EFiled: Dec 06 2021 01:29PM EST
Filing ID 67145043
Case Number 313,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN DIEP, derivatively on behalf of EL POLLO LOCO HOLDINGS, INC.,	)	
Plaintiff Below, Appellant,	)	No. 313, 2021
vs.	)	
TRIMARAN POLLO PARTNERS, L.L.C.,	)	On appeal from the Memorandum Opinion, dated July 30, 2021 and
Defendant Below, Appellee,	)	Order, dated September 10, 2021, of the Court of Chancery of the State of
and	)	Delaware
EL POLLO LOCO HOLDINGS, INC.,	)	C.A. No. 12760-CM
Nominal Defendant Below, Appellee.	)	

APPELLANT'S OPENING BRIEF

Dated: December 6, 2021

Hung G. Ta
JooYun Kim
Natalia D. Williams
HGT LAW
250 Park Avenue, 7th Floor
New York, NY 10177
Tel : (646) 453-7288

Peter Safirstein
SAFIRSTEIN METCALF LLP
1345 Ave. of the Americas, 2nd Floor
New York, NY 10105
Tel: (212) 201-2855

Ralph N. Sianni (#4151)
ANDERSEN SLEATER SIANNI LLC
2 Mill Road, Suite 202
Wilmington, DE 19806
Tel: (302) 510-8528

Counsel for Plaintiff Below-Appellant

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No(s).

Cases

GLOSSARY

Abbreviation	Definition
"2016 Motion"	Defendants' Motion to Stay or Dismiss the Derivative Action, filed December 2, 2016
"Ammerman"	Settling Defendant Douglas K. Ammerman, EPL Board member during the Relevant Period
"Board"	Board of Directors of El Pollo Loco Holdings, Inc. during the Relevant Period
"Bogeajis"	Settling Defendant Kay Bogeajis, EPL Chief Operating Officer during the Relevant Period
"Borgese"	Settling Defendant Samuel N. Borgese, EPL Board member
"Company SSS"	Same-store sales for Company-operated restaurants
"Complaint"	Verified Stockholder Derivative Complaint, filed on September 20, 2016
"Defendants"	Defendant TPP and Settling Defendants
"EPL" or the "Company"	El Pollo Loco Holdings, Inc.
"Executive Management Team"	Sather, Roberts, Valle and Bogeajis
"Floyd"	William Floyd, EPL Board member and SLC member
"Franchise SSS"	Same-store sales for franchised EPL restaurants
"Hawley"	Ryan Hawley, EPL's Vice President of Marketing Planning & Analysis
"Insider Trading Policy" or "Policy"	EPL's insider trading policy
"Kehler"	Dean Kehler, one of the principals and beneficial owners of TPP, and EPL Board member
"Lynton"	Carol "Lili" Lynton, EPL Board member and SLC member
"Maselli"	Michael Maselli, Chairman and EPL Board member

Abbreviation	Definition
"May Earnings Call"	EPL's 2015 Q1 earnings call that was held on May 14, 2015
"Module [No.]" or "M[No.]"	An EPL module, ranging from four to seven weeks, during which time EPL promoted certain products
"Motion"	SLC's Motion to Dismiss Count I Against TPP, and supporting papers, filed September 25, 2020
"Opinion" or "Mem. Op."	Court of Chancery's Memorandum Opinion, dated July 30, 2021
"Period [No.]" or "P[No.]"	Each quarter of EPL's fiscal year was divided into three "periods."
"Roberts"	Settling Defendant Laurance Roberts, EPL Chief Financial Officer
"Roth"	John M. Roth, CEO of Freeman Spogli & Co. and an EPL Board member
"Sather"	Settling Defendant Stephen J. Sather, EPL President and Chief Executive Officer during the Relevant Period
"Settling Defendant(s)"	Sather, Roberts, Valle, Bogeajis, Ammerman and/or Borgese
"SLC"	The Special Litigation Committee of the Board
"SLC Members"	Douglas J. Babb, William R. Floyd, and Carol ("Lili") Lynton
"SLC Report"	Report of the SLC, filed with the Court on February 14, 2019
"SSS"	Same-store sales: the percentage change in comparable same-store sales calculated on a year-over-year basis
"System-Wide SSS"	SSS for both Company-operated and franchise-owned EPL restaurants
"TPP"	Defendant Trimaran Pollo Partners, L.L.C.

Abbreviation	Definition
"TPP Sale"	May 19, 2015 sale of EPL stock by Defendant TPP, Sather, Valle, Bogeajis, executed as a block trade
"*Turocy*" or "*Turocy* Class Action"	The related federal securities class action, styled, *Turocy v. El Pollo Loco Holdings, Inc*., No. 8:15-cv-01343-DOC-KES (C.D. Cal.)
"*Turocy* settlement"	Settlement of the *Turocy* Class Action
"Valle"	Settling Defendant Edward Valle, EPL Chief Marketing Officer during the Relevant Period

NATURE OF THE PROCEEDINGS

A corporation that creates a special litigation committee to evaluate a stockholder derivative suit presents the "only instance in American Jurisprudence where a defendant can free itself from a suit by merely appointing a committee to review the allegations of the complaint." *Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985). This unique power is even more extreme where, as here, a Delaware court has already denied the corporation's motion to dismiss, and determined that the Defendants faced a substantial likelihood of liability for insider trading.

Since a special litigation committee may essentially act as judge and jury by rejecting the claims against its fellow directors and seeking dismissal of those claims in court, Delaware law imposes a heavy burden of persuasion on the committee. It must "meet the normal burden under Rule 56 that there is no genuine issue as to any material fact and that the moving party is entitled to dismiss as a matter of law" (*Zapata Corp. v. Maldonado,* 430 A.2d 779, 788 (Del. 1981)); and must demonstrate that its independence is "above reproach" (*Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart,* 845 A.2d 1040, 1055 (Del. 2004)).

Here, the SLC concluded that Plaintiff's insider trading claims should be dismissed. The Court of Chancery, however, did not hold the SLC to its burden. Instead of requiring the SLC to demonstrate that there were no genuine questions of material fact as to the reasonableness of the SLC's conclusions, the Court went

further and impermissibly *resolved* ("determined") any questions that Plaintiff raised. Mem. Op. at 54-55 (stating "the court must only determine whether the SLC had 'reasonable bases' for reaching its conclusions") (citations omitted).

In this case, there were numerous questions of fact as to the reasonableness of the SLC's core conclusions that there was no insider trading violation by TPP. TPP, a 59.2% controlling shareholder of EPL, sold over $118 million of EPL stock in one day while in possession of material, non-public information that the restaurant chain's unprecedented price increases had negatively impacted sales and value scores. The record reflects that the Board (and TPP) received extensive warnings, yet affirmatively misled investors and analysts about the connection between price increases and financial performance. Just three months after the TPP Sale, EPL announced poor results, which its CEO admitted were caused by the increased pricing, causing EPL's stock price to drop by 20%. By selling before this negative news was made public, TPP avoided tens of millions in losses.

As for the SLC itself, far from being "above reproach," the SLC lacked independence because two of its three members (a) served on the Board when it approved factual arguments in support of dismissal concerning the very same subject matters that the SLC was later tasked to investigate; and (b) had significant ties to the controlling stockholder Defendant, TPP.

SUMMARY OF ARGUMENTS

1. ***Disputed Issues Of Material Fact Concerning The Reasonableness Of The SLC's Conclusions.*** The SLC could not meet its burden of persuasion as to the reasonableness of its conclusions. The Court of Chancery erred by failing to hold the SLC to a summary judgment standard and improperly resolving disputed issues of material fact in favor of the SLC.

2. ***Disputed Issues Of Material Fact Concerning The SLC's Independence.*** The SLC could not meet its burden of persuasion to establish its own independence. The Court of Chancery erred by failing to hold the SLC to a summary judgment standard and improperly resolving disputed issues of material fact in favor of the SLC.

3. ***Discretionary Ruling Under The Second Prong Of Zapata.*** The Court of Chancery abused its discretion by ruling that the SLC's conclusions were reasonable.

STATEMENT OF FACTS

I. COMPANY BACKGROUND

EPL operates and franchises quick service restaurants ("QSR+"), which serve Mexican-inspired, "fresh quality food, but with a fast casual dining experience to provide customers with speed, convenience, and value." A194-95. EPL repeatedly attributed the Company's success to this QSR+ business model – that is, the ability of EPL to deliver value while maintaining pricing power. *See*, *e.g.*, A948.

Immediately prior to the $118 million TPP Sale, Defendant TPP was a 59.2% controlling stockholder of EPL. A198. At all relevant times, TPP was represented on the EPL Board by three directors: Kehler, Roth and Maselli (Chair of the EPL Board). A199.

II. DEFENDANTS KNEW THAT EPL'S SALES AND VALUE SCORES WERE NEGATIVELY IMPACTED BY PRICE INCREASES

EPL derives revenue from two sources, Company-owned restaurants and franchised restaurants. Accordingly, EPL refers to three different SSS (same-store sales) metrics: System-Wide SSS (for all restaurants), Company SSS (for Company-operated restaurants) and Franchise SSS (for franchised restaurants). In each case, SSS growth is based on the number of customers (transactions growth) and spending per customer (check growth).

A. Defendants Were Repeatedly Informed About The Negative Impact Of EPL'S Price Increases

Before 2014, EPL had taken only one pricing action per year. A1266 at 80:12-15. Beginning in 2014, however, EPL increased prices three times in a 12-month period: (1) in M6[1] 2014 by 0.5%; (2) in M9 2014 by 1.5%; and (3) in M2 2015 by 1.0%. A1273-74; A302. Concerned about this change in "the cadence of [EPL's] pricing actions" compared to previous years, Hawley closely monitored the impact on sales, transactions and value. A302, A1266.

Hawley was unquestionably the EPL employee with the most knowledge about pricing. Hawley had been Vice President of Marketing Planning and Analysis at EPL since 2012. A261. Hawley testified that he "owned the pricing strategy" and was "ultimately in charge of developing pricing recommendations for the brand." A1260-61. Indeed, Settling Defendant Valle (the CMO) "testified that he did not believe there was anyone at EPL in 2014 and 2015 more qualified than Mr. Hawley to analyze pricing." A303 n.785.

Commencing in Fall 2014, Hawley repeatedly alerted EPL's senior management and Board about the negative impact of price increases on customer traffic and EPL's value scores. A302.

---

[1] "M[No.]" or "Module [No.]" refers to the corresponding EPL "module." *See* Glossary. EPL normally designated 10 modules per calendar year, referring to them as "M1," "M2," etc. A245 n.342.

In a November 24, 2014 presentation, Hawley analyzed the effect of the M6 price increases, showing that, while SSS increased 0.2% due to the price increase, the number of items sold decreased by 1.1%, causing a net SSS loss of 0.9% as compared to the M4 and M8 periods. A521. Additionally, Sandelman (the market research company) found that EPL's value scores had declined. A527, A534.

On February 2, 2015, Hawley gave a presentation to senior management, analyzing the effect of the 2014 M9 price increases. A535-58. There had been a drop in units sold for items where EPL increased pricing. A311 & n.860 (citing A1282 at 151:13-19). Hawley stated that, comparing the 2014 M8 and 2015 M1 periods, check growth from pricing per day was $71, but the transactions loss was $91, resulting in a net sales impact of -0.1%. Transactions loss was 129% versus the plan assumption of 25%. A542. Additionally, according to Market Force (a customer experience measurement company), value scores declined immediately following the M9 2014 price increases. A545.

On February 5, 2015, Hawley gave a presentation to the Board with a slide, entitled "EPL Value Scores Decreased After M9 2014 Pricing," showing that value scores for both Company-operated and franchised restaurants had decreased by approximately 2.0% from M9 2014 to M10 2014. A314, A1563.

On February 23, 2015, Hawley presented the Board with a "P3 2015 Sales Update."[2] A313, A559-95. Hawley again presented the negative effects of the 2014 M9 price increases. Hawley also presented the negative impact of the more recent 2015 M2 price increases, showing that SSS growth year-to-date in 2015 (*i.e.*, through the Period 2, Week 3) was 3.3%, below the 2015 plan of 3.9%. A585. Indeed, in each of the first three weeks of P2, transaction growth was below plan by 0.9%, 1.0% and 1.4%, respectively. *Id.* Hawley informed the Board that EPL was "***Seeing Some Warning Signs on Pricing***." A586 (emphasis added).

On March 25, 2015, Hawley provided Settling Defendant Valle with a "2015 Pricing Test" presentation (A597), in which Hawley stated that "[c]urrent pricing analytics and value scores indicate ***we may be hitting some barriers to additional pricing***" and that EPL was "***Experiencing Some Concerning Trends on Value***." A599-600 (emphasis added).

B. At The May 12, 2015 Board Meeting, Defendants Were Provided Further Evidence Of The Negative Impact Of Higher Prices

At the May 12, 2015 Board meeting, Hawley repeated his warnings about the negative impact of the price increases. Hawley presented to the Board "an alternate thread of data that would suggest that [EPL] should be careful about future pricing

---

[2] EPL broke down each quarter into three periods (each approximately one month) and consecutively designated all the periods for the fiscal year as "Period [No.]" or "P[No.]." A206 n.118.

actions." A1288. Hawley explained that "Menu prices have shifted up significantly," and that compared to 2014, EPL had been steadily increasing prices for promotional items, in some cases by more than 7%. A679-80.

Hawley presented the causal link between higher prices and the slowdown in customer traffic. In 2015 Q1, transactions increased by just 0.1%, compared to 1.4%, 2.2%, 3.3% and 3.1%, respectively, in each of the prior quarters. A681. Hawley explicitly stated that the recent 2015 M2 price increases (launched on January 29, 2015) (A289) had caused negative sales: "We've Seen a Decrease in M2 Pricing Items Sold – Has led to lower total sales from pricing." A685. While an average of 254 items per day were sold when the Company was running M1 pricing, only 231 items per day were sold under M3 pricing (which reflected the price increases in M2), an approximate 10% drop. This "led to lower total sales from pricing." *Id.*

Hawley advised the Board that EPL's value scores amongst customers had dropped and were now below the value scores of its competitors. A682. For example, in 2014, when asked whether EPL "Provide[s] Good Value for the Money," 71% answered affirmatively, putting the Company's score above other QSR competitors (who scored 66%). However, by 2015, NPD's[3] market tracking study showed that

[3] Hawley described NPD as a "[l]eading market research firm tracking food and beverage consumption." A426.

only 54% viewed EPL as providing good value, while EPL's competitors continued to score 66%. *Id.* Hawley also informed the Board that a separate study by Market Force confirmed that, after EPL increased prices in 2014 M9 and in 2015 M2, there was an immediate dip in the value scores. A683; *see also* A1296.

Hawley told the Board that, as a result, "We Are Trending Below Plan for Q2." A697. EPL now forecast that customer transactions would *fall* by 1% in the 2015 Q2. *Id.*

C. Defendants Concealed From Investors The Negative Impact Of Price Increases On Customer Traffic And Value Scores

In preparation for the May Earnings Call, the Company prepared several drafts of a script, including anticipated questions and answers (Q&A). The final version of the proposed Q&A, circulated by CFO Roberts on May 14, 2015, anticipated the following question: "Any negative response from consumers to our price increases. Any impact on value scores." A927. The Company prepared the following response: "***We are seeing some potential pushback from consumers on prices***. While still strong, ***value scores have dropped in Q1 2015*** (per Marketforce and NPD)." *Id.* (emphasis added).

On the May Earnings Call, Morgan Stanley analyst John Glass directly posed the anticipated question: "you're seeing that there's some price resistance in the higher price points?" A940. However, as "[t]he SLC confirmed[,] … none of the

officers on the [May 14] Q1 2015 Earnings Call explicitly stated that EPL's slower sales and transaction trends were linked to price increases in Q1 2015." A454. Instead, Settling Defendant Valle responded that the sales slowdown was attributable to EPL's mis-steps in creating marketing confusion and mixed messaging. A384 (citing A932-44). As the court concluded in the *Turocy* Class Action, "the statements made during the May 14 call affirmatively created the impression that consumer confusion—and to a lesser extent the New Year's Eve holiday and the changes to the Under 500 line—were the causes of the decline in customer traffic and sales. In fact, Valle knew that the pricing was a direct cause, including the removal of the value-priced menu." *Turocy v. El Pollo Loco Holdings, Inc.*, 2017 U.S. Dist. LEXIS 123458, at *28-29 (C.D. Cal. Aug. 4, 2017)

As a result, analysts on the May Earnings Call did not understand Defendants' comments to constitute a disclosure that the Company's increased prices were causing a negative reaction from customers. *See*, *e.g.*, A1226 at 34:10-14, A1234-35 at 57:1-58:1, A1360 at 98:9-20, A1329, A1334.

III. DEFENDANTS KNEW THAT THE PROJECTED 2015 Q2 COMPANY SSS WAS JUST HALF OF THE COMPANY'S PUBLIC GUIDANCE TO INVESTORS

A. Defendants Believed That The 2015 Q2 SSS Growth Rate Was Material To Investors

For the 2015 Q2, Defendants "aligned" around a Company SSS projection of 2.5%. A433. On May 12, 2015, EPL's senior management presented the Board with this 2.5% projection. A437. Defendants also projected that 2015 Q2 Franchise SSS would be 3.6%. Using the weighted average of these two figures, EPL forecast that the 2015 Q2 System-Wide SSS would be 3.0%. A325-26, A437 (citing A831). *See also supra* at 4.

Prior to the May Earnings Call, EPL had never "comment[ed] on quarters in progress [*i.e.*, the 2015 Q2] while reporting the prior quarter's results." A361. On this occasion, Defendants believed there were several reasons why it was important to disclose the 2015 Q2 SSS growth rate. *See*, *e.g.*, A361 (Roberts stating that he had "serious concerns" about the need to disclose EPL's SSS projections for 2015 Q2).

First, the Company's full year System-Wide SSS public guidance was 3%-5%, and therefore, disclosure of the 2015 Q2 SSS data was appropriate because it was lower than the full year projection. A361. Second, Defendants believed that fulsome disclosure was necessary because TPP intended to sell stock (the TPP Sale) in the upcoming trading window. A367, A383. Defendants even contacted the

Company's outside lawyers, Skadden, to request that they review the call script for the May Earnings Call, specifically, the proposed disclosure as to the softness in 2015 Q2 SSS. A365-66; A920-23.

B. Prior To the May Earnings Call And The May 19, 2015 TPP Sale, Defendants Were Aware Of Information That 2015 Q2 Company SSS Would Be Significantly Below 2.5%

In the days leading to the May Earnings Call and the May 19, 2015 TPP Sale, TPP and the Settling Defendants were presented with information showing a significant downward departure from the 2.5% figure for 2015 Q2 Company SSS.

On May 11, 2015, Hawley provided Settling Defendant Valle with an "updated forecast" based on sales through the current week, showing that the projected 2015 Q2 Company SSS was just ***1.2%***. A296-97, A637.

The next day, on May 12, 2015, at 1:14 p.m., Hawley circulated a further draft of the Q&A for the upcoming earnings call, which was "[u]pdated based on the meeting today." A647-51. The "meeting" referred to in Hawley's email was a meeting of the Executive Management Team (comprising Settling Defendants Sather, Roberts, Valle and Bogeajis) that had occurred earlier that day at 12:00 p.m. A372.[4] In the May 12, 2015 draft, the proposed answer for 2015 Q2 Company SSS was now "Company SSS% in ***1.0-2.5%*** range.…" A648 (emphasis added).

---

[4] *See also* A1304 at 322:13-25 (Hawley affirming meeting of the "leadership team" at which a range of 1% to 2.5% for 2015 Q2 Company SSS was discussed).

Despite the deterioration in the 2015 Q2 Company SSS, EPL continued to use the 2.5% figure in guidance to investors. Specifically, during the May Earnings Call, Defendants informed investors that 2015 Q2 System-Wide SSS would be approximately 3.0%. A937 (stating that the metric would be "closer to the low end of the range" of 3%-5%). This representation was false, because it was calculated using the prior 2.5% 2015 Q2 Company SSS figure (weighted alongside the 2015 Q2 Franchise SSS projection of 3.6%). A325-26; *supra* at 10-11.

Hawley's "updated forecast" was confirmed seven days later. On May 19, 2015, the date of the TPP Sale, the projected 2015 Q2 Company SSS (based on actual performance data as of that date and the forecast for the balance of the 2015 Q2) was ***1.25%***, less than half of the 2.5% projection that was the foundation of Defendants' public guidance. A439. As the SLC admitted below in the Court of Chancery, "by May 19, 2015, the ***TPP Directors knew that … the 'effective' Q2 Company SSS forecast had dropped to approximately 1.25%—one half of the official 2.5% forecast*** communicated at the May 11 Board meeting." A1631-32 (footnotes omitted) (emphasis added).

On May 19, 2015, at 9:01 a.m., EPL's senior management and Board (including all three TPP directors) were all informed via an emailed Daily Sales Flash Report that, for the *quarter-to-date*, the 2015 Q2 Company SSS growth rate was just ***0.1%***. A1744.

In their interviews with the SLC, Defendants themselves conceded that any significant (in this case, a 50%) negative departure from 2015 Q2 Company SSS was material. *See* A361 ("Mr. Roberts explained that, as it got closer to the Q1 2015 Earnings Call, and, after Mr. Hawley raised the possibility of a 1.0%–2.5% range for Q2 Company SSS, Mr. Roberts decided with certainty that the Company should disclose information about Q2 2015.") (footnote omitted); A446 (Settling Defendant and CEO Sather stated to the SLC that "Q2 was traditionally the strongest quarter in a year – indicating the potential importance of its 2015 Plan misses during the beginning of Q2.") (footnote omitted).

IV. EPL'S INSIDERS SELL $130 MILLION OF STOCK WHILE IN POSSESSION OF NEGATIVE MATERIAL INFORMATION AND IN VIOLATION OF THE INSIDER TRADING POLICY

On May 19, 2015, Defendants TPP, and Settling Defendants Sather, Valle and Bogeajis collectively sold approximately 6 million shares of EPL stock at $21.85 per share for gross proceeds of over $130 million. TPP alone sold 5,402,500 shares of EPL stock, receiving approximately $118 million (the TPP Sale). A414.

In selling, TPP violated the mandatory pre-clearance procedures required under EPL's Insider Trading Policy. A614-27; A440 ("The SLC learned that TPP, in executing the May 19, 2015 Block Trade, apparently *failed to comply with the Policy's pre-clearance requirements*.") (emphasis added). Among other things: (a) TPP failed to submit its pre-clearance request at least two business days in

advance of the May 19, 2015 TPP Sale (A397); and (b) the Company's "Chief Legal Officer" (who was not even a lawyer) never issued any written pre-clearance (A397-98).

V. THE TRUTH IS FINALLY REVEALED, CAUSING EPL'S STOCK PRICE TO PLUMMET

On August 10-11, 2015, three months after the TPP Sale, EPL's Board held a two-day regular meeting. A955-1004. In his presentation for the 2015 Q2, Hawley stated that sales had fallen across all demographics, across all modes of orders (dine in/take-out/drive-through), and all parts of the day (lunch, snack and dinner). A1013-15. In a section entitled "Pricing Deep Dive," Hawley stated that "***Transactions Drop Coincided with Increase in Pricing Level***." A1016-17 (emphasis added). Specifically, Hawley pointed to price increases in February 2015, the "Steady Increase in LTO [limited time offering] Prices Through Q2," and "Significant Price Increases on All of Our Top Sell[ing products]" for a drop in the Company's value scores and the decline in transaction (traffic) growth in the 2015 Q1 and Q2. A1018-20.

Two days later, on August 13, 2015, the Company issued a press release announcing its results for the 2015 Q2. A427; A1145-51. Contrary to the Company's prior guidance, 2015 Q2 "System-wide comparable restaurant sales [had only grown] 1.3%, ***including a 0.5% decrease for company-operated restaurants***, and a

2.6% increase for franchised restaurants." A1145-51 (emphasis added). The actual 2015 Q2 Company SSS of -0.5% was significantly worse than the projection of 2.5% that was the foundation of the Company's public guidance, and was driven by a 3.9% decrease in traffic. As a result, the Company announced that it was cutting its full year 2015 guidance for comparable store sales growth from a range of 3%-5%, to just 3%. *Id.*

During the earnings conference call held later that afternoon, Defendants acknowledged the impact on customer traffic of higher prices. CEO Sather stated that "***second-quarter results were impacted by the combination of higher-priced offerings and a reduction of [the] value portion of [its] menu***." A1202 (emphasis added). Sather further stated: "***We lost the value focus on the first half of 2015***. As you know, we employ a balance of a high/low-pricing strategy, and what I think happened is we temporarily overweighted this to the higher-priced items." A1205 (emphasis added).

Investors and analysts reacted with surprise to these revelations. On August 14, 2015, EPL's stock price fell by 20%, from $18.36 to $14.56 per share (A513), which was 33% below the price at which Defendant TPP sold its stock, and which erased more than $410 million in market capitalization.

VI. PROCEDURAL HISTORY AND RELATED ACTIONS

A. Defendants' 2016 Motion To Dismiss Was Denied And The Settling Defendants Settled

On September 20, 2016, Plaintiff commenced this derivative lawsuit. A1. On December 2, 2016, Defendants filed a Motion to Stay or Dismiss the Derivative Action (the 2016 Motion). A4. Notably, two of the SLC Members, Lynton and Floyd, had been elected to the Board on April 1, 2016, and were both on the Board when EPL decided to file the 2016 Motion.

On March 17, 2017, Vice Chancellor Laster denied Defendants' motion to dismiss and denied Defendants' motion to stay the *Brophy* claim. A1478.

On June 26, 2017, Plaintiff and Defendants participated in a full day mediation, which was unsuccessful. EPL then appointed the SLC to investigate Plaintiff's claims.

On January 17, 2018, the Court stayed this lawsuit pending the SLC's investigation. A28-29.

On February 13, 2019, the SLC filed its Report. A29-44.

On June 23, 2020, following the release of the Report, Plaintiff settled the claims against the Settling Defendants (representing less than 10% of total claims) for a cash payment of $625,000, which settlement was subsequently approved by the Court of Chancery. A63D-63E.

B. The *Turocy* Class Action And Its Settlement

On August 24, 2015, EPL investors filed a purported class action in the Central District of California alleging that TPP, Sather, Roberts and Valle (and related entities) committed securities fraud. *Turocy*, ECF 1.

On April 17, 2017, the *Turocy* plaintiffs filed a Third Amended Complaint ECF 74 ("TAC"). The TAC was based on EPL's May 12, 2015 Board presentation, which Vice Chancellor Laster ordered should be made publicly available. A1478 at 111:12-16. As a result, the *Turocy* plaintiffs made allegations that are identical or substantially similar to those pled in this action. A236-37.

On August 4, 2017, the Central District of California denied Defendants' motion to dismiss. *Turocy*, 2017 U.S. Dist. LEXIS 123458.

In January 2019, the *Turocy* Class Action was settled for a cash payment of $20 million. A238-39.

On August 27, 2019, the Central District of California approved the settlement. *Turocy*, ECF 217.

C. SLC'S Motion To Dismiss And The Court of Chancery's Decision

On September 25, 2020, the SLC moved to dismiss the *Brophy* claim against Defendant TPP. A52.

On September 10, 2021, the Court of Chancery granted the SLC's Motion based on its underlying Memorandum Opinion, dated July 30, 2021 (attached hereto as Exhibit 1 and hereinafter "Mem. Op."). This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY INCORRECTLY HELD THAT THERE WERE NO DISPUTED QUESTIONS OF FACT AS TO THE REASONABLENESS OF THE SLC'S CONCLUSIONS

A. Question Presented

Did the Court of Chancery fail to properly apply a summary judgment standard and erroneously conclude that there are no disputed questions of fact as to the reasonableness of the SLC's conclusions? This issue was preserved for appeal. A1704-26.

B. Standard of Review

Rulings regarding the reasonableness of an SLC's conclusions (*i.e.*, the first prong of *Zapata)* are reviewed *de novo*. *Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 840-41 (Del. 2011) ("As an initial matter, *Zapata*'s first prong is subject to a summary judgment standard, our review of which is *de novo*.") (footnote and citation omitted).

C. Merits of the Argument

1. An SLC Seeking Dismissal Of A Derivative Suit Bears The Burden Of Persuasion Under A Summary Judgment Standard

In *Zapata*, this Court set forth the legal standards for evaluating a special litigation committee's motion to dismiss a derivative lawsuit where demand on the board is excused. *Zapata*, 430 A.2d at 787. The Court explained that a deferential business judgment standard was inappropriate because "some tribute must be paid

to the fact that the lawsuit was properly initiated. It is not a board refusal case." *Id.* This Court noted two additional concerns: the possibility that committees might be created and motions to dismiss filed "after years of vigorous litigation for reasons unconnected with the merits of the lawsuit," and the natural "empathy" of committee members who are "passing judgment on fellow directors in the same corporation and fellow directors [ ] who designated them to serve both as directors and committee members." *Id.*

Based on these considerations, this Court required that a special litigation committee "be prepared to meet the normal burden under Rule 56 that there is no genuine issue as to any material fact and that the moving party is entitled to dismiss as a matter of law." *Id.* at 788. The Court then established a two-step analysis for evaluating a special litigation committee's motion to dismiss. *Id.* at 788-789.

First, the reviewing court should "inquire into the independence and good faith of the committee and the bases supporting its conclusions." *Id.* at 788. In *Kahn,* this Court clarified that: "*Zapata*'s first prong is subject to a summary judgment standard." *Kahn*, 23 A.3d at 840-41 (footnote and citation omitted).

Second, the reviewing court "may proceed, in its discretion… [to] determine, applying its own independent business judgment, whether the motion should be granted." *Zapata*, 430 A.2d at 789; *see also London v. Tyrrell*, 2010 WL 877528, at *11 (Del. Ch. Mar. 11, 2010). The reviewing court may engage in this second step

even if "the Court is satisfied under Rule 56 standards that the committee was independent and showed reasonable bases for good faith findings and recommendations." *Zapata*, 430 A.2d at 789.

The standards applicable to a motion for summary judgment are well-established. "[T]he Court must view the evidence, and all reasonable inferences taken therefrom, in the light most favorable to the non-moving party" and the "'moving party bears the burden of demonstrating both the absence of a material fact and entitlement to judgment as a matter of law.'" *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002) (citation omitted). Summary judgment is "a harsh remedy that affects a party's substantive rights" and "must be cautiously invoked." *GMG Capital Invs., Ltd. Liab. Co. v. Athenian Venture Partners I, Ltd. P'ship*, 36 A.3d 776, 783 (Del. 2012). Further, summary judgment "is not a mechanism for resolving contested issues of fact" and "'is not a substitute for the trial of disputed fact issues.'" *Id.*; *see also Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002) ("The test is not whether the judge considering summary judgment is skeptical that [the non-movant] will ultimately prevail.").

In *Kahn*, this Court demonstrated how the summary judgment standard should be applied when assessing the reasonableness of a special litigation committee's conclusions under *Zapata*. This Court affirmed the reasonableness of the KKR special litigation committee's conclusions because, among other things, there were

independent expert reports or other undisputed facts to support those conclusions including: (i) a "financial experts' opinion of the preferred share market" supporting the committee's materiality analysis; (ii) "undisputed facts in the record" supporting the "conclusion that the statute of limitations barred the *Brophy* claims"; and (iii) a "[f]inancial expert analysis" that negated an inference of scienter because "for every dollar KKR redistributed from the common to the preferred shareholders, KKR lost more than it gained." *Kahn*, 23 A.3d at 841.

Here, the Court of Chancery did not apply a summary judgment standard.

The central factual questions were whether TPP made the TPP Sale while in the possession of non-public information concerning (a) customers' price resistance to EPL's unprecedented price increases; and (b) the deteriorating 2015 Q2 Company SSS. The SLC concluded that these items of negative information were immaterial, and/or that the TPP Sale was not motivated by this information.

In opposition, Plaintiff raised numerous questions of material fact as to the reasonableness of these conclusions. However, the Court proceeded to *weigh* the competing accounts and to *resolve* the disputed questions of fact, all while *deferring to the SLC*. *See*, *e.g.*, Mem. Op. at 54 ("It bears noting at the outset that the court's role on this motion is not to second guess the conclusions that the SLC reached.") (footnote omitted). In effect, the Court of Chancery shifted the burden of persuasion to Plaintiff on summary judgment.

2. The Court Of Chancery Improperly Resolved Disputed Questions Of Material Fact About The Negative Impact Of Higher Prices

One of the central conclusions reached by the SLC was that any information suggesting a link between increased prices and lower customer traffic (*i.e.*, customer price resistance) was not material. A444. The SLC arrived at this conclusion by accepting Defendants' assertions that, as of the May Earnings Call, they believed that factors other than customer price resistance, such as "poor weather," were causing the known customer traffic slowdown. A445 n.2011, A446 n.2013.

In opposition to the SLC's Motion, Plaintiff raised numerous issues of material fact to show that, over a period of several quarters, EPL's Board and senior officers in fact discussed, with increasing concern, the impact of higher prices on EPL's SSS and customer value scores. Specifically:

- The impact of price increases was a major focus within the Company because EPL sought to increase prices by a total of 3% within a year, which EPL had never done before. A1266, A1273-34, A302.
- On November 24, 2014, Hawley prepared an analysis of the effect of the M6 price increases. Hawley noted declining value scores, as reported by Sandelman. Hawley concluded that "some warning signs have begun to emerge" and that, "while pricing is a necessity[,]... caution should be used." A521, A527, A534.
- On February 2, 2015, Hawley gave a presentation at the weekly senior management meeting, in which he analyzed the effect of the 2014 M9 price increases of 1.5%. The presentation showed that there had been a drop in units sold of items for which EPL had increased pricing. Market Force

value scores declined immediately following the M9 2014 price increases. A535-58, A311, A542, A545.

- At the February 5, 2015 Board meeting, Hawley gave a presentation, stating that "EPL Value scores decreased after M9 2014 Pricing." A314, A1563.

- On February 23, 2015, Hawley provided to all Defendants and the Board a "P3 2015 Sales Update," stating that EPL was "***Seeing Some Warning Signs on Pricing***." A559, A586 (emphasis added).

- On March 25, 2015, Hawley provided Settling Defendant Valle a "2015 Pricing Test" presentation, which stated that "[c]urrent pricing analytics and value scores indicate ***we may be hitting some barriers to additional pricing***." Hawley also noted that EPL was "***[e]xperiencing some concerning trends on value.***" A599-600 (emphasis added).

- At a May 12, 2015 Board meeting, at which TPP's directors were present, Hawley gave a marketing presentation informing the Board of the "Opportunities for Improvement… Pricing and Value." A677. Hawley stated that he inserted this slide because "I was highlighting an alternate thread of data that would suggest that ***we should be careful about future pricing actions***." A1288 (emphasis added). Hawley advised the Board that, as a result of the 2015 M2 price increases, "We've seen a decrease in M2 pricing items sold – ***has led to lower total sales from pricing***." Hawley also advised the Board that "Value Scores Have Dropped," as reported by both NPD and Market Force. A682-83, 1296.

- On May 14, 2015, Settling Defendant and CFO Roberts circulated the final version of the proposed Q&A for the May Earnings Call. In anticipation of the question "Any negative response from consumers to our price increases. Any impact on value scores," the proposed response was: "***We are seeing some potential pushback from consumers on prices***. While still strong, ***value scores have dropped in Q1 2015*** (per Marketforce and NPD)." A927

In short, Plaintiff raised numerous questions of fact as to the reasonableness of the SLC's conclusions that any link between increased prices and lower customer traffic was immaterial.

Against this background, the Court of Chancery held that Plaintiff's "alternative conclusion[ ] that the decline in SSS and value score was based on pricing increases" did not create a dispute of fact because "the SLC had provided *ample reasonable bases* for its conclusion that the data presented by Hawley was immaterial." Mem. Op. at 57 (emphasis added). Under a summary judgment standard, however, the Court of Chancery was not permitted to *weigh* the competing accounts and assess whether the SLC provided "ample" reasons to explain away any issues of fact raised by Plaintiff.

As one of these "ample reasonable bases," the Court observed that "the SLC relied on Hawley's own statements discounting a correlation between value scores and pricing increases and noting that he 'had been, in effect, providing his own point of view throughout his portion of the [Management Presentation],'" and that "Hawley himself had 'ultimately dismissed' the conclusion that 'the slower sales were due to changing underlying sales trends.'" Mem. Op. at 56-57 (footnotes omitted).

However, Plaintiff offered, and the record reflects, numerous specific facts indicating that the negative correlation between value scores and increased prices

was not just a one-time random musing by Hawley, but a subject that Hawley ***repeatedly*** presented to EPL's ***senior officers*** and to the ***Board***, including at the May 12, 2015 Board meeting. *See* Facts II.B. The SLC (and the Court of Chancery) also ignored Hawley's other, directly contrary statements that, ultimately, he *did* become concerned that the decline in sales reflected "changing underlying sales trends," and were not attributable to one-off factors such as "poor weather." Specifically, Hawley informed the SLC that, "by May 19, 2015 (the day of the stock sales at issue in the Investigation), he [Hawley] ***was increasingly concerned that the two prior weeks of bad sales were caused by issues with the business trends or modules, not just the weather.***" *See* A1751 (emphasis added).

Furthermore, Plaintiff raised questions of fact as to whether it was reasonable for the SLC to discount Hawley's data and presentations given that Hawley was "ultimately in charge of developing pricing recommendations for the brand," and given that his superior, Valle, "did not believe there was anyone at EPL in 2014 and 2015 more qualified than Mr. Hawley to analyze pricing." *See supra* at 5.

Plaintiff also showed that, although Defendants claimed to believe at the time that there were other causes such as "poor weather," the SLC never identified any contemporaneous communications among Defendants reflecting any discussion of such alternative causes. A1718-19. Instead, the SLC relied entirely on Defendants' *post hoc*, unsworn explanations for this narrative.

Moreover, unlike the committee in *Kahn*, which also evaluated insider trading claims, the SLC here never consulted any independent sources or experts, but instead simply accepted at face value that many at the Company believed Hawley's analyses were flawed. A457. However, "an SLC fails to conduct a reasonable investigation if it simply accepts defendants' version of disputed facts without consulting independent sources to verify defendants' assertions." *London*, 2010 WL 877528, at *17.

The SLC, therefore, did not meet its burden because there were genuine questions of material fact as to the reasonableness of its conclusion that the price increases did not have a negative impact on customer traffic and sales.

3. The Court Of Chancery Improperly Resolved Disputed Issues Of Material Fact Regarding Defendants' Scienter

Another of the SLC's central conclusions was that, in making the TPP Sale, TPP was not motivated in whole or in part by any negative information in TPP's possession. A473. However, Plaintiff raised numerous facts indicating that TPP and other Defendants knew of material, non-public negative information, and that they concealed this information from investors prior to making the TPP Sale. Specifically:

- The SLC has admitted that, on the morning of the TPP Sale on May 19, 2015, "the TPP Directors knew that … the 'effective' Q2 Company SSS forecast had dropped to approximately 1.25%—one half of the official 2.5% forecast communicated at the May 11 Board meeting." A1631-32

(footnote omitted). This information was not shared with investors before the TPP Sale. *See infra*, Argument I.C.4.

- In making the TPP Sale, TPP failed to comply with EPL's Insider Trading Policy. *See* Facts IV. To the extent insider trading policies are instituted to create a safe harbor, TPP's violation of the policy further supports an inference of scienter.

- For the May Earnings Call, Defendants prepared a Q&A that anticipated analysts asking whether there was "[a]ny negative response from consumers to our price increases." A927. Defendants proposed the following response: "***We are seeing some potential pushback from consumers on prices***." *Id.* (emphasis added).

- However, during the May Earnings Call, when asked directly whether customers were exhibiting price resistance, none of the Defendants provided the prepared answer. Instead, Defendants ad-libbed that any negative performance was attributable to marketing confusion and "the marketing communication thing," so that "the visibility of value on our menu is not as strong as it used to be." A940.

- In numerous Board presentations and other documents circulated amongst senior management, Defendants were repeatedly apprised of the impact of higher prices on EPL's value scores. *See*, *e.g.*, A1563 ("EPL Value scores decreased after M9 2014 Pricing"); A682 ("Value Scores Have Dropped"); *see generally* Facts II.A.

- In the May Earnings Call Q&A, Defendants anticipated that analysts would ask whether there was "any impact on value scores." A927. In response, Defendants prepared the following answer: "While still strong, ***value scores have dropped in Q1 2015*** (per Marketforce and NPD)." *Id.* (emphasis added).

- However, during the May Earnings Call, Defendants made no reference to the fact that EPL's value scores had dropped. Instead, Settling Defendant Valle stated that "[o]ur value scores, though, are still high" and Settling Defendant Sather stated "Value scores remain still one of our best attributes." A940.

- On May 5, 2015, Settling Defendant and CEO Sather sent Maselli (one of Defendant TPP's three representatives on the EPL Board) the results of a Market Force customer survey, in which "Period 5 shows lower scores in almost all categories." A321, A629. Sather instructed Maselli to "***keep this between us at this point*** as I don't want anyone to over react." A321 (emphasis added, footnote omitted).

- On May 8, 2015, Hawley circulated an earlier draft of the Q&A. A631-35. In response to the potential question from investors as to "***[w]hat keeps you up at night***," Hawley proposed the following response: "***[p]ricing and value***; How to continue to keep the QSR+ balance - high quality but still at a good price." A634 (emphasis added). However, this question and proposed answer were then deleted by Settling Defendant and CFO Roberts in a subsequent draft of the Q&A. A639-45.

Despite these factual issues, the Court of Chancery improperly resolved questions of fact by accepting the SLC's narrative as to TPP's reasons for the TPP Sale.

Specifically, Plaintiff argued that TPP's undisputed violation of the Company's Insider Trading Policy, including the failure to comply with the Policy's pre-clearance requirement, supported the inference of scienter. However, the Court of Chancery accepted the SLC's characterization of this as a "technical violation" (Mem. Op. at 53) and proceeded to cite the policy in support of an inference *in favor* of TPP. Specifically, the Court of Chancery held that the "existence of the lock-up agreements and the Policy resulted in May 19, 2015, being the first available Trading Window since the IPO," and that this window "provided a *more plausible* explanation for Pollo Partners' intent than the exploitation of material nonpublic

information." Mem. Op. at 58 (emphasis added); *see also id.* at 61 (noting the SLC's "determin[ation] that innocent explanations for the timing of the trade and the disclosures issued in May 2015 were *more plausible* than the insider trading theory set forth in the Complaint.") (emphasis added, footnote omitted).

Under a summary judgment standard, however, the Court of Chancery was not permitted to weigh which narrative was "more plausible." In any event, because TPP breached the Insider Trading Policy, TPP could not access the trading window. Therefore, the Court should not have drawn an inference *favoring* TPP based on this trading window. A622 ("even if the Trading Window is open, you and your Restricted Affiliates may not trade in Company securities… if you are aware of material non-public information about the Company…. In addition, you must pre-clear all purchases and sales with the Chief Legal Officer even if you initiate them when the Trading Window is open."). Furthermore, no witness interviewed by the SLC stated that TPP had a predetermined intention to sell in the "first available Trading Window," and in fact TPP directors Maselli and Kehler were closely monitoring the market because they had not yet determined whether to sell. A386-87.

Importantly, the Court ignored that all reasonable inferences from the violation of the Insider Trading Policy should be drawn "in the light most favorable to the non-moving party." *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*,

871 A.2d 428, 444 (Del. 2005). As Vice Chancellor Laster explained in denying the 2016 Motion, an equally plausible inference was that, "if I hadn't been able to sell yet and I was coming up on my first chance to sell and there was bad stuff, I might want not to let the bad stuff get out to the market before I could at least sell some of my position." A1474 at 107:19-23.

Plaintiff also argued that, during the May Earnings Call, Defendants affirmatively concealed negative information concerning the impact of higher prices on sales and value scores, as well as the declining 2015 Q2 Company SSS metric, and that this too evidenced scienter. However, the Court of Chancery accepted the SLC's conclusion that "the EPL board and Executive Management Team made the decision not to share that information in the Earnings Call *for other reasons*." Mem. Op. at 58 (emphasis added). Specifically, the Court of Chancery accepted the SLC's conclusion that "the SSS range in the Q1 2015 Earnings Call Q&A may have been Mr. Hawley's forecast," but it "did not reflect an official position by the Company." Mem. Op. at 58.

However, not only did Plaintiff raise questions of fact (*see supra*) concerning these purported "other reasons," the Court's legal analysis was incorrect. Even if the negative SSS information was not an "official position" within the Company (which itself is disputable), the point is that Defendants, including TPP, were aware of the materially negative, non-public information at the time of the TPP Sale. *See Kahn*,

23 A.3d at 838 (the element of scienter is satisfied where the defendant made its sale motivated "in whole or *in part*" by negative information in its possession) (emphasis added).

4. Plaintiff Raised Questions Of Material Fact Regarding The Deterioration In 2015 Q2 Company SSS

At the time of the TPP Sale, TPP (by virtue of its three representatives on the Board) also possessed negative information concerning the Company's deteriorating 2015 Q2 SSS performance – information that departed significantly from what investors had been told. The SLC, however, concluded that this information was immaterial, a conclusion that was central to the SLC seeking dismissal of this litigation.

The Court of Chancery did not directly address Plaintiff's arguments (A1704-30) as to the reasonableness of this conclusion. Nevertheless, Plaintiff raised numerous questions of material fact suggesting this conclusion was not reasonable:

- EPL's senior management had "aligned" around a 2015 Q2 Company SSS figure of 2.5%, a figure that was provided to the Board on May 12, 2015. *See* Facts II.A. Defendants conceded in SLC interviews that any significant negative departure from this figure was material. *See* A365-66. *See* Facts II.B.

- Prior to the May Earnings Call and the TPP Sale, Defendants were presented with information showing that the projected 2015 Q2 Company SSS was significantly below 2.5%. *See* Facts II.B.

- Despite the deteriorating 2015 Q2 Company SSS, Defendants proceeded to inform investors on the May Earnings Call that the 2015 Q2, System-

Wide SSS would be approximately 3.0%. A937. This 3.0% projection was not based on Hawley's updated figures, but was instead calculated as the weighted average of the prior 2.5% 2015 Q2 Company SSS figure and the 3.6% 2015 Q2 Franchise SSS figure. A326. *See* Facts II.B.

- By the morning of, and immediately prior to, the TPP Sale, TPP learned of further data confirming the significant deterioration in the 2015 Q2 Company SSS. The SLC concluded that, "by May 19, 2015, the TPP Directors knew that… the 'effective' Q2 Company SSS forecast had dropped to approximately 1.25%—one half of the official 2.5% forecast communicated at the May 11 Board meeting." A1631-32 (footnote omitted). For the quarter-to-date, the 2015 Q2 Company SSS growth rate was just ***0.1%***. A1744. *See* Facts II.B.

Accordingly, at the very least, there were questions of fact concerning the reasonableness of the SLC's conclusion that the deteriorating 2015 Q2 Company SSS was immaterial.

II. THE COURT OF CHANCERY INCORRECTLY HELD THAT THERE WERE NO DISPUTED QUESTIONS OF FACT AS TO THE SLC'S INDEPENDENCE

A. Question Presented

Did the Court of Chancery incorrectly hold that there are no disputed questions of fact as to the SLC's independence? This issue was preserved for appeal. A1726-36.

B. Standard Of Review

Rulings regarding the independence of an SLC and the reasonableness of its conclusions (*i.e.*, the first prong of *Zapata*) are reviewed *de novo*. *Kahn*, 23 A.3d at 840-41.

C. Merits Of The Argument

1. The SLC Has The Burden To Show There Is No Material Issue Of Fact Raising Doubt As To The SLC's Independence

Unlike the "demand-excused context" where the entire board is "presumed to be independent," an SLC "has the burden of establishing its own independence by a yardstick that must be… above reproach." *Beam*, 845 A.2d at 1055 (quoting in part *Lewis*, 502 A.2d at 967). As former Vice Chancellor Strine explained, "[t]he SLC bears the burden of persuasion on this motion and must convince me that there is no material issue of fact calling into doubt its independence." *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 920 (Del. Ch. 2003) (citing *Zapata*, 430 A.2d 779; *Lewis*, 502 A.2d 962).

Here, the SLC did not meet its burden of demonstrating no material issues of fact casting doubt on its independence.

2. There Are Disputed Questions Of Fact As To The Independence Of Two SLC Members Based On Their Prior Filing Of A Motion To Dismiss

In 2016, Floyd and Lynton both served on the Board when it decided to retain the same counsel as four of the Settling Defendants and file a motion to stay or dismiss the insider trading claims at issue. *See* A113-75. The 2016 Motion did not merely raise technical or procedural arguments, but, rather, affirmatively argued the very same issues of fact that the SLC would later be tasked with "independently" investigating. For example, the motion asserted that Board members did not face a substantial likelihood of liability for insider trading because, *inter alia*:

- "[N]either the timing nor the amounts of stock sold were suspicious." A127.
- "The alleged non-public information was disclosed." A161-64.
- "The market's awareness of El Pollo Loco's menu changes and the impact on same store traffic is confirmed by contemporaneous analyst reports." A163.
- "[T]he undisclosed intra-quarter results were immaterial." A165-68.
- The "disputed sales" were not "suspicious in amount and timing" because "the first time a permitted selling window opened for corporate insiders was on May 19, 2015, the day the Sellers made their disputed sales." A168.
- "[T]he Sellers sold at a time that did not maximize their potential return, further negating an inference that they calculated the sales to reap the benefits of insider information." A170.

- "[T]he fact that the Sellers retained a significant percentage of their holdings also negates scienter." A171.
- "[T]he lapse in time between the May 19 sales and the alleged bad news disclosed months later on August 13 further underscores the lack of scienter." A171.

Both Floyd and Lynton were on the Board when EPL presented these arguments, and presumably believed what was asserted – that the Defendants (including TPP) did not face a substantial likelihood of liability for insider trading. Floyd testified at his deposition that no Board member, including himself, objected to the filing of this motion. A1769 at 66:8-16, A1728. To hold that these Board members can be separated from the arguments made in Court on behalf of EPL implies that the arguments were merely those of counsel and not the company it represented, or else that the directors were uninformed or held opposing opinions but remained silent.

Indeed, the SLC later repeated many of these same arguments from the 2016 Motion when it moved to dismiss Plaintiff's Complaint. *See*, *e.g.*, A1657-62 (arguing that the undisclosed intra-quarter results were immaterial); A1663 (arguing that "the timing of the Block Trade… does not suggest an ulterior motive"); A1664 (arguing that "the Company accurately disclosed that Q2 2015 SSS would likely be below market expectations").

Floyd and Lynton could not reasonably be expected to divorce themselves from the positions previously asserted in the Court of Chancery. At best, their independence was never "above reproach" as required by *Beam*. At worst, the SLC lacked independence because "the SLC members appear to have reviewed the merits of plaintiffs' claims before the SLC was ever formed" and therefore "prejudged the suit based on that prior exposure or familiarity" and "conducted the investigation with the object of putting together a report that demonstrates the suit has no merit." *London*, 2010 WL 877528, at *15.

The Court of Chancery concluded that there was no issue of material fact as to these members' independence, and that Plaintiff was not entitled to "an inference that both Floyd and Lynton must therefore have reviewed, analyzed, and prejudged the merits of this litigation." Mem. Op. at 42. The Court reasoned that Plaintiff "cannot rely on inferences at this stage" since "the applicable standard is akin to a summary judgment inquiry" and Plaintiff's allegation that these members had prejudged the merits was "unsupported." *Id.* (footnote omitted).

Plaintiff, however, is the non-moving party, and under a summary judgement standard, all reasonable inferences from the evidence must be decided "in the light most favorable to the non-moving party." *AeroGlobal*, 871 A.2d at 444. At the very least, there should have been an inference in favor of the non-moving party that Floyd and Lynton would be reluctant to contradict their prior court filing arguing

that there was no liability for insider trading, and inclined to reach the same conclusions of fact set forth in that filing.

Moreover, it is not necessary to show that an SLC member "actually acted improperly," only that the record "raise a question of fact as to whether [they] could act independently." *Lewis*, 502 A.2d at 967. Since the 2016 Motion made factual arguments concerning the same subject matters that Lynton and Floyd were later tasked to "independently" investigate, their presence on the Board for the earlier filing raises a question of fact as to their independence. Accordingly, the SLC did not meet its "burden of persuasion" of demonstrating "that there is no material issue of fact calling into doubt [the SLC's] independence." *Oracle*, 824 A.2d at 920.

3. There Are Disputed Questions Of Fact As To The Independence Of Two SLC Members Based On Their Relationships With Kehler

In addition to the above, Lynton and Floyd lacked independence based on their relationships with Kehler, who had recruited them both to the EPL Board.

Kehler is one of TPP's representatives on the Board, and one of the three co-founders of Trimaran Capital, which formed Defendant TPP in 2005 as the ownership vehicle to acquire the business of EPL. A197. Kehler is one of only two people vested with all the power to manage, deal with, and dispose of the capital, assets and funds of TPP. A197-98. It was Kehler who authorized the TPP Sale.

A197. In addition, Kehler has an ownership interest in TPP and personally received $2,954,766 from the TPP Sale. A415.

Lynton and Kehler have a long-standing relationship, dating back over 35 years. Lynton and Mrs. Kehler knew each other in college. Early in their careers, Lynton, Kehler and Mrs. Kehler worked together at Lehman Brothers. A218. The Lynton and Kehler families shared approximately 20 family dinners at their respective residences over the 35-year relationship, with spouses and children typically in attendance. Kehler's family even made visits to the home of Lynton's mother. Lynton and Mrs. Kehler had private one-on-one meals, and followed up with each other on new ventures. (Lynton sent Mrs. Kehler a congratulatory email when Mrs. Kehler was named the Executive Director of the American Ballet Theatre). Lynton reached out to Kehler seeking important business advice regarding fees for a private equity firm looking to invest in her business. Additionally, Lynton and Kehler regularly solicited contributions for and made contributions to each other's charities. A217-18.

The Court of Chancery, however, improperly inferred that, because Lynton held numerous leadership roles in other sectors separate from EPL, she "has a reputational incentive to act independently…." Mem. Op. at 48. Additionally, the Court characterized Lynton's relationship with Kehler as "based largely around their

children" so that there was "no basis to conclude that [such] a relationship… gave rise to a 'sense of obligation' to Kehler much less [TPP]." Mem. Op. at 48-49.

This Court, however, has explicitly recognized that deep human friendships, lasting for decades, could compromise a director's independence. *Delaware County Employees Ret. Fund v. Sanchez*, 124 A.3d 1017, 1022 (Del. 2015). Critically, as in *Sanchez* and *Oracle*, the SLC's decision here represents millions of dollars for Kehler and TPP, and events that may arguably be coincidental cannot be resolved in defendant's favor where, "when considered in the plaintiff-friendly manner required, create a reasonable doubt about … independence." *Id.* at 1024. *Accord*, *Sandys v. Pincus*, 152 A.3d 124 (Del. 2016) ("[O]ur courts cannot blind themselves…when considering whether a director on a controlled company has other ties to the controller beyond her relationship at the controlled company.").[5]

Plaintiff also raised, and the record reflects, questions of material fact concerning Floyd's independence from Kehler. Floyd has also known Kehler for

---

[5] Contrary to the Court of Chancery's finding (Mem. Op at 48), the facts here are more akin to those in *London*, 2010 WL 877528, at *13-15 (finding members of the special litigation committee were not independent where they were solicited by an interested director with years of connections between them) than in *Sutherland v. Sutherland*, 958 A.2d 235, 240-41 (Del. Ch. 2008) (finding special committee member was independent where he was not identified by any interested director, and apart from some *de minimis* contact with a sister-in-law of the interested defendants, had no previous relationship with any of the defendants).

many years. Both jointly served on the Board of Overseers for the University of Pennsylvania School of Nursing for more than sixteen years. Kehler was Chair of the Board when Floyd joined. A216. The Court of Chancery noted that Floyd had been awarded the Dean's medal by the Board of Overseers, but ignored that the medal was awarded when Kehler was the Chair and that the timing of the award was close in proximity to Kehler's solicitation of Floyd to join the EPL Board. The Court also noted the conversations between Kehler and Floyd regarding this litigation, but failed to credit Plaintiff with the inference that Kehler was "testing" Floyd's reaction to this litigation while bemoaning that the "optics did not look good." Mem. Op. at 44.

As then Vice Chancellor Strine observed, "[i]t is no easy task to decide whether to accuse a fellow director of insider trading." *Oracle*, 824 A.2d at 921. Notably, the *Oracle* and *London* courts found material questions of fact regarding independence based upon connections more tenuous than those at issue here. *See London*, 2010 WL 877528, at *15 (finding lack of independence where an interested director was cousin to one committee member's wife and had minimal business relations with another committee member); *Oracle*, 824 A.2d at 920-21 (finding lack of independence regarding an insider trading claim, where two committee members held positions at Stanford University and one of the defendants taught in a different department).

These personal relationships, when viewed in full context, including their longevity and the nature of the allegations at issue, with all reasonable inferences credited to Plaintiff, reveal disputed questions of material fact as to the independence of Lynton and Floyd.

III. THE COURT OF CHANCERY ABUSED ITS DISCRETION IN GRANTING THE SLC'S MOTION UNDER *ZAPATA*'S SECOND STEP

A. Question Presented

Did the Court of Chancery err in ruling that the SLC's conclusions were reasonable under the second prong of *Zapata*? This issue was preserved for appeal. A1736-37.

B. Standard Of Review

The standard of review for this issue is abuse of discretion. *Kahn*, 23 A.3d at 841 ("Because *Zapata's* second prong implicates the Court of Chancery's business judgment, we review for an abuse of discretion.") (citation omitted).

C. Merits Of The Argument

Here, the Court of Chancery abused its discretion by ruling, under the second step of *Zapata*, that the SLC's conclusions were "reasonable." Mem. Op. at 60. The *Zapata* second step is intended to "thwart instances where corporate actions meet the criteria of step one, but the result does not appear to satisfy its spirit." *Zapata*, 430 A.3d at 789. Given the extensive factual record supporting Plaintiff's allegations of insider trading against a controlling stockholder, it was error to not find, at the very least, that dismissal on this record violates the spirit of *Zapata*.

CONCLUSION

For all the aforementioned reasons, Plaintiff respectfully submits that the SLC failed to meet its burden of persuasion and its motion to dismiss must be denied, and the Opinion of the Court of Chancery be reversed.

ANDERSEN SLEATER SIANNI LLC

/s/ Ralph N. Sianni
Ralph N. Sianni (DE Bar No. 4151)
2 Mill Rd. Suite 202
Wilmington, DE 19806
(302) 510-8528

Counsel for Plaintiff Below-Appellant

Of Counsel:

Peter Safirstein
SAFIRSTEIN METCALF, LLP
1345 Ave. of the Americas, 2nd Floor
New York, NY 10105
(212) 201-2845

Hung G. Ta
JooYun Kim
Natalia D. Williams
HGT LAW
250 Park Avenue, 7th Floor
New York, NY 10177
(646) 453-7288

Dated: December 6, 2021