**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| BENCHMARK CAPITAL PARTNERS VII, L.P., a Delaware limited partnership,<br><br>Plaintiff,<br><br>v.<br><br>TRAVIS KALANICK,<br><br>Defendant,<br><br>and<br><br>UBER TECHNOLOGIES, INC., a Delaware corporation,<br><br>Nominal Defendant. | ) | C.A. No. 2017-0575-SG |

**DEFENDANT TRAVIS KALANICK'S OPPOSITION TO PLAINTIFF'S MOTION FOR EXPEDITED PROCEEDINGS AND FOR ENTRY OF A STATUS QUO ORDER**

1. Benchmark Capital Partners ("Benchmark") initiated this action as part of its public and personal attack on Travis Kalanick, the founder of Uber. To that end, Benchmark alleges—not with particularity, but largely "on information and belief"—that *over a year ago* Kalanick fraudulently obtained amendments to a voting agreement that gave him control over three board seats, including the one he now occupies. Seeking to obtain expedited proceedings and a status quo order, Benchmark attempts to recast its fraud claim as a Section 225 action.

2. This is a very unusual Section 225 action. It does not challenge the outcome of a recent, disputed election that calls into question the authority of the entire board, or even a majority of the board, to manage the business. This is instead a dispute between a single stockholder, Benchmark (which has the right to designate one director), and one of the company's other seven directors, Kalanick. The eight directors continue to manage the business. There is no uncertainty regarding the validity of actions approved by a majority of the board. Nor is there any other independent, impending source of potential harm to the company or its stockholders. As a result, the considerations that often justify expedition and the entry of a status quo order in a typical Section 225 action are not present here.

3. But there is a much more fundamental issue. As explained in Kalanick's pending motion to dismiss, Benchmark's claims are subject to mandatory arbitration, and consequently this Court lacks subject matter jurisdiction to resolve them. Because Kalanick's motion to dismiss goes to the jurisdiction of the Court, it must be resolved before the Court enters any scheduling order governing litigation of Benchmark's claims, permits discovery, or grants any relief against Kalanick.

4. Finally, even if subject matter jurisdiction were present, Benchmark has failed to allege a colorable fraud claim or demonstrate a threat of imminent irreparable harm justifying preliminary injunctive relief. Nor is Benchmark's proposed order designed to maintain the status quo—it seeks a dramatic change to

the status quo based on stale and meritless allegations asserted "on information and belief."

## STATEMENT OF FACTS

### A. Kalanick Founds Uber And Later Raises Capital From Investors.

5. Beginning in 2009, Kalanick, then 33 years old, and his friend Garrett Camp pursued an innovative idea that was so thoroughly successful under his leadership that today, only eight years later, it seems commonplace: an application on a mobile phone that could be used to order, track, and receive car service from independent drivers. By mid-2010, the two launched Uber. They raised a small amount of capital and began operations in San Francisco. Kalanick ran the fledgling company and was formally appointed CEO in October 2010.

6. In February 2011, Benchmark became an investor in Uber. It contributed $11 million of capital in return for approximately an 18% share in the company, and also purchased some outstanding shares for $1 million. It also negotiated for a seat on the company's board, just as Kalanick later did for the three seats at issue. Benchmark is a highly sophisticated venture capital firm, which provided early-stage funding for companies such as eBay, Dropbox, Twitter, Snapchat, and Instagram.

**B. Uber Achieves Phenomenal Success And Raises Additional Capital.**

7. In 2011, under Kalanick's management, Uber launched operations in additional cities and was an instant success. Over the next several years, Uber became the world leader in mobile car-hailing and technology services. By December 2015, it was valued at over $60 billion—meaning Benchmark's initial investment of $12 million had grown to more than $7 billion.

8. As significant investors came to Uber over the years, they often bargained for a board seat, and each time this occurred the company's Voting Agreement among its shareholders was amended and restated. The Voting Agreement sets forth the agreed composition of the board, voting rights—including the right to fill board seats—and various other rights and obligations of the stockholders. As required by Section 5.4 of the Agreement, each amendment was accomplished through a formal, detailed writing, signed by all parties.

9. In June 2016, stockholders executed an Amended and Restated Voting Agreement in connection with a $3.5 billion investment in the company by the Saudi Arabian government's Public Investment Fund ("PIF"). Among other things, the amendment granted PIF a voting representative on the board. As a condition of agreeing to this change, Kalanick sought and received the right to appoint three additional directors at his discretion. All parties to the Agreement, including Benchmark, agreed to the amendment. The three new seats were created through an

amendment to Uber's charter, and Kalanick's right to fill them was set forth in the Voting Agreement. Kalanick never exercised his right to fill any of those seats for a year, however, and filled one of them (with himself) only after he resigned as CEO. He has never filled the other two seats.

10. Benchmark's allegation that it was "fraudulently induced" to enter into these amendments is a fabrication articulated for the first time in its complaint. Indeed, in the 14 months since the challenged amendments were signed, Benchmark never suggested that the amendments were "fraudulently induced" or in any way unenforceable, although all of the events on which it bases its claim of fraud were well known to Benchmark. Its position was explicitly to the contrary.

### C. On May 27, 2017, Kalanick's Mother Is Killed In A Boating Accident, And He Takes A Leave Of Absence.

11. Through May 2017, Benchmark outwardly supported Kalanick as CEO of the company. At some point, however, it began secretly planning an effort to oust him. It executed its plan at the most shameful of times: immediately after Kalanick experienced a horrible personal tragedy.

12. On May 27, 2017, Kalanick's mother was killed and his father critically injured in a boating accident. Kalanick spent the next two weeks tending to his father in the hospital and grieving with his family. He buried his mother on June 9, and on June 11 he informed the board that, given the emotional toll of dealing with this tragedy, he thought it best to take a leave of absence as CEO. The board expressed

great sympathy for his loss. All board members, including Bill Gurley of Benchmark, said that they fully supported whatever decision he made, and that he would be welcome to return as CEO when he was ready.

### D. On June 20, 2017, Benchmark Principals Ambush Kalanick And Pressure Him To Sign A Resignation Letter.

13. On June 20, 2017, not more than a week after having expressed "support" for Kalanick as CEO, and a week and a half after his mother's funeral, Benchmark sent its principals Peter Fenton and Matt Cohler to Kalanick's hotel room in Chicago with a demand that he immediately resign as CEO. They threatened to launch a public campaign against him if he refused.

14. Fenton and Cohler handed Kalanick a letter, purportedly on behalf of Benchmark and others, which stated that they were "deeply grateful for your vision and tireless efforts over the last eight years," but which demanded that Kalanick "immediately and permanently resign as CEO." At this time, Benchmark was fully aware of all of the unfounded allegations set forth in its Complaint—relating to the Waymo lawsuit, the India investigation, and the "Greyball" investigation—yet it made no mention of having been "fraudulently induced" to enter into the 2016 Voting Agreement. Not only did Benchmark not dispute Kalanick's right under that Agreement to appoint three additional directors, it expressly acknowledged that Kalanick had "three Board seats you control," suggested that he should agree to limit his discretion in filling those board seats, and explicitly agreed that he should

"retain[] one [seat] for yourself." These admissions directly contradict Benchmark's allegations in this suit.

15. The Benchmark principals also handed Kalanick a draft resignation letter, and told him he had hours to sign it, or else Benchmark would start a public campaign against him. Notwithstanding the personal strain he was under, Kalanick demanded removal of a provision Benchmark inserted later in the day that suggested the document was a contractual undertaking—including language reciting that Kalanick had received consideration in exchange for the letter, which he had not—and Benchmark agreed. Ultimately, given his emotional state, Kalanick relented and signed the revised letter. The letter stated that Kalanick would fill two of the board seats under his control under the Voting Agreement, but that these appointments would be "subject to receiving approval of all then current directors other than one." The letter also stated that Kalanick would agree to "mak[e] conforming amendments to the Voting Agreement as soon as possible." Kalanick received no consideration for any of the statements in the letter, and it was not signed by any other party to the Voting Agreement.

### E. After Pushing Kalanick Out As CEO, Benchmark Attempts To Strip Kalanick Of His Rights.

16. After his resignation as CEO, Kalanick re-appointed himself to the board, as permitted by the Voting Agreement. On June 27, 2017, at Benchmark's insistence, counsel to the board sent Kalanick a draft amendment to the Voting

Agreement. One of the proposed amendments was to *confirm* Kalanick's re-appointment to the board—again, directly contrary to Benchmark's allegation here that Kalanick has no right to be on the board. Another proposed change was to *confirm* Kalanick's right to appoint two additional directors, but to condition his appointments on approval by all but one of the voting directors (whereas under the Voting Agreement as it exists now, Kalanick's right to appoint is unqualified). Kalanick, now cognizant of Benchmark's plan to steal away his valuable voting rights, rejected Benchmark's proposed amendment.

17. This lawsuit—and the threatened public smear campaign—soon followed. Uber's independent directors immediately reacted to it. The board met on August 11 and the six members not involved in the litigation unanimously issued a statement that the board was "disappointed" in Benchmark's lawsuit and confirming that it was destructive to the company. Thus, contrary to Benchmark's suggestion that its lawsuit is "in the best interests of Uber," every other member of the board disagrees.

## ARGUMENT

### I. THE COURT SHOULD RESOLVE THE ARBITRATION MOTION BEFORE ENTERING A SCHEDULE IN THIS ACTION.

18. Kalanick's Motion to Dismiss (the "Arbitration Motion") demonstrates that the Voting Agreement between him and Benchmark, among others, contains a broad arbitration provision that not only applies to Benchmark's claims but also

empowers the arbitrator to decide substantive arbitrability. Substantive arbitrability "is jurisdictional," and it must be "answered at the outset." *Redeemer Committee of Highland Crusader Fund v. Highland Capital*, 2017 WL 713633, at *3 (Del. Ch.). Therefore, this Court should resolve the Arbitration Motion before entertaining a scheduling order, permitting any discovery, or providing any other relief.[1]

19. Resolving the Arbitration Motion at the outset will not prejudice Benchmark, the company, or its stockholders. As discussed below, Benchmark has failed to identify any irreparable harm posed by the current status quo. If Benchmark truly believed there is an exigency here, it could have sought expedited relief in arbitration.

20. An arbitrator appointed pursuant to the AAA Rules is empowered to "take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property…" AAA Commercial Rule R-37(a). The Voting Agreement's arbitration provision allows "a provisional remedy or equitable relief" in Court *only* for claims regarding "intellectual property rights." Voting Agreement ¶5.18. The Court should decline to enter equitable relief where Benchmark committed to seek that relief in arbitration. *See BFI Waste Sys. of N. Am. v. Waste Mgmt. Holdings*, 1998 WL

[1] *See, e.g.*, *Alpha Builders v. Sullivan*, 2004 WL 5383570, at *2 (Del. Ch.) ("The Court must assure itself as a threshold matter that it has subject matter jurisdiction before it addresses whether preliminary injunctive relief should be granted.").

671277, at *2–3 (Del. Ch.) (C. Chandler) (no threatened irreparable injury because "Plaintiffs may seek the type of relief requested here from the arbitration panel").

21. Benchmark is not seeking to preserve the status quo pending arbitration. To the contrary, Benchmark ignores the arbitration provision and seeks drastic relief that would silence and sideline Kalanick—essentially the final relief it hopes to achieve. The arbitrator, not this Court, should consider that question, along with the merits of Benchmark's claims.

## II. BENCHMARK HAS NOT SATISFIED ITS BURDEN FOR SHOWING GOOD CAUSE FOR A STATUS QUO ORDER.

22. Even if the Court concluded that it could exercise jurisdiction, Benchmark has failed to meet its burden to demonstrate: (1) that the status quo order is necessary to avoid imminent irreparable harm; (2) a reasonable likelihood of success on the merits; and (3) that the harm to Benchmark outweighs the harm to Kalanick. *See, e.g.*, *Raptor Sys., Inc. v. Shepard*, 1994 WL 512526, at *2 (Del. Ch.) (status quo order in a Section 225 action is "essentially a temporary restraining order"). Benchmark acknowledges that imminent irreparable harm and balancing of harms "predominate" in this analysis. (Mot. ¶19.)[2]

[2] In contrast to the harm to Kalanick from Benchmark's attempt to limit his rights and power as a director, Benchmark has identified no harm to itself if the injunction is not entered. Thus, the balance of harms weighs heavily in favor of Kalanick.

### A. Benchmark Has Not Demonstrated A Threat Of Imminent Irreparable Harm.

23. Benchmark fails to demonstrate an imminent, unspeculative, and genuine threat of irreparable injury. "[P]otential harm that may occur in the future … does not constitute imminent and irreparable injury." *CNL-AB LLC v. E. Prop. Fund I SPE*, 2011 WL 353529, at *11 (Del. Ch.). The court will only grant interlocutory injunctive relief "upon a persuasive showing that it is urgently necessary." *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579, 586 (Del. Ch. 1998).

24. Benchmark has not shown any threatened injury, much less imminent, unspeculative, and irreparable injury that would make the injunction it seeks "urgently necessary." In its lone attempt to allege irreparable injury, Benchmark asserts that allowing Kalanick to remain on the board—a position he has held since the company was founded in 2009 and throughout its meteoric growth—"threatens the sound management of Uber" while it searches for a new CEO. (Compl. ¶62.) Kalanick, however, is now one of eight directors, and there is no allegation that he controls a majority of the board. Moreover, in matters concerning this dispute, the other directors have asked both Kalanick and Benchmark's representative to excuse themselves, which both have done. It is, therefore, hard to imagine—without engaging in rank, impermissible speculation—how Kalanick might disrupt "the sound management of Uber."

25. Tacitly acknowledging that it has failed to demonstrate imminent, irreparable injury, Benchmark erroneously suggests the Court can dispense with this requirement because it has characterized its fraud claim as a Section 225 claim. (Mot. ¶19.) This is, however, a Section 225 action in name only. Benchmark challenges the authority of only one director out of eight. As a result, there is no uncertainty about the board's ability to manage the company,[3] which is a consideration that often weighs in favor of a status quo order in a true Section 225 action. Here, there is no uncertainty or imminent, irreparable harm that would warrant a status quo order.

### B. Benchmark's Fraud Allegations Do Not Support The Drastic Injunctive Relief It Seeks.

26. Benchmark's fraud claim is premised on the assertion that, in or about June 2016, Kalanick somehow determined that he would be forced into resigning as CEO approximately a year later—and that he therefore fraudulently induced all of the stockholders to enter into the amended Voting Agreement to preserve his role in the company. Not only does Benchmark's fraud claim defy common sense, it is

[3] Attempting to manufacture uncertainty, Benchmark speculates that Kalanick may cast a deciding vote as a director. Benchmark does nothing to suggest that is likely to occur, much less imminent. Nor could it. The board's practice has been to excuse both Kalanick and Benchmark's representative from considering matters concerning this dispute.

belied by the fact that Kalanick did not fill any of the new seats for a year, and only ever filled one of them (with himself) after resigning as CEO.

27. Benchmark does not allege a single false statement by Kalanick. Instead, its theory is that Kalanick failed to disclose material information to Benchmark. But rather than pleading particularized *facts* to support its claims, as required by Rule 9(b), Benchmark offers only unsupported "information and belief" allegations, and citations to unverified media reports and allegations in other lawsuits. In reality, as explained above, after learning of the matters alleged in the Complaint, Benchmark repeatedly acknowledged, including as recently as June 27, 2017, that Kalanick has the right to appoint three directors, including himself. Benchmark cannot now avoid that result through threadbare allegations of fraud.

### C. Benchmark's Proposed "Status Quo" Order Dramatically Alters The Status Quo And Is Otherwise Overbroad And Unworkable.

28. In all events, Benchmark's proposed order must be rejected. First, Paragraph 2(c) effectively limits Kalanick's ability to vote on matters before the board for approval. That would violently *change* the status quo, as Kalanick currently is a director of the company and has been from its inception. *See Capital Link v. Capital Point*, 2015 WL 7731766, at *3 (Del. Ch.) ("injunction removing and replacing incumbent directors would be 'both drastic and impractical,' and may result in 'disruptive changes in corporate administration.'").

29. Second, Paragraph 2(d) of Benchmark's proposed order, which seeks to prevent Kalanick "from taking action that would have the effect of disrupting the continuing management of the business and affairs of Uber," is impermissibly vague and overbroad. It fails to identify the actions that are prohibited, and invites disagreements and gamesmanship regarding what is disruptive. It should be rejected. Ct. Ch. R. 65(d) ("every restraining order shall be specific in its terms").

## CONCLUSION

30. For the foregoing reasons, Kalanick respectfully requests that the Motion be denied.

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## CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2017, a copy of the foregoing document was served electronically upon the following counsel of record *via File & ServeXpress*:

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