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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ERSTE ASSET MANAGEMENT GMBH, Plaintiff, v. BERNARDO HEES, ALEXANDRE BEHRING, JORGE PAULO LEMANN, MARCEL HERRMANN TELLES, PAULO BASILIO, DAVID KNOPF, EDUARDO PELLEISSONE, 3G CAPITAL, INC., 3G CAPITAL LTD., 3G GLOBAL FOOD HOLDINGS, L.P., 3G GLOBAL FOOD HOLDINGS GP LP, 3G CAPITAL PARTNERS II L.P., 3G CAPITAL PARTNERS LTD, HK3 18 LP, JOHN CAHILL, GEORGE ZOGHBI, RASHIDA LA LANDE, and JOAO M. CASTRO-NEVES, Defendants, -and- THE KRAFT HEINZ COMPANY, a Delaware Corporation, Nominal Defendant.	No. 374, 2024 CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. No. 2023-1191-LWW **PUBLIC VERSION** **FILED ON: NOVEMBER 6, 2024**

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Cases

Statutes

Other Authorities

Rules

NATURE OF PROCEEDING

In *Morrison v. Berry*, this Court "offer[ed] a cautionary reminder to directors and the attorneys who help them craft their disclosures" that they cannot obtain *Corwin* cleansing through "partial and elliptical disclosures."[1] This case provides an opportunity for a similar cautionary reminder directed to directors and attorneys who seek a Court of Chancery Rule 23.1 dismissal based on false, non-compliant, federally mandated disclosures respecting director compensation.

This is an appeal from the dismissal of an application for relief under Court of Chancery Rule 60(b) to reopen a prior Rule 23.1 dismissal in *In re Kraft Heinz Co. Derivative Litigation*, 2021 WL 6012632 (Del. Ch. Dec. 15, 2021), *aff'd*, 282 A.3d 1054 (Del. Aug. 1, 2022) (TABLE) (the "Prior Action") (A88-121; A177). Dismissal of the Prior Action was predicated on the determination that director John Cahill could impartially consider a demand to sue 3G Capital, Inc. (together with its affiliate entities, "3G"), which is a major stockholder of The Kraft Heinz Company ("Kraft Heinz" or the "Company"), and 3G-affiliated officers and directors of Kraft Heinz. That determination turned on Cahill's supposed status as a *former consultant* to Kraft Heinz:

[1] 191 A.3d 268, 272 (Del. 2018) (internal quotation omitted).

> [T]he plaintiffs allege that Cahill lacks independence from 3G because his prior consulting compensation of $500,000 per year, coupled with his director compensation of about $235,000 per year, constituted more than half of Cahill's publicly reported income in 2018.
>
> Cahill's consulting agreement with Kraft Heinz terminated on July 1, 2019—before this action was filed. There are no facts alleged indicating that Cahill expected his consulting arrangement to resume.

(A116 (footnotes omitted).)

The allegation that Cahill's consulting arrangement terminated on July 1, 2019—before the July 30, 2019 date for assessing demand futility—came from Kraft Heinz's proxy statement disclosures. Kraft Heinz repeatedly disclosed Cahill's purported status as a *former consultant*. (A331-33 ¶¶ 256-60.) Plaintiff Erste Asset Management GmbH ("Erste") and other stockholder plaintiffs in the Prior Action ("Plaintiffs") had no reason to plead to the contrary and no reason to investigate the accuracy of the proxy disclosures. Had Plaintiffs remained silent, the defendants in the Prior Action (the "Prior Action Defendants") could have asked the Court of Chancery to take judicial notice of the publicly disclosed background fact that Cahill's consultancy relationship terminated on July 1, 2019.[2]

[2] *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170-72 (Del. 2006) (taking judicial notice of vote totals in a Form 10-Q); *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 n.28 (Del. 2004) (recognizing that courts may take judicial notice of SEC filings).

After this Court affirmed the Court of Chancery's dismissal of the Prior Action, Erste made a Rule 23.1 demand on the board of directors of Kraft Heinz (the "Board"). When Erste's Rule 23.1 demand was refused, Erste pursued a request for books and records under 8 *Del. C.* § 220. That Section 220 inspection revealed that Cahill had remained a compensated consultant to Kraft Heinz throughout 2019 and beyond.

At the Court of Chancery's direction, Erste filed an independent action rather than a Rule 60(b) motion in the Prior Action. (A231.) Erste alleged the following in its Verified Stockholder Complaint for Relief from Judgment and Damages (the "Complaint"):

> [T]he entire notion of Cahill having a "prior" or "former" consulting relationship as of July 30, 2019, is a litigation-driven fiction. On June 20, 2019, the Compensation Committee approved new compensation arrangements for ongoing consulting work by Cahill (and Zoghbi) with Cahill and Zoghbi both to receive grants of new stock options that would vest over three years.

(A339 ¶ 277.) Using newly obtained information, Section XIV of the Complaint pleads particularized allegations about the terms and approval processes respecting Cahill's new consulting arrangement and how "his ongoing work for the Company … exceeded the role and scope of his service as [a] director." (A331 ¶ 253 (internal quotation marks omitted) (citation omitted).) For his new stock options to vest

fully, Cahill depended on the good will of senior officials affiliated with 3G, such as Chairman of the Board and 3G co-Managing Director Alexandre Behring.

Erste filed this independent action (i) to seek relief under Rule 60(b) on the grounds of newly discovered evidence, fraud between the parties, and fraud on the court; (ii) to reassert the derivative claims from the Prior Action; and (iii) to recover individual damages (*i.e.*, litigation costs) flowing from the disloyal false disclosures respecting Cahill's consulting arrangement. In addition to the Prior Action Defendants, the Complaint sues certain Kraft Heinz fiduciaries who knew that Kraft Heinz made false disclosures about Cahill's new consulting arrangement (together, "Defendants"). Defendants moved to dismiss, and the parties agreed to brief initially the sufficiency of the claims seeking Rule 60(b) relief and disclosure liability.

Defendants insisted below that Kraft Heinz "fully disclosed the facts concerning the changes in Cahill's consultancy arrangements and compensation in its public filings in mid-2019 and early 2020." (A363.) The Court of Chancery rejected this argument. The opinion below recognizes that Erste needed access to Kraft Heinz's internal documents to learn about Cahill's "recut consulting arrangement," his "new arrangement," and the "fact that Cahill provided consulting services to Kraft Heinz on new terms." (Ex. A at 21, 22 n.109.)

Yet, the Court of Chancery denied Rule 60(b) relief. It construed the Rule 60(b) standards against Erste without reaching the question whether Cahill's undisclosed ongoing consulting relationship on new financial terms rendered him not independent of 3G for purposes of demand futility under Rule 23.1.

The Court of Chancery committed multiple legal errors respecting the operative standards for relief under Rule 60(b)(2) and 60(b)(3). Essentially, the Court of Chancery (i) allowed Defendants to rest on a Rule 23.1 dismissal predicated on false disclosures respecting Cahill's revised consulting arrangement and compensation and (ii) blamed Erste for not having earlier uncovered the actual facts. The Court of Chancery also erred respecting the sufficiency of Erste's allegations that it could recover litigation costs incurred by Erste's counsel on Erste's behalf due to Kraft Heinz fiduciaries having disloyally misrepresented Cahill's consulting arrangement.

The ruling below undermines the integrity of Rule 23.1 practice. A proxy statement is effectively part of the record for a motion to dismiss under Rule 23.1. SEC filings are a recognized public source for pleading demand futility, *Rales v. Blasband*, 634 A.2d 927, 935 n.10 (Del. 1993), and Delaware courts rely on the accuracy of uncontroversial background facts in SEC filings. If not reversed, the ruling below would also render Section 220 practice unmanageable. Current law

prohibits stockholders from obtaining books and records where the same information is disclosed publicly. But the Court of Chancery dismissed the Complaint on the basis that Erste should have obtained books and records verifying the accuracy of Kraft Heinz's public filings before relying on them to allege demand futility. Stockholder plaintiffs cannot expect to obtain in a pre-litigation Section 220 inspection documents allowing them to audit the proxy statement of a Delaware corporation for compliance with 17 C.F.R. § 229.402(k) respecting the disclosure of director compensation (including consulting fees and stock option compensation).

Newly obtained documents establish that Kraft Heinz fiduciaries knowingly misrepresented and concealed the consulting arrangement approved by the 3G-dominated Compensation Committee in June 2019, on the eve of the anticipated filing of derivative litigation. Reversal is warranted because Erste sufficiently pleaded (i) fraud for purposes of Rule 60(b)(3), (ii) newly discovered evidence for purposes of Rule 60(b)(2), (iii) Cahill's lack of independence under Rule 23.1, and (iv) a disclosure claim to recover litigation costs incurred due to Kraft Heinz's false, non-compliant, and disloyal Cahill-related disclosures.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in rejecting Erste's claim for relief from judgment due to fraud under Rule 60(b)(3). Erste satisfied the standard for Rule 60(b)(3) relief because Kraft Heinz's false proxy statement disclosures prevented Plaintiffs from fairly alleging in the Prior Action dispositive facts respecting Cahill's lack of independence. The Court of Chancery erroneously (i) conflated the standard for fraud under Rule 60(b)(3) with the standard for fraud on the court and (ii) required Erste to plead "extrinsic" rather than "intrinsic" fraud, a distinction incompatible with the plain text of Rule 60(b)(3). The Court of Chancery erroneously required Erste to plead "egregious conduct involving a corruption of the judicial process itself," such as the equivalent of bribery of a judge, or that opposing counsel "gave false information to this court." (Ex. A at 24-25.)

2. The Court of Chancery erred in rejecting Erste's claim for relief from judgment under Rule 60(b)(2) due to newly discovered evidence. The court blamed Erste for not having learned pre-litigation the "fact that Cahill provided consulting services to Kraft Heinz on new terms" because Erste's Section 220 demand did not seek "documents about directors' compensation or consulting arrangements with Kraft Heinz." (Ex. A at 21-22.) This reasoning overlooks how (i) federal law mandated that Kraft Heinz accurately disclose the pertinent aspects of Cahill's

ongoing consulting relationship and his annual compensation, *see* 17 C.F.R. § 229.402(k); (ii) Section 220 is not a backup regulatory regime to verify the accuracy of data publicly disclosed pursuant to federal regulations; and (iii) Erste's original Section 220 demand for information about director relationships should have prompted Kraft Heinz to produce documents about Cahill's consultancy relationship with Behring.

3. The Court of Chancery erred in dismissing Erste's disclosure claim on the basis that Erste made "no effort" to plead reasonable reliance, causation, and damages. (Ex. A at 28.) The Court of Chancery's conclusion rests on the erroneous proposition that Erste could not recover its litigation costs as damages because Erste supposedly did not exercise reasonable diligence to uncover the actual facts respecting Cahill's consulting relationship. *See* Argument II. The Court of Chancery similarly erred in ruling that a culpable state of mind could not be reasonably inferred due to the supposed availability of the actual facts from a Section 220 inspection. (Ex. A at 29.)

STATEMENT OF FACTS

A. Scandal and Litigation at 3G-Managed Kraft Heinz

In February 2019, Kraft Heinz disclosed a $15.4 billion goodwill and intangible asset impairment charge, and that Kraft Heinz received an SEC subpoena in October 2018. (A248 ¶ 23.) Kraft Heinz stock dropped 27% on the news. (*Id.*) Soon thereafter, Kraft Heinz announced that it was unable to timely file its Form 10-K, due to a dispute with its auditor. (A249 ¶ 25.) Kraft Heinz attributed the $15.4 billion impairment to triggering events in the fourth quarter of 2018, conveniently avoiding mentioning circumstances in the third quarter of 2018, when 3G unloaded a block of Kraft Heinz stock for $1.2 billion. (*Id.*) In May 2019, Kraft Heinz announced that it would restate its financial statements for 2016, 2017, and the first nine months of 2018. (A249 ¶ 27.) In June 2019, Kraft Heinz filed its belated Form 10-K, which disclosed material weaknesses in its internal controls and a United States Department of Justice investigation. (A250 ¶ 28.)

By this time, stockholders had filed federal securities law class actions and a federal derivative action and served a Section 220 demand relating to 3G's stock sale. (A248-49 ¶ 24; A326-27 ¶¶ 240-42; A346 ¶ 301.) Kraft Heinz's stock price dropped from over $77 at the beginning of 2018 to $27.65 at the end of May 2019. (A258 ¶ 54.)

At all relevant times, the top executives at Kraft Heinz were affiliated with 3G or came from 3G's other portfolio companies. (Ex. A at 3; A254-55 ¶¶ 43-46; A265-66 ¶ 77; A267-68 ¶ 84; A327-28 ¶ 245.) As of June 2019, Kraft Heinz's eleven-person Board included three 3G principals—Jorge Paulo Lemann, Alexandre Behring, and Joao Castro-Neves—who constituted a majority of the Board's Compensation Committee. (A239-40 ¶ 3; A253-54 ¶¶ 40-41; A262 ¶ 66; & A29.) A fourth director, Alexandre Van Damme, was a longtime business partner of 3G, and two other directors—Cahill and Zoghbi—were Company consultants. (Ex. A at 3; A239 ¶ 3; A263 ¶ 69.)

B. The 3G-Dominated Compensation Committee Approves a Modified Consulting Arrangement with Cahill

Upon the creation of Kraft Heinz by merger in 2015, Cahill entered into a two-year consulting agreement under which he provided advisory and consulting services to CEO Bernardo Hees and Chairman Behring. (A257 ¶ 51.) In 2017, Cahill entered a new consulting agreement under which he provided advisory services to Behring and Hees for $500,000 per year. (A257-58 ¶ 52.) That 2017 agreement was terminable on 30 days' notice by either party. (*Id.*)

On June 1, 2019, Cahill emailed Behring and another director and asked them "to consider a change to my financial arrangement." (A14.) Noting that all of his Kraft Heinz stock options were "underwater," Cahill proposed that Kraft Heinz

suspend the annual $500,000 to him and "[i]n lieu, the Company would provide me a one-time grant of 500,000 options vesting ratably over three years." (*Id.*) Cahill wrote that his "commitment to working with the new team to turn around Kraft Heinz is solid." (*Id.*)

On June 20, 2019, the 3G-dominated Compensation Committee received a presentation slide about proposed new compensation arrangements for Cahill and Zoghbi. (A15-16.) As to Cahill, it stated:

> - Currently receives an annual gross compensation of USD $500k as an advisor.
> - We are proposing no cash compensation effective July 2019 and a one time grant of #500,000 stock options [after the blackout period].
> - This creates a path for Cahill becoming an independent board member in three years.

(*Id.* (footnote omitted).) The minutes for the Compensation Committee meeting state:

> The Committee discussed proposed changes to Mr. Cahill's compensation arrangement and Mr. Zoghbi's compensation arrangement. A discussion followed, after which upon a motion duly made and seconded, the Committee approved the changes to Mr. Cahill's and Mr. Zoghbi's compensation arrangements.

(A18.)

Kraft Heinz granted Cahill 500,000 stock options on August 16, 2019. (A37-38.) The stock award agreement provides for one-third vesting on each annual anniversary of the grant date. (A329 ¶ 252.) Cahill's stock options were subsequently valued at [redacted] at the time of issuance. (A331 ¶ 254.) Cahill could have exercised the 500,000 stock options on January 6, 2023, for a gain of $8.59 million. (*Id.*)

A 2023 report by a Board working group created in response to Erste's post-dismissal Rule 23.1 demand summarized what Cahill said in 2019 about the work he would perform in exchange for receiving the 500,000 stock options:

[redacted]

(A329-31 ¶ 253 (emphasis added).) The report concluded that "it was reasonable for [Cahill] to be compensated for his ongoing work for the Company that exceeded the role and scope of his service as [a] director." (*Id.*)

C. Kraft Heinz Falsely Discloses That Cahill's Consultancy Ceased on July 1, 2019

On August 2, 2019, Kraft Heinz filed a proxy statement (the "2019 Proxy") that falsely refers to Cahill as "a former consultant to Kraft Heinz" and falsely states: "Mr. Cahill's advisory and consulting arrangement terminated on July 1, 2019." (A331-32 ¶ 256; A26.) The 2019 Proxy says nothing about the revised consulting compensation arrangement approved by the Compensation Committee on June 20, 2019. (A332 ¶ 257.)

On March 27, 2020, Kraft Heinz filed a proxy statement (the "2020 Proxy") that falsely describes Cahill as a "former consultant" and falsely states: "Mr. Cahill's advisory and consulting arrangement terminated on July 1, 2019. In connection with the termination of his consulting agreement, Mr. Cahill received a one-time grant of 500,000 stock options." (A332-33 ¶¶ 258-59; A73; A56; A58; A65.)

In 2021, 2022, and 2023, Kraft Heinz filed proxy statements that falsely refer to Cahill as a "former consultant." (A332-33 ¶ 259.) The proxy statement dated March 24, 2023, falsely states that Cahill "last provided consulting services to Kraft Heinz in July 2019, and received a grant of stock options in August 2019 in connection with the termination of his consulting agreement." (*Id.* (emphasis omitted).)

D. The Prior Action

Various derivative actions filed by Kraft Heinz stockholders in late 2019 and early 2020 were consolidated into the Prior Action. (A39-52.) Paragraph 43 of the consolidated amended complaint alleged that Cahill served as a consultant to Kraft Heinz "until July 1, 2019." (A336 ¶ 268.) That allegation was based on language in the 2019 Proxy that is also found in the 2020 Proxy. (*Id.*) The consolidated amended complaint was filed after the filing of the 2020 Proxy.

During briefing and oral argument on their motion to dismiss under Court of Chancery Rule 23.1, the Prior Action Defendants stressed that Cahill was no longer a consultant as of the date for assessing demand futility. (A336-37 ¶¶ 267, 269-70.) The Court of Chancery's analysis of Cahill's independence turned on Cahill's status as a former consultant, not a current consultant with future income at risk:

> Cahill's consulting agreement with Kraft Heinz terminated on July 1, 2019—before this action was filed.[120] There are no facts alleged indicating that Cahill expected his consulting arrangement to resume.[121]
>
> [120] [Compl. ¶ 43.]
>
> [121] *Compare Orman v. Cullman*, 794 A.2d 5, 30 (Del. Ch. 2002) (finding consulting fees comprising director's primary employment were material where the director was beholden to a controller for "future renewals"); *Friedman v. Beningson*, 1995 WL 716762, at *1, *5 (Del. Ch. Dec. 4, 1995) (finding regular receipt of consulting fees over 12 years to be material where an interested party could affect future receipts of such fees).

(A116-17 (cleaned up).)

The determination that Cahill was independent was a necessary holding to support dismissal of the Prior Action. (A115-20.)

On appeal, the Prior Action Defendants used the following terminology to describe Cahill and his consultancy: "former consultant"; "prior consulting arrangement"; "former consulting arrangement"; "prior consulting"; "waning prior consulting relationship"; "former status as a consultant." (A337 ¶ 271; A130; A152-53; A157-58.) The Prior Action Defendants distinguished Cahill's status from cases involving "**indefinite or lengthy consulting arrangements [that] courts have found indicative of bias-producing relationships**." (A157 (bolding in original).) The Prior Action Defendants distinguished a string of cases in which consulting fees were deemed material because of "indefinite or lengthy consultancy relationships."[3] At oral argument on appeal, the Prior Action Defendants argued

[3] (A157; *see id.* at A156-57 & n.5 (citing *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); *In re The Limited, Inc. S'holders Litig.*, 2002 WL 537692, at *4 (Del. Ch. Mar. 27, 2002) (inferring at pleading stage that consulting fees of $150,000 were material to a university administrator who would have wanted consultancy to be renewed); *Orman v. Cullman*, 794 A.2d at 30 (finding consulting fees comprising director's primary employment material where director was beholden to controller for "future renewals"); *Mizel v. Connelly*, 1999 WL 550369, at *3 (Del. Ch. Aug. 2, 1999) (holding directors who were employed full-

that Cahill was "free of the consulting relationship" as of the demand date. (A338 ¶ 272 (internal quotation marks omitted) (citation omitted).)

This Court summarily affirmed the dismissal of the Prior Action for failure to plead demand futility. (A177.)

E. Erste Discovers Cahill's Undisclosed Consultant Arrangement

Following this Court's affirmance of the dismissal of the Prior Action, Erste served a Rule 23.1 demand contending, among other things, that the grant of 500,000 stock options to Cahill after the 2019 termination of his 2017 consulting agreement was wasteful because Cahill was apparently providing nothing to the Company in return. (A338 ¶ 274.) When Kraft Heinz rejected Erste's Rule 23.1 demand, Erste served a Section 220 demand. The documents produced by Kraft Heinz included: (i) Cahill's June 1, 2019 email proposing modified consultant compensation; (ii) the slide presented to the Compensation Committee on June 20, 2019; (iii) the minutes of that Compensation Committee meeting; and (iv) the working group's report discussing the claim that the stock option grant to Cahill was wasteful. (A329-30 ¶ 253; A210-13.)

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time and feared authorizing a demand "would endanger their continued employment" lacked independence); *Friedman v. Beningson*, 1995 WL 716762, at *1, *5 (finding regular receipt of consulting fees over 12 years to be material where an interested party could affect future receipts of such fees)).)

These four documents, which are summarized above in Section B, revealed the falsity of Kraft Heinz's repeated proxy statement disclosures that Cahill's consultancy services had terminated on July 1, 2019. Nonetheless, Defendants' main factual argument below in support of dismissal of Erste's claim for Rule 60(b) relief and disloyal disclosure claim was that the newly obtained documents supposedly showed that Cahill was being compensated for expanded directorial responsibilities, not ongoing consultancy services. (A364; A418-19.) The Court of Chancery properly rejected that factual argument, but nonetheless denied Rule 60(b) relief on the erroneous ground that Erste's obligation to use reasonable diligence entailed a Section 220 inspection by which Erste would have discovered Cahill's new consulting arrangement.

ARGUMENT

I. THE COURT OF CHANCERY DISMISSED ERSTE'S RULE 60(B)(3) CLAIM BASED ON INCORRECT LEGAL STANDARDS

A. Question Presented

Did the Court of Chancery err in dismissing Erste's Rule 60(b)(3) claim as a matter of law despite Kraft Heinz having made false, non-compliant proxy statement disclosures that concealed Cahill's ongoing provision of consulting services for which he was compensated through a grant of stock options that would vest over a span of three years? (A471-73.)

B. Scope of Review

A claim that the trial court employed an incorrect legal standard in denying a Rule 60(b) application is reviewed *de novo*. *MCA, Inc. v. Matsushita Elec. Indus. Co.*, 785 A.2d 625, 638 (Del. 2001). The underlying question whether Cahill is independent for purposes of pleading demand futility is also reviewed *de novo*. *Marchand v. Barnhill*, 212 A.3d 805, 817 (Del. 2019).

C. Merits of Argument

Erste sought relief under Rule 60(b)(3), which provides that the court may relieve a party from a final judgment for the following reason: "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." The Court of Chancery's analysis repeatedly

referenced Rule 60(b)(3), but did so under the heading "Fraud on the Court." (Ex. A at 22-25; *see also id.* at 1.) The phrase "fraud upon the Court" is found in the penultimate sentence of Rule 60(b), and the Court of Chancery erred by applying the case law interpreting "fraud on the court" without regard for the case law interpreting Rule 60(b)(3). The Court of Chancery also erred by classifying Erste's claim as "intrinsic" fraud and denying it on that basis, in contradiction with the plain language of Rule 60(b)(3).

1. The Court of Chancery Erroneously Applied the "Fraud on the Court" Standard to Erste's Rule 60(b)(3) Claim

"A Rule 60(b)(3) motion is reserved for situations where a party has engaged in fraud or misrepresentation that prevents the moving party from fairly and adequately presenting his or her case." *MCA*, 785 A.2d at 639 (citing 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2860 (1995) [hereinafter *Wright & Miller*]). "Rule 60(b)(3) is generally employed in situations where fraud or misrepresentation between the parties has occurred." *Id.* at 639 n.15 (citing *Wright & Miller* § 2870).

In *MCA*, this Court found Rule 60(b)(3) inapplicable because the alleged wrongdoing was that class counsel "violated their obligation of candor toward the tribunal as well as their fiduciary duty to protect the interests of the class." *Id.* at 638. The appellants did "not claim that the alleged fraud on the part of class counsel

prevented them from adequately presenting their case." *Id.* at 639. This Court classified the alleged wrongdoing in *MCA* as "fraud upon the court." *Id.* For that reason, the appellants in *MCA* bore the "heavy burden" of showing "the most egregious conduct involving a corruption of the judicial process itself." *Id.* (citing *Wright & Miller* § 2871).

Wright & Miller elaborates on the need to distinguish between the circumstances when fraud under Rule 60(b)(3) is the operative standard and those cases involving alleged "fraud upon the court":

> Perhaps the principal contribution of all of these attempts to define "fraud upon the court" and to distinguish it from mere "fraud" is as a reminder that there is a distinction…. The drafters must have conceived of "fraud upon the court," as they used that phrase, as referring to very unusual cases involving "far more than an injury to a single litigant."
>
> Thus, the ***courts have refused to invoke this concept in cases in which the wrong, if wrong there was, was only between the parties in the case and involved no direct assault on the integrity of the judicial process***. Nondisclosure by a party or the party's attorney has not been enough.
>
> The cases in which it has been found that there was, or might have been, a "fraud upon the court," for the most part, have been cases in which there was "the most egregious conduct involving a corruption of the judicial process itself." The concept clearly includes bribery of a judge or the employment of counsel in order to bring an improper influence on the court.

Wright & Miller § 2870 (emphasis added) (citations omitted) (footnotes omitted). In cases involving perjury, "there is a powerful distinction between perjury to which

an attorney is a party and that with which no attorney is involved." *Id.* Perjury by an officer of the court can implicate fraud upon the court.

Here, the alleged fraud was committed by fiduciaries of Kraft Heinz who knew the actual facts respecting Cahill's ongoing consultancy relationship. The Court of Chancery erred in not following *MCA* and not making the necessary determination that the alleged fraud is properly classified as fraud between the parties under Rule 60(b)(3), not fraud on the court. The Court of Chancery improperly collapsed the two categories and conflated the two tests.

The Court of Chancery erroneously stated that the "sort of fraud implicating Rule 60(b)(3) is narrow. It is 'confined to the more serious, but fortunately rare, cases involving a corruption of the judicial process itself.'" (Ex. A at 23 (quoting *Smith v. Williams*, 2007 WL 2193748, at *4 (Del. Super. July 27, 2007)).) The Court of Chancery's reliance on *Smith* was misplaced. *Smith* was discussing "fraud on the Court," not fraud under Rule 60(b)(3):

> Thus, "fraud on the court" is typically confined to the more serious, but fortunately rare, cases involving a corruption of the judicial process itself, such as bribery of a judge or juror, improper influence exerted on the court by an attorney, or involvement of an attorney as an officer of the court in the perpetration of fraud. In each of these instances, the integrity of the court and its ability to function impartially are directly affected…. As Professor Moore has suggested in an oft-cited quote:

> Fraud upon the Court should, we believe, embrace only that species of fraud which does or attempts to, defile the Court itself, or is a fraud perpetrated by officers of the Court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.

Smith, 2007 WL 2193748, at *4 (quoting 7 James Moore et al., *Moore's Federal Practice* ¶ 60, 33 at 512-513).

In a prior decision, the Vice Chancellor properly distinguished between the two categories of cases:

> A Rule 60(b)(3) motion is reserved for situations where a party has engaged in fraud or misrepresentation that prevents the moving party from fairly and adequately presenting his or her case. "Fraud on the court," by contrast, is a different, more serious, species, generally limited to fraudulent conduct that seriously affects the integrity of the normal process of adjudication.

Franklin v. Glenhill Advisors LLC, 2023 WL 569192, at *5 (Del. Ch. Jan. 27, 2023) (footnote omitted) (internal quotation marks omitted), *aff'd*, 304 A.3d 950 (Del. 2023). Below, the Vice Chancellor failed to distinguish the two categories of cases.

The Court of Chancery rejected the notion that Erste's allegations supported a finding of "egregious conduct involving a corruption of the judicial process itself." (Ex. A at 24.) The Court of Chancery noted that the relevant disclosures in the 2019 Proxy and the 2020 Proxy "pre-date the April 27, 2020 amended complaint in the Prior Action." (*Id.*) The Court of Chancery also noted that Erste "merely

challenges statements made in SEC filings—outside the judicial process." (*Id.*) The Court of Chancery further observed that "Erste makes no well-pleaded allegation supporting a reasonable inference that counsel gave false information to this court." (*Id.* at 25.)

The above reasoning may be a legitimate basis to reject a claim of "fraud on the Court," but it is an improper basis to reject a claim of fraud between the parties under Rule 60(b)(3). Kraft Heinz's concealment of Cahill's ongoing consultancy prevented Erste from fairly and adequately presenting its case. The Court of Chancery observed that the "purported fraud is Kraft Heinz's public statements that Cahill was a 'former consultant whose consulting agreement had been terminated,'" and Erste's argument is that "these disclosures created a misimpression that Cahill's consulting relationship was in the past, which were relied upon by Erste, this court, and the Supreme Court in the Prior Action." (*Id.* at 24 (quoting A242 ¶ 9).)

The "misimpression" created by the false proxy statement disclosures was outcome-determinative as to Cahill's independence. In the Prior Action, the Court of Chancery distinguished the pleaded termination of Cahill's consultancy relationship from the facts in two other cases:

> *Compare Orman v. Cullman*, 794 A.2d 5, 30 (Del. Ch. 2002) (finding consulting fees comprising director's primary employment were material where the director was beholden to a controller for "future renewals"); *Friedman v. Beningson*, 1995 WL 716762, at *1, *5 (Del. Ch. Dec. 4, 1995) (finding regular receipt of consulting fees over 12 years to be material where an interested party could affect future receipts of such fees).

(A116 n.121 (cleaned up).) Here, the facts are similar to *Orman v. Cullman* and *Friedman v. Beningson* because they implicate the receipt of future compensation. The operative date for assessing demand futility is July 30, 2019. (A101.) As of that date, Cahill had not yet been issued the 500,000 stock options. Anticipation of those options would weigh on a hypothetical decision by Cahill to sue 3G. Even if the stock options were granted in accordance with the Compensation Committee's approval on June 20, 2019, only the first third of the options would vest in the first year. If Chairman Behring and the other 3G partners who comprised a majority of the Kraft Heinz Compensation Committee no longer wanted Cahill's consulting services, they could terminate his consultancy before the rest of the stock options vested. Plaintiffs were prevented from making that argument in the Prior Action.

Erroneously, the Court of Chancery did not analyze whether Erste satisfied the Rule 60(b)(3) standard for fraud between the parties (*i.e.*, that Kraft Heinz's fraud prevented Erste from fairly and adequately presenting its case respecting

Cahill's lack of independence). The Court of Chancery's application of the wrong legal standard warrants reversal.

2. The Court of Chancery Erred in Holding That Relief Under Rule 60(b)(3) Requires Pleading of Extrinsic Fraud

As noted above, Rule 60(b)(3) refers to "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." This language tracks its federal counterpart, which was drafted many decades ago to avoid the archaic and unclear distinction between intrinsic fraud and extrinsic fraud. *Wright & Miller* § 2860 ("The rule reaches all fraud, and rejects the confusing distinction between extrinsic and intrinsic fraud."); 12 James Moore et al., *Moore's Federal Practice* § 60.43[1][b] (3d ed.) ("Rule 60(b)(3) expressly states that a party may be relieved from a judgment on the basis of fraud, regardless of whether the fraud could be classified as 'intrinsic' or 'extrinsic.'").

The Court of Chancery exacerbated the confusion between Rule 60(b)(3) and fraud upon the court by erroneously stating: "To justify relief under Rule 60(b)(3), the 'fraud must be extrinsic.'" (Ex. A at 23 (quoting *Smith*, 2007 WL 2193748, at *5).) *Smith* does not stand for that proposition. The argument in *Smith* was that the plaintiff's perjury was "tantamount to a 'fraud on the Court' which should be remedied by dismissal." *Smith*, 2007 WL 2193748, at *1. *Smith* nowhere mentions Superior Court Civil Rule 60(b)(3).

The Court of Chancery also relied on *Postorivo*, which is likewise inapt. (Ex. A at 24 (citing *Postorivo v. AG Paintball Hldgs., Inc.*, 2008 WL 3876199, at *21 (Del. Ch. Aug. 20, 2008)). *Postorivo* followed *Smith* in discussing alleged fraud on the court. *Postorivo* nowhere mentions Rule 60(b)(3), which rejects any distinction between extrinsic fraud and intrinsic fraud. The Court of Chancery's labeling of Erste's allegations as "intrinsic fraud" has no bearing on a proper Rule 60(b)(3) analysis.

The Court of Chancery failed to analyze the operative question under Rule 60(b)(3), which is whether Kraft Heinz's false disclosures respecting the purported termination of Cahill's consultancy "prevent[ed] the moving party from fairly and adequately presenting his or her case." *MCA*, 785 A.2d at 639. Under the line of cases exemplified by *Orman v. Cullman* and *Friedman v. Beningson*, the answer to that question is yes.

Moreover, the Court of Chancery's erroneous requirement of extrinsic fraud was based on *Smith*, which erroneously defined extrinsic fraud as fraud that "affects the integrity and fairness of the judicial process itself." (Ex. A at 23 (cleaned up).) That is the definition for fraud upon the court. *See*, *e.g.*, *Johnson v. Preferred Pro. Ins. Co.*, 91 A.3d 994, 1005 (Del. Super. 2014) ("Fraud on the court is . . . generally

limited to fraudulent conduct that seriously 'affects the integrity of the normal process of adjudication.'" (quoting *Moore's Federal Practice* § 60.21[2])).

II. THE COURT OF CHANCERY ERRED IN HOLDING THAT "REASONABLE DILIGENCE" FOR PURPOSES OF RULE 60(B)(2) REQUIRES A STOCKHOLDER PLAINTIFF TO DEMAND INSPECTION OF BOOKS AND RECORDS THAT WOULD CONFIRM THE ACCURACY OF FEDERALLY MANDATED PROXY STATEMENT DISCLOSURES RESPECTING DIRECTOR COMPENSATION

A. Question Presented

Did the Court of Chancery err in dismissing Erste's claim of newly discovered evidence under Rule 60(b)(2) on the basis that "reasonable diligence" entails vetting the accuracy of federally mandated proxy statement disclosures respecting director compensation through a pre-litigation Section 220 inspection? (A462-67.)

B. Scope of Review

The Court of Chancery's dismissal under Court of Chancery Rule 12(b)(6) of Erste's application under Rule 60(b)(2) is subject to *de novo* review. *RBC Cap. Mkts., LLC v. Educ. Loan Tr. IV*, 87 A.3d 632, 639 (Del. 2014). The concept of "reasonable diligence" implicates questions of law. *See Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 768 (Del. 2013) ("This Court reviews the interpretation and application of legal precepts, such as … the doctrine of laches, *de novo*."). The underlying question whether Cahill is independent for purposes of pleading demand futility is reviewed *de novo*. *Marchand*, 212 A.3d at 817.

C. Merits of Argument

One element of "newly discovered evidence" for purposes of Rule 60(b)(2) is whether or not the evidence could have been discovered for use before dismissal "in the exercise of reasonable diligence." *Vianix Del. LLC v. Nuance Commc'ns, Inc.*, 2011 WL 487588, at *4 (Del. Ch. Feb. 9, 2011). The Court of Chancery erroneously held that Erste would have known about Cahill's "recut consulting arrangement had it exercised reasonable diligence." (Ex. A at 21.)

According to the Court of Chancery, Erste could have sought and obtained "Compensation Committee minutes and presentations" in a Section 220 inspection and thereby learned the "fact that Cahill provided consulting services to Kraft Heinz on new terms." (*Id.*) The Court of Chancery explained that such documents are "routinely provided in response to Section 220 demands," and they "would have allowed Erste to understand Cahill's new arrangement." (*Id.* at 21-22 & n.108.) The Court of Chancery chided Erste for having "chose[n] not to demand documents about directors' compensation or consulting arrangements with Kraft Heinz" despite having "demanded" documents about the relationships between or among members of the Board, apart from their service as directors as directors of Kraft Heinz. (*Id.* at 21-22.)

The analogy fails. Federal law does not create a checklist of relationships between or among directors that must be disclosed in a proxy statement. Such information is therefore properly available under Section 220 because Section 220 creates an avenue to obtain information that is *not* required to be publicly disclosed. Federal law creates a checklist for the disclosure of director compensation data. Section 220 does not purport to create a back-up verification regime.

The Court of Chancery erred as a matter of law in holding that "reasonable diligence" for purposes of Rule 60(b)(2) entails pursuit of a Section 220 inspection for backup materials confirming the accuracy of federally mandated proxy statement disclosures concerning director compensation. Stockholders and the Delaware courts are entitled to rely on publicly traded Delaware corporations to comply with their clear legal obligations under 17 C.F.R. § 229.402(k), which is also known as Item 402(k) of Regulation S-K. Section 220 of the Delaware General Corporation Law does not establish a back-up regulatory regime to the Securities and Exchange Commission by which stockholder plaintiffs and members of the Court of Chancery are deputized to confirm the accuracy of federally mandated compensation disclosures.

1. Stockholders and the Delaware Courts Are Entitled to Rely on the Accuracy of Information Filed with the SEC

Erste supplied the Court of Chancery with a highlighted, excerpted handbook published in 2016 setting forth required proxy statement disclosures respecting director compensation under Item 402(k) of Regulation S-K. (A525-38.) It provides that "companies must disclose in the Director Compensation Table all director compensation earned or paid to its directors in the last completed fiscal year. Narrative disclosure of any material factors necessary to understand the director compensation accompanies the table." (A530.) In particular, "Companies must include in the All Other Compensation column to the Director Compensation Table, if applicable: the dollar amounts of consulting fees paid to directors (including … for non-director services) …." (A531.) Instruction to Item 402(k)(2) requires a "narrative description" of "[w]hether any director has a different compensation arrangement, identifying that director and describing the terms of the arrangement." (A537.)

"Shareholders are entitled to rely upon the truthfulness of all information disseminated to them by the directors they elect to manage the corporate enterprise." *Malone v. Brincat*, 722 A.2d 5, 10-11 (Del. 1998). A stockholder plaintiff "may rely on public filings and accept them as true, and need not assume that directors and officers will falsify such filings." *Ryan v. Gifford*, 918 A.2d 341, 360 (Del. Ch.

2007)). The oft-invoked "tools at hand" available to a stockholder plaintiff, *White v. Panic*, 783 A.2d 543, 557 & n.54 (Del. 2001), includes access to publicly available information maintained by "governmental agencies such as the Securities and Exchange Commission." *Rales*, 634 A.2d at 934 n.10.

Delaware courts take judicial notice of information filed with the SEC. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d at 170-72; *Wal-Mart Stores, Inc.*, 860 A.2d at 320 & n.28; *Ontario Provincial Council of Carpenters' Pension Tr. Fund v. Walton*, 2023 WL 3093500, at *2 & n.2 (Del. Ch. Apr. 26, 2023); *Samuels v. CCUR Hldgs., Inc.*, 2022 WL 1744438, at *2 n.8 (Del. Ch. May 31, 2022); *In re Tyson Foods, Inc. Cons. S'holder Litig.*, 919 A.2d 563, 584 n.41 (Del. Ch. 2007) ("According to Tyson's 2004 proxy statement, Bond received a base salary of $943,615 and a bonus of $1.2 million in 2003."). The operative evidentiary rule permits judicial notice of "a fact that is not subject to reasonable dispute because it … can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." D.R.E. 201(b)(2).

In the statute of limitations context, the Court of Chancery has reasoned that the "obligation to exercise reasonable diligence" does not entail "an obligation to sift through a proxy statement, on the one hand, and a year's worth of press clippings and other filings, on the other, in order to establish a pattern concealed by

those whose duty is to guard the interests of the investor." *In re Tyson Foods, Inc.*, 919 A.2d at 591. The Court of Chancery did not explain why Erste had any obligation of reasonable diligence to look beyond the 2019 Proxy Statement and demand inspection of Compensation Committee materials that may or may not contradict Kraft Heinz's director compensation disclosures.

2. Section 220 Does Not Establish a Backup Regulatory Regime to Confirm the Accuracy of Director Compensation Disclosures

Section 220 does not establish a backup regulatory regime to confirm or dispute the content of compensation data publicly disclosed pursuant to Item 402(k) of Regulation S-K. The Court of Chancery erred in holding otherwise.

"As a general matter, an inspecting stockholder with a proper purpose 'bears the burden of proving that each category of books and records is essential to accomplishment of the stockholder's articulated purpose for the inspection.'" *KT4 P'rs LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 751 (Del. 2019) (quoting *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1035 (Del. 1996))). "Books and records satisfy this standard 'if they address the "crux of the shareholder's purpose" and if that information is unavailable from another source.'" *Id.* (quoting *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264, 1271 (Del. 2014)). It logically follows that the Court of Chancery "will limit or deny any

inspection to the extent that the requested information is available in the corporation's public filings." *Polygon Glob. Opportunities Master Fund v. W. Corp.*, 2006 WL 2947486, at *3 (Del. Ch. Oct. 12, 2006) (citing Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 8.6(e)(1) (2005)).

Erste could not demand inspection of Kraft Heinz's Compensation Committee materials based on mere speculation the Company's director compensation disclosures could be inaccurate. "If the stockholder cannot present a credible basis … from which the court can infer wrongdoing or mismanagement, it is likely that the stockholder's demand is an 'indiscriminate fishing expedition.'" *AmerisourceBergen Corp. v. Lebanon Cnty. Emps.' Ret. Fund*, 243 A.3d 417, 428 (Del. 2020) (quoting *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 122 (Del. 2006)). "The lack of any evidence … is reflective of the kind of speculation and idle curiosity that cannot form a credible basis to investigate." *KT4 P'rs LLC v. Palantir Techs., Inc.*, 2018 WL 1023155, at *15 (Del. Ch. Feb. 22, 2018), *aff'd in part, rev'd in part on other grounds*, 203 A.3d 738 (Del. 2019).

The Court of Chancery cited two inapt Rule 60(b)(2) rulings in which plaintiffs had not obtained documents in discovery, *In re U.S. Robotics Corp. Shareholders Litigation*, 1999 WL 160154 (Del. Ch. Mar. 15, 1999), and

Wimbledon Fund LP v. SV Special Situations LP, 2011 WL 378827 (Del. Ch. Feb. 4, 2011). (Ex. A at 22 n.110.) But Plaintiffs could not have taken discovery before disposition in the Prior Action of Defendants' Rule 23.1 motion to dismiss. *Levine v. Smith*, 591 A.2d 194, 208-10 (Del. 1991). If the Compensation Committee materials are not available under Section 220, it is illogical to conclude that they supposedly could have been requested "years ago." (Ex. A. at 22.)

3. The Court of Chancery Erroneously Analyzed Erste's Ability to Uncover Cahill's Ongoing Consultancy Through a Section 220 Inspection

Apart from the issues of law discussed above, the Court of Chancery erred in analyzing Erste's ability to uncover Cahill's ongoing consultancy through a Section 220 inspection. On a motion to dismiss, the pertinent question is whether the complaint pleads reasonable diligence "under any reasonably conceivable set of circumstances susceptible to proof." *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 897 (Del. 2002). The Court of Chancery erroneously ruled that Erste's Section 220 demand "cannot be read to include documents about compensation or consulting arrangements" (Ex. A at 22 n.109), and that inspection of the "2019 Compensation Committee materials would have allowed Erste to understand Cahill's new arrangement." (*Id.* at 22 n.108).

The Court of Chancery acknowledged that Erste demanded documents "reflecting any and all personal, familiar, financial, or business relationships, other than their service as directors of Kraft Heinz, between or among any members of the Board." (Ex. A at 22 n.109.) By the plain words of that request, it covers the ongoing consulting relationship between Cahill and Behring. As discussed in Section B of the Statement of Facts, *supra*, that relationship began with Cahill's 2015 consulting agreement, continued with Cahill's 2017 consulting agreement, went beyond Cahill's responsibilities as a director, and continued on new terms approved on June 20, 2019. (*See* Ex. A at 4-6, 15.) It follows that Kraft Heinz should have produced the Compensation Committee materials, as well as Cahill's June 1, 2019 email, in which he refers to his "commitment to working with the new team to turn around Kraft Heinz." (A14.)

But Kraft Heinz did not do so. Below, Defendants argued that Kraft Heinz's proxy statement disclosures were accurate, insisted that Cahill's consultancy terminated on July 1, 2019, and contended that the grant of 500,000 stock options to Cahill was "designed to compensate him for his expanded role and work" as Chair of the newly reconstituted Operations and Strategy Committee. (A496.) The Court of Chancery rejected Defendants' contention by referring to Cahill's "recut consulting arrangement," his "new arrangement," and the "fact that Cahill provided

consulting services to Kraft Heinz on new terms." (Ex. A at 21, 22 n.108.) But if Cahill's consultancy relationship with Behring remained in place, then Erste's request for documents reflecting any business relationship between directors apart from service as a director did, in fact, request documents reflecting that consulting relationship.

The Court of Chancery also erred in characterizing as "cumulative" Cahill's June 1, 2019 email and the 2023 report of the Board working group. (*Id.* at 22 n.108.) Defendants insisted on the accuracy of Kraft Heinz's proxy statement disclosures in the face of all of Erste's newly discovered evidence. According to Defendants, the documents "do not show that Cahill continued working and being compensated as a consultant to the Company after his 2017 Consulting Agreement terminated as of July 1, 2019," and "show that Cahill *did* stop performing consulting services." (A363-64; A414.) If Erste possessed only the Compensation Committee materials, Defendants would have been emboldened to argue that those documents did not actually specify that a consultancy relationship would remain in place.

It is reasonably conceivable that Erste's failure pre-litigation to expose the falsity of Kraft Heinz's proxy statement disclosures respecting a terminated consulting relationship with Cahill is attributable to fraudulent concealment by Kraft Heinz, not lack of diligence by Erste.

III. THE COURT OF CHANCERY ERRED IN DISMISSING ERSTE'S INDIVIDUAL CLAIM FOR DAMAGES BASED ON DISLOYAL FALSE DISCLOSURES

A. Question Presented

Did the Court of Chancery err in dismissing Erste's individual claim for damages (*i.e.*, recoupment of its litigation costs) damages against certain fiduciaries of Kraft Heinz for disloyally approving never-corrected false disclosures in the 2019 Proxy and 2020 Proxy on the basis that Erste did not plead the requisite elements of *scienter*, reasonable reliance, causation, and damages? (A475-77.)

B. Scope of Review

This Court reviews a trial court's grant of a Rule 12(b)(6) motion to dismiss *de novo*. *RBC Capital Mkts.*, 87 A.3d at 639.

C. Merits of Argument

Count II of the Complaint contains the following allegations:

> 291. The Disclosure Defendants knew the actual facts about the revised compensation arrangements for ongoing consultancy work by Cahill and Zoghbi. The Disclosure Defendants also knew that the 2019 Proxy falsely and misleadingly described the changes to the compensation arrangements of Cahill and Zoghbi, and that subsequent proxy statements falsely described Cahill's ongoing consultant status.
>
> 292. The Disclosure Defendants acted disloyally in never correcting the 2019 Proxy or the 2020 Proxy, which they knew was being used by the 3G Defendants to create a false record for the Court of Chancery and the Delaware Supreme Court to adjudicate the independence of Cahill and Zoghbi in the Prior Action.

> 293. Plaintiff Erste was a Co-Lead Plaintiff in the Prior Action. Plaintiff Erste was harmed directly by the litigation costs incurred on Erste's behalf in the Prior Action. Plaintiff Erste continues to incur litigation costs to escape the effect of the wrongful dismissal of the Prior Action based on fraudulent public disclosures by [Kraft Heinz] that were not corrected by the Disclosure Defendants.

(A344 ¶¶ 291-93.)

As to Cahill, Count II pleads a claim under *Malone v. Brincat*, which provides that directors bear a "general fiduciary duty of loyalty and good faith" to "deal with their stockholders honestly" and not "knowingly disseminat[e] to the stockholders false information." 722 A.2d 5, 10 (Del. 1998); *see also Dohmen v. Goodman*, 234 A.3d 1161, 1169 (Del. 2020) ("[T]o state a claim for breach of fiduciary duty in this context, the directors must have knowingly disclosed false information.").

Defendants argued below that Erste had not pleaded the elements of a disclosure claim to recover Erste's litigation costs because "the Company indisputably disclosed all of the facts about the changes in Cahill's … consulting arrangements and compensation in subsequent SEC filings before Erste and the other plaintiffs filed the Complaint in the Prior Action" and "it was Plaintiff's tactical choice to craft the allegations of its Prior Complaint without evaluating all of the Company's public statements concerning issues it intended to plead." (A418-19.) The Court of Chancery rejected the argument that Erste failed to plead

falsity, but rejected the disclosure claim on the basis that the other elements were not well-pleaded because Erste could have uncovered the actual facts about Cahill's new consultancy arrangement through a pre-litigation Section 220 inspection.

According to the Court of Chancery, Erste's "pleading deficiency" with respect to "reasonable reliance, causation, and resulting damages" "may well be because Count II is aimed at recovering the attorneys' fees and expenses Erste incurred *due to its own litigation strategy*." (Ex. A at 28 (emphasis added).) The court blamed Erste for having "opted not to seek books and records about compensation." (*Id.* at 28-29.) As to *scienter*, the court referred back to Erste's supposed insufficient diligence: "On these facts, I cannot reasonably infer that the director defendants 'knew' false statements were being used to create a false litigation record." (*Id.* at 29 (cleaned up).)

This rationale fails as a matter of law. *See supra* Argument II. Erste incorrectly alleged that Cahill's consultancy had terminated, in reasonable reliance on the false and misleading disclosures in the never-corrected 2019 Proxy.

Additionally, Erste's brief below properly rebutted Defendants' arguments to dismiss Count II by discussing how they all "turn on the false premise that the facts respecting Cahill were accurately and publicly disclosed by April 2020." (A475-76.) The Court of Chancery improperly suggested that Erste waived its

disclosure claim (Ex. A at 28 n.138) when, in fact, Erste responded to Defendants' actual argument.

CONCLUSION

For all the forgoing reasons, Erste respectfully requests that this Court reverse the dismissal of this action, determine that Cahill is not independent for purposes of pleading demand futility, grant relief from the dismissal of the Prior Action, and remand the case for further proceedings.

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