

Chancery Tosses Derivative Suit Over Uber-Ottomotto Deal

By **Rachel Graf**

Law360 (April 1, 2019, 5:21 PM EDT) -- A Delaware vice chancellor dismissed an investor's derivative lawsuit over losses stemming from Uber's deal to buy a self-driving vehicle startup that allegedly stole trade secrets, saying Monday that the investor failed to ask the board to bring the litigation before he did.

Lenza H. McElrath III has argued that such a demand would have been pointless because Uber Technologies Inc.'s board signed off on the company's acquisition of startup Ottomotto LLC. Vice Chancellor Sam Glasscock III rejected this argument, saying most of the directors who would have decided whether to bring the litigation themselves would have been "disinterested and independent" since they joined the board after the acquisition occurred.

An Uber spokesperson said the company was "pleased" with the dismissal order.

McElrath filed the suit in December 2017 seeking damages on the company's behalf for losses that include a \$245 million trade secret settlement with Waymo. McElrath's suit drew heavily on filings in other litigation involving Google and Waymo, which accused former Waymo engineer Anthony Levandowski of downloading thousands of Waymo trade secrets before leaving the company to start Ottomotto and quickly join Uber.

McElrath claims the board should have demanded to see for themselves investigators' findings about whether trade secrets had been stolen before approving the acquisition, rather than trusting management's account of the findings. The board should have known former Uber CEO Travis Kalanick had a history of shady business practices and been wary of his representations, according to the lawsuit.

In his opinion, Vice Chancellor Glasscock compared the crux of McElrath's arguments to a fable about a scorpion and a frog.

"In the popular fable often attributed to Aesop, a scorpion stings a frog that is ferrying it across a river, dooming both scorpion and frog. 'Why would you do that?' asks the frog, dying. 'It is my nature,' replies the drowning scorpion, 'as you knew yourself when you let me on your back,'" Glasscock wrote in the opinion. "The plaintiff in this unusual derivative action blames the defendant directors of Uber Technologies, Inc. on similar grounds, with then-CEO Travis Kalanick cast as the scorpion."

But the directors who allegedly decided to trust Kalanick and approve the deal now make up the minority of the board, according to the opinion.

"Therefore, there is no reasonable doubt that a majority of the [board] can be impartial, and the plaintiff has fallen short of pleading demand futility," Vice Chancellor Glasscock said.

Counsel for McElrath didn't respond Monday to a request for comment.

McElrath is represented by Michael J. Barry, Jeff A. Almeida, and Rebecca A. Musarra of Grant & Eisenhofer PA.

Uber directors Garrett Camp, Ryan Graves, Arianna Huffington, Yasir Al-Rumayyan, William Gurley and David Bonderman are represented by R. Judson Scaggs Jr., Susan W. Waesco and Sabrina M. Hendershot of Morris Nichols Arsht & Tunnell LLP and Susan S. Muck, Kevin P. Muck and Marie C. Bafus of Fenwick & West LLP.

Kalanick is represented by Donald J. Wolfe Jr., T. Brad Davey, J. Matthew Belger and Jacob R. Kirkham of Potter Anderson & Corroon LLP and Joseph G. Petrosinelli and Kenneth J. Brown of Williams & Connolly LLP.

Uber's general counsel Salle Yoo is represented by Jody C. Barillare, Susan D. Resley and Marc J. Sonnenfeld of Morgan Lewis & Bockius LLP.

Uber is represented by A. Thompson Bayliss and Michael A. Barlow of Abrams & Bayliss LLP and Mark P. Gimbel, C. William Phillips and Bryant Pulsipher of Covington & Burling LLP.

The case is McElrath v. Kalanick et al., case number 2017-0888, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Jay Jackson Jr.