UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

March 30, 2023

Lori Zyskowski
Gibson, Dunn & Crutcher LLP

Re: Mondelēz International, Inc. (the "Company")
Incoming letter dated January 16, 2023

Dear Lori Zyskowski:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by Maryknoll Sisters of St. Dominic, Inc. and co-filer for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal requests that, within one year, the board of directors adopt targets and publicly report quantitative metrics appropriate to assessing whether the Company is on course to eradicate child labor in all forms from the Company's cocoa supply chain by 2025.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal transcends ordinary business matters.

Copies of all of the correspondence on which this response is based will be made available on our website at https://www.sec.gov/corpfin/2022-2023-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: Sanford Lewis

Gibson, Dunn & Crutcher LLP

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January 16, 2023

***VIA E-MAIL***

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: *Mondelēz International, Inc.*
*Shareholder Proposal of the Maryknoll Sisters of St. Dominic et al.*
*Securities Exchange Act of 1934—Rule 14a-8*

Ladies and Gentlemen:

This letter is to inform you that our client, Mondelēz International, Inc. (the "Company"), intends to omit from its proxy statement and form of proxy for its 2023 Annual Meeting of Shareholders (collectively, the "2023 Proxy Materials") a shareholder proposal (the "Proposal") and statements in support thereof (the "Supporting Statement") received from the Maryknoll Sisters of St. Dominic, Inc. and the Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota (collectively, the "Proponents").

Pursuant to Rule 14a-8(j), we have:

- filed this letter with the Securities and Exchange Commission (the "Commission") no later than eighty (80) calendar days before the Company intends to file its definitive 2023 Proxy Materials with the Commission; and

- concurrently sent copies of this correspondence to the Proponents.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("SLB 14D") provide that shareholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the staff of the Division of Corporation Finance (the "Staff"). Accordingly, we are taking this opportunity to inform the Proponents that if the Proponents elect to submit additional correspondence to the Commission or the Staff with respect to this Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

## THE PROPOSAL

The Proposal states, in relevant part:

> **Resolved:** Shareholders request that, within one year, the Board of Directors adopt targets and publicly report quantitative metrics appropriate to assessing whether Mondelēz is on course to eradicate child labor in all forms from the Company's cocoa supply chain by 2025. In the Board and management's discretion, such metrics may include: current estimates of the total numbers of children in its supply chain on a regional basis, working in hazardous jobs, working during school hours, and employed after school hours.

A copy of the Proposal and its Supporting Statement, as well as related correspondence with the Proponents, is attached to this letter as Exhibit A.

## BASIS FOR EXCLUSION

For the reasons discussed below, we respectfully request that the Staff concur with our view that the Proposal may be excluded from the 2023 Proxy Materials pursuant to Rule 14a-8(i)(7) as relating to the Company's ordinary business operations because the Proposal relates to the Company's litigation strategy and the conduct of ongoing litigation to which the Company is a party. The Company is currently involved in litigation in which the underlying subject matter relates to the subject matter of the Proposal, namely allegations concerning the causing and/or aiding of trafficking and forced labor of children in the cocoa supply chain. As described below, disclosing the information requested in the Proposal would require the Company to take action that could harm its legal defense in the pending lawsuit.

As demonstrated in the precedent set forth below, Rule 14a-8(i)(7) permits the exclusion of shareholder proposals like the Proposal that relate to the Company's legal strategy and thus interfere with the Company's ordinary business operations, and as such, it would be appropriate for the Company to exclude the Proposal from its 2023 Proxy Materials.

**ANALYSIS**

**The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Deals With Matters Relating To The Company's Ordinary Business Operations, Specifically Ongoing Litigation To Which The Company Is A Party.**

Rule 14a-8(i)(7) permits a company to omit from its proxy materials a shareholder proposal that relates to the company's "ordinary business" operations. According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the term "ordinary business" refers to matters that are not necessarily "ordinary" in the common meaning of the word, but instead the term "is rooted in the corporate law concept of providing management with flexibility in directing certain core matters involving the company's business and operations." Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release"). In the 1998 Release, the Commission stated that the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting," and identified two central considerations that underlie this policy. The first was that "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." *Id.* (citing Exchange Act Release No. 12999 (Nov. 22, 1976)). The Staff has consistently concurred with the exclusion of shareholder proposals that implicate and seek to oversee a company's ordinary business operations, including when the subject matter of the proposal is the same as or similar to that which is at the heart of litigation in which a company is then involved.

In addition, a shareholder proposal being framed in the form of a request for a report does not change the nature of the proposal. The Commission has stated that a proposal requesting the dissemination of a report may be excludable under Rule 14a-8(i)(7) if the subject matter of the report is within the ordinary business of the issuer. *See* Exchange Release No. 20091 (Aug. 16, 1983). The Staff, likewise, has indicated that "[where] the subject matter of the additional disclosure sought in a particular proposal involves a matter of ordinary business . . . it may be excluded under rule 14a-8(i)(7)." *Johnson Controls, Inc.* (avail. Oct. 26, 1999).

***The Proposal Is Excludable Because It Relates To The Company's Litigation Strategy And The Conduct Of Litigation To Which The Company Is A Party***

*A. Background*

We believe that the Proposal may be excluded from the 2023 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal implicates the Company's litigation strategy in a

pending lawsuit involving the Company and therefore relates to the Company's ordinary business operations.

As described below, the Company is currently involved in litigation seeking to hold the Company liable for its alleged role in the forced labor and trafficking of children in the cocoa supply chain. The complaint underlying this litigation alleges, among other things, that the Defendants (as defined below), including the Company, have knowingly benefited from the forced labor of children harvesting and selling Defendants' cocoa and that, "rather than at least make progress, the abuse of child workers has increased." *See Complaint at 2, Coubaly v. Cargill, Inc., No. 21-386 (D.D.C., Feb. 12, 2021), ECF No. 1.* Moreover, the complaint alleges that Defendants have misled the public by promising to "phase out" their use of forced child labor. *Id.* In this regard, implementing the Proposal to provide publicly reported targets and quantitative metrics to assess whether Mondelēz is on course to eradicate child labor from the Company's supply chain as requested by the Proposal could be used in litigation to argue that the company is legally responsible. Thus, the Proposal would require the Company to take action (in the form of public disclosures) that could harm its legal strategy in pending litigation by hampering its ability to develop and present its defense against allegations relating to the forced labor of children. As such, the Proposal interferes with management's obligation to defend the Company from unwarranted litigation, and it is inappropriate because the Company is involved in pending litigation on the very issues that form the basis for the Proposal.

The Staff has consistently concurred with the exclusion under Rule 14a-8(i)(7) of shareholder proposals that implicate and seek to oversee a company's ordinary business operations, including when the subject matter of the proposal is the same as or similar to the subject matter of litigation in which a company is then involved. For example, in *Chevron Corp.(Sisters of St. Francis of Philadelphia)* (avail. Mar. 30, 2021), the Staff concurred in the exclusion under Rule 14a-8(i)(7) of a proposal that requested a report analyzing "how Chevron's policies, practices and the impacts of its business, perpetrate racial injustice and inflict harm on communities of color," where the company was involved in litigation seeking to hold the company liable for alleged harmful impacts of its business practices on climate change and in turn on communities of color, and the company's position in the litigation was to contest the existence of such impacts. Likewise, in *Walmart Inc.* (avail. Apr. 13, 2018), the Staff concurred with the exclusion under Rule 14a-8(i)(7) of a proposal requesting a report on risks associated with emerging public policies on the gender pay gap, where the company was involved in numerous pending lawsuits regarding gender-based pay discrimination and related claims before the U.S. Equal Employment Opportunity Commission, and the proposal "would obligate the [c]ompany to take a public position, outside the context of pending litigation and the discovery process" with respect to the possible existence of a gender pay gap at the company. *See also General Electric Co.* (avail. Feb. 3, 2016) (concurring with the exclusion of proposal requesting a report assessing all potential sources of liability related

to PCB discharges in the Hudson River while the company was defending multiple pending lawsuits related to its alleged past release of chemicals into the Hudson River); *Chevron Corp.* (avail. Mar. 19, 2013) (concurring with the exclusion of proposal requesting that the company review its "legal initiatives against investors" because "[p]roposals that would affect the conduct of ongoing litigation to which the company is a party are generally excludable"); *Johnson & Johnson* (avail. Feb. 14, 2012) (concurring with the exclusion of proposal where implementation would have required the company to report on any new initiatives instituted by management to address the health and social welfare concerns of people harmed by LEVAQUIN®, thereby taking a position contrary to the company's litigation strategy); *Reynolds American Inc.* (avail. Mar. 7, 2007) (concurring with the exclusion of proposal requesting that the company provide information on the health hazards of secondhand smoke, including legal options available to minors to ensure their environments are smoke free, while the company was defending several cases alleging injury as a result of exposure to secondhand smoke and a principal issue concerned the health hazards of secondhand smoke); *AT&T Inc.* (avail. Feb. 9, 2007) (concurring with the exclusion of proposal requesting that the company issue a report containing specified information regarding the alleged disclosure of customer records to governmental agencies, while the company was defending multiple pending lawsuits alleging unlawful acts related to such disclosures); *Reynolds American Inc.* (avail. Feb. 10, 2006) (concurring with the exclusion of proposal requesting that the company notify African Americans of the unique health hazards to them associated with smoking menthol cigarettes, which would be inconsistent with the company's pending litigation position of denying such health hazards); *Exxon Mobil Corp.* (avail. Mar. 21, 2000) (concurring with the exclusion of proposal requesting immediate payment of settlements associated with the Exxon Valdez oil spill as relating to litigation strategy); *Philip Morris Companies Inc.* (avail. Feb. 4, 1997) (concurring with the exclusion of proposal where the Staff noted that although it "has taken the position that proposals directed at the manufacture and distribution of tobacco-related products by companies involved in making such products raise issues of significance that do not constitute matters of ordinary business," the proposal "primarily addresses the litigation strategy of the [c]ompany, which is viewed as inherently the ordinary business of management to direct").

*B. Coubaly Litigation*

The Company is currently involved in litigation seeking to hold the Company liable for its alleged role in the forced labor and trafficking of children in violation of the Trafficking Victims Protection Reauthorization Act (the "TVPRA"), brought in the United States District Court for the District of Columbia (the "District Court") by eight citizens of Mali (the "Plaintiffs"), including Issouf Coubaly ("Coubaly") as the named Plaintiff, on behalf of themselves and a putative class of all other similarly situated individuals against the Company and other corporations that import, process, or sell

cocoa or chocolate (the "Defendants"). The lawsuit alleges, among other claims, the forced labor and trafficking of the Plaintiffs when they were children by the Defendants in violation of the TVPRA. *See Complaint at 6, Coubaly, No. 21-386.* The District Court granted the Defendants' motion to dismiss for lack of subject-matter jurisdiction, noting that "the complaint fails to allege facts sufficient to establish a 'traceable connection between the plaintiff[] [childrens'] injur[ies] and the complained-of-conduct of the defendant[s]'" and "[b]ecause the complaint does not satisfy the causation prong of Article III standing, the Court must dismiss the case without prejudice for lack of jurisdiction." *See Coubaly v. Cargill, Inc., No. 21-CV-386 (DLF), 2022 WL 2315509, at 15 (D.D.C. June 28, 2022)*. The suit is currently on appeal in the United States Court of Appeals for the District of Columbia Circuit (the "Appellate Court"). *See Appellants' Opening Brief, Coubaly v. Cargill, Inc., No. 22-7104 (D.C. Cir. Nov. 14, 2022).* The main issue on appeal is whether the District Court erred in finding that the Plaintiffs lacked Article III standing to sue for any of their claims and dismissing all claims. To the extent that the Appellate Court were to find that the case should be remanded to the District Court, the existence of publicly reported targets and quantitative metrics to assess whether Mondelēz is on course to eradicate child labor from the Company's supply chain, such as the one requested by the Proposal, could negatively impact the Company's litigation strategy.

Similar to the precedents described above, the report requested by the Proposal involves the same subject matter as the Coubaly litigation and would require the creation and disclosure of a report that could adversely affect the litigation strategy of the Company's ongoing litigation. Specifically, the preparation and disclosure of this report would require the Company to take a position on the following matters that are contested, or could be contested on remand, in the ongoing Coubaly litigation:

> (a) an estimate of the number of children in the Company's cocoa supply chain, broken down by region; and
>
> (b) adoption of targets to "eradicate child labor in all forms from the Company's cocoa supply chains by 2025" and quantitative metrics appropriate to assessing progress towards this goal.

Allegations regarding each of these matters directly relate to the Plaintiffs' complaint, which the Company disputes. For example, the complaint asserts claims of trafficking and forced labor on behalf of all individuals "who were trafficked from Mali to any cocoa producing region of Côte d'Ivoire and forced to perform labor as children" and alleges that "there is uniform agreement that there are thousands of children or former child workers that would qualify as class members." Furthermore, the complaint alleges that a key common question of law and fact is whether the Defendants "caused and/or aided and abetted the trafficking of Plaintiffs . . . by either providing logistical support to the

supplier farms and/or failing to provide sufficient logistical support and/or take adequate action to prevent and stop such forced child labor in violation of international law, federal law and California state law[.]" *See Complaint at 12-13, Coubaly, No. 21-386.*

This lawsuit and appeal remain ongoing and, to date, there has been no adverse judgment against the Company in this matter. The Company's management has a responsibility to defend the Company's interests against unwarranted litigation, which it is committed to doing in this case. A shareholder proposal that interferes with this obligation is inappropriate, particularly when the company is involved in pending litigation on the very issues that form the basis for the proposal. Importantly, a key issue on appeal in the Coubaly litigation is whether there is a traceable connection between the Plaintiffs' injuries and the Company's conduct. Because the Plaintiffs' underlying complaint relies on the theory that the Company is liable for child labor in its supply chain for allegedly failing to take appropriate remedial action against child labor and asserts that the Company made false claims regarding its intention of eradicating child labor, the creation and disclosure of the report requested by the Proposal could contradict or otherwise harm the Company's litigation strategy through its presumption that the Company: (1) controls farms in the cocoa supply chain where child labor may be occurring; and (2) has the power to "eradicate child labor in all forms from the Company's cocoa supply chain." Were the Appellate Court to remand the lawsuit to the District Court to focus on the substantive issues underlying the complaint, which the Company disputes, the requested information in the Proposal could be directly implicated.

Furthermore, the complaint cites to the Company's current disclosures regarding child labor, including the Company's Cocoa Life program and commitment to Child Labor Monitoring & Remediation Systems, to allege that the Company "knowingly benefits from child labor and is extremely aware that its own failure to stop this practice is universally condemned in the world." *See Complaint at 64, Coubaly, No. 21-386.* The report requested by the Proposal would obligate the Company to take additional public positions outside the context of the pending litigation process with respect to the Company's alleged involvement in the human trafficking and forced labor of children (which it disputes) and potentially compel the Company to disclose assessments regarding such alleged involvement, which may prematurely disclose the Company's litigation strategy to its opposing parties in pending litigation and prejudice the Company's position in such case, were the case to be remanded to the District Court. For that reason, as explained above, the Staff consistently views shareholder proposals that implicate a company's litigation conduct or litigation strategy as excludable under Rule 14a-8(i)(7). As demonstrated in precedent like *Walmart Inc.*, *General Electric Co.*, and *Johnson & Johnson*, it is not proper for Rule 14a-8 to be used to require the Company to report on information that would increase the likelihood that it will be found liable in pending litigation. Such a proposal harms the Company's legal strategy and thus interferes with the Company's ordinary business operations.

As a final matter, we note that a proposal relating to ordinary business matters such as ongoing litigation is excludable under Rule 14a-8(i)(7) regardless of whether or not it touches upon a significant policy issue. Although the Commission has stated that "proposals relating to such [ordinary business] matters but focusing on sufficiently significant social policy issues (*e.g.*, significant discrimination matters) generally would not be considered to be excludable," the Staff has expressed the view that proposals relating to both ordinary business matters and significant social policy issues may be excluded in their entirety in reliance on Rule 14a-8(i)(7). As an example, although smoking is often considered a significant policy issue, as noted above, the Staff has concurred with the exclusion of proposals that touched upon this issue where the subject matter of the proposal (*e.g.*, the health effects of smoking) was the same as or similar to that which was at the heart of litigation in which the company was then involved. *See, e.g.*, *Philip Morris Companies Inc.* (avail. Feb. 4, 1997) (noting that although the Staff "has taken the position that proposals directed at the manufacture and distribution of tobacco-related products by companies involved in making such products raise issues of significance that do not constitute matters of ordinary business," the company could exclude a proposal that "primarily addresses the litigation strategy of the Company, which is viewed as inherently the ordinary business of management to direct"). Similarly, the subject matter of the Proposal (*e.g.*, "adopt targets and publicly report quantitative metrics appropriate to assessing whether [the Company] is on course to eradicate child labor in all forms from the Company's cocoa supply chain by 2025") encompasses the subject matter of litigation in which the Company is currently involved. Thus, because the Proposal implicates the Company's litigation strategy, which is an ordinary business matter, the Proposal is excludable under Rule 14a-8(i)(7).

In summary, the Proposal requests that the Company take action that could directly undermine the Company's position in pending litigation against the Company at the same time that the Company is challenging Plaintiffs' allegations. In this regard, the Proposal seeks to substitute the judgment of shareholders for that of the Company by requiring the Company to take action that could harm its legal defense in pending litigation. Thus, implementing the Proposal would intrude upon Company management's exercise of its day-to-day business judgment with respect to pending litigation in the ordinary course of its business operations. Accordingly, we believe that the Proposal may be properly excluded from the Company's 2023 Proxy Materials under Rule 14a-8(i)(7) as relating to the Company's ordinary business operations.

## CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its 2023 Proxy Materials.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (212) 351-2309.

Sincerely,

Lori Zyskowski

Enclosures

cc: Ellen M. Smith, Mondelēz International, Inc.
Constance Ricketts, Tulipshare Ltd.
Catherine Rowan, Maryknoll Sisters of St. Dominic, Inc.
Michael Passoff, Proxy Impact
Sister Pegge Boehm, Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota

**EXHIBIT A**

**From:** Constance Ricketts [redacted]
**Sent:** Wednesday, December 7, 2022 4:18 PM
**To:** Mdlz Board <Mdlz-board@mdlz.com>
**Subject:** Shareholder Proposal for Inclusion in 2023 Proxy Statement [Attn: Corporate Secretary]

**CAUTION:** External email. Do not click links or open attachments unless you recognize the sender and know the content is safe.

December 7, 2022

Via Electronic Mail and FedEx Overnight Delivery

Mondelēz International, Inc.
905 West Fulton Market, Suite 200
Chicago, Illinois 60607
Attn: Corporate Secretary of Mondelēz International, Inc.
Email: mdlz-board@mdlz.com

Re: Shareholder Proposal for 2023 Annual Shareholder Meeting

Dear Corporate Secretary,

Tulipshare Ltd. ("Tulipshare") is filing a shareholder proposal on behalf of the Maryknoll Sisters of St. Dominic ("Proponent"), who is a shareholder of Mondelēz International, Inc. (the "Company"), for action at the next annual meeting of Mondelēz International, Inc. The Proponent submits the enclosed shareholder proposal for inclusion in the Company's 2023 proxy statement, for consideration by shareholders, in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934.

The Proponent has continuously beneficially owned an amount of Mondelēz International, Inc. stock for a duration of time that enables it to file a shareholder proposal for inclusion in the Company's 2023 proxy statement. These shares will be held through the date of the 2023 annual meeting of shareholders. Proof of ownership and the Proponent's authorization letter are being sent separately.

The Proponent has authorized Tulipshare to act on its behalf. Please forward any correspondence on this matter to Tulipshare and not to the Maryknoll Sisters of St. Dominic. A representative of the Proponent will attend the stockholders' meeting to move the proposal as required.

Tulipshare is available to meet with the Company via teleconference on Wednesday, December 21 between 3pm CT and 5pm CT; Wednesday, December 28 between 3pm CT and 5pm CT; and Wednesday, January 4 between 3pm CT and 5pm CT. Any co-filers will, in their submission letters, authorize Tulipshare to engage with the Company on their behalf, within the meaning of Rule 14a-8(b)(iii)(B), but may participate subject to their availability.

I can be contacted at [redacted] or by email at [redacted] to schedule a meeting

and to address any questions.  Please address any future correspondence regarding the proposal to me at this address.

Sincerely,

Constance Ricketts

Attorney | Head of Shareholder Activism

Tulipshare Ltd.

[redacted]

**Resolved:** Shareholders request that, within one year, the Board of Directors adopt targets and publicly report quantitative metrics appropriate to assessing whether Mondelēz is on course to eradicate child labor in all forms from the Company's cocoa supply chain by 2025. In the Board and management's discretion, such metrics may include: current estimates of the total numbers of children in its supply chain on a regional basis, working in hazardous jobs, working during school hours, and employed after school hours.

**Whereas:** Hazardous child labor on cocoa farms, which includes using machetes and harmful pesticides, meets the International Labor Organization's definition of the "worst forms of child labor."[1] International agreements have repeatedly failed to eradicate hazardous child labor from the cocoa supply chain.[2]

Over twenty years ago, Mondelēz signed the Harkin-Engel Protocol, voluntarily committing to end the worst forms of child labor, including forced labor, in West African cocoa production by 2005.[2] Yet, cocoa farming remains plagued by child labor in seven countries according to the Bureau of International Labor Affairs' 2022 report.[3] The Department of Labor estimates that 1.56 million children engage in hazardous work on cocoa farms in Ghana and Côte d'Ivoire, where 60 percent of cocoa is produced.[4] Despite Mondelēz's Cocoa Life program, established a decade ago to stamp out child labor, and its monetary commitments,[4] children exposed to child labor on cocoa farms in Ghana rose by 10 percent since 2009, amounting to 55 percent.[5] Furthermore, 95 percent of cocoa farming children in West Africa are "involved in hazardous child labor."[6]

Mondelēz acknowledges that "cocoa farmers and their communities are still facing big challenges."[7] While Mondelēz states it's "on track" to achieve its goal of Child Labor Monitoring & Remediation Systems covering 100 percent of Cocoa Life communities in West Africa by 2025, it currently reports only 61 percent coverage.[8] Even if Mondelēz reaches this goal by 2025, that does not guarantee that its cocoa will be child labor-free. Failure to adhere to United Nations Sustainable Development Goal 8.7, calling for the elimination of all child labor by 2025,[9] exposes Mondelēz and its investors to significant financial, legal, and reputational risks.

Mondelēz is noticeably absent from Slave Free Chocolate's list of companies that only use ethically grown cocoa,[10] and "would not guarantee that any of their products were free of child labor" per *The*

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[1] https://www.norc.org/Research/Projects/Pages/assessing-progress-in-reducing-child-labor-in-cocoa-growing-areas-of-c%C3%B4te-d%E2%80%99ivoire-and-ghana.aspx;
https://www.ilo.org/ipec/Campaignandadvocacy/Youthinaction/C182-Youth-orientated/worstforms/lang--en/index.htm

[2] https://www.businessinsider.com/cocoa-companies-child-labor-complicity-lawsuit-2021-2#:~:text=In%202001%2C%20the%20companies%20signed,2005%2C%20according%20to%20the%20IRAdvocates

[3] https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2021/2022-TVPRA-List-of-Goods-v3.pdf

[4] https://www.reuters.com/business/sustainable-business/cadbury-maker-mondelez-invest-600-mln-sustainable-cocoa-sourcing-2022-10-25/

[5] https://nypost.com/2022/04/04/investigation-uncovers-horrible-truth-behind-cadburys-creme-egg/

[6] *Id*.

[7] https://www.cocoalife.org/progress/next-phase-of-cocoa-life

[8] https://www.mondelezinternational.com/Snacking-Made-Right/Reporting-and-Disclosure/Goals-and-Progress

[9] https://www.unodc.org/roseap/en/sustainable-development-goals.html

[10] https://www.slavefreechocolate.org/ethical-chocolate-companies

*Washington Post*.[11]

Mondelēz states, "No amount of child labor in the cocoa supply chain should be acceptable."[12] Shareholders agree, and considering that the number of exploited children in cocoa production has increased over the past twenty years, shareholders require the requested report to assure that management fulfills its fiduciary duty to protect Mondelēz and its investors from adverse risks associated with continued use of child labor within its cocoa supply chain.

[11] https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa/?utm_term=.6cb753bcb6f8

[12] https://www.cocoalife.org/the-program/child-labor

# Sanford Lewis & Associates

PO Box 231
Amherst, MA 01004-0231
413 549-7333
sanfordlewis@strategiccounsel net

February 10, 2023
Via electronic mail

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Shareholder proposal to Mondelēz International, Inc. on behalf of Maryknoll Sisters of St. Dominic, Inc.

Ladies and Gentlemen:

Maryknoll Sisters of St. Dominic, Inc. (the "Proponent") is the beneficial owner of common stock of Mondelēz International, Inc. (the "Company"), and Tulipshare Ltd. ("Tulipshare") has submitted a shareholder proposal (the "Proposal") to the Company on behalf of the Proponent. We have been asked by Tulipshare to respond to the letter dated January 16, 2023 (the "Company Letter") sent to the Securities and Exchange Commission by Lori Zyskowski of Gibson Dunn. In that letter, the Company contends that the Proposal may be excluded from the Company's 2023 proxy statement. A copy of this letter is being emailed concurrently to Ms. Zyskowski.

## SUMMARY

The Proposal (attached hereto as Exhibit A) requests that the Company's board of directors adopt targets and publicly report quantitative metrics appropriate to assessing whether Mondelēz is on course to eradicate child labor in all forms from the Company's cocoa supply chain by 2025. The Proposal suggests that, in the discretion of board and management, such metrics may include: current estimates of the total numbers of children in its supply chain on a regional basis, working in hazardous jobs, working during school hours, and employed after school hours.

The Company seeks exclusion of the Proposal pursuant to Rule 14a-8(i)(7) as relating to the Company's ordinary business operations, arguing that the Proposal implicates the Company's litigation strategy and conduct in *Issouf Coubaly v Cargill, Incorporated, et al.* – a case pending

resolution on appeal in which the Company is a defendant.[1] In particular, the Company claims that publishing a report with the requested disclosures and mitigation targets would provide support to opposing parties in *Coubaly* to demonstrate liability of the Company.

However, the requested disclosures by the Proposal would not amount to material admissions or disclosures of strategy implicating the core issues of the *Coubaly* litigation. The Company has already made various similar public disclosures that in no way reflect liability over the issue of forced child labor in West Africa. Relatedly, the recommended actions in the Proposal would not require the Company to take a position that is not in the same vein as current public positions that the Company has taken with respect to the eradication of forced child labor in its cocoa supply chain.

In any event, information about mitigation efforts as is requested by the Proposal is generally inadmissible evidence for proof of culpability and, therefore, would be of limited utility to the plaintiffs in *Coubaly*.

In view of the foregoing, exclusion pursuant to Rule 14a-8(i)(7) is unwarranted in this matter since the Proposal does not implicate the Company's ordinary business by way of its litigation strategy or conduct in *Coubaly*.

## ANALYSIS

### The Proposal is not excludable under Rule 14a-8(i)(7) as it does not implicate the core issues of ongoing litigation.

The Company seeks exclusion pursuant to Rule 14a-8(i)(7) upon its view that the Proposal interferes with ordinary business by adversely affecting the Company's litigation strategy and conduct in *Coubaly*. To that end, the Company generally claims that the subject matter of the Proposal concerns the main issues raised in *Coubaly*, wherein the Company is accused of causing or aiding the trafficking and forced labor of children in cocoa supply chains operating in West Africa.[2] However, the requested actions would not result in material or

[1] The complaint was dismissed in the United States District Court for the District of Columbia upon jurisdictional grounds (*see* No. 21-386 (D.D.C., June 28, 2022)), which judgment plaintiffs appealed. Although the Company states that fulfillment of the Proposal would result in disclosures that could affect issues on appeal (*see* Company Letter at page 7), such assertion is incorrect given that "[t]he court of appeals makes its decision based solely on the trial court's . . . case record" and "does not receive additional evidence" (*Appellate Courts and Cases*, U.S. Courts, https://www.uscourts.gov/statistics-reports/appellate-courts-and-cases-journalists-guide). Therefore, the Company's challenge hinges on the premise that the Proposal will harm the Company's litigation strategy only if the appellate court remands the matter to be tried on the merits.

[2] It should be noted that the Company does not challenge whether the Proposal concerns a significant policy issue that would transcend ordinary business operations, but rather maintains that the Proposal's exclusion is warranted

incriminating admissions showing or implying the Company's culpability in the litigation, nor disclose litigation strategy. Rather, the requested actions would manifest in disclosures that are on par with prior, repeated admissions by the Company that already clearly evince its knowledge of forced child labor in its cocoa supply chain, as well as its commitment to eradicating such human rights atrocities.

*Rule 14a-8(i)(7): the relationship between ongoing litigation and ordinary business, according to the Commission*

Rule 14a-8(i)(7) ordinarily allows exclusion of a shareholder proposal that "deals with a matter relating to the company's ordinary business operations." In certain circumstances, the Staff has granted no-action relief where the fulfillment of a proposal's request might involve a statement or admission by the company that could materially affect its litigation strategy, or which discloses litigation strategy. However, exclusions concerning litigation could easily encompass *all* shareholder proposals that address significant social policy issues since these issues usually manifest in controversies that end up being disputed in the courts. As a result, companies would largely avoid having to include proposals that focus on significant social policy issues, thereby depriving investors of access to the shareholder proposal process for attention to the most critical issues facing their companies.

To avoid such blanket exclusions, Staff precedent excluding proposals that might involve some adverse "admissions" have been narrowly circumscribed to apply only where the proposal would require a company to engage in conduct that is pointedly inconsistent with defense of ongoing litigation, such as making statements concerning the core issues of the litigation like admitting to liability or fault. Conversely, Staff routinely rejects exclusion where fulfillment of a proposal concerning a significant policy issue of legitimate concern to investors could result in making non-core admissions or information available for plaintiffs (*see e.g., Chevron Corp.* (Mar. 28, 2018) (Staff denied exclusion of a proposal requesting a report on actions to prospectively minimize methane emissions, where the company argued that it overlapped "both factually and strategically" with the core elements of an ongoing litigation addressing the Company's proportional share of methane emissions attributable to its historical "production, promotion, marketing, and use of fossil fuel products")).

Indeed, where there is a claim that a shareholder proposal could lead to some disclosures that could be interpreted as admissions usable in ongoing litigation, the existence of an overriding significant policy issue can prevent exclusion. In *JPMorgan Chase & Co.* (Mar. 14, 2011), for example, the company sought exclusion of a proposal seeking board oversight over

because it implicates ongoing litigation, regardless of its relationship to a significant policy issue (*see* Company Letter at page 8).

the development and enforcement of policies to ensure that same loan modification methods for similar loan types applied uniformly to loans owned by the company and those serviced for others, and report policies and results to shareholders. The Staff ultimately denied exclusion under Rule 14-a8(i)(7) because the proposal went to core issues in the overwhelming social policy issue posed by the housing crisis and its relationship to mortgage lending practices, even though JPMorgan had argued that the requested actions could be interpreted as admissions (*see also Sprint Corporation* (Feb. 18, 2003) (although the proposal was excluded, the Staff rejected Sprint's ordinary business argument that the proposal involved contested factual questions that were the subject of discovery in a pending lawsuit)).

***1. The Proposal's requested actions would not provide probative evidence that the Company is liable for its alleged role in forced child labor and trafficking in West African cocoa farm operations.***

The Company generally claims that "the Proposal could be used in litigation to argue that the [C]ompany is legally responsible" for its alleged role in the forced labor and trafficking of children in the cocoa supply chain. Specifically, the Company asserts that some of the requested disclosures – namely, "an estimate of the number of children in the Company's cocoa supply chain, broken down by region" as well as the adoption of targets to "eradicate child labor in all forms from the Company's cocoa supply chains by 2025" and quantitative metrics appropriate to assessing progress towards this goal – are matters contested by the Company in the *Coubaly* litigation. The Company further argues that these disclosures could harm its litigation strategy by creating a "presumption" that the Company: "(1) controls farms in the cocoa supply chain where child labor may be occurring; and (2) has the power to 'eradicate child labor in all forms from the Company's cocoa supply chain.'"

For context, the *Coubaly* complaint principally accuses Mondelēz and six other companies dependent on cocoa supply chains based in West Africa (hereinafter collectively referred to as "Defendants") of violating the Trafficking Victims Protection Reauthorization Act ("TVPRA") (18 U.S.C. § 1595 *et. seq.*), which prohibits the forced or trafficked labor of children.[3] As the Company Letter notes, the complaint alleges that the Defendants "took a leading role in developing . . . various 'plans' . . . to create the false impression that they are taking action to stop and prevent ongoing use of forced or trafficked child labor," but which ultimately "allow[ed] them to continue using child labor to harvest their cocoa" so as to benefit from such labor.

[3] *See* 18 U.S.C. § 1595 *et. seq.; see also* Complaint, *Coubaly,* No. 21-386 (D.D.C., June 28, 2022).

Contrary to the Company's contention, descriptive facts about the prevalence of child labor in the cocoa supply chain do not, in themselves, imply or show the Company's liability in the matter, or that the Company has control and/or power over forced child labor operations in West Africa. Such a showing would require more probative evidence that the Company knowingly participated in the intricacies of a forced child labor venture, such as proof of direct involvement in labor recruitment operations, employment practices or working conditions in the West African cocoa farms. In fact, the TVPRA does not impose liability upon merely "passive" beneficiaries of forced labor, but rather requires that a plaintiff show that the defendants "took some action to operate or manage [a child labor] venture."[4] To the contrary, the requested report would provide further support that the Company has established public programs aimed at addressing child labor in its West African supply chains, thereby negating any suggestion that the Company or Defendants are scheming to obscure their existence.

In any event, **public documents, including various ones prepared and published by the Company, confirm that the Company acknowledges the existence of child labor in its West African cocoa supply chain, as well as its commitment to eradicating such human rights violations**. For example, the Company currently includes a section in its website entitled "Our Positions," one of which concerns "Child Labor in Cocoa."[5] Such section states that the Company applies specific approaches "to eliminating child labor" that "focus[ ] on prevention, monitoring and remediation, with a heavy emphasis on addressing the root causes of child labor." The Company further publishes "transparency reporting" on its progress regarding a range of initiatives, stating, as relevant here, that it is "on track" towards achieving its "[c]hild [l]abor" goal of rolling out community-based mitigation frameworks by way of a Company-based program, Cocoa Life, that covers certain West African communities where the Company's cocoa supply chain is embedded.[6]

The Coca Life site, which is owned by the Company, declares that "Mondelēz International . . . [is] committed to making [its] snacks the right way by . . . respecting human rights across [its] value chain," which "includes the rights of children in the cocoa supply chain, and through [its] Strategy to Help Protect Children [the Company is] working to help prevent

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[4] Ramona L. Lampley, *Mitigating Risk, Eradicating Slavery*, 68 Am. U. L. Rev. 1707, 1742-1743 (2019). Notably, a "[defendant's] knowledge of forced labor — at a factory that [it] did not own, operate, or have any control over — cannot be based solely on . . . general reports" (*Ratha v. Phatthana Seafood Co., Ltd.*, No. CV 16-4271-JFW (C.D. Cal. Dec. 21, 2017)).

[5] *Child Labor in Cocoa*, Mondelēz International (last visited Jan. 25, 2023) (describing the Company's "approach to eliminating child labor"), https://www.mondelezinternational.com/Snacking-Made-Right/ESG-Topics/Child-Labour-in-Cocoa.

[6] *Our ESG Progress*, Mondelēz International (last visited Jan. 25, 2023), https://www.mondelezinternational.com/Snacking-Made-Right/Reporting-and-Disclosure/Goals-and-Progress.

and combat the risk of child labor, bringing [the Company] closer to [its] ultimate vision to collaborate with others to help work toward a cocoa sector that is free of child labor."[7] Cocoa Life further publishes "2030 Goals" which include ensuring that, "[i]n West Africa, where child labor risk is significant, . . . all Cocoa Life communities are covered by child labor due diligence systems."

In 2022, the Company publicly informed investors that Cocoa Life Child Labor Monitoring & Remediation Systems – a framework "embedded in company supply chains in order to identify, address, and prevent, child labour"[8] – had "expanded coverage to 1,548 communities, reaching 61% coverage in West Africa."[9] The Cocoa Life program further reports that the Company is "working with local authorities and partners towards a goal to have a [Child Labor Monitoring & Remediation System] in place across 100% of Cocoa Life communities in West Africa by 2025."[10] The Cocoa Life *Snacking Made Right: 2021 ESG Report* provides additional information on "[h]uman [r]ights [p]rogress" that includes annual percentages of Child Labor Monitoring & Remediation System-covered communities in West Africa.[11] The report also includes a section specifically focused on "[u]pstream [s]upply [c]hains," wherein the Company reinforces that it is "committed to addressing the issues of child and forced labor" by "[a]ddressing the [r]oot [c]auses" and rolling out "[m]onitoring and [r]emediation" programs in West Africa. Notably, the Company states therein that it "[r]ecogniz[es] the need for everyone involved to work together to tackle human rights issues in global supply chains and make good practices mainstream." As such, the Company "support[s] legislative efforts to enable practical, proactive and ongoing human rights due diligence," such as "the European Union Commission's proposed Corporate Sustainability Due Diligence directive (issued in February 2022), which will require companies to identify and address human rights . . . risks in their value chain."

As such, the Proposal's request for an adoption of mitigation goals and disclosure of quantitative metrics appropriate to assessing progress towards these goals would enhance the

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[7] *Helping to Enhance Child Protection Systems and Improve Access to Quality Education in Cocoa Life Communities,* Cocoa Life | Mondelēz International (last visited, Feb. 6, 2023), https://www.cocoalife.org/the-program/child-protection.

[8] *Child Labour Monitoring and Remediation Systems*, International Cocoa Initiative (last visited Feb. 9, 2023), https://www.cocoainitiative.org/our-work/operational-support/child-labour-monitoring-and-remediation-systems.

[9] *Mondelēz International Releases 2021 Human Rights Due Diligence and Modern Slavery Report*, Investor Relations, Mondelēz International (Jul. 12, 2022), https://ir.mondelezinternational.com/news-releases/news-release-details/mondelez-international-releases-2021-human-rights-due-diligence.

[10] Cocoa Life *supra* note 7.

[11] *Snacking Made Right: 2021 ESG Report,* Mondelēz International (2021), https://www.mondelezinternational.com/-/media/Mondelez/Snacking-Made-Right/SMR-Report/2021/2021-MDLZ-Snacking-Made-Right-ESG-Report.pdf

Company's existing framework for addressing child labor issues in its cocoa supply chain. The Company would not be making any new admissions as to their knowledge that child labor exists in its West Africa cocoa supply chain, nor would it imply that the Company has any control or power over the problem any more than current Company reporting on the issue. Supply chains are ordinarily composed of complex, multi-tiered networks where control is not centralized in such a way that one company's mitigation plans could show power to fully eradicate the problem of child labor in supply chains.

Furthermore, any information that the Company already has about the extent of forced child labor in the supply chain, along the lines of the requested disclosures, would likely be subject to discovery since any information that pertains – even slightly – to any issue in the litigation is largely discoverable. The plaintiffs in *Coubaly* would have access to that information regardless of the success of this Proposal, unless the Company asserts that it is excluded under a recognized privilege. In short, this Proposal is not adding to public knowledge or evidence about the Company's involvement in adopting and fulfilling mitigation goals other than their applicability to a 2025 target date.

Staff precedent buttresses the foregoing conclusions. In *Philip Morris Companies, Inc*. (Feb. 14, 2000), shareholders requested "a report . . . with the details of how the company intends to address what the company now admits: that [Phillip Morris] products causes ill-health among humans." Shareholders further requested that the report "note how the company intends to correct this defect in the products that cause such sicknesses, such as reducing or eliminating harmful constituents in the product or its smoke or recall of brands that are suspected of causing lung cancer." Phillip Morris sought exclusion, providing that it was involved as a defendant in cases alleging harms significantly related to issues raised in the proposal — namely, "alleg[ing] that cigarett[e] smoking caused the plaintiffs' diseases and that cigarettes are defective products." Phillip Morris thus argued that its "position with respect to those allegations," which were "directly at issue in th[o]se cases[,] . . . would intrude more deeply into management's fundamental prerogative of determin[ing] litigation strategy." In response, shareholders argued that "[t]he [c]ompany ha[d] publically [sic] admitted" — including on its website — "that cigarettes cause illness," that the report "could be [no] more damaging to its defenses in its litigation than the [c]ompany's own web site statements," and that the "proposal neither request[ed] any information about litigation nor t[old] the [c]ompany how to handle the litigation." Ultimately, the Staff denied exclusion of the proposal under Rule 14a-8(i)(7).

In *American International Group, Inc*. (Mar. 14, 2005), the Staff similarly declined to grant AIG no-action relief pursuant to Rule 14-a8(i)(7). That proposal "urge[d] a special committee of independent directors to oversee [a board] committee . . . [to] examin[e] the [c]ompany's sales practices, including its use of contingent commissions, recent revelations of

bid rigging and price fixing in association with [a certain insurance company,] and sale of finite risk insurance," which findings would be reported to shareholders. AIG sought exclusion of the proposal, contending that it "would interfere significantly with the [c]ompany's current litigation strategy" since "the subject matter of the proposal [was] the same or similar to that which is at the heart of litigation in which [the company was] . . . involved." However, the proponent argued that "[t]he [p]roposal in no way dictate[d] or direct[ed] the [c]ompany in their legal strategy" and was instead "focus[ed] on a major policy issue which confronts insurance companies and brokers" by requesting that AIG "report on new 'recommendations' to resolve the major public controversy facing AIG."

*Lorillard, Inc*. (Mar. 3, 2014) concerned a proposal requesting that the company "prepare appropriate materials . . . informing poor and less formally educated tobacco users of the health consequences of smoking [Lorillard] products along with market-appropriate cessation materials," and develop "[a] report on this material's preparation and method of distribution." Lorillard challenged the proposal as excludable under Rule 14a-8(i)(7) since it "adversely affect[ed] the [c]ompany's and Lorillard Tobacco's litigation strategy in pending lawsuits." The company contended that "the [p]roposal [was] in direct contradiction to positions the [c]ompany . . . t[ook] in pending litigation," considering that "[i]n virtually all of the [c]ompany's . . . pending product liability cases, one of the central issues litigated [was] that of the plaintiff's awareness of the health risks of smoking tobacco cigarettes." Lorillard thus argued that implementation of the proposal "would represent an admission by the [c]ompany . . . that certain members of the public [were] not sufficiently aware of the health risks of smoking and that different segments of the population require[d] different forms of communication and different messages in order to become aware of the risks of smoking." On the other hand, the proponent argued that the company's contention was too over-broad and "would be equally applicable to any shareholder proposal to a tobacco company that called on it to take any action with respect to its deadly product." Notably, the proponent asserted that "*it is difficult in the extreme to understand how litigation strategy could be adversely affected by a proposal requesting that the company do what it claims it is already doing*" (emphasis added). The Staff ultimately denied the proposal's exclusion.

As a final example, in *The Walt Disney Company* (Jan. 19, 2022), shareholders called upon Disney to "report on both median and adjusted pay gaps across race and gender, including associated policy, reputational, competitive, and operational risks, and risks related to recruiting and retaining diverse talent." Although Disney claimed that it was engaged in ongoing litigation "alleging that men at the [c]ompany are paid more than women for the same or substantially similar work," the Staff ultimately declined exclusion of the proposal upon a finding that "the [p]roposal [did] not deal with the [c]ompany's litigation strategy or the conduct of litigation to which the [c]ompany is a party." Like with the instant manner, the *Disney* proposal only sought

factual information that would allow investors to make their own judgment as to the company's progress with respect to the issues raised in the proposal.

***2. The Proposal does not require the Company to take a position as to its culpability in the litigation.***

The Company next claims the requested disclosures would "obligate the Company to take additional public positions outside the context of the pending litigation process with respect to the Company's alleged involvement in the human trafficking and forced labor of children (which it disputes) and potentially compel the Company to disclose assessments regarding such alleged involvement, which may prematurely disclose the Company's litigation strategy to its opposing parties in pending litigation and prejudice the Company's position in such case."

The requested disclosures, as previously stated, do not concern the Company's liability in forced child labor and trafficking in West Africa. The Proposal only seeks information as to the Company's progress and mitigation goals with respect to forced child labor in the Company's cocoa supply chain. By providing information on its commitments and progress concerning forced child labor in its cocoa supply chain, the Company is not explaining or revealing any aspects of its litigation strategy or taking a position as to whether it is *culpable* in any way for the existence of child labor in its supply chain. Instead, the Company would be reinforcing its current and public position that it acknowledges the existence of child labor in West Africa cocoa farms but is working towards eliminating all such labor from its supply chain. Accordingly, and contrary to the Company's contention, Mondelēz would not need to take a new or conflicting position as to its involvement in forced child labor such that it would materially impact the litigation.

What's more, the Proposal clearly affords management discretion in deciding what disclosures are appropriate to include in the report, and whether to include the disclosures recommended as part of the Proposal. For instance, the Proposal clearly states that, "[i]n the Board and management's *discretion*, such metrics *may* include" (emphasis added), among other things, "current estimates of the total numbers of children in its supply chain on a regional basis." Should the Company determine that this disclosure would harm its litigation strategy because it would result in an incriminating admission, it may choose to not include it. Indeed, where a proposal provides management with flexibility such that disclosures going to the core of pending litigation can be averted, as is the case here, the proposal is not excludable on the basis of the litigation exclusion.[12]

[12] *Compare The Walt Disney Company* (Jan.19, 2022) (Staff denied no-action relief with respect to a proposal requesting reporting of median and adjusted pay gaps across race and gender, where the proposal provided management sufficient flexibility to exclude disclosures implicating a California-based litigation) *with Chevron*

In addition, as a general matter, it should be noted that the *Coubaly* complaint covers alleged harms during the period between "February 15, 2011 through the present," meaning February 12, 2021, when the suit was filed in the U.S. District Court for the District of Columbia. However, the Proposal calls for disclosures involving future goals and "current estimates," and in no way explicitly requests metrics during the time period covered by the lawsuit. Therefore, since the Proposal calls for current and prospective quantitative disclosures, as opposed to retrospective ones, the Company would not make any statements or admissions that would materially impact the litigation.

In a related example, *The Travelers Companies, Inc.* (Apr. 1, 2022), the Staff declined to exclude a proposal requesting a "report on current company policies and practices, and options for changes to such policies, to help ensure its insurance offerings reduce and do not increase the potential for racist police brutality, nor associate our brand with police violations of civil rights and liberties." In seeking no-action relief, Travelers argued that, as a property casualty insurer, "the [c]ompany currently faces, has faced and could again in the future face legal proceedings that would be adversely affected by publication of a report regarding the [c]ompany's business practices and the impact they may be claimed to have on racist police brutality." In response, shareholders argued that "where a proposal offers flexibility such that disclosures going to the core of pending litigation can be averted, the proposal is not excludable on the basis of the litigation exclusion." Like in *Travelers*, management here is afforded with sufficient flexibility as to disclose privileged information or to refrain from disclosing matters that could adversely affect its litigation strategy. However, the core issues requested as part of the Proposal do not implicate the crux of the litigation insofar as mere knowledge of a problem, without more, does not equate to culpability.

***3. Subsequent remedial efforts are generally inadmissible evidence and therefore unlikely to affect the outcome of the litigation.***

Notwithstanding the nature of the requested information, it should also be noted that evidence regarding a party's remedial efforts is ordinarily inadmissible to prove negligence or culpable conduct in connection with the offense.[13] The rule is based on the public policy consideration that precautionary measures to avoid harm, regardless if they were connected to the offender, are to be encouraged, as is the case here. The Company therefore cannot claim that

*Corp.* (March 30, 2021) (relief granted as to a proposal requesting a report analyzing how Chevron's policies, practices, and business operations perpetuated racial injustice in the United States).

[13] *See* Federal Rules of Evidence 407 ("When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction").

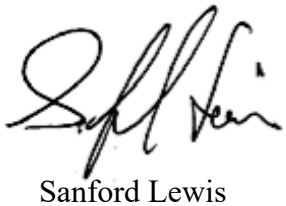
any of its mitigation efforts with respect to forced child labor in its cocoa supply chain will be admitted as an admission of liability – the main concern of an ordinary business exclusion under Rule 14a-8(i)(7) involving litigation. Similarly, information that is solely related to the application of those mitigation efforts, such as metrics regarding the presence of forced child labor by regional breakdown, is similarly excludable as trial evidence.

For example, in *Johnson & Johnson* (Mar. 3, 2022), the Staff declined exclusion of a proposal because it "[did] not deal with the [c]ompany's litigation strategy or the conduct of litigation to which the [c]ompany is a party." The proposal requested that Johnson & Johnson "discontinue global sales of its talc-based Baby Powder." Notably, the proponent argued that "the [p]roposal's request for [c]ompany efforts to reduce consumer exposure prospectively . . . would not be deemed an admission under the Federal Rules of Evidence . . . Rule 407." Similarly, in *Dow Chemical Company* (Feb. 11, 2004) the Staff declined exclusion of a proposal under Rule 14a-8(i)(7), despite the company's argument that it was exposed to ongoing litigation. The proposal requested that Dow Chemical prepare a report to shareholders describing new initiatives instituted by the management to address the specific health, environmental and social concerns of the survivors of the Bhopal tragedy. In essence, the Staff agreed that a request for proactive action to reduce potential or ongoing harms is generally not considered an admission of liability.

## CONCLUSION

In view of the foregoing, exclusion is unwarranted pursuant to Rule 14a-8(i)(7). Accordingly, the Proponent respectfully submits that the Company's request for no-action relief be denied.

Sincerely,



Sanford Lewis

Antonio Pontón-Núñez

## EXHIBIT A: THE PROPOSAL

**Resolved:** Shareholders request that, within one year, the Board of Directors adopt targets and publicly report quantitative metrics appropriate to assessing whether Mondelēz is on course to eradicate child labor in all forms from the Company's cocoa supply chain by 2025. In the Board and management's discretion, such metrics may include: current estimates of the total numbers of children in its supply chain on a regional basis, working in hazardous jobs, working during school hours, and employed after school hours.

**Whereas:** Hazardous child labor on cocoa farms, which includes using machetes and harmful pesticides, meets the International Labor Organization's definition of the "worst forms of child labor."[1] International agreements have repeatedly failed to eradicate hazardous child labor from the cocoa supply chain.[2]

Over twenty years ago, Mondelēz signed the Harkin-Engel Protocol, voluntarily committing to end the worst forms of child labor, including forced labor, in West African cocoa production by 2005.[2] Yet, cocoa farming remains plagued by child labor in seven countries according to the Bureau of International Labor Affairs' 2022 report.[3] The Department of Labor estimates that 1.56 million children engage in hazardous work on cocoa farms in Ghana and Côte d'Ivoire, where 60 percent of cocoa is produced.[4] Despite Mondelēz's Cocoa Life program, established a decade ago to stamp out child labor, and its monetary commitments,[4] children exposed to child labor on cocoa farms in Ghana rose by 10 percent since 2009, amounting to 55 percent.[5] Furthermore, 95 percent of cocoa farming children in West Africa are "involved in hazardous child labor."[6]

Mondelēz acknowledges that "cocoa farmers and their communities are still facing big challenges."[7] While Mondelēz states it's "on track" to achieve its goal of Child Labor Monitoring & Remediation Systems covering 100 percent of Cocoa Life communities in West

[1] https://www.norc.org/Research/Projects/Pages/assessing-progress-in-reducing-child-labor-in-cocoa-growing-areas-of-c%C3%B4te-d%E2%80%99ivoire-and-ghana.aspx;
https://www.ilo.org/ipec/Campaignandadvocacy/Youthinaction/C182-Youth-orientated/worstforms/lang--en/index.htm
[2] https://www.businessinsider.com/cocoa-companies-child-labor-complicity-lawsuit-2021-2#:~:text=In%202001%2C%20the%20companies%20signed,2005%2C%20according%20to%20the%20IRAdvocates
[3] https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2021/2022-TVPRA-List-of-Goods-v3.pdf
[4] https://www.reuters.com/business/sustainable-business/cadbury-maker-mondelez-invest-600-mln-sustainable-cocoa-sourcing-2022-10-25/
[5] https://nypost.com/2022/04/04/investigation-uncovers-horrible-truth-behind-cadburys-creme-egg/
[6] *Id*.
[7] https://www.cocoalife.org/progress/next-phase-of-cocoa-life

Africa by 2025, it currently reports only 61 percent coverage.[8] Even if Mondelēz reaches this goal by 2025, that does not guarantee that its cocoa will be child labor-free. Failure to adhere to United Nations Sustainable Development Goal 8.7, calling for the elimination of all child labor by 2025, [9] exposes Mondelēz and its investors to significant financial, legal, and reputational risks.

Mondelēz is noticeably absent from Slave Free Chocolate's list of companies that only use ethically grown cocoa,[10] and "would not guarantee that any of their products were free of child labor" per *The Washington Post*.[11]

Mondelēz states, "No amount of child labor in the cocoa supply chain should be acceptable."[12] Shareholders agree, and considering that the number of exploited children in cocoa production has increased over the past twenty years, shareholders require the requested report to assure that management fulfills its fiduciary duty to protect Mondelēz and its investors from adverse risks associated with continued use of child labor within its cocoa supply chain.

[8] https://www.mondelezinternational.com/Snacking-Made-Right/Reporting-and-Disclosure/Goals-and-Progress
[9] https://www.unodc.org/roseap/en/sustainable-development-goals html
[10] https://www.slavefreechocolate.org/ethical-chocolate-companies
[11] https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa/?utm_term=.6cb753bcb6f8
[12] https://www.cocoalife.org/the-program/child-labor

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February 20, 2023

***VIA E-MAIL***

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: *Mondelēz International, Inc.'s No-Action Request on the Shareholder Proposal of the Maryknoll Sisters of St. Dominic et al. Securities Exchange Act of 1934—Rule 14a-8*

Ladies and Gentlemen:

This letter relates to the above-referenced no-action request (the "No-Action Request") submitted to the staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission (the "Commission") on January 16, 2023, on behalf of our client, Mondelēz International, Inc. (the "Company"). The No-Action Request relates to the shareholder proposal (the "Proposal") and statement in support thereof received from the Maryknoll Sisters of St. Dominic, Inc. and the Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota. The Proposal calls for the Company to disclose information about its effort to help eliminate child labor from the global cocoa supply chain. Mondelez argued in the No-Action Request that the Proposal, if adopted, would interfere directly with the Company's ordinary business operations—specifically, its ability to defend itself in a case in which the plaintiffs accuse it of doing too little to eliminate the risk of child and forced labor in the global cocoa supply chain.

On February 10, 2023, Tulipshare Ltd. ("Tulipshare") responded to the No-Action Request (the "Response"). Tulipshare defends the Proposal in many ways, but its Response boils down to two propositions, both of which are not just wrong, but show why the Staff should concur with the exclusion of the Proposal under Rule 14a-8(i)(7) as relating to the Company's litigation strategy and thus interfering with the Company's ordinary business operations.

First, Tulipshare says that the information it wants the Company to disclose will not impact the pending litigation because that information has no bearing on the merits of the dispute and would not be admissible anyway. But the Staff cannot accept that argument without deciding a host of questions reserved for the courts—including what plaintiffs

must allege to satisfy the constitutional standing requirement and a federal anti-trafficking statute that the Commission is not responsible for administering. We respectfully submit that deciding those issues is the job of the courts, not the Commission. The Staff should not decide questions briefed by the parties in an active case—or hypothetical questions that might become relevant should the litigation continue past its current stage.

Second, Tulipshare contends that the information it requests is already public anyway. But if that is the case, then the Proposal would accomplish nothing, other than to potentially impact ongoing litigation in which the Company is a defendant.

Either way—whether the Proposal would require disclosure of nonpublic information and interfere with ongoing litigation or would be a pointless exercise in redundancy—the Staff should concur with the exclusion of the Proposal from the Company's 2023 Proxy Materials.

Shareholder proposals are a valuable tool for effecting important changes to corporate governance. But not everything is fit for public disclosure and debate. It should be left to the discretion of the Company to decide, in the ordinary course of its business, whether to make statements or disclose information that might bear on active litigation. The Company's judgment about litigation strategy should not be a matter of public discourse.

**BACKGROUND**

The Proposal requests that the Company "adopt targets and publicly report quantitative metrics appropriate to assessing whether Mondelēz is on course to eradicate child labor in all forms from the Company's cocoa supply chain by 2025." The "metrics may include: current estimates of the total numbers of children in its supply chain on a regional basis, working in hazardous jobs, working during school hours, and employed after school hours."

In the No-Action Request, the Company argued that the Proposal should be excluded from the Company's proxy statement and form of proxy for its 2023 Annual Meeting of Shareholders (collectively, the "2023 Proxy Materials") pursuant to Rule 14a-8(i)(7), explaining that the Proposal relates to the Company's ordinary business operations—specifically, the Company's litigation strategy in ongoing litigation where the Company is a named defendant.

The Company is involved in a case pending in the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit"), *Coubaly v. Cargill Inc.*, in which the underlying subject matter relates to the subject matter of the Proposal. The plaintiffs in *Coubaly* have sued the Company (and several other corporations that import, process, or sell cocoa or chocolate (collectively, the "Defendants")) for, among other things,

violating the Trafficking Victims Protection Reauthorization Act (the "TVPRA"). The plaintiffs' argument—which the Company contends is fundamentally flawed—is that despite its efforts to help eradicate the risk of child labor, the Company has allegedly knowingly benefited from the forced labor of children who harvested cocoa.[1]

The Company explained in the No-Action Request that requiring it to disclose the information requested in the Proposal could harm its legal defense in *Coubaly*. Tulipshare's Response is its effort to show that the disclosures it demands would have no effect on *Coubaly,* which as demonstrated below, is not the case.

**ARGUMENT**

Shareholders have a lot of say in the governance of the companies they own, and rightly so. But not every proposal is fit for a shareholder vote. Perhaps at the very top of the list of proposals that should not be subject to a shareholder vote are proposals that could impact a company's ongoing litigation. And as Tulipshare's Response makes abundantly clear, that's precisely the problem with the Proposal here.

Tulipshare offers six reasons why the Proposal supposedly would not impact the *Coubaly* litigation. Five of those reasons are variations on a theme—that disclosing the Company's knowledge of the extent of forced labor in its cocoa supply chain and its efforts to eliminate it would have no bearing on the case. The trouble with that argument is that the plaintiffs in *Coubaly* have said precisely the opposite. And that discrepancy (between what Tulipshare says and what the *Coubaly* plaintiffs say) leaves the Staff in a difficult position: The only for way for the Staff to determine whether Tulipshare is right or wrong about the effect of the demanded disclosures on the litigation is to evaluate the *Coubaly* plaintiffs' case, but this is in fact the role of the D.C. Circuit. The court will decide whether the *Coubaly* plaintiffs have Article III standing to sue and, if they do, whether they alleged enough to state a claim under the TVPRA and the other laws under which they sue. The Staff should not assume the role of the court and decide those issues—or any other issues in the litigation that either already are or could become relevant.

Perhaps because it suspects the Staff might look askance at requiring the disclosure of nonpublic information bearing on active litigation, Tulipshare changes tack and offers another reason for taking action, claiming the Company has already disclosed the type of information it is seeking under the Proposal. But that alternative argument is self-defeating. If the public already has the information, then the Proposal would accomplish

[1] *E.g.*, *Coubaly v. Cargill, Inc.*, No. 1:21-cv-00386, Dkt. 2 ¶ 46, 54, 61, 120, 153 (D.D.C. Feb. 18, 2021).

nothing other than to push the Company to make statements that could impact ongoing litigation.

In other words, and as the following discussion of Tulipshare's arguments demonstrates, the Response proves only that the Proposal is inappropriate and unnecessary and should be excluded from the Company's 2023 Proxy Materials.

1. Tulipshare contends that the information the Proposal requests the Company to produce is irrelevant to the question whether the Company is liable under the TVPRA. According to Tulipshare, "descriptive facts about the prevalence of child labor in the cocoa supply chain do not, in themselves, imply or show the Company's liability in the matter, or that the Company has control and/or power over forced child labor operations in West Africa."[2] The TVPRA, Tulipshare argues, "require[s] more probative evidence that the Company knowingly participated in the intricacies of a forced child labor venture," and "does not impose liability upon merely 'passive' beneficiaries of forced labor."[3] The Company could not agree more.

The problem is that the plaintiffs in *Coubaly* very much *disagree* with Tulipshare. The plaintiffs have already taken the position that to state a claim under the TVPRA, "a defendant need not actively participate in the underlying forced labor or trafficking with an overt act so long as they knew or should have known they are benefitting from a venture that is responsible for the unlawful activity."[4] The *Coubaly* plaintiffs have also argued that the Defendants are liable under the TVPRA because they have not eliminated forced labor from their supply chains despite pledging to do so.[5] In support of that argument, the plaintiffs have pointed to the Defendants' public-facing statements, including statements similar to those contemplated by the Proposal. In their complaint, for example, the plaintiffs quote the Company as stating that it "support[s] a systemic approach to address the root causes of child labor and call[s] for strong public-private partnerships with governments, development partners and civil society organizations."[6] The plaintiffs argue that this statement proves the Company "admits that there is still child slavery in its supply chain, and indirectly, that it is still profiting from child slavery."[7] The plaintiffs rely on similar language to argue that the Company "knowingly

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[2] Response at 5.

[3] *Id.*

[4] *Coubaly v. Cargill, Inc.*, No. 1:21-cv-00386, Dkt. 33 at 21–22 (D.D.C. Sept. 28, 2021).

[5] *Id.* at 3.

[6] *Coubaly v. Cargill, Inc.*, No. 1:21-cv-00386, Dkt. 2 ¶ 112 (D.D.C. Feb. 18, 2021) (quoting https://www.cocoalife.org/the-program/child-labor).

[7] *Id.* ¶ 113.

benefits from child labor," which the plaintiffs claim establishes liability under the TVPRA.[8]

So although Tulipshare's central argument is that disclosing the information requested by the Proposal would have no bearing on liability, the plaintiffs in *Coubaly* have repeatedly said the exact opposite. In the plaintiffs' view, the Company and the other Defendants are liable *because* they allegedly know that the risk of forced labor is a problem and have been unsuccessful in eradicating it.

Whether the plaintiffs are right or wrong is not something that neither Tulipshare nor the Staff can decide. This decision must be left to the courts. Tulipshare has nevertheless asked the Staff to step in and proclaim that the Defendants have the better of the argument and that the disclosure the Proposal requests therefore carries zero litigation risk. It is inappropriate for Tulipshare to ask the Staff to substitute its judgment for that of the D.C. Circuit by requiring a disclosure that would bear directly on the case if that court or the district court endorsed the plaintiffs' theory.

2. Tulipshare speculates that in the event of a remand to the district court, statements about the Company's efforts to remove forced labor from its supply chain would not "be admitted as an admission of liability" because they qualify as "[s]ubsequent remedial efforts."[9] That argument suffers from the same problem as the first argument: Tulipshare again assumes that the courts will reject the *Coubaly* plaintiffs' theory that allegedly unsuccessful efforts to end forced labor *do* prove liability. The Company strongly disagrees with that theory, but only the courts can determine whether the plaintiffs or the Company is right.

And only the courts should decide the sorts of evidentiary issues Tulipshare raises. The Federal Rules of Evidence are long and complex, permitting the admission of some evidence, requiring the exclusion of other evidence, and leaving it to district courts to make judgment calls on a great deal of evidence in between. Sometimes evidence can serve only one purpose; sometimes it can be admissible for one purpose but not others. *E.g.*, Fed. R. Evid. 407 (subsequent remedial measures are admissible "for another purpose—such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures"); Fed. R. Evid. 404(b) (evidence of other acts is admissible "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"). Whether evidence would or would not be admissible here is precisely the sort of question that might become relevant if the D.C. Circuit were to remand the case for further proceedings in the district

[8] *Id.* ¶ 120.

[9] Response at 10-11.

court. And neither Tulipshare nor the Staff should opine on hypothetical and half-formed evidentiary questions that might end up before the district court in the event of a remand.

3. Tulipshare argues that *Coubaly* is about the past—specifically, the decade before the complaint was filed—whereas the Proposal is about the future.[10] But Tulipshare neglects to mention that the plaintiffs in *Coubaly* seek injunctive relief, an inherently prospective remedy. Tulipshare also does not acknowledge that the plaintiffs repeatedly allege that the Defendants *continue* to benefit from alleged forced labor in the Ivory Coast. In fact, the complaint uses the word "ongoing" no fewer than 16 times.[11] Tulipshare is wrong that any statements about labor practices now or in the future could not possibly "materially impact the litigation."[12] And should the case be remanded to the district court, the plaintiffs could move for leave to amend their complaint to incorporate the public statements requested in the Proposal.

4. Tulipshare says that even if the evidence the Proposal requests the Company to produce would not be *admissible*, it would be *discoverable*, so "[t]he plaintiffs in *Coubaly* would have access to that information regardless of the success of this Proposal."[13] But the case is now on appeal, after the plaintiffs' complaint was dismissed, without any discovery having been taken.[14] Tulipshare is therefore wrong that "this Proposal is not adding to public knowledge or evidence about the Company's involvement in adopting and fulfilling mitigation goals."[15] In fact, what the Proposal requests goes beyond discovery in a lawsuit because discovery materials are not presumptively public unless attached to a court filing, and even then might be sealed on the motion of the Company.

5. Tulipshare suggests in passing that because *Coubaly* is currently on appeal (before the D.C. Circuit), the record is locked and there is no chance that anything the Company says could be used against it in litigation.[16] But, as the Company argued in the No-Action Request and as Tulipshare itself acknowledges, the case might not end in the court of appeals.[17] Should the appellate court disagree with the district court's order dismissing

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[10] *See id.* at 10.

[11] *Coubaly v. Cargill, Inc.*, No. 1:21-cv-00386, Dkt. 2, ¶¶ 50, 51, 57, 63, 80, 83, 99, 101, 155, 157, 159, 170, 171 (D.D.C. Feb. 18, 2021).

[12] Response at 10.

[13] *Id.* at 7.

[14] *See id*. at 2 n.1.

[15] *Id.* at 7.

[16] *See* Response at 2 n.1.

[17] *See* No-Action Request at 6–7; Response at 2 n.1.

the case on jurisdictional grounds, the case would be remanded, and the plaintiffs might move for leave to amend their complaint or seek discovery.

6. On top of its many arguments that invite the Staff to decide legal questions that already are being litigated or might be litigated, Tulipshare offers one more rationale for its Proposal: The Company "has already made various similar public disclosures," and "the Proposal would not require the Company to take a position that is not in the same vein as current public positions that the Company has taken" in the past.[18] Tulipshare says some version of this many times—for example, that "the requested actions would manifest in disclosures that are on par with prior, repeated admissions by the Company"; that "public documents, including various ones prepared and published by the Company, confirm that the Company acknowledges the existence of child labor in its West African cocoa supply chain"; and that the Company has said much the same thing on the website for Cocoa Life and its own website.[19] In arguing that everything it seeks is more or less already public knowledge, Tulipshare defeats the very purpose of the Proposal.

**CONCLUSION**

Tulipshare's various defenses of the Proposal serve only to demonstrate that it would interfere with ongoing litigation. Tulipshare speculates about the outcome of various legal disputes, some that are currently being litigated (including what plaintiffs must allege to state a claim under the TVPRA and to demonstrate that their injuries are fairly traceable to the challenged conduct of the Defendants) and some that are hypothetical (like whether certain categories of information would be discoverable and whether certain evidence would be admissible). Tulipshare invites the Staff to do the same thing—to step into the shoes of the D.C. Circuit or of the district court on remand. The Staff should decline that invitation. It is the province of the courts, not the Staff, to say what the law is. For that reason, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its 2023 Proxy Materials.

[18] *Id.* at 2.

[19] *Id.* at 3, 5–7 (emphasis omitted).

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (212) 351-2309.

Sincerely,

Lori Zyskowski

Enclosures

cc: Ellen M. Smith, Mondelēz International, Inc.
Constance Ricketts, Tulipshare Ltd.
Catherine Rowan, Maryknoll Sisters of St. Dominic, Inc.
Michael Passoff, Proxy Impact
Sister Pegge Boehm, Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota

# Sanford Lewis & Associates

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February 28, 2023
Via electronic mail

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Shareholder proposal to Mondelēz International, Inc. on behalf of Maryknoll Sisters of St. Dominic, Inc.

Ladies and Gentlemen:

Tulipshare Ltd. ("Tulipshare") has submitted a shareholder proposal (the "Proposal") on behalf of Maryknoll Sisters of St. Dominic, Inc. (the "Proponent"), the beneficial owner of common stock of Mondelēz International, Inc. (the "Company"), to the Company.

On January 16, 2023, the Company submitted a no-action request (the "No-Action Request") to the Securities Exchange Commission (the "Commission") seeking to omit the Proposal from its forthcoming proxy statement on the basis that the Proposal implicates the Company's ordinary business matter of defending itself against ongoing litigation. On February 10, 2023, the Proponent and Tulipshare submitted a letter (the "Response") opposing the No-Action Request. Lori Zyskowski of Gibson Dunn submitted a supplemental reply on behalf of the Company on February 20, 2023 ("Supplemental Letter"), which the Proponent has asked us to address herein. A copy of this letter is being emailed concurrently to Ms. Zyskowski.

## SUMMARY

The Company reiterates in its Supplemental Letter that the Proposal would affect its litigation strategy given that the requested disclosures are similar to the type of information being used against the Company to prove liability in *Coubaly*. The Supplemental Letter also contends that consideration of the Proponent' arguments would essentially force the Staff to make decisions reserved for the courts. While engaging in the same type of hypotheticals that the Company denounces, the Company ignores the Proponent's principal position: that the requested disclosures would only expand upon already public information and not provide a new avenue to prove the Company's liability in the ongoing litigation.

As we submitted in the Response and will buttress hereinafter, the key to successfully challenging a proposal under Rule 14a-8(i)(7) for implicating ongoing litigation is showing that the proposal would materially affect the company's litigation strategy. Here, implementation of the Proposal would only fill information gaps of existing public disclosures about the Company's performance with respect to its stated goal of eradicating child labor from its supply chain by 2025. Based on these requested disclosures, the plaintiffs in *Coubaly* would not be able to propose a new theory of liability or support their current theory any more than they could with current information. Conversely, investors will gain valuable insight to hold the Company accountable on its progress towards achieving its publicly stated child labor eradication targets. Overall, the Proposal does not interfere with the Company's litigation strategy. Therefore, exclusion of the Proposal is unwarranted.

**BACKGROUND**

The ongoing litigation at issue in this No-Action Request, *Coubaly v Cargill Inc.*, is currently under appeal after the case was dismissed upon jurisdictional grounds.[1] *Coubaly* accuses the Company and six other corporations dominating the global cocoa supply chain (hereinafter collectively referred to as the "Defendants") of violating the Trafficking Victims Protection Reauthorization Act (18 U.S.C. § 1595 *et. seq*.) ("TVPRA"), which prohibits forced labor and trafficking of children.[2] As relevant here, the plaintiffs allege the Defendants developed a scheme that created "the false impression that they are taking action to stop and prevent ongoing use of forced or trafficked child labor," but which ultimately "allow[ed] them to continue using child labor to harvest their cocoa" so as to benefit from such labor.[3] To that end, the Defendants point to statements made by the Company in its websites recognizing the existence of forced child labor in its supply chain and committing to prevention, monitoring and remediation of the issue.

Indeed, as the Proposal notes, the Company has been engaged in forced child labor mitigation efforts since at least 2001 when it signed the Harkin-Engel Protocol, which had the objective of eliminating "the worst forms of child labor" from cocoa global supply chains. Since then, the Company has made numerous public statements regarding its child labor eradication commitments and efforts, many of which were included as part of the Proponent's Response and the Proposal. In particular, the Company's website includes a section entitled "Child Labor in Cocoa" in which the Company details its approach "to eliminating child labor" by "focus[ing] on prevention, monitoring and remediation, with a heavy emphasis on addressing the root causes of

[1] *Coubaly,* No. 21-386 (D.D.C., June 28, 2022).
[2] *See* Complaint, *Coubaly,* No. 21-386 (D.D.C., June 28, 2022).
[3] *Id.*

child labor."[4] The Company's website also features progress metrics on various "ESG" issues, stressing that the Company is "committed to regularly and transparently reporting [its] progress."[5] This website notes that the Company committed to "cover[ing] 100% Cocoa Life communities in West Africa by 2025" with "Child Labor Monitoring & Remediation Systems (CLMRS)," and achieved "61%" of this goal by 2021.[6] This metric is also disclosed as part of the Company's *Human Rights Due Diligence and Modern Slavery Report* for 2021, published in its website and as part of investor relations communications.[7]

"Cocoa Life," as referenced above, "is [the Company]'s global cocoa sustainability program launched in 2012,"[8] which "help[s] prevent and combat the risk of child labor, bringing [the Company] closer to [its] ultimate vision to collaborate with others to help work toward a cocoa sector that is free of child labor."[9] Similar to the Company website, Cocoa Life declares that "[i]n West Africa, where child labor risk is significant, [it] aim[s] to have all Cocoa Life communities covered by CLMRS by 2025."[10] To do so, Cocoa Life puts forth details about its prevention, monitoring and remediation efforts, and publishes a "progress dashboard" which also provides that, by 2021, "61% of Cocoa Life communities in West Africa [were] covered with a [CLMRS]."[11] Furthermore, Cocoa Life and the Company jointly published in October 2022 a report entitled *Cocoa Life Strategy to Help Protect Children*, which outlines their approach to mitigating child labor from its supply chain.[12]

**ANALYSIS**

The Proponent maintains that the Proposal is not excludable under Rule 14a-8(i)(7) as it does not materially affect the Company's litigation strategy or conduct in *Coubaly*.

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[4] *Child Labor in Cocoa*, Mondelēz International (last visited Feb. 24, 2023) (describing the Company's "approach to eliminating child labor"), https://www.mondelezinternational.com/Snacking-Made-Right/ESG-Topics/Child-Labour-in-Cocoa.

[5] *Our ESG Progress*, Mondelēz International (last visited Feb. 24, 2023), https://www.mondelezinternational.com/Snacking-Made-Right/Reporting-and-Disclosure/Goals-and-Progress.

[6] *Id.*

[7] *See Human Rights Due Diligence and Modern Slavery Report*, Mondelēz (2021), https://www.mondelezinternational.com/-/media/Mondelez/About-Us/Human-Rights/MDLZ-HRDD-and-Modern-Slavery-Report-2021.pdf; *Mondelēz International Releases 2021 Human Rights Due Diligence and Modern Slavery Report*, Investor Relations - Mondelēz (Jul. 12, 2021), https://ir.mondelezinternational.com/news-releases/news-release-details/mondelez-international-releases-2021-human-rights-due-diligence.

[8] *What is Cocoa Life*, Cocoa Life (last visited Feb. 24, 2023), https://www.cocoalife.org/.

[9] *Helping to Enhance Child Protection Systems and Improve Access to Quality Education in Cocoa Life Communities*, Cocoa Life (last visited Feb. 24, 2023), https://www.cocoalife.org/the-program/child-protection.

[10] *Id.*

[11] *Our Progress*, Cocoa Life (last visited Feb. 24, 2023), https://www.cocoalife.org/impact#dashboard.

[12] *Cocoa Life Strategy to Help Protect Children*, Mondelez & Cocoa Life (Oct. 2022), https://www.cocoalife.org/~/media/CocoaLife/en/download/article/2022/cocoa-life-strategy-to-help-protect-children.pdf.

Implementation of the Proposal will only result in disclosures of information that would allow investors to assess the Company's progress with respect to the Company's own public goals and progress reporting regarding the eradication of forced child labor from its West African cocoa supply chain by 2025. Accordingly, the Proposal would not result in any new admissions or evidence that would provide the *Coubaly* plaintiffs with new attacks regarding the Company's alleged culpability in violating the TVPRA.

In its Supplemental Letter, however, the Company ignores this point and instead focuses on leading the Staff to believe that the Proponent's opposition to the No-Action Request has, in essence, created a mini-trial of *Coubaly*. In doing so, the Company disputes the Response by generally arguing that: (1) the *Coubaly* parties disagree on the burden of proof to show the Company's liability; (2) the requested disclosures may be admissible to prove liability or for other purposes; and, (3) the requested disclosures would "go beyond discovery."

We submit that these contentions are without merit and obfuscate the standard of review for litigation strategy exclusions under the ordinary business exception provided by Rule 14a-8(i)(7). Adopting the Company's position that any disclosure could be used in some way in litigation — regardless of its materiality — could, as we noted in our prior Response, result in the potential exclusion of "*all* shareholder proposals that address significant social policy issues since these issues usually manifest in controversies that end up being disputed in the courts. As a result, companies would largely avoid having to include proposals that focus on significant social policy issues, thereby depriving investors of access to the shareholder proposal process for attention to the most critical issues facing their companies."

***The Proposal's requested disclosures would not be any more dispositive in proving liability than previously existing Company disclosures.***

The Proponent's Response provides that "descriptive facts about the prevalence of child labor in the cocoa supply chain do not, in themselves, imply or show the Company's liability in the matter, or that the Company has control and/or power over forced child labor operations in West Africa." In its Supplemental Letter, the Company contends that such notion is contradicted by the *Coubaly* plaintiffs' theory of liability in the case, according to which "a defendant need not actively participate in the underlying forced labor or trafficking with an overt act so long as they knew or should have known they are benefitting from a venture that is responsible for the unlawful activity."[13] In the Company's view, the requested disclosures would prove such theory of liability since they would show that the Company "know[s] that the risk of forced labor is a problem and ha[s] been unsuccessful in eradicating it."[14]

[13] Supplemental Letter at 4-5, quoting *Coubaly*, No. 1:21-cv-00386, Dkt. 33 at 21–22 (D.D.C. Sept. 28, 2021).
[14] *Id.*

Determining which theory of liability is applicable in *Coubaly* is not a relevant concern in the resolution of the instant matter. What is of concern is whether the requested disclosures would adversely affect the Company's litigation strategy. It is evident that it would not. As the Supplemental Letter acknowledges, the *Coubaly* plaintiffs state in their complaint that the Company "admits that there is still child slavery in its supply chain," which they support by pointing to, as the Company characterizes, "public-facing statements, including statements similar to those contemplated by the Proposal."[15]

Indeed, the Proposal recognizes these statements – namely, the Company's goal of eradicating child labor in its West African cocoa supply chain by 2025 and its progress to date in achieving such goal – and solely seeks disclosures *within that context* that could help investors assess the Company's progress. Consequently, the requested disclosures are not any more dispositive than previously existing disclosures. In other words, that the plaintiffs would have another instance of the Company acknowledging knowledge of child labor in its supply chain as a result of the requested disclosures would not help the plaintiffs' case any more than the Company's existing public-facing statements already do. Similarly, the requested disclosures would prove no more than current Company statements do as to whether the Company continues to benefit from forced child labor – to date, the Mondelēz website admits that the Company has knowledge of child labor in its West African cocoa supply chain, but has not fully eradicated the problem.

Accordingly, no matter which theory of liability the court agrees with in the event that the *Coubaly* case is remanded, the requested disclosures would make no difference, considering the prior disclosures of the Company.

***The Proposal requests disclosures concerning subsequent remedial measures, as opposed to prior Company conduct, which are generally inadmissible evidence and unlikely to affect the outcome of litigation.***

As the Response notes, evidence regarding a party's remedial efforts is generally inadmissible to prove negligence or culpable conduct in connection with an alleged offense. Relying on Staff precedent,[16] the Proponent accordingly maintains that the Proposal's requested disclosures would be inadmissible to prove liability in *Coubaly*.

In its Supplemental Letter, the Company contends that such "argument suffers from the

[15] *Id.*
[16] *See Johnson & Johnson* (Mar. 3, 2022); *Dow Chemical Company* (Feb. 11, 2004).

same problem as the [prior] argument" – that is, that it depends on an assumption "that the courts will reject the *Coubaly* plaintiffs' theory that allegedly unsuccessful efforts to end forced labor do prove liability." However, the plaintiffs' theory of liability relies on *prior* Company admissions of knowledge about child labor in its cocoa supply chain. Conversely, the Proposal's requested disclosures are wholly *forward looking*, falling squarely within the rule against admissibility of subsequent remedial efforts. Whether the requested disclosures could be admissible for other evidentiary purposes, as the Supplemental Letter implies, is speculative and serves no purpose in the resolution of this No-Action Request – we agree with the Company that "the Staff should not opine on hypothetical and half-formed evidentiary questions."[17]

***The Proposal requests disclosures of information that are discoverable by the plaintiffs in the litigation.***

As the Supplemental Letter notes, the Proponent contended that, regardless of evidentiary admissibility, the requested disclosures would be discoverable, and therefore the plaintiffs in *Coubaly* would have access to that information regardless of the success of this Proposal. The Company now contends that "what the Proposal requests goes beyond discovery in a lawsuit because discovery materials are not presumptively public unless attached to a court filing, and even then might be sealed on the motion of the Company."

However, this contention in the Supplemental Letter does not undercut the Proposal or support the Company's litigation position.

Whether the general public could have access to the requested disclosures by way of public discovery materials is irrelevant to the litigation-based argument for exclusion. Rather, as the Proponent's Response stated, any information that pertains – even slightly – to any issue in a litigation is largely discoverable by an opposing party. Thus, information that the Company already has about the extent of forced child labor in the supply chain, along the lines of the requested disclosures, would likely be discoverable *by the Coubaly plaintiffs*. Thus, if the Proposal is ultimately not implemented by the Company, the plaintiffs in *Coubaly* will still have access to that information by way of discovery, thereby undermining the contention that making the statements public would affect the Company's litigation strategy. In contrast, public disclosure of this information is important for accountability on these issues to the Company's investors.

[17] Supplemental Letter at 6.

***Implementation of the Proposal would expand on prior disclosures by the Company.***

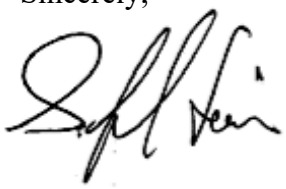
Attempting to undermine the Proposal, the Company states at the end of its Supplemental Letter that "[i]n arguing that everything [the Proposal] seeks is more or less already public knowledge, [the Proponent] defeats the very purpose of the Proposal." We wholeheartedly disagree.

At the outset, it should be noted that the Company has not raised a substantial implementation challenge pursuant to Rule 14a-8(i)(10). In any event, any such challenge would be without merit, thereby debunking the Company's position that implementation of the Proposal would serve no purpose. Indeed, the Proposal specifically recognizes the Company's public statements regarding its knowledge that forced child labor is an ongoing and serious problem in its cocoa supply chain in West Africa as well as its commitments towards eradicating the problem by 2025. Within this context, the Proposal requests additional disclosures to help investors "assure that management fulfills its fiduciary duty to protect Mondelēz and its investors from adverse risks associated with continued use of child labor within its cocoa supply chain." Implementation of the Proposal is therefore critical for investors to hold the Company accountable as to whether it has fulfilled its public goals.

**CONCLUSION**

In light of the reasons set forth in the Response and herein, we maintain that exclusion of the Proposal is unwarranted under Rule 14a-8(i)(7). As such, the Proponent respectfully submits that the Company's request for no-action relief be denied.

Sincerely,



Sanford Lewis

Antonio Pontón-Núñez