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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GRACE BROTHERS, LTD. and BANC OF AMERICA SECURITIES, LLC, Plaintiffs, v. UNIHOLDING CORPORATION, UNILABS GROUP LIMITED, UNILABS HOLDINGS SA, EDGARD ZWIRN, ENRICO GHERARDI, ALESSANDRA VAN GEMERDEN, TOBIAS FENSTER, DANIEL REGOLATTI, PI ERRE-ALAIN BLUM, and BRUNO ADAM, Defendants.	)	Civil Action No. 17612

MEMORANDUM OPINION

Date Submitted: June 13, 2000
Date Decided: July 12, 2000

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STRINE, Vice **Chancellor**

Plaintiffs Grace Brothers, Ltd. and Banc of America Securities, LLC are institutional investors who own stock in UniHolding Corporation ("UniHolding"). They have filed suit against, among others, the directors of UniHolding (the "defendant-directors") and UniHolding's largest stockholder, Unilabs Holdings, SA ("Unilabs"). The plaintiffs allege that the defendants breached their fiduciary duties to UniHolding's non-controlling stockholders (the "Minority Stockholders") by allowing UniHolding's wholly-owned subsidiary, Unilabs Group Limited ("UGL"), to assume control over UniHolding's primary asset, its 54% stake in Unilabs, SA ("ULSA"), which is a clinical laboratory services company operating in Europe.

The defendants are alleged to have effected this scheme by causing UGL to issue to Unilabs and other Unilabs affiliates a controlling block of UGL stock in exchange for their UniHolding shares. This swap transformed UGL's parent, UniHolding, into its powerless child and, together with other transactions, left UniHolding with no assets other than its now-minority interest in UGL.

By virtue of these actions, the plaintiffs allege, the defendant-directors have served Unilabs' and their own personal interests in controlling ULSA through UGL, a British Virgin Islands ("BVI") corporation whose shares are

not listed on any stock exchange. Because UGL would afford the Minority Stockholders with no liquidity and substantially reduced informational rights, the defendants allegedly knew that the Minority Stockholders would have little interest in holding UGL shares. Not only that, afer the swap the defendant-directors allowed UniHolding to default on its federal securities law disclosures, leading to the company's delisting. These actions, the plaintiffs say, caused UniHolding stockholders to find themselves with delisted stock that is valued at one-sixth of its worth in 1997, even though its former controlled subsidiary, ULSA, is prospering.

The defendant--directors' have moved to dismiss the complaint for, among other reasons, failure to make a demand on the UniHolding board and for failure to state a. claim for breach of fiduciary duty.

In this opinion, I conclude that: (1) demand is excused because a majority of the UniHolding board was either interested in the transactions challenged in the complaint or beholden to other directors who were; and (2) the complaint states a claim that the UniHolding directors purposely effected transactions to benefit Unilabs and its affiliate stockholders at the expense of UniHolding's Minority Stockholders. In the latter respect, I

[1] Throughout this opinion I refer at times to the moving defendant-directors simply as "defendants" where their status as directors IS u-relevant.

conclude that the complaint states a claim for breach of fiduciary duty irrespective of whether the: UniHolding board decided to implement the challenged transactions in major part through actions by its wholly-owned subsidiary, UGL. Directors of a parent board can breach their duty of loyalty if they purposely cause -- or knowingly fail to make efforts to stop -- action by a wholly-owned subsidiary that is adverse to the interests of the parent corporation and its stockholders. As a result, I deny the defendants' motion to dismiss, except as to plaintiffs' duty of care claims, which are barred by the exculpatory provision of UniHolding's certificate of incorporation.

I. Factual Background

A. The Plaintiffs

Plaintiffs Grace Brothers and Banc of America control, respectively, 457,187 and 232,494 shares of nominal defendant UniHolding Corporation.

B. The Corporate Defendants

Nominal defendant UniHolding Corporation is a Delaware corporation.

Defendant UGL is a BVI corporation that was formerly a wholly-owned subsidiary of UniHolding.

Defendant Unilabs is Panamanian corporation that was the largest stockholder of UniHolding and is now the largest stockholder of UGL. Panama Holdings is wholly-owned by Swiss Holdings, a Swiss Corporation. For simplicity's sake, I generally refer to both Swiss Holdings and Unilabs as "Unilabs" in this opinion.

C. The Ownership Structure Of UniHolding Before The Challenged Transactions

Resolution of this motion requires an understanding of the profound difference between UniHolding's status as of the time the plaintiffs became stockholders in January 1997 and its status after the transactions challenged in the complaint (the "Challenged Transactions").

In January 1997, the plaintiffs and certain other institutional investors became common stockholders of UniHolding. At that time, UniHolding stock traded on the NASDAQ Small Cap Market. UniHolding's business consisted of providing clinical laboratory testing services to physicians, managed care organizations, hospitals, and other health care providers. UniHolding itself had no operations but conducted all of its business through subsidiaries. Its clinical. laboratory business was operated by ULSA, a Swiss (corporation that had laboratories throughout continental Europe.

UniHolding controlled ULSA through its ownership of 54% of ULSA's stock. The rest of ULSA's stock was publicly traded. Although

UniHolding's interest in ULSA was its most important asset, UniHolding also owned a wholly-owned subsidiary, Global Unilabs Clinical Trials, Ltd. ("GUCT"), which performed testing for the pharmaceutical industry.

In the beginning of 11997, UniHolding was, for all practical purposes, controlled by Unilabs and stockholders who had affiliations with it. Before the Challenged Transactions were undertaken, Unilabs owned 4 1.6 % of UniHolding's outstanding shares, and the Chairman of the board of Unilabs, defendant Edgar Zwirn, was also Chairman of UniHolding's board of directors. When the UniHolding shares Zwirn controlled through Unilabs are aggregated with those of the other defendant-directors, the UniHolding directors controlled over 50% of the company's issued and outstanding voting common stock.

D. The UniHolding Board Of Directors

The plaintiffs contend that a majority of the UniHolding board of directors is bound together by their ties to the company's Chairman, defendant Zwirn. Those ties, plaintiffs say, contributed to what the plaintiffs argue was a course of conduct designed to benefit Zwirn personally to the detriment of the Minority Stockholders of UniHolding.

The alleged ties depend to a large extent on Zwirn's own multiple roles at corporations affiliated with UniHolding. At all relevant times,

Zwirn served as the Chaimnan of the Board of Unilabs and of its parent, Swiss Holdings. Through Unilabs, Swiss Holdings owned 41.6% of UniHolding's voting stock. Zwirn and his family own 23.3% of Swiss Holdings.

Zwirn's managerial authority extended down to all of UniHolding's subsidiaries. Thus he was the Chairman of the boards of UGL, GUCT, and ULSA as well as of other direct or indirect UniHolding subsidiaries.

Defendant Enrico Gherardi was director and secretary of UniHolding. He owned nearly 250,000 UniHolding shares, or approximately 4.6% of the company's stock. In addition, Gherardi served as a director of ULSA, and the plaintiffs believe that he (and/or defendant van Gemerden) also served on the UGL board, The complaint also alleges that a company affiliated with Gherardi received over $1.6 million in unspecified consulting fees from ULSA during the years 1997 to 1999 and that GUCT also paid a Gherardi-affiliated company $300,000 in fees annually during that period.

Defendant Alessandra van Gemerden was a director of UniHolding and GUCT as well as of two other UniHolding subsidiaries. She owned over 490,000 UniHolding shares, or approximately 8.2% of the company's stock. Van Gemerden is defendant Gherardi's niece and is affiliated with

the same businesses that received over $2.5 million in unspecified consulting fees from ULSA and GUCT during years 1997 to 1999.'

Defendant Tobias Fenster was at all relevant tirnes a director of UniHolding and GUCT as well as of two other UniHolding subsidiaries. Most important for present purposes is the fact that Fenster is Zwirn's brother-in-law and serves as the Chief Executive Officer of United Laboratories Espana, SA ("ULSP"), ULSA's Spanish subsidiary.

Finally, defendants Daniel Regolatti and Pierre-.Alain Blum were at all relevant times directors of UniHolding and ULSA.

According to the plaintiffs, none of the defendant-directors would have held their directorships and offices or received other related benefits but for the beneficence of Zwirn. Thus the plaintiffs argue that none of the defendant-directors was capable of exercising a business judgment adverse to Zwirn's personal interests and that all of them lacked independence as a consequence.

E. ULSA Is Listed On The Swiss Stock Exchange

In April 199'7, ULSA's stock became listed on the Swiss Exchange. According to the plaintiffs., this event is important because it led the defendant-directors, particularly Zwirn, to question UniHolding's continued

[2] I infer this from the fact that the amounts, timing, and sources of the payments are identical.

utility to them. As a Swiss corporation, Swiss Holdings may have seen little need to continue to hold its Unilabs control block in ULSA through a publicly traded U.S. corporation, UniHolding, when ULSA shares were now freely tradable on a European exchange.

F. UniHolding Announces Its Intent To Merge Into UGL

In August of 1997, UniHolding announced that its board of directors had approved the concept of merging the company into its UGL subsidiary. The stated purpose of the merger was to streamline the corporate structure of UniHolding and its subsidiaries.

G. The UniHolding Board Abandons The Merger And Sits By While Its Wholly-Owned Subsidiary Turns Itself Into UniHolding's Parent Corporation

The plaintiffs allege that the defendant directors in effect decided to implement a strategy that would provide Unilabs with the benefits of the proposed merger but relieve it from shouldering the burden of fair treatment of the Minority Stockholders that would be demanded in a merger. That alleged strategy had several components, which I now describe.

1. GUCT Is Spun-Off To The UniHolding Stockholders

In January 1998, UniHolding's board approved a spin-off of GUCT to UniHolding's stockholders (the "Spin-Off"). In the Spin-Off, UniHolding shareholders received a *pro rata* share of 7.9 million shares of GUCT

common stock. But UniHolding retained non-voting GUCT preferred stock valued at $20 million on a historical cost basis, which it then transferred to its wholly-owned UGL subsidiary. UniHolding recorded a net loss of $2.8 million on the transaction.

Because GUCT stock had not been traded publ-icly prior to the Spin-Off, the UniHolding board assured its stockholders that GUCT would file a registration statement with the Securities and Exchange Commission after the Spin-Off and thereafter issue public disclosures in accordance with federal law. To date, GUCT has not done so, and its stock is not listed or traded on any public exchange.

2. The Child Takes Over The Parent:
UGL Assumes Control Of UniHolding

'The most important transaction the plaintiffs attack was the culmination of a year's worth of effort. In April of 1998, UniHolding announced that its 100% child had — supposedly without the involvement of UniHolding's board — become UniHolding's 60% percent parent:

> On April 24, 1998 the Registrant's subsidiary, Unilabs Group Limited ("UGL") issued 3,156,700 new shares of its common stock in exchange for the same number of shares of common stock of the Registrant [UniHolding]. *The newly-issued UGL shares were issued to Unilabs Holdings SA and its affiliates* and certain European institutional investors in exchange for shares of Registrant on a one-for-one basis. As a result of these

> transactions;, UGL now directly holds approximately 3.9 million shares (60%) of the Registrant.[3]

In another disclosure, UGL described the purpose for the stock swap (the Initial Swap") the following way:

> *[Unilabs]* ***h****oldings and its affiliates* and certain European institutional. investors transferred their shares of the Issuer for the same number of UGL Shares because they preferred holding their investments through a British Virgin Islands entity (such as UGL) rather than a Delaware corporation (such as the Issuer). While the undersigned reporting persons have not solicited -nor made any offer for additional transfers, they at present do not intend to oppose any effort by other shareholders of the Issuer to transfer their shares in consideration for UGL Shares of the same one-for-one basis.
>
> UGL also plans to investigate the quoting or listing of the UGL Shares on various markets. Depending upon the progress with respect to such markets, there could be further developments and transactions involving UGL and the Issuer.[4]

Defendants Zwim, Gherardi, and van Gemerden exchanged the UniHolding shares they controlled for UGL shares in the Initial Swap. The Initial Swap left UniHolding's remaining stockholders as the owners of a publicly traded Delaware subsidiary of a non-publicly traded BVI corporation, the majority owner of which was Unilabs.

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[3] Second Amended Complaint ¶ 43, at 8 (hereinafter "Complaint") (*quoting* Form 8-K dated April 24, 1998) (brackets in original; emphasis added).

[4] Compl. ¶ 45, at 9 (*quoting* Amended Schedule 13-D dated Apr. 24, 1998) (emphasis added; quotations omitted).

This situation did not persist, however, because the Initial Swap was rescinded. Then, on October 29, 1998, UniHolding once again announced its ongoing evaluation of a possible merger with UGL:

> On August 8, 1997, the Company announced its intention to merge Uni Holding into its wholly-owned subsidiary, UGL, with a view toward streamlining the corporate structure. The proposed merger was and is subject to shareholder and regulatory approvals. In the fourth quarter of fiscal 1998, a major shareholder, Unilabs Holdings SA, a Panama corporation ("Holdings,") reported the contribution to UGL of approximately 3.1 million shares of UniHolding common stock in exchange for the same number of shares of LJGL common stock. However, this was rescinded. Accordingly, at present UGL rernains a wholly-owned subsidiary of UniHolding. The Company is now continuing to examine the feasibility of the proposed merger with UGL.[5]

Yet approximately five months later, UniHolding announced that, rather than merging with its wholly-owned subsidiary UGL, UniHolding had once again been acquired by its corporate child. Specifically, UniHolding announced that Unilabs and certain other members of a "controlling group" had swapped their UniHolding shares to UGL in exchange for UGL shares (the "Swap"). The disclosure issued by UniHolding warrants careful consideration in view of its emphasis on the fact that the Swap was performed to benefit "a controlling group" and the fact that UniHolding

[5] Compl. ¶ SO, at 10

UGL's parent corporation — was supposedly informed of the Swap after it had already occurred:

> *Unilabs' European founders had until recently held their controlling stake through a holding company, Unilabs Group Limited, itself owned by UniHolding Corporation, a US, Nasdaq-listed, corporation. With a view to simplify the group's shareholding structure and avoid any subsequent confusion with this US corporation's activities, the founders of Swiss-based [ULSA] now hold their majority stake directly through Unilabs Group Limited.*
>
> *As summarized in the above [ULSA] press release, the Board of Directors of UniHolding was* ***informed*** *by its subsidiary Unilabs Group Limited* (a British Virgin Islands corporation, "UGL"), that UGL has reached a definitive agreement with Unilabs Holdings SA (a Panama corporation, "Holdings") on [Unilabs'] own behalf and on behalf of affiliates of [Unilabs]. Under such agreement, UGL has agreed to issue to [Unilabs] approximately 2.8 million newly-issued shares of UGL common stock for a consideration consisting of approximately 2.8 million shares of UniHolding common stock. Prior to the transaction, [Unilabs] was the single largest shareholder of UniHolding. *According to UGL, the purpose of the transaction was to enable the controlling group, which includes the group founders, to simplify the structure of their holdings* without necessarily proceeding with a more massive restructuring entailing for example the liquidation of UniHolding; a restructuring which might not have been in the best interest of the companies and all their shareholders, while, according to UGL the described transaction was made with a view to preserve the interests of the minority shareholders."

UniHolding's public disclosures further explained:

> On February 2.5, 1999, the Registrant's subsidiary, Unilabs Group Limited ("UGL") issued approximately 2.8 million new

[6] Compl. ¶ 52, at 10-l 1 (*quoting* Press release dated March 2, 1999) (emphases added).

> shares of its common stock in exchange for the same number of shares of common stock of the Registrant. The newly-issued UGL shares were issued to *Unilabs Holdings SA and its affiliates* in. exchange for shares of the Registrant on a one-for-one basis. As a result of these transactions, UGL now directly holds approximately 4.7 million shares (60%) of the Registrant. The Registrant continues to hold 2.5 million shares of UGL, the initial amount of UGL shares issued and outstanding when the Registrant owned 100% of UGL.[7]

Thus as a result of the Swap, UniHolding became a subsidiary of UGL -- which now controlled 73.4% of UniHolding's stock — but retained a 43% interest in UGL. In turn, Unilabs — whose Chairman Zwim was Chairman of both UniHolding and UGL — became UGL's majority stockholder. Gherardi and van Gemerden also participated in the Swap, and it is plausible to infer for purposes of this motion that they were an integral part of the "controlling group" of "Unilabs and its affiliates" referred to in UniHolding's public disclosures. Therefore, I hereinafter refer to Unilabs, Zwirn, Gherardi, and van Gemerden collectively as the "Controlling Group,"

Given their participation as part of the Controlling Group in the Initial Swap and the ultimate Swap, the plaintiffs allege that Zwirn, Gherardi, and van Gemerden (and the other members of the UniHolding board) were deeply involved in planning and implementing the Swap. Despite the involvement of UniHolding's board, the plaintiffs aver, UniHolding never

[7] Compl. ¶ 54, at 11 (quoting Form 8-K dated March 12, 1999) (emphasis added).

disclosed any information that the Swap was being considered until after the Swap had already transpired. Moreover, the plaintiffs contend that the defendant-directors, as the board members of UGL's 100% owner, clearly had the authority to stop the Swap from occurring but did not do so.

3. UniHolding Exchanges A Block Of Its UGL Shares For UniHolding Shares Held By UGL

After the Swap was announced, UniHolding received complaints about the Swap from several of the Minority Stockholders, who included the plaintiffs and the Mutual European Fund (through its agent, Franklin Mutual Advisers, Inc.), as well as accompanying demands for books and records pursuant to 8 Del. C. § 220. Before its complaint could. be resolved, Mutual European Fund sold its UniHolding shares for $2.00 each. The plaintiffs suspect that members of the Controlling Group or their affiliates purchased the Mutual European shares but cannot verify this suspicion because the buyer did not file the required Schedule 13-D after acquiring the shares.

After the demands were received, the UniHolding board convened a June 16, 1999 board meeting. The minutes of the meeting, which are attached to the complaint, have a surreal quality. They indicate that Zwirn explained to his fellow UniHolding directors (two others of whom had participated directly in the Swap) why the UGL board had engaged in a transaction whereby UGL became its owner's parent. In particular, Zwirn

referred the board to a. June 7, 1999 UGL memorandum (the "UGL Memo"), described in greater detail below, which discusses the Swap and the reasons behind it. Although redacted in large part, the minutes reflect the board's awareness of the Minority Stockholders unhappiness with the Swap.

In September o f 1999, the UniHolding board approved a proposal made in the UGL Memo. The UGL Memo indicated that the IJGL and UniHolding boards had reached an "agreement in principle" about this proposal before the June 16, 1999 board meeting.* The proposal was designed to dampen the ire of UniHolding's Minority Stockholders through an exchange of shares that would eliminate UGL as a stockholder of UniHolding (the "Exchange"). In exchange for 430,000 shares of UGL stock, UniHolding was to receive all of the over 5.85 million UniHolding shares owned by UGL. After the Exchange, UniHolding was expected to cancel the shares rather than keep them as treasury stock.

The defendants allege that the purpose of the Exchange was to protect UniHolding's remaining stockholders from having their attributed interest in ULSA diluted as a result of the Swap. The Exchange did so by reducing UGL's ownership in UniHolding from 73.4% to zero, thus restoring the indirect proportionate interest of UniHolding's remaining stockholders in

[8] Compl. Ex. C at U0045

ULSA approximately to the level that existed before the Swap. The Exchange also had the effect of slightly reducing UniHolding's position in IJGL from 43% to 37%. In the end, the plaintiffs, along, with another Minority Stockholder, Morgan Stanley, became the owners of over 52% of UniHolding.[9]

4. The UGL Memo Explaining the "Restructuring"

The plaintiffs attached to the complaint a copy of the June 1999 UGL Memo regarding the Swap and the Exchange. According to the UGL Memo,, the Swap was inspired by the European UniHolding stockholders' desire to get rid of the undue cost associated with holding their indirect investment in ULSA through a publicly listed and traded American corporation. More specifically, the UGL Memo indicates that UniHolding had failed to develop a good market for its stock, despite the company's efforts to obtain get analysts to follow the stock and appreciate the strong performance of the ULSA subsidiary. Indeed, the UGL Memo asserts that analysts themselves had complained about UniHolding's unwieldy structure,

[9] According to defendants, this means that demand should be required because plaintiffs, if they act concertedly with Morgan Stanley, can elect a new board. But the UniHolding certificate provides for a classified board so that such a change can only occur over a two year period; moreover, I decline to adopt the innovation that stockholders who wish to brmg a derivative suit must take steps to unseat the board as opposed to simply satisfying the traditional tests that neasurc demand futility.

blaming this corporate structure for the failure of UniHolding's stock price to thrive

Thus Unilabs "and certain other non-US stockholders of UniHolding" decided "to hold their shares at the UGL rather than UniHolding, level.""" The UGL Memo asserts that these stockholders offered the plaintiffs and other American institutional holders the opportunity to do the same but that those stockholders had declined to do so. Nevertheless, the UGL Memo stated, UniHolding was "free to maintain" its status as a publicly listed and traded corporation "at its own expenses [sic] if its board and shareholders determine that it is in their best interests."] [1]

H. UniHolding Is Delisted For Failure To Comply With Its Securities Law Responsibilities And Is Forced To Hock Its Assets To UGL

During 1998 and 1999, the UniHolding board repeatedly ignored SEC filing deadlines. As a final consequence of these failures, the SEC delisted UniHolding on Septernber 17, 1999.

The delisting was accompanied by UniHolding's inability to fund its limited operations, After the Spin-Off and the Swap, UniHolding's only assets were its stock in UGL and certain non-trading assets that UniHolding

[10] *Id.* at UOOO8

[11] Id

later sold to UGL for $10,000. The sale of the non-trading assets in June of 1999 was based on a five-year-old book value.

Consistent with the UGL Memo, UniHolding board minutes from June 1999 reflect Zwirn's view that UniHolding vvould have to meet all of its obligations itself. Even though UGL was at that time UniHolding's majority stockholder, Zwirn told his fellow UniHolding directors at the June 16, 1999 board meeting that "[i]n view of the new relationship between UGL and [UniHolding], he felt that, contrary to what happened previously, UGL would no longer make financial resources available to [UniHolding], and it was necessary to arrange for bridge financing . . . ."[12]

As a result, the UniHolding board entered into a loan agreement with its former wholly-owned subsidiary, whereby UniHolding would pledge 320,000 of its 430,000 UGL shares in exchange for a $500,000 loan. This loan was procured in part to help UniHolding defend against the § 220 actions brought by the plaintiffs.

1. The Stock Price Of UniHolding Plummets

From the time the plaintiffs acquired their UniHolding shares in January 1997 until its shares were delisted in September 1999, UniHolding's stock price fell from $12 per share to $2.00 per share. During the time the

[12] *Id.* at U0004.

-plaintiffs have been stockholders, UniHolding has never paid a dividend. UniHolding stock currently has no market price and does not, for all practical purposes, trade.

By contrast, ULSA has apparently done extremely well during the same period and has paid substantial dividends to its stockholders. Yet, according to the complaint, none of these dividends have been upstreamed to UniHolding's stockholders through that company by way of UGL.

II. Legal Analysis

The defendants argue that the complaint must be dismissed for several reasons. I turn to the defendants' first two arguments now, applying the familiar standards that must be used under Court of Chancery Rules 23.1 [13] and 12(b)(6).'"

A. Must The Complaint Be Dismissed For Failure To Plead Facts Excusing Demand On The UniHolding Board?

The defendants contend that the claims raised by the plaintiffs are solely derivative in nature. As a result, defendants assert, the complaint

[13] In considering the defendants' motion to dismiss under Rule 23.1, the well-pleaded allegations of the derivative complaint must be accepted as true, but conclusory allegations will not be. *Grobow v. Perot*, Del. Supr., 539 A.2d 180, 187 (1988).

[14] On a motion to dismiss, the well-pleaded allegations of the complaint will be accepted as true, but mere conclusory allegations will not be. E.g., *In re Tri-Star Pictures Litig., Inc.*, Del. Supr., 634 A.2d 3 19, 326 (1993). If, after doing so and drawing all reasonable inferences in favor of the plaintiffs, the court IS convinced that there is no basis for a recovery by the plaintiffs, the court must grant the motion to dismiss. *Id.*

must be dismissed unless the plaintiffs have satisfied the *Aronson* v. *Lewis*[15] test for demand excusal. That test requires a derivative plaintiff to plead particularized facts that create a reasonable doubt as to whether: (1) a majority of the UniHolding directors are disinterested and independent; or (2) the Challenged Transactions were valid exercises of business judgment by the UniHolding board of directors." The defendants argue that the complaint fails to satisfy either prong of *Aronson* and therefore must be dismissed. I now turn to the first prong of *Aronson*.

The defendants assert that the UniHolding board is comprised of wholly disinterested and independent directors. According to the defendants, none of the UniHolding directors had a financial interest in effecting a reorganization of UniHolding that would prefer the interests of the Controlling Group affiliates over the interests of the Minority Stockholders. Nor, defendants assert, does the complaint plead facts from which one can infer that any of the other UniHolding directors could not exercise their business judgment independently of defendant Zwirn. By contrast, the plaintiffs argue that every member of the UniHolding board

[15] *Aronson v. Lewis*, Del. Supr., 473 A.2d 805 (1984).

[16] *Id.*, 473 A.2d at 814-15.

either was interested in the challenged transactions or was so beholden to Zwirn as to lack independence.

After carefully examining the allegations of the complaint, I conclude that the plaintiffs have pled particularized facts that create a reasonable doubt about the impartiality of four of the six UniHolding directors: Zwirn, Gherardi, van Gemerden, and Fenster. As a result, demand is excused.

As to defendant Zwirn, the complaint alleges facts that support the inference that Zwirn is the dominant player in Unilabs, which controlled 41.6% of UniHolding's stock at the inception of the Challenged Transactions.[17] In view of Zwirn's position as Chairman of UniHolding, UGL, and USLA, it is also reasonable to infer that Unilabs had effectively used its position in UniHolding to ensure that its leader, Zwirn, would be the k ey executive at all the downstream businesses. Moreover, the attachments to the complaint support this and suggest that Unilabs was the driving force behind the creation and operation of ULSA from the beginning. Moreover, Unilabs appears to have only relinquished equity to the extent necessary to

[17] *Friedman v. Beningson*, Del. Ch., C.A. No. 12232, 1995 Del. Ch. LEXIS 154, at *13, Allen, C. (Dec. 4, 1995) (where director controlled 36% of the company's stock and served as its highest ranking officer, the "confluence of voting control with directoral and official decision making authority is quite consistent with control of the board") (internal citation omitted), *appeal denied*, Del. Supr., 676 A.2d 900 (1996), *reported in full*, 1996 Del. LEXIS 11 (Jan. 10, 1996).

raise capital and to have taken great care to ensure that it would not give up effective control over ULSA.

The complaint also alleges that Zwirn orchestrated the Challenged Transactions and directed the other UniHolding board members to assent.[18] These allegations are buttressed by pled facts and documents incorporated into the complaint indicating Zwirn's central role in the Challenged Transactions.'"

'Taken together, these facts create a reasonable doubt about Zwirn's disinterest. Underlying this doubt is the fact that UniHolding had the option of restructuring through a merger in which it would have had to ensure that the Minority Stockholders received fair consideration or through a distribution of its controlling interest in ULSA directly to its stockholders on a *pro rata* basis. Instead, UniHolding chose to effect a transaction that enabled the Controlling Group to continue to use the Minority S to&holders equity to help them exercise firm majority control over ULSA while

[18] Compl. ¶ 56 ("Defendant Zwirn orchestrated the February 2.5, 1999 Stock Swap and, upon information and belief, other members of the UniHolding Board of Directors were intimately Involved in the formulation and implementation of the 'two-step' restructuring of UniHolding and its formerly wholly-owned subsidiary, UGL.); *id.* ¶ 127 ("Defendant Zwirn directed the Director Defendants to endorse the February 25, 1999 Stock Swap, to consent to the September 3, 1999 stock exchange as the final step to the restructuring of UniHolding and UGL, and to engage in the related Corporate Transactions at issue.").

[19] *See Heineman v.* Data *Point* Corp., Del. Supr., 611 A.2d 950, 955 (1992) (to raise a doubt about a board's ability to act independently of a controlling stockholder, a plaintiff must advance particularized allegations from which it can be inferred that the board members who approved the transaction are acting at the direction of the allegedly dominating individual or entity).

decreasing the Minority Shareholders' liquidity and informational rights. It is thus implausible that Zwirn — who indirectly owns over 23% of Unilabs — had no financial interest in the Challenged Transactions. As a result, the plaintiffs have established a reasonable doubt as to his ability to give impartial cons-ideration to a demand.

The complaint also pleads particularized facts that create reasonable doubt about the ability of defendants Gherardi and van Gemerden to impartially consider a demand. Gherardi is van Gemerden's uncle. Between the two of them, they owned nearly 13% of UniHolding before the Challenged Transactions. They subsequently converted their UniHolding shares into UGL stock in the Swap. In addition, Gherardi serves on the ULSA board, and van Gemerden served on the boards of two other UniHolding subsidiaries.'" According to the documents quoted above that were attached to the complaint, the Swap was effected at the instance of the '"controlling group" of Unilabs "and its affiliates." As stated previously, it is reasonable to infer at this pleading stage that Gherardi and van Gemerden were part of this "controlling group" of "affiliates" of Unilabs.

[20] The complaint suggests that one or both also served on the UGL board, but whether that is true or not would not change the outcome of this motion.

The basis for this inference is strengthened lby the fact that, according to UniHolding public disclosures, a company affiliated with Gherardi and van Gemerden received "'unspecified consulting fees" from GUCT and ULSA of over $2.5 million during the period 1997 to 1999.[21] Although the defendants fault the plaintiffs for not detailing the nature of these fees or Gherardi's and van Gemerclen's precise affiliations with the company receiving these fees, it seems to me reasonable to infer that UniHolding (whose approach to disclosure compliance allegedly is otherwise less than exemplary) would not have disclosed these substantial fees if Gherardi's and van Gemerden's affiliation to the recipient company was immaterial to them. Thus 1 conclude that Gherardi and van Gemerden were "'interested" in the Challenged Transactions.

The fact that Gherardi's and van Gemerden's involvement in the Unilabs' family of companies was so extensive and apparently lucrative also creates a reasonable doubt about their ability to act adversely to Zwim's interests. Zwim is clearly positioned to exert substantial influence over decisions regarding Gherardi's and van Gemerden's roles at and

[21] Compl. ¶¶ 8 1, 86.

remuneration from Unilabs-affiliated companies.[22]

Likewise, the complaint also raises a reasonable doubt about the ability of defendant Fenster to impartially consider a demand adverse to Zwirn's interest. Fenster is Zwirn's brother-in-law.[23] Any suggestion that Fenster's family bond to Zwim is strained would seem to be contradicted by Fenster's service as CEO o-f ULSA's Spanish subsidiary, ULSP, and as a director of UniHolding and other Unilabs-related companies."' It is reasonable to infer that Fenster does not serve as CEO of ULSP as a matter

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[22] *Rales v. Blasband*, Del. Supr., 634 A.2d 927, 937 (1993) (where controlling stockholder-directors were positioned to exert substantial influence over a director'!; continued employment, that director could not objectively 'consider a demand adverse to their interests); *Friedman v. Beningson*, 1995 Del. Ch. LEXIS154, at * 15 (where 36% stockholder/director/CEO could exercise influence over director's receipt of $48,000 a year in consulting fees, that director's ability to consider a demand detrimental to the CEO was sufficiently doubtful as to excuse demand); *Mizel v. Connelly*, C.A. No. No. 16638, mem. op., 1999 Del. Ch. LEXIS 157, at *8 n.1, Strine, V.C. (July 22, 1999, corr. Aug. 2, 1999) (where chairman and CEO held 32.7% of the company's stock, "the pragmatic, realist approach dictated by *Rales* require[d the court] to accord great weight to the practical power wielded by a stockholder controlling such a block and to the impression of power likely to be hai bored by the stockholder's fellow directors").

[23] *Harbor Finance Partners v. Huizenga*, Del. Ch., 75 1 A.2d 879, 886-89 (1999) (director who was brother-m-law of CEO and who was involved in various businesses with the CEO could not impartially consider a demand adverse to the CEO's interest); *see also Grimes* v. *Donald*, Del. Supr., 673 A.2d 1207, 1217 (1996) (a "material financial or familial inrerest" can disable a director from considering a demand); *Mizel v. Connelly*, 1999 Del. Ch. LEXIS 157, at *11-*12 (grandson could not objectively consider demand adverse to interests of his grandfather); *cf. Chaffin* v. *GNI Group, Inc.*, Del. Ch.. CA. No. 16211, mem. op., 1999 Del. Ch. LEXIS 182, at *17-*20, Jacobs, V.C. (Sept. 3, 1999) (where a transaction benefited his son financially, the father was "interested" in transaction for purposes of the business judgment rule).

[24] *Huizenga*, 75 1 A.2d at 889

of charity rather than for material compensation."' In view of Fenster's close familial and business relationships with Zwirn and Zwirn's influence over Fenster's employment at ULSP, Fenster's ability to consider a demand impartially is doubtful.

Because four of the six UniHolding directors cannot impartially consider a demand, I need not examine the impartiality of defendants Regolatti and Blum. Similarly, having found that the plaintiffs' complaint rneets the first prong of *Aronson*, I will not consider the second prong of that test. Nor will I engage in the metaphysical exercise of determining whether the plaintiffs have stated individual — as opposed to exclusively derivative — claims. Such an analysis can be undertaken later in the litigation, if necessary to determine a remedy or address other issues.

B. Does The Complaint State A Claim Against The Director-Defendants For Breach Of The Fiduciary Dutv Of Loyalty?

Because the complaint seeks relief in the form of monetary damages and because the UniHolding certificate of incorporation contains an

[25] *Cf. Kahn* v. *Tremont Corp.*, Del. Ch., C.A. No. 12339, mem. op., 1994 Del. Ch. LEXIS 41, at *8-*9, Allen, C. (Apr. 21, 1994, rev. Apr. 22, 1994) (where directors might jeopardize their employment as executives by granting a demand contrary to interests of the director who indirectly controlled the corporation, a reasonable doubt existed as to their impartiality); *Mizel v. Connelly*, 1999 Del. Ch. LEXIS 157, at *8-*9 (where director-officers would have to consider a demand harmful to the interests of a director who was their management superior, reasonable doubt as then independence was created); *Steiner v. Meyerson*, Del. Ch., C.A. No. 13 139, mem. op., 1995 Del. Ch. LEXIS 95, at *27- *30, Allen, C. (July 18, 1995) (a director who was the company's president and chief operating officer could not objectively evaluate a demand adverse to a director who was chairman and CEO and therefore his boss).

exculpatory charter provision pursuant to 8 Del. C. § 102(b)(7), the plaintiffs may survive this motion to dismiss only if the complaint states a cognizable claim for breach of fiduciary duty not immunized by the exculpatory charter provision." Put simply, the complaint must state a claim for the breach of the duty of loyalty."

In arguing that the complaint does not do so, the defendants advance two somewhat contradictory arguments. Relying on the plaintiffs' claim that the defendants unlawfully divested the Minority Stockholders of appraisal rights by accomplishing their reorganization of UniHolding and UGL through the Swap, the defendants first argue that they are protected by the doctrine of independent legal significance.[28] The defendants next contend that the complaint fails to state a claim against them in relation to the Swap, because the Swap was effected without the involvement of the UniHolding board. As a consequence, the defendants claim, the UniHolding directors are not proper defendants to an action challenging that transaction.

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[26] *In re General Motors Class H Shareholders Litig.*, Del. Ch., 734 A.2d 611, 619 n.7 (1999).

[27] *McMillan v. Intercargo Corp.*, Del. Ch., C. A. No. 16963, mem. op., 2000 Del. Ch. LEXIS 70, at *25-*26 & *25 n.41, Strine, V.C. (Apr. 20, 2000). The pertinent exceptions in § 102(b)(7) relatmg to unlawful actions and actions taken in bad faith are quite obvious examples of disloyal acts. Arguably, the improper personal benefits provision of § 102(b)(7)(iv) could be seen as preventing a director from benefiting from his own gross negligence in the context of a self-dealing transaction, but this, too, can properly be seen as raising loyalty concerns, given that it involves a fiduciary who has personally benefited from his own lack of care at the expense of the beneficiaries of his service.

[28] Defs.' Br. at 29 (*citing Orzeck v. Englehardt,* Del. Supr., 195 A.2d 375 (1963)).

For the following reasons, however, I reject the defendants' arguments and find that the complaint states a claim for breach of the fiduciary duty of loyalty.

Read as a whole, the complaint alleges that Zwirn, Gherardi, and van Gemerden, with the active support of their fellow directors, effected a scheme whereby the Controlling Group was able to gain the benefits of a squeeze-out merger without having to ensure that the merger was fair to UniHolding's Minority Stockholders. The members of the Controlling Group made clear their desire to rid themselves of the expense of being stockholders in a publicly listed and regulated corporation that provides its minority stockholders with important benefits such as regular financial disclosures, access to books and records, and a liquid market for their securities. These benefits were critical to the Minority Stockholders but not nearly as important to the Controlling Group. After all, the Controlling Group could obtain liquidity whenever it desired by selling UniHolding's control block in ULSA, could most likely dictate dividend flow to themselves through their control of the UGL and ULSA boards, and would have day-to-day access to corporate information through their multiple corporate offices.

The defendants initially announced to the market that they were considering a merger that would have streamlined UniHolding's structure but that would have required the defendants to take steps to guarantee the -Fairness of the consideration received in the merger.[29] After making this announcement, the Controlling Group consummated the Initial Swap at the UGL level, which had the effect of placing UniHolding's wholly-owned subsidiary in control of UniHolding. Defendant Zwim was UGL's Chairman and the facts in the complaint amply support the inference that he instigated the Initial Swap. Defendants van Gemerden and Gherardi each participated in that swap. And by the time the Initial Swap was rescinded, it is clear that the entire UniHolding board knew that UGL's board was prepared to engage in a transaction that would place UGL in control of UniHolding and leave UniHolding's Minority Stockholders in a potentially compromised position

Furthermore, it is reasonable to infer that the entire UniHolding board was aware of the Initial Swap at the planning stages. Because UniHolding had already announced the possibility of a merger so as to streamline the UniHolding/UGL/ULSA holding structure and because several of the

[29] That is, the defendants would have had to show, in the absence of procedural protections such as an effective special committee with real clout, that the straight exchange of liquid shares in a publicly listed and SEC-regulated company for identical securities in a non-listed, non-SEC regulated corporation was a fair transaction.

defendants were involved in the Initial Swap, the plaintiffs are entitled to the inference that the UniHolding board considered that swap as an alternative means of accomplishing, the streamlining that would advantage the Controlling Group. This inference is made even stronger by the fact that the Initial Swap was rescinded and that the UniHolding board then announced that a merger was still a real possibility. And by the time the final Swap took place, it seems implausible that the UniHolding board was uninvolved in determining which option to pursue. At the very least, the cornplaint pleads facts that, if true, make clear that the UniHolding board was not only fully aware of the possibility of the final Swap before it occurred but stood by and did nothing to stop it.

In this same regard, it is counterintuitive that those directors of UGL who were not affiliated with UniHolding[30] decided independently that it was important for UGL to take action to respond to the desires of the Controlling Group of UniHolding stockholders — *who* were *not UGL* stockholders — without consulting with the UniHolding board. While events may in fact have transpired in this rather unusual manner, on a dismissal motion the plaintiffs are entitled to the inference that the Controlling Group also

[30] This group's Identity is not revealed in the record.

dominated UGL and impelled UGL to do what it did. After all, Zwirn was UGL's Chairman.

In this context, the UniHolding board's supine reaction supports a claim for breach of the duty of loyalty. It is by no means a novel concept of corporate law that a wholly-owned subsidiary functions to benefit its parent.[31] To the extent that members of the parent board are on the subsidiary board or have knowledge of proposed action at the subsidiary level that is detrimental to the parent, they have a fiduciary duty, as part of their management responsibilities, to act in the best interests of the parent and its stockholders.

Here the pled facts support the inference that certain members of the UniHolding board — Zwirn, van Gemerden, and Gherardi -- actively initiated and participated in the Swap at the UGL level to the benefit of their personal interests and at the expense of UniHolding and its Minority Stockholders. The other members of the board permitted them to do so. Although the defendants-directors would have me find that they were powerless to control the actions of UniHolding's whollly-owned subsidiary, they have not supported that implausible assertion with legal authority, and I

[31] *E.g., Sternberg v. O'Neil,* Del. Supr., 550 A.2d 1105, 1124 (1988); *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.,* Del. Supr., 545 A.2d 1171, 1174 (1988).

hesitate to adopt an "uncontrollable child" theory ofparent-subsidiary relations. More reasona'ble is the inference that the UniHolding directors decided that the best way to accomplish the goals desired by the Controlling Group was to effect a transaction at the UGL level and to allow that transaction to take place, even though UniHolding had the practical power to stop it.

'There is no safe harbor in our corporate law for fiduciaries who purposely permit a wholly-owned subsidiary to effect a transaction that is unfair to the parent company on whose board they serve. Nor do I find convincing the defendants' attempt to compartmentalize Zwirn's role in the Swap. In their papers and at oral argument, the defendants would have me pretend that the Zwirn who served as Chairman of UniHolding had no responsibility to control or know about the actions of the Zwim who served as Chairman of UGL., even though "they" were in fact one person.

This argument rests on the premise that the members of a parent board who also serve on the board of a subsidiary board may take: action at the subsidiary level that is disloyal to the parent without bearing any fiduciary responsibility to the parent to help it exercise its power to stop the disloyal

action." Put more simply, the plaintiffs argue that a director of a parent board such as Zwirn has no duty to stop himself from injuring the parent while wearing his subsidiary hat.[33] The policy implications of accepting this premise are, to put it mildly, unappealing. I decline to endorse an approach that so obviously invites abuse and that would gut the duty of loyalty owed by Delaware directors to their stockholders.

This conclusion finds strong support in Vice Chancellor Jacobs's post-trial decision in the analogous case of *Technicorp International II, Inc. v. Johnston* ("*TCI II v. Johnston*").[34] In that case, the defendants argued that they were not subject to service of process in Delaware under 10 Del. C. § 3 114 for their actions in pillaging the wholly-owned California subsidiary of a Delaware corporation on whose board they served, even though that

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[32] *See Hoover Industries, Inc. v. Chase*, Del. Ch., C.A. No. 9276, mem. op., 1988 Del. Ch. LEXIS 98, at *4-*8, Allen, C. (July 13, 1998) (rejecting defendant's argument that because he performed his challenged actions solely as an officer, he was not susceptible to substituted service under 10 Del. C. § 3 114, strongly implying that such an approach would reduce the protective function of the duty of loyalty, and noting, that it would also "encourage a jurisprudence of distinctions of metaphysical subtlety"); *cf. Manchester v. Narragansett Capital, Inc.*, Del. Ch., C.A. No. 10822, mem. op., 1989 Del. Ch. LEXIS 141, at *23-*24, Chandler, V.C. (Oct. 18, 1989) ("given the fact that the individual defendants are all employees, shareholders, officers, and directors of the corporation, it would be artificial to distinguish their actions as having, been taken in different guises when, as directors, they control the corporation").

[33] *See Carlton Investments v. TLC Beatrice Int'l Holdings, Inc.*, Del. Ch., C.A. No. 13950, mem. op., 1996 Del. Ch. LEXIS 130, at *10 n.7, Allen, C. (Oct. 17, 1996) ("culpable inaction by directors is a sufficient ground for a breach of fiduciary duty claim permitting service of process under Section 3 1 14") (*citing Carlton Investments v. TLC Beatrice Int'l Holdings, Inc.*, Del. Ch. C.A. No. 13950, amended order at 3, Allen, C. (Dec. 19, 1995)) (subsequent history omitted).

[34] *Technicorp Int'l II, Inc. v. Johnston* ("*TCI II v. Johnston*"), Del. Ch., C.A. No. 15084, mem op., Jacobs, V.C. (May 31, 2000).

subsidiary was the parent's '"only operating asset and source of income."[35] Like UniHolding, the parent in that case held all of its key operations at the subsidiary level, making oversight of subsidiaries a crucial aspect of the parent board's function.

Vice Chancellor Jacobs rejected the directors' suggestion they could escape responsibility at the parent level, stating:

> In Hoover *Industries, Inc.* v. *Chase,* a director and officer of a corporation and its subsidiary was charged with wrongfully diverting assets of both the parent and the subsidiary. The director claimed jurisdiction under §3 114 was unavailable because the: ch.allenged transactions were performed in his capacity as an '"officer" rather than as a director. Rejecting that contention, former Chancellor Allen stated that "[t]he duty of loyalty of a director is . . . a special obligation upon a director in *any* of his relationships with the corporation.*' The Chancellor also observed that it well may be that "a director qua director owes a duty to the corporation to so conduct himself in all of his capacities so as not to inflict an intentional, wrongful injury upon the corporation," but the Court found it unnecessary to explore the soundness of that proposition in that particular case. In this case, I conclude that that proposition is axiomatic and subsumed within the director's broader duty of loyalty. Thus, Johnston and Spillane had a duty as directors '"in any of their relationships" with [the parent corporation] not to injure that corporation or its assets, including its wholly-owned subsidiary . . . . This {Court, therefore, has personal jurisdiction over the defendants under § 3 114 with respect to [the parent corporation's] claim for wrongfully diverting assets of [the subsidiary] .[36]

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[35] Id., mem. op. at 11.

[36] *TCI II v. Johnston*, mem. op. at 11-12 (*quoting Hoover Industries*, mem. op. at 3-5) (emphasis added in *TCI II v. Johnston*). *Pauley Petroleum Inc. v. Continental Oil Co.* does not hold to the contrary. Del. Supr., 239 A.2d 629 (1968). In that case, the Supreme Court affirmed the Chancellor's decision not to order an American parent company to take whatever action it could

Equally ineffective is the defendants' reliance on the doctrine of independent legal significance. It was long ago settled that inequitable action is not insulated from review simply because that action was accomplished in compliance with the statutory and contractual provisions governing the corporation.[37] The defendants are on firmer ground in arguing that the transactions complained of by the plaintiffs did not give rise to rights under 8 Del. C. § 262.[38] Nonetheless, if the plaintiffs later prove that the defendants took inequitable action designed to have the same effect on the plaintiffs as a squeeze-out merger, an award of quasi-appraisal damages would be within the realm of possibilities as a remedy.

Finally, the fact that the defendants belatedly undertook the Exchange cannot save them at this stage of the litigation. Although the Exchange

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to force its Mexican subsidiary to terminate litigation against one of the plaintiffs subsidiaries. The case did not involve an allegation by a stockholder of the parent that the parent board was breaching its fiduciary duties to oversee the company's operations, even at the subsidiary level. Rather., it involved allegations by a business whose interests were adverse to the aligned interests of the parent and its subsidiary. Thus the Supreme Court upheld the application of the traditional veil piercing analysis but expressly noted that the separate identities of a parent and subsidiary may be disregarded "in the irterest ofjustice, when such matters as fraud are involved" or "where equitable consideration[s] among members of the corporation require it ." *Id.*, 239 A.2d at 633 (citations omitted). *See* also *Carlton Investments* 1996 Del. Ch. LEXIS 130, at *13-* 14 (if separate subsidiaries are used to divert assets to an interested director, the court will ignore the separate existences of a parent and subsidiary because to do otherwise "would simply advance a wrong").

[37] See, *e.g., Schnell v. Chris-Craft Industries, Inc.*, Del. Supr., 285 A.2d 437, 439 (1971).

[38] Indeed: the proposed merger most likely could have been accomplished without triggermg statutory appraisal rights. See, *e.g.*, 8 Del. C. §§ 253, 262(b)(2)(a).

reduced the dilutive effect of the Swap,[39] UniHolding's Minority Stockholders were still left as the owners of stock in a delisted corporation, the only valuable asset of which was a non-revenue-generati.ng minority block of an unlisted BVI corporation dominated by the Controlling Group. At this stage, therefore, one cannot rule out the possibility that this transformation caused the Minority Stockholders real harm. Nor can one rule out the possibility that the defendants knew that the Swap would be likely to induce some or all of the Minority Stockholders to cash out for a pittance, much as Franklin had done, thereby enabling the Controlling Group to absorb the minority's stake at an unfair price.

In this respect, it is again noteworthy that the defendants apparently never considered the option of distributing ULSA shares to rhe Minority Stockholders proportionate to their interests in UniHolding. That option would have given the Minority Stockholders stock in a listed corporation and therefore much more liquidity and value, although it also would have cut into the Controlling Group's voting power at ULSA. Furthermore, the defendants' failure to consider this option contributes to the inference at this

[39] Because the Exchange took place after the Minority Stockholders complained about the Swap, it is inferable that the Exchange was ginned up to make the Swap look fair. It is also conceivable that the Exchange was performed later so as to allow the UniHolding board to argue that it was uninvolved in the Swap, a claim that would have been even less plausible had the Swap and Exchange been effected contemporaneously.

point that they wanted to retain as much control o:f ULSA as possible for themselves and put as much pressure as possible on the Minority Stockholders to sell out their stakes cheaply.

That inference is not undercut for the purposes of this motion by the fact that the Controlling Group allegedly gave the Minority Stockholders the opportunity to trade their Nasdaq-listed shares in UniHolding for illiquid securities in an unlisted BVI corporation. It may turn out that evidence introduced later in the litigation will bear out the defendants' assertion that the Swap and Exchange were in fact a fair way to balance the divergent interests of the Controlling Group and the Minority Stockholders. But for now, it is impossible to conclude that the defendants did not realize that the chance to hold a minority block in a corporation such as ULG was an offer that institutional investors who want liquidity and reliable corporate disclosures would undoubtedly refuse (in part because of their own fiduciary obligations).

In sum, the complaint pleads facts that, if true, state a claim that the defendants breached their duty of loyalty.

C. Are The Defendam-Directors Subject To Personal Jurisdiction Under 10 Del. C. § 3 1 14?

The defendants also argue that they are not subject to this court's jurisdiction because the Swap did not involve actions they took as directors

of UniHolding. As the reader might anticipate from the discussion above, I believe this argument lacks merit.

The complaint pleads that the UniHolding board actively participated in a scheme to benefit the Controlling Group to the detriment of UniHolding as an entity and its Minority Stockholders. To that end, the complaint alleges, members of the UniHolding board instigated action at the UGL level, and other members of the UniHolding board permitted that action, even though UniHolding was UGL's 100% owner and can be presumed to have had the power to prevent UGL, UniHolding's own creation, from turning on its parent.

Thus the complaint states a claim for breach of fiduciary duty against the UniHolding board members in their capacity as UniHolding directors. This suffices to invoke this court's jurisdiction over them."[40]

D. Whether The Complaint Must Be Dismissed &cause Indispensable Parties Are Allegedly Not Before The Court

The defendant-directors also contend that dismissal is warranted because the plaintiffs will most likely be unable to obtain jurisdiction over

[40] *TCI II v. Johnston,* mem. op at 11-12 (discussed *supra*); *Hoover Industries,* 1988 LEXIS 98, at *5 -*7 (discussed *supra*); *Carlton* 1996 Del. Ch. LEXIS at *12 (if plaintiff makes a prima facie showing that a director of a Delaware corporation knew that the corporation's French subsidiary was being used to effect sel-'-dealing transaction to the detriment of its corporate parent and "took no action as director to correct the alleged abuses," jurisdiction under 10 Del. C. § 3 114 could be asserted).

UGL and Unilabs. Because the Swap is the central transaction challenged and because UGL and Unilabs were the major parties to that transaction, the defendant-directors assert that those companies are indispensable parties and that a proper balancing analysis under by Court of Chancery Rule 19(b) dictates dismissal in their absence.[41]

For purposes of this motion, I will assume that the plaintiffs will have difficulty obtaining personal jurisdiction over UGL and Unilabs in Delaware. Although the plaintiffs are in the process of effecting service on these foreign corporations pursuant to the relevant international treaties, the complaint fails to allege acts that transpired in Delaware. Thus, even if it can be shown that any of the defendant-directors acted as agents for UGL and/or Unilabs, jurisdiction over UGL and Unilabs is doubtful.[42]

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[41] See Ct. Ch. R. 19(b) ("If [an indispensable party] cannot be made a party, the Court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable. The factors to be considered by the Court include: First, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.").

[42] *HMG/Courtland Properties, Inc. v. Gray*, Del. Ch., 729 A.2d 300, 305 (1999) (jurisdiction over a co-conspirator in a breach of fiduciary duty action cannot be predicated on 10 Del. C. § 3 114 but must be based instead on an application of § 3 104, which, according to the alter ego theory of personal jurisdiction, turns in part on "the existence of acts in Delaware which can be fairly imputed to the out-of-state defendant and which satisfy the long-arm statute [and] federal due process requirements").

Nonetheless, I conclude that this action should proceed even if UGL and Unilabs cannot be required to participate as defendants. To use the words of Rule 19(b), it would ill serve "equity and good conscience" to permit defendants who have allegedly committed breaches of fiduciary duty against stockholders of Delaware corporations to escape jurisdiction here merely because the breaches they allegedly committed to benefit non-Delaware holding entities took place outside Delaware. If this were the rule, controlling stockholders, would have an incentive to create non-Delaware holding entities simply to thwart the ability of minority stockholders to (obtain a reliable forum to redress fiduciary breaches.

Similarly, dismissing this case because UGL is a British Virgin Islands corporation could incentivize Delaware boards of directors to set up or use non-Delaware subsidiaries as vehicles for self-dealing transactions on the hope that Delaware's lack of jurisdiction over the subsidiaries will allow the parent board to escape accountability here. Perhaps in view of the obvious concerns raised by a contrary approach, it is not uncommon for this court to hear claims that directors of Delaware corporations have committed breaches of fiduciary duty at the behest of a majority or controlling stockholder who is not before the court. Proceeding in such a manner has

never been thought unduly prejudicial, and I perceive no case-specific prejudice here.

Here, if this case gets to that point, the court can fashion an award of monetary damages that holds the defendant-directors accountable for any *and only* the harm that their breaches of fiduciary duty may have caused the plaintiffs. If the defendant-directors believe that Unilabs or UGL should shoulder a portion of their liability, the defendant-directors may file separate actions for contribution or indemnification against UGL and Unilabs in the domiciles of those entities. Moreover, given that director Zwirn has a considerable amount of influence over Unilabs and that Unilabs controls UGL, Zwim has more than a slight say in whether those entities choose to participate in this action.

Nor will the defendant-directors face evidentiary prejudice because Unilabs and UGL might be absent. Zwim was the primary mover on behalf of these entities participating in the Swap and that he therefore possesses sufficient knowledge to ensure that there is no evidentiary unfairness to the defendant-directors in proceeding without Unilabs and UGL. Furthermore, Zwirn likely possesses the practical authority to ensure that UGL and Unilabs provide him and the other defendant-directors with any additional evidence they need to defend this suit, and this court can aid the defendant-

directors (through the issuance of appropriate process to their domicile nations under international conventions) if he is unable to convince those corporations to do so.

'The absence of prejudice to the defendant-directors is compounded by the quandary in which dismissal would put the plaintiffs. In Delaware, the plaintiffs can obtain jurisdiction over the entire UniHolding board. It is unclear whether jurisdiction over the whole board can be had elsewhere, and even if it could be had in, for example, the British Virgin Islands, there is no just reason why the plaintiffs should be forced to litigate against the directors of a Delaware corporation in another forum.[43]

For all these reasons, I conclude that the relevant interests at stake weigh in favor of denying the defendant-directors' motion to dismiss pursuant to Court of Chancery Rule 19.

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[43] *Sternberg* v. *O'Neill*, 550 A.2d at 1123 ("Delaware has an interest in holding accountable those responsible for the operation of a Delaware corporation"); *Carlton Investments*, 1996 Del. Ch. LEXIS 130, at *17 ("As has been noted in the past, actions involving claims that a director has breached his fiduciary duties to a Delaware corporation are of special concern to this Court. Section 3114 recognizes the strong interest that this Court has in assuring the effective administration of the law governing corporations organized in Delaware and, therefore, in hearing cases regardmg internal corporate governance issues.") (internal citation omitted).

III. Conclusion

Based on the foregoing, the motion to dismiss is DENIED, except that the plaintiffs' claim for monetary relief against the defendant-directors other than Zwirn, Gherardi, and van Gemerden based on their breaches of duty of care is HEREBY DISMISSED. IT IS SO ORDERED.