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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,	:	
v.	:	No. 313, 2021
TRIMARAN POLLO PARTNERS, L.L.C.	:	Court Below: Court of Chancery of the State of Delaware C.A. No. 12760-CM
Defendant Below, Appellee,	:	
and	:	**Public Version Filed: January 7, 2022**
EL POLLO LOCO HOLDINGS, INC.,	:	**Original Version Filed: December 20, 2021**
Nominal Defendant Below, Appellee.	:	

APPELLEE'S ANSWERING BRIEF

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Dated: December 20, 2021

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NATURE OF PROCEEDINGS

The independent members of the SLC,[1] Carol "Lili" Lynton, William Floyd, and Douglas Babb, issued a comprehensive 377-page Report, detailing the exhaustive factual record developed over its year-long investigation, carefully analyzing the relevant legal issues, and explaining the bases for the SLC's recommendation that it was not in the Company's best interests to pursue Plaintiff's claims. As a result of this determination, the SLC moved to dismiss Plaintiff's Complaint.

The SLC then produced to Plaintiff more than 13,000 pages of documents—on top of the 408 exhibits to the Report—and Plaintiff took full-day depositions of two of the three SLC members.

On July 30, 2021, the Court of Chancery issued a detailed decision ("Opinion") in which it faithfully applied the standard articulated in *Zapata Corporation v. Maldonado*, 430 A.2d 779 (Del. 1981) and its progeny. After "dilat[ing] extensively on Plaintiff's challenge to the substance and scope of the SLC's investigation," the court granted the Motion, finding the SLC had met its burden under *Zapata*. Opinion 1, 60.

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[1] Capitalized terms not defined herein have the meaning ascribed in Plaintiff's Opening Brief ("Brief" or "OB").

In his appeal, Plaintiff does not point to any information that the SLC failed to consider, nor question the existence of the evidence upon which the SLC based its conclusions. Instead, Plaintiff raises supposed factual disputes regarding *the allegations in his Complaint* and argues that the Court of Chancery "erred by failing to hold the SLC to a summary judgment standard[.]" OB 3. Plaintiff demonstrates a fundamental misunderstanding of Delaware law. "The granting of the SLC's motion using the Rule 56 standard does not mean that the court has made a determination that the claims the SLC wants dismissed would be subject to termination on a summary judgment motion, only that the court is satisfied that there is no material factual dispute that the SLC had a reasonable basis for its decision to seek termination." *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 929 n.20 (Del. Ch. 2003); *see also Katell v. Morgan Stanley Grp., Inc.*, 1995 WL 376952, at *12 (Del. Ch. June 15, 1995) (the SLC is not required "to show that the parties do not dispute material facts regarding Plaintiffs' allegations").

Plaintiff repeatedly refers to what "Defendants" as a group supposedly knew or believed, all the while citing only to evidence regarding the perspective of a lone EPL employee non-defendant, Ryan Hawley, then VP of Marketing Planning & Analysis. For example, Plaintiff lists eight bullet points supposedly showing that "EPL's Board and senior officers in fact discussed, with increasing concern" the impact of EPL's pricing actions. OB 24. Yet every one of those bullet points cites

to *Hawley's testimony* about his *own perspective* or to documents *Hawley drafted* (most of which were never shared with TPP).

Plaintiff's attacks on the SLC's independence fare no better.

First, Plaintiff seeks an inference—devoid of factual support—that the SLC prejudged his claims. The Court of Chancery correctly held that Plaintiff "cannot rely on inferences at this stage," and that his position "finds no support in Delaware law." Opinion 42–43.

Second, Plaintiff's assertion that Floyd lacks independence because he was nominated to the Board by Dean Kehler, a director associated with TPP, and served on a separate board with Kehler, is foreclosed by "well-settled Delaware law," which holds that "a director's independence is not compromised simply by virtue of being nominated to a board by an interested stockholder," *In re KKR Fin. Holdings LLC S'Holder Litig.*, 101 A.3d 980, 996 (Del. Ch. 2014), *aff'd sub nom. Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015), and that "one's position on multiple boards does not in and of itself call into question one's independence from an interested director sitting with him on such boards," *Zimmerman ex rel. Priceline.com, Inc. v. Braddock*, 2002 WL 31926608, at *10 (Del. Ch. Dec. 20, 2002).

Third, Plaintiff's attempts to undermine Lynton's independence arise from misleading and inaccurate assertions regarding her familiarity with Kehler. Far from

the "deep human friendships" that courts have held impair a director's independence, at most Lynton and Kehler "move in the same business and social circles," which is insufficient to undermine Lynton's independence. *See Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1050–52 (Del. 2004) ("Allegations of mere personal friendship or a mere outside business relationship, standing alone, are insufficient to raise a reasonable doubt about a director's independence.").

Finally, Plaintiff offers no support for his position that the court abused its discretion when it determined that the SLC's recommendation did not "appear[] 'irrational' or 'egregious' or some other such extreme word." *Kindt v. Lund*, 2003 WL 21453879, at *3 (Del. Ch. May 20, 2003) (citation omitted). The court "extensively" considered each of Plaintiff's arguments and correctly determined that dismissal "falls within the range of reasonable outcomes." Opinion 60. The court's appropriate exercise of its discretion should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The trial court correctly ruled that the SLC met its burden to demonstrate that the SLC had reasonable bases for the conclusions detailed in its 377-page Report.

2. Denied. The court correctly ruled that the SLC met its burden to demonstrate its independence.

3. Denied. The court did not abuse its discretion in determining that the SLC's recommendation was reasonable under *Zapata*'s discretionary second step.

COUNTERSTATEMENT OF FACTS

I. This Action

Plaintiff filed his Complaint on September 20, 2016. *See* A1. As relevant to this appeal, Plaintiff alleges that in May 2015, TPP sold EPL stock, motivated, in whole or part, by material, nonpublic information relating to (i) the allegedly negative customer response to certain increased prices of EPL's menu items; or (ii) intra-quarter SSS forecasts. A95–96, 107–09. On March 17, 2017, without "expressing any view about what the facts may ultimately hold," A1476 at 109:10–12, Vice Chancellor Laster denied the Defendants' motion to dismiss, noting that the allegations were "the types of things where there might be explanations both ways … and at this stage of the case the plaintiffs get the inference," A1471 at 104:11–13.

II. The Special Litigation Committee

On October 6, 2017, the Board designated the SLC and granted it exclusive authority to investigate and evaluate the allegations and issues in Plaintiff's Complaint and to take whatever actions the SLC deemed appropriate and in the best interests of the Company. B32–33.[2] The Board appointed Floyd and Lynton as the

[2] Plaintiff's Appendix includes 339 of the 377 pages of the Report. The 38 pages Plaintiff excluded include sections addressing the very bases for the SLC's conclusions that Plaintiff argues on appeal are lacking, and the excluded appendices directly support those conclusions. The SLC has included a full copy of the Report and the appendices thereto in its Supplemental Appendix. *See* B1–443.

SLC's initial members. B33. In January 2018, the Board appointed Babb to the SLC. *Id.*

Each of the SLC members are non-employee, outside directors who qualify as independent directors under the NASDAQ rules. B26. None of them were EPL directors or affiliated with EPL at the time of the alleged misconduct. B45. Plaintiff does not dispute Babb's independence.

A. William R. Floyd

Floyd has significant operational and leadership experience, including over a decade of executive experience in the restaurant industry. B36–37. Floyd served as COO of Taco Bell and KFC and the Chairman of the Board of Buffet Holdings, Inc. B36. He also served as Chairman and CEO of Physiotherapy Associates, President and CEO of Beverly Enterprises, Inc., and President and CEO of Choice Hotels, International. B36–37.

Prior to joining the Board, Floyd did not know any Board members other than Kehler, nor did he have any prior personal, financial, or familial relationship with any of the Defendants, Trimaran Capital, Freeman Spogli, or any of their principals. B37–38.

Floyd met Kehler in 2006, when Floyd joined the 30-member Board of Overseers of the University of Pennsylvania School of Nursing ("Board of Overseers"), which meets three to four times per year and of which Kehler was Chair

at the time. B38. In 2016, Floyd received a "Dean's Medal"—referring to the "Dean" of the Nursing School, not Dean Kehler—from the University of Pennsylvania School of Nursing. B491 at 241:17–21. Floyd has had virtually no social interaction with Kehler or his family. B487–93 at 237:14–243:20.

B. Carol "Lili" Lynton

Lynton is an experienced executive with over 28 years of restaurant industry experience. She is the cofounder and operating partner of the Dinex Group, a specialty restaurant business that operates Daniel Boulud-branded restaurants, and has served as director and executive officer of PR NYC, LLC, a New York-based restaurant owner/operator. B38.

Lynton also has extensive financial industry experience, having served as Chief Investment Officer of HD American Trust, a family investment office, and as an analyst at Sanford C. Bernstein and Lehman Brothers. B39.

Prior to joining the Board, Lynton did not know any Board members other than Kehler, nor did she have any other prior personal, financial, or familial relationship with any of the Defendants, Trimaran Capital, Freeman Spogli, or any of their principals other than Jay Bloom, whom she knew only as a business partner of Kehler. B39–40, 48.

As is detailed in the Report, Lynton met Kehler's wife while they both attended Harvard College, where they interacted two to three times. B39–40. From

1983 to 1985, Lynton worked as a junior analyst at Lehman Brothers, where Kehler and his wife also were employed. B40. Lynton did not report to Kehler, and they only worked together over one two-week period for a business pitch. *Id.* She has not worked with Kehler since departing Lehman Brothers 36 years ago to pursue her MBA degree from Harvard Business School. B39–40. Lynton's only other professional contact with Kehler was a brief phone call approximately 12 years ago, during which she sought advice from him and, separately, two unaffiliated individuals, regarding fees for a private equity firm exploring an investment in her business. B40.

For a year or two, Lynton's eldest daughter attended the same high school as the Kehlers' eldest son. B40; B445 at 123:10–16. Lynton has dined with the Kehlers roughly 20 times over the past 35 years, B40, many of which "would have been a long time ago," B449 at 137:9–23 and were "mostly with the kids and about the kids," B454 at 171:22–172:25. Though Lynton's and the Kehlers' children would visit each other's homes when the children were young—and once visited Lynton's mother's home then—Lynton has only dined with Kehler's wife twice since 2016. B450 at 138:17–20; B458 at 172:2–25; B460 at 174:6–23.

Over the past decade, Kehler contributed approximately $13,000 total to the East Harlem Tutorial Program, of which Lynton is a board member and to which she has contributed over $2 million and raised over $5 million. B40. In the five years

prior to joining the Board, Lynton donated approximately $10,000 total to CARE USA, a nonprofit of which Kehler was a board member and which reported donor contributions of over $185 million during fiscal year 2017. *Id*.

III. The SLC's Investigation

Over the course of more than a year, the SLC conducted a thorough investigation in which it received over 249,000 documents, including internal emails, board materials, and hundreds of EPL's periodic financial reports. B63–65. The SLC Members reviewed over 12,500 pages of relevant documents, prepared for and attended over a dozen witness interviews, reviewed transcripts or summaries thereof of 15 depositions taken in the *Turocy* Action, and reviewed and revised the SLC report and its over 400 exhibits. B66, 79–81. The SLC and its counsel conducted 16 interviews with 12 witnesses, including each of the Defendants, the TPP Directors,[3] and several key EPL employees, including Hawley, whom the SLC interviewed on three occasions. B77–78.

IV. The SLC Report

In its 377-page single-spaced Report—accompanied by 408 exhibits and six appendices—the SLC set forth its detailed findings and conclusions, including that the Board (including the TPP Directors) and senior management: (i) were skeptical of the link Hawley attempted to draw between EPL's pricing actions and sales; and

[3] "TPP Directors" refers to Kehler, Maselli, Barton, and Roth.

(ii) reasonably believed in the achievability of the Q2 Company SSS forecast provided to the Board and disclosed to the market. Based on these findings and a careful analysis of applicable law, the SLC concluded that TPP did not possess material, nonpublic information and that TPP was not motivated to trade, in whole or in part, as a result of any such information.

A. Relevant Findings of Fact

1. Impact of EPL Pricing Changes

EPL increased the prices of certain menu items twice in 2014 and once in 2015. B124. For each of those pricing actions, Hawley sought to analyze the effects of the increased prices. He presented his findings to senior management and, in far fewer instances, the Board.[4] B124–41. Despite Hawley's concerns about the potential effects of the pricing actions, EPL's sales growth and value scores remained positive following each. *Id.* Moreover, members of senior management and the Board, including Maselli, expressed doubts about Hawley's perspective, both because of the generally positive trend of EPL's sales and value scores, and because of the many factors that impact performance during any given period. B133–36.

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[4] The majority of Hawley's presentations and analyses Plaintiff highlights were *not* shared with the Board or provided to the TPP Directors. *See* B126–41.

i. May 12, 2015 Management Team Presentation

As part of EPL's quarterly Board meeting, the TPP Directors attended a Management Team Presentation on May 12, 2015. B154. Hawley prepared and presented a majority of the "Marketing" slides within the presentation, including all of the slides referenced in the Complaint. B155–56. Several of Hawley's slides discussed the Company's recent pricing actions in connection with slower sales growth in early 2015. B156–70.

Based on a careful review of the documentary evidence and testimony of more than a dozen witnesses, the SLC concluded that the slides purportedly showing a connection between EPL's pricing actions and decreased sales reflected Hawley's own perspective, which senior management and the Board did not share. B123–24, 313–16. Additionally, certain of Hawley's slides were inaccurate or mislabeled and therefore did not substantiate the supposed link between pricing and weaker sales. B166, 281, 350, 366, 370.

For example, in a slide directly following two slides regarding the pricing action, Hawley emphasized that Q1 2015 transactions had dropped to 0.1%, suggesting a causal connection between price increases and negative performance. B314; *see* A815. But the Company had planned for *zero* transaction growth in Q1 2015, meaning that actual growth in the quarter had outpaced EPL's official plan for fiscal year 2015 ("Plan"). A815.

Hawley presented another slide speculating that "pricing" had "led to lower total sales." B159. But the slide's data referenced only those individual menu items subject to the 2015 pricing increase, not "total sales." *Id.* It is neither surprising nor problematic that the Company sold fewer items for which prices were raised, particularly given that companies often increase profit by selling fewer of the same items at higher prices due to the resulting decrease in expenses. B313.

Hawley also presented two slides relating to a purported decline in EPL's so-called "value scores"—consumer survey responses regarding EPL's value. B161–70. Both slides contained significant flaws that led the attendees, including the TPP Directors, to give them very little credence. *Id.*

The first, titled "Value Scores Have Dropped," purportedly showed that EPL's value scores, as measured by NPD, had declined in Q1 2015 and were below those recorded by other Quick Service Restaurants. B161. The TPP Directors, among other members of the Board and senior management, discounted this data because (i) NPD was a newly retained firm with limited customer survey data on EPL; and (ii) the slide misleadingly compared Q1 2015 value scores with prior full-year averages, despite the importance of seasonal variance in the restaurant industry. B161–63. Indeed, contemporaneous emails showed that NPD had warned Hawley about the insufficient sample sizes, and Hawley himself questioned the reliability and significance of the data at the time. B161–64.

The second, titled "Market Force Value Scores Confirm Trend," was mislabeled by Hawley as showing "value scores," when it instead showed a distinct Market Force measurement regarding "price competitiveness." B164–65. Market Force's actual value score data—the source most trusted by EPL—showed that EPL's value scores were in fact at all-time highs during Q1 2015. B165, 282. Hawley confirmed as much, but said that he had presented the then-limited NPD data as "one piece of an alternative data stream." B164–65, 281–84.

Finally, Hawley presented a slide indicating that Company SSS was trending below the official Plan for Q2 2015, a fact EPL disclosed to the market during the Q1 2015 Earnings Call. B171–72; *see* A697. The individuals interviewed by the SLC identified factors unrelated to the Company's pricing actions that they believed contributed to the slower sales, including the simultaneous (and atypical) promotion of two higher-priced, non-chicken proteins on the menu at the same time (a factor that Hawley acknowledged was potentially causing the softness in sales). B176.

Several other slides from the Management Team Presentation confirmed that management believed at the time that marketing confusion stemming from the Company's promotional menu items and the impact of having two higher-priced proteins on the menu at the same time—not resistance to incremental price increases across a variety of products—was to blame for the sales slowdown. B177–79. For example, the Management Team Presentation reflects that EPL decided to end the

promotion of higher-priced Carne Asada ahead of schedule, while launching the Company's highly anticipated Hand-Carved Salads one week earlier. B179. The Management Team Presentation likewise included a slide—"Sourcing From Shrimp May Be Limiting Sales"—that highlighted the sales impact of having two higher-priced proteins on the menu at the same time. A700.

2. Q2 2015 Company SSS

i. Monitoring and Forecasting

Throughout the relevant period, the Company circulated several periodic reports to EPL's officers and directors, including the TPP Directors, B90–101, including two daily reports containing information regarding SSS, B94–99.

The first, the "Daily Sales Flash Report" included actual SSS for the prior day, week-to-date, period-to-date, and year-to-date. B94–95.

The second, the "Daily Sales Update," included actual SSS results layered in with interim projections generated by Hawley. B87, 97. Hawley generated these two-week forecasts using a separate—and less rigorous—process and model than he used to generate the formal quarterly forecasts presented to the Board. B96–97. Hawley explained that these informal forecasts were generated primarily for the operations team for staffing purposes and that neither management nor the Board considered these to be the "official" forecast, which had "organizational alignment" and were presented during Board meetings. B98.

In the period leading up to the Block Trade,[5] the Daily Sales Updates reflected Hawley's increasingly negative forecasts for Q2 Company SSS. B113–14, 145, 290–94. By May 19, 2015, the TPP Directors had received reports showing that, consistent with the revised guidance disclosed to the market, EPL had not met the Company SSS Plan for P4 2015 (April) and had failed to meet its Company SSS Plan for the first three weeks in P5 2015 (May). B290–94. The reports also contained information sufficient to calculate an "effective" Q2 Company SSS forecast—a combination of actuals through May 18, the interim two-week forecast for the period in progress, and the official forecast for the final period of the quarter—of approximately 1.25%.[6] *Id.*

However, the record confirms the limited utility of mid-period results in determining how a particular quarter will turn out given the underlying nature of EPL's sales, which have a high baseline variability and a sensitivity to both predictable and non-predictable events, such as the introduction of new products, refocusing of marketing emphasis, operational issues, poor weather, and others.

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[5] This refers to the May 19, 2015 Rule 144 block trade through which TPP sold a portion of its EPL shares.

[6] The daily reports did not contain an "effective" Q2 2015 Company SSS forecast. However, recipients of those reports could have calculated such a forecast by using the P4 actuals, the official P6 forecast presented to the Board during the May 2015 Board Meeting, and the P5 forecast presented in the Daily Sales Update. B293–94. The SLC found no evidence indicating that any of the TPP Directors in fact calculated this "effective" Company SSS forecast.

B294. Indeed, EPL had previously demonstrated the ability to rebound in the final period to meet or exceed the forecast for a quarter after facing two significantly below-forecast periods. B301, 428.

ii. May 11, 2015 Board Presentation

Senior management and the Board, including the TPP Directors, attended a May 11, 2015 presentation during which Roberts presented on EPL's internal Q2 2015 forecasts. B146–47. EPL had lowered its forecasted Q2 2015 Company SSS from the Plan of 4.7%, which had been set the prior year, to 2.6%.[7] B147. The updated Q2 2015 Franchise SSS forecast had been lowered to 3.6%, which resulted in a System-Wide Q2 2015 forecast of approximately 3.0%. B147–48. While the revised forecast was generated in large part by Hawley, consistent with the usual process in advance of prior Board meetings, senior management and Maselli had reached "alignment" on the forecast prior to its presentation to the Board. B148–49.

Neither the TPP Directors nor other members of the Board and senior management expressed serious concerns or doubts regarding the updated forecast. B149. Rather, Maselli and others told the SLC that they believed EPL's promising product lineup—in particular, the introduction of Hand-Carved Salads—would help improve sales in the remainder of Q2 2015. B150–51.

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[7] EPL management attributed the discrepancy between the 2.6% forecast in the May 11 Board Presentation and the 2.5% in the May 12 Management Team Presentation to rounding differences. B172.

Nevertheless, and despite the Company's prior practice of only providing full-year guidance, the Company decided to disclose that Q2 2015 SSS would likely be below market expectations. B205–06. Accordingly, during the Q1 2015 Earnings Call, the Company disclosed that it expected Q2 2015 System-Wide SSS (then forecasted to be 3.0%) to be on the low end of the 3.0% to 5.0% full-year guidance range, and expected Company SSS (forecasted to be 2.5%) to be "below that." B206.

iii. Hawley's Sensitivity Analysis and Earnings Call Q&A

On May 11, 2015, Hawley generated an unofficial "sensitivity test" resulting in a Q2 2015 Company SSS forecast of 1.2%. B118–22. The following day, Hawley circulated to members of senior management a draft document for EPL's upcoming earnings call Q&A, in which he had added a Q2 Company SSS range of 1.0% to 2.5%. B197–99. However, neither the 1.2% sensitivity test nor the range in the Q&A document was ever communicated to the TPP Directors, and the TPP Directors did not participate in the Q1 2015 Earnings Call or the preparation therefor in any fashion.

In any event, for the reasons detailed in the Report, Hawley's sensitivity analyses did not undermine senior management's confidence in EPL's ability to achieve the results presented to the Board and disclosed to the market.[8]

3. Block Trade

TPP had long planned to sell down its ownership of EPL stock over time. B215, 234. TPP, an investment vehicle for private equity firms Trimaran Capital and Freeman Spogli, acquired EPL in November 2005. B19. Almost nine years later, in July 2014, TPP sold approximately 8.2 million shares of its EPL stock in EPL's IPO. B20, 216. In EPL's November 19, 2014 second offering, TPP again sold a substantial amount of its EPL stock—over 6 million shares—which left TPP with just over 22 million shares. B20, 216.

Having owned EPL or been EPL's majority shareholder for nearly 10 years, TPP sought to continue downsizing its position at the next opportunity. Trimaran Capital was first contacted with respect to a potential Rule 144 block trade by Morgan Stanley on February 19, 2015, after which Jefferies presented on the same topic in March 2015. B218–19. However, because there was no open trading

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[8] Hawley testified that his 1.2% projection was an informal "sensitivity analysis," which he routinely prepared to analyze various scenarios. B285–86; *see* B118–22. He explained that in this instance, the projection—which he spent less than one minute preparing, as opposed to the weeks-long process for generating formal forecasts—reflected a "worst-case" scenario based on Hawley's manual addition of future days of poor sales into the model. B286.

window at the time—EPL's Insider Trading Policy prohibited insiders from selling stock outside of pre-established trading windows—Trimaran Capital did not connect with potential buyers until May 1, 2015, after TPP had been alerted about the upcoming trading window (but before TPP became aware of any allegedly material nonpublic information), when Morgan Stanley again reached out. B217–20.

On May 19, 2015, the first day of the first open trading window since the secondary offering, TPP sold approximately 5.4 million shares of EPL stock in the Block Trade. B238. TPP continued to hold 16.7 million shares of EPL stock. *Id.*

Although EPL's Insider Trading Policy was generally followed and enforced, TPP did not submit a formal written pre-clearance request pursuant to the Policy. B222–23, 295–96. Instead, one of the TPP Directors advised Edye Austin, EPL's then VP of Legal, of the upcoming Block Trade on May 18, 2018. *Id.* Austin raised no objection.

B. Relevant Conclusions of Law

The SLC determined first that TPP did not possess material, nonpublic information concerning (i) the alleged negative impact of EPL's pricing actions (as no such impact had been established); or (ii) Company SSS for Q2 2015. B327–28. Second, the SLC concluded that TPP was not motivated, in whole or in part, to sell EPL stock by any such information. B347–56.

Accordingly, and in consideration of all other relevant factors, the SLC concluded that it was not in the Company's best interest to pursue a claim against TPP and filed its motion to dismiss this Action. B327, 387–91.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY RULED THAT THE SLC HAD REASONABLE BASES FOR ITS CONCLUSIONS

A. Question Presented

Whether the Court of Chancery correctly held that the SLC had reasonable bases for its conclusion that Plaintiff's claim against TPP should be dismissed. This issue was preserved below. A1654–66.

B. Scope of Review

This Court reviews rulings regarding the existence of reasonable bases for the SLC's conclusions *de novo*. *Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 840–41 (Del. 2011).

C. Merits of Argument

Under *Zapata*'s first step, the Court "inquire[s] into the independence and good faith of the committee and the bases supporting its conclusions." *Zapata Corp. v. Maldonado*, 430 A.2d 779, 788 (Del. 1981). "As to [those] limited issues presented by the motion," the SLC has the burden of "demonstrating that there is no genuine issue as to any material fact and that the corporation is entitled to dismiss the complaint as a matter of law." *Kaplan v. Wyatt*, 484 A.2d 501, 507 (Del. Ch. 1984), *aff'd*, 499 A.2d 1184 (Del. 1985). This requires the SLC to "show that Plaintiffs do not dispute the existence of information or evidence relied on by the Special Committee, but it does not require the Special Committee to show that the

parties do not dispute material facts regarding Plaintiffs' allegations." *Katell*, 1995 WL 376952, at *12. "The Special Committee can use undisputed information to form its own conclusions as to factual disputes concerning Plaintiffs' allegations." *Id.*

"Importantly, the granting of the SLC's motion using the Rule 56 standard does not mean that the court has made a determination that the claims the SLC wants dismissed would be subject to termination on a summary judgment motion, only that the court is satisfied that there is no material factual dispute that the SLC had a reasonable basis for its decision to seek termination." *Oracle*, 824 A.2d at 929 n.20.

If the court is satisfied that an independent SLC had reasonable bases for its decision to seek termination, it can "grant the motion, order a dismissal of the suit and end the litigation" without proceeding to *Zapata*'s second step. *Kaplan*, 484 A.2d at 508. As in *Kaplan*, "there is no genuine dispute of material fact as to what the Special Litigation Committee did here or as to the information actually utilized by it in reaching its conclusions," *id.* at 519, and, accordingly, the Court of Chancery's decision granting the motion should be affirmed.

1. The Court of Chancery Applied the Correct Standard

Plaintiff's appeal rests on the flawed claim that "the Court of Chancery did not apply a summary judgment standard" and "shifted the burden of persuasion to Plaintiff." OB 23. Contrary to Plaintiff's assertions, the Court of Chancery did not

"*weigh* the competing accounts," "*resolve* the disputed questions of fact," or "*defer[] to the SLC*." OB 23 (emphases in original). Rather, the court correctly assessed the *SLC's conclusions*, found that they had reasonable bases, Opinion 54–55, and found that Plaintiff's arguments failed to "raise a genuine question of material fact as to … the reasonable bases for the SLC's conclusions," Opinion 59–60.

2. The SLC Had Reasonable Bases to Conclude That TPP Did Not Possess Material, Nonpublic Information

i. Impact of EPL's Pricing Actions

The SLC concluded that the TPP Directors held good-faith and reasonable bases to question Hawley's position that the Company's pricing actions caused EPL's relative slowdown in Q2 2015. B315–16. Having found that the evidence did not establish a causal link, the SLC determined that the TPP Directors could not have possessed material, nonpublic information about that purported link.

EPL's prior pricing actions and Hawley's analyses thereof confirm the reasonableness of the TPP Directors' opinions about whether the M2 pricing action harmed EPL's performance. During the period in which EPL took three pricing actions, Hawley was outspoken about their potential impact on EPL's performance. B122–41. But despite his concerns and repeated presentations, the Company's sales growth remained strong in the periods immediately following each of the pricing actions, thus supporting—not undermining—the TPP Directors' skepticism of Hawley's narrative. B129, 136, 140–41.

Moreover, the record confirms the TPP Directors' good-faith and reasonable disagreement with Hawley's slides in the May 12, 2015 Management Team Presentation purporting to demonstrate that pricing had negatively impacted performance and value scores. B284; *see also supra* 11–15.

Instead of addressing the bases of the SLC's conclusions, Plaintiff claims that he has "raised numerous issues of material fact to show that … EPL's Board and senior officers discussed, with increasing concern, the impact of higher prices on EPL's SSS and customer value scores." OB 24. But Plaintiff cannot defeat the SLC's motion by pointing to alleged issues of material fact regarding his claim. Under *Zapata*, the SLC is not required "to show that the parties do not dispute material facts regarding Plaintiffs' allegations," and the SLC is entitled "to form its own conclusions as to factual disputes concerning Plaintiffs' allegations." *Katell*, 1995 WL 376952, at *12.

In any event, each of the alleged factual "issues" identified by Plaintiff reflect the viewpoint of a single individual at EPL, Hawley, whose perspective was not shared by senior management or the Board, and who never established a causal link between higher prices and worsening performance. *See* OB 24–25 ("*Hawley* prepared an analysis …; *Hawley* gave a presentation …; *Hawley* provided …; *Hawley* gave a marketing presentation ….").

In fact, only two of the eight bullet points provided by Plaintiff do not explicitly reference Hawley, and both nonetheless implicate Hawley's—and only Hawley's—viewpoint. OB 24–25. First, in support of the assertion that "[t]he impact of price increases was a major focus within the Company," Plaintiff draws exclusively from *Hawley's testimony* regarding *Hawley's perspective* on EPL's pricing. OB 24. Second, Plaintiff's bullet point regarding the proposed Q&A omits that the quoted language was, once again, drafted by Hawley. B197.

Plaintiff further incorrectly claims that the SLC "ignored Hawley's … 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.'" OB 27 (emphasis in original). Putting aside that the SLC addressed the view that Hawley eventually formed, B199, by conveniently focusing solely on "poor weather," Plaintiff himself ignores the many factors contributing to EPL's highly variable sales patterns, including "the introduction of new products, refocusing of marketing emphasis, [and] operational issues," B294, 362, 367, which are consistent with Hawley's belief that the slowdown may have been "caused by issues with the business trends or modules," OB 27 (quoting A1751).

Contrary to Plaintiff's assertions, the SLC neither "relied entirely on Defendants' *post hoc*, unsworn explanations," nor "simply accepted [them] at face

value." OB 27–28. Contemporaneous documents confirm Defendants' discussion of non-pricing action related causes of the sales slowdown. For example, the Management Team Presentation that is at the heart of Plaintiff's allegations reflects concerns about marketing confusion created by promoting two higher priced menu items. *See* A707 (slide regarding "unbundling" combos on menu "to show lower prices"); A709 (slide showing changes to "bring strength to remainder of year," including ending Carne Asada promotion ahead of schedule). The Q&A, drafts of which Plaintiff cites to highlight Hawley's viewpoint (despite these drafts never having been shared with TPP), also reflect the Company's concerns about marketing confusion. *See* A927 (the "[f]ocus on alternative proteins at higher price points looks to be driving softer transactions," leading EPL to "adjust[] balance of year marketing plan to better balance value with higher price point items"). This evidence supports the uncontroverted testimony that senior management and the Board were discussing non-pricing action reasons for the sales slowdown, reasons which were disclosed to the market at the time. B205–11.

Finally, as is evident from the Report, Plaintiff's assertion that the "SLC … never consulted any independent sources" is misguided. OB 28. The SLC reviewed tens of thousands of source documents, including contemporaneous emails, board materials, and key metrics and reports. Unlike in *London v. Tyrell*, where the SLC made a key determination "solely based on" a defendant's testimony, the SLC here

considered each witness's testimony in conjunction with the voluminous record at hand. 2010 WL 877528, at *26 (Del. Ch. Mar. 11, 2010). And that the SLC in *Kahn*, *see* OB 28, consulted experts because of the distinct factual and legal issues present in that case is irrelevant to the reasonableness of the SLC's conclusions here.

The SLC met its burden by providing reasonable bases for its conclusion that the narrative presented by Hawley was immaterial, and Plaintiff's unsurprising disagreement with that conclusion does not indicate otherwise.

ii. Q2 2015 Company SSS

Under Delaware law, intra-quarter results and forecasts are material "only when the … information makes it likely that the company will either outperform or underperform its projections in some markedly unexpected manner." *In re Oracle Corp.*, 867 A.2d 904, 940 (Del. Ch. 2004), *aff'd sub nom. In re Oracle Corp. Derivative Litig.*, 872 A.2d 960 (Del. 2005) (noting the "inherent imprecision of forward-looking estimates and the correspondingly greater caution that rational investors should use in relying upon such estimates").

Here, the Company's performance and projections were within the expected level of intra-quarter variability that EPL often experienced such that the information available to TPP did not establish a likelihood that sales would deviate in a "markedly unexpected manner" from the Company's disclosures to investors. EPL's sales are particularly subject to this variability due to the Company's reliance

on limited-time offers and frequent menu changes, as well as external factors such as weather. *See id.* at 939 ("If a company … is subject to the expected variations in results of an operating business in a market economy, one would expect that its intraquarter results and projections will often involve some deviation from the original quarterly projections.").

EPL's sales data prior to Q2 2015 demonstrates the intra-quarter variability experienced by the Company. B421–24, 428–29. EPL's sales performance varied significantly throughout many years, including those immediately preceding 2015. B301, 428–29. Moreover, EPL's performance in Q1 2015 revealed that the Company's ability to achieve its Plan targets varied on a weekly basis. B424–25.

Of particular note, prior to Q2 2015, EPL's sales had sufficiently rebounded in the final period of a quarter after two significantly below-Plan periods to meet or even exceed the forecast for the quarter. B301, 428. This further demonstrates that a particular module—which generally consists of new menu items or limited-time offers—could spur EPL's sales enough to meet its quarterly sales targets following sub-par sales in prior periods. B301. Thus, consistent with that precedent, the expectation that adding Hand-Carved Salads and related products to the menu for the remainder of Q2 2015 would significantly boost EPL's sales was reasonable. B328.

While Plaintiff claims to list "numerous questions of material fact suggesting" that the SLC's conclusion was not reasonable, OB 33, he ignores that the SLC carefully considered each of those questions and "in light of the underlying nature of the Company's sales trends, which indicated a high baseline variability and a sensitivity to both predictable and non-predictable events," concluded that the data did not meet the standard for being "material" under Delaware law. B294; *see* B298–304.

As Plaintiff merely disagrees with the SLC's application of Delaware law—but cites no legal authority to the contrary—and disagrees with the SLC's resolution of factual disputes—but cites no facts ignored by the SLC—there is no genuine question as to the existence of reasonable bases for the SLC's conclusions.

3. The SLC Had Reasonable Bases to Conclude That TPP's Sale of EPL Stock Was Not Motivated by Material Nonpublic Information

Plaintiff argues that the "Court of Chancery improperly resolved questions of fact by accepting the SLC's narrative as to TPP's reasons for the" Block Trade. OB 30. Yet once again, Plaintiff misconstrues the Court of Chancery's Opinion. Rather than resolve any questions of fact, the Court of Chancery correctly held that the SLC met its burden to demonstrate reasonable bases for its conclusions. Opinion 57–60; *see* B327. Plaintiff's attempt to challenge that holding falls short.

First, contrary to Plaintiff's assertion that no witness stated that TPP intended to sell in the first available trading window, OB 31, TPP's principals explicitly stated that intention, which was further supported by TPP's sales of a significant number of EPL shares in the only two prior opportunities TPP had to sell shares. *See* B351 (Maselli: "Trimaran always intended to sell down its interest over time," specifically by "taking the Company public through an IPO, participating in a secondary offering, agreeing to a lock-up period, and *then a sale during the first open window*" (emphasis added)); *see also* B216–17, 347.

Many of the factual issues raised by Plaintiff consist of the same set of mischaracterized or irrelevant facts that he claims show that the TPP Directors *possessed* information about the impact of EPL's price increases and intra-quarter sales data. OB 28–30. In doing so, Plaintiff conflates the two elements of a *Brophy* claim, while failing to point to any evidence that TPP "consciously acted to exploit" the alleged material, nonpublic information. For instance, in arguing that TPP "knew of" and "concealed" material, nonpublic information prior to the Block Trade, Plaintiff cites facts and documents showing that Hawley—not TPP—believed that the Company's pricing actions may have had a negative impact on performance. *See, e.g.*, OB 29–30 (citing "numerous Board presentations and other documents" created by Hawley and responses in the Q&A drafted by Hawley and not shared with TPP).

Moreover, more than half of the "facts indicating that *TPP* … knew of material, non-public negative information … and concealed this information" relate to statements made by the *Settling Defendants* on the Q1 2015 Earnings Call and the content of a Q&A document drafted by certain *EPL employees* in preparation for the call. OB 28–30, 32. But the TPP Directors did not participate in the earnings call and were not involved in preparing or reviewing the Q&A document, thus rendering those facts entirely irrelevant to TPP's scienter.[9]

Plaintiff also cites a May 5, 2015 email from former CEO Stephen Sather sending Maselli the results of a Market Force customer survey, which Sather requested be kept "between us at this point as I don't want anyone to over react." OB 30. Maselli explained that he understood Sather's comment as relating to the fact that the report was a "very early read" and that Sather likely wanted more data before circulating more broadly, as the report contained less than 15.5% of the likely total responses for the month. B143. In any event, far from containing a smoking gun, the early value score results were only two percentage points below the average over the prior six periods. B143 n.954.

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[9] Though irrelevant, Plaintiff falsely claims that certain settling "Defendants" "ad-libbed" their explanations regarding the sales slowdown on the Q1 2015 Earnings Call, OB 29, ignoring the contemporaneous documents demonstrating that management had planned to address those potential causes on the earnings call, *see* A926–27.

Plaintiff then argues that TPP's technical violation of the Insider Trading Policy "supported [an] inference of scienter," which the Court of Chancery allegedly "ignored." OB 30–31. Plaintiff cites no legal authority supporting his argument that the court should draw a negative inference against TPP based on its failure to provide a full 48-hours' notice and receive formal written clearance. As the Court of Chancery noted, "the SLC conducted an independent and thorough evaluation of … each Defendants' scienter based on its interviews and review of an extensive record, obviating the need for an inference of intent based on the Policy alone." Opinion 54.

Pointing to the same technical violation of the policy, Plaintiff next argues that the Court of Chancery "should not have drawn an inference *favoring* TPP based on this trading window." OB 31 (emphasis in original). Notwithstanding that it was the SLC, not the court, that made conclusions about TPP's motivation to sell, Plaintiff's argument lacks logic. That the open trading window flowed from the policy—a different part of which TPP failed to comply with—does not mean that the SLC drew an inference in favor of TPP, nor does it render the SLC's conclusions unreasonable.

Finally, Plaintiff again mischaracterizes the Court of Chancery's holding, asserting that the Court of Chancery "held that … [the open trading] window 'provided a *more plausible* explanation for Pollo Partners' intent than the

exploitation of material nonpublic information." OB 30–31 (citing Opinion 58) (emphasis in original). Once again, the Court of Chancery was merely summarizing the SLC's conclusion, Opinion 58 ("The *SLC concluded* that the open Trading Window provided a more plausible explanation ….") (emphasis added), which it found was reasonable, Opinion 59–60. In doing so, the Court of Chancery correctly held that the SLC had met its burden. Opinion 60.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT THE SLC WAS INDEPENDENT

A. Question Presented

Whether the Court of Chancery correctly held that the SLC met its burden to demonstrate its independence. This issue was preserved below. A1639–53.

B. Scope of Review

This Court reviews rulings regarding the independence of a special litigation committee *de novo*. *Kahn*, 23 A.3d at 840–41.

C. Merits of Argument

Under the first step of *Zapata*, the Court must determine whether there is any material issue of fact calling the SLC's independence into serious doubt. *Zapata*, 430 A.2d at 788–89. "[A] director is independent when he is in a position to base his decision on the merits of the issue rather than being governed by extraneous considerations or influences." *Kaplan*, 499 A.2d at 1189 (citing *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984)). A director is considered interested, on the other hand, when the director "would be more willing to risk his or her reputation than risk the[ir] relationship with" an interested director. *Beam*, 845 A.2d at 1052.[10]

[10] The independence inquiry for SLC members "has often been informed by case law addressing independence in the pre-suit demand context and vice-versa." *London,* 2010 WL 877528, at *12.

1. The SLC Met Its Burden to Demonstrate Lynton's Independence

Lynton is a well-respected, successful, and prominent member of the community who approached her duties as a member of the SLC with the seriousness and openness courts in Delaware require. Lynton candidly disclosed each and every point of contact she had with Kehler and his wife, all of which were openly disclosed to Plaintiff. B39–40; *cf. Oracle*, 824 A.2d at 929 ("Noticeably absent from the SLC Report was any disclosure of several significant ties between Oracle or the Trading Defendants and Stanford University …."). The Court of Chancery correctly found that there was "no basis to conclude that a relationship based mainly around their children gave rise to a 'sense of obligation' to Kehler, much less [TPP]." Opinion 49.

In arguing otherwise, Plaintiff misstates the record in an effort to create the impression of a "deep human friendship," OB 41, that does not exist. Plaintiff claims Lynton and Kehler "worked together at Lehman Brothers," *id*. at 40, when Lynton merely worked on a single, two-week pitch with Kehler (more than 30 years ago), B40. *See In re LendingClub Corp. Derivative Litig.*, 2019 WL 5678578, at *17 (Del. Ch. Oct. 31, 2019) (allegations that directors "shared a 'thirteen-year working relationship' by virtue of the fact that they both worked at Morgan Stanley 'from at least 1997 through 2010'" did not support a finding of lack of independence).

Plaintiff similarly claims that the "Lynton and Kehler families shared approximately 20 family dinners at their respective residences over their 35-year relationship, with spouses and children typically in attendance." OB 40. But the meals were not "family dinners at their respective residences;" they included large events attended by Lynton and one of the Kehlers, and Lynton has been to the Kehlers' home only five times in the past 20 years, while Kehler's wife has only been to Lynton's home once. B449 at 137:11–25; B457–58 at 171:22–172:4. And far from "regularly solicit[ing] contributions for and mak[ing] contributions to each other's charities," OB40, the record confirms the Court of Chancery's conclusion that "the specific donations identified by Plaintiff were immaterial compared to [Lynton and Kehler's] wealth," Opinion 46.[11]

At most, Lynton and the Kehlers "occasionally had dinner over the years, [and went] to some of the same parties and gatherings," which is insufficient to undermine Lynton's independence. *See In re MFW S'holders Litig.*, 67 A.3d 496, 509 n.37; 511 (Del. Ch. 2013), *aff'd sub nom. Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014). This Court has repeatedly rejected independence challenges where, as

[11] *See* B40 (Lynton has donated over $2 million to the East Harlem Tutorial Program); B462 at 181:4–10; B464–65 at 286:21–287:10 (Lynton's charitable foundation controls assets [redacted], she is a beneficiary of a [redacted] trust, and her net worth is approximately $40 million); B40 (Kehler donated $13,000 to the East Harlem Tutorial Program).

here, an independent director and an interested director "move in the same business and social circles," even when they can be characterized as "close friends." *Beam*, 845 A.2d at 1050–52. As this Court recently confirmed, even being a "personal friend [of an interested director] … is insufficient to establish a lack of independence." *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 2021 WL 4344361, at *20 (Del. Sept. 23, 2021).

Delaware courts routinely reject challenges to independence based on significantly closer ties than those present here. *See*, *e.g.*, *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 177–79 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006) (relationship as "close friend[s] for 40-45 years" who "met every ten to fourteen days … does not destroy [the director's] independence"); *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 980–81 (Del. Ch. 2000) (a "long-standing 15-year professional and personal relationship … alone fails to raise a reasonable doubt that [the director] could not exercise his independent business judgment"); *Khanna v. McMinn*, 2006 WL 1388744, at *15–16, *19–20 (Del. Ch. May 9, 2006) ("[l]ong-time" friendship where the two directors both own "homes in the same neighborhood and 'neighboring wineries'" and were alleged to have previous "business dealings" did not compromise independence).

Unlike here, the cases relied upon by Plaintiff to support his assertion that courts have found a lack of independence "based upon connections more tenuous than those at issue here," OB 42 (citing *London* and *Oracle*), involve "the type of *very close personal relationship* that, *like family ties*, one would expect to *heavily influence a human's ability to exercise impartial judgment*,"[12] that go far beyond Lynton's sporadic contact with Kehler (or, more accurately, Kehler's wife). For example, in *London*, the defendant was the SLC member's "wife's cousin," whose "comings and goings" were discussed "through the family grapevine," and the other SLC member hired the defendant director as CFO for his company and testified that "he has 'a great respect for [the defendant director]. And *he was very helpful in helping me get a good price for my company. Very helpful*.'" 2010 WL 877528, at *13–15 (emphases added).

Plaintiff's description of the facts in *Oracle*—"two committee members held positions at Stanford University and one of the defendants taught in a different department," OB 42—grossly understates the relationships at issue in that case:

> Among the directors who are accused by the derivative plaintiffs of insider trading are: (1) another Stanford professor, *who taught one of the SLC members when the SLC member was a Ph.D. candidate* and who *serves as a senior fellow and a steering committee member alongside that SLC member* … ; (2) a Stanford alumnus who has

[12] *Sandys v. Pincus*, 152 A.3d 124, 130 (Del. 2016) (director was not independent where he co-owned a private plane with interested director) (emphases added).

> *directed millions of dollars of contributions … [to] parts of Stanford with which one of the SLC members is closely affiliated*; and (3) Oracle's CEO, who has made millions of dollars in donations to Stanford … and who was considering making donations of his $100 million house and $170 million for a scholarship program as late as August 2001, at around the same time period the SLC members were added to the Oracle board.

Oracle, 824 A.2d at 920–21 (emphases added). And a review of other cases in which courts have found independence lacking confirms that none of the connections necessary for such a finding are present here. *See*, *e.g.*, *Delaware Cty. Emps.' Ret. Fund v. Sanchez*, 124 A.3d 1017, 1020–22 (Del. 2015) (the director and an interested director had "been close friends for more than five decades," the director's "personal wealth [was] largely attributable to business interests over which [the interested director] has substantial influence," and the director's brother also worked full-time for the same company); *Lewis v. Fuqua*, 502 A.2d 962, 966–67 (Del. Ch. 1985) (sole member of SLC "was a member of the Board … at the time the challenged actions took place[,] … is one of the defendants in this suit[,] … has had numerous political and financial dealings with [defendant CEO, and] … is President of Duke University which is a recent recipient of a $10 million pledge from" the company and the defendant CEO).

As none of Lynton's interactions with the Kehlers indicate that Lynton has a close personal, familial or business relationship with Kehler or his wife, that Lynton would be more willing to risk her reputation than some supposed relationship with

Kehler, or that Lynton otherwise felt a sense of obligation to Kehler (much less TPP), the Court of Chancery correctly found that Lynton is independent.

2. The Company's Prior Motion to Dismiss Is Irrelevant to the SLC's Independence

Despite having been provided extensive discovery, including deposing Lynton and Floyd, the only "evidence" Plaintiff points to in support of his argument that the SLC members "reviewed the merits of plaintiffs' claims before the SLC was ever formed," and "prejudged the suit," OB 38 (quoting *London*, 2010 WL 877528, at *15), is Floyd's testimony that he did not object to the filing of the 2016 MTD. This is wholly insufficient to raise a material issue regarding Lynton or Floyd's independence.

This is particularly true given Floyd's testimony—ignored by Plaintiff—that confirms Plaintiff is unable to establish that Floyd was even given the opportunity to review the brief in support of the 2016 MTD at the time. B479–80 at 63:24–64:11.[13] And despite having the chance to do so, Plaintiff did not ask Lynton *any* questions about the 2016 MTD during her deposition.

Having failed to identify any facts to support his position, Plaintiff seeks an inference that Floyd and Lynton *must* have reviewed and approved the arguments

[13] Once again, Plaintiff failed to include this dispositive portion of the record in Plaintiff's Appendix, choosing instead to cherry-pick a single page of the four pages of Floyd's deposition in which the 2016 MTD is discussed. *See* A1769. The SLC has included the full relevant portion of the transcript. *See* B479–82.

made in support of the 2016 Motion given "their presence on the Board." OB 39. As the Court of Chancery correctly found, Plaintiff—having been given the opportunity to take full discovery into the SLC's independence—"cannot rely on inferences at this stage," and "'unsupported allegations are insufficient to create a genuine dispute as to material facts.'" Opinion 42 (quoting *Shuttleworth v. Abramo*, 1997 WL 349131, at *1 (Del. Ch. June 13, 1997) and collecting cases). "[S]tripped of the inference," Plaintiff's argument "that the mere fact that Floyd and Lynton sat on the board when the [2016 Motion] was filed, standing alone, automatically disqualifies them … finds no support in Delaware law." Opinion 43.

The Court of Chancery was correct and Plaintiff has been unable to identify a single case to support the bright line rule for which he advocates. This is unsurprising, as courts considering the issue have rejected Plaintiff's position: "[S]ince a 'motion to dismiss is designed to test the legal sufficiency of the complaint ... [and not] the evidence at issue,' *it cannot be concluded that [the SLC member] prejudged the evidence in th[e] case*" by authorizing the filing of an MTD. *Strougo ex rel. The Brazil Fund, Inc. v. Padegs*, 27 F. Supp. 2d 442, 449 (S.D.N.Y. 1998) (applying *Zapata*) (emphasis added) (citations omitted).

The lone case cited by Plaintiff does not indicate otherwise. OB 38 (citing *London*, 2010 WL 877528, at *15). In *London*, it was "clear" that a committee upon which the members of the SLC sat reviewed valuations tied to the alleged

wrongdoing and later used language "suggesting that the SLC might have engaged in a combative assault rather than an investigation." 2010 WL 877528, at *15–16. Here, the Court of Chancery correctly found, in the words of the *London* court, that the "SLC members [were] simply exposed to or bec[a]me familiar with a derivative suit before the SLC [was] formed," *id.* at *15, and that the SLC went into the investigation with an open mind, Opinion 43 ("[T]he tone of the SLC Report and of each SLC member is even-keeled and unbiased, suggestive of a fair investigation—not a 'combative attack' on Plaintiff's claims.").

3. The Chancery Court Correctly Rejected Plaintiff's Attack on Floyd's Independence

Plaintiff first asserts that Floyd lacks independence because Kehler nominated Floyd to the Board and Floyd served with Kehler on the Board of Overseers for 16 years. Plaintiff's position is foreclosed by "well-settled Delaware law," which holds that "a director's independence is not compromised simply by virtue of being nominated to a board by an interested stockholder," *In re KKR*, 101 A.3d at 996, and that "one's position on multiple boards does not in and of itself call into question one's independence from an interested director sitting with him on such boards," *Zimmerman*, 2002 WL 31926608, at *10. *See also Highland Legacy Ltd. v. Singer*, 2006 WL 741939, at *5 (Del. Ch. Mar. 17, 2006) (same).

Plaintiff then incorrectly claims Floyd was "awarded the Dean's medal by the Board of Overseers," OB 42, when Floyd was awarded the Dean's medal by the

Dean of the Nursing School, not the Board of Overseers. B500 at 250:10–21. Based on Plaintiff's inaccurate tying of the award to the Board of Overseers, Plaintiff argues that the Court of Chancery "ignored that the medal was awarded when Kehler was the Chair [of the Board of Overseers] and that the timing of the award was close in proximity to Kehler's solicitation of Floyd to join the EPL Board," OB 42, without explaining how this in any way undermines Floyd's independence.

Finally, Plaintiff takes aim at the Court of Chancery's rejection of his argument that Floyd lacks independence because Kehler briefly mentioned the litigation to Floyd during his recruitment to the EPL Board. OB 42. The Court correctly found that "extensive additional testimony provided by Floyd"—ignored by Plaintiff in his Brief—demonstrated that Kehler's brief remarks were "immaterial and insufficient to suggest that Floyd approached the investigation with his mind already made." Opinion 45 (citing B469 at 10:14–18; B473 at 14:4–16; B475–76 at 46:16–47:8; B477–78 at 50:16–51:1; B481 at 65:16–22). In a last-ditch effort, Plaintiff claims—for the first time on appeal—that the Court should have drawn an inference that "Kehler was 'testing' Floyd's reaction to this litigation." OB 42. Putting aside that Plaintiff waived this argument by not making it below[14] and that

[14] *See Urdan v. WR Cap. Partners, LLC*, 244 A.3d 668, 676 n.18 (Del. 2020) (argument not raised below was waived) (citing Del. Supr. Ct. R. 8).

Plaintiff offers no evidence in support of it, even assuming *arguendo* Kehler was "testing" Floyd's reaction, this would say nothing about *Floyd's* independence.

III. THE COURT OF CHANCERY'S GRANT OF THE SLC'S MOTION UNDER *ZAPATA*'S SECOND STEP WAS NOT AN ABUSE OF DISCRETION

A. Question Presented

Whether the Court of Chancery abused its discretion in finding that the SLC's recommendation fell "within a range of reasonable outcomes." Opinion 60 (quoting *In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 468 (Del. Ch. 2013)). This issue was preserved below. A1655–56.

B. Scope of Review

This Court reviews a ruling under *Zapata*'s second step under an abuse of discretion standard. *Kahn*, 23 A.3d at 841.

C. Merits of Argument

Zapata's "second step is used when the first step is met, but the result still appears 'irrational' or 'egregious' or some other such extreme word," *Kindt*, 2003 WL 21453879, at *3 (citation omitted), and thus would "disturb the spirit of *Zapata*." *Kaplan*, 499 A.2d at 1192. In light of the SLC's extensive investigation and thorough treatment of the issues in the Report, the Court of Chancery, having "dilated extensively on Plaintiff's challenge to the substance and scope of the SLC's investigation," was well within its discretion to "conclude that the recommended result falls within the range of reasonable outcomes." Opinion 60.

On appeal, Plaintiff merely asserts that there is an "extensive factual record supporting Plaintiff's allegations," OB 44, without addressing the full factual record

developed by the SLC that was considered below. This falls far short of demonstrating that the Court of Chancery abused its discretion in finding that the SLC's recommended result was within the range of reasonable outcomes. The Court of Chancery's decision should be affirmed.

CONCLUSION

The judgment should be affirmed.

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CERTIFICATE OF SERVICE

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