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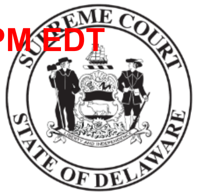

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS[1]

This appeal concerns a stockholder derivative lawsuit where Plaintiffs claim that 3G Capital, Inc. ("3G") and affiliates are liable for selling stock in nominal defendant The Kraft Heinz Company ("Kraft Heinz" or the "Company") purportedly based on confidential information obtained from Company directors and officers who are or were 3G partners. The Court of Chancery dismissed Plaintiffs' complaint for failure to plead demand futility with particularity, as required by its Rule 23.1. The court reasoned that the Complaint lacked adequate factual allegations suggesting that at least 6 of 11 members of the Company's board of directors (the "Board") could not impartially consider a litigation demand.

On appeal, as Plaintiffs acknowledge, only the independence prong of this Court's refined demand-futility standard announced in *United Food & Commercial Workers Union & Participating Food Industry Employers Tri-State Pension Fund* v. *Zuckerberg*, 262 A.3d 1034 (Del. 2021) is at issue. Defendants do not dispute that the three 3G-affiliated directors—Alexandre Behring, Jorge Paulo Lemann, and Joao Castro-Neves—could not impartially consider a demand. Below, Plaintiffs conceded the independence of two directors—John Pope and Jeanne

[1] Citations to Plaintiffs-Appellants' Appendix are in the form of "A###." Citations to Plaintiffs-Appellants' Opening Brief are in the form of "OB##." Citations to the Court of Chancery's Opinion are in the form "Op." Citations to Defendants-Appellees' Appendix are in the form of "B###."

Jackson. On appeal, they now concede the independence of a third—Feroz Dewan. Plaintiffs' complaint was thus required to allege with particularity that at least three of the five other directors—Gregory Abel, Tracy Britt Cool, John Cahill, George Zoghbi, or Alexandre Van Damme—lacked independence from 3G or its partners. As the Vice Chancellor correctly held, Plaintiffs did not.

As to Abel and Cool, Plaintiffs did not allege any direct, bias-producing relationships between them and 3G. Instead, Plaintiffs seek the illogical inference that those directors could not impartially consider a demand because their employer (and the Company's largest stockholder) Berkshire Hathaway Inc. ("Berkshire") and its Chairman and CEO Warren Buffett purportedly are beholden to 3G and its partner Lemann. As the Vice Chancellor recognized, however, Plaintiffs' allegations in their totality failed to plead with particularity that Berkshire's investments with 3G are anything other than ordinary investments in the context of Berkshire's business or that those investments are material to Berkshire. The Complaint itself rebuts materiality because it acknowledges that Kraft Heinz is not among Berkshire's most important investments. Nor did the Complaint allege with particularity that Buffett had a longstanding and deep personal relationship akin to family ties with Lemann such that it is reasonable to infer his own impartiality would have been affected had he still been a Kraft Heinz director, much less that Abel and Cool would have felt beholden to 3G as a result.

One step removed from Abel and Cool, Plaintiffs' defective allegations as to Berkshire and Buffett are manifestly insufficient.

As to Cahill, Plaintiffs principally rely on his status as a former consultant to the Company and the fact that he was classified as not independent of Kraft Heinz under the NASDAQ listing standards in a 2019 proxy statement. But Plaintiffs failed to allege with particularity how Cahill's consulting arrangement rendered him beholden or created a sense of "owingness" to 3G. As the Vice Chancellor reasoned, Plaintiffs' complaint acknowledged that Cahill had *no* relationship with 3G before Heinz acquired Kraft Foods Group, Inc. ("Kraft") (where Cahill was CEO). Nor did Plaintiffs allege particularized facts showing this arrangement was material to Cahill. Plaintiffs' allegations overlooked the trajectory of Cahill's consulting relationship, which trended towards termination as the two entities' businesses unified. As Plaintiffs also overlook, the proxy statement explained that Cahill was a former consultant and CEO of Kraft but did not mention any relationship with 3G as pertinent to the Board's analysis, as it did for the 3G-affiliated directors. These incorporated facts distinguish this case from this Court's decision in *Sandys* v. *Pincus*, 152 A.3d 124 (Del. 2016), where there was no indication in the proxy statement *at all* why the board classified two directors as not independent under a listing standard.

This Court need not consider Plaintiffs' allegations and arguments concerning the two remaining directors (Zoghbi and Van Damme) because the court below did not reach them. In all events, their allegations are insufficient. As to Zoghbi, Plaintiffs failed to allege with particularity that his ongoing consulting relationship rendered him beholden to 3G. Like Cahill, Zoghbi had no relationship with 3G prior to the merger that created the Company. And like Cahill, the 2019 proxy statement explained that Zoghbi's consulting relationship and former role as an officer was the basis for his classification as not independent under the listing standard. As to Van Damme, Plaintiffs' allegations of social and business connections to 3G and its partner Lemann are insufficient to plead a lack of independence with particularity.

The Court of Chancery's dismissal of the complaint for failure to plead demand futility under Rule 23.1 should be affirmed.

SUMMARY OF ARGUMENT

1. **Denied.** Dismissal of the Complaint under Rule 23.1 was proper because the Vice Chancellor correctly held that the Complaint failed to plead with particularity that at least 6 of the Company's 11 directors could not impartially consider a demand:

a. **Denied.** The court below correctly held that the Complaint did not plead with particularity that Abel and Cool could not impartially consider a demand because Plaintiffs' allegations concerning Berkshire and Buffett do not in their totality plead disabling personal and business relationships with 3G and its partners.

b. **Denied.** The court below correctly held that the Complaint did not adequately plead that Cahill could not impartially consider a demand because Plaintiffs failed to allege with particularity that Cahill was beholden or felt any sense of "owingness" to 3G, and the determination that Cahill was not independent under NASDAQ listing standards based on his relationship with Kraft Heinz does not change that conclusion.

c. **Denied.** While not decided below, the Complaint did not plead with particularity that Zoghbi had any bias-producing

relationship with 3G, and the determination that he was not independent under NASDAQ listing standards based on his relationship with Kraft Heinz does not alter the analysis.

d. **Denied.** While not decided below, the Complaint did not plead with particularity that Van Damme has longstanding, bias-producing personal and business relationships with 3G and its partners that would render him unable to impartially consider a demand.

STATEMENT OF FACTS

A. The Parties, Relevant Non-Parties, and Kraft Heinz's Board.

Kraft Heinz is one of the largest food and beverage companies worldwide and is incorporated in Delaware. (A455 ¶53.) The Company was formed by the July 2015 merger of Kraft and H. J. Heinz Holding Corporation ("Heinz"). (A455 ¶53, A458-463 ¶¶67-79.)

Plaintiffs purport to have held Kraft Heinz common stock since July 2015. (A441 ¶¶22-24.) The seven individual defendants are current or former Company directors or officers. (A444-446 ¶¶34-40.)

Defendant 3G is a global investment firm. (A441 ¶25.) The Complaint alleges that 3G and certain affiliated entities owned approximately 24.2% of the Company's outstanding stock in March 2016. (A443 ¶¶28-32, A463 ¶79.)

Non-party Berkshire is a holding company that invests in a number of operating subsidiaries. As the Complaint alleged, the "most important" of these operating subsidiaries are "insurance businesses conducted on both a primary basis and a reinsurance basis, a freight rail transportation business and a group of utility and energy generation and distribution businesses." (A455 ¶54.) The Complaint alleged that Berkshire owned approximately 26.8% of the Company's outstanding shares as of March 3, 2016, and 27% as of September 30, 2019. (A450-452 ¶47, A463 ¶79.) According to Berkshire's 2019 Form 10-K, as of December 31, 2019,

Berkshire's total assets were valued at approximately $446.6 billion, including its investment in Kraft Heinz, which was valued at $10.5 billion, less than 2.5% of Berkshire's total assets. (B85-86.) Non-party Warren Buffett is the Chairman and CEO of Berkshire and one of the world's most successful investors. (A456 ¶55; B117.)

When the first suit in this consolidated case was filed on July 30, 2019, the Company's Board had the following 11 members: defendants Alexandre Behring and Jorge Paulo Lemann and non-parties Gregory Abel, John Cahill, Joao Castro-Neves, Tracy Britt Cool, Feroz Dewan, Jeanne Jackson, John Pope, Alexandre Van Damme, and George Zoghbi. (A444 ¶¶34-35, A446-452 ¶¶42-47, A454 ¶49, A455 ¶¶51-52.)

B. Plaintiffs' Claims.

Plaintiffs' April 2020 consolidated complaint (the "Complaint") alleges that 3G and affiliates sold Company stock in August 2018—amounting to just 7% of 3G's stake—based on material, nonpublic information purportedly showing that Kraft Heinz would be required to recognize impairment charges that it subsequently announced in February 2019. (A433 ¶1, A437-438 ¶12, B53.) Their "central claim" is for breach of fiduciary duty against 3G and affiliates under *Brophy* v. *Cities Service Co.*, 70 A.2d 5 (Del. Ch. 1949). (OB1.)

Plaintiffs did not make a pre-suit demand on the Board, asserting that their failure to do so should be excused as futile. (A527.) The Complaint did not challenge the disinterestedness or independence of Pope or Jackson, as Plaintiffs admit. (OB2.) Defendants did not dispute that Plaintiffs' allegations sufficiently alleged that the 3G-affiliated directors—Behring, Lemann, and Castro-Neves—could not impartially consider a demand. To allege demand futility, Plaintiffs were thus required to plead with particularity that 3 of the remaining 6 directors—Dewan, Abel, Cool, Cahill, Zoghbi, or Van Damme—lacked independence from 3G and its partners.

C. The Court of Chancery Dismisses the Complaint, and Plaintiffs Appeal.

The Vice Chancellor dismissed the Complaint with prejudice for failure to plead demand futility. (Op. 32.) Conducting a director-by-director analysis, the court determined that Plaintiffs' allegations were insufficient to allege with particularity that Dewan, Abel, Cool, and Cahill lacked independence from 3G and its partners. (*Id.* 12-31.) Concluding Plaintiffs failed to allege a board majority could not have impartially considered a demand, the court did not decide whether Zoghbi and Van Damme lacked independence. (*Id.* 32.)

All defendants also moved to dismiss the Complaint under Rule 12(b)(6). (*Id.* 9.) The court did not reach these motions' merits.

Plaintiffs now contend that the Vice Chancellor erred and should be reversed. Notably, Plaintiffs concede that—as the Vice Chancellor concluded—their allegations did not adequately plead that Dewan could not impartially consider a demand. (OB2.) The court below's analysis as to Abel, Cool, and Cahill was correct, and its dismissal should be affirmed. In all events, Plaintiffs also failed to plead with particularity that Zoghbi and Van Damme lacked independence.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFFS DID NOT PROPERLY ALLEGE DEMAND FUTILITY

A. Question Presented

Did the Complaint allege with particularity that Plaintiffs' failure to submit a pre-suit demand on Kraft Heinz's Board should be excused as futile? This issue was considered below. (Op. 9-32; B145-176; B191-211.)

B. Scope of Review

This Court reviews *de novo* the dismissal of a complaint for failure to plead demand futility with particularity under Rule 23.1. *Brehm* v. *Eisner*, 746 A.2d 244, 254 (Del. 2000).

C. Merits of the Argument

This Court's *Zuckerberg* standard governs demand futility. (Op. 10-12; OB19-20.) As Plaintiffs admit, this appeal concerns whether Plaintiffs alleged with particularity, on a director-by-director basis, that at least three of the five remaining directors lacked independence from 3G and its partners. (OB20.)

"To show a lack of independence, a derivative complaint must plead with particularity facts creating 'a reasonable doubt that a director is ... so beholden to an interested director ... that his or her discretion would be sterilized.'" *Zuckerberg*, 262 A.3d at 1060. A disinterested director is not independent if particularized allegations considered in their totality support the inference that he

or she "would be more willing to risk his or her reputation than risk the relationship with the interested [person]." *Beam* v. *Stewart*, 845 A.2d 1040, 1052 (Del. 2004).

Contrary to Plaintiffs' assertion (OB20), the Vice Chancellor did not articulate and apply the wrong standard for pleading a lack of independence. The court explained that the independence inquiry focused on whether a majority of the directors "had disabling connections to 3G" such that there was a reasonable doubt they "could exercise their independent and disinterested judgment regarding a demand to sue 3G." (Op. 14; *see id.* 20, 27, 32.) Under the proper standard, the court below correctly found Plaintiffs' allegations deficient.

1. The Court Below Correctly Held That Abel and Cool Are Independent of 3G.

Plaintiffs do not allege that Abel and Cool lack independence because of any direct, bias-producing relationships they have with 3G or its partners. Instead, they advance the transitive theory that Abel and Cool lacked independence from 3G because those directors are purportedly beholden to Berkshire, who designated them, and its Chairman and CEO, Warren Buffett, who both are in turn, purportedly beholden to 3G and its partners. (OB22-28; A450-452 ¶47, A454-455 ¶50.) In support, Plaintiffs rely on Berkshire's (i) alleged shared current or past investments with 3G, consisting of the acquisition of H.J. Heinz Company in 2013, the acquisition of Kraft in 2015, and investments in Burger King, RBI, and AB

InBev (A450-452 ¶47); and (ii) allegations that Buffett has a "close" relationship with Lemann (*id.*). But as the Vice Chancellor held, "[c]onsidered in their totality, [these] allegations provide no reason to doubt that either director could not exercise disinterested and independent judgment regarding a demand." (Op. 20.)

First, the court below properly held that Plaintiffs' allegations about Berkshire's shared investments with 3G are insufficient to plead Abel and Cool lack independence from 3G. Plaintiffs concede, as they must, that both Berkshire and 3G are engaged in the business of investing in companies. (A441 ¶25, A455 ¶54.) But Plaintiffs do not allege with particularity any facts suggesting that the transactions those entities invested in were conducted other than at arms' length in the ordinary course of these entities' business. *See Olenik* v. *Lodzinski*, 2018 WL 3493092, at *17 (Del. Ch. July 20, 2018) (rejecting allegation that director lacked independence from interested co-director because he was the CEO of a company that invested in five different companies purportedly led by the interested director and thus must "wish[] to maintain a good relationship with [the interested director]"), *aff'd in part, rev'd in part on other grounds*, 208 A.3d 704 (Del. 2019); *In re Goldman Sachs Grp., Inc. S'holder Litig.*, 2011 WL 4826104, at *12 (Del. Ch. Oct. 12, 2011) (holding that allegation a director lacked independence from Goldman because he was the CEO of an entity that had received large loans from Goldman was insufficient where plaintiff "fail[ed] to plead facts that show

anything other than a series of market transactions occurred between [the two companies]"); *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *38 nn.18-19 (Del. Ch. June 11, 2020) (holding under Rule 12(b)(6) standard that business relationships between companies on whose boards directors sat was insufficient to "support a reasonable inference that either company had a material relationship with the other" or otherwise affect the directors' independence). The absence of such allegations makes it unreasonable to infer that 3G is such a uniquely valuable business partner to Berkshire that it would essentially cause Abel and Cool to violate their fiduciary duties to Kraft Heinz to protect 3G. *Beam*, 845 A.2d at 1048 ("[I]nferences that are not objectively reasonable cannot be drawn in the plaintiff's favor.").

Nor are Plaintiffs' allegations sufficient to allege that Berkshire's investments with 3G were subjectively material to Berkshire. *See In re MFW S'holders Litig.*, 67 A.3d 496, 510 (Del. Ch. 2013) ("[T]he plaintiffs have done nothing . . . to compare the actual economic circumstances of the directors they challenge to the ties the plaintiffs contend affect their impartiality."), *aff'd*, *Kahn* v. *M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014); *McElrath* v. *Kalanick*, 2019 WL 1430210, at *17 (Del. Ch. Apr. 1, 2019) ("The materiality inquiry must focus on the financial circumstances or personal affinities of the particular director in question."), *aff'd*, 224 A.3d 982 (Del. 2020). As noted above and as Plaintiffs

have never disputed, Berkshire publicly reported that it had more than $446 billion in assets, and its investment in Kraft Heinz was less than 2.5% of that total. (*Supra*, 8.) Yet, Plaintiffs failed to allege that Berkshire's investments with 3G comprised such a substantial part of Berkshire's business that it is reasonable to assume that Berkshire, with approximately $40.5 billion in cash, cash equivalents, and short-term investments in U.S. Treasury Bills on hand, would be more willing to cause its directors to risk their reputation as fiduciaries than risk the relationship with 3G. (B86.)

Zuckerberg highlights Plaintiffs' pleading failure. There, in affirming the Court of Chancery, this Court rejected the allegation that a director of Facebook, Inc., who also founded Netflix, Inc., lacked independence from Facebook's controller because Facebook and Netflix did business with each other. 262 A.3d at 1061-62. This Court reasoned that "[e]ven if Netflix had purchased advertisements from Facebook, the complaint does not allege that those purchases were material to Netflix or that Netflix received anything other than arm's length terms under those agreements." *Id.* at 1062.

Plaintiffs' assertion on appeal that Kraft Heinz "remains Berkshire's fifth largest public company investment" does not rescue the Complaint's defective allegations. (OB26.) To begin with, the article Plaintiffs rely on is one of several documents they proffered that is not properly part of the appellate record because it

was never presented to the court below. Sup. Ct. R. 9(a) (requiring that an "appeal shall be heard on the original papers and exhibits"); *Del. Elec. Coop., Inc.* v. *Duphily*, 703 A.2d 1202, 1206 (Del. 1997) ("Supreme Court Rule 9(a) implicitly imposes a limitation upon the record on appeal by requiring that such record shall consistent of 'the original papers or exhibits.'"). It also constitutes one of several arguments not presented below that this Court should not consider on appeal, especially because Plaintiffs failed to explain in their opening brief why "the interests of justice . . . *require*" such arguments to be considered. Sup. Ct. R. 8 (emphasis added); *Duphily*, 703 A.2d at 1206 (explaining that "an appellate court reviews only matters considered in the first instance by a trial court" and "[p]arties are not free to advance arguments for the first time on appeal").

The article nonetheless highlights Plaintiffs' inability to plead that Berkshire's investments with 3G was subjectively material to Berkshire. The article summarizes Berkshire's portfolio of about 47 publicly traded U.S. securities with a value of $334 billion. While Kraft Heinz is the fifth largest, it represents only 3.9% of the total portfolio and is dwarfed by Berkshire's investments in Apple Inc. (44.2%), Bank of America Corp. (12.6%), American Express Company (7.8%), and Coca-Cola Co (7.5%)—none of which are alleged to be Berkshire-3G co-investments. Moreover, the size of Berkshire's Kraft Heinz investment as a percentage of Berkshire's overall assets—just 2.5%—is more significant for the

materiality analysis than its size as compared to Berkshire's other public company investments. The Complaint's failure to allege that Berkshire's investment relationship with 3G is subjectively material to Berkshire is glaring, given the publicly available information subject to judicial notice that Plaintiffs ignored and otherwise omitted from it.

As the Vice Chancellor recognized (Op. 22-23 n.106), Plaintiffs' reliance on *Sandys* is misplaced. (OB25-26.) There, this Court held that two directors (Gordon and Doerr), who were partners at prominent venture capital firm Kleiner Perkins, lacked independence from two co-directors who were well known Silicon Valley entrepreneurs, Mark Pincus, the corporation's former CEO/current Chairman and controller, and Reid Hoffman. 152 A.3d at 131. In so holding, this Court relied on unique allegations—not present here—about Kleiner Perkins's business relationships. This Court reasoned that Kleiner Perkins's overlapping relationships with Pincus and Hoffman were likely highly important to the firm because "venture capitalists compete to fund the best entrepreneurs" and "these relationships can generate ongoing economic opportunities" in networks of "repeat players." *Id.* at 126, 133-34. This Court noted that Kleiner Perkins had (i) invested, alongside Hoffman, in a company co-founded by Pincus's *wife*; (ii) invested in a company on which Hoffman served as a director; and (iii) completed two financings with *Hoffman's own* venture capital firm. *Id.*

Unlike Kleiner Perkins, Berkshire is not alleged to be a player in a small interdependent world like venture capitalism in Silicon Valley. It is alleged to be an investor in large, publicly traded companies, and does not rely on 3G for access to those investments. Plaintiffs' Complaint alleged that Berkshire engages "in a number of diverse business activities" and that "[t]he *most important* of these are insurance businesses conducted on both a primary basis and a reinsurance basis, a freight rail transportation business and a group of utility and energy generation and distribution businesses." (A455 ¶54 (emphasis added).) Plaintiffs did not allege an "interlocking" web of material economic relationships that made Berkshire and Buffett so dependent on 3G that they would somehow cause Abel and Cool to protect 3G rather than exercise their own fiduciary duties to Kraft Heinz. *Sandys*, 152 A.3d at 126, 134.

At bottom, Plaintiffs point to the fact that Berkshire had investments in companies that 3G also invested in and, in conclusory fashion, state that Berkshire and 3G have an important co-investment relationship. Plaintiffs, however, made no effort to *contextualize* these alleged investments, as required by Delaware law, because to do so would show their allegations lack substance. *Beam*, 845 A.2d at 1049 (director independence is a "contextual inquiry" that is "fact-specific").

Second, Plaintiffs' allegation that Buffett had a "close friendship" with 3G's co-founder, Lemann, does not improve the analysis for Plaintiffs. (A450-452 ¶47.)

Plaintiffs allege that Buffett described Mr. Lemann as a friend, had a favorable opinion of him as a business partner, said he would do business with him in the future, attended one of Lemann's birthday parties at Harvard University, and attended three professional workshops with Lemann. (*Id.*) Those allegations in no way support a reasonable doubt that *Buffett* would lack independence from 3G, much less that Abel and Cool would lack independence via Buffett.

As this Court explained in *Beam*, "[a]llegations that [an interested person] and the other directors moved in the same social circles, attended the same weddings, developed business relationships before joining the board, and described each other as 'friends' . . . are insufficient, without more, to rebut the presumption of independence." 845 A.2d at 1051; *accord Crescent/Mach I Partners, L.P.* v. *Turner*, 846 A.2d 963, 980-81 & n.44 (Del. Ch. 2000) (holding that a "long-standing 15-year professional and personal relationship" between a director and the company's chairman and CEO did not raise reasonable doubt director lacked independence). Here, twice removed from Abel and Cool, these allegations are insignificant. The statements attributed to Buffett are also too vague and general to be "suggestive of the type of very close personal relationship that, like family ties, one would expect to heavily influence a human's ability to exercise impartial judgment." *Sandys*, 152 A.3d at 130.

Plaintiffs' argument that *Marchand* v. *Barnhill*, 212 A.3d 805 (Del. 2019), supports the proposition that they have sufficiently alleged facts suggesting a deep personal relationship between Buffett and Lemann falls short. There, this Court held that allegations one director "owes an important debt of gratitude and friendship to the [interested CEO's] family for giving him his first job, nurturing his progress [over 28 years] from *an entry level position* to a *top manager and director*, and honoring him by spearheading a campaign to name a building at an important community institution after him" adequately alleged a lack of independence. *Id.* at 819-20 (emphases added). Nothing approaching these detailed allegations of a deep personal relationship has been alleged about Buffett and Lemann. Plaintiffs admitted that Berkshire and 3G did not do business with each other until 2013—which was late in both men's respective careers. (A450-452 ¶47.) And Plaintiffs' improper new argument and reliance on new excerpts from the book *Dream Big* that were not provided to the court below (A94-96) still underscore the lack of allegations suggesting a deep relationship. Sup. Ct. R. 8 & 9(a). In those excerpts, the author explains that Buffett was one of almost 100 people the author relied on and was not even among the 8 people specifically described as "close to [Lemann and his partners]." (A95-96.)

Plaintiffs' argument that vague and general positive statements by Buffett about Lemann after Kraft Heinz announced certain impairments in February 2019

are somehow analogous to a special litigation committee member publicly proclaiming the innocence of the target of the investigation is misguided. (OB22-23.) In *Biondi* v. *Scrushy*, 820 A.2d 1148 (Del. Ch. 2003), *aff'd sub nom. In re HealthSouth Corp. S'holders Litig.*, 847 A.2d 1121 (Del. 2004) (TABLE), on which Plaintiffs rely, the Court of Chancery denied a special litigation committee's motion for a stay pending its investigation where: (i) the company had retained a law firm to conduct a pre-investigation under the purview of the entire board; (ii) the company's new CEO said that law firm's report exonerated the investigation target, even though the law firm rejected that interpretation of its own report; (iii) another committee member resigned, proclaiming that the target was innocent; and (iv) the committee chair then reported his opinion that the law firm's report actually vindicated the investigation target—all before the committee's investigation began in earnest. *Id.* at 1165-66. Buffett's general statements to the effect that Lemann is a "good friend" are in no way equivalent. (OB22.) This is especially so considering Buffett was not on the Board and, unlike the *Biondi* committee chair, was not alleged to have known about any purported insider trading by 3G in August 2018 at the time of the statements.

Buffett's generalized statements are similar to those this Court rejected in *Beam* as insufficient to allege a lack of independence. There, this Court concluded that allegations a director had personally contacted a publisher in order to dissuade

the publisher from printing unfavorable references to the company's controller and holder of 94% of its voting stock was "insufficient to create a reasonable doubt that [the director] [wa]s capable of considering presuit demand free of [the controller's] influence." *Beam*, 845 A.2d at 1053. Again, Plaintiffs did not allege that Buffett knew of any potential misconduct by 3G when these statements were made, much less that had he known of such potential misconduct he would have leaned on Abel and Cool to protect 3G and Lemann.

Plaintiffs' reliance on *Sandys* to support their allegation that Buffett lacks independence from Lemann is misplaced. (OB24-25.) There, this Court held that allegations a director was a "close family friend" with the former CEO/current Chairman and controller of the corporation, coupled with the fact that their families "own[ed] an airplane together," were together sufficient to plead a lack of independence. 152 A.3d at 129-30. This Court reasoned that co-ownership of an airplane "is not a common thing, and suggests that the [two directors'] families are extremely close to each other and are among each other's most important and intimate friends" because it "involves a partnership in a personal asset that is not only very expensive, but that also requires close cooperation in use, which is suggestive of detailed planning indicative of a continuing, close personal friendship." *Id.* at 130-31. Plaintiffs alleged no similar ties between Buffett and Lemann, as the Vice Chancellor recognized (Op. 24 n.110).

Dell Technologies, on which Plaintiffs rely, likewise only shows that Plaintiffs' allegations about Abel and Cool—by way of Buffett and Berkshire—are insufficient. (OB24-25.) There, under the lenient Rule 12(b)(6) standard, the court found it reasonably conceivable that two directors (David Dorman and William Green) on a special transaction committee lacked independence from Michael Dell and Silver Lake—their transaction counterparties—in negotiations to buy Dell Technologies based on allegations suggesting close personal and business relationships not present here. 2020 WL 3096748, at *36-38.

As to Dorman, the court relied not just on allegations that Dorman's employer Centerview Capital had a longstanding business relationship with Dell and Silver Lake, but also critically that Dorman "*regularly leverage[d]* those relationships to raise capital and attract new investment opportunities" from others. *Id.*, at *36 (emphasis added). Plaintiffs do not allege anything of the sort concerning the purported importance of 3G to Berkshire. The court also relied on Dorman's unique material social ties to Silver Lake's managing partner. *Id.* In particular, Dorman and Silver Lake's managing partner belonged to "two of the world's most exclusive and secretive private clubs—Augusta National Golf Club and San Francisco Golf Club—each with only approximately 300 members." *Id.* As alleged in the complaint, membership at August National was "referred to as 'a tight-knit cluster of like-minded souls who deeply trust one another.'" *Id.*

Reinforcing these interlocking ties, the deal's financial advisor—Stuart Francis of Evercore—was selected to advise the special committee "only days after Francis played in a golf tournament with Dorman and in a foursome with [the wife of Silver Lake's managing partner]." *Id.*, at *37. Buffett and Lemann are not alleged to have had an equivalent social relationship, much less one that Buffett regularly leveraged to obtain investments from others.

As to Green, the court found the complaint adequately alleged he lacked independence from Dell not simply because Green had a close 30-year friendship with one of Dell's closest friends (Joseph Tucci), but because Tucci was then actively "advising the Company and Mr. Dell on the other side of the negotiating table," and serving as Dell's agent. *Id.*, at *37. There are no equivalent allegations here because Buffett and Berkshire were not involved in 3G's challenged stock sale, as Plaintiffs do not dispute. As "a further basis to question Green's independence," the court also relied on the allegation that, while serving on the company's special committee and negotiating against Dell and Silver Lake's advisor Goldman Sachs, Goldman Sachs was representing Green in his capacity as a director of the company's subsidiary in another transaction. *Id.*, at *38.

Finally, Plaintiffs do not challenge the court below's rejection of the Complaint's deficient allegations, (A452-454 ¶48), about the purported effect a shareholders' agreement requiring Berkshire to vote for, and not facilitate the

removal of, 3G's designated director nominees would have on Abel or Cool's independence when considered holistically with Plaintiffs' other allegations. (Op. 25-26; B153-160; B192-193.) Plaintiffs have thus waived any such argument, Sup. Ct. R. 14(b)(vi)(A)(3), which nevertheless fails for the reasons articulated by the Vice Chancellor.

2. The Court Below Correctly Held That Cahill Is Independent of 3G.

Plaintiffs alleged that Cahill lacks independence from 3G because (i) he served as a consultant to the Company from July 2015 through July 1, 2019, and is paid ordinary director compensation, (ii) the Company's 2019 proxy statement (the "2019 Proxy"), which was incorporated by reference in the Complaint, stated that he was not "independent" under the NASDAQ listing standards, and (iii) his son, Jack Cahill, works as a district manager at AB InBev. (A446-447 ¶43.) None of these allegations is sufficient, as the court below correctly determined. (Op. 26-31.)

First, Plaintiffs' allegations regarding Cahill's prior consulting arrangement and ordinary director compensation do not demonstrate a lack of independence. The Complaint does not allege particularized facts suggesting that Cahill owed his prior consulting arrangement to 3G or that 3G has any "type of financial influence or control" over him because of it. *In re Delta & Pine Land Co. S'holders Litig.*, 2000 WL 875421, at *8 (Del. Ch. June 21, 2000) (rejecting conclusory allegations

of control over financial interest of directors where complaint did not allege "particularized facts showing influence or control over the employment, the livelihood, or the financial interests of the directors on an individual and personal basis"). Also, "ordinary director compensation alone is not enough" to show a lack of independence. *Ryan* v. *Gursahaney*, 2015 WL 1915911, at *8 (Del. Ch. Apr. 28, 2015), *aff'd*, 128 A.3d 991 (Del. 2015) (TABLE).

As the Vice Chancellor reasoned, neither Cahill's prior consulting nor director fees were adequately alleged to "create a sense of 'owingness' to 3G," given that Cahill had *no relationship* with 3G before the merger. (Op. 28.) Nor did the Complaint allege with particularity *why* Cahill would feel beholden to 3G for the prior consulting or director fees. Accepting the pleaded facts as true, it is inferable that Cahill's prior consulting arrangement was due to his former position as Kraft's CEO and his expertise in assisting Kraft's and Heinz's respective businesses to combine—not to 3G. (A446-447 ¶43.) As publicly disclosed (A138), Cahill's prior consulting relationship was approved by the disinterested members of Kraft Heinz's Board, undercutting a suggestion that 3G alone was responsible for it and its renewal or non-renewal.

Plaintiffs' non-contextual allegations are further deficient because the 2019 Proxy and other documents capable of judicial notice highlighted that Cahill had other far greater sources of income, having served in several high-paying positions

for years from which he reportedly earned millions of dollars.[2] The 2019 Proxy also reported that Cahill served on the boards of American Airlines Group, Colgate Palmolive Company, and Legg Mason, Inc. (B66.) Plaintiffs do not contend that Cahill is beholden to 3G for any of those positions. These sources of income, which Plaintiffs' allegations ignored, undercut their argument that Cahill's primary source of income was Kraft Heinz. (OB31.)

The Complaint also lacks particularized allegations showing that Cahill's prior consulting arrangement was material to him—financially or otherwise—as is required to plead a lack of independence. *White* v. *Panic*, 793 A.2d 356, 366 (Del. Ch. 2000) (allegations pertaining to consulting relationships insufficient absent particularized allegations that the fees paid were so material to those directors as to taint their judgment), *aff'd*, 783 A.2d 543 (Del. 2001). Here, Plaintiffs alleged that an annual consulting fee of $500,000—*together* with ordinary director fees of $235,000—constituted 52% of Cahill's publicly reported income in *2018*, the year

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[2] As the 2019 Proxy reported, Cahill served as Chairman and CEO of Kraft from December 2014 through July 2015, as Kraft's non-executive Chairman from March 2014 to December 2014, and as Kraft's Executive Chairman since October 2012. (B66.) As Kraft reported in its 2015 proxy statement, Cahill earned $6,532,553, $5,996,779, and $4,092,668 in 2012, 2013, and 2014, respectively. (B5.) Cahill also served as the Executive Chairman, Designate for Mondelez International, Inc.; as an Industrial Partner at private equity firm Ripplewood Holdings LLC from 2008 to 2011; as Chairman and CEO of The Pepsi Bottling Group, Inc. from 2003 to 2006 and as Executive Chairman until 2007; and in several leadership positions at PepsiCo, Inc. for 9 years. (B66.)

before the Complaint was filed, (A446-447 ¶43). Absent allegations of how Plaintiffs determined that percentage, the allegation is insufficiently particularized. More importantly, Plaintiffs overlooked that the consulting fee necessarily constituted only 35% of that total.

The cases Plaintiffs rely on for the proposition that similar amounts or percentages of compensation have been held to be material are inapposite because, unlike the allegations here, the allegations of materiality in those cases were *contextualized* to the directors' personal circumstances. (OB31-33 & n.2.) In several of the cases, the amounts and percentages were deemed material because they constituted, or exceeded, the directors' primary employment or source of income. *Kahn* v. *Portnoy*, 2008 WL 5197164, at *8-9 (Del. Ch. Dec. 11, 2008) (finding director fees of approximately $160,000 material where "it exceeds the compensation from her position as a clerk in the United States Bankruptcy Court"). In others, the plaintiffs alleged the directors had *significant personal liabilities*, rendering the amounts material. *See In re MAXXAM, Inc./Federated Dev. S'holders Litig.*, 659 A.2d 760, 774 (Del. Ch. 1995) (finding $250,000 consulting fees would be material to a director who "recently emerged from personal bankruptcy").[3] In other cases, the compensation alone was not held sufficient—but

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[3] *See Kahn* v. *Tremont Corp.*, 694 A.2d 422, 426 (Del. 1997) (finding one-year consulting position at $10,000 a month and bonuses of $325,000 material where (i) immediately beforehand, the director's "business ventures *had all but dried*

was considered in combination with other starker facts not alleged here. *See Cumming* v. *Edens*, 2018 WL 992877, at *17 (Del. Ch. Feb. 20, 2018) (finding director fees constituting 60% of director's total income from two entities managed by controller sufficient in combination with unique fact that director "list[ed] his address on SEC Form 4s (for investments unrelated to [the controller]) as 'C/O [the controller]'").[4] Finally, in the remaining cases, the fees were deemed material because of the expectation of *indefinite future renewals* of the agreement. *See In re Limited, Inc. S'holders Litig.*, 2002 WL 537692, at *6 (Del. Ch. Mar. 27, 2002) (annual consulting fees of $150,000 material to senior university administrator who would have wanted consultancy to be renewed); *Mizel* v. *Connelly*, 1999 WL 550369, at *3 (Del. Ch. Aug. 2, 1999) (holding directors who were employed full-

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up when [an interested party] . . . offered [director] a consulting position" and (ii) director had promoted various business ventures in which interested party "invested . . . *despite their poor performance*") (emphases added).

[4] *See In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *34 (Del. Ch. June 4, 2004) (finding that *undisclosed* consulting arrangements *directly* with controller and other entities owned by controller material); *In re Ply Gem Indus., Inc. S'holders Litig.*, 2001 WL 755133, at *9 (Del. Ch. June 26, 2001) (finding $91,000 consulting fees material to co-founder and director of corporation who had served in director and executive positions at the corporation for *over 47 years*).

time and feared authorizing a demand "would endanger their *continued* employment" lacked independence) (emphasis added).[5]

Plaintiffs alleged nothing of the sort here and have not pleaded facts showing that Cahill's former consulting arrangement was material to him within the context of his personal circumstances. And the overall *trajectory* of Cahill's consulting arrangement, in which his compensation declined as Kraft and Heinz became integrated before being terminated after about four years, highlights that it was not like those indefinite or lengthy consulting arrangements courts have found indicative of bias-producing relationships.

On appeal, and tacitly conceding their Complaint's allegations are insufficient, Plaintiffs cite SEC filings and Cahill's first consulting agreement to assert that Cahill earned $10 million from his first and second consulting agreements between 2015 and 2019. (OB15-17 (citing A106, A134, A428).) Plaintiffs' request that this Court consider the first consulting agreement is particularly improper under Rule 9(a) because it was never presented to the court

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[5] *See Orman* v. *Cullman*, 794 A.2d 5, 30 (Del. Ch. 2002) (finding consulting fees comprising director's primary employment material where director was beholden to controller for "future renewals"); *Friedman* v. *Beningson*, 1995 WL 716762, at *1, *5 (Del. Ch. Dec. 4, 1995) (finding periodic receipt of consulting fees over course of *12-year* tenure as director of corporation material where interested party could affect future receipt/renewals of such fees); *Shaev* v. *Saper*, 320 F.3d 373, 378 (3d Cir. 2003) (finding consulting arrangement material where director had been a consultant for 5 years and was dependent on CEO and controller for continuation of consulting arrangement).

below.[6] In all events, Plaintiffs' new argument does not indicate that 3G was responsible for those consulting relationships or sufficiently contextualize Cahill's waning prior consulting relationship to his personal circumstances. Plaintiffs overlook that the first consulting agreement— accounting for substantially all compensation paid—was for a two-year term during which Cahill was paid $4 million annually. (A106.) In the following two years, Cahill was paid only $500,000 annually. (A134; A421.) Plaintiffs also overlook that Cahill reportedly received over $16.6 million from his Kraft positions in the three years *before* the merger. (B66.)

Second, as the Vice Chancellor correctly reasoned, the fact that Cahill was not considered independent from *Kraft Heinz* under the NASDAQ listing standards does not cause him to lack independence from *3G* with respect to a litigation demand "given the dearth of particularized allegations suggesting that Cahill is beholden to 3G." (Op. 30.) As this Court recognized in *Sandys*, "the criteria NASDAQ has articulated as bearing on independence are relevant under Delaware law," but do not "perfectly marry with the standards" applicable under Rule 23.1. 152 A.3d at 131. This is because a board's determination of director independence

[6] For unspecified reasons, Plaintiffs ask this Court to consider two Section 220 demands that were never provided to the court below. (OB16, 31, 33 (referencing A364-415).) Those are likewise not part of the appellate record. Moreover, the earlier demand was sent by a stockholder, Leonard Gassmann, who was never a plaintiff in this action. (A364-382.)

under the NASDAQ listing standards "is qualitatively different from, and thus does not operate as a surrogate for, [Delaware courts'] analysis of independence under Delaware law for demand futility purposes." *Teamsters Union 25 Health Servs. & Ins. Plan* v. *Baiera*, 119 A.3d 44, 61 (Del. Ch. 2015).

The fact that the court below declined to infer that Cahill was deemed to lack independence under a bright-line NASDAQ rule does not, as Plaintiffs would have it, mean it is reasonably inferable that the Board based its determination on a bias-producing relationship *with 3G*. (Op. 30 n.132; OB30.) While the 2019 Proxy does not directly reference the rule, Cahill would have automatically been deemed to lack independence under NASDAQ Marketplace Rule 5605(a)(2)(A) because he was employed by the Company "at any time during the past three years." (B241.) And the 2019 Proxy explains that the Board considered Cahill's former status as a consultant to Kraft Heinz and his role as CEO of Kraft. (B68-69 ("Mr. Cahill, the former Chief Executive Officer of Kraft and a former consultant to Kraft Heinz . . . [is] not independent").) The 2019 Proxy does not reference any purported relationship between Cahill and 3G. Indeed, the Board knew how to identify 3G when relationships with 3G were considered in evaluating independence. The 2019 Proxy explained that, "in conducting its evaluations of [Lemann, Behring, Castro-Neves, and Telles], the Board considered [their] affiliation with 3G Capital." (B69.) Plaintiffs cannot plead with particularity that

the Board considered a relationship between Cahill and 3G when the 2019 Proxy does not suggest that, and actually suggests the opposite.

Plaintiffs' reliance on the result reached in *Sandys* is thus misplaced. (OB29-30, 36.) There, this Court determined that two directors (Gordon and Doerr) lacked independence because, in part, they were deemed by the corporation's board to lack independence under NASDAQ listing rules where the SEC filings "did not disclose *why* its board made this determination" at all. 152 A.3d at 131-33 (emphasis added). Absent *any* indication of what the board considered, this Court concluded "it likely that the other facts pled by the plaintiff were taken into account," including other business relationships with the controller. *Id.* at 133. Unlike Cahill, Gordon and Doerr were partners at private equity firms—not company consultants or employees who would have automatically lacked independence under a bright-line rule. *Id.* Their classification as not independent was thus inexplicable, except by inferring bias-producing relationships with the controller.

Third, Plaintiffs' argument that Cahill lacks independence because his son, Jack Cahill, "works as a District Sales Manager at AB InBev," where 3G partner Telles is purportedly a "controlling stockholder" does not save their deficient allegations. (A446-447 ¶43; OB37-38.) Relying on cherry-picked statements from *Dream Big*, Plaintiffs allege "Jack Cahill started his career at AB InBev as a

member of its highly selective management trainee program, a position for which he was hand-picked by Defendant Telles." (A447 ¶43.) *Dream Big*, however, *contradicts* this allegation, as it discusses a training program at Brazilian brewer *Brahma* and certain successors—not *AB InBev*. (A86-89; B101, B103.) Absent from the Complaint are particularized facts about when Jack Cahill started his career at AB InBev, what Telles's involvement, if any, was at that time, whether Jack Cahill maintained any relationship with Telles, and—most critically—whether Telles had any ongoing influence over Jack Cahill's employment.

Allegations that a close family member's employment might be affected by a decision to reject demand are insufficient standing alone to plead a lack of independence. *See Cal. Pub. Emps.' Ret. Sys.* v. *Coulter*, 2002 WL 31888343, at *9 (Del. Ch. Dec. 18, 2002) (rejecting allegation that a director's son's "livelihood is dependent" on an interested director was alone sufficient to raise a reasonable doubt as to the director's independence). In *Coulter*, before finding that a director lacked independence, the court relied on stronger allegations, including that the director and the interested person were "lifelong friends" and the director had overlapping financial interests with the interested person and owned stock options that were repriced along with the interested person's options. *Id.* And, in *In re China Agritech, Inc. Shareholder Derivative Litigation*, the court found that a director—whom the court already determined faced a substantial likelihood of

personal liability for alleged misconduct—also lacked independence where his daughter was the corporation's head of the internal audit department and a demand investigation "would necessitate an investigation into [his] daughter." 2013 WL 2181514, at *20 (Del. Ch. May 21, 2013). The court did not, as Plaintiffs suggest (OB37), rely solely on the fact that the daughter's "primary employment depends on the good wishes of the Company's controlling stockholders." *Id.*

Here, where Plaintiffs have otherwise failed to plead bias-producing relationships between Cahill and 3G, the allegations about his son do not satisfy their stringent pleading burden. This is especially so because the Complaint lacks particularized facts suggesting that 3G has any ability to affect Cahill's son's employment or would (or could) take actions to terminate his employment.

Finally, Plaintiffs' argument that their failure to allege with particularity how Cahill is purportedly beholden to 3G is obviated because they allege 3G is Kraft Heinz's controlling stockholder also fails. (OB36-37.) The Vice Chancellor did not need to reach the issue of whether Plaintiffs' control allegations were sufficient (and they are not) because as this Court has long held, even the presence of a controlling stockholder "does not excuse presuit demand on the board without particularized allegations of relationships between the directors and the controlling stockholder demonstrating that the directors are beholden to the stockholder." *Beam*, 845 A.2d at 1054. Nor do such allegations "strip the directors of the

presumption of independence," *Aronson* v. *Lewis*, 473 A.2d 805, 815 (Del. 1984), *overruled on other grounds by Brehm*, 746 A.2d 244, or change "the director-based focus of the demand futility inquiry," *Baiera*, 119 A.3d at 67. Absent allegations of a bias-producing nature, Plaintiffs are essentially asking this Court to adopt another flavor of the "structural bias" argument for purportedly controlled companies that this Court rejected in *Beam*. 845 A.2d at 1051. In more recent precedents like *Sandys*, this Court continues to require particularized allegations of bias-producing relationships with alleged controllers before finding directors lacked independence from them. (*Supra*, 17-18.)

3. The Complaint Does Not Allege with Particularity That Zoghbi Lacks Independence from 3G.

In a single paragraph, the Complaint alleges that Zoghbi lacked independence from 3G because of his current position as a Company consultant, which purportedly provides 74% of his then-current publicly reported income, and because the 2019 Proxy stated that he was not "independent" under NASDAQ listing standards. (A447-448 ¶44.) Like those against Cahill, these allegations are deficient.

Plaintiffs failed to allege with particularity that Zoghbi was beholden to 3G for his consulting agreement with the Company because—like Cahill—Zoghbi was a Kraft officer and had no relationship with 3G before the merger. (*Id.*; OB17-18, 41.) Nor do they allege 3G could or did exert any influence or control over

Zoghbi's ability to enjoy the benefits of his consulting agreement, which should end the analysis as to Zoghbi. Moreover, Zoghbi's consulting agreement, which was incorporated by reference and presented below, provides that it will terminate, at the latest, on "the three-year anniversary of the Effective Date (July 1, 2022)." (B75.) It further provides that if Zoghbi's consulting position were involuntarily terminated sooner—with or without cause—he remained entitled to "a lump sum payment (less applicable deductions) equal to the pay [he] would have received had [he] remained employed through the three-year anniversary of the Effective Date." (*Id.*) Plaintiffs' assertion that Zoghbi would fear authorizing a demand targeting 3G would "jeopardiz[e]" his income is contradicted by the agreement. (OB42.) Plaintiffs also ignore the *trajectory* of Zoghbi's post-merger relationship with Kraft Heinz, which was trending towards termination as Kraft and Heinz unified their businesses.

The Complaint also did not plead with particularity the materiality of Zoghbi's consulting arrangement to him. *White*, 793 A.2d at 366. Plaintiffs merely note that his $400,000 consulting fee constitutes 74% of his total "current publicly reported income," a conclusory percentage they do not explain. (A447-448 ¶44.) Tacitly conceding their pleading failure, Plaintiffs improperly ask this Court to consider for the first time certain SEC filings to show other compensation he received as COO of the Company's U.S. Commercial business. (OB41; A97-

132.); Sup. Ct. R. 8 & 9(a). But Plaintiffs cannot satisfy their pleading burden by stating Zoghbi's compensation absent particularized facts *contextualizing* how that compensation is both bias-producing and material to him. (*Supra*, 27-28.)

Plaintiffs overlooked that Zoghbi's consulting arrangement was not his primary employment. Zoghbi served as the CEO of Arnott's Biscuits Ltd., a privately held Australian food company. (B110, B78.) Zoghbi also served as a director of Brambles Ltd., a publicly traded global supply chain logistics company that is publicly traded on the Australian Stock Exchange. (B67, B110.) Zoghbi also had a lengthy history of high-level executive positions before the merger. (B67.) Plaintiffs do not allege 3G had anything to do with these positions.

Nor does the allegation that Zoghbi was classified as non-independent under the NASDAQ listing standards render him beholden to 3G. As with Cahill, the 2019 Proxy discloses that "Zoghbi, our former Chief Operating Officer of the U.S. Commercial business and Special Advisor at Kraft Heinz, [is] not independent." (B68-69.) Again, unlike *Sandys*, it is not inferable that the Board's determination was because of relationships with 3G, because Zoghbi also was automatically deemed not independent under a NASDAQ rule, and the Board did not mention relationships with 3G in connection with that determination.

Plaintiffs also alleged that Zoghbi is not independent of 3G because he "faces the prospect of liability" as a defendant in a related federal securities action.

(A447-448 ¶44.) This stray conclusory allegation, however, cannot plead a lack of independence given the absence of any other alleged bias-producing relationships with 3G. It also cannot suffice to plead a substantial likelihood of personal liability as to Zoghbi—a point Plaintiffs did not dispute below or on appeal. *Aronson*, 473 A.2d at 815 (holding "mere threat of personal liability" is not disabling); (OB20 ("This appeal concerns *Zuckerberg*'s third prong—*i.e.*, whether plaintiffs pleaded facts leading to an inference that at least three directors . . . lack independence from 3G and 3G's director designees.").) This is especially so because Plaintiffs did not name Zoghbi as a defendant in this action. The fact that the federal court denied Zoghbi's motion to dismiss over one year after the Complaint was filed is insufficient to plead a substantial likelihood of liability where there are "no well-pleaded allegations" of directorial scienter in *Plaintiffs'* Complaint "that the [federal decision] could bolster." *In re Zimmer Biomet Holdings, Inc. Derivative Litig.*, 2021 WL 3779155, at *24 (Del. Ch. Aug. 25, 2021).

4. The Complaint Does Not Allege with Particularity That Van Damme Lacks Independence from 3G.

The court below did not decide whether Plaintiffs adequately alleged that Van Damme lacked independence from 3G and its partners, but Plaintiffs make much of that court's observation that the allegations about Van Damme "come closest to supporting a reasonable doubt about a non-3G director's ability to objectively consider a demand." (Op. 32; OB38-39.) As shown below, Plaintiffs'

allegations are insufficient to plead Van Damme lacked independence. In any event, Plaintiffs' insufficient allegations underscore the absence of similar allegations as to Abel, Cool, Cahill, and Zoghbi, thus highlighting why the decision below should be affirmed.

First, Plaintiffs' allegations of "deep financial ties to, and a longstanding business relationship with, 3G," (OB39-40), are fundamentally no more than the allegation of "mere outside business relationship[s which], standing alone, are insufficient to raise a reasonable doubt about a director's independence." *Beam*, 845 A.2d at 1050. The Complaint contains no particularized, non-conclusory allegations showing that 3G actually controls the boards of AB InBev, RBI, or Burger King. *Ash* v. *McCall*, 2000 WL 1370341, at *7 (Del. Ch. Sept. 15, 2000) (rejecting conclusory allegations of control). Nor are there any allegations demonstrating that Van Damme is "beholden" or feels any sense of "owingness" to 3G for his current director position at AB InBev or his prior director positions at RBI and Burger King. To the contrary, as the Complaint alleges, Van Damme became a director of AB InBev because *his* family was one of the controlling shareholders of Interbrew, which merged with 3G's entity AmBev in 2004 (becoming InBev) and which later merged with Anheuser-Busch in 2008 to form AB InBev. (A441-442 ¶26, A448-450 ¶45.) As Plaintiffs did not (and cannot) dispute, Van Damme is reportedly one of Belgium's richest people with an

estimated fortune of over 17 billion euros in 2018 (B89-90, B42), and the Complaint nowhere alleges that his directorships are at all material to him—economically or otherwise. *See McElrath* v. *Kalanick*, 224 A.3d 982, 996 (Del. 2020) (concluding director was independent where plaintiff failed to allege "that the directorship was of substantial material importance to him").

Second, Plaintiffs' allegations that Van Damme has an "ongoing close friendship" with Lemann are based on out-of-context statements Plaintiffs cherry-picked from *Dream Big*, which Plaintiffs had incorporated into their Complaint by reference, and unreasonable inferences from those statements. (A448-450 ¶45.) *Dream Big* makes clear that the two men first met in early 2002 at a business meeting with an "old acquaintance," Telles, who had met Van Damme in 1995 during preliminary merger-related overtures between brewers Brahma and Interbrew while both companies were evaluating a transaction with Anheuser-Busch. (A90-93.) During 2002, Lemann and Van Damme had three mixed social-business meetings in Brazil, New York, and Switzerland when both were in these locations—not joint vacations as Plaintiffs assert. (*Id.*; A433 ¶2.) The book's statement that Van Damme was "virtually an ally" of the 3G partners refers to his view of a potential merger with Interbrew during discussions that began in earnest in early 2003 and ended in early 2004. (A92.) Nothing from Plaintiffs' selective quotations of *Dream Big* suggested that Lemann and Van Damme had anything

other than a good business relationship as part of those business and merger discussions. Nothing suggests that they became close friends after the merger or that they are particularly close today. (*Id.*) Plaintiffs alleged no social meetings between Van Damme and Lemann in the *18 years* since that merger, which alone renders conclusory and not well pleaded their irresponsible allegation that Lemann and Van Damme had an "ongoing" and "close" friendship. (A448-450 ¶45.)

The facts of the cases Plaintiffs rely on bear no resemblance to the Complaint's thin allegations about Van Damme's relationship with Lemann. (OB39.) In *Marchand*, this Court held a complaint adequately alleged a director lacked independence from an interested CEO where the director owed his entire 28-year professional career at the company—from an administrative assistant to a manager and director—to the CEO's family and was further honored by the family in having a building at an important community institution named after him. 212 A.3d at 820. The same is true of *Delaware County Employees Retirement Fund* v. *Sanchez*, in which the director (Jackson) owed his personal wealth and primary employment to the interested person, who was also his friend of 50 years. 124 A.3d 1017, 1020-21 (Del. 2015). And in *Frederick Hsu Living Trust* v. *Oak Hill Capital Partners III, L.P.*, the court relied on detailed documents and testimony evidencing that a director (Morgan), who was the "consummate Silicon Valley insider" and routinely served as a professional director, lacked independence from

the private equity fund he was negotiating against and its partner (Pade). 2020 WL 2111476, at *20 (Del. Ch. May 4, 2020). The court relied on evidence of (i) Morgan's business dealings with the private equity fund, (ii) his *leveraging of that relationship* to gain future business, and (iii) his longstanding personal and professional relationship with Pade, which included family vacations at Pade's vacation home and the fact that Pade and Morgan "socialized *regularly*." *Id.* (emphasis added).

Third, Van Damme's alleged "connections" to AB InBev and certain 3G-related individuals through his charitable interests, investments in certain 3G funds, and beneficial ownership of an entity that invested in RBI are insufficient. (A448-450 ¶45.)

Plaintiffs alleged that Van Damme serves on the board of DKMS, a charitable organization to which 3G or its partners made contributions. (*Id.*) But Plaintiffs did not allege particularized facts showing that Van Damme received any compensation or personal benefit from any contribution to DKMS from AB InBev or any 3G-related individual, that he actively solicited such support, or that he had any substantial dealings with those contributors as a DKMS board member. The absence of such allegations distinguishes this case from *Cumming*, on which Plaintiffs rely (OB40). There, the court relied on allegations that the director (Hoof Holstein) was "employed in a leadership position" at the non-profit where

the wife of the controller (Edens) served on the board and the director served alongside Edens on other boards he facilitated her joining, which constituted at least half her annual income. 2018 WL 992877, at *14-15. A more apt comparison is *Chester County Employees' Retirement Fund* v. *New Residential Investment Corp.*, 2017 WL 4461131, at *8 (Del. Ch. Oct. 6, 2017). There, the court held plaintiffs' non-contextualized allegations that a director and controller were each "significant donors" to an organization could not plead a lack of independence without details "that might illuminate Plaintiff's understanding of the term 'significant.'" *Id.*

Nor do Plaintiffs allege the donations' materiality to DKMS or how such fundraising efforts would affect Van Damme's decision making as a director. *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 822-23 (Del. Ch. 2005) (allegations did not plead lack of independence where plaintiffs "state that [the corporation] is a significant benefactor, but they never state how [its] contributions could, or did, affect the decision-making process of the [director]"), *aff'd*, 906 A.2d 766 (Del. 2006).

Because 3G is a global investment firm (A441 ¶25), the allegation that Van Damme invested in 3G funds is insufficient, absent allegations showing the materiality of these investments or how it would cause him to lack independence. *See J.P. Morgan*, 906 A.2d at 822. Even more attenuated is the allegation that Van

Damme lacks independence because an entity in which he invests happens to have invested in RBI. *Olenik*, 2018 WL 3493092, at *17.

Finally, even taken together, this Court has found similar allegations lacking. In *Zuckerberg*, this Court held allegations that a director was a "long-serving board member," an "early investor" in the company, a "personal friend" of the controller, and served at an entity that got "good deal flow" from the company, were insufficient to plead a lack of independence. 262 A.3d at 1062-63. This Court reasoned that the mere allegation of a friendship was insufficient, and the complaint "d[id] not explain why [the director's] status as a long-serving board member [or] early investor" would make him beholden to the controller. *Id.* The complaint also failed to (i) support an inference that the director's "service on the Board is financially material to him," or (ii) "allege that serving as a [company] director confers such cachet that [the director's] independence is compromised." *Id.* Plaintiffs' Complaint is similarly deficient.

CONCLUSION

As the court below correctly concluded, Plaintiffs failed to carry their burden of pleading particularized facts suggesting that at least 6 of the Company's 11 directors could not impartially consider a demand. That court's dismissal of Plaintiffs' Complaint should thus be affirmed.

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CERTIFICATE OF SERVICE

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