IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE CAMPING WORLD HOLDINGS, INC. STOCKHOLDER DERIVATIVE LITIGATION	No. 52, 2022 On appeal from the Court of Chancery, C.A. No. 2019-0179-LWW

APPELLANTS BETSY M. HUNNEWELL, IRA SONET, AND LINCOLNSHIRE POLICE PENSION FUND'S OPENING BRIEF

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TABLE OF CONTENTS

EXHIBITS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES & OTHER AUTHORITIES

NATURE OF PROCEEDINGS

Plaintiffs-Appellants Betsy M. Hunnewell, Ira Sonet, and Lincolnshire Police Pension Fund ("Plaintiffs"), stockholders of Camping World Holdings, Inc. ("CWH or the "Company"), brought this action derivatively to seek redress for harm caused by Defendants[1] to CWH in connection with their breaches of fiduciary duty and unjust enrichment in connection with CWH's acquisition of Gander Mountain Company ("Gander"). Before filing their derivative actions, Plaintiffs utilized 8 *Del. C.* §220 to inspect the Company's internal books and records.

The trial court issued its Memorandum Opinion on January 31, 2022 (Ex. A, the "Opinion"). Despite utilizing Section 220, the trial court found that Plaintiffs' Verified Amended Stockholder Derivative Complaint (the "Complaint") did not alleged sufficient particularized facts that a demand upon the Board of Directors of CWH (the "Board") was excused. In particular, the trial court held that there was

[1] "Defendants" refer to the Individual Defendants, Crestview Partners II GP, L.P. and Crestview Advisors, L.L.C. (collectively "Crestview"), and ML Acquisition Company, LLC ("ML"). The "Individual Defendants" refer to Marcus Lemonis ("Lemonis"), Brent Moody ("Moody"), Stephen Adams ("Adams"), Andris Baltins ("Baltins"), Brian Cassidy ("Cassidy"), Jeffrey Marcus ("Marcus"), K. Dillon Schickli ("Schickli"), Mary George ("George"), Howard Kosick ("Kosick"), Thomas Wolfe ("Wolfe"), Roger Nuttall ("Nuttall"), and Daniel Kilpatrick ("Kilpatrick"). "Selling Defendants" refer to Lemonis, Moody, Nuttall, Wolfe, and Crestview. Nominal defendant CWH is not included in "Defendants."

not a reason to doubt whether a majority of the Board of CWH faced a substantial likelihood of liability for breaching their fiduciary duties by trading CWH stock on the basis of material nonpublic information ("MNPI"), commonly referred to as a "*Brophy*" claim in reference to *Brophy v. Cities Service Company*, 70 A.2d 5, 8 (Del. Ch. 1949), or the basis of making or approving false and misleading statements to the public. The trial court also held that the Plaintiffs did not raise a reason to doubt the Board's independence from Marcus Lemonis, the Company's Chief Executive Officer ("CEO"), Chairman, and controlling stockholder.

On February 2, 2022, the Court entered its order granting Defendants' Motion to Dismiss with prejudice. (Ex. B).

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in holding that the Complaint fails to adequately allege facts from which it may reasonably be inferred that a majority of the Board faces a substantial likelihood of liability for breaching their fiduciary duties by engaging in various trades while in the possession of MNPI regarding the nature of the Company's acquisition and integration of Gander. In concluding that Plaintiffs failed to sufficiently allege demand futility, the Court of Chancery erred by repeatedly refusing to grant reasonable inferences in Plaintiffs' favor, and granting inferences in Defendants' favor. The Court of Chancery's interpretation of Plaintiffs' allegations, including references to Board minutes and materials obtained from a Section 220 investigation, failed to appropriately credit these allegations and materials. The standard applied by the Court of Chancery in its review of these allegations will discourage stockholders from utilizing Section 220 demands, and will encourage corporations to even further sanitize their books and records to attempt to prevent plaintiffs from obtaining sufficient facts to effectively combat fiduciary wrongdoing.

2. The Court of Chancery erred in holding that the Complaint fails to adequately allege facts from which it may reasonably be inferred that a majority of the Board faces a substantial likelihood of liability for making or approving false

statements in connection with the Company's acquisition and integration of Gander.

3. The Court of Chancery erred in holding that the Complaint fails to adequately allege that at least four members of the Board are not independent of Lemonis.

STATEMENT OF FACTS

CWH's business traditionally centered on selling and servicing recreational vehicles. (A043-44).[2] Marcus Lemonis ("Lemonis") is CWH's CEO, Chairman, and controlling stockholder. (Opinion at 4-5).

In April 2017, Lemonis decided to massively expand CWH's focus by acquiring the assets of bankrupt outdoor retail store, Gander. (A069). Despite the importance of the acquisition, the Board did not review or approve the acquisition before the Company won the auction for Gander. *Id*. Lemonis then instituted his plan to close all Gander stores, liquidate the inventory, and reopen select stores. Again, the Board did not review or sign off on Lemonis' plan.

CWH's acquisition and integration of Gander went poorly. Lemonis noted that CWH needed to "completely rebuild[] the business." (A072-73, A098, A116-19). He described his visit to a Gander site as "kind of a giant shit show."[3]

While the Board did not receive a plan for Gander's integration (including expected store openings) until December 2017, from May 1, 2017 through to February 27, 2018, Lemonis routinely informed the Board about the significant

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[2] Citations to the Appendix to the Opening Brief of Appellants Betsy Hunnewell, Ira Sonet, and Lincolnshire Police Pension Fund are designated herein as "A__."

[3] A116-17.

problems facing the Gander integration. These specific issues on which Lemonis updated the Board included Gander inventory levels, corporate overhead, the integration of Gander staff, and increasing selling, general, and administrative ("SG&A") expenses related to the integration. (A077-80, A083-85, A088-89, A092-94, A100-03, A112-14). There was however, no reflection in the Board minutes or materials of any discussion of the dates or locations for opening Gander stores for months after the acquisition. (*Id.*). In fact, despite the above knowledge, it was not until December 5, 2017, eight months after the acquisition, that the Board first saw a plan for the Gander stores. (A078-79, A101). It was only at that meeting that the Board finally received a listing of specific Gander store locations with dates for openings and planned openings. (*Id*.).

Though the Board did not see a plan for opening Gander Stores until December 5, 2017, Board updates from August 2017 through to January 2018 showed double-digit increases to the Company's year-over-year SG&A expenses ranging from 15.2%-23.3%, vastly higher than the Company's single digit increases prior to the acquisition (ranging from 5.9%-9.6%). (A077-78, A088-90, A092-93, A096-97, A100-05).

Additionally, prior to seeing the specific plan for store openings, and after learning of the increasing SG&A, and after numerous presentations by Lemonis on

the Gander acquisition, the Board decided during a September 28, 2017 meeting to visit a Gander site in person. (A093-94; MTD Transcript at 47-49).

But the Defendants did not tell the market about these significant problems. Despite knowledge of the foregoing problems with the Gander integration, the Defendants repeatedly assured the market that early trends in Gander stores had been promising and boasted about new stores that the Company planned to open throughout 2017 and 2018. (A090-91, A105-09, A111-12). While internal projections they received showed far fewer planned store openings, Defendants told analysts and investors that the Company would open 15-20 stores by the end of 2017, sixty-nine new Gander stores by May 2018, and nearly seventy-two stores by mid-June. (A078-79, A090-91, A103, A108-09). And even as they received reports showing SG&A expenses skyrocketing, Defendants told the market that "[w]e do not anticipate that Gander Outdoors stores will have much impact on the company's adjusted EBITDA in 2018." (A107).

While in possession of this material, non-public information about the true nature of the Gander integration, CWH's fiduciaries sold over $450 million worth of CWH publically traded stock, individually, and through entities they exerted control over, including Board members Lemonis, Adams, Marcus, Cassidy, and Moody (the "Selling Defendants"). (A086, A091-92, A094-95, A100, A112).

The truth about the significant problems CWH was facing integrating Gander and the disastrous impact on the Company's financials began to emerge in May 2018 when the Company issued a press release showing decreasing EBITDA and increased SG&A expenses. (A115-19). On an earnings conference call on June 6, 2018, Lemonis admitted he had failed to properly communicate with stockholders, telling the public he was "used to holding all my cards so I can sucker punch my competitor." (A119).

Not long after, in August 2018, CWH announced that it was lowering its fiscal year 2018 adjusted EBITDA guidance from a range of $431 million to $441 million to a range of $370 million to $380 million. (A121). This was in large part due to pre-opening expenses related to Gander store openings. *Id.* CWH's stock price plummeted as it released each piece of negative news. (A110, A119, A122). In total, CWH lost over 55% of its value. (A122).

ARGUMENT

I. The Court of Chancery Erred in Concluding that Plaintiffs Did Not Adequately Allege that a Majority of the Board Faces a Substantial Likelihood of Liability for Improper Stock Sales

A. Question Presented

1. Did the Court of Chancery err in failing to view Plaintiffs' allegations as true and provide reasonable inferences in Plaintiffs' favor in concluding that the Complaint does not adequately allege that demand is futile because a majority of the Board faces substantial likelihood of liability for breaching their fiduciary duties through stock sales that violated *Brophy*, 70 A.2d at 8? (A345-66; *see also* Transcript of Motion to Dismiss Hearing (Ex. C) ("MTD Transcript") at 37-69).

B. Scope of Review

The Court's review of the decision on a motion to dismiss under Chancery Court Rule 23.1 for failure to plead demand futility is "*de novo* and plenary."[4] The Court must accept all well-pleaded allegations as true and draw all reasonable inferences in Plaintiffs' favor.[5]

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[4] *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1047 (Del. 2021) ("*Zuckerberg*") (emphasis in original). Here, as throughout, all emphasis is added and citations and footnotes are omitted unless otherwise noted.

[5] *Sandys v. Pincus*, 152 A.3d 124, 126-28 (Del. 2016).

C. Merits of the Argument

Plaintiffs adequately plead demand futility when their particularized allegations create a reasonable doubt as to whether a majority of the Board received a material personal benefit from their improper stock sales, or faces a substantial likelihood of liability on any of Plaintiffs' claims, or lacks independence from someone who does (Lemonis).[6] The Court of Chancery erroneously held that demand futility is assessed on a "claim-by-claim basis[,]" suggesting that Plaintiffs must establish demand futility for a majority of the Board for ***each*** of the claims.[7] This approach, however, is inconsistent with this Court's refined demand futility test set forth in *Zuckerberg*, which states that the question is, "whether the director faces a substantial likelihood of liability on ***any*** of the claims that would be the subject of the litigation demand[.]"[8] Thus, Plaintiffs need only show that a majority of the Board in total would face a substantial likelihood of liability for either wrongdoing.

In determining whether Plaintiffs have pleaded a sufficient reasonable doubt, the Court must accept as true all of the Complaint's allegations. *Brehm v. Eisner*, 746 A.2d 244, 268 (Del. 2000). The Court must also draw all reasonable inferences

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[6] *Zuckerberg*, 262 A.3d at 1059.

[7] Opinion at 16-18.

[8] 262 A.3d at 1059.

in Plaintiffs' favor and cannot credit Defendants with any such inferences. *Id.* at 255. Plaintiffs are also "not required to plead evidence" (*id.* at 254), nor demonstrate a reasonable probability of success on the claim. *Hughes v. Hu*, No. CV 2019-0112-JTL, 2020 WL 1987029, at *12 (Del. Ch. Apr. 27, 2020).

Here, the Court of Chancery addressed only the more exacting "threshold issue … [of] whether the plaintiffs' failure to make a demand on Camping World's board should be excused," and not whether Plaintiffs have stated a claim against any of the Defendants. (Opinion at 2, 16, 51-52). Thus, Plaintiffs restrict their argument to the same.

At the time this action commenced, CWH's Board consisted of nine individuals: Lemonis, Adams, Baltins, Cassidy, George, Kosick, Marcus, Schickli, and Moody. (A130-31). Defendants "concede[d]" that Adams is not independent from Lemonis. (Opinion at 20). Concerning Moody, an officer, the Court of Chancery concluded that an analysis of his potential liability was "likewise unnecessary." (Opinion at 21). Thus, Plaintiffs need only demonstrate how two other members of the Demand Board face a substantial likelihood of liability or lack independence from Lemonis to implicate a majority of the Board. Plaintiffs have done so here.

Directors face a substantial likelihood of liability on a *Brophy* claim when a plaintiff alleges facts leading to a rational inference that "1) [the fiduciaries] possessed material, nonpublic company information; and 2) [the fiduciaries] used that information improperly by making trades because [they were] motivated, in whole or in part, by the substance of that information." *In re Fitbit, Inc. S'holder Derivative Litig.*, No. CV 2017-0402-JRS, 2018 WL 6587159, at *12 (Del. Ch. Dec. 14, 2018) (first and second inserts added).

The Court of Chancery erred in concluding that Plaintiffs did not sufficiently allege that the Selling Defendants, constituting a majority of the Demand Board, faces a substantial likelihood of liability from their *Brophy* claims. (Opinion at 23-24).

1. The Selling Defendants Possessed MNPI

The Court of Chancery erred in concluding that Plaintiffs' allegations regarding the status of the Gander integration, and the number and timing of the opening of the Gander stores, did not establish material information. (Opinion at 28-29, 31). Information is material if it "would have been of consequence to a rational investor, in light of the total mix of public information." *In re Oracle Corp. Derivative Litig.*, 867 A.2d 904, 940 (Del. Ch. 2004), *aff'd*, 872 A.2d 960 (Del. 2005).

Defendants possessed MNPI including: (i) that the Company's integration of Gander was going poorly and was "a giant shit show" that resulted in a need to completely rebuild; that (ii) despite providing public projections of the number of stores to be opened, the Board first saw nothing constituting a plan, and then when it did, the plan did not match the public projections; and that (iii) the increasing SG&A expenses were ***not*** coupled with increasing Gander store openings. *See* Section I.C.1 & 2.

It was "of consequence" to know the problems at Gander were so significant they constituted "a giant shit show" the likes of which Lemonis had never seen, and which prompted a Board visit to a Gander facility. Lemonis himself has acknowledged that "[b]ad inventory management and the wrong inventory are the two things that kill companies."[9]

It was "of consequence" to know that Lemonis' and the Company's projections of specific store openings were not tied to objective plans, and that the Board (depending on the timeframe) either saw no explicit plan, or saw a plan that was behind the overly optimistic public projections. The specific numbers implied that

[9] A118.

the Company had a methodical process with store dates and locations already chosen, neither of which it had.

It was "of consequence" to know that the increasing SG&A expenses were not simply due to increased Gander stores opening (because those stores were ***not*** opening). The increase in expenses without corresponding increase in revenue would significantly impact the Company's adjusted EBITDA and margin, which are CWH's most important metrics. (A107-08).

The Court of Chancery's conclusion that the rising SG&A was disclosed and therefore could not be part of or relate to MNPI misses the fact that it was the SG&A increasing ***in combination*** with the lack of specifically planned or achieved store openings that results in a material omission. (Opinion at 28-29). Similarly, the Court of Chancery's characterization that "the market knew that the earlier plan for Gander store openings was delayed" again misses the point that while the public received revised estimates, they ***still*** did not know that the Board was not reviewing a concrete plan that would enable it to confidently assure stockholders ***any*** amount of stores would open, or ***when*** they would open. (Opinion at 29).

The Court of Chancery instead concluded "the fact that the Company was still developing a plan for the number of Gander stores it might ultimately open was already known to the market before Crestview traded in the May 2017 secondary

offering." (Opinion at 28). But the disclosure that store openings were subject to negotiation of lease terms and approval of the bankruptcy court is ***not*** equivalent to a disclosure that the Company did not have an articulable plan to open the "seventy or more stores." In fact, there is no evidence that the Board was even shown a "developing plan" during the initial false statements, and holding as such improperly provides inferences in the Defendants' favor.

Similarly, the Court of Chancery also erred in concluding that "whether 60 or 70 Gander stores would open in 2018 does not reflect a 'substantial likelihood' of an 'extreme departure' from the Company's public statements about anticipated store openings."[10] As an initial matter, a 14% decrease in the number of expected store openings is significant, especially at the beginning of the Gander integration.

Moreover, the Board materials show that the Company only expected to open 61 stores throughout all of 2018 and that CWH was behind schedule on this plan, while Defendants were also assuring the market they would open 69 Gander stores by May 2018 and 72 stores by June 2018. (A102-03, A108-09, A111-12). Thus, Defendants were telling the public that CWH would open 20% more stores than

[10] Opinion at 31.

internally planned in six months less time. The information in Defendants possession was indeed an "extreme departure" from their public statements.

Moreover, Defendants' own actions demonstrate the materiality of the number of store openings. They consistently issued updated exact numbers and timelines to the public which further supports the materiality of the information—if the numbers were immaterial, the Company could have simply said it would open Gander stores in the future.

Defendants also recognized that even small changes in these numbers mattered. For example, in the Annual Report on Form 10-K issued on March 13, 2018 (the "2017 Form 10-K"), just a few weeks after the above statements regarding opening 72 stores by June, the Company now claimed it would open 74 stores by June. (A111-12). That Defendants would provide an updated timeline that increased the stores opening by just two and decreased the time by a month demonstrates that they knew the market was closely watching this information, and that these numbers were indeed material.

2. Plaintiffs' Complaint Pleads Particularized Facts Demonstrating the Selling Defendants Knew and Traded on this Material Information

a. The Selling Defendants Learned About the MNPI from Lemonis

At the motion to dismiss stage, Plaintiffs need only plead facts from which the Court can reasonably infer that the directors knew MNPI. (A399-445). Here, Plaintiffs adequately alleged that Defendants possessed MNPI at the time of their trades.

The Court of Chancery erred in viewing Plaintiffs' allegations in the light most favorable to Defendants in this regard, beginning with the conclusions that there was no "reason to impute Lemonis's knowledge [regarding the Gander integration] to Marcus or Cassidy."[11] A review of Plaintiffs' allegations demonstrates that numerous particularized facts contribute to a reasonable inference that Lemonis shared the MNPI discussed above with the entire Board, including that Lemonis regularly presented to the Board on the Gander integration during Board meetings.

Between May 2017 and March 2018, defendants Adams, Cassidy, Marcus, and Moody[12] attended Board meetings with several "detailed" discussions about the

[11] Opinion at 25.

[12] Although the Court excluded Adams and Moody from its analysis, Plaintiffs include them here for completeness.

Gander integration, and routinely received presentations ***from Lemonis*** on the Gander integration, including discussing ***inventory levels "in detail***," corporate overhead, the integration of Gander staff, increasing SG&A expenses, and eventually months later, specific openings. (A077-80, A083-90, A92-94, A096-97, A100-05, A112-13).

It is a reasonable inference that Lemonis shared his MNPI with the Board during these numerous Board presentations ***about Gander***, month-after-month, especially given that he called it "a giant shit show" that he "probably [had] never experienced anything like[,]" and that he observed inventory problems on his site visit, *i.e.* the type of issues he believed could "kill companies." (A116-18). The inference is strengthened by the fact that the Board decided during a September 28, 2017 Board meeting, after Lemonis presented on the Gander integration, that it would conduct its own Gander site visit. (A093, A103-04; MTD Transcript at 47-49).

The inference that Lemonis shared his MNPI with the Board is further supported here because the integration was of such special importance to the Company. A043-44, A063-73; *see also Pfeiffer v. Toll*, 989 A.2d 683, 693 (Del. Ch. 2010) (imputing board knowledge regarding the corporation's "core operations"), *abrogated on other grounds by Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d

831 (Del. 2011); *Fitbit*, 2018 WL 6587159, at *15 n.179 (finding it reasonable to infer "both Fitbit management ... and the Board knew of the alleged material, nonpublic information" where "the problems with [the product] were profound and [the product] drove the Company's bottom line"); *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 777 (Del. Ch. 2009), (refusing to draw the negative inference that a majority of the defendants were kept entirely in the dark about pervasive misconduct), *aff'd sub nom. Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011).

b. The Timing and Size of the Sales Plus the Board Materials (or lack Thereof) Further Demonstrates the Wrongful Nature of the Trades

(1) Crestview's May 2017 Sales

The Court of Chancery erred in concluding that Cassidy and Marcus did not have MNPI when Crestview sold $152 million worth of CWH stock in connection with the May 2017 Secondary Offering. (Opinion at 26; A086).

In addition to the MNPI provided to them by Lemonis, Cassidy and Marcus knew the number of stores to be opened was not based on a specified plan with locations or dates. Even though the Board met three times prior to the May 2017 Offering, and discussed Gander each time, there was no mention of any specifics for the opening of ***any*** Gander stores, let alone 70. (A080, A083 -85). This is particularly significant given that on May 16, 2017, the Board received a monthly

update report including projected opening dates for retail stores and dealership stores with no mention of any Gander store openings. (A084-85). Moreover, ***eventually***, the Board ***was*** presented with this type of information—but not until a Board meeting on December 5, 2017. (A078-79, A100-01).

(2) Crestview's and ML's October and November 2017 Sales

The Court of Chancery erred in concluding that Cassidy and Marcus did not have MNPI when Crestview and Lemonis and Adams, through ML, collectively sold $310.3 million worth of CWH stock in a secondary stock offering on October 30 and November 1, 2017. (A125-28).

First, the Board continued to receive updates on CWH store openings that made ***no mention*** of Gander store locations or dates. (A084-94). Moreover, none of the stores in these projections matched the list of potential Gander stores provided in the Company's June 2017 press release. (A087, A092-94). The Board materials also demonstrate no discussions of the dates or locations of the opening of Gander stores prior to the October 2017 Secondary Offering. (A080, A083-88, A090-94).

Second, despite seeing no evidence of Gander stores opening, or there being a specific plan for locations or dates of stores to open, the Board saw huge increases in the Company's year-over-year SG&A expenses after the acquisition, increasing every month. (A088-90, A092-94). What the Board saw was concerning enough

that they decided at a September 2017 Board meeting to visit a Gander facility in person. (A093-94, A116-17).

Finally, the Court of Chancery took the Board's decision during a September 28, 2017 meeting to visit a Gander site, a decision just prior to the October 2017 Secondary Offering, and viewed it in the light most favorable to defendants. (Opinion at 28-30). The Court of Chancery concluded that the Board's visit did not have any ties to Lemonis' visit to the Gander facility. (*Id.* at 30). However, the reasonable inference of the Board deciding to visit a site after a long discussion about Gander is that the information provided to the Board was negative. Further, Lemonis' description of his own visit is the most direct evidence of what the Board saw in visiting the Gander site and why they decided to visit. Even if Lemonis was discussing a different later visit to a Gander facility with his colorful statement, it is unreasonable to infer that a Gander facility would have been in better shape earlier in the integration process, or that the Board decided to visit simply out of curiosity. This is just one of the numerous allegations that support a reasonable inference that contrary to the Court of Chancery's conclusion, the "directors learned about major problems with the integration" before May 8, 2018.[13]

[13] Opinion at 43.

In short, prior to May 8, 2018, Plaintiffs have alleged that the Board knew: SG&A expenses were rising but without an appropriate increase in stores; that there was no articulated plan provided to or discussed by them about when or where Gander stores would open for months—and when it was, it did not match the Company's public statements; and they made the decision during a September 28, 2017 Board meeting to personally visit a Gander facility, all the while selling hundreds of millions of shares of their personally held CWH stock. (A080, A083-94, A116-17, A125-28). This is enough, at this early stage of the litigation.

In addition to the MNPI possessed by the Selling Defendants, the size and timing of the Selling Defendants' trades support the inference of scienter. *See Pfeiffer*, 989 A.2d at 694 (stating that trades made by outside directors that were "unusual in timing and amount [] support[ed] a pleading-stage inference that the sellers took advantage of [the] confidential corporate information"); A432-33 (finding sales of 41% and 13% of holdings sufficient to raise an inference of scienter); *Fitbit*, 2018 WL 6587159, at *15 (suspicious stock sales demonstrated scienter for purposes of demand futility); *see also Silverberg v. Gold*, No. CIV.A. 7646-VCP, 2013 WL 6859282, at *15 (Del. Ch. Dec. 31, 2013) (same). Yet, the Court of Chancery made no mention of the substantial sales in its scienter analysis. (Opinion at 33-35).

The facts alleged here are even stronger than those found sufficient in *Zimmerman v. Braddock*, No. CIV.A. 18473-NC, 2005 WL 2266566, at *8 (Del. Ch. Sept. 8, 2005), *rev'd on other grounds*, 906 A.2d 776 (Del. 2006). In *Zimmerman*, the plaintiff alleged that the selling defendants knew a particular line of business faced specific problems not known to the public and that the board was provided with reports concerning that business line. *Id.* The court held that these two facts combined with "the sheer size of the trades (collectively, approximately $248 million)," meant that the selling defendants "for motion to dismiss purposes, can be viewed as facing substantial personal liability." *Id.*

Here, the Selling Defendants knew of the serious problems integrating and opening Gander stores well before the market did and the "sheer size of the trades" is substantial. In just the subset of sales described above, Defendants' sales proceeds totaled more than $327 million. The size of trades combined with the allegations of insider knowledge threatens the Selling Defendants with disabling "substantial personal liability," as in *Zimmerman*. *Id.*

Rather than provide Plaintiffs with the proper inference, the Court of Chancery held the complaint contained "conclusory allegations [that] are more akin to those in *TrueCar*, where the plaintiffs alleged that the board had non-public information that a website redesign would negatively affect the company's business."

(Opinion at 33). But, this matter bears little resemblance to *TrueCar*. The vague statements in *TrueCar* that were susceptible to multiple interpretations were "two references in the Board materials about risk of 'USAA underperformance' and the desire to 're-energize' the Company's relationship with USAA." *In re TrueCar, Inc. S'holder Derivative Litig.*, No. CV 2019-0672-AGB, 2020 WL 5816761, at *15 (Del. Ch. Sept. 30, 2020).

In contrast, here the Board saw unequivocally that SG&A expenses were increasing, and that (depending on the time) there was either no plan at all for where or when Gander stores would open, or the Company was falling behind the pace it publicly touted. Further, in *TrueCar*, the Court of Chancery explained that "the forecast in the Board package provided no indication that TrueCar expected its sales from USAA to be adversely impacted in 2017, and, ***to the contrary, projected that those sales would increase***." *Id.* Here, the Board was not given any explanation for why there was no plan for when or where Gander stores would open, and once they started opening, it was clear the Company was behind and there were still problems.

Moreover, in concluding that the timing of these trades was not suspicious, the Court of Chancery erred by failing to credit reasonable inferences in Plaintiffs'

favor.[14] The Court of Chancery concluded that "[a]ny inference that Crestview's trading decisions were completed on the basis of Marcus or Cassidy's superior information is further undercut by the timing of the trades" because they were "made after a public announcement" or were made "shortly after the company engaged in a transaction or released financial information." (Opinion at 34-35). This ignores that Plaintiffs plead that the timing was suspicious because the sales were soon after receiving negative information ***and*** near the relevant period high. Each of the above sales occurred at or above $40 per share, near the relevant period high, and more than double the $19.04 price per share to which the shares fell when the truth was fully revealed. (A122, A125-28). In contrast, *Guttman v. Huang*, 823 A.2d 492, 503-04 (Del. Ch. 2003) is not instructive because there the Court of Chancery concluded the timing allegations did not support a conclusion of insider trading, because "the timing of the defendants' trades is quite disparate, having ***only*** the common pattern of coming after the filing of a certified financial statement."

3. The Selling Defendants Are Personally Interested

Even though Marcus, Cassidy, and Adams did not sell "personally"-owned stock and the benefit did not inure to them "personally," they are nevertheless liable

[14] Opinion at 34.

under *Brophy*.[15] (A286). Vice Chancellor Slights made clear this was consistent with the principles of *Brophy* and *Guth v. Loft*, 5 A.2d 503, 510-11 (Del. 1939) and that allowing "directors, through their controlled funds, to profit from inside information without recourse," "is not and cannot be our law." *Fitbit*, 2018 WL 6587159, at *14.

Here, Marcus and Cassidy, Crestview's appointees to the Board, were also partners and members of Crestview's investment committee, and had voting control over Crestview. (A132-33). Similarly, although ML made the sales, Adams was one of only two owners of ML, and took a financial benefit from these sales. *Id*. These particularized allegations are sufficient at the pleading stage to allow a reasonable inference that Marcus, Cassidy, and Adams personally profited from their entities' stock sales through their ownership and control of them. *See Fitbit*, 2018 WL 6587159, at *14.

That Cassidy and Marcus had control over Crestview's trades is supported by the decision in *TrueCar*, 2020 WL 5816761, at *9-10. There, the court held that sales by an entity affiliated with a TrueCar, Inc. ("TrueCar") director were attributable to a director who *shared* voting and dispositive power over the TrueCar

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[15] Defendants did not dispute that Lemonis personally profited from, and can be held liable for, ML's trades. (A286).

stock, as one of four members of an investment committee. *Id.* at *10; *see also Fitbit*, 2018 WL 6587159, at *14 (attributing stock sales to two directors who "share[d] voting and dispositive power over the Fitbit stock owned by their respective funds").

While the Court of Chancery did not decide this issue, it recognized that "[t]he question becomes a closer call—and more like the facts in *TrueCar*—if Marcus and Cassidy are viewed together as representing one-fifth of the vote over Crestview's investment decisions" as opposed to viewing them individually. (Opinion at 23-24). The 20% of the voting dispositive power possessed by Marcus and Cassidy is functionally indistinguishable from the 25% voting dispositive power exercised by the director in *TrueCar*.

Even if Marcus and Cassidy did not have control of Crestview, the allegations support that they were privy to MNPI, shared that information with Crestview, and then Crestview traded on it. It makes no sense that Delaware law would allow a fiduciary to escape liability if, for example, it did not have a vote on whether to sell a company's stock after providing MNPI to an entity. The Court noted that a *Brophy* claim is a state version of a federal insider trading claim. (Opinion at 22). Under federal law, a "tipper" is still liable for the trades of the receiver of the information. *See*, *e.g.*, *Dirks v. S.E.C.*, 463 U.S. 646 (1983).

Accordingly, demand is excused because a majority of the Board faces a substantial likelihood of liability for Plaintiffs' *Brophy* claims.

II. The Court of Chancery Erred in Concluding that Plaintiffs Did Not Adequately Allege that a Majority of the Board Knowingly Made and Approved False and Misleading Statements

A. Question Presented

Did the Court of Chancery err in failing to view Plaintiffs' allegations as true and provide reasonable inferences in Plaintiffs' favor in concluding that the Complaint did not adequately allege that demand is futile because a majority of the Board faces a substantial likelihood of liability for knowingly making or approving false and misleading statements? (A366-71; *see also* MTD Transcript at 34-36, 69-74).

B. Scope of Review

See Argument Section I.B. *supra*.

C. Merits of the Argument

Plaintiffs have also sufficiently alleged demand is futile because a majority of the Board faces a substantial likelihood of liability for making and approving false and misleading statements. Directors who knowingly issue false and misleading statements "may be considered to be interested for purposes of demand." *In re InfoUSA, Inc., S'holders Litig.*, 953 A.2d 963, 990-91 (Del. Ch. 2007); *see also Malone v. Brincat*, 722 A.2d 5, 9-10 (Del. 1998).

Lemonis made false statements in his role as an officer of the Company, for which he cannot be exculpated under Section 102(b)(7) and therefore faces a

substantial likelihood of liability for simple breaches of his duty of care. (A367). *City of Warren Gen. Emps.' Ret. Sys. v. Roche*, No. CV 2019-0740-PAF, 2020 WL 7023896, at *20 (Del. Ch. Nov. 30, 2020) (explaining that an officer/director "cannot be exculpated for breaches of duty of care with respect to challenged conduct taken in her role as an officer").

Plaintiffs have also sufficiently alleged that Adams, Baltins, Cassidy, George, Kilpatrick, Schickli, and Moody made, approved, or signed statements falsely stating the amount of stores CWH would open and misleading the market about the success of the Gander integration. (A367). The Court of Chancery erred in concluding that "plaintiffs have failed to demonstrate that Baltins, Cassidy, Marcus, Schickli, George, or Kosick face a substantial likelihood of liability" for false statements. (Opinion at 37). The Court of Chancery did not draw any conclusions as to the claims against Lemonis, Adams, or Moody. (*See* Opinion at 35-44).

The Court of Chancery concluded that "[P]laintiffs never indicate 'what specifically the Company was obligated to disclose' before [May 8, 2018]."[16] However, Plaintiffs explained that Defendants were required to disclose the true

[16] Opinion at 43.

nature of the Gander integration and an accurate projection of the number of Gander stores CWH planned to open, *i.e.*, the MNPI described above.[17]

Defendants' most blatant misrepresentation concerned the number of stores the Company would open in 2018. The Board documents show that contrary to (a) Lemonis' public representations in February 2018 that the Company would open 72 Gander stores by mid-June 2018, and the March 2018 representations that CWH would open 74 Gander stores by May 2018, (b) internally and non-publically, CWH planned to open only 60 Gander stores during 2018. (A108-09). As the Court of Chancery acknowledged, the Audit Committee, consisting of Baltins, Cassidy, Schickli, George, and Kosick, specifically approved these statements.[18]

The Court of Chancery brushed aside these false statements by stating that "there is no indication that the Audit Committee members believed that the difference between opening 60 and 72 Gander stores in 2018 would have a material effect on the Company's financial performance."[19] As an initial matter, the false and misleading 2017 Form 10-K issued on March 13, 2018, stated that the Company would open 74 Gander Stores by May 2018. (A111-12). The difference between

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[17] *E.g.*, A367.

[18] Opinion at 39-42.

[19] Opinion at 42-43.

60 and 74 is over 20%. Further, the fact that the Company was providing constant and specific (though incorrect) updates to the investing public about the status of the Gander store openings demonstrates that the Defendants themselves knew that this information was material.

In addition, the Court of Chancery again gave Defendants unwarranted inferences in considering their liability for the false statements. The Court of Chancery stated that "the figures in the 2018 plans are based on projections dated November 27, 2017" and "it would not be reasonable, given the multitude of disclosures about changes to the number of store openings, to infer that the numbers presented to the Board were set in sto[n]e rather than management's best estimate as of November 27, 2017." (Opinion at 42.) First, the CWH Board reviewed the plan to open only 61 stores for 2018 in January 2018, just a month before the false statements. Second, it would make little sense for management to provide the Board outdated numbers, and therefore the reasonable assumption is that the numbers were still accurate. Finally, there is no evidence in the 220 production of any revised plan to open drastically more stores than originally anticipated on a much quicker timeline. It was an error for the Court of Chancery to provide such an inference without the existence of any revised plan. As the court in *In re Tyson Foods, Inc.* noted, "it is more reasonable to infer that exculpatory documents would be provided

[in response to a Section 220 demand] than to believe the opposite: that such documents existed and yet were inexplicably withheld." 919 A.2d 563, 578 (Del. Ch. 2007).

Defendants also made a series of statements that omitted the problems facing CWH over the integration of Gander. Defendants' statements were false and misleading because, as they knew, the problems were so severe that Lemonis admitted they had to "completely rebuild[] the business," recognizing "challenges on several fronts, including our IT infrastructure, inventory management and distribution systems," that led to him calling the facility he visited "a giant shit show" that he had "probably [] never experienced anything like." (A047, A079-80, A088-90, A098, A116-17).

It was also an error for the Court of Chancery to conclude that "[f]or some of the challenged statements, such as press releases about the Gander acquisition, the Complaint lacks any allegation of involvement by the outside directors." (Opinion at 39-40). Plaintiffs alleged and the documents show active involvement by a majority of the Board. The Board materials demonstrate that defendants Baltins, Cassidy, George, Kosick, and Schickli, at a minimum, discussed, reviewed, and approved the misleading SEC filings, press release and conference call transcripts during Audit Committee meetings. (A062, A074, A080, A087-88, A096, A105,

A111, A114-15, A131-32). For example, the Audit Committee meeting minutes for the November 9, 2021 Form 10-Q, say "'The Committee reviewed the financial statements and approved the report' … as presented ***subject to the comments and changes provided***.'" MTD Transcript at 73:3-7. These defendants were therefore responsible for the false and misleading statements, and thus, they face a substantial likelihood of liability for breaching their duty of loyalty. *See Ryan v. Gifford*, 918 A.2d 341, 356 (Del. Ch. 2007) (finding the fact that the members of the audit committee were responsible for reviewing and approving false financial statements sufficient to show they faced a "substantial likelihood" of liability for breaching their fiduciary duties); *Hughes*, 2020 WL 1987029, at *13 (referring to the audit committee's approval of the company's financial statements as a "decision" made by the audit committee that could subject it to liability). Accordingly, Plaintiffs adequately alleged that a majority of the Board faces a substantial likelihood of liability for making or approving the false statements.

III. The Court of Chancery Erred in Concluding that Plaintiffs Did Not Adequately Allege that There Is Reason to Doubt the Independence of a Majority of the Board

A. Question Presented

Did the Court of Chancery err in failing to view Plaintiffs' allegations as true and provide reasonable inferences in Plaintiffs' favor in concluding that the Complaint did not adequately allege that demand is futile because there is a reason to doubt the independence of a majority of the Board from a controlling CEO? (A379-90; *see also* MTD Transcript at 55-57, 74-83).

B. Scope of Review

See Argument Section I.B. *supra*.

C. Merits of the Argument

Plaintiffs pled sufficient particularized facts creating reason to doubt the independence of a majority of the Board when the facts are considered holistically. These well-pled facts were ignored by the Court of Chancery. (Opinion at 48-51). Moody, Schickli, Baltins, Lemonis, and Adams combined compose a majority of the Board. Lemonis faces a substantial likelihood of liability for breaching his fiduciary duty to the Company through improper stock sales and making false statements, as discussed above. Defendants "concede[d]" that Adams is not independent from Lemonis. Plaintiffs have also sufficiently alleged that Schickli, Baltins, and Moody are not independent from Lemonis. Thus, the particularized facts alleged in the

Complaint—considered in their totality—create a reason to doubt the independence of a majority of the Board.

At the pleading stage the Court must "review the complaint on a case-by-case basis to determine whether it states with particularity facts indicating that a relationship—whether it preceded or followed board membership—is so close that the director's independence may ***reasonably*** be doubted. This doubt might arise either because of financial ties ... [or] a particularly close ... business affinity...."[20]

The Court should not consider facts tending to show directors lack independence in a vacuum. "[Delaware] law requires that all the pled facts regarding a director's relationship to the interested party be considered in full context in making the, admittedly imprecise, pleading stage determination of independence."[21]

1. The Court of Chancery Did Not Consider Lemonis' Controlling Status or His History of Dominance over the Board

The Court of Chancery erred in disregarding Lemonis' controlling status and history of dominance at the Company.[22] "'Delaware is more suspicious when the

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[20] *Beam ex. rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1051 (Del. 2004) (emphasis in original).

[21] *Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1022 (Del. 2015).

[22] *See* A461 at 15:16-20 (observing "someone who is one of the leading capitalists and more influential figures of our day is not something that a court can ignore when

fiduciary who is interested is a controlling stockholder.'"[23] As this Court has recognized, there is a risk that "directors laboring in the shadow of a controlling stockholder face a threat of implicit coercion."[24]

Lemonis is exactly the type of individual that would take such aggressive retaliatory steps: he is currently being sued for looting a company that appeared on his television show ***and pushing out the original owners of the company***, and has bragged that he keeps information from others to "sucker punch" them.[25]

Further, Lemonis is no ordinary controlling stockholder, he is also the Chairman, CEO, and face of the Company. While, the "confluence of voting control with directoral and official decision making authority" is "consistent with control of the board[,][26] Lemonis' control here goes even further. Due to CWH's convoluted

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evaluating the degree of influence that a controller has over a company"); *Tesla*, 2018 WL 1560293, at *15 (noting that Elon Musk was the "face of Tesla," just as Lemonis is the face of CWH); *see also* Opinion at 48-51.

[23] *In re BGC Partners, Inc.*, No. CV 2018-0722-AGB, 2019 WL 4745121, at *8 (Del. Ch. Sept. 30, 2019); *see also Sandys*, 152 A.3d at 133.

[24] *In re EZcorp, Inc. Consulting Agreement Derivative Litig.*, No. CV 9962-VCL, 2016 WL 301245, at *20 (Del. Ch. Jan. 25, 2016).

[25] A390 (citing *Goureau v. Lemonis*, No. CV 2020-0486-MTZ, 2021 WL 1197531, at *1-6 (Del. Ch. Mar. 30, 2021); A141.

[26] *Friedman v. Beningson*, No. CIV. A. 12232, 1995 WL 716762, at *5 (Del. Ch. Dec. 4, 1995).

ownership structure, Lemonis can sell equity into the market without any reduction in voting power. He is also an influential figure in business world with his own television show dedicated to his supposed expertise in running businesses. Again, despite relevant authority to the contrary, the Court of Chancery failed to consider the importance and influence of the dominating director, Lemonis.

Further, due to being a serial investor, Lemonis (and Adams) regularly look to their loyal "go to" individuals for appointments as executives, directors, or simply to hire for their services. The Complaint contained the following table of just the Board members overlapping positions at Lemonis and Adams' companies (A242):

Director Defendants' Positions at Lemonis/Adams Affiliated Companies	
Entity	Defendants
Adams Outdoor Advertising, Inc.	• Andris A. Baltins (Current Director)
Camping World Holdings, Inc.	• Andris A. Baltins (Current Director) • Brian P. Cassidy (Current Director) • Mary J. George (Current Director) • Daniel G. Kilpatrick (Former Director) • Howard A. Kosick (Current Director) • Jeffrey A. Marcus (Current Director) • Brent L. Moody (Current Executive) • K. Dillon Schickli (Current Director)
Camping World, Inc.	• Brent L. Moody (Former Executive)
CWGS Enterprises, LLC	• Andris A. Baltins (Current Director) • Brian P. Cassidy (Current Director) • Jeffrey A. Marcus (Current Director) • Brent L. Moody (Former Executive) • K. Dillon Schickli (Current Director)
FreedomRoads, LLC	• Brent L. Moody (Former Executive)
Good Sam Enterprises, LLC	• Andris A. Baltins (Current Director) • Brent L. Moody (Former Executive) • K. Dillon Schickli (Former Executive)

The Court has consistently considered it relevant whether a director has a history of serving at a controller's pleasure at other companies in its independence

analysis.[27] Similarly, the law has consistently looked at whether an individual could expect future appointments as influencing an individual's ability to independently consider whether to sue the controlling directors.[28] Yet, the Court of Chancery did not do either here. (*See* Opinion at 48-51).

Similarly, the Court of Chancery never addresses the Board's history of subservience to Lemonis. (*See* Opinion at 48-51). Lemonis acts as if the Board does not exist, engaging in major transactions, such as the Gander acquisition, without even telling the Board. He even caused CWH to guarantee a $12 million line of credit to

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[27] *BGC*, 2019 WL 4745121, at *12 (explaining that being one of a controlling director's "go-to choices for board appointments" is an important relationship and the individual would not want to compromise the "good relationship" with the controlling director); *In re Tesla Motors, Inc. S'holder Litig.*, No. CV 12711-VCS, 2018 WL 1560293, at *17-18 (Del. Ch. Mar. 28, 2018) (director not independent when serving on the board for nearly a decade with the controlling stockholder, having connections with the controlling stockholder's related company, and having a relationship with controlling stockholder).

[28] *See In re Trump Hotels S'holder Derivative Litig.*, No. 96 CIV 7820 DAB, 2000 WL 1371317, at *8 (S.D.N.Y. Sept. 21, 2000) (applying Delaware law and finding a lack of independence because, among other things, the "directors knew that successful service on the board of THCR and its subsidiaries might lead to future positions on other Trump-controlled entities"); *Caspian Select Credit Master Fund Ltd. v. Gohl*, No. CV 10244-VCN, 2015 WL 5718592, at *7 (Del. Ch. Sept. 28, 2015) (finding directors lacked independence where majority stockholder had nominated them to various boards of directors, and, based on such prior dealings, it was reasonable to infer they expected to be considered for directorships in companies the majority stockholder acquired in the future).

him. (A139). Lemonis has also caused CWH to buy products and services from a number of small companies in which he became a major investor on his television show.[29] When discussing Company actions, he describes them as steps and decisions that he personally took without Board oversight, which is consistent with the Board documents.[30] In short, to the extent he thought of them at all, Lemonis considered the other directors "an easy tool, deferential, glad to be of use[,]"[31] but these facts are entirely absent from the Court's independence analysis.

2. Schickli Lacks Independence from Lemonis

In addition to ignoring Lemonis' dominating personality and control, the Court of Chancery improperly reviewed each allegation regarding Schickli independently and failed to provide Plaintiffs with appropriate reasonable inferences.

In particular, the Court of Chancery concluded that Lemonis controlling Schickli's appointment is not enough to overcome the presumption of independence. (Opinion at 49). The Court of Chancery then separately looked at the fact that Schickli previously served as Chief Operating Officer of Good Sam Enterprises,

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[29] A139; MTD Transcript at 75:19-76:1.

[30] A140-41.

[31] *Ezcorp*, 2016 WL 301245, at *41.

LLC ("Good Sam") does not "by itself 'create a disabling interest' today." (Opinion at 50).

It was in error for the Court of Chancery to not consider these allegations collectively, and to credit Plaintiffs with the reasonable inference that Schickli's executive position at Good Sam in the early 90s, serving as a director at CWH since its founding, and serving as a director of CWGS Enterprises, LLC ("CWGS") since 2011, meant that the Schickli and Lemonis (and Adams) had a continuing relationship far greater than the "distant business relationship" the Court of Chancery held was "not sufficient to challenge" Schickli's independence.[32]

Thus, Lemonis and Schickli's twenty-five year mutually beneficial relationship is sufficient for a stockholder to reasonably believe that Schickli lacks independence, particularly when the additional factors regarding Lemonis' control are taken into account.[33] Indeed, "causing a lawsuit to be brought against another

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[32] Opinion at 50.

[33] *E.g.*, *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 55 (Del. Ch. 2013) ("I find that Prang's current ***and past*** relationships with Gandhi and Sequoia resulted in a sense of 'owingness' that compromised his independence for purposes of determining the applicable standard of review."); *InfoUSA*, 953 A.2d at 979, 990-94 (finding prior business ties and significant financial compensation received from the controlling director established reasonable doubt as to the directors' independence); *In re Primedia Derivative Litig.*, 910 A.2d 248, 261 n.45 (Del. Ch. 2006) (holding on motion to dismiss that directors who had "substantial past or current relationships,

person is no small matter, and is the sort of thing that might plausibly endanger a relationship[,]" a relationship that has been particularly fruitful for Schickli.[34]

3. Baltins Lacks Independence

Having held that Schickli did not lack independence, the Court of Chancery did not rule on Baltins or Moody's independence. However, in a footnote, the Court of Chancery implied that it would find Baltins did not lack independence.[35] As with Schickli, the Court of Chancery failed to consider Lemonis' overarching domination and control. It also ignored significant additional factors regarding Baltins that demonstrate his lack of independence.

Defendant Baltins is a stockholder of the boutique ten person law firm, Kaplan Strangis & Kaplan, P.A. ("KSK").[36] As the Court correctly noted, CWH paid KSK

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both of a business and of a personal nature, with [a controller]" were not independent).

[34] *Sandys*, 152 A.3d at 134; *see Goldman v. Pogo.com, Inc.*, No. CIV.A. 18532-NC, 2002 WL 1358760, at*4 (Del. Ch. June 14, 2002) (finding lack of independence between "business partners"); *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 21-22 (Del. Ch. 2014) (discussing closeness of long-standing business relationship as bearing on independence, including "making co-investments in a venture capital fund and at least four other companies").

[35] Opinion at 51 n.198.

[36] A382.

$600,000 in fees for legal services in 2017 and 2018.[37] The Court of Chancery recognized these payments, but failed to recognize that Baltins and KSK have represented Good Sam since at least November 1996. (Opinion at 51). Good Sam paid KSK approximately $3.4 million between 2005 and 2012 alone for legal services. KSK represented Adams Outdoor in its 1996 offering of senior notes. Again, looking at these arguments collectively, it is clear that initiating suit against Lemonis would put millions in fees at risk for Baltins' law firm.

The court's holding in *InfoUSA* is directly on point. In *InfoUSA*, the court held that a threat of a partner at a law firm losing a controlled company's business was sufficient to call into question the director's independence.[38] In reaching its conclusion, the court noted "there is a unique relationship between a law firm and its partners," when it comes to pay and prestige based on client relationships.[39] The company in *InfoUSA* paid the law firm $1.1 million, a comparable amount to what CWH paid KSK, without even taking into account the fees earned from the

[37] A136-37.

[38] 953 A.2d at 991-92.

[39] *Id.* at 991.

additional Lemonis and Adams' connected entities.[40] Notably, KSK is a small law firm, whereas Robbins Kaplan LLP, the law firm in *InfoUSA*, was a national firm with over 250 lawyers.[41] The court held that the director was interested even though the revenues from the controlled business represented "a miniscule proportion of [Robbins Kaplan LLP's] total revenues[.]"[42] That is all the more true here, where Baltins is partner at a far smaller law firm.

Rather, the Court of Chancery held that this action was more like *In re The Limited, Inc. Shareholders Litigation*, No. CIV.A. 17148, 2002 WL 537692 (Del. Ch. Mar. 27, 2002), than *InfoUSA*.[43] However, the sum at issue in *The Limited* was a $400,000 payment,[44] millions less than at issue here. Further, the payment was to a business, not a law firm.[45] In distinguishing *In re Limited*, the court in *InfoUSA* pointed to this material distinction in businesses. The Court of Chancery failed to

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[40] *Id.* at 979.

[41] A383.

[42] 953 A.2d at 991.

[43] Opinion at 51 n.198.

[44] 2002 WL 537692, at *5.

[45] *Id.*

acknowledge this fact at all in its dicta analysis. Accordingly, Baltins also lacks independence.[46]

4. Moody Also Lacks Independence from Lemonis

The Court of Chancery did not address defendant Moody in its Opinion, other than to say that an analysis is "likewise [as with Adams] unnecessary." (Opinion at 21). Defendant Moody is CWH's President, Chief Operating and Chief Legal Officer.[47] In these positions, defendant Moody has received at least $11 million in compensation. *Id.* Moody also has roles at CWGS and Good Sam, pursuant to which he receives additional compensation.[48] He has had no employment outside of the CWH entities since 2002.[49] Moody serves at the whim of Lemonis, the Company's CEO and controlling stockholder. As the court in *Ezcorp* noted, "remuneration a person receives from her full-time job is typically of great

[46] It is also worth noting that defendant Baltins also states that he "receive[s] directors' fees which are paid by Adams Office[,]" though he fails to disclose the amount. That the Board would just brush aside this failure to include material information further shows Lemonis' domination and control.

[47] A048.

[48] A134-35.

[49] A134-35.

consequence to her."[50] Accordingly, "[u]nder the great weight of Delaware precedent, senior corporate officers generally lack independence for purposes of evaluating matters that implicate the interests of a controller."[51] Moody, Schickli, Baltins, Lemonis and Adams combined compose a majority of the Board. Thus, the particularized facts alleged in the Complaint—considered in their totality—create a reason to doubt the independence of a majority of the Board.

[50] 2016 WL 301245, at *39.

[51] *Id.* at *35.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request reversal of the Court of Chancery's decision.

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Dated: March 31, 2022

CERTIFICATE OF SERVICE

I, Martin S. Lessner, Esquire, hereby certify that on April 14, 2022, I caused to be served a true and correct copy of the foregoing document upon the following counsel of record in the manner indicated:

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