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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,	)	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 REPLY BRIEF

Dated: January 19, 2022

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INTRODUCTION

The SLC's[1] Answering Brief ("Ans.") confirms why the Court of Chancery's Opinion should be vacated, and the SLC's Motion denied upon *de novo* review.

The SLC largely avoids the central question on this appeal: whether the Court of Chancery mis-applied the summary judgment standard set forth in *Zapata Corp. v. Maldonado,* 430 A.2d 779 (Del. 1981) and improperly resolved disputed questions of fact. Instead, the SLC suggests that, under *Zapata*, an SLC motion to dismiss a stockholder's claims should be granted so long as the SLC followed a formal, thorough process and there exists *any* evidence that its conclusions of fact and law were arguably reasonable. This lenient, SLC-friendly standard is wrong, and inconsistent with *Zapata* and its forty-year progeny, in which Delaware courts have always imposed the burden on an SLC to demonstrate, under a summary judgment standard, that there is no material factual question concerning the reasonableness of its conclusions. *Zapata*, 430 A.2d at 788; *Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 836 (Del. 2011). This standard requires inquiry into facts both supporting and contradicting the SLC's conclusions, and a meaningful assessment of whether those conclusions were reasonable. The SLC also has the burden of showing that there are no disputed material facts concerning its independence. *Id.*

[1] The abbreviations herein are the same as those defined in the Glossary of Appellant's Opening Brief ("Opening Brief" or "OB") unless stated otherwise.

Here, applying the summary judgment standard correctly, the SLC failed to carry its burden.

First, the SLC failed to establish that there were no disputed questions of material fact as to the reasonableness of its principal conclusions. As an initial matter, the very posture of this case raises significant doubt as to the SLC's conclusion that the insider trading claim should be dismissed for zero value:

- Two courts—the Delaware Chancery Court and the U.S. District Court (C.D. Cal.)—have upheld claims that EPL officers and directors possessed material information concerning customer price resistance and failed to disclose this to investors on the May Earnings Call;
- Five days after the May Earnings Call, TPP, a 59.2% controlling EPL stockholder, sold over $118 million of stock without following the procedures required by the Company's Insider Trading Policy;
- Three months after the May Earnings Call, EPL admitted in a press release that higher prices had impacted customer traffic, causing EPL's stock price to fall by 20% and allowing TPP to avoid a 33% loss on the stock that it sold;
- TPP and other Defendants settled the *Turocy* Class Action for a payment of $20 million; and
- The Settling Defendants here (representing 10% of the *Brophy* claims) agreed to pay $625,000 to settle this action, leaving TPP as the sole remaining Defendant.

Importantly, the SLC minimized key evidence contradicting its conclusions. For example, the SLC concluded that Hawley's warnings to the Board about customer resistance to higher prices were not shared by others, and that this information was therefore immaterial. Ans. at 2, 25. But this conclusion is easily

disproved. The final version of the Q&A approved for use at the May Earnings Call contained the following prepared answer: "***We are seeing some potential pushback from consumers on prices…value scores have dropped*** in Q1 2015." A927. This and earlier drafts of the Q&A were circulated and discussed by all members of senior management and the Board (including TPP's directors). No one objected to the inclusion of the prepared answer in the final Q&A, demonstrating that the issue of customer price resistance was not just Hawley's lone opinion. Moreover, EPL belatedly disclosed to investors that Hawley was right, and that "***results were impacted by the combination of higher-priced offerings and a reduction of [the] value portion of [the] menu***." A1202 (emphasis added).

Likewise, the SLC concluded that, when the projection for 2015 Q2 Company SSS dropped by half from 2.50% to 1.25%, this reduction merely represented "intra-quarter variability" and was therefore immaterial. Ans at 28. However, the SLC's conclusion rested on the premise that the 1.25% was the quarter-to-date figure and that this underperformance could be reversed by improved performance in the rest of the quarter. This was factually wrong. The 1.25% was the revised projection for the entire 2015 Q2, and therefore already accounted for intra-quarter variability and any possible out-performance in the second half of that quarter. A439. In fact, as of the date of the TPP Sale, the selling Defendants knew that the quarter-to-date figure was just 0.1%. A1744.

Second, the SLC failed to establish that there were no disputed questions of material fact as to its independence. The SLC does not contest that EPL previously asserted numerous conclusions of law and fact in the 2016 Motion that were the very same issues that Lynton and Floyd (constituting a majority of the SLC) were subsequently tasked with "independently" evaluating. Instead, the SLC argues that there is no evidence Floyd and Lynton were aware of the arguments in the 2016 Motion. However, Floyd testified that the full Board discussed seeking dismissal of Plaintiff's claims as part of its regular "litigation update" in 2016. B481-82.

The SLC also minimizes the fact that Defendant TPP's control person, Kehler, handpicked Lynton and Floyd to serve on the EPL Board (A215, A217), and the long standing relationships between Kehler and the two SLC members, including a 35-year deeply layered relationship with Lynton (A217-18).

In short, the SLC cannot discharge its burden of establishing that there were no disputed material facts that its independence was "above reproach," as required by *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1055 (Del. 2004).

ARGUMENT

I. *ZAPATA* REQUIRES A RIGOROUS AND MEANINGFUL SUMMARY JUDGMENT ANALYSIS

The SLC agrees that, under *Zapata*, it has the burden of demonstrating that there is no genuine question of material fact that it had reasonable bases to support its conclusions. Ans. at 22; *Kahn*, 23 A.3d at 836 (Del. 2010) ("The first prong of the Zapata standard analyzes…the quality of its investigation and the reasonableness of its conclusions."); *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 929 n.20 (Del. Ch. 2003) (then-Vice Chancellor Strine expressly stating that under *Zapata* a reviewing court must be "satisfied that there is no material factual dispute that the SLC had a reasonable basis for its decision to seek termination" and that "[i]f there is a material factual question about these issues…causing doubt," *Zapata* mandates denial of the SLC's motion).

Having correctly stated the standard, the SLC misapplies it. According to the SLC, its conclusions were reasonable as long as it followed a proper process and there exists some evidence in support. As to its process, the SLC argues that "there is no genuine dispute of material fact as to what the [SLC] did here." Ans. at 23 (citation omitted). As to its conclusions, the SLC argues that its burden is to "show that Plaintiffs do not dispute *the existence* of information or evidence relied on by the Special Committee." Ans. at 22 (quoting *Katell v. Morgan Stanley Group, Inc.*, 1995 Del. Ch. LEXIS 76 (Del. Ch. June 15, 1995)) (emphasis added); *see also* Ans.

at 2 ("Plaintiff does not point to any information that the SLC failed to consider, nor question [any] evidence upon which the SLC based its conclusions."). Thus, according to the SLC, a court need not evaluate evidence *contradicting* the SLC's conclusions to determine whether that evidence raises any disputed material facts as to the reasonableness of those conclusions.

This is incorrect because, by definition, whether or not a conclusion is "reasonable" involves an analysis of competing facts, both supporting and contradicting. *See London v. Tyrrell*, 2010 WL 877528, at *21 (Del. Ch. Mar. 11, 2010) (denying special litigation committee's motion to dismiss where it failed to adequately explore contrary evidence and did not adequately address "ample evidence" contradicting its conclusion). If the standard under the first prong of *Zapata* was simply whether the SLC adopted a thorough process and found facts to support its conclusions, this Court in *Zapata* and *Kahn* could have so stated. This Court did not do so because the SLC's interpretation would render the *Zapata* standard toothless.

As the *Zapata* Court recognized, the SLC procedure affords a Delaware corporation the unique ability to dismiss claims against fellow directors and officers, even after failing to have those same claims dismissed at the pleading stage, and possibly "after years of vigorous litigation." 430 A.2d at 787. Additionally, the committee controls the investigation process, including the collection of documents,

selection of witnesses, and hiring of experts, all without affording the plaintiff the benefit of full discovery. Thus, if all that was required was that the committee hire counsel, conduct an investigation, produce a large report that draws all inferences and conclusions in favor of defendants, and then scour the record for any supporting evidence, no plaintiff would ever withstand an SLC's motion to dismiss.

None of the cases cited by the SLC supports its interpretation of the first prong of *Zapata*. For example, the SLC cites *Katell*, but there the Court of Chancery stated that "[t]he Special Committee has to demonstrate the reasonableness of the bases of its conclusions *with undisputed facts.*" 1995 Del. Ch. LEXIS 76, at *34 (citing *Zapata*, 430 A.2d at 787) (emphasis added). The SLC quotes only the subsequent sentence from *Katell*, which omits the modifying language that the court is discussing undisputed facts. *See also Kahn*, 23 A.3d at 841 ("the SLC's conclusion that the statute of limitations barred the *Brophy* claims is reasonable and was based on undisputed facts in the record"). Unlike *Katell*,[2] there are numerous disputed questions of material fact concerning the materiality of negative information about

[2] In *Katell*, the court noted that the plaintiffs failed to provide "any plausible reason" to contradict the special committee's conclusion. *Katell*, 1995 Del. Ch. LEXIS 76, at *35. Also, the *Katell* committee "primarily used the Partnership Agreement" and, citing Delaware law and various agreement provisions, concluded that the challenged transaction was "expressly permitted" and that the general partners' approval must be viewed against the agreement standards of "gross negligence" and "willful misconduct." *Id*. at *30.

customer price resistance and the deterioration in 2015 Q2 Company SSS, and concerning Defendant TPP's scienter. *See* OB Argument § I.C.2-4; *infra* Argument, § II.A-C.

II. THERE ARE QUESTIONS OF MATERIAL FACT CONCERNING THE REASONABLENESS OF THE SLC'S CONCLUSIONS

A. There Are Questions Of Material Fact As To The Reasonableness Of The SLC's Conclusions Concerning The Negative Impact Of Higher Prices

The SLC argues that the evidence did not establish a causal link between EPL's price increases and the Company's poor performance, and therefore TPP could not have possessed material, nonpublic information about this causal link before the TPP Sale. Ans. at 24. However, there was critical contradicting evidence that cast significant doubt on the reasonableness of the SLC's conclusions.

Central to the SLC's conclusion is its determination that a "lone EPL employee" (Ans. at 2, 25), Hawley, believed that EPL's price increases were causing customer price resistance, and that this "perspective was not shared by senior management or the Board" (*id.* at 25). The record, however, belies this conclusion. On May 14, 2015, Settling Defendant and CFO Roberts circulated the final draft of the Q&A to be used to answer questions from investors during the May Earnings Call. A927. Although the SLC now refers to this critical document fleetingly in its Answering Brief as "drafted by Hawley" (Ans. at 26), the SLC concluded that drafts of the earnings call script and the Q&A were widely circulated "to members of the Board beginning on May 5, 2015, and up until the Q1 2015 Earnings Call was held on May 14, 2015." A359.

In anticipation of the question whether there was "***[a]ny negative response from consumers to our price increases. Any impact on value scores,***" the prepared 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 (emphasis added). Neither senior management, the Board nor TPP objected to the inclusion of this prepared response in the final draft, or in any of the earlier drafts. A372. Indeed, EPL Chairman Maselli (a TPP representative on the Board) told the SLC that "he had likely reviewed some of the draft answers and joined a prep call the morning before the Q1 2015 Earnings Call to talk about the proposed answers and draft responses." A378. In short, the negative impact of customer price resistance was a view not only shared by many others, including the controlling stockholder Defendant TPP, but was also considered material enough to warrant inclusion in a Q&A for purposes of disclosure to investors.

Moreover, the SLC ignores that Hawley was the individual at EPL with ***the most*** knowledge about pricing (A261, A303 n.785), and that Hawley advised the Board and senior management about the negative impact of price increases repeatedly, over several months (A302; OB at 5-7). Neither the Board nor senior management objected to Hawley's analyses and presentations throughout this period.

Hawley's "perspective," "viewpoint" or "narrative," as the SLC repeatedly describes it (Ans. at 25-27), was also supported by concrete sales numbers that demonstrated the negative impact of price increases on customer traffic and sales (*see*, *e.g.*, A311-14, A517-34, A535-95), and these figures were known by other insiders, including TPP. The negative impact of EPL's price increases was further confirmed by independent market research companies, who concluded that EPL's value scores had declined. *See, e.g.*, A527, A534 (Sandelman found value scores declined); A545 (Market Force showed value scores declined following M9 2014 price increases); A682 (by 2015, NPD found that only 54% viewed EPL as providing good value, while competitors continued to score 66%); A683 (Market Force confirmed an immediate dip in value scores after 2014 M9 and 2015 M2 price increases).

Finally, Hawley was ultimately proven correct. On August 11, 2015, the Board was provided with a "Pricing Deep Dive" presentation stating that "***Transactions Drop Coincided with Increase in Pricing Level***." A1016-17 (emphasis added). On August 13, 2015, following this presentation, the Company admitted to investors that "second-quarter results ***were impacted by the combination of higher-priced offerings and a reduction of [the] value portion of [its] menu***" and that the Company "lost the value focus on the first half of 2015." A1202 (emphasis added), A1205.

The SLC argues that there were contemporaneous documents showing "Defendants' discussion of non-pricing action related causes of the sales slowdown." Ans. at 27. However, the SLC does not point to a single contemporaneous email, Board minutes, presentation or other document in which EPL's senior officers and Board members cited poor weather, "marketing confusion" or other factors. Instead, the SLC points to information from the May 12, 2015 Board presentation itself and the Q&A that only confirm the issue of customer price resistance. Ans. at 27 (citing "A707 (slide regarding "unbundling" combos on menu to "show ***lower prices***") and "A927 (the "[f]ocus on alternative proteins at ***higher price points*** looks to be ***driving softer transactions***")) (emphasis added).

In short, there was clearly a genuine issue of fact as to the reasonableness of the SLC's conclusions concerning the materiality of customer price resistance.

B. There Are Questions Of Material Fact As To The Reasonableness of The SLC's Conclusion That The Deterioration In 2015 Q2 Company SSS Was Immaterial

The SLC found that it was immaterial that EPL revised its 2015 Q2 Company SSS projection downward by 50% (from 2.5% to 1.25%), and therefore that TPP could not have traded illegally on this information. Ans. at 28-30. Again, there are significant doubts about the reasonableness of this conclusion.

In the first place, Defendants themselves conceded that any significant (in this case, a 50%) negative departure from 2015 Q2 Company SSS was material. A361, A446.

Importantly, the SLC argues that the revised projections "were within the expected level of intra-quarter variability that EPL often experienced" and did not indicate that sales would deviate in a "markedly unexpected manner." Ans. at 28-29. In other words, the SLC concluded that, despite the poor performance as of May 14, 2015 (*i.e.*, in the first half of the 2015 Q2), EPL could exceed expectations in the second half of the quarter.

The record reveals, however, that this conclusion was not only unreasonable, but erroneous. In the days prior to the TPP Sale, TPP and the Settling Defendants were presented with information showing a significant downward departure from the 2.5% forecast. 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). In other words, the 1.25% Company SSS figure was the revised forecast for ***the entire 2015 Q2***, and therefore already factored in both the performance quarter-to-date, and the possibility of any intra-quarter variability and "catch-up" performance in the second half of the 2015 Q2.

Moreover, as of the morning of the TPP Sale, the quarter-to-date 2015 Q2 Company SSS was just ***0.1%***. A1744. Thus, to make up the poor performance of 0.1% in the first half of the 2015 Q2 and achieve the original 2.5% forecast, the Company would have had to project an outsized approximately 5% Company SSS in the second half of the 2015 Q2. But the SLC does not cite any document reflecting such a projection. In short, the SLC's conclusions based on intra-quarter variability are contradicted by the factual record.

Finally, Defendants' subjective beliefs about intra-quarter variability and EPL's ability to achieve the 2.5% forecast in the second half of 2015 Q2 are irrelevant. The test for materiality is objective and evaluates whether the "non-disclosed information would have been of consequence to a rational investor, in light of the total mix of public information." *In re Oracle Corp. Deriv. Litig.*, 867 A.2d 904, 940 (Del. Ch. 2004), *aff'd*, 872 A.2d 960 (Del. 2005).

C. There Are Questions Of Material Fact As To The Reasonableness Of The SLC's Conclusion That TPP Lacked Scienter

The SLC argues that TPP's principals explicitly stated their intention to sell in the first open window. Ans. at 31 (citing B351). However, the statement by Maselli that the SLC cites was a self-serving *post-hoc* explanation that referred only to TPP's general practice. B351 (Maselli "stated that the 'norm' is to sell early in the open window because the disclosure is 'freshest' and the best data is available to the market"). As Plaintiff correctly noted, no witnesses interviewed by the SLC stated

that TPP had a ***predetermined intention*** to sell EPL stock in the first available window. OB at 31. Importantly, TPP directors Maselli and Kehler were closely monitoring the market at the time of the sale because they had not yet determined whether to sell. *Id.* (citing A386-87).

The SLC also argues that, even if TPP possessed material, nonpublic information, there is no indication that TPP "consciously acted to exploit" this information. Ans. at 31. However, here, the circumstantial evidence of motivation was strong. *Cf. SEC v. Ginsburg*, 362 F.3d 1292, 1299 (11th Cir. 2004) (summary judgment inappropriate where defendant engaged in suspicious pattern of trading after receiving calls from company insider); *SEC v. Singer*, 786 F. Supp. 1158, 1164 (S.D.N.Y. 1992) (SEC presented sufficient circumstantial evidence to survive summary judgment where "it is clear that proof of insider trading can well be made through an inference from circumstantial evidence and not solely upon a direct testimonial confession").

In response to a direct question on the May Earnings Call from investors about the negative impact of higher prices, EPL and its senior management failed to disclose the prepared answer that was included in the final Q&A, and instead offered explanations based on "marketing confusion" that two courts have already held were literally misleading. *See* OB at 9-10. EPL and its senior management also failed to warn of the declining 2015 Q2 Company SSS metric. None of the Defendants,

including TPP, acted to correct these omissions. Instead, just five days after the May Earnings Call, TPP and the Settling Defendants sold over $130 million of EPL stock, with TPP alone selling approximately $118 million. A414.

The SLC makes a strained argument that many of the facts identified in the Opening Brief about TPP's scienter relate to the Settling Defendants or other employees, and not TPP. Ans. at 31-32. This argument is misleading. The SLC does not, and cannot, dispute that TPP controlled EPL. TPP had three representatives on the Board: Kehler, Roth and Maselli (Chair). Leading up to the TPP Sale, TPP's directors on the Board were made privy to numerous Board presentations and other documents repeatedly informing all Defendants that price increases were negatively impacting EPL's sales and value scores. *See* OB, Facts II.A. Tellingly, the SLC never claims that TPP was unaware of this documentary evidence, or the lower projections for the 2015 Q2 Company SSS.

Lastly, the SLC attempts to minimize TPP's violation of the Insider Trading Policy as merely "technical," claiming that no authority exists for drawing an adverse inference based on such a violation. Ans. at 33. TPP's violation was not merely "technical." The Insider Trading Policy explicitly prohibited trading unless the trader complied with the mandatory procedure of providing advance written notice of an intent to sell stock. This failure to provide advance notice undermines TPP's supposed long term intent to sell on the first day of the trading "window."

Courts have held that violations of a company's insider trading policy generally raise an inference of scienter. *See, e.g., SEC v. Yang, et al.*, 999 F. Supp. 2d 1007, 1014 (N.D. Ill. 2013) (denying summary judgment with respect to insider trading claims because there was evidence "tending to show that Yang concealed from his employer… that he was violating its policies barring trading in the stock of public companies, barring personal trading without preclearance…from which [evidence] a jury reasonably could infer consciousness of guilt.").

Further, numerous Circuit Courts of Appeal have held that unusually large or suspiciously timed stock sales create an inference of scienter. *See, e.g., Stevelman v. Alias Research, Inc.*, 174 F.3d 79, 85 (2d Cir. 1999) ("unusual insider trading activity," including large sales and well-timed sales, "may permit an inference of bad faith and scienter") (internal quotation marks and citations omitted); *Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir 1989) (scienter may be satisfied as long as the plaintiff "adequately identifies circumstances indicating conscious behavior by the defendants") (citation omitted). Here, EPL's controlling stockholder, TPP, sold over 5.4 million shares of EPL stock, receiving approximately $118 million. A414. As described above, the SLC itself concluded that as of the morning of the TPP Sale, the TPP Directors knew that the 2015 Q2 Company SSS forecast had dropped by half to 1.25%, even though the projection used by EPL in its guidance to investors was 2.5%. A1631-32. All of these factors, together with TPP's violation of the

Insider Trading Policy, can be characterized as "unusual insider trading activity," giving rise to an inference of bad faith and scienter.[3]

[3] The SLC also defends the Court of Chancery's apparent use of a "plausibility" standard by arguing that the Court "was merely summarizing the SLC's conclusion" regarding scienter. Ans. at 34. It is clear from the Opinion, however, that the Court was stating its own analysis.

III. THERE ARE QUESTIONS OF MATERIAL FACT CONCERNING THE SLC'S INDEPENDENCE

A. Lynton And Floyd Cannot Dissociate Themselves From The Arguments Made In The 2016 Motion

The SLC does not dispute that, in the 2016 Motion, EPL previously asserted at least ten conclusions of law and fact that were precisely the same issues of law and fact that Lynton and Floyd (constituting a majority of the SLC) were later tasked with "independently" evaluating. OB at 36-37.

When filing the 2016 Motion, EPL (and its Board) could have moved to dismiss Plaintiff's lawsuit on purely procedural grounds, or perhaps relied on a statute of limitations, or simply argued that Plaintiff failed to plead his case sufficiently. But this is not what EPL did. Instead, the Company made factual arguments that no insider trading occurred because, *inter alia*: the "timing and amount" of stock sales were "[not] suspicious" (A127, A168); "[t]he alleged non-public information was disclosed" (A161-64); the undisclosed financial results "were immaterial" (A165-68); and all Defendants, including TPP, lacked the scienter for insider trading because they merely took advantage of a "permitted selling window" (A168), did not "maximize their potential return" (A170), and "retained a significant portion of their holdings" (A171). These are precisely the same questions of law and fact that Lynton and Floyd, as members of the SLC, were supposed to investigate independently.

Here, Floyd and Lynton served on the Board at the time of the 2016 Motion. A215, A217. They could never be "above reproach," as required by *Beam*, because they cannot reasonably be expected to reach conclusions of fact and law contrary to what the Company had already argued in court while they themselves were on the Board. As then-Vice Chancellor Strine explained in *Oracle*, a court must ask "how a reasonable person similarly situated to that director would behave" and be mindful that SLC members are "persons of typical professional sensibilities." *Oracle*, 824 A.2d at 942.

In its Answering Brief, the SLC improperly attempts to foist its burden of demonstrating its independence onto Plaintiff. *See*, *e.g.*, Ans. at 41 ("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."). Not only is this improper, but Floyd's deposition testimony demonstrates unequivocally that the full Board was well-aware of EPL's efforts to dismiss Plaintiff's claims in 2016, and discussed seeking dismissal of Plaintiff's claims in the context of a "litigation update," even though Floyd claimed to have no recollection of any particular details:

> Q: …did the board discuss this step of getting the Delaware Chancery Court to dismiss this litigation back in 2016?
>
> Floyd: Yes, they did, but I don't recall any of the details of it.
>
> Q: Do you recall if there were discussions on the board about the subject?

> Floyd: At that period of time, as part of the board agenda, we would have a litigation update of which I'm sure this was part and—I'm sure there is—there was discussion about it, but I don't recall the details.

B481-82. Floyd further testified that he did not object to filing the 2016 Motion, and did not recall any other Board member objecting at that time. B482.

The SLC argues that any involvement by Lynton and Floyd in the 2016 Motion is irrelevant because "a motion to dismiss is designed to test the legal sufficiency of the complaint." Ans. at 42 (*quoting Strougo ex rel. The Brazil Fund, Inc. v. Padegs*, 27 F. Supp. 2d 442, 449 (S.D.N.Y. 1998)). This argument fails because the 2016 Motion did not merely argue that Plaintiff's complaint was inadequately pled or "insufficient," but rather made at least ten arguments of law and fact suggesting that no inside trading could have ever occurred. Moreover, *Strougo* is easily distinguished because it pre-dates both this Court's requirement in *Beam* that the SLC demonstrate its independence "above reproach," and the guidance in *Oracle* and *London*.

The SLC's attempt to distinguish *London* also fails. In *London*, counsel for the plaintiffs sent a letter to the company before filing suit that included valuation materials created by plaintiffs' financial advisor. *London*, 2010 WL 877528, at *8. The court therefore concluded that "the SLC members appear to have reviewed the merits of plaintiffs' claims before the SLC was ever formed." *Id.* at *15. The court found that the SLC members had "prejudged the merits of the suit" in part because

members later used the word "attack" in describing their review of plaintiffs' valuation materials. *Id.* at *15-16. In this case, although the SLC members may not have been foolish enough to use the word "attack" in describing their response to Plaintiff's claims, the conclusion is the same. Because they either expressly or tacitly approved the filing of the 2016 Motion, there is a question of material fact as to whether Lynton and Floyd pre-judged the merits of Plaintiff's insider trading claims, and therefore whether Lynton's and Floyd's independence was "above reproach."

There are numerous ways that EPL could have avoided this problem and created a truly independent SLC. First, it could have formed an SLC as soon as Plaintiff filed his Complaint in 2016. Second, it could have moved to dismiss the Complaint without arguing the aforementioned conclusions of law and fact. Third, it could have selected or added directors who were not on the Board when the 2016 Motion was filed (such as Babb, the third SLC member). Fourth, it could have selected separate legal counsel from any of the individual defendants and moved to dismiss on other grounds.

EPL failed to take any of these steps, and its failure should not be overlooked. Otherwise, Delaware companies will no longer be obliged to form SLCs "whose fairness and objectivity cannot reasonably be questioned" and those SLCs will be less likely "to instill confidence in the judiciary and, as important, the stockholders of the company that the committee can act with integrity and objectivity." *Oracle*,

824 A.2d at 940 (quoting *Biondi v. Scrushy*, 820 A.2d 1148, 1156, 1166 (Del. Ch. 2003)).

B. Even Without The 2016 Motion, The SLC Cannot Establish Its Independence Is Above Reproach

Even putting aside their involvement in the 2016 Motion, SLC members Lynton and Floyd cannot establish that their independence was above reproach, and the SLC's arguments to the contrary fail.

The SLC seeks to minimize its burden by focusing almost exclusively on cases that do not involve a special litigation committee.[4] However, "[u]nlike the demand excused context, where the board is presumed to be independent, the SLC has the burden of establishing its own independence by a yardstick that must be… above reproach." *Beam*, 845 A.2d at 1055 (citing *Zapata*, 430 A.2d at 779); *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993) (a special committee member considering a business transaction is "presumptively disinterested"). Accordingly, "it is conceivable that a court might find a director to be independent in the pre-suit demand context but not independent in the Zapata context based on the same set of factual allegations made by the two parties." *London*, 2010 WL 877528, at *13.

[4] In its discussion of Lynton (Ans. at 36-41) and Floyd (Ans. 43-45), the SLC collectively cites 13 cases about director independence, of which only *Oracle*, *Beam*, and *Lewis* discuss an SLC's independence.

Against this context, Lynton and Kehler share a deep, multifaceted relationship spanning 35 years. *See* OB at 40; *see also* B446, B449, B458 (sharing "approximately 20 dinners" with each other and their families "mostly at [each other's] residences" of which only five were "events" such as "Bar Mitzvahs"); B445 (having children who attended high school together); B448, B450 (Lynton dining with Kehler's wife alone at least "four or five times" and having lunch with Ms. Kehler "maybe four or five times"); B456 (Lynton going to a museum with Mrs. Kehler); B460 (Lynton, Mrs. Kehler and their children visiting Lynton's mother's house in Larchmont).[5] That Lynton may have "candidly disclosed" her relationship with Kehler (Ans. at 36) does not satisfy the SLC's burden of demonstrating independence "above reproach."[6]

[5] Contrary to the SLC's characterization (Ans. at 37 n.11), the charitable contributions (*see* OB at 40)—even if small—demonstrate that Lynton and Kehler have maintained their relationship over many years, and are able to count on each other.

[6] For all the reasons stated in the Opening Brief, the SLC has not established an absence of material questions of fact concerning Floyd's independence. *See* OB at 41-42. Also, the Court of Chancery erred to the extent it found the SLC's conclusions to be reasonable under the second prong of *Zapata*. *See* OB at 44.

CONCLUSION

For all the aforementioned reasons and the reasons set forth in Plaintiff's Opening Brief, 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.

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