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 REPLY BRIEF

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SUMMARY OF ARGUMENT

Plaintiffs-Appellants Betsy M. Hunnewell, Ira Sonet, and Lincolnshire Police Pension Fund ("Plaintiffs") demonstrated in their Opening Brief ("POB") that: (a) Defendants sold stock based, at least in part, on material nonpublic information ("MNPI");[1] (b) they were responsible for false and misleading statements made to the market; and (c) that a majority of the Board of Directors (the "Board") lack independence from CWH's CEO, Chairman, and controlling stockholder, Marcus Lemonis ("Lemonis"). Plaintiffs further explained that the Court of Chancery erred in reaching the opposite conclusion and was only able to do so by, not just failing to credit Plaintiffs reasonable inferences, but also by improperly crediting inferences to Defendants and by failing to consider allegations holistically.

In their Answering Brief ("AB"), Defendants misconstrue Plaintiffs' arguments and ask this Court to reaffirm the improper inferences the Court of Chancery granted them. For example, after receiving a horrible financial metrics

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[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. "Individual Defendants" refer to Marcus Lemonis, Brent Moody ("Moody"), Stephen Adams ("Adams"), Andris Baltins ("Baltins"), Brian Cassidy ("Cassidy"), Jeffrey Marcus ("Marcus"), K. Dillon Schickli ("Schickli"), Mary George, Howard Kosick, Thomas Wolfe, Roger Nuttall, and Daniel Kilpatrick. Nominal defendant Camping World Holdings, Inc. ("CWH" or the "Company") is not included in "Defendants."

about the Gander Mountain Company ("Gander") acquisition, the Board decided to visit a Gander facility. The Board minutes, however, do not specify the reason for the visit. Instead, the Board minutes provide only high-level descriptions of the discussions that occurred during the meetings leaving many of the important details unsaid. The absence of such information required the Court to draw the inferences in Plaintiffs' favor, including the inference that the Board decided to visit the facility because the integration was going so horribly.

Ignoring this precedent, Defendants argued for the inferences in their favor, and the Chancery Court agreed. In doing so, the Chancery Court effectively neutered Section 220, permitting Board members to take only generalized minutes and insulate themselves from any liability, despite the level of detail. Respectfully, the Court should correct the Court of Chancery's error in dismissing this action.

ARGUMENT

I. Defendants Improperly Argue that Demand Futility Is Assessed on a "Claim by Claim" Basis

Defendants maintain that even after *Zuckerberg*, demand futility "is conducted on a claim-by claim basis." AB at 12. Yet, in *United Food and Commercial Workers Union and Participating Food Industry Employers Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1058-59 (Del. 2021), this Court stated multiple times that the question was whether a director lacked independence or was disinterested in relation to "***any of the claims*** that are the subject of the litigation demand."

In the AB, Defendants do not address *Zuckerberg*'s "any of the claims" language at all. AB at 11. Instead, they merely cite three cases that repeated the "claim by claim" language from decisions that pre-dated *Zuckerberg*, without any analysis. Yet, during oral argument, Defendants explained that they were ***not pursuing the argument they now make***:

> ***I just want to be clear***, the idea that the substantial likelihood of liability prong, question two, says any of the claims. ***We're not arguing you have to show that someone has a substantial likelihood of liability for every claim*** that should have been brought to the demand before.

POB, Exhibit C at 85:16-22. Thus, even Defendants know the "claim by claim" analysis was revised in *Zuckerberg* and their new arguments to the contrary should be ignored.

II. Plaintiffs Have Sufficiently Alleged the Board Faces a Substantial Likelihood of Liability Under *Brophy*

Plaintiffs explained that Defendants possessed three types of material information that: (i) the Company's integration of Gander was going poorly; (ii) the Company had no basis for its public projections regarding the number of stores to be opened, as shown by the lack of a plan to do so; and (iii) the increasing sales, general, and administrative("SG&A") expenses were not coupled with increasing Gander store openings. POB at 13.

Defendants do not challenge the first piece of MNPI, the integration of Gander went poorly. Nor do they argue that the public was aware of the integration's problems. Instead, they focus on whether the lack of a plan was MNPI and state that the public knew SG&A was increasing. In doing so, Defendants misconstrue Plaintiffs' allegations and arguments, improperly rely on inferences in their favor, and ignore the context of Plaintiffs' allegations.

A. Defendants Cannot Establish that the Board Saw a Plan for Opening Gander Stores Prior to the Wrongful Trades at Issue

The POB explained that from when CWH announced the Gander acquisition until December 5, 2017, the Defendants lacked a plan regarding where or when Gander stores would open despite their claims to the market, as shown by the absence of any plan in the 220 production. POB at 5-6. Defendants' answering brief

fails to counter this key fact, never once pointing to an actual plan for Gander store openings that was presented to and/or reviewed by the Board in that time frame. AB at 16-17.

Instead, Defendants argue that the absence of a plan to open Gander stores was not MNPI they needed to disclose. They also claim there was either a (undisclosed) plan or it was of no significance that the Company did not have one. AB at 15-19, 22-23. All these arguments fail.

First, the lack of a plan was material because it was "of consequence" to a rational investor. *In re Oracle Corp. Derivative Litig.*, 867 A.2d 904, 940 (Del. Ch. 2004), *aff'd*, 872 A.2d 960 (Del. 2005). From the early stages of the Gander acquisition, Defendants told the public the number of stores CWH would open, starting with a press release in May of 2017 touting a plan to open "seventy or more" Gander stores. (A083-84).[2] Numerous other specific projections followed. (A09-91, A105-09, A111-12). This was important because it let the outside investor know how and when the Company would see a return for the increase in expenses the Gander acquisition caused.

In contrast to these specific projections, the MNPI possessed by the Defendants in connection with their October and November 2017 sales was that

[2] "A__" refer to the citations to the Appendix to the Opening Brief.

there simply was no plan to open Gander stores. Indeed, the only plans showing potential store openings that the Board received in the months before the insider sales did not list a single Gander store opening (they only showed CWH store openings) much less any of the 57 potential Gander stores identified in the Company's June 2017 press release. This was key information to the market in light of the fact that CWH's SG&A was rapidly increasing, which would in turn weigh down the Company's EBITDA. That there was no plan meant the Company had no basis for telling the public how many stores would open, or when, or for reassuring them that the increasing costs were of no concern. (A107-08).

Defendants assert that this is not MNPI because CWH made disclosures regarding the uncertainty of stores openings and rising SG&A costs. AB at 18. CWH's disclosures, however, revealed only that the timing of those openings was uncertain. A rational investor would still have believed that there was a ***plan*** as to ***why*** and ***how*** the Company was going to get to seventy stores, and ***where*** they would be, even if there was ***some*** uncertainty. Similarly, Plaintiffs explained that while CWH disclosed rising SG&A costs, it did not disclose the troubles causing the increasing costs or that "the increasing SG&A expenses were ***not*** coupled with increasing Gander store openings." POB at 13. Thus, the MNPI was that until

December 5, 2017, there was no plan to open any Gander stores that would justify the increasing SG&A expenses. (A078-79, A100-01).

Defendants attempt to characterize Plaintiffs' argument as asking the "Court to conclude the lack of updated internal store-opening schedules somehow proves CW had no plan—and that this constitutes MNPI." AB at 22. However, it was not a lack of ***updated*** schedules that demonstrates there was no plan: the Board did not see ***any*** "store-opening schedules" (or plan) until December 5, 2017. (A084-94; POB at 19-20).

Further, Defendants argue the "'updated exact numbers and timelines for store openings" the Board received later do not matter because they took place "after the 2017 sales addressed in Plaintiffs' Opening Brief[.]" AB at 23. Defendants' argument misses the point. First, the Company provided store-opening numbers to the public as far back as May 8, 2017 ("goal is operate ***seventy or more***" stores). (A084). Then, prior to the October sales, Defendants made further specific projections on June 30, 2017 (listing 57 locations; and planning to open "initial ***15 to 20 Gander stores by the end of 2017***"). (A091). Second, Defendants' statements about specific store openings made after the sales are further evidence that they believed the market considered this information material. Therefore, Defendants' knowledge that there was no basis for specific stores opening projections, *i.e.*, an

identifiable plan, was information that was "materially different than existed in the marketplace at the time they traded." AB at 23 (citing *Guttman v. Huang*, 823 A.2d 492, 505 (Del. Ch. 2003)).

Defendants argue against the conclusion that the Board saw no plan by claiming: (a) Plaintiffs' argument contradicts itself because Plaintiffs point out the Board discussed Gander, and (b) that Plaintiffs "offer no plausible reason why the Board should have seen a 'developing plan.'" AB at 16-17.

First, there is nothing contradictory about Plaintiffs' arguments. Even though the Board minutes reflect that Defendants discussed a number of aspects of the Gander acquisition, there is no reference to any plan for how the Company was going to open any particular number of stores, where those stores would be, or when any of those stores would open. POB 17-18 (citing A077-80, A083-90, A92-94, A096-97, A100-05, A112-13). Nonetheless, Defendants claim that the mere fact the Board discussed certain Gander topics, means there must have been a specific plan for opening seventy stores. AB at 16-17. But there is not a single document to support this claim and Defendants cite to none. The absence of this evidence in the form of Board minutes, or otherwise, entitles Plaintiffs to the reasonable inference that no plan for Gander store openings existed prior to December 2017. *See In re Tyson Foods, Inc.*, 919 A.2d 563, 578 (Del. Ch. 2007); *Hughes v. Xiaoming Hu*, 2020 WL

1987029, at *16 (Del. Ch. Apr. 27, 2020) ("The Company could have produced documents in response to the plaintiff's Section 220 demand that would have rebutted this inference. The absence of those documents is telling because '[i]t is more reasonable to infer that exculpatory documents would be provided than to believe the opposite: that such documents existed and yet were inexplicably withheld.'") (Alteration in original).

Further supporting that inference, once there was such a plan for store openings in December 2017, the Board ***received and reviewed it***. (A071, A078). Nonetheless, the Court of Chancery credited Defendants' with the inference that the Board had a plan in place prior to December 2017. POB, Exhibit A, Memorandum Opinion ("Opinion") at 27. *In re Dell Techs. Inc. Class v. S'holders Litig.*, 2020 WL 3096748, at *34 (Del. Ch. June 11, 2020) (refusing to "draw an inference in the defendants' favor" because "[a]t the pleading stage, the plaintiffs are entitled to all reasonable inferences").

B. Plaintiffs' Allegations Demonstrate Scienter

The Court of Chancery only cursory looked at scienter, mainly finding that since there was no MNPI, there could be no scienter and that the timing of Crestview's trading supported this outcome. Opinion at 33-34. Plaintiffs, however, sufficiently alleged scienter because the Board: (i) had no identifiable plan about

when or where Gander stores would open; (ii) saw negative information about the Gander integration that was significant enough to justify conducting an in person site visit; (iii) knew that SG&A expenses were rising, even before it knew any Gander stores were opening; and (iv) sold hundreds of millions worth of CWH stock while in possession of this MNPI. POB at 30. As the POB explained "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." POB at 13. On September 28, 2017, the Board decided that before its next meeting, it would conduct a visit to a Gander facility in person. (A093). This decision followed months of negative news regarding the Gander integration: double-digit increases to the Company's year-over-year SG&A expenses that were vastly higher than the single digit increases prior to the acquisition coupled with ***no mention of even a single Gander store opening or plans to open one***. POB at 5-7 (A077-78, A088-90, A092-94, A096-97, A100-05).

Despite these circumstances, Defendants described Plaintiffs' allegations concerning the reasons for the visit as "conjecture". AB at 19-21; POB at 29-30. But, Defendants offer ***no other plausible explanation*** for the visit other than the prior receipt of negative news about the integration. AB at 19-21. Instead, they claim that because the minutes did not state exactly why the Board decided to visit

the site or when Lemonis conducted his site visit, that they are entitled to the inference that the sire visit was unrelated to the integration issues. But, Delaware does not require Plaintiffs to plead such "newspaper facts." *Elburn v. Albanese*, 2020 WL 1929169, at *2 (Del. Ch. Apr. 21, 2020) (rejecting defendants' argument that plaintiff was required to identify the "who, what, when, where and how" of the circumstances justifying a finding of demand excusal). Further, Plaintiffs' inference is reasonable, and therefore, must be credited, "***even if [the court] believe[s a competing inference is] more likely***". *Inter-Mktg. Grp. USA, Inc. v. Armstrong*, 2020 WL 756965, at *14 (Del. Ch. Jan. 31, 2020).

More importantly, Defendants are not entitled to favorable inferences from their own omissions in the Board minutes. A proper (and really the only) inference in this context is that the Board decided to visit a Gander facility at the end of a meeting after receiving negative numbers about the integration because the integration was going poorly. To demand more here or allow Defendants' argument to prevail will incentivize fiduciaries to further sanitize Board minutes and materials to protect themselves from liability. POB at 3. Defendants responsive to this perverse outcome is essentially to say "too bad", because there are no "guarantees" under Section 220. AB at 25. Plaintiffs, however, are not seeking guarantees. We simply ask for a presumption at the motion to dismiss phase that does not reward

Defendants for hiding facts or undercut the purpose of Section 220, especially after years of this Court encouraging stockholders to use the tools at hand.

C. Defendants' Arguments Regarding the Characterization of Their Insider Sales Fail

Defendants claim Plaintiffs "assert that the size and timing of the trades ***alone*** establish scienter." AB at 26. We make no such assertion. Instead, Plaintiffs contend, "the size and timing of the Selling Defendants' trades ***support*** the inference of scienter." POB at 22.

None of Defendants' authorities support the conclusion that the size of the trades here is insignificant. For example, Defendants cite to *Guttman* where the court "declin[ed] to find inference of scienter based on large sales, noting that selling director retained 'as strong a stake in [the company]'s long-term credibility and prospects as anyone." AB at 27 (citing *Guttman*, 823 A.2d at 502, n.20, 503-04). However, the director in *Guttman* sold only 12% of his stock, far less than the 43.4% sold by Moody and 39.9% sold by Crestview here. *Id.*; A301-02. Moreover, the director there also happened to be "the company's CEO" who "founded the company." 823 A.2d at 502 n.20. Further, here, Plaintiffs bolstered the Verified Amended Stockholder Derivative Complaint (the "AC") with Section 220 documents, while the *Guttman* plaintiffs failed to make an inspection demand. *Id.* at 504.

Moreover, Defendants' contention that cases Plaintiffs rely upon are inapposite because the selling defendants in those cases sold a higher percentage of stock is wrong. AB at 27. Two of the defendants in *Toll* sold amounts (29% and 37%) below the 43.4% sold by Moody and 39.9% sold by Crestview. *Pfeiffer v. Toll*, 989 A.2d 683, 689 (Del. Ch. 2010), *abrogated on other grounds by Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831 (Del. 2011).

Additionally, neither *Toll* nor *Silverberg* set a "floor" for the minimum percentage of stock a director has to sell for that fact to support a conclusion of scienter. *See Toll*, 989 A.2d at 689 (recognizing sales were "suspicious in timing and amount" including for directors who sold 29% and 37% of their shares, all the way up to 92% and 93%, without setting any minimum); *Silverberg on Behalf of Dendreon Corp. v. Gold*, 2013 WL 6859282, at *15 n.72 (Del. Ch. Dec. 31, 2013) (recognizing that one defendant sold 19% of his shares but that "I need not address whether [this defendant] acted with scienter" and announcing no floor on percentage of shares sold to be considered significant).

Defendants' assertion that Plaintiffs were "[u]nable to cite any particularized allegations in the AC demonstrating the supposedly suspicious timing of the trades," is likewise wrong. AB at 28. Plaintiffs allege that Defendants made trades "soon after receiving negative information [and the Board meeting in which they decided

to visit the Gander facility] ***and*** near the relevant period high. Each of the above sales occurred at or above $40 per share … ***near[ly] … double*** the $19.04 price per share to which the shares fell when the truth was fully revealed." POB at 25 (A122, A125-28). Thus, like in *Silverberg*, there is significance in the fact that defendants "elected to sell after the stock reached a likely high point." POB at 22 citing *Silverberg*, 2013 WL 6859282, at *15.

D. Defendants' Arguments that Marcus and Cassidy Cannot Be Held Liable for Crestview's Sales Fail

Defendants do not refute the conclusion that it "is not and cannot be our law" that directors could, "through their controlled funds, [be permitted] to profit from inside information without recourse." POB at 26; AB at 29-31. Nor do they contest that Marcus and Cassidy, as "tippers" to Crestview, could still be held liable even without control. POB at 27; AB at 29-31. Instead, Defendants assert that Marcus and Cassidy should not be considered together but offer no reason to ignore the fact that these two CWH directors were both part of the investment committee of Crestview. AB at 29-31. Defendants' contention that *Zuckerberg* "requires evaluating claims on a director-by-director basis" expands that holding unreasonably. AB at 29 (citing *Zuckerberg*, 262 A.3d at 1059). *Zuckerberg* does not require the Court to examine each director ***in a vacuum***. It strains credulity to suggest Marcus and Cassidy would not: (i) control Crestview's trades of CWH stock,

or (ii) share the MNPI they had with others at the company in connection with those trades.[3]

[3] Defendants' argument concerning Adams' control of ML Acquisition is a distraction. The only issue in front of the Court is demand futility and Defendants have conceded Adams is not independent of Lemonis.

III. Plaintiffs Have Sufficiently Alleged a Majority of the Board Knowingly Made and Approved False and Misleading Statements

Plaintiffs argued that demand was futile because a majority of the Board made false statements: (i) misrepresenting the number of stores the Company would open—especially with respect to the stores it would open in 2018; and (ii) omitting the nature and extent of the problems with the Gander integration. POB at 30-34.

Defendants make no argument that the statements at issue were not false beyond saying that Plaintiffs' allegations "mirror the failed MNPI allegations." AB at 33. But the allegations are even stronger here regarding falsity. For example, Lemonis' prepared remarks on February 27, 2018 stated that the Company would open seventy-two stores by mid-June (A108-09) and the 2017 Form 10-K stated the Company would open seventy-four stores by May 2018. (A111-12). At the time Defendants made these statements, the Company planned to open only sixty Gander stores and had already fallen significantly behind that plan. A108-09. Notably, the Defendants do not attempt to defend the Chancery Court's ruling that the difference between sixty and seventy-two stores was immaterial; instead, Defendants attempt to deflect by essentially saying that this is not "the key question." AB at 23. Their own actions demonstrate the fallacy of this argument, as they were constantly updating the market about the number of stores the Company would open.

Defendants' argument that the Plaintiffs failed to allege bad faith based on the MNPI the Board withheld from the market also fails. AB at 33. Plaintiffs sufficiently allege bad faith by explaining that Defendants knew the statements they were making concerning the nature of the Gander integration and the projections of the number of Gander stores CWH planned to open were false when made. POB at 30-31; *Hughes*, 2020 WL 1987029, at *13.

Defendants focus most of their argument on whether Plaintiffs alleged sufficient participation in the preparation of the false statements. AB at 33-35. Yet Plaintiffs' allegations show extensive Audit Committee involvement, including: days reviewing CWH's Form 10-K (A105, A111); reviewing scripts for conference calls—including Lemonis' statement that CWH would open seventy-two stores by June (A105, A108-09; POB, Exhibit C, Transcript at 7:9-12); and even suggesting changes to certain filings (POB, Exhibit C, Transcript at 71:13-17; 73-7; A105, A111).[4]

[4] Defendants claim that Plaintiffs raised this argument for the first time at oral argument. AB at 34. Not true. Plaintiffs have consistently argued that Defendants were directly involved in reviewing and approving the false statements. (*See, e.g.*, A105, A111, A114-15). To the extent Defendants are referring to the specific contents of the Audit Committee or Board's minutes, these minutes cited to and explicitly incorporated by reference into the AC.

Delaware has found directors responsible for false statements based on significantly less participation. *See INFOUSA, Inc., S'holders Litig.*, 953 A.2d 963, 990-91 (Del. Ch. 2007) (referring to disclosures in Form 10-K as "issued" by directors and finding demand futile because directors faced a substantial likelihood of liability for signing Form 10-Ks that contained false statements); *Ryan v. Gifford*, 918 A.2d 341, 357-58 (Del. Ch. 2007) (holding that demand was futile where directors made "false representations [in] ... public disclosures").

Defendants also argue that Plaintiffs cannot allege collective knowledge based on Defendants' attendance at meetings. AB at 33. This is wrong on both the law and the facts. For most meetings, Plaintiffs allege exactly which defendant attended. *E.g.*, A102, listing attendees by names. For the meetings that lack specific attendee allegations, the fault lies with the Defendants' own record keeping. As explained earlier, the Court should not allow Defendants to avoid liability by failing to keep detailed records. More importantly, courts have consistently held when Defendants act together as a group, it is appropriate to look at them collectively. *See In re Pattern Energy Grp. Inc. S'holders Litig.*, 2021 WL 1812674, at *58 n.737 (Del. Ch. May 6, 2021) (grouping members of the Special Committee together to consider whether they acted disloyally or in bad faith); *Rosenbloom v. Pyott*, 765 F.3d 1137, 1151 n.13 (9th Cir. 2014) ("When appropriate, courts may evaluate demand futility

by looking to the whole board of directors rather than by going one by one through its ranks.").

Plaintiffs' participation allegations stand in stark contrast to those in *Citigroup*, the main case upon which Defendants rely. AB at 32 and 34 (citing *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 132-35 & n.88 (Del. Ch. 2009)). In *Citigroup*, the plaintiffs failed to allege any participation in the false statements including "how the board was actually involved in creating or approving the statements." 964 A.2d at 133 n.188. Supported by the Company's own internal records, Plaintiffs here allege the actual when and where of the review and approval, and sometimes editing, of the specific statements at issue. To demand more would: (a) reward Defendants' own failure to keep detailed minutes; and (b) effectively render Audit Committee review as meaningless under Delaware law.

Finally, Defendants attempt to bolster this participation argument by citing to inapposite cases. AB at 33-34. Defendants' reliance on *TrueCar* is unhelpful as the court focused solely on the knowledge of the directors. AB at 34; *In re TrueCar, Inc. S'holder Derivative Litig.*, 2020 WL 5816761, at *19 (Del. Ch. Sept. 30, 2020). Defendants' reliance on *Ellis* is even more attenuated. The Court dismissed the claim there because there was no allegation that the directors even knew about the letters

at issue. AB at 34; *Ellis v. Gonzalez*, 2018 WL 3360816, at *11 (Del. Ch. July 10, 2018), *aff'd*, 205 A.3d 821 (Del. 2019).

IV. Plaintiffs Have Sufficiently Alleged a Majority of the Board Lacks Independence

Defendants agree that Plaintiffs must only raise a reason to doubt the independence of Schickli, Baltins, and Moody. AB at 36. Plaintiffs have done so here.

A. Numerous Facts that Collectively Demonstrate Lemonis' Control and Domination of the Board

Lemonis' dominance of the Board is supported by: (i) his controlling stockholder status; (ii) his positions as Chairman, CEO, and face of the Company; (iii) his ruthlessness and retaliation against those who opposed him; (iv) his bragging about keeping information from others to "sucker punch" them; (v) his ability to sell equity into the market without any reduction in voting power;(vi) the "independent" directors' histories of having served as Lemonis' loyal "go-to" individuals; and (vii) his history of forcing the Company into transactions uniquely beneficial to himself, including guaranteeing a $12 million loan for which CWH received no benefit. POB at 37-40.

These allegations collectively support a strong inference of Lemonis' domination of the Board. In response, Defendants defend the Court of Chancery's error to view the allegations separately rather than holistically. AB at 42-45.

Defendants do not dispute that Lemonis forced CWH to enter into business arrangements or that he unilaterally caused the Company to acquire Gander. AB at 44. Instead, they argue that none of these actions harmed the Company. *Id.* In doing so, Defendants ignore the very subject of this litigation—the Gander acquisition—an admitted disaster. Moreover, Delaware has noted that saying "no" to a transaction is significantly easier than voting to initiate litigation against an individual. *See In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 940 (Del. Ch. 2003); *In re BGC Partners, Inc. Derivative Litig.*, 2021 WL 4271788, at *11 (Del Ch. 2021); *Marchand v. Barnhill*, 212 A. 3d 805, 819 (Del. 2019). Yet, the Board here did not even muster the ability to say "no" to Lemonis.

Defendants challenge the relevance of Plaintiffs' contention that Schickli, Baltins, and Moody's were Lemonis' "loyal 'go to' individuals," based on *Zuckerberg*. AB at 42 (citing POB at 38; *Zuckerberg*, 262 A.3d at 1063). But this matter is nothing like those unique circumstances in *Zuckerberg*. This Court has explained courts "cannot blind themselves to that reality," when examining independence. *Sandys v. Pincus*, 152 A.3d 124, 133 (Del. 2016). The reality here is that Schickli, Baltins, and Moody are not the billionaires or corporate legends like the directors at issue in *Zuckerberg*. The substantial sums of money and high profile

positions they owe to Lemonis matter to them, as they would to the vast majority of people outside an elite few like the Facebook director.

B. Schickli Lacks Independence

Defendants again attack each allegation regarding Schickli individually (AB at 38) rather than looking at them "holistically, because they can be additive." *Sciabacucchi v. Liberty Broadband Corp.*, 2022 WL 1301859, at *15 (Del. Ch. May 2, 2022).

In addition to the above, Schickli has a 25 year relationship with Lemonis and Adams.[5] Schickli also serves a director on at least three other Lemonis controlled entities. (A242). In addition, and unmentioned by both the Court of Chancery and Defendants, is Schickli's continued expectation of future positions. *See Sciabacucchi v. Liberty Broadband Corp.*, 2018 WL 3599997, at *14 (Del. Ch. July 26, 2018) (finding lack of independence when director was cognizant of the "possibility of endangering [future] … ventures" with the controller). These facts,

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[5] Defendants try to draw a line between Lemonis and Adams (AB at 37), but they have admitted that these two are not independent of each other and Delaware recognizes that a relationship to a close adviser to the controller is relevant to the independence analysis. *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *37 (Del. Ch. June 11, 2020) (Considering that a director had a thirty year relationship to an adviser to the controller in deciding the director lacked impudence and rejecting defendants argument that the relationship was "irrelevant.").

combined with Lemonis' dominating position and Schickli's history of subservience described above, are sufficient at this early stage to call into doubt Schickli's independence. *See Caspian Select Credit Master Fund Ltd. v. Gohl*, 2015 WL 5718592, at *7 (Del. Ch. Sept. 28, 2015) (holding that directors lacked independence when the controlling stockholder nominated them to various boards and, looking at the controlling director's prior dealings, it was reasonable to infer the directors expected future roles); *AIG Ret. Servs., Inc. v. Barbizet*, 2006 WL 1980337, at *5 (Del. Ch. July 11, 2006) (director lacked independence from the interested defendant because he was appointed to several of the controller companies' board, the director and interested individual had a long relationship, and the relationship continues to provide material benefits).

C. Baltins Lacks Independence

Defendants engage in a number of sleights of hands concerning Baltins. First, they try to limit the analysis of the fees Baltins' law firm, Kaplan Strangis & Kaplan, P.A. ("KSK"), received from Lemonis to just those received from CWH. But, KSK also received millions of dollars in fees from Lemonis' other controlled entities, most notably Good Sam. (A136-37). In fact, KSK has represented Good Sam since 1996. *Id.* Defendants, and the Court of Chancery, ignored KSK's relationship with Lemonis' other controlled entities. AB at 39-41; POB at 51. But, a vote to initiate

litigation against Lemonis threatens all of these fees, not just those that come directly from CWH.

Next, Defendants argue the fees might not have been material to KSK. AB at 40-41. But, it defies common sense that millions of dollars in fees and a high profile client are not material to a boutique ten-person firm. Defendants' objection to Plaintiffs pointing out KSK is only a ten-person firm ignores that the AC states that KSK is a "boutique" law firm and that Plaintiffs' motion to dismiss opposition cited to KSK's website to support its allegation that KSK is a ten-person firm. (A136, A382). Therefore, it is appropriate to consider the size of KSK. *In re Gardner Denver, Inc. S'holders Litig.*, 2014 WL 715705, at *9 (Del. Ch. Feb. 21, 2014) (taking judicial notice of public statements from company website).

Finally, Defendants try to distinguish *INFOUSA* because the law firm there was paid $3 million ***in total*** over the five years. AB at 41 (citing *INFOUSA*). However, the AC identified $4 million in fees paid by Lemonis' entities and Baltins receives unspecified amounts of "directors" fees from Lemonis' other entities. (A136-37). Further, the firm in *INFOUSA* was Robbins Kaplan LLP, a national firm with over 250 lawyers. (A383). Thus, KSK received more in fees while being 25 times smaller than the firm in question in *INFOUSA*.

D. Moody Lacks Independence

Defendants do not respond to Plaintiffs' argument that Delaware case law is nearly unanimous that officers lack independence from a CEO, and in particular from a CEO that owns a controlling stake in a company. AB at 41-42; POB at 45-46; *see In re Ezcorp, Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245, at *35 (Del. Ch. Jan. 25, 2016) (recognizing that "[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"). In fact, Defendants do not address any case decided ***within the past twenty years***. AB at 41-42.

Defendants' argue for the first time in the AB that CWH's bylaws say that officers "may only 'be removed … by the Board[,]'" though they fail to explain the process and whether each member of the Board has an equal say. AB at 42 (omission in original). CWH's bylaws do ***not say*** that an officer "may only be removed … by the Board" but only that they "may" be removed in that manner. (B785) (omission in original).

Finally, Defendants' claim that the argument "Moody serves at the whim of Lemonis" is new is wrong. The AC states "Moody owes these past positions and his current position, along with the substantial remuneration these positions have

brought, due to staying in defendants Lemonis' and Adams' good graces." AB at 42; A134-35; *see also* A381-82.

CONCLUSION

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

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Dated: May 17, 2022

CERTIFICATE OF SERVICE

I, Martin S. Lessner, Esquire, hereby certify that on May 31, 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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