EFiled: Mar 16 2022 04:11PM EDT
Filing ID 67400163
Case Number 16,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE KRAFT HEINZ COMPANY DERIVATIVE LITIGATION	)	No. 16, 2022
	)	CASE BELOW:
PUBLIC VERSION FILED ON: MARCH 16, 2022	)	COURT OF CHANCERY OF THE STATE OF DELAWARE
	)	C.A. No. 2019-0587-LWW

APPELLANTS' OPENING BRIEF

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DATED: March 1, 2022

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NATURE OF PROCEEDING

This is a stockholder derivative suit on behalf of The Kraft Heinz Company ("KHC"). Appellants/Plaintiffs-Below General Retirement System of the City of Detroit, Police & Fire Retirement System of the City of Detroit, and Erste Asset Management GmbH ("Plaintiffs") appeal from the Memorandum Opinion of the Court of Chancery dismissing the Consolidated Amended Verified Stockholder Derivative Complaint (the "Complaint") for failure to plead demand futility. *In re Kraft Heinz Co. Deriv. Litig.*, Cons. C.A. No. 2019-0587-LWW (Del. Ch. Dec. 15, 2021) (the "Memorandum Opinion") (Exhibit A).

The derivative claims are against entities and individuals affiliated with 3G Capital, Inc., a Brazilian/American private equity firm (together with its affiliates, "3G"). The central claim against 3G is asserted under *Brophy v. Cities Service Co.*, 70 A.2d 5 (Del. Ch. 1949), and it arises out of the sale by a 3G affiliate of over $1.2 billion worth of KHC common stock on August 6, 2018, a few months before significant stock price drops and the public announcement of a $15.4 billion impairment charge, which arose out of ongoing business pressures at KHC.

KHC has an 11-member board of directors (the "Board"). Defendants concede that there is reason to doubt that three directors—3G co-founder Jorge Paulo Lemann, 3G co-founder Alexandre Behring, and 3G partner Joao M. Castro-

Neves—would bring impartial business judgment to bear on a litigation demand respecting 3G. Plaintiffs concede the independence of three directors—Jeanne P. Jackson, John C. Pope, and Feroz Dewan. Demand futility is established if there are well-pleaded allegations that three of the remaining five directors—Alexandre Van Damme; George Zoghbi; John T. Cahill; Gregory Abel; and Tracy Britt Cool—lack independence from 3G.

No decision was rendered below as to Van Damme or Zoghbi. Reversal is warranted if the Vice Chancellor erred respecting either (i) similarly situated Abel and Cool or (ii) Cahill. Demand futility is established if any of the following combinations of directors lack independence from 3G: (i) Van Damme plus Abel and Cool; (ii) Van Damme plus Cahill and Zoghbi; or (iii) Abel and Cool plus either Cahill or Zoghbi.

Van Damme is a longtime close friend of 3G co-founder (and KHC director defendant) Lemann, and he has been closely involved with 3G's businesses and 3G's co-founders. The Vice Chancellor observed that the totality of the particularized allegations respecting Van Damme "come closest to supporting a reasonable doubt about a non-3G's director's ability to objectively consider a demand." (Mem. Op. at 32.)

Abel and Cool are senior executives affiliated with Berkshire Hathaway Inc. ("Berkshire") and subordinates of Warren Buffett. Buffett is a longtime close friend of Lemann, and 3G was described in *Forbes* as "Warren Buffett's favorite deal-making partner." (A450-452 ¶47.) Buffett recently described Lemann as a "good friend" and "an absolutely outstanding human being" and he previously described Berkshire and 3G as "partners." (*Id.*) The Vice Chancellor erroneously held that Buffett's close personal relationship with Lemann and close business relationship with 3G "would hardly be sufficient to show that Buffett lacks independence" and are "of little consequence" for purposes of evaluating whether Buffett subordinates Abel and Cool can act impartially respecting a litigation demand as to Lemann and 3G. (Mem. Op. at 23-24.)

At the operative date for assessing demand futility, Cahill was the Vice Chairman of KHC, a former CEO of Kraft, and a recent consultant for KHC. Zoghbi was a former KHC senior executive who was currently employed as a Special Advisor to KHC. Both Cahill and Zoghbi were deemed not independent by the Board according to KHC's 2019 proxy statement. The Vice Chancellor noted that the particularized allegations respecting Zoghbi present a "closer call" than those respecting Cahill. (*Id.* at 31.)

SUMMARY OF ARGUMENT

1. Dismissal under Court of Chancery Rule 23.1 was not warranted because:

   a. the Vice Chancellor erred in ruling that Abel and Cool can impartially consider a demand against 3G, in light of the close personal friendship between their boss, Warren Buffett, and 3G director defendant Lemann, and the deep business partnership between Berkshire and 3G;

   b. the Vice Chancellor erred in ruling that Cahill can impartially consider a demand, given KHC's determination that he is not independent and the factual bases supporting that determination;

   c. Van Damme cannot impartially consider a demand, given his longstanding close personal and business relationships with Lemann, 3G, and other co-founders of 3G; and

   d. Zoghbi cannot impartially consider a demand, given KHC's determination that he is not independent and the factual bases supporting that determination.

STATEMENT OF FACTS

A. Van Damme's Role in the Growth of 3G

3G is a Brazilian/American investment firm co-founded in 2004 by, among others, KHC director defendants Jorge Paulo Lemann and Alexandre Behring. (A441 ¶25.) 3G's business model involves buying mature companies, instituting rigorous cost-cutting measures using zero-based budgeting, and then using those companies' equity as currency to acquire other mature companies and repeat the cost-cutting process. (A456 ¶57.) From small origins in Brazil, 3G has repeated this process to create massive, global conglomerates, including (i) the world's largest brewer, Anheuser-Busch InBev ("AB InBev"), (ii) a combination of Burger King, Tim Hortons, and Popeyes Louisiana Kitchen, Inc. under the corporate umbrella of Restaurant Brands, International, Inc. ("RBI"); and (iii) KHC. (A441-442 ¶26.)

The signal transaction making 3G a global player occurred in 2004, when the Brazilian brewer AmBev (itself created by 3G-orchestrated mergers) merged with Interbrew, a privately-controlled Belgian brewing company, to create InBev, the entity that later acquired Anheuser-Busch, creating AB InBev, which later acquired SABMiller. (A441-442 ¶26.a.) AmBev's merger with Interbrew grew out of the close personal friendship between 3G co-founder (and subsequent KHC director)

Jorge Paulo Lemann and major Interbrew stockholder (and subsequent KHC director) Alexandre Van Damme. (A448 ¶45.)

A book about 3G discusses how 3G co-founder Marcel Telles introduced Van Damme to Lemann in 2002, and how Lemann then cultivated a friendship with Van Damme over the course of a year, leading to the merger negotiations:

> The possibility of a deal involving the two companies was not discussed, but following the meeting in New York, it was Lemann who began strengthening the relationship with Van Damme. He invited him to watch the samba schools at the Rio Carnival from the Brahma VIP lounge. Later, they spent sunny days with their respective families in the Hamptons, a luxury coastal area near New York, and met in the Swiss Alps in the middle of that year. Personality wise, Van Damme was himself averse to exposure in the press and liked the discreet and down to earth style of the three Ambev controllers. A valuable link was forming.
>
> …
>
> The scenario was perfect for a project and Lemann suggested the possibility of the two companies uniting at a meeting with Van Damme in May 2003. Although he did not go into the details of the format of the deal, shareholder composition or governance, the Belgian, who was virtually an ally by that stage, liked the idea.

(A91-92; *see* A448-450 ¶45.)

Van Damme served on the board of InBev and, later, of AB InBev. (A448-450 ¶45.) Van Damme is a beneficial owner of an affiliate of the entity that holds the AB InBev interests of some of the founding families of Interbrew, including the Van Damme family. (*Id*.) That same entity holds a substantial stake in RBI. (*Id*.)

Van Damme separately invested in the 3G funds that acquired Burger King in 2010, became a director of Burger King in 2011, and has served as a director of RBI since its formation in 2014. (*Id*.) Van Damme also invested in the 3G funds that acquired Heinz in 2013 and joined the KHC Board in April 2018. (*Id.*) Van Damme's closeness to 3G is further evidenced by the fact that various 3G co-founders have repeatedly co-chaired the annual fundraising event of a charitable organization for which Van Damme serves as a director. (*Id.*)

B. Lemann's Close Friendship with Buffett Leads To 3G's Partnerships with Berkshire

Prior to the events at KHC giving rise to this litigation, 3G was described in *Forbes* as Buffett's "favorite deal-making partner" and in *The New York Times* as "Mr. Buffett's preferred business partner in striking multibillion-dollar deals." (A450-452 ¶47; A456 ¶59.) A book about 3G describes Buffett and Lemann as "longstanding friends" who have a "close relationship" and a "firm friendship." (A450-452 ¶47.) Buffett and Lemann first met in 1998, and *The New York Times* reported that Buffett said of Lemann: "I consider it one of the largest mistakes in my life that we didn't really team up as partners until considerably later." (*Id.*) Even after the catastrophic and scandalous events giving rise to this litigation, Buffett publicly embraced 3G and Lemann, affirming that Berkshire would continue to

pursue co-investment opportunities with 3G, and extolling Lemann as "a good friend" and "an absolutely outstanding human being." (*Id.*)

Lemann approached Buffet about acquiring Heinz in December 2012. (A457 ¶63.) The deal closed in June 2013, with 3G and Berkshire splitting common stock ownership 50/50, and 3G taking over day-to-day operations. (A457-458 ¶¶63-64.) Buffett stated that Heinz would be "3G's baby." (*Id.*) Berkshire invested $12.4 billion in the acquisition of Heinz. (A451 ¶47.)

In 2014, Berkshire invested $3 billion to finance Burger King's acquisition of Tim Hortons to form RBI. (A441-442 ¶26.b, A450-452 ¶47.)

In 2015, 3G and Berkshire worked together to acquire Kraft Foods Group, Inc. ("Kraft") in a stock-for-stock merger with Heinz that created KHC (the "Merger"). (A433 ¶3.) 3G and Berkshire funded a special dividend of approximately $10 billion paid to Kraft's stockholders, which allowed Berkshire and 3G, in combination, to control 51% of KHC's common stock. (A459 ¶70.)

C. The Governance of KHC

3G and Berkshire executed a shareholders' agreement (the "Shareholders' Agreement"), which remains in force, by which three directors on the eleven-person KHC Board of directors would be designated by 3G and three directors would be designated by Berkshire. (A460 ¶72; A461-462 ¶¶76-78.) 3G co-founder Behring

was appointed Chairman of the Board. (A444 ¶34.) KHC's governance arrangements contemplated that personnel from 3G or from 3G-controlled companies would populate key management positions. (A461 ¶75.) For example:

- 3G partner Bernardo Hees, the Heinz CEO, became KHC CEO (A445 ¶37; A457-458 ¶64);
- 3G partner Paulo Basilio, Heinz's CFO, became KHC's CFO and later its U.S. Zone President; he was replaced as KHC's CFO by 3G partner David Knopf (A445 ¶¶38-39; A461 ¶75); and
- Heinz senior executive Eduardo Pelleissone became KHC's COO (A445-446 ¶40).

Berkshire's original director designees were Buffett, Abel, and Cool. (A460 ¶73.) The Berkshire designees did not sit on KHC's nominating and governance committee, which gave outsized influence to 3G's designees in selecting directors. (A139.) KHC's public filings acknowledge that 3G, Berkshire, and Buffett may be deemed to be a group for purposes of Section 13(d) of the Securities Exchange Act of 1934. (A452-454 ¶48; A152.)

D. The Danger of Massive Goodwill Impairments

By early 2018, there was significant concern within KHC (and thus at 3G) whether the 3G strategy of massive cost cutting could succeed in the face of new

private label competition caused, in part, by an escalating grocery war between Amazon and Walmart. (A434 ¶¶4-5; A464-467 ¶¶82-89; A470 ¶100.) In February 2018, Hees warned the KHC Board about "accelerating" private label offerings in the United States, driven mainly by Walmart. (A434 ¶5.)

At the April 19, 2018 Board meeting, KHC management reported that KHC was already projected to miss its EBITDA projection for fiscal year 2018 by $300-$400 million, amidst increasing private label competition. (A434 ¶5; A475-479 ¶¶114-125.) Buffet resigned from the KHC Board following this meeting, perhaps due to the intractable business problems KHC was then facing. (A475 ¶114.)

On April 30, 2018, at a conference on disruption, Lemann made news by admitting publicly that he was a "terrified dinosaur," explaining: "I've been living in this cozy world of old brands, big volumes, nothing changing very much, and you could just focus on being very efficient and you'd be okay, and all of a sudden we are being disrupted in all ways…. We bought brands and we thought they would last forever…. [W]e really have to adjust." (A434-435 ¶6.) It was not clear from Lemann's remarks whether they applied specifically to KHC.

On May 2, 2018, an analyst asked Hees to comment on Lemann's highly publicized remarks at KHC's earnings call. Hees responded: "We believe in the big brands when you support them, right, when you give the right relevancy, the right

product offering in the marketplace, they go really well." (A164.) In the same earnings call, Knopf stated, "we continue to be very confident in the strength of our brands," and referred to "transitory headwinds in the U.S. … that should fade into the second half." (A161-162.)

On February 25, 2019, in the immediate aftermath of KHC's public disclosures of its massive impairment, Buffett was interviewed on CNBC and stated—with apparent reference to Lemann's April 2018 "terrified dinosaur" remarks—that Lemann had "pointed out that the game had changed in terms of brands … a full year ago." (A475 ¶112.)

In the spring and summer of 2018, KHC engaged in annual impairment testing based on KHC's projections as of April 1, 2018. (A435 ¶7.) KHC publicly reported whenever a goodwill reporting unit or brand had a cushion of fair value over carrying value of less than 10%. (A437-438 ¶12; A487-488 ¶144.) On July 31, 2018, the Audit Committee was advised that the cushions for the following large business unit and large trademarks were just above KHC's 10% public disclosure threshold:

Unit	Carrying Value	Cushion
US Refrigerated	$28.922 billion	$3.444 billion (12%)

Trademark	Carrying Value	Cushion
Kraft Master Brand	$15.913 billion	$2.046 billion (13%)
Philadelphia	$6.651 billion	$753 million (11%)
Oscar Mayer	$6.642 billion	$890 million (13%)

(*See* A488-489 ¶146; A217-218.)

On August 2, 2018, Hees reported to the Board that KHC was facing "[u]nprecedented commercial headwinds in U.S., pushed by Private Label / deflation from Wal-Mart." (A493 ¶158; A202.) Nevertheless, on the earnings call of August 3, 2018, 3G's Hees and Knopf spoke of "transitory factors" and "several transitory headwinds" confronting KHC. (A350; A353; *see* A496-499 ¶¶166-67.)

E. 3G Sells $1.2 Billion of KHC Stock

On August 7, 2018, 3G sold 20,630,314 shares of KHC stock for proceeds in excess of $1.23 billion, or $59.85 per share. (A499 ¶169.) 3G had not previously sold such a large block of KHC stock. (A499 ¶170.) Hees had told analysts six months earlier: "We are long-term owners with an unlimited time horizon." (*Id.*)

F. KHC's Problems Culminate in a Massive Write-Down, a Dispute with Its Auditor Preventing the Timely Filing of Its Form 10-K, Needed Restatements of Prior 10-Ks, and an SEC Investigation

KHC's disclosure of disappointing quarterly earnings on November 1, 2018, prompted a stock price drop of 9.73%, from $56.20 to $50.73 per share. (A438 ¶13.)

According to a subsequent internal memo, as of November 1, 2018, KHC "did not have, nor was it possible to develop, an updated long-term view or forecast." (A507 ¶191.) In other words, KHC admitted lacking the ability to make reliable projections that would inform goodwill valuations less than three months after 3G's stock sale.

By December 4, 2018, the Audit Committee called for a "thorough investigation." (A509 ¶198.) PwC said it would "consider industry headwinds." (*Id.*) On December 5, 2018, Hees projected EBITDA of just $6.855 billion for 2019, as compared to his projection a year earlier of EBITDA of $8.4 billion for 2018. (A509 ¶200.)

On February 21, 2019, KHC disclosed impairments totaling $15.4 billion, primarily attributed to the U.S. Refrigerated and Canada Retail business units and the Kraft and Oscar Mayer trademarks. (A510-511 ¶¶204-05.) KHC also disclosed that an SEC investigation was ongoing. (A511-512 ¶207.) KHC's stock price dropped 27.46%, from $48.18 per share on February 21, 2019, to $34.95 per share on February 22, 2019. (A512 ¶208.)

On February 28, 2019, KHC announced that it was unable to timely file its annual report for fiscal year 2018 because of a dispute with its auditor. (A512-513 ¶211.) KHC later announced in May 2019 that it would be restating its consolidated

financial statements and related disclosures for the years ended December 30, 2017, and December 31, 2016, and for various quarterly reports. (A513 ¶214.)

In August 2019, KHC's new CEO admitted that supply chain losses had been increasing 15% year over year since the Merger, which meant that KHC's systemic financial problems had not first manifested themselves in late 2018. (A519 ¶¶229-30.)

G. The Securities Fraud Class Action

In early 2019, cases were filed and ultimately consolidated into *In re The Kraft Heinz Company Securities Litigation*, Case No. 19-1339 (N.D. Ill.) (the "Securities Fraud Class Action"). (A444 ¶34.) The defendants in the Securities Fraud Class Action are individual executives and directors of KHC (including Hees, Knopf, Behring, and Zoghbi) and corporate entities affiliated with 3G. (A444 ¶34; A447-448; A934-936.)

On August 11, 2021, the District Court denied motions to dismiss filed in the Securities Fraud Class Action. (A933-982.) As summarized in a supplemental brief filed in this action, the District Court held, among other things, that 3G is a controller of KHC, that the knowledge of individual 3G partners can be imputed to 3G, that the circumstances of 3G's stock sale warrant an inference of scienter, that 3G

possessed material non-public information at the time of the stock stale, and that a claim had been sustained as to Zoghbi. (A987-997.)

H. KHC Discloses That Cahill and Zoghbi Are Not Independent

The proxy statement for the September 12, 2019 annual meeting of stockholders of KHC, disclosed the following respecting the independence determinations made by the Board of directors respecting Cahill and Zoghbi:

> Mr. Cahill, the former Chief Executive Officer of Kraft, and a former consultant to Kraft Heinz, and George Zoghbi, our former Chief Operating Officer of the U.S. Commercial business and Special Adviser at Kraft Heinz, are not independent.

(A419-420.) Cahill's and Zoghbi's employment and/or consulting agreements with KHC are attached to SEC filings that are subject to judicial notice, *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 172 (Del. 2006), and they are incorporated by reference in the Complaint, *see* A446-447 ¶43 ("Following the Merger, and until July 1, 2019, Cahill served as a consultant for KHC…."); *id.* A447-448 ¶44 ("Zoghbi has been employed as a Special Advisor to KHC since October 2017, after having served as COO of KHC's U.S. Commercial business since the Merger.").

Cahill had been Kraft's CEO immediately before the Merger. (A446-447 ¶43.) His first consulting agreement with KHC, effective on July 9, 2015, provided Cahill with $4 million annually. (A106.) Cahill was to provide "advisory and consulting services … to CEO Bernardo Hees and Chairman Alex Behring … related

to the current and historical finances of the Company; relationships with licensors, customers and vendors; … product development, marketing and distribution; government affairs and strategic opportunities[.]" (*Id.*) Behring and Hees were 3G partners. (A441 ¶25; A445 ¶37.) Hees signed Cahill's first consulting agreement on behalf of KHC. (A103.)

Cahill's second consulting agreement, effective November 1, 2017, provided that Cahill would be paid $500,000 per year to continue providing advisory services to Behring and Hees. (A134.) Cahill's second agreement did not have a defined term, but KHC's 2020 proxy statement asserts that it terminated on July 1, 2019 (A428) —*i.e.*, after Plaintiffs served Section 220 demands (A364-415) and within the same month that the first complaint in this consolidated litigation was filed.[1] The annual base salary of $500,000, in addition to the $235,000 he earned as a KHC director, adds up to more than half of Cahill's publicly ascertainable income in 2018. (A446-447 ¶43.) In addition to his consulting and director compensation, KHC's 2020 proxy states that "[i]n connection with the termination of his consulting

[1] *See* Verified Stockholder Derivative Complaint, *Defabiis v. 3G Capital, Inc.*, C.A. No. 2019-0587, 2019 WL 3436783 (Del. Ch. July 30, 2019) ("Cahill is currently a paid 'consultant' to Kraft Heinz.").

agreement, Mr. Cahill received a one-time grant of 500,000 stock options." (A428.) Hees signed Cahill's second consulting agreement on behalf of KHC. (A134.)

In total, during the roughly four years between the Merger and the filing of the first complaint in this consolidated action on July 30, 2019, KHC paid Cahill more than $10 million. Additionally, Cahill's son works at AB InBev. (A446-447 ¶43.) Cahill's influence with 3G presumably helped his son start his career in AB InBev's highly competitive management trainee program (with 74,000 applicants for 24 positions), which 3G employs at all of its companies and has historically been overseen by 3G co-founder Telles. (*Id.*)

Zoghbi is a former KHC officer, having served as the Chief Operating Officer of KHC's U.S. Commercial Business from the Merger until October 2017. (A447-448 ¶44.) Pursuant to a 2015 agreement, Zoghbi received: (i) a base salary of $850,000; (ii) a 2016 special incentive bonus with a target payment of $10 million (and a minimum guaranteed payout of $7 million), based on performance in net cost savings (40%), sales growth (40%), and innovation (20%); and (iii) a $4 million retention bonus conditioned on Zoghbi's continued employment with KHC through January 1, 2017. (A125.) In 2016, KHC paid Zoghbi over $12 million in total compensation. (A127; A146.) Hees signed Zoghbi's first employment agreement. (A103.)

KHC entered into a revised employment agreement with Zoghbi, effective January 1, 2017, that (i) continued Zoghbi's base salary of $850,000, (ii) provided a 2017 target annual incentive award opportunity of 200% (with a bonus multiplier of 130%), and (iii) granted Zoghbi a long-term equity incentive award, which included restricted stock units with a three-year cliff and performance stock units, which vested after three years based on achieving U.S. sales growth targets and U.S. adjusted EBITDA growth targets. (A421.) In 2017, KHC paid Zoghbi over $17 million in total compensation. (A146.) Hees signed Zoghbi's second employment agreement. (A116.)

On September 1, 2019, Zoghbi entered into a new agreement with KHC that reduced his salary from $850,000 to $400,000, provided him with a one-time grant of 200,000 options, and made him eligible to receive compensation for his services as a director, including an annual stock award valued at $125,000 and an annual cash retainer of $110,000. (A428.) That agreement backdates the effective date to July 1, 2019, the day that KHC states Cahill's consulting agreement terminated. (*Id.*) Zoghbi received the vast majority of his publicly ascertainable income in 2016-2019 from KHC. (A447-448 ¶44.)

ARGUMENT

THE VICE CHANCELLOR ERRED IN DISMISSING THE COMPLAINT FOR FAILURE TO PLEAD DEMAND FUTILITY

A. Question Presented

Did Plaintiffs plead particularized facts providing "reason to doubt that the board could bring its impartial business judgment to bear on a litigation demand"? *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1049 (Del. 2021). This issue was preserved below in Plaintiffs' brief opposing Defendants' motions to dismiss and at oral argument. (A594-604; A732-737; A895-908.)

B. Scope of Review

This Court's review of the decision on a motion to dismiss under Chancery Court Rule 23.1 is *de novo*. *Delaware Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1021 (Del. 2015).

C. Merits of Argument

Demand futility is determined "on a director-by-director basis" by applying the "three-part test" under *Zuckerberg*:

> (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;

> (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and
>
> (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.

262 A.3d at 1059. "If the answer to any of the questions is 'yes' for at least half of the members of the demand board, then demand is excused as futile." *Id.* This appeal concerns *Zuckerberg*'s third prong—*i.e.*, whether plaintiffs pleaded facts leading to an inference that at least three directors, in addition to the three concededly conflicted directors, lack independence from 3G and 3G's director designees on KHC's Board, who face a substantial likelihood of liability under *Brophy*.

The Court of Chancery erred by articulating and applying an incorrect standard for pleading independence—whether a director was "so beholden to 3G that he would be motivated to cover up insider trading." (Mem. Op. at 31.) Delaware law imposes no requirement that a plaintiff plead that a director is so compromised that the director would commit an illegal act (*i.e.*, be an accessory after the fact) with an illicit motive. The proper inquiry is whether there is "reason to doubt" that a director can bring to bear "impartial business judgment" respecting a litigation demand. *Zuckerberg*, 262 A.3d at 1049.

Impartial business judgment means that a director's decision "is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984). "A plaintiff is only required to plead facts supporting an inference – or in the words of *Rales*, 'create a reasonable doubt' – that a director cannot act impartially." *Sandys v. Pincus*, 152 A.3d 124, 130 (Del. 2016) (quoting *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993)).

An operative question is whether the director and the defendant have the sort of relationship—such as an "important and intimate" friendship or a "mutually beneficial ongoing business relationship"—that "might have a material effect on the parties' ability to act adversely toward each other." *Sandys*, 152 A.3d at 130, 134. "In other words, the question is whether, applying a subjective standard, those ties were *material*, in the sense that the alleged ties could have affected the impartiality of the individual director." *Zuckerberg*, 262 A.2d at 1061 (internal quotation omitted). The Court of Chancery is bound to consider the particularized facts about "the relationships between the director and the interested party in their totality and not in isolation from each other, and draw all reasonable inferences from the totality of those facts in favor of the plaintiffs." *Sanchez*, 124 A.3d at 1019.

1. The Vice Chancellor Erred in Ruling That Abel and Cool Are Independent of 3G

In the aftermath of KHC's public disclosure of a massive impairment, a dispute with its auditor, and an ongoing SEC investigation, all of which led to a massive stock drop, not long after 3G had unloaded over $1.2 billion of KHC stock, Warren Buffett publicly proclaimed that Berkshire would continue to pursue co-investments with 3G and that Lemann was an "absolutely outstanding human being" and a "good friend." (A450-452 ¶47.) The Court of Chancery erred in holding that Buffett's public statement, and the supporting pleaded facts about his close, longstanding friendship with Lemann and Berkshire's deep business relationship with 3G, "would hardly be sufficient to show that Buffett lacks independence" and were "of little consequence" for purposes of evaluating the ability of Abel and Cool—both longtime Berkshire employees and Buffett protégés—to exercise impartial judgment respecting a demand to sue the 3G defendants. (Mem. Op. at 23-24.)

Buffett's public embrace of 3G and Lemann is analogous, for demand futility purposes, to the special litigation committee chair who was found to lack independence because he "publicly and prematurely issued statements exculpating one of the key company insiders whose conduct is supposed to be impartially investigated." *Biondi v. Scrushy*, 820 A.2d 1148, 1166 (Del. Ch. 2003). The

difference is that neither Buffett nor his Berkshire protégés on the KHC Board of directors had been asked to impartially investigate 3G. Regardless of their personal integrity, they could not properly be chosen to serve in such a capacity. *See In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 947 (Del. Ch. 2003) ("persons of integrity and reputation can be compromised in their ability to act without bias when they must make a decision adverse to others with whom they share material affiliations"). In light of Buffett's public embrace of 3G and Lemann, his close friendship with Lemann, Berkshire's deep relationship with 3G, and Buffett's role as CEO and Chairman of Berkshire, it would be futile to expect Buffett subordinates Abel and Cool to impartially evaluate suing the 3G defendants.

Delaware corporate law does not expect directors to be "persons of unusual social bravery, who operate heedless to the inhibitions that social norms generate for ordinary folk." *Id.* at 938. The test for director independence is meant to identify those directors who would be operating under untenable circumstances if they were expected to pass judgment. The decision to pursue or commence litigation is a particularly difficult one. *See Sandys*, 152 A.3d at 134 ("Causing a lawsuit to be brought against another person is no small matter, and is the sort of thing that might plausibly endanger a relationship."). The potentially detrimental personal and career impacts of causing your boss's longtime good friend and business partner to be sued

for wrongdoing is the kind of extraneous consideration that "might have a material effect" on a director's ability to act adversely toward a defendant. *Sandys*, 152 A.3d at 134.

The Vice Chancellor erred in comparing the quandary that Abel and Cool would face from a Rule 23.1 demand to the attenuated "transitive theory of independence" (Mem. Op. at 21) at issue in *In re KKR Fin. Holdings LLC Shareholder Litigation*, 101 A.3d 980, 997 (Del. Ch. 2014), *aff'd sub nom. Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015). In *KKR*, the plaintiff alleged that two directors were not independent from KKR because fifteen years before the challenged transaction they had worked at Wells Fargo with a third director who was deemed not independent. *Id.* at 998-99. The legal insignificance of that prior happenstance bears no resemblance to the pressing problem confronting Buffett subordinates Abel and Cool. Abel and Cool worked at Berkshire and reported to Buffett at the time of the underlying wrongdoing and also when the initial complaint was filed. (A450-452 ¶47; A454 ¶49.) Abel is Buffett's heir apparent and protégé. (*Id.*) Cool is a Buffett protégé who treats Buffett as a father figure. (*Id.*)

An analogous case is *In re Dell Techs. Inc. Class V Stockholders Litigation*, 2020 WL 3096748 (Del. Ch. June 11, 2020), in which one Dell director, David Dorman, lacked independence because he was a partner at a financial firm whose

parent company had longstanding relationships with interested defendants: "As a principal of Centerview Capital, Dorman had reason to remain on good terms with both Mr. Dell and Silver Lake, given their outsized influence in the financial world and the history of beneficial transactions that these relationships have generated for Dorman's firm." *Id.* at *36. Another director, William Green, lacked independence because he "had a thirty-year friendship and business association with Joseph Tucci, who has described himself as Mr. Dell's 'brother from another mother' and is one of Mr. Dell's closest friends. *Id.* at *37.

As in *Dell*, Plaintiffs pleaded that Abel and Cool have close relationships with Buffett and Berkshire, who have significant ties to 3G and Lemann. The constellation of business connections is, itself, sufficient. In *Sandys*, this Court held that it was inferable that directors were not independent because venture capital firms with which they were affiliated were part of "networks arise of repeat players who cut each other into beneficial roles in various situations," and "precisely because of the importance of a mutually beneficial ongoing business relationship, it is reasonable to expect that sort of relationship might have a material effect on the parties' ability to act adversely toward each other." 152 A.3d at 134. The same is true of Berkshire and 3G. The Court of Chancery erred by characterizing the

question as whether it is reasonable to infer that Berkshire "relies on 3G to gain access to investments." (Mem. Op. at 22.)

Berkshire is in the business of buying companies. *The New York Times* reported that 3G is "Warren Buffett's favorite deal-making partner." (A450-452 ¶47.) In Buffett's own words, "I consider it one of the largest mistakes in my life that we didn't really team up as partners until considerably later." (*Id.*) Berkshire invested nearly $30 billion in 3G's rollups of the companies comprising RBI and KHC, which Berkshire relies on 3G to manage. (*Id.*) Even though the market value of Berkshire's investment in KHC has been cut in half over time, KHC remains Berkshire's fifth largest public company investment. (*See* Berkshire Hathaway, Inc., Form 13F, Information Table (February 14, 2022), *available in sortable format by market value at* https://www.cnbc.com/berkshire-hathaway-portfolio/.) Buffett publicly reaffirmed in 2019, after KHC's write-down, that Berkshire would continue to pursue co-investment opportunities with 3G. (A450-452 ¶47.)

Plaintiffs are entitled to the reasonable inference that Berkshire places importance on its relationship with 3G as a partner for operating existing multi-billion dollar co-investments and pursuing new multi-billion dollar deals. The factual allegations here are stronger than in *Zuckerberg*. In that case, as to a specific director who was a founder of Netflix, the complaint did "not make any

particularized allegations explaining how obtaining special access to Facebook user data was material to Netflix's business interests[.]" 262 A.3d at 1062. As to another director who is a partner at venture capital firm Founders Fund, the complaint did "not identify a single deal that flowed to—or is expected to flow to—Founders Fund through this association, let alone any deals that would be material to Thiel's interests." *Id.* at 1063.

The pleaded facts of the Berkshire/3G business relationship must be combined with Buffett's close friendship with Lemann. The Vice Chancellor erred by not considering the factual allegations of the Berkshire/3G business relationship and Buffett/Lemann personal relationship "in their totality" and what they would mean for purposes of Buffett subordinates Abel and Cool deciding whether to sue 3G and Lemann. *Sanchez*, 124 A.3d at 1019.

"[T]he plaintiff cannot just assert that a close relationship exists, but when the plaintiff pleads specific facts about the relationship—such as the length of the relationship or details about the closeness of the relationship—then this Court is charged with making all reasonable inferences from those facts in the plaintiff's favor." *Marchand v. Barnhill*, 212 A.3d 805, 818 (Del. 2019). Buffett himself called Lemann a "good friend" and an "outstanding human being." (A450-452 ¶47.) The author of the book about 3G spoke to Buffett and Lemann (A94-96) and described

them as "longstanding friends" who have a "firm friendship" and "close relationship." (A450-452 ¶47.) Supporting details include the statement in the book that Buffett and Lemann are "so close that Buffett has accompanied Lemann to three workshops" with the business professor who wrote the foreword to the book, and that Buffett attended Lemann's birthday party. (*Id.*; A94-96.)

These are not the kind of "thin" and "conclusory" allegations of personal relationships found insufficient in *Beam v. Stewart*, 845 A.2d 1040 (Del. 2004). The Complaint pleads facts supporting the reasonable inference that Buffett and Lemann have a "continuing close personal friendship" that "one would expect to heavily influence a human's ability to exercise impartial judgment." *Sandys*, 152 A.3d at 130.

The Vice Chancellor rejected the reasonable inference that Buffett and Lemann have a "close personal relationship" (Mem. Op. at 24), which means ignoring Buffett's own words and the words of those who know them. The Vice Chancellor disregarded the import to Abel and Cool of potentially sundering their boss's close personal friendship, as well as damaging their employer's multiple, multi-billion-dollar co-investments and ongoing business relationship that may lead to future multi-billion-dollar co-investments. The web of pleaded facts leads to a reasonable inference calling into question the impartiality of Abel and Cool.

2. The Vice Chancellor Erred in Ruling That Cahill Is Independent of 3G

The Court of Chancery erred in holding that Plaintiffs had not alleged facts leading to an inference that Cahill lacked independence. The KHC Board determined that Cahill was not independent. (A446-447 ¶43.) The 2019 proxy did not state why the Board made that determination, but it is inferable that the Board determined that Cahill could not exercise his business judgment impartially because of his long and lucrative history with the Company, while it was under 3G's control, and because his son has professional ties to 3G. These facts create a pleading stage reasonable doubt as to Cahill's ability to act independently on a demand.

In *Sandys v. Pincus*, this Court held that "to have a derivative suit dismissed on demand excusal grounds because of the presumptive independence of directors whose own colleagues will not accord them the appellation of independence creates cognitive dissonance that our jurisprudence should not ignore." 152 A.3d at 131. A company's board "[does] not lightly classify [directors] as having a 'relationship which, in the opinion of the [c]ompany's board of directors, would interfere in the exercise of independent judgment in carrying out the responsibilities of a director." *Id.* at 133 (quoting Nasdaq Rule 5605(a)(2)).

As in *Sandys v. Pincus*, the Vice Chancellor correctly rejected the argument that "Cahill was deemed not independent based on a bright-line listing rule." (Mem.

Op. at 30 n.132.) Instead, the KHC Board affirmatively determined that Cahill was not independent under Nasdaq Rule 5605(a)(2). The 2019 proxy states that "[f]or a director to be considered independent, the Board must affirmatively determine, after reviewing all relevant information, that a director has no direct or indirect material relationship with Kraft Heinz that would interfere with his or her exercise of independent judgment." (*See* A419-420.) "This is the bottom line under the NASDAQ rules." *Sandys*, 152 A.3d at 133. The 2019 proxy states that, having performed this analysis, the Board determined that Cahill had a material relationship that would interfere with his exercise of business judgment. (*Id.*; A446-447 ¶43.)

The Vice Chancellor's holding that the Board did not determine that Cahill lacked independence based on a bright-line rule distinguishes this case from *Teamsters Union 25 Health Services & Insurance Plan v. Baiera*, 119 A.3d 44 (Del. Ch. 2015), in which the Court of Chancery held that "[g]iven the peculiarities of the NYSE Rules" the determination that a director was not independent "carries little weight." *Id.* at 61. There, the Court of Chancery held that a director tripped a bright-line listing rule because he happened to have been a consultant almost three years before the action was filed. *Id.* at 61. By the time the complaint was filed, the director had "severed his ties" nearly three years earlier and had a full-time job as the "President, CEO, and a director of Bankrate." *Id.* Cahill is not similarly situated.

Unlike the director in *Baiera*, Cahill was a former officer and remained a highly paid consultant during underlying wrongdoing and after Plaintiffs initiated their Section 220 investigations, until his agreement was terminated during that same month that the first action in this consolidated case was filed. And unlike the director in question in *Baiera*, Cahill did not otherwise have a full-time job. *See Mizel v. Connelly,* 1999 WL 550369, at *3 (Del. Ch. July 22, 1999) (holding that "it is doubtful" that directors who rely on most of their income from the company "can consider [a] demand [against its largest stockholder] on its merits without also pondering whether an affirmative vote would endanger their continued employment."); *In re The Limited, Inc.*, 2002 WL 537692, at *5 (Del. Ch. March 27, 2002) (a director was not independent because "as a general matter, compensation from one's principal employment is typically of great consequence to the employee") (internal quotation and citation omitted).

Plaintiffs pleaded that the combination of Cahill's consulting fees, including his recent consulting fees of $500,000 per year and director fees of $235,000 comprised 53% of his publicly reported income. *See, e.g., Cumming v. Edens*, 2018 WL 992877, at *15 (Del. Ch. Feb. 20, 2018) (holding director had "material ties" that created a reasonable doubt about his "ability to independently evaluate a demand" because he received "60% of his publicly reported income" from a

defendant); *Kahn v. Portnoy*, 2008 WL 5197164, at *8-9 (Del. Ch. Dec. 11, 2008) (inferring at pleading stage that director fees of $160,000 were material); *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *34 (Del. Ch. May 3, 2004, revised June 4, 2004) (finding after trial that consulting and director fees totaling $150,000 in one year and $170,000 in another were material); *Kahn v. Dairy Mart Convenience Stores, Inc.*, 1996 WL 159628, at *6 (Del. Ch. Mar. 29, 1996) (denying summary judgment based on dispute of fact about whether consulting fees were material).[2]

At the pleading stage, Plaintiffs are entitled to the reasonable inference that Cahill's consulting arrangement was material to him. *See, e.g.*, *Kahn v. Tremont Corp.*, 694 A.2d 422, 430 (Del. 1997) (purportedly "independent" director found beholden to majority stockholder where, three years previously, company had retained his consulting services for $10,000 per month and more than $325,000 in

[2] *See also Orman v. Cullman*, 794 A.2d 5, 30 (Del. Ch. 2002) (inferring at pleading stage that consulting fees of $75,000 were material); *In re Ply Gem*, 2001 WL 755133, at *8-9 (Del. Ch. June 26, 2001) (inferring at pleading stage that consulting fees of $91,000 were material); *Friedman ex rel. York Research Corp. v. Beningson*, 1995 WL 716762, at *5 (Del. Ch. Dec. 4, 1995) (inferring at pleading stage that consulting fees of $48,000 were material); *In re MAXXAM, Inc./Federated Dev. S'holders Litig.*, 659 A.3d 760, 774 (Del. Ch. 1995) (declining to approve settlement and noting that consulting fees of $250,00 were likely material); *Shaev v. Saper*, 320 F.3d 373, 378 (3d Cir. 2003) (inferring at pleading stage that consulting fees of $135,500 plus a discretionary bonus of $25,000 were material).

bonuses); *Friedman v. Beningson*, 1995 WL 716762, at *5 (Del. Ch. Dec. 4, 1995) (director's periodic receipt of consulting fees from the Company cast doubt over his independence); *In re New Valley Corp. Deriv. Litig.*, 2001 WL 50212, *7-8 (Del. Ch. Jan. 11, 2001) (noting that current or past business, personal, or employment relationships can create a reasonable doubt about independence but reserving "judgment on the ultimate nature of these relationships until an adequate record exists, after further discovery and factual development").

While director fees, standing alone, may not always be dispositive, "[a]n influence that warrants discounting in a comparatively pure setting can take on greater significance when operating in conjunction with other influences." *BCIM Strategic Value Master Fund, L.P. v. HFF, Inc.*, 2022 WL 304840, at *18 n.13 (Del. Ch. Feb. 2, 2022). That is especially true here. In the four years after the Merger, KHC paid Cahill more than $10 million to provide advisory and consulting services to 3G partners. Cahill continued to be a paid consultant after Plaintiffs served their Section 220 demands until his consulting agreement was terminated the same month that the first complaint in this consolidated action was filed. The amount of money that Cahill received, both past and present, supports a reasonable inference at the pleading stage that 3G's payments were material to him.

The Court of Chancery erred by focusing on the termination of the consulting agreement a few short weeks before the first case in this action was filed. (Mem. Op. at 27.) Cahill's current and recent material financial relationship creates a reasonable doubt about his independence. *See also In re The Limited,* 2002 WL 537692, at *7 ("the determination of whether a particular director is 'beholden' to an allegedly controlling person is not limited to the power to affect the director in the future. One may feel 'beholden' to someone for past acts as well."); *In re Ply Gem Indus., Inc. S'holders Litig*., 2001 WL 1192206, at *1 (Del. Ch. Oct. 3, 2001) (recognizing that past benefits conferred "may establish an obligation or debt (a sense of 'owingness') upon which a reasonable doubt as to a director's loyalty to a corporation may be premised").

The Court of Chancery erred in holding that the "Complaint lacks any particularized allegations supporting a pleading-stage inference that 3G was responsible for his directorship or consulting arrangement with Kraft Heinz or had the power to strip him of potential future consulting fees or his Board position." (Mem. Op. at 28-29.) To the contrary, the Complaint pleads that 3G partners dominated the nominating and governance committee, which recommends to the Board who should serve as directors. (A491 ¶153; A765-766; A137 ("In January 2018, the Governance Committee recommended and the Board nominated each

director nominee for election to the Board of Directors.").) It is also reasonable to infer that 3G had a role in deciding who would directly advise 3G partners Behring and Hees because 3G partners occupied all of KHC's senior officer positions. Indeed, Hees signed both of Cahill's consulting agreements on behalf of KHC.

The Court of Chancery erred in giving "little weight" to the Board's determination that Cahill lacked independence because "whether Cahill is independent under Nasdaq rules concerns his independence from Kraft Heinz – not from 3G." (Mem. Op. at 30.) In *In re EZCorp Inc. Consulting Agt. Deriv. Litig.*, 2016 WL 301245 (Del. Ch. Jan. 25, 2016), the Court of Chancery observed that independence under the Nasdaq rules is closely related to independence for purposes of Chancery Court Rule 23.1:

> [T]he two sources of authority are mutually reinforcing and seek to advance similar goals. The fact that a director qualifies as independent for purposes of a governing listing standard is therefore a helpful fact which, all else equal, makes it more likely that the director is independent for purposes of Delaware law. The opposite is likewise true.

Id. at *36 (emphasis added). The Court of Chancery's holding overlooks the fact that KHC is controlled by 3G and that its senior officers are all 3G partners—*i.e.*, KHC is "3G's baby." (A462 ¶77.)

The Court of Chancery's holding is in tension with *Sandys v. Pincus*, which held that not being independent from a company means that a director is not independent from those in charge of the company:

> [I]f a director cannot be presumed capable of acting independently because the director derives material benefits from her relationship with the company that could weigh on her mind in considering an issue before the board, she necessarily cannot be presumed capable of acting independently of the company's controlling stockholder.

152 A.3d at 133. Because corporations must act through humans, it was error to conclude that the only reasonable inference was that Cahill lacked the ability to exercise his independence business judgment when dealing with KHC, but that he was independent from the controlling stockholder, everyone on the Board, and the entire C-suite.

The demand futility analysis as to Cahill is further strengthened by 3G's status as a controlling stockholder. *See In re BGC Partners, Inc.*, 2019 WL 4745121, at *8 (Del. Ch. Sept. 30, 2019) (holding that "the presence and influence of a controller is an important factor that should be considered in the director-based focus of the demand futility inquiry under the first prong of *Aronson*, particularly on the issue of independence"). Given 3G's large stockholdings, significant Board representation, partnership with Berkshire, control over the nominating committee, and the fact that every senior officer position is held by a 3G partner or employee, it is reasonable to

infer the 3G controls KHC or, at the very least, that 3G exercised significant influence over KHC to an extent that it should have been considered in the overall analysis.

Cahill's son's employment as a manager at AB InBev, where Lemann is a "controlling shareholder," adds to the reasons Cahill might not act impartially in deciding whether to sue 3G or its partners. (A442 ¶26(a), A446-447 ¶43.) His son began his career at AB InBev "as a member of its highly selective management trainee program" (A446-447 ¶43), which 3G oversees, and which makes it reasonable to infer that Cahill's position played a role in his son's selection. Cahill inferably feels a sense of "owingness" to 3G. *See, e.g., In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 54-55 (Del. Ch. 2013). Concern over a child's job is recognized as bearing on a director's independence. *See In re China Agritech, Inc. S'holder Deriv. Litig.*, 2013 WL 2181514, at *20 (Del. Ch. May 21, 2013) (noting director could not consider demand because daughter's "primary employment depends on the good wishes of the Company's controlling stockholders").

The Court of Chancery misapprehended *California Public Employees Retirement System v. Coulter*, 2002 WL 31888343 (Del. Ch. Dec. 18, 2002), in holding that "allegations that a director's son's 'livelihood [wa]s dependent' on the interested party were insufficient to raise a reasonable doubt as to the director's

independence." (Mem. Op. at 31 n.135 (quoting *Coulter*).) While *Coulter* found that this factor might be "without more … insufficient to raise a reasonable doubt" as to the director's independence, Chancellor Chandler went on to hold, "however, [that] none of the allegations stands alone 'without more'" and that "[t]aken together, they give this Court reason to doubt that [the] director is disinterested and independent." 2002 WL 31888343, at *9 (holding that director's son's position as the general manager at a restaurant in a nationwide chain was relevant to the director's ability to impartially consider a demand against the company's CEO). The same reasoning and conclusion apply here.

Considered together and drawing all reasonable inferences in Plaintiff's favor, the Board's affirmative determination that Cahill had a material relationship that impaired his ability to exercise his business judgment, his lucrative consulting fees made possible by 3G partners, and the fact of his son's employment with a 3G-controlled company, are enough to raise a reasonable doubt about his independence at the pleading stage.

3. Van Damme Is Not Independent of 3G

The Court of Chancery did not decide whether Plaintiffs' allegations were sufficient to plead futility respecting Van Damme, but noted that "[t]he particularized allegations that make up that web, taken as true and in their totality,

come closest to supporting a reasonable doubt about a non-3G director's ability to objectively consider a demand." (Mem. Op. at 32.) Demand on Van Damme is excused because of his extensive and interconnected personal, professional and financial ties to 3G and its principals.

Van Damme has a 30-year-long personal friendship with Lemann: "Lemann and Van Damme are so close that they have watched the samba schools together at the Rio Carnival, summered together with their respective families in the Hamptons, and visited each other in the Swiss Alps." (A448-450 ¶45.) These are the kinds of social ties that support a reasonable doubt about a director's independence, as opposed to a "thin social-circle friendship." *Beam*, 845 A.2d at 1051. "[A]ny realistic consideration of the question of independence must give weight to [this kind of 'deep and longstanding' friendship] and consider [its] natural effect on the ability of the parties to act impartially toward each other." *Marchand*, 212 A.3d at 820; *see also Frederick Hsu Living Tr. v. Oak Hill Cap. Partners III, L.P.*, 2020 WL 2111476, at *20, *35 (Del. Ch. May 4, 2020) (holding that committee was tainted by social and business connections between director and an interested party, including vacationing together).

Van Damme also has deep financial ties to, and a longstanding business relationship with, 3G. He has served on the boards of each of the three major

companies that 3G controlled—KHC, AB InBev, and RBI and its predecessor, Burger King—and co-invested with 3G in each of those companies. (A448-450 ¶45.) He also beneficially owns an affiliate of a family office that held $350 million of RBI stock, in addition to a material portion of AB InBev, the formation of which he facilitated. (*Id.*) At the pleading stage, it is doubtful that Van Damme could put aside his significant pecuniary ties to 3G in assessing Plaintiffs' claims. "[E]conomic relations … buttress the[] contention that they are confidantes" and together provide reason to doubt Van Damme's independence at the pleading stage. *Sanchez*, 124 A.3d at 1022.

The allegations respecting the thickness of Van Damme's social and business ties are enhanced by Van Damme's substantial ties to 3G and its partners through his charitable activities. He serves on the board of DKMS, a charity that is heavily supported by 3G partners personally and 3G's controlled company AB InBev. (A448-450 ¶45 (noting how individual 3G partners and AB InBev were, at various times, a "Visionary Sponsor," a "Gold Sponsor," "Diamond Sponsors," and twice "Platinum Sponsors" at DKMS between 2016 and 2019).) This interlocking relationship casts further doubt on Van Damme's ability to act impartially. *See Cumming*, 2018 WL 992877, at *15 (holding charitable ties coupled with other connections adequate to plead demand futility).

Considered in their totality and drawing all favorable inferences in favor of Plaintiffs, Van Damme's 30-year history of "important personal and business relationships" with Lemann and 3G raise a reasonable doubt about his independence at the pleading stage. *Marchand*, 212 A.3d at 820.

4. Zoghbi Is Not Independent of 3G

The Court of Chancery did not decide whether Plaintiffs' allegations were sufficient to plead futility respecting Zoghbi, but the Court of Chancery observed that "whether Zoghbi is independent of 3G is … a closer call than Cahill." (Mem. Op. at 31.) Demand on Zoghbi is excused because the KHC determined that he was not independent, which is supported by his employment at the Company. Zoghbi is also a defendant in the Securities Fraud Class Action, where his motion to dismiss has been denied. (A933-982.)

KHC acknowledged in its 2019 proxy that it does not consider Zoghbi independent. (A447-448 ¶44.) This creates a reasonable doubt about his independence for the same reasons as Cahill. Zoghbi has been employed as a Special Advisor to KHC since October 2017, after having served as COO of its U.S. Commercial business since 2015, during which time he was paid nearly $30 million. (*Id.*; A108-109; A119; A127; A138; A142; A144; A146.)

His position with the Company creates a reasonable doubt about his independence. *See Orman v. Cullman*, 794 A.2d 5, 30 (Del. Ch. 2002) ("it is reasonable to question the objectivity of a director who has a consulting contract with his company."). The Court of Chancery correctly noted that Zoghbi "is alleged to have received a larger consulting fee [than Cahill], which was ongoing as of July 2019 and accounts for a comparatively greater percentage of his income." (Mem. Op. at 31 (citing A447-448 ¶44, which notes that as of July 2019, Zoghbi received a $400,000 salary from KHC, amounting to 74% of his publicly reported income).) On a motion to dismiss, Plaintiffs are entitled to the inference that the risk of jeopardizing 74% of his income would bear on Zoghbi's decision about whether to sue the Defendants. And although KHC reduced Zoghbi's compensation from $850,000 to $400,000 after the first complaint in this case was filed, Zoghbi became entitled to at least $235,000 a year in additional director compensation, and he also received 200,000 options.

Coupled with his employment by KHC, Zoghbi cannot impartially consider a demand to sue the Defendants because he is a defendant in the Securities Fraud Class Action, where his motion to dismiss was denied. In *Pfeiffer v. Toll*, 989 A.2d 683 (Del. Ch. 2010), Vice Chancellor Laster held that a director facing the threat of liability in a related federal securities action could not impartially consider a

demand: "In light of the federal securities action, it is not possible for the defendants in this case, who comprised a majority of the Board when the suit was filed, to consider a demand impartially." *Id.* at 690, *abrogated on other grounds by Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831 (Del. 2011). As in *Pfeiffer*, the federal complaint survived "the rigorous standards for pleading securities fraud" where "the complaint sufficiently alleged that the defendants made material representations and omissions of material fact in connection with future projections … that were knowingly unreasonable" at the time they were made. 989 A.2d at 690 (quotations and citations omitted).

As explained in Plaintiffs' Supplemental Brief in Opposition to Defendants' Motion to Dismiss, both this action and the Securities Fraud Class Action concern insiders' knowledge of material non-public information about KHC's business, strategy, finances, and prospects. (A983-1000.) In denying Zoghbi's motion to dismiss the Securities Fraud Class Action, the District Court concluded there was a strong inference that Zoghbi caused KHC to make false statements with scienter. He is ill-suited to sit in judgment of whether 3G sold stock based on material non-public information, which is also an issue in the case in which he is a co-defendant.

CONCLUSION

For the reasons above, Appellants/Plaintiffs-Below respectfully request reversal of the Court of Chancery's dismissal of the Complaint.

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2022, I caused a copy of the foregoing **Public Version of Appellants' Opening Brief** to be served upon the following counsel by File & Serve*Xpress*:

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