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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE CAMPING WORLD HOLDINGS, INC. STOCKHOLDER DERIVATIVE LITIGATION	:	No. 52, 2022
	:	Case Below: Court of Chancery of the State of Delaware
	:	C.A. No. 2019-0179-LWW

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Plaintiffs appeal the Court of Chancery's dismissal of the Amended Verified Stockholder Derivative Complaint ("AC") for failure to plead demand futility. The Court of Chancery set out its reasoning in a 52-page opinion detailing why Plaintiffs did not meet their burden under Court of Chancery Rule 23.1. As the Court of Chancery held, the AC not only lacks particularized factual allegations showing demand futility, but pleads contradictory theories that undermine the inferences Plaintiffs offer to fill the gaps, alleging both that the Camping World Holdings, Inc. ("CW" or the "Company") board of directors (the "Board") (i) received detailed information about the Gander integration, yet (ii) was kept in the dark about those same topics, following the whims of a supposedly dominating CEO and Board Chairman. The Court of Chancery got it right. Plaintiffs failed to plead facts supporting demand futility, and the Court of Chancery's decision should be affirmed.

On December 14, 2018, Plaintiff Lincolnshire Police Pension Fund ("LPPF") demanded to inspect certain CW books and records under 8 *Del. C.* § 220. B699; A042.[1] In response, CW produced thousands of pages of Board materials from between January 1, 2017 and August 7, 2018, including minutes from meetings of

[1] Unless otherwise indicated, all internal citations and quotation marks are omitted, and emphasis is added.

the Board and its Audit Committee and independence questionnaires. The Parties entered into a confidentiality agreement, agreeing that any future complaint LPPF filed would incorporate by reference all books and records produced. B720.

On March 5, 2019, Plaintiffs Betsy Hunnewell and Ira Sonet filed a complaint, and on April 12, 2019, LPPF filed its complaint. The actions were consolidated on May 30, 2019 and Plaintiffs designated LPPF's complaint as the operative complaint. Defendants moved to dismiss on October 30, 2020. Rather than oppose Defendants' motion, Plaintiffs filed the AC on January 7, 2021, which Defendants also moved to dismiss.

On January 31, 2022, the Court of Chancery granted Defendants' motion and dismissed the consolidated action with prejudice for failure to plead demand futility. The Court of Chancery concluded that demand was not futile under *United Food & Commercial Workers Union v. Zuckerberg*, 262 A.3d 1034 (Del. 2021), because Plaintiffs failed to plead that a majority of the nine-director Board in place at the time of the initial complaint (the "Demand Board") (i) faced a substantial likelihood of liability on Plaintiffs' *Brophy*[2] claims related to CW's acquisition and integration of Gander Mountain Co. ("Gander"), and to its adjustments to financials and weaknesses in its internal controls, disclosure claims related to the Gander

[2] *Brophy v. Cities Serv. Co.*, 70 A.2d 5 (Del. Ch. 1949).

integration and adjustments to financials and weaknesses in internal controls, or *Caremark*[3] claims; or (ii) lacked independence from defendants Marcus Lemonis or Stephen Adams. Plfs.' Opening Br. ("POB"), Ex. A ("Op.") 21. Specifically, the Court of Chancery limited its analysis to Baltins, Cassidy, George, Kosick, Marcus, and Schickli and concluded that none faced a substantial likelihood of liability on any of Plaintiffs' claims, and that of the two outside directors (Baltins and Schickli) alleged to lack independence from Lemonis or Adams (assuming their interestedness), at least Schickli was independent, ending the inquiry. *Id.*

On February 14, 2022, Plaintiffs filed a notice of appeal, and on March 31, 2022, they filed their Opening Brief, asserting that the Court of Chancery erred in concluding that Plaintiffs had failed to plead demand futility as to the *Brophy* claims and disclosure claims related to Gander, and lack of independence from Lemonis. POB 3-4. On appeal, Plaintiffs focus their *Brophy* arguments on Cassidy and Marcus, *id.* at 19-25; their disclosure claim arguments on Baltins, Cassidy, George, Kosick, and Schickli, *id.* at 30-34; and their independence arguments on Baltins's, Moody's, and Schickli's independence from Lemonis, *id.* at 35-46. Plaintiffs did not appeal the dismissal of their *Caremark* claims, or the dismissal of their *Brophy* and disclosure claims based on CW's adjustments to financials and weaknesses in

[3] *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. 1996).

internal controls (which they first abandoned below, B738, B747). *See, e.g.*, POB 3-4. Those claims are now finally resolved.

SUMMARY OF ARGUMENTS

1. Denied. The Court of Chancery correctly held that Plaintiffs failed to plead with particularity that a majority of the Demand Board faces a substantial likelihood of liability for Plaintiffs' *Brophy* claims. Delaware law requires Plaintiffs to allege with particularity that these directors (i) possessed material non-public Company information ("MNPI"), and (ii) used that MNPI improperly by making trades motivated, in whole or in part, by the substance of that information. The Court of Chancery correctly held that Plaintiffs failed on both prongs.

2. Denied. The Court of Chancery correctly held that Plaintiffs failed to plead with particularity that a majority of the Demand Board faces a substantial likelihood of liability for making or approving false statements regarding the Gander integration. Plaintiffs did not plead with particularity which disclosures were misleading or what made them misleading, that a majority of the Demand Board made the disclosures knowingly or in bad faith, or facts showing sufficient Board involvement in the preparation of the disclosures to support any likelihood of liability.

3. Denied. The Court of Chancery correctly held that, even if Lemonis faced a substantial likelihood of liability (which he does not), Plaintiffs failed to rebut the presumption that at least four other CW directors lack independence from him.

COUNTER-STATEMENT OF FACTS

Without accepting allegations outside of the AC and newly introduced on appeal, Defendants avoid repeating background facts recited by Plaintiffs where possible, Supr. Ct. R. 14(b)(v), and incorporate the summary of alleged facts set forth in the Court of Chancery's Opinion, Op. 3-14.

I. CW and Its Board

Founded in 1966, CW is the country's leading provider of products and services for recreational vehicles. A043, A049. Plaintiffs sued the Demand Board, A130-31:

- **Marcus Lemonis** has served as CW's CEO and Board Chairman since March 2016. A050.
- **Brent Moody** has served as CW's President since September 2018 and on the Board since May 2018. *Id.*
- **Stephen Adams** has served on the Board since March 2016. A051.
- **Andris Baltins** has served on the Board since March 2016 and also served on the Audit Committee from October 2016 to September 2017. A052.
- **Brian Cassidy** has served on the Board since March 2016 and also served on the Audit Committee from October to December 2016. A052-53.
- **Mary George** has served on the Board and the Audit Committee since January 2017. A054.
- **Howard Kosick** served on the Board and the Audit Committee from October 2017 to May 2019. A055.
- **Jeffrey Marcus** served on the Board from March 2016 to February 2020. A053.

- **K. Dillon Schickli** has served on the Board since March 2016 and on the Audit Committee since October 2016. *Id.*[4]

Plaintiffs also sued Crestview Advisors, L.L.C., a registered investment adviser to certain private equity funds that invested in CW, and defendant Crestview Partners II GP, L.P. ("Crestview Partners"), general partner of those funds. A045, A057, A064. Following a secondary offering in 2017, Crestview Partners held a 22.38% voting interest in CW and designated to CW's Board two directors, Marcus and Cassidy. A066-67; B441. Finally, defendant ML Acquisition Company, LLC ("ML Acquisition") is a limited liability company indirectly owned by Lemonis and Adams, with Lemonis as its sole director. A058, A064.

II. Gander Acquisition

In May 2017, CW made a series of announcements about its acquisition of certain assets of Gander, a sporting supplies retailer. A080-82. CW explained that the "deal provide[d] much flexibility," allowing Gander inventory to be liquidated, existing stores to be closed, and CW to reopen (with new inventory) about 70 stores, with the precise locations and dates to be determined after months of negotiating leases. A081-84; B265. Over the next year, CW made frequent disclosures about

[4] Plaintiffs also sued three other individuals. Defendant Daniel Kilpatrick served on the Board from January 2017 to May 2018, and rejoined in February 2020. A057. Defendant Thomas Wolfe served as CW's CFO from March 2016 to December 2018. A055. Defendant Roger Nuttall held various positions at CW's subsidiaries from January 2011 to December 2018. A056.

the status of the Gander integration and its impact on Selling, General, and Administrative ("SG&A") expenses and Earnings Before Interest, Taxes, Depreciation, and Amortization ("EBITDA"). For example:

- On June 30, 2017, CW announced it had lowered the estimated number of openings to "less than seventy," listing 57 locations "expected to reopen," A087, and on August 10, told investors it planned to open "the initial 15 to 20 Gander stores by the end of 2017," A091. Lemonis reiterated CW still did not "know how many stores [it was] going to end with." B280. CW also disclosed an increase in SG&A expenses for the second quarter of 2017, "driven" in part by Gander-related costs, and that it "expect[ed] to incur meaningful incremental expenses without the benefit of the full revenue" as it "beg[an] to ramp the Gander [] business to open stores." B273-74.

- On October 27, 2017, CW disclosed its plan to open the initial 15 to 20 stores in the first quarter of 2018, rather than in 2017. B444. Lemonis confirmed that plan on November 9, noting CW planned to open "60-some stores" in total but did not have a "specific forecast" for the openings. A099. CW also disclosed that SG&A expenses for the third quarter had increased due in part to Gander, and that it would "continue to incur meaningful incremental expenses" due to Gander. B456-57.

- In December 2017, CW opened the first two Gander stores, ahead of schedule. A103. On January 4, 2018, it stated it planned to open 69 stores by May 2018. *Id.*

- By February 27, 2018, 11 Gander stores were "up and running," when CW stated it planned to open around 72 stores by mid-June 2018. A108. CW noted that it "expect[ed]" Gander stores "to be a drag on the adjusted EBITDA in the first half of the year," while they were opening, "and accretive in the second half." A106-07. SG&A expenses had increased 37.5% in the fourth quarter of 2017, due in part to "$17.7 million preopening and payroll costs associated with [] Gander." B597.

- On March 13, the 2017 10-K similarly disclosed an increase in SG&A expenses for 2017, including Gander's impact, and that CW planned to operate 74 Gander stores by May. B617, B628.

- On May 8, 2018, CW reported that although it had successfully opened 42 Gander stores, it was facing challenges related to its "[IT] infrastructure, inventory management and distribution systems." A115-16. CW "expect[ed]" to open the remaining Gander stores "by the end of the year" but still "hope[d]" to open them over the summer. B651. SG&A expenses had "increased 39.7% to $245.1 million" including "$19.7 million of pre-opening expenses related to Gander" in the first quarter of 2018. B646. Lemonis noted that Gander's impact to second quarter adjusted EBITDA would be "significantly more" than the first quarter's $8.9 million loss, and he did not reiterate a prior EBITDA forecast for the second quarter, instead confirming that "the change in Gander" could "possibly cause [CW] to alter [its] outlook." A115; B653-54, B656. When second quarter adjusted EBITDA came in at 9% below guidance, CW lowered its guidance for 2018. A121.

By September 2018, 60 Gander stores were open. B683.

ARGUMENT

I. The Court of Chancery Correctly Held that Plaintiffs Failed to Plead with Particularity that a Majority of the Demand Board Faces a Substantial Likelihood of Liability for the *Brophy* Claims

A. Question Presented

Did the Court of Chancery correctly hold that Plaintiffs failed to plead with particularity, or offer reasonable inferences, that a majority of the Demand Board faces a substantial likelihood of liability for Plaintiffs' *Brophy* claims? A285-303; B736-46; *see also* B3-11.

B. Scope of Review

This Court's "review of decisions of the Court of Chancery applying Rule 23.1 is *de novo* and plenary." *Zuckerberg*, 262 A.3d at 1047. The Court "may affirm on the basis of a different rationale than that which was articulated by the trial court." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995). And while the Court rules on "issue[s] *fairly presented* to the trial court," *id.*, the "merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal," Supr. Ct. R. 14(b)(vi)(A)(3).

Plaintiffs did not make a pre-suit demand, A131, and demand is excused only if Plaintiffs pleaded "particularized facts creating a 'reasonable doubt that' … a majority of the [D]emand [B]oard 'could have properly exercised its independent and disinterested business judgment in responding to a demand.'" *Zuckerberg*, 262

A.3d at 1048. In *Zuckerberg*, this Court articulated a "universal test for assessing whether demand should be excused as futile," posing three questions to evaluate on a director-by-director basis:

> (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;
>
> (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and
>
> (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.

Id. at 1050, 1058-59. The Court made clear that these questions "[b]lend[] the *Aronson* test with the *Rales* test," without "chang[ing] the result of demand-futility analysis," and "cases properly construing *Aronson*, *Rales*, and their progeny remain good law." *Id.* at 1058-59.

In the demand futility context, the "court 'counts heads' of the members of a board to determine whether a majority of its members are disinterested and independent." Op. 19; *see Braddock v. Zimmerman*, 906 A.2d 776, 785-86 (Del.

2006).[5] This demand futility analysis "is conducted on a *claim-by-claim* basis," *Beam v. Stewart*, 833 A.2d 961, 977 n.48 (Del. Ch. 2003), *aff'd*, 845 A.2d 1040 (Del. 2004), as the Court of Chancery has confirmed in decisions applying *Zuckerberg*, *see, e.g.*, Op. 18; *In re Vaxart, Inc. S'holder Litig.*, 2021 WL 5858696, at *14-15 (Del. Ch. Dec. 1, 2021) (applying *Zuckerberg* and reiterating that "[d]emand futility is assessed on a claim-by-claim basis"); *Firemen's Ret. Sys. of St. Louis v. Sorenson*, 2021 WL 4593777, at *7 (Del. Ch. Oct. 5, 2021) (same); *see also Kiger v. Mollenkopf*, 2021 WL 5299581, at *6 (D. Del. Nov. 15, 2021) (same).

Finally, although the Court should "accept as true all of the complaint's particularized and well-pleaded allegations" and "draw all reasonable inferences in the plaintiff's favor," *Zuckerberg*, 262 A.3d at 1048, the Court "need not blindly accept as true all allegations," *White v. Panic*, 783 A.2d 543, 549 (Del. 2001), and "inferences that are not objectively reasonable cannot be drawn in the plaintiff's favor," *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 56 (Del. 2017);

[5] Plaintiffs intimate that the Court of Chancery determined that Lemonis, Adams, and Moody face a substantial likelihood of liability, insisting they "need only demonstrate how two other members of the Demand Board face a substantial likelihood of liability or lack independence from Lemonis." POB 11. But the Court of Chancery made clear that "by not conducting an analysis of the claims against Lemonis, Adams, and Moody, it should not be understood that the court has concluded that those individuals face a substantial likelihood of liability." Op. 23 & n.89; *see also id.* at 20 & n.82.

see also Brehm v. Eisner, 746 A.2d 244, 255 (Del. 2000) ("[C]onclusory allegations are not considered as expressly pleaded facts or factual inferences.").

C. Merits of the Argument

As an initial matter, Plaintiffs do not argue demand futility based on *Zuckerberg*'s "material personal benefit" prong, waiving any argument on that basis. *See* Supr. Ct. R. 14(b)(vi)(A)(3). And rightly so, because in a *Brophy* case, alleging that a director sold stock is not enough to constitute a "material personal benefit *from the alleged misconduct*." *Zuckerberg*, 262 A.3d at 1059. That is because the alleged misconduct is not trading in company stock; it is trading based on MNPI, which a plaintiff must plead with particularity. *See Guttman v. Huang*, 823 A.2d 492, 502 (Del. Ch. 2003). Rejecting the notion that directors have a disabling "personal 'interest'" based on stock sales alone, *Guttman* held that "it is unwise to formulate a common law rule that makes a director 'interested' whenever a derivative plaintiff cursorily alleges that he made sales of company stock in the market at a time when he possessed [MNPI]." *Id.* (applying *Rales*).

Instead, Plaintiffs focus on the substantial likelihood of liability prong. POB 9. But the Court of Chancery correctly concluded that a majority of the Demand Board does not face a substantial likelihood of liability on Plaintiffs' *Brophy* claims. As detailed below, Plaintiffs failed to plead with particularity that Adams, Cassidy, Lemonis, Marcus, and Moody (or any other director): (i) possessed MNPI, and (ii)

used that MNPI to make trades motivated, in whole or in part, by the substance of that information. Op. 21, 35. Rather, Plaintiffs' claims consist entirely of unsupported allegations and requests for unreasonable inferences that these directors breached their duty of loyalty because of stock sales—allegations and inferences that the Court of Chancery correctly disregarded. *Id.* at 18; *Beam*, 845 A.2d at 1048 (inferences "not objectively reasonable cannot be drawn in [Plaintiffs'] favor").

1. Plaintiffs Fail to Allege that Any Defendant Possessed MNPI

Plaintiffs fail to plead particularized facts supporting the notion that any director possessed MNPI about the Gander integration.[6] Specifically, Plaintiffs fail to allege the "directors possessed information about [CW]'s actual performance that was materially different than existed in the marketplace at the time they traded." *Guttman*, 823 A.2d at 505.

On appeal, Plaintiffs argue the Court of Chancery erred in concluding that Plaintiffs' conclusory allegations "did not establish material information." POB 12. But materiality requires context, and the Court of Chancery correctly assessed whether the "adverse information about Gander [] was *materially different than that*

[6] Plaintiffs argue the "Selling Defendants" (defined as "Lemonis, Moody, Nuttall, Wolfe, and Crestview," POB 1 n.1) traded on MNPI, yet focus their arguments on Cassidy and Marcus (and sometimes Lemonis, Moody, and Adams). *Id.* at 17-19. Defendants therefore respond to the arguments regarding Cassidy, Marcus, Lemonis, Moody, and Adams.

in the marketplace at the time of [the] trades," considering both what information the public had, and whether the supposed MNPI was pleaded with particularity. Op. 25-26; *see also In re Oracle Corp. Deriv. Litig.*, 867 A.2d 904, 940 (Del. Ch. 2004) (under *Brophy*, courts must "evaluate the information in [a director's] possession, compare it to what the market knew, and identify if any of the non-disclosed information would have been of consequence to a rational investor, in light of the total mix of public information"), *aff'd*, 872 A.2d 960 (Del. 2005) (ORDER). Plaintiffs' materiality arguments ignore the timing of trades and the information publicly available at the time. POB 12-16. As detailed below, all of the supposed MNPI was publicly available before the relevant trades, or is not pleaded with particularity, instead "rest[ing] on conclusory allegations and generalizations that cannot support a finding of materiality." Op. 26.

a. No MNPI Relevant to Crestview Partners' Sales on May 31 and June 9, 2017

Below, Plaintiffs all but abandoned any *Brophy* claims based on Crestview Partners' sales in a May 2017 secondary offering, mentioning those sales only in a footnote in their opposition brief. A356. Now Plaintiffs claim that, at the time of the sales, Cassidy and Marcus—Crestview Partners' Board designees—possessed MNPI that "the number of [Gander] stores to be opened was not based on a specified plan with locations or dates," which supposedly contradicted public statements on May 8 and 26 that CW's "current goal [was to] operate seventy or more [Gander]

locations." POB 19-20; A083-85. That argument ignores CW's May 4 and 26 public disclosures that it did not have an exact schedule for (or list of) the 70 store openings, as it was still identifying which stores would open and when. B249 ("We don't know which stores we may be looking to keep, … and when individual stores will come online …."); B265 (disclosing that CW's "current goal" of operating 70 or more locations was "subject to, among other things, the negotiation of lease terms with landlords on terms acceptable to us and approval of the Bankruptcy Court" and that CW had "until October 6, 2017 to determine which real estate leases" it would assume); *see also* Op. 27-28. Plaintiffs identify no information that any director possessed but the public did not—*i.e.*, Plaintiffs fail to allege any MNPI.

Plaintiffs ask this Court to infer that CW supposedly "*did not have an articulable plan* to open the 'seventy or more stores,'" and to conclude the purported absence of "an articulable plan" constitutes MNPI. POB 14-15. But as the AC acknowledges, the meeting minutes from May 8 and 16, 2017, show the Board discussed several topics related to store openings, including: "the status of the purchase of certain assets of Gander," "[m]erchandizing," "strategic opportunities generally resulting from [the] acquisition," and "[i]nventory levels, rent for real property, and corporate overhead." A083-85. The Court of Chancery correctly concluded those allegations "are inconsistent with [Plaintiffs'] theory," Op. 26-27, and an inference that CW had no "articulable plan"—whatever that means—is "not

objectively reasonable," and thus "cannot be drawn in the [P]laintiff[s'] favor," *Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008); *see also* Op. 27.

Plaintiffs' argument that the Court of Chancery improperly drew an inference in Defendants' favor by finding "the Board was [] shown a 'developing plan'" prior to Crestview Partners' May and June 2017 sales similarly fails. POB 14-15. The Court did not draw any such inference; instead, it found "the fact that the Company was still developing a plan" for opening Gander stores was "known to the market before Crestview [Partners] traded." Op. 28. Moreover, the Court did not need to draw this inference: Plaintiffs offer no plausible reason why the Board should have seen a "developing plan," as "[m]ost of the decisions that a corporation … makes are, of course, not the subject of director attention." *Caremark*, 698 A.2d at 968.

b. No MNPI Relevant to Crestview Partners' and ML Acquisition's Sales on October 30 and November 1, 2017

On June 30, 2017, CW disclosed that it would open "less than seventy" stores, listing 57 locations it "expected" to open eventually. A087. Then, on August 10, Lemonis announced that the "current plan" was to open 15 to 20 stores by the end of 2017, another 15 to 20 in the first few months of 2018, and 10 to 30 thereafter. A090-91. Plaintiffs argue that the Board had MNPI that contradicted those statements at the time of the October 30 and November 1, 2017 sales because the Board reviewed reports at its June 22, August 9, August 24, and September 28

meetings that "made no mention of Gander store locations or dates," and Board minutes do not reflect "discussions of the dates or locations … prior to the October 2017 Secondary Offering." POB 20; A086-94. The AC then leaps to the counterintuitive conclusion that the supposed *lack of discussions* about store opening dates and locations constitutes MNPI about "*delays* in opening Gander stores and building Gander inventory." A096. On top of that inference being unreasonable, *before* these sales, CW *had* disclosed store opening delays: the October 2017 offering prospectus disclosed the initial 15 to 20 stores would not open in 2017 as previously announced, but "by the end of the first quarter of 2018." B444; *see also* Op. 29. Moreover, on August 10, Lemonis reiterated that CW was still negotiating leases for Gander stores, that "the final number of initial locations will largely be dependent on the results of those negotiations," and that "*we don't know how many stores we're going to end with*." B273, B280.

Plaintiffs next contend that the Board had MNPI because they knew SG&A expenses were increasing. POB 20-21; A088-89, A092-93, A096. On appeal, Plaintiffs do not dispute the Court of Chancery's conclusion that CW disclosed the rising expenses. *See* POB 14; Op. 29. Nor could they. B273-74 (disclosing on August 10 that an "increase in SG&A expenses" was partly "driven" by "$1.4 million of pre-opening and payroll costs associated with [] Gander," and that CW "expect[ed] to incur meaningful incremental expenses" because of the Gander

integration "for some time"). Rather, Plaintiffs insist the Court of Chancery "misse[d] 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" because an "increase in expenses without corresponding increase in revenue [from store openings] would significantly impact the Company's adjusted EBITDA and margin." POB 14. This new theory ignores that CW repeatedly disclosed (i) that it did not have an exact schedule for store openings, (ii) delays in expected openings, and (iii) increasing SG&A expenses and that it "expect[ed] to incur meaningful incremental expenses without the benefit of the full revenue for some time." *See, e.g.*, A099; B249, B265, B273-74, B280, B444; *see also* B2-4.

Finally, Plaintiffs assume without support that on September 28, 2017 the Board had "a long discussion about Gander," and therefore decided to visit a Gander facility because the discussion must have included bad news. POB 20-21. But the minutes do not reflect any discussion about delays or concerns with the Gander rollout. B436. As the Court of Chancery held, "[r]easonable inferences cannot [] be drawn from conjecture." Op. 29-30; *see also Good*, 177 A.3d at 56 (rejecting as unreasonable inference that board consciously ignored problems or intentionally violated environmental regulations based on board presentation discussing environmental problems and steps to address them).

Plaintiffs' logic is shaky on its face, and falls apart completely in light of the AC's allegations. First, the AC does not allege there was "a long discussion about Gander"; it alleges the meeting (which also covered other topics) lasted 45 minutes. A093; B436. And elsewhere in the AC, Plaintiffs draw the opposite conclusion—that the length of a different 50-minute meeting covering Gander and other topics allegedly demonstrated that the Board received only "brief updates" on Gander, and there was no "plan in place to actually open any stores." A070-71, A141. As the Court of Chancery noted, such contradictory allegations cut against a finding that Plaintiffs sufficiently pleaded MNPI. Op. 45.

Second, Plaintiffs attempt to "tie[]" the Board's September 2017 decision to visit a Gander facility to Lemonis's statement made *over seven months later* regarding his visit to one Gander distribution center at an unspecified time, claiming "Lemonis' description of *his own* visit is the most direct evidence of what *the Board saw* in visiting the Gander site[7] and why they decided to visit."[8] POB 21. But as the Court of Chancery concluded, "there are no particularized allegations establishing when Lemonis's site visit occurred." Op. 25, 29-30. No case supports the reasonableness of Plaintiffs' requested inference, and the AC fails to support an

[7] The AC does not allege the Board visited any distribution center.

[8] Plaintiffs rely heavily on this statement to argue the Demand Board had MNPI. POB 5, 13, 18, 33.

inference that the Board heard about (much less ever saw) anything similar to what Lemonis described seven months later at a distribution center. That is particularly true given that Lemonis allegedly "observed inventory problems on his site visit," POB 18, but the AC alleges that in August 2017 (the month preceding the Board's decision to visit), "there was no Gander inventory of which to speak," A089.

Plaintiffs' cited cases demonstrate that far more particularized allegations are required than those offered here. For instance, in *In re Fitbit, Inc. Stockholder Derivative Litigation*, 2018 WL 6587159 (Del. Ch. Dec. 14, 2018), the court inferred knowledge of the "scope and severity" of product issues where internal communications showed "thousands of customer complaints" and instructed employees to "destroy documents" recounting the issues. *Id.* at *5, *7, *12. Comparing those allegations to the AC's, the Court of Chancery correctly concluded that the AC's "conclusory allegations are more akin to those in *TrueCar*," where the court refused to infer that directors had MNPI regarding the negative impact of the affiliate's website redesign from board materials' references to the desire to "re-energize" a company-affiliate relationship. *Compare* Op. 32-33, *and In re TrueCar, Inc. S'holder Deriv. Litig.*, 2020 WL 5816761, at *14-15, *25-26 (Del. Ch. Sept. 30, 2020), *with* POB 23-24.

Ultimately, Plaintiffs assert that "the 'directors learned about major problems with the integration' before May 8, 2018," POB 21 (quoting Op. 43), hardly the

particularized allegation necessary to support a finding that the Board had MNPI at the time of the 2017 sales.[9]

c. Plaintiffs' Generalized MNPI Arguments Fail

Plaintiffs repeatedly point to a November 2017 preliminary plan listing 60 planned Gander store opening dates for 2018 that was presented to the Board on December 5, 2017 and January 4, 2018 to claim that the integration was "behind schedule." POB 13, 15, 22; *see also* B487-88, B543-44. First, it is impossible to treat the preliminary plan as MNPI for the stock sales *preceding* the Board's receipt of the plan that Plaintiffs address in their Opening Brief. As to later sales, Plaintiffs contend the plan presented "an 'extreme departure' from [] public statements" in early 2018 that projected around 70 stores by May and June (A103, A108-11). POB 15-16. But the plan was dated "as of 11/27/2017," B488, B544, and lined up with CW's November 2017 public projection of about 60 stores total, A099-100. To the extent Plaintiffs ask the Court to conclude the lack of updated internal store-opening schedules somehow proves CW had no plan—and that this constitutes MNPI, they are wrong. That the Board allegedly did not receive up-to-the-minute numbers does not mean CW had no plans to open more than 60 stores, on a revised timeline,

[9] Plaintiffs do not raise on appeal Moody's sales pursuant to his Rule 10b5-1 plans or ML Acquisition's March 15, 2018 sales, and therefore waive any argument as to those sales (which would fail, in any event, A291-98; B2-8) .

months after drafting the preliminary plan. *See In re GoPro, Inc. S'holder Deriv. Litig.*, 2020 WL 2036602, at *13 (Del. Ch. Apr. 28, 2020) (directors not required "to possess detailed information about all aspects of the operation of the enterprise"); *South v. Baker*, 62 A.3d 1, 16 (Del. Ch. 2012) ("day-to-day operational issue[s]" do not require director involvement).

Plaintiffs also contend that CW's "issu[ance]" to the public of "updated exact numbers and timelines" for store openings supports the "materiality of the number[s]." POB 16. But again, the only such "issu[ances]" took place in 2018, *after* the 2017 sales addressed in Plaintiffs' Opening Brief, *id.*, and even then, they were preceded by cautionary disclaimers specifying that this was CW's "plan," A103, A108-09; B617, or provided robust warnings about potential "delays in opening[s]," B621. Plaintiffs ignore that (as the AC alleges) most of CW's public projections—and *all* of those prior to 2018—referred to "goal[s]" and/or ranges, accompanied by cautionary language. A084-85, A087, A091, A098-99; *see also* B280, B444. Regardless, the key question is not "the materiality of the number of store openings," POB 16, but whether the "directors possessed information … that was materially different than existed in the marketplace at the time they traded," *Guttman*, 823 A.2d at 505. As discussed above, the AC does not allege any material difference. *See supra* Section I.C.1.a-b.

Next, Plaintiffs contend that other Defendants learned MNPI from Lemonis and dispute the Court of Chancery's conclusion "that there was no 'reason to impute Lemonis's knowledge [regarding the Gander integration] to Marcus or Cassidy.'" POB 17 (alteration in original) (quoting Op. 25). To start, the Court of Chancery found Plaintiffs failed to allege any MNPI. *See* Op. 25-33. Nor could any such knowledge be imputed as Plaintiffs request: "Delaware law does not permit the wholesale imputation of one director's knowledge to every other," *Wilkin ex rel. Orexigen Therapeutics, Inc. v. Narachi*, 2018 WL 1100372, at *14 n.166 (Del. Ch. Feb. 28, 2018).

In any event, the AC again directly contradicts Plaintiffs' argument. On the one hand, Plaintiffs argue the Board had "several 'detailed discussions'" about Gander, and "routinely received presentations from Lemonis," on Gander, "month-after-month." POB 17-18. On the other hand, the AC alleges the opposite: "[t]hroughout the Gander integration and store opening process the Board was given only brief updates," with "limited information." A070, A141; *see also* A046-47 (alleging Lemonis "institute[d] his [Gander] plan without input from the Board"). Such contradictory allegations demonstrate Plaintiffs failed to plead their allegations with the requisite particularity. Op. 45 (citing *GoPro*, 2020 WL 2036602, at *8).

Moreover, the AC does not support Plaintiffs' assertion that Lemonis must have shared MNPI with the Board because Gander was "of special importance."

POB 18 (citing A043-44 and A063-73, which allege only that CW is one of the nation's "largest RV dealer[s]," and that it purchased Gander assets). The AC does not allege (as Plaintiffs' authorities require) that Gander was CW's "core operation[]" and "drove the Company's bottom line." POB 18-19. To the contrary, Gander was an "ancillary business[]" that CW hoped would "complement" its primary offerings. A081; B251. In sum, Plaintiffs "failed to allege particularized facts that support a reasonable inference that any of [the defendants] possessed [MNPI] when they traded," and the Court of Chancery thus correctly dismissed Plaintiffs' *Brophy* claims. *TrueCar*, 2020 WL 5816761, at *26.[10]

Finally, Plaintiffs' argument—made only in their Summary, and nowhere in the body of the Opening Brief, and therefore waived—that the "standard" the Court of Chancery applied will "discourage stockholders from utilizing Section 220 demands" and "encourage corporations to even further sanitize their books and record," POB 3, ignores that Section 220 nowhere guarantees a well-pled derivative complaint; it affords only a right of inspection, 8 *Del. C.* § 220. Here, CW produced

[10] Nor does Plaintiffs' citation to *Zimmerman v. Braddock*, 2005 WL 2266566 (Del. Ch. Sept. 8, 2005), *rev'd on other grounds*, 906 A.2d 776 (Del. 2006), suggest a different result. First, the *Zimmerman* defendants had previously not contested their interestedness, which the court took into account. *Id.* at *7. And unlike the AC, the *Zimmerman* complaint contained more than "mere cursory allegations of insider trading" and presented particularized facts to allow a reasonable inference that the selling defendants had knowledge of the alleged MNPI. *Id.* at *2, *7-8.

thousands of pages of Board records for inspection; Plaintiffs cite no evidence of wrongdoing because none occurred.

2. Plaintiffs Fail to Allege Scienter

The AC also contains no particularized facts satisfying *Brophy*'s second element—that any Defendant used MNPI improperly by making trades motivated by the substance of the MNPI. *Guttman*, 823 A.2d at 505. As an initial matter, no Defendant could have been motivated to trade based on MNPI, because Plaintiffs failed to plead the existence of any MNPI. *See TrueCar*, 2020 WL 5816761, at *26; *supra* Section I.C.1. Even if they had, the AC would still fail because it does not "well-plead scienter." *Tilden v. Cunningham*, 2018 WL 5307706, at *20 (Del. Ch. Oct. 26, 2018). CW's certificate of incorporation exculpates directors from liability "[t]o the fullest extent" permitted under the Delaware General Corporation Law, B182, meaning that to establish a substantial likelihood of liability on the *Brophy* (or any) claim, Plaintiffs were required to plead "particularized facts that demonstrate that the directors acted with scienter," *Wood*, 953 A.2d at 141.

As they did below, Plaintiffs unsuccessfully assert that the size and timing of the trades alone establish scienter. POB 22-25. These arguments fail.

First, Plaintiffs claim the "sheer size of the trades" satisfies their scienter burden, asserting for the first time in their Opening Brief that the Selling Defendants' "sales proceeds totaled more than $327 million." *Id.* at 23. As a matter of law, the

Court cannot "infer scienter based only on the size of the trades." *Tilden*, 2018 WL 5307706, at *20. Moreover, Moody, Crestview Partners, and ML Acquisition all retained large stakes in CW, countering any inference of scienter based on the trades' size. *See* A301-02 (Moody, Crestview Partners, and ML Acquisition sold 43.4%, 39.9%, and 2.5% of their holdings, respectively, between March 8, 2017 and August 7, 2018); *Guttman*, 823 A.2d at 502 n.20, 503-04 (declining 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").

Plaintiffs' cases do not help their cause. In *Pfeiffer v. Toll*, 989 A.2d 683 (Del. Ch. 2010), the proportion of shares sold was greater than any sales here. *See id.* at 684-85, 689, 692-94 (sales of over 80% of shares). Similarly, the directors in *Silverberg v. Gold*, 2013 WL 6859282 (Del. Ch. Dec. 31, 2013), sold greater percentages (58% and 77%) for the "first time" despite having served on the board "for a combined 17 years." *Id.* at *15.

The Court of Chancery also found that the only pattern in the timing of the trades is that they followed CW's filings and disclosures, Op. 34-35; A299-300, "consistent with the idea that [CW] permitted stock sales in such periods [to] diminish[] the possibility that insiders could exploit outside market buyers," Op. 34-35 (second and third alterations in original); *see also Tilden*, 2018 WL 5307706, at *20. Indeed, "the timing of the [D]efendants' trades is quite disparate," with

Defendants entering into Rule 10b5-1 plans or trading on different dates (the only exception being sales in the October 2017 secondary offering) or selling when underwriters exercised options to buy. *Guttman*, 823 A.2d at 503-04; A299; Op. 35. *Guttman* is on point. *Guttman* rejected the argument that directors' sales of 50% and 100% of their stock, more than any Defendant sold here, created a substantial likelihood of liability where the timing of trades (as here) had "only the common pattern of" following public filings. 823 A.2d at 503-04; A301-02.

Unable to cite any particularized allegations in the AC demonstrating the supposedly suspicious timing of the trades, Plaintiffs assert that the Court of Chancery "ignore[d]" that "the sales were soon after receiving negative information *and* near the relevant period high." POB 25. But Plaintiffs do not cite a single case in support of this stock price theory, nor does it make sense given that Moody sold pursuant to 10b5-1 plans[11] and the other Defendants largely traded on different dates or pursuant to underwriters' options. *See TrueCar*, 2020 WL 5816761, at *25-26 (sales when "stock traded at or near all-time highs" was "not sufficient to support a reasonable inference of scienter"). This is a far cry from *Silverberg*, which Plaintiffs

[11] Rule 10b5-1 plans provide third parties with "exclusive discretion to execute trades under [] pre-determined parameters." *See Laborers' Dist. Council Constr. Indus. Pension Fund v. Bensoussan*, 2016 WL 3407708, at *2, *12 n.70 (Del. Ch. June 14, 2016) (finding that 10b5-1 plan "tend[ed] to exculpate [the director] and the board"), *aff'd*, 155 A.3d 1283 (Del. 2017).

cite, where every challenged sale came "within a day" of the company achieving an "FDA approval milestone." 2013 WL 6859282, at *15.

3. Marcus, Cassidy, and Adams Did Not Sell Stock

Plaintiffs' assertions that Marcus, Cassidy, and Adams can be liable for sales by Crestview Partners and ML Acquisition fail. POB 25-27. Delaware courts infer a personal, material benefit to a director from sales by an affiliated entity only when the director "exercised control" in the form of "voting and dispositive power over" the affiliated entity's stock. *See TrueCar*, 2020 WL 5816761, at *9-10; Op. 23-24. Plaintiffs fail to do so here.

To start, Plaintiffs assert Marcus and Cassidy had the requisite "voting and dispositive control" over Crestview stock only because *together* they comprise one-fifth of Crestview Partners' investment committee. POB 27. But *Zuckerberg* requires evaluating claims on a director-by-director basis, and Plaintiffs cite no case supporting the notion that it would be appropriate to combine two directors' voting authority to reach any conclusion. 262 A.3d at 1059. Nor does the AC allege (with particularity or otherwise) that Marcus and Cassidy were not independent of each other and thus must be considered together, much less anything about their relationship to each other or their voting record at CW or Crestview Partners. Indeed, Plaintiffs allege only that they are both members of Crestview Partners' investment committee, comprised of 10 people. A052-53, A057-58; B168. That is

hardly sufficient to abandon *Zuckerberg*'s director-by-director mandate and treat Marcus and Cassidy as a single individual with dispositive power over Crestview Partners' investment decisions—and Plaintiffs cite no case law suggesting otherwise.

Plaintiffs next insist their "allegations support that [Marcus and Cassidy] were privy to MNPI, shared that information with Crestview, and then Crestview traded on it." POB 27. But Plaintiffs do not cite a single paragraph in the AC to support this assertion, and for good reason—the AC does not allege that Marcus and Cassidy shared any MNPI with Crestview Partners.[12] Indeed, as detailed above, Plaintiffs failed to allege with particularity that there was any MNPI at all. *See supra* Section I.C.1.

As to Adams, Plaintiffs argue only that he "was one of only two owners of ML, and took a financial benefit from these sales," POB 26—ignoring the AC's allegations that (i) Adams is only an indirect owner of ML Acquisition and (ii) Lemonis is the "sole director." A058, A064, A132. Further, the AC does not contain any particularized allegations about what, if any, benefit Adams received from ML

[12] Having no basis to plead this, Plaintiffs allege only that Crestview Partners had "access" to MNPI through Marcus and Cassidy (A057-58) and separately the conclusory statement that Crestview was "in possession" of (unidentified) MNPI (A122).

Acquisition's sales. *See Brophy*, 70 A.2d at 8 (a director is liable only when he "uses his knowledge to *make a profit for himself*").

II. The Court of Chancery Correctly Held that Plaintiffs Failed to Plead with Particularity that a Majority of the Demand Board Faces a Substantial Likelihood of Liability for Alleged Misstatements

A. Question Presented

Did the Court of Chancery correctly hold that Plaintiffs failed to plead with particularity that a majority of the Demand Board faces a substantial likelihood of liability for allegedly making or approving false and misleading statements related to the Gander integration knowingly or in bad faith? A303-06; B746-48.

B. Scope of Review

See supra Section I.B.

C. Merits of the Argument

The Court of Chancery correctly dismissed Plaintiffs' disclosure claims as insufficient to plead demand futility. Specifically, Plaintiffs were required to—but did not—plead with particularity (i) "*which disclosures were misleading*, when the Company was obligated to make disclosures, what specifically the Company was obligated to disclose," and "how the Company failed to do so"; (ii) "that the violation was made *knowingly or in bad faith*," with "allegations regarding what the directors knew and when"; and (iii) "factual allegations that reasonably suggest sufficient board involvement in the *preparation of the disclosures*." *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 132-35 & n.88 (Del. Ch. 2009). Plaintiffs focus on the Audit Committee—Baltins, Cassidy, George, Kosick, and Schickli—

for supposedly having "made, approved, or signed statements falsely stating the amount of stores [CW] would open and misleading the market about the success of the Gander integration." POB 30-34.

At the threshold, because the alleged misstatements mirror the failed MNPI allegations, Plaintiffs did not allege any misstatements or omissions, ending the inquiry. *See supra* Section I.C.1; *see also* A305; B747; Op. 40-44.

The AC also fails to allege facts supporting the notion that any director acted knowingly or in bad faith. "[A] showing of bad faith in the context of demand excusal is a high hurdle, and essentially requires the plaintiff to demonstrate intentional wrongdoing by the board." *McElrath v. Kalanick*, 224 A.3d 982, 993 (Del. 2020); *see also Citigroup*, 964 A.2d at 132, 134 (requiring facts supporting either that "defendants acted in bad faith in not adequately informing themselves" or "had *knowledge* that any disclosures or omissions were false or misleading"); *TrueCar*, 2020 WL 5816761, at *13-19; *supra* Section I.C.1-2. Plaintiffs' allegations that these directors collectively attended meetings, without any facts specific to any particular director, fail. *Citigroup*, 964 A.2d at 134 ("[W]hether the alleged misleading statements or omissions were made with knowledge or in bad faith requires an analysis of the state of mind of the *individual* director defendants.").

Nor did Plaintiffs plead the required particularized "factual allegations that reasonably suggest sufficient Board involvement in the *preparation* of the

disclosures." *Id.*; *see also TrueCar*, 2020 WL 5816761, at *13. It is "not particularized enough" to generically assert that the Audit Committee "reviewed[] and approved" certain public filings. POB 33-34; *Ellis ex rel. AbbVie Inc. v. Gonzalez*, 2018 WL 3360816, at *10 (Del. Ch. July 10, 2018), *aff'd*, 205 A.3d 821 (Del. 2019) (ORDER).

Plaintiffs try to salvage their disclosure claims by citing a single set of minutes from a November 8, 2017 Audit Committee meeting—an argument that Plaintiffs raised below for the first time during oral argument and was therefore "neither pled nor briefed, and so was waived." *Patel v. Duncan*, 2021 WL 4482157, at *21 (Del. Ch. Sept. 30, 2021); *see also Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) (a "party waives an argument by not including it in its brief"), *aff'd*, 840 A.2d 641 (Del. 2003) (ORDER). Regardless, the minutes state only that "[t]he committee reviewed the financial statements and approved the report as presented subject to the comments and changes provided." POB 34 (quoting POB Ex. C 73:3-7). Plaintiffs do not allege any "facts suggesting that the director defendants prepared the [] statements or that they were directly responsible for the misstatements or omissions" but instead "merely allege[] that [CW's] statements contained false statements and material omissions and that the director defendants reviewed the [] statements pursuant to their responsibilities" on the Audit Committee, which is not enough. *Citigroup*, 964 A.2d at 134.

Plaintiffs' case law does not support their position. *Ryan v. Gifford*, 918 A.2d 341, 355-56 (Del. Ch. 2007) concerned options backdating, which the Court concluded alone was sufficient to render demand futile because "[b]ackdating options qualifies as one of those 'rare cases [in which] a transaction may be so egregious on its face that board approval cannot meet the test of business judgment, and a substantial likelihood of director liability therefore exists.'" And *Hughes v. Xiaoming Hu*, 2020 WL 1987029, at *13 (Del. Ch. Apr. 27, 2020) concerned a *Caremark*, rather than disclosure, claim.

III. The Court of Chancery Correctly Held that Plaintiffs Failed to Plead with Particularity that at Least Four Directors Lack Independence from Lemonis

A. Question Presented

Did the Court of Chancery correctly hold that Plaintiffs failed to plead particularized facts or request reasonable inferences demonstrating that at least four directors lack independence from Lemonis? A310-315; B752-60.

B. Scope of Review

See supra Section I.B.

C. Merits of the Argument

"Because Plaintiffs cannot establish any director's interestedness, there is no need to evaluate independence." *In re Alphabet Deriv. S'holder Litig.*, 2022 WL 1045642, at *5 (N.D. Cal. Apr. 7, 2022) (applying Delaware law and citing *Zuckerberg*, 262 A.3d at 1059); *see also Zuckerberg*, 262 A.3d at 1059. Even if this Court reaches the independence question, there is no doubt a majority of the Demand Board could have impartially evaluated a demand.

First, Plaintiffs waived any challenge to Cassidy's, George's, Kosick's, or Marcus's independence from Lemonis. Op. 48. As a result, they limit their argument to Schickli, Baltins, and Moody. POB 35-36. Thus, the Court of Chancery's dismissal of the AC must be affirmed unless Plaintiffs adequately pleaded that *all* of Schickli, Baltins, and Moody lack independence from Lemonis

(assuming this Court, unlike the Court of Chancery, first determines Lemonis faces a substantial likelihood of liability). POB 35-36. If the Court finds any of them independent, it need not reach the others.

"[D]irectors are presumed to be independent." *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 59 (Del. Ch. 2015). To overcome that presumption, a derivative plaintiff must demonstrate that the director was "so beholden to an interested director … that his or her discretion would be sterilized." *Zuckerberg*, 262 A.3d at 1060. In other words, Plaintiffs must show that the director "would be more willing to risk his or her reputation than risk the relationship with the interested director." *Kalanick*, 224 A.3d at 995 n.72. This requires, "at a minimum," that the alleged disabling relationship be "material to the particular defendant whose independence" is challenged. *Friedman v. Dolan*, 2015 WL 4040806, at *6 (Del. Ch. June 30, 2015).

The AC pleads no facts rebutting the presumption of Schickli's, Baltins's, or Moody's independence.

1. Plaintiffs Fail to Rebut Schickli's Presumed Independence

Plaintiffs waived their argument—which the Court of Chancery rejected—that Schickli "lacks independence from Crestview [Partners]" by omitting it from their Opening Brief. A386; *see* Op. 48 n.187. Instead, Plaintiffs bundle two shaky arguments in an attempt to support a "twenty-five year mutually beneficial

relationship" between Lemonis and Schickli that supposedly undermines Schickli's independence from Lemonis. Even when considered together, Plaintiffs' arguments fail.

Plaintiffs first reach back decades, claiming that Schickli's "executive position" "in the early 90s" at CW-related company Good Sam Enterprises, LLC ("Good Sam") makes him beholden to Lemonis. POB 41. As the Court of Chancery recognized, this argument is irrelevant to Schickli's independence from Lemonis because "[o]nly Adams—and not Lemonis—is alleged to have controlled Good Sam when Schickli served in that role from 1993-1995." Op. 50; *see* A044, A135. Schickli's service at an entity unaffiliated with Lemonis nearly 30 years ago creates zero doubt as to his independence from Lemonis: "an outside business relationship [is] insufficient to raise a reasonable doubt that the director lacked independence." *Zuckerberg*, 262 A.3d at 1061; *see also* Op. 50 ("a distant business relationship" is insufficient (quoting *In re MFW S'holders Litig.*, 67 A.3d 496, 514 (Del. Ch. 2013), *aff'd sub nom. Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014))).

Plaintiffs' second argument, that Schickli lacks independence because he has "serv[ed] as a director at [CW] since its founding, and serv[ed] as a director of CWGS Enterprises, LLC ("CWGS") since 2011," POB 41, likewise does not call into question his independence. *See Zuckerberg*, 262 A.3d at 1062-63 (no reasonable doubt as to independence where director was company's "longest-

tenured board member besides Zuckerberg"); *Friedman*, 2015 WL 4040806, at *6-7 ("long-term board service" and "service at other []controlled entities" inadequate to rebut independence presumption). As the Court of Chancery recognized, these allegations are not "bolstered by specifically alleged facts suggesting that these board appointments have been financially material" to Schickli. Op. 49, 50 n.197. It is not enough to assert—without factual support—that Schickli's relationship with Lemonis "has been particularly fruitful for Schickli." POB 42.

Apparently recognizing the frailty of their attacks on Schickli's independence, Plaintiffs claim that the Court of Chancery did "not consider these allegations collectively." *Id.* at 41. This is expressly contradicted by the Court of Chancery's explanation of the analysis it undertook: "[t]he court must consider all the particularized facts pled by the plaintiffs about the relationships between the director and the interested party ***in their totality and not in isolation from each other***." Op. 49. As the Court of Chancery determined, even when considered together, the AC's unsupported allegations create no doubt as to Schickli's independence.

2. Plaintiffs Fail to Rebut Baltins's Presumed Independence

The AC fails to rebut the presumption of Baltins's independence. Plaintiffs contend Baltins lacks independence from Lemonis because CW paid a law firm,[13] in

[13] Kaplan, Strangis & Kaplan, P.A. ("KSK").

which Baltins is an alleged "shareholder," fees of $600,000 total in 2017 and 2018 combined, three years before the AC was filed. POB 42-45; A136-37. But the AC does not allege facts supporting a reasonable inference that the fees were so material to KSK or Baltins as to threaten Baltins's independence, and bare allegations of "financial ties between the interested party and the director, without more, is not disqualifying." *Zuckerberg*, 262 A.3d at 1061-62, 1064 (no reasonable doubt as to directors' independence where company (i) paid $2 million fees to company on whose board director also sat and (ii) had "ongoing and potential future business relationships with" another director's company). In their Opening Brief, Plaintiffs attempt to salvage materiality by claiming KSK is a 10-person firm. POB 42, 44. But Plaintiffs did not allege that in the AC, and it has no place in this Court's analysis. *See Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 255 n.45 (Del. 2019).

In re Limited, Inc., 2002 WL 537692 (Del. Ch. Mar. 27, 2002), is instructive. There, plaintiffs failed to plead the materiality of the payments at issue, or that the director "benefited from any portion of those revenues." *Id.* at *5. The same is true here. Whereas *Limited* concerned an *ongoing*, "$400,000 *annual* revenue" stream, 2002 WL 537692, at *5, here the AC alleges KSK received a *total* of $600,000, and does not allege any payments in the years preceding the AC, A136-37. Plaintiffs' reliance on *In re InfoUSA, Inc. Shareholders Litigation*, 953 A.2d 963 (Del. Ch.

2007) (POB 43-44) is similarly misplaced. InfoUSA paid a law firm (which continued to serve as counsel at the time of suit) over $3 million in the five years preceding the court's ruling, alleged to equate to "one partner's worth of revenue." 953 A.2d at 979, 990-91. Here, the total alleged fees are *five times* less than $3 million and were paid years ago, and there are no allegations regarding average income per partner at KSK or that KSK's representation is ongoing.

Plaintiffs' claims that KSK received "millions in fees" are based on allegations about "business relationships before [Baltins] join[ed] the [B]oard"—specifically, fees Good Sam paid KSK over 10 years ago, POB 43-44—and have no bearing on his independence from Lemonis as of the AC's filing, especially considering the AC contains no allegations regarding Lemonis's relationship to Good Sam at the time. *Beam*, 845 A.2d at 1051. Vague allegations about KSK's representation of Adams Outdoor Advertising, Inc. (of which Adams is the controlling stockholder, A136) over 25 years ago, POB 43, similarly fail.

3. Plaintiffs Fail to Rebut Moody's Presumed Independence

Plaintiffs insist that Moody lacks independence from Lemonis because Moody is compensated by CW for serving as an officer. POB 45-46; *see also* A050-51. But Moody's position at CW only demonstrates his "interests are aligned with [CW]" and thus he "is able to make decisions in the best interests of [CW]." *In re Dow Chem. Co. Deriv. Litig.*, 2010 WL 66769, at *8 (Del. Ch. Jan. 11, 2010).

Moreover, Plaintiffs admit that most of Moody's compensation came from stock awards. *See* A051. Therefore, had Moody faced a litigation demand, he would have acted as an "economically rational individual whose priority [was] to protect the value of his [CW] shares." *See In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 356 (Del. Ch. 1998), *rev'd on other grounds sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

Plaintiffs also improperly add a new allegation on appeal: that "Moody serves at the whim of Lemonis." POB 45. Plaintiffs do not cite the AC for support for that allegation, and it is not true: under CW's Bylaws, "each officer shall be chosen by the Board" and may only "be removed … by the Board." B784-85.

4. Plaintiffs Fail to Plead Lemonis's "History of Dominance" Undermined the Demand Board's Presumed Independence

Failing the required director-by-director independence analysis, Plaintiffs rely on generic arguments about Lemonis's alleged "dominance" of the Demand Board, but Plaintiffs provide no particularized allegations bearing on its independence.

Plaintiffs insist that Schickli, Baltins, and Moody are Lemonis's "loyal 'go to' individuals." POB 38. In *Zuckerberg*, this Court rejected a similar argument even where the director was the "longest-tenured board member" (other than the alleged controller), the controller's "close friend and mentor," and retained his board seat despite involvement in two scandals. 262 A.3d at 1063. Here, the most Plaintiffs can muster is that these directors have served in positions at various entities within

CWGS, and Schickli was appointed to CW's Board by ML Acquisition. POB 38-40. That is insufficient. *See Beam*, 845 A.2d at 1050-52 (allegations that directors "move in the same business … circles" cannot overcome the presumption of independence); *Friedman*, 2015 WL 4040806, at *6-7; *Dow*, 2010 WL 66769, at *9 (no reasonable doubt as to independence where director played a role in nominating another director). Plaintiffs' case law does not suggest otherwise. In *In re BGC Partners, Inc. Derivative Litigation*, the fact that a director was an alleged controller's "go-to choice[]" for board appointments could "not overcome the presumption of independence" without (*inter alia*) "specifically alleged facts"—absent here—"suggesting that the[] board appointments [were] financially material" to the director. 2019 WL 4745121, at *12, *15 (Del. Ch. Sept. 30, 2019). And *In re Tesla Motors, Inc. Shareholder Litigation* is inapposite as it applied the Rule 12(b)(6) standard to far more concrete allegations than those here. *See* 2018 WL 1560293, at *12, *17 (Del. Ch. Mar. 28, 2018) (explaining that "Musk gift[ed] [the director] the first Tesla Model S and the Second Tesla Model X ever made," and director's venture capital firm owned large stake in target company in challenged transaction).

Noting that Lemonis "can sell equity into the market without any reduction in voting power," Plaintiffs cite *Friedman v. Beningson*, 1995 WL 716762 (Del. Ch. Dec. 4, 1995), to assert that a "confluence of voting control with directoral and

official decision making authority" is "consistent with control of the board." POB 37-38. But *Beningson* specifies that is "*not itself sufficient* … to support a conclusion of reasonable doubt" as to the Board's independence. 1995 WL 716762, at *5. Similarly, the notion that Lemonis is the "face" of CW and "an influential figure in business world [sic]" does not clear the hurdle, POB 37-38, as Plaintiffs' cited case explains. *Tesla*, 2018 WL 1560293, at *15 & n.231 (fact that "Musk is the 'face of Tesla'" with a reputation "as a visionary business leader" was "not dispositive of the controller question"); *see also In re Tesla Motors, Inc. S'holder Litig.*, 2022 WL 1237185, at *37 (Del. Ch. Apr. 27, 2022) (finding in later opinion that "[t]he Tesla Board [w]as [n]ot '[d]ominated by" alleged controller).

Next, Plaintiffs argue that the Demand Board has a "history of subservience to Lemonis" because he supposedly acts "without Board oversight" and "caused [CW] to buy products and services" from companies in which he has an interest. POB 39-40. But Plaintiffs declined to appeal dismissal of their lack-of-oversight claims, Op. 44-48, and conspicuously absent from the AC are any allegations that these transactions harmed CW or represented bad value for CW (let alone that they were material). *See, e.g.*, *Vaxart*, 2021 WL 5858696, at *18 (allegation that entity "was a controller because it obtained" a benefit "on favorable terms" insufficient).

Plaintiffs' remaining arguments, POB 37, fail. Unsubstantiated allegations from *an unrelated lawsuit* the AC never mentioned are irrelevant to independence,

but the Court need not reach that question because they cannot be accepted as true, in any event. *See Sheldon v. Pinto Tech. Ventures, L.P.*, 2019 WL 336985, at *6 n.76 (Del. Ch. Jan. 25, 2019), *aff'd*, 220 A.3d 245 (Del. 2019). Plaintiffs also claim Lemonis "bragged that he keeps information from others to 'sucker punch' them." This out-of-context quote refers to "holding all my cards so I can sucker punch my *competitor*." A119. Plaintiffs fail to explain how keeping information from competitors shows dominance over the Demand Board.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court of Chancery's decision be affirmed.

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