 612 (Del. 2013). Rather, "[p]laintiffs need only 'make a threshold showing, through the allegation of particularized facts, that their claims have some merit." *Id.* (citing *Rales*, 634 A.2d at 934). Further, the Court must take as true the complaint's allegations and draw all fair inferences in favor of plaintiff. *Shoen,* 137 P.3d at 1182. When a plaintiff alleges that a board, or a majority of it, was involved in nearly all the decisions that allegedly give rise to a substantial likelihood of liability, "courts may evaluate demand futility by looking to the whole board of directors rather than going one by one through its ranks." *Allergan*, 765 F.3d at 1151, n.13 (citing *In re Pfizer Inc. S'holder Derivative Litig.*, 722 F. Supp. 2d 453, 461 (S.D.N.Y. 2010)).

B. The Relevant Board for Purposes of Demand Futility

The relevant directors for the demand futility analysis are those on the board at the time Lead Plaintiffs filed their Amended Complaint on March 23, 2018. *La. Mun. Police Emps.' Ret. Sys. v. Wynn*, 829 F.3d 1048, 1058 (9th Cir. 2016) ("*LAMPERS*") (citing *Braddock v. Zimmerman*, 906 A.2d 776, 786 (Del. 2006)). "[S]hareholders must allege that at least half of the board, as it was constituted when the shareholders *filed* the amended complaint, was incapable of entertaining a pre-suit demand." *Id.* (emphasis added).

There were eight board members at the time Lead Plaintiffs filed their Amended Complaint on March 23, 2018: Defendants Hagenbuch, Johnson, Miller, Mulroy, Randt, Jr., Shoemaker, Virtue, and Wayson. Amended Complaint ¶ 1 n.1.[3] Thus, to survive a motion to

[3] All "¶ __" references are to Lead Plaintiffs' Amended Complaint.

dismiss, Plaintiffs must allege facts that show that demand is futile as to four of those eight directors. *AMERCO*, 252 P.3d at 698 (Nev. 2011) (citing *Beneville v. York*, 769 A.2d 80, 86 (Del. Ch. 2000)); *Shoen*, 137 P.3d at 1184 n.62.

C. Lead Plaintiffs Adequately Pleaded Demand Futility

Lead Plaintiffs sufficiently pleaded that a majority of the Board faces a substantial likelihood of liability for two separate reasons, each of which as alleged independently satisfies demand futility: 1) for knowingly failing to take action in the face of credible and corroborated reports that Steve Wynn sexually harassed and abused Wynn Resorts employees, including failing to notify regulators of information material to Steve Wynn's suitability as a gaming licensee, and 2) for profiting on this information through insider trading that came at the Company's and shareholder's expense.

According to the Amended Complaint, by 2009, and certainly by 2016, the Board was aware that: (1) Steve Wynn had paid a multimillion-dollar settlement in 2005 (the "Settlement"); (2) Steve Wynn was engaged in an alleged "pattern" of sexual misconduct; and (3) it had an obligation to report such misconduct to gaming regulators. According to the Amended Complaint, a March 28, 2016, press release shows that the Board knew of the Settlement, of Steve Wynn's pattern of sexual misconduct, and also that it understood its obligation to report such conduct to gaming regulators and shareholders, stating: "[a]s a leader in a *highly regulated* industry, Wynn Resorts prides itself on transparency and full disclosure to regulators and shareholders. *Allegations made by Ms. Wynn that the company would hide any relevant activities from our regulators are patently false.*" *See e.g.*, ¶¶ 100; 139. Yet the Amended Complaint alleges that the Board consciously did just that, jeopardizing Wynn's gaming licenses and its $2.4 billion casino currently under construction. ¶¶ 66, 102. According to the Amended Complaint, knowledge of this one incident of sexual assault is sufficient to have required the Board to conduct an investigation, as well as report the incident to gaming regulators.

In addition to alleged knowledge of the 2005 sexual assault and Steve Wynn's "pattern" of sexual misconduct, other circumstantial evidence alleged by Lead Plaintiffs supports that the

Board knew of Steve Wynn's reckless and illegal conduct. This circumstantial evidence includes, among other things: (1) lawsuits filed with the EEOC and against the Board by Steve Wynn's victims, which allege that the Board knew of Steve Wynn's misconduct even earlier than 2016; (2) evidence that the Company's General Counsel, Defendant Sinatra, and at least two Board members, Steve Wynn and Elaine Wynn, knew about the 2005 assault as early as 2009; (3) the fact that Steve Wynn's "suitability" was critical to the Company's business; (4) the sheer magnitude and duration of Steve Wynn's illegal conduct, which involved at least hundreds of individual instances of sexual assault and harassment over the course of decades, along with a litany of additional red flags; (5) the Board's involvement in the Elaine Wynn/Okada litigation, which specifically involved serious allegations of sexual misconduct against Steve Wynn; (6) a lawsuit filed by Worldwide Wynn LLC, a subsidiary of Wynn Resorts, against Doreen Whennen, former Vice President of Hotel Operations at Wynn Las Vegas, to prevent her from disclosing notes concerning Steve Wynn's 2005 sexual assault; (7) that numerous Wynn employees reported Steve Wynn's sexual misconduct to senior Wynn executives and that Steve Wynn's inappropriate behavior was well-known by Wynn employees throughout the Company and on public display in various Wynn Las Vegas locations; (8) the Board's knowledge of a settlement in *Arrowsmith, et al. v. Mirage Casino-Hotel*, 2:97-cv-00638-RLH-LRL (D. Nev. 1997), in which Steve Wynn was accused of fostering an environment of harassment, sexually coerced relations, and sexual misconduct at his previous company; (9) the Board's knowledge that Steve Wynn paid a settlement to a Wynn employee relating to sexual misconduct allegations in 2006; (10) the Board's knowledge of NLRB proceedings from 2006 which documented Steve Wynn's flagrant misogyny and abusive treatment of his female employees; and (11) the Board's failure to act even after a *Wall Street Journal* article exposed Steve Wynn's sexual predation by allowing Steve Wynn to continue to live on the premises and to walk away with billions of dollars. *See, e.g.*, ¶¶ 5-6, 12, 38, 42, 65-67, 73, 75-84, 86-95, 98, 99, 100, 102, 104-106, 148-51.

Drawing all reasonable inferences in favor of Lead Plaintiffs, the Court concludes that the allegations listed above are sufficient to plead that the Board had actual knowledge of serious

allegations that Steve Wynn was violating the law. As a result, demand is futile since the Board faces a substantial likelihood of liability for its knowing and conscious inaction.

In addition, under Nevada law, Directors who trade on inside information have divided loyalty rendering them incapable of impartially considering a demand. *In re Las Vegas Sands Corp. Derivative Litig.*, No. A576669, 2009 Nev. Dist. LEXIS 11, at *11 (EJDC Nov. 4, 2009). To establish a substantial likelihood of liability for insider trading, plaintiffs must allege that the directors "engaged in material trading activity at a time when (one can infer from particularized pled facts that) they knew material, non-public information about the company's financial condition." *Guttman v. Huang*, 823 A.2d 492, 502 (Del. Ch. 2003).

According to the Amended Complaint, five Wynn Directors – Wayson, Mulroy, Randt, Shoemaker, and Hagenbuch (together, the "Selling Directors") – collectively sold over 58,000 shares of Wynn Resorts common stock for a combined total of over $6 million, outside of 10b5-1 trading plans, and following their March 28, 2016, acknowledgement of having been warned of serious misconduct by Steve Wynn. *See, e.g.*, ¶¶ 21, 30, 32, 34, 37, 40, 42, 108-115. According to the Amended Complaint, the sales were highly suspicious in that they were significant in magnitude, ranging anywhere from 28% – 100% of the Selling Directors' total holdings, or they were dramatically out of line with the Selling Directors' prior trading practices. *Id.*

The Court concludes that, solely for the purpose of evaluating demand futility, the Amended Complaint contains adequate allegations to support a finding that due to a majority of the Board of Directors trading activity there is an independent basis for finding that the Board faces a substantial likelihood of liability and is, therefore, incapable of considering a demand.

II. MOTION TO STRIKE

The "[t]he function of a reply [brief] is to answer the arguments made in opposition to the position taken by the movant, not to raise new issues or arguments or change the nature of the primary motion." 56 Am. Jur. 2d Motions, Rules, and Orders § 26. "[A] trial court may grant a motion to strike issues raised for the first time in a reply memorandum." *Id.* Defendant Sinatra's reply brief delved into issues that were not addressed in the Motion to Dismiss. Accordingly, the

Court grants Lead Plaintiffs' Motion to Strike, but without prejudice to Defendant Sinatra filing a separate motion to dismiss at a later date.

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Defendants' Motion to Dismiss on demand futility is DENIED.

2. Lead Plaintiffs' Motion to Strike is GRANTED without prejudice to Defendant Sinatra filing a separate motion to dismiss at a later date.

DATED this 4th day of September, 2018

District Court Judge JT

This Order was circulated to all counsel beginning on August 17, 2018.

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