EFiled: Nov 20 2024 04:45PM EST
Filing ID 75053599
Case Number 374,2024

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

APPELLEES' ANSWERING BRIEF

OF COUNSEL:

Daniel J. Kramer
Andrew J. Ehrlich
Robert N. Kravitz
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

OF COUNSEL:

Sandra C. Goldstein
Stefan Atkinson
Kevin M. Neylan, Jr.
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800

Dated: November 20, 2024

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

Matthew D. Stachel (No. 5419)
1313 N. Market Street, Suite 806
Post Office Box 32
Wilmington, DE 19899-0032
(302) 655-4410

Attorneys for Appellees/Defendants Below The Kraft Heinz Company, Bernardo Hees, Alexandre Behring, Jorge Paulo Lemann, Marcel Herrmann Telles, Paulo Basilio, David Knopf, Eduardo Pelleissone, John Cahill, George Zoghbi, Rashida La Lande, and Joao M. Castro-Neves

POTTER ANDERSON & CORROON LLP

Michael A. Pittenger (No. 3212)
Jacqueline A. Rogers (No. 5793)
Camilia R. Katkocin (No. 7216)
1313 N. Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801
(302) 984-3800

Attorneys for Appellees/Defendants Below 3G Capital, Inc., 3G Capital Partners Ltd., 3G Capital Partners II LP, 3G Global Food Holdings GP LP, 3G Global Food Holdings LP, and HK3 18 LP

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Cases

Other Authorities

NATURE OF PROCEEDINGS[1]

Plaintiff Erste Asset Management GmbH ("Plaintiff" or "Erste") seeks to secure a do-over, via an independent action under Rule 60(b), to revive derivative claims it asserted on behalf of nominal defendant The Kraft Heinz Company ("Kraft Heinz" or the "Company"), which the Court of Chancery correctly dismissed with prejudice in December 2021 in a well-reasoned opinion that this Court summarily affirmed in August 2022. *In re Kraft Heinz Co. Deriv. Litig.*, 282 A.3d 1054 (Del. 2022) (TABLE); *In re Kraft Heinz Co. Deriv. Litig.*, 2021 WL 6012632 (Del. Ch. Dec. 15, 2021). But the Vice Chancellor correctly determined that Plaintiff's 2023 complaint failed to adequately plead that relief from the prior judgment was warranted under Rule 60(b) on the basis of either purported newly discovered evidence or purported fraud on Plaintiff and on the court. The Vice Chancellor also correctly determined that Plaintiff failed to state a disclosure-based claim for breach of fiduciary duty because it did not attempt to plead the required elements of reasonable reliance, causation, damages, or scienter. Each of Plaintiff's arguments on appeal lacks merit. The Court of Chancery's dismissal should be affirmed.

[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###."

Plaintiff's arguments to reverse the Vice Chancellor's decision below are nothing more than an expression of its disappointment in the 2021 dismissal and its own strategic decisions, and provide no basis to reopen the prior judgment. "Because of the significant interest in preserving the finality of judgments, Rule 60(b) motions are not to be taken lightly or easily granted." *In re MCA, Inc.* v. *Matsushita Elec. Indus. Co., Ltd.*, 785 A.2d 625, 634-35 (Del. 2001) (footnote and citations omitted). "A Rule 60(b) motion is not an opportunity for a do-over or an appeal." *Carlyle Inv. Mgmt. L.L.C.* v. *Nat'l Indus. Grp. (Hldg.)*, 2012 WL 4847089, at *5 (Del. Ch. Oct. 11, 2012), *aff'd*, 67 A.3d 373 (Del. 2013).

First, Plaintiff does not come close to alleging well-pleaded factual allegations supporting an inference that the judgment in the prior action should be reopened under Rule 60(b)(3) due to purported fraud on Plaintiff by Kraft Heinz. As a threshold matter, Plaintiff's opening brief on appeal abandoned—and thus waived—its claim that the complaint pleaded fraud on the court. Plaintiff's argument to this Court that the Vice Chancellor only analyzed whether the complaint pleaded fraud on the court and not fraud on Plaintiff under Rule 60(b)(3) misses the mark. As the Vice Chancellor correctly reasoned, Plaintiff's argument fails because Plaintiff's challenge is to extra-litigation disclosures in proxy statements made before Plaintiff filed the amended complaint in the prior action. But Rule 60(b)(3) only applies to fraud that amounts to *unfair litigation tactics* in the prior litigation

that prevented the Plaintiff from presenting its case. The complaint pleaded nothing of the sort and thus cannot state a claim that relief under Rule 60(b)(3) is warranted.

Second, Plaintiff's argument that the Vice Chancellor erred in determining that the complaint failed to adequately plead the existence of newly discovered evidence that Plaintiff could not have discovered in the exercise of reasonable diligence both before it filed the consolidated complaint in April 2020 *and* before the prior action was dismissed is equally unfounded. As the Vice Chancellor reasoned, Plaintiff could have uncovered the purportedly newly discovered evidence had it conducted both an appropriately thorough books and records inspection and review of Kraft Heinz's public statements before filing its April 2020 complaint. Indeed, using Kraft Heinz's public statements alone, Plaintiff effectively (and improperly) made the argument that it now wishes it had made in the April 2020 complaint for the first time on appeal to this Court in 2022. Plaintiff's books and records demand also did not even *attempt* to seek the relevant minutes and materials that Plaintiff now claims are newly discovered, which are in the heartland of materials that corporations are required to produce in response to books and records demands. And Plaintiff's argument that it could satisfy the Rule 60(b)(2) reasonable diligence standard by merely relying on certain of Kraft Heinz's public statements (while ignoring others) without pleading any effort to obtain the documents it now claims are newly discovered is contrary to the well-settled Rule 60(b)(2) standard.

Finally, Plaintiff cannot revive its direct claim for breach of fiduciary duty against certain of the Kraft Heinz director defendants for purportedly knowingly making false disclosures in Kraft Heinz's proxy statements to create an allegedly false litigation record. Plaintiff does not dispute that this claim does not seek to vindicate Kraft Heinz shareholders' economic and voting rights but rather seeks compensatory damages to Plaintiff in the amount of its litigation expenses in the prior action. As the Vice Chancellor correctly concluded, Plaintiff was required—but failed—to plead the required elements of reasonable reliance, causation, damages, and scienter. Plaintiff's argument that it can rely on a presumption of reliance, causation, and damages ignores well-settled law that such a presumption is not applicable in an individual stockholder's suit to recover compensatory damages for breach of fiduciary duty. The Vice Chancellor also correctly concluded that Plaintiff waived any argument that its complaint satisfied these elements. In all events, the complaint lacked well-pleaded factual allegations about each disclosure defendant's conduct to support an inference that the director knowingly made false statements for the purpose of creating a false litigation record.

The Court of Chancery's dismissal of the Complaint under Rule 12(b)(6) for failure to plead relief is warranted under Rule 60(b) (Count I) and to state a disclosure-based breach of fiduciary duty claim on which relief can be granted (Count II) should be affirmed.

SUMMARY OF ARGUMENT

1. **Denied.** Dismissal of the Complaint under Rule 12(b)(6) was proper because the Vice Chancellor correctly held that the Complaint failed to adequately plead that relief from the judgment in the prior action (Count I) was warranted under Rule 60(b)(3) for purported fraud.

2. **Denied.** Dismissal of the Complaint under Rule 12(b)(6) was proper because the Vice Chancellor correctly held that the Complaint failed to adequately plead that relief from the judgment in the prior action (Count I) was warranted under Rule 60(b)(2) for purported newly discovered evidence.

3. **Denied.** Dismissal of Plaintiff's breach of fiduciary duty claim for alleged false disclosures (Count II) under Rule 12(b)(6) was proper. The Vice Chancellor correctly held that Plaintiff failed to adequately plead the required elements of reasonable reliance, causation, damages, and scienter, and in all events waived any argument that it had so pleaded.

STATEMENT OF FACTS

A. The Parties.

Kraft Heinz is one of the world's largest food and beverage companies and is incorporated in Delaware. (A262.) The Company became a public entity in July 2015 after the merger of Kraft Foods Group, Inc. ("Kraft Foods") and H. J. Heinz Holding Corporation ("Heinz"). (A267.) The individual defendants are current or former Kraft Heinz directors or officers. (A253–A262.)

Defendant 3G Capital, Inc. is a global investment firm. (A251.) Defendants 3G Capital Partners Ltd., 3G Global Food Holdings L.P., 3G Global Food Holdings GP LP, 3G Capital Partners II L.P., and HK3 18 LP are 3G Capital, Inc. affiliates. (A252–A253.)

Plaintiff is an asset management company that purportedly owned a single share of Kraft Heinz stock out of over 1 billion shares outstanding. (A250–A251.)

B. John Cahill's Consulting Agreements and the Company's Disclosures.

Defendant John Cahill was CEO of Kraft Foods before it merged with Heinz. (A256.) After the merger in July 2015, he served as a director of the merged company and vice chairman of the Board. (*Id.*) Also in July 2015, he and the Company agreed to a two-year Consulting Agreement pursuant to which he agreed to provide specified consulting services to then-CEO Bernardo Hees and Chairman

Alex Behring, for which he would be paid $4 million per year (the "2015 Consulting Agreement"). (A257.)

After the 2015 Consulting Agreement expired, Cahill and the Company entered into a new Consulting Agreement effective November 1, 2017 (the "2017 Consulting Agreement"), under which Cahill was paid $500,000 per year. (A257–A258.) In light of a reduction in his consulting duties, Cahill proposed that the Company reduce his compensation to be more consistent with that paid to other directors. (A210.) Cahill noted that he believed the value of the services he was to provide and, in fact provided, to the Company under that agreement exceeded the $500,000 annual payment. (*Id.*) The advisory and consulting services Cahill was to provide (the "Services") "related to the current and historical finances of the Company; relationships with licensors, customers and vendors; employee matters; product development, marketing and distribution; government affairs and strategic opportunities (including potential mergers, divestitures, or acquisitions)." (B1 ¶ 1.)

The 2017 Consulting Agreement also stated that the "Services" that Cahill was to provide to the Company were "distinct from the duties [he provided] as a member of the Board of Directors of Kraft Heinz or any committee thereof," and that upon termination of the agreement, Cahill would "have no further Services obligations, under the Agreement." (B1 ¶¶ 1 & 3.)

In June 2019, Cahill emailed Behring and director Gregory Abel, asking that they "consider a change to [his] financial arrangement with Kraft Heinz." (A14.) He wrote:

> The bulk of my financial tie[s] to the Company is in the form of options, and all my options are underwater. This is completely appropriate given our results and the losses shareholders have endured. At the same time, I am mindful that I am deemed to be a non-independent Director because of recurring annual consulting payments of $500,000. This is probably not hea[l]thy for the long term.
>
> To address both issues, I recommend the Company suspend consulting payments to me (benefitting the ongoing P&L). In lieu, the Company would provide me a one-time grant of 500,000 options vesting ratably over three years. This would get me on the road to independent status.
>
> If you think this is not sensible, no worries. Know that my commitment to working with the new team to turn around Kraft Heinz is solid. Thinking through this, [i]t occurred to me that this approach has benefits from several perspectives.
>
> No rush to respond. Thanks. John

(*Id.*)

Cahill also told Behring and Abel that he expected that his work for the Company as a Board committee chair was likely to increase at that time, in light of "increasing commercial headwinds facing the Company" and because the Company "had recently reconstituted its Operations and Strategy Committee," and he had been named to lead the Committee. (A210.) Cahill's proposal was also based on the fact that the Company's focus at the time was "on expense management, and compensating him through options vesting over three years would provide the

Company with more cash-in-hand during that period." (A210–A211.) Finally, Cahill explained that his belief that it would be in the Company's interests to position him to qualify as an independent director under NASDAQ listing rules in three years' time "was not motivated by any shareholder derivative actions or demand letters" and he "did not recall being aware at the time he proposed the compensation structure of any shareholder derivative actions or demand letters." (A211.)

The Compensation Committee of the Company's Board then met on June 20, 2019. A deck presented at the meeting said, in regard to Cahill:

> • "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."
>
> • "This creates a path for Cahill becoming an independent board member in three years."

(A16.)

In regard to the timing of the options, the deck said "[t]he stock options are expected to be issued the later of the end of the blackout period or August 15 based on the closing price for the KHC stock on that date." (*Id.*)

The minutes of the Committee's June 20, 2019 meeting state that the Committee "discussed proposed changes to Mr. Cahill's compensation arrangement," and, after discussion, approved them. (A18.)

Kraft Heinz filed its 2019 Proxy Statement with the SEC on August 2, 2019, after the Compensation Committee had approved the termination of Cahill's compensation as a consultant but before his new stock options were issued. Accordingly, the 2019 Proxy Statement reported that "Mr. Cahill's advisory and consulting arrangement terminated on July 1, 2019," but did not show that he had received a grant of stock options, because that had not yet occurred. (B7.) Once the stock options were granted, however—which happened on August 16, 2019—they were promptly disclosed in a Form 4 filed with the SEC just four days later, on August 20, 2019. (A37–38.)

The 2019 Proxy Statement also disclosed that the Board had appointed Cahill as chair of its newly re-established Operations and Strategy Committee, and detailed the committee's extensive responsibilities. (A79–A80.) That committee's responsibilities included reviewing and making recommendations to the Board regarding: "[i] our corporate strategy, performance, and annual capital plan, as well as certain individual capital projects; [ii] the impact of external developments and factors such as any changes in economic conditions, competition in the industry, environmental and safety regulations, federal state and local regulations and technology, on our corporate strategy and its execution; [iii] identification of prospects and opportunities for corporate developments and growth initiatives, including acquisitions, divestitures, joint ventures and strategic alliances; and [iv]

implementation of our corporate strategy through corporate developments and growth initiatives, including acquisitions, divestitures, joint ventures and strategic alliances." (*Id.*)

The Company's 2020 Proxy Statement, which the Company filed with the SEC on March 27, 2020, also disclosed that Cahill's 2017 "advisory and consulting arrangement terminated on July 1, 2019," and that, "[i]n connection with the termination of his consulting agreement, [he] received a one-time grant of 500,000 stock options." (A73.)

C. Plaintiff's Pre-Suit Inspection and Prior Derivative Complaint.

On December 2, 2019, Plaintiff submitted its first Section 220 demand to the Company. (B11.) The Company agreed to produce certain documents in response to this demand, as Plaintiff admitted in the preamble to its complaint. (A238.) Notwithstanding the 2019 disclosures concerning Cahill's compensation arrangements in the proxy statements and Form 4, Plaintiff's demand did not seek documents relating to those arrangements. (B18–B20.)

Satisfied with its pre-suit inspection, Plaintiff ultimately filed suit on January 21, 2020 in an action styled *Erste Asset Mgmt. GmbH* v. *3G Cap., Inc.*, C.A. No. 2020-0043-AGB (Del. Ch.). That action was subsequently consolidated with a prior derivative action that had commenced on July 30, 2019, styled *In re Kraft Heinz Co. Deriv. Litig.*, Cons. C.A. No. 2019-0587-LWW (the "Prior Action").

On February 7, 2020, Plaintiff moved to be appointed a lead plaintiff in the Prior Action. (B26.) At that time, Plaintiff represented that it held 13,347 shares of Kraft Heinz stock and argued to the Court that its stake in Kraft Heinz meant that it "ha[d] a substantial interest in the outcome of this litigation and [was] properly motivated to monitor the litigation and counsel." (B33.)

By order dated March 13, 2020, Plaintiff was appointed a co-lead plaintiff in the Prior Action. (A49–A52.)

On April 27, 2020—well after the Company had disclosed all of the foregoing information about the termination of Cahill's consulting agreement and his option grant—including the 2019 Proxy disclosing the termination of the consulting agreement, the 2019 Form 4 disclosing the option grant, and the 2020 Proxy again disclosing the option grant "[i]n connection with the termination of [Cahill's] consulting agreement"—Plaintiff and its co-lead plaintiffs filed a Consolidated Amended Verified Stockholder Derivative Complaint (the "Prior Complaint") in the Prior Action. (B53; A58.) The claims in the Prior Complaint were based on 3G's August 2018 sale of 7% of its then-24% stake in Kraft Heinz, which was followed six months later in February 2019 by Kraft Heinz disclosing disappointing financial results and impairment charges and its stock price dropping significantly. (B55–B62 ¶¶ 1–21.) The complaint alleged, among other things, that the 3G Defendants and the individual defendants named in that action breached their fiduciary duties to

Kraft Heinz stockholders in connection with the approval of 3G's sale of Company stock, which was allegedly based on adverse material non-public information about the Company. (*Id.*)

D. The Court of Chancery Dismissed the Prior Complaint for Failure to Plead Demand Futility.

On December 15, 2021, the Court of Chancery issued a detailed memorandum opinion dismissing the Prior Complaint with prejudice pursuant to Rule 23.1 for failure to plead demand futility. *Kraft Heinz*, 2021 WL 6012632. The court reasoned that the plaintiffs had failed to plead particularized facts creating a reasonable doubt that six of the eleven members of Kraft Heinz's board of directors at the time the original complaint was filed (the "Demand Board") lacked independence from 3G or its defendant partners: Jeanne Jackson, John Pope, Feroz Dewan, Gregory Abel, Tracy Britt Cool, and Cahill. *Id.* at *5, *8. Because those six constituted a majority of the Demand Board, the court did not resolve whether George Zoghbi and Alexandre Van Damme, two other Demand Board members, were independent of 3G. *Id.* at *13. The court also did not rule on the defendants' pending motions to dismiss for failure to adequately state claims for relief.

In regard to Cahill, among other things, the Court of Chancery rejected the plaintiffs' argument that he lacked independence from 3G because Kraft Heinz had previously paid him $500,000 per year as a consultant in addition to his $235,000 per year director compensation. The court reasoned:

> 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.

Id. at *11. The court's statement that Cahill's consulting agreement with Kraft Heinz had terminated on July 1, 2019, was based on the plaintiffs' own allegation in the Prior Complaint. (B69 ¶ 43 ("Following the Merger, and until July 1, 2019, Cahill served as a consultant for KHC and was paid an annual base salary of $500,000, in addition to annual Board fees of approximately $235,000, which together constituted more than half (52%) of Cahill's publicly reported income in 2018.").)

The court also reasoned that, even if it were to find that Cahill's past consulting and director fees were material to him at the time, "it is not clear why they would create a sense of 'owingness' to 3G." *Kraft Heinz*, 2021 WL 6012632, at *12) (citations and footnotes omitted). As the court explained:

> Cahill had no relationship with 3G before Kraft was merged with Heinz. The Complaint lacks any particularized allegations supporting a pleading-stage inference that 3G was responsible for his directorship or consulting arrangement with Kraft Heinz or had the power to strip him of potential future consulting fees or his Board position.

Id. (citations and footnotes omitted).

Finally, the court assumed that Cahill lacked independence from the Company "under Nasdaq rules," but held that this consideration did not change the futility analysis, because the Nasdaq independence determination "concerns [Cahill's] independence from Kraft Heinz—not from 3G. In [the

court's] view, that determination carries little weight given the dearth of particularized allegations suggesting that Cahill is beholden to 3G." *Id.* (citation and footnote omitted).

E. This Court Summarily Affirmed The Court of Chancery's Decision in the Prior Action.

The plaintiffs appealed the Court of Chancery's decision to this Court. For the first time on appeal, the plaintiffs argued that the Company had changed the compensation arrangements of Cahill and Zoghbi[2] in 2019, so that they might be considered independent in connection with the consideration of anticipated derivative litigation. Based on public filings, the plaintiffs argued:

> • "The stock grants to Zoghbi and Cahill were disclosed in August 2019, and Zoghbi's new consulting agreement was entered into on September 6, 2019, suggesting that the economic arrangements for both individuals were being restructured in anticipation of the filing of derivative actions."
>
> • "Cahill's status as a 'prior consultant' appears to have been orchestrated while KHC was expecting derivative litigation, and implemented afterwards."
>
> • "KHC's 2020 proxy statement describes the grant of stock options to Cahill '[i]n connection with the termination of his consulting

[2] In its 2023 Complaint, Plaintiff alleged that (i) the judgment in the Prior Action should be reopened due to purported fraud and newly discovered evidence concerning Zoghbi's compensation arrangement with Kraft Heinz and (ii) certain director defendants breached their fiduciary duties in making purportedly false statements about Zoghbi's compensation arrangements in Kraft Heinz's proxy statements. The Vice Chancellor held that Plaintiff's allegations as to Zoghbi also failed to state a claim. (Op. 25–29.) In its opening brief on appeal, Plaintiff abandoned its claims as to Zoghbi.

> agreement" (A428), but the Form 4 respecting the options was filed on August 20, 2019, and states that the 'transaction date' was August 16, 2019—after the termination of the consulting agreement and after the filing of the first derivative complaint. (AR20.) In other words, KHC sought to challenge demand futility based on Cahill's status as former consultant, when in reality they were conniving to pay him differently without requiring any further consulting work."
>
> • "Cahill's economic arrangements had not severed as of the operative date[.]"
>
> • "As with Cahill, the timing of Zoghbi's new agreement [in 2019] suggests that KHC was trying to restructure his compensation in anticipation of derivative litigation, in the hope of defeating demand futility. Defendants argue that Zoghbi's new agreement provides that if KHC terminated his agreement, he would be paid a "lump sum" equal to his cash consulting compensation until July 1, 2022. (AB at 37.) No such make-whole payment for cash compensation previously existed. (AR2-11.) The 2020 proxy statement disclosed that Zoghbi received 200,000 stock options in connection with the new agreement reducing his compensation. (A428.) He received those 200,000 options on August 16, 2019, the same day that Cahill got 500,000 options. (AR21.)"

(B159, B171–B172, B175.) The plaintiffs cited no particularized, well-pleaded allegations (or anything else) for the proposition that the compensation changes "appear[ed]" to have been orchestrated in anticipation of derivative litigation.

On August 1, 2022, this Court affirmed the Court of Chancery on the basis of, and for the reasons stated in, the court's opinion. *Kraft Heinz*, 282 A.3d 1054.

F. Switching Courses, Plaintiff Served a Litigation Demand, Which Was Investigated by a Working Group of the Board and Ultimately Rejected as Contrary to the Company's Best Interests.

On November 29, 2022, nearly four full months after this Court affirmed the dismissal of the Prior Action, Plaintiff served a pre-suit litigation demand on the

Kraft Heinz Board to bring the claims that were the subject of its Prior Complaint against the 3G Defendants. (B184.) Plaintiff claimed that the 3G Defendants and certain individual defendants affiliated with 3G improperly caused the Company "to gift director John T. Cahill 500,000 options after his consulting agreement was terminated." (B189–B190.)

The Board tasked a Working Group comprised of two independent directors, advised by counsel at Simpson Thacher & Bartlett LLP, with reviewing the allegations of Plaintiff's demand (as it had other related litigation demands previously submitted by other stockholders) and recommending an appropriate course of action to the Board. Based on a report supplementing its previous reports (the "Working Group Report"), the Working Group recommended rejecting the demand. (A339.) The Board endorsed that recommendation, and Plaintiff's counsel was notified by letter dated May 30, 2023. (B191.)

Almost three months later, Plaintiff served a Section 220 demand in August 2023, seeking documents concerning the Board's decision. (A339; B193.) The Company produced certain documents to Plaintiff, including the Working Group Report and the documents it cited. (A339.) According to its Section 220 demand, Plaintiff sold 3,800 shares of stock on December 22, 2020 and then 9,636 on April 14, 2021, leaving it with only a single share of stock—at the same time it was serving as Co-Lead Plaintiff in the Prior Action. (B200.) Plaintiff's statement in its

Complaint that it previously owned a "significantly greater stake" in the Company "but sold it down and decided to retain standing to pursue relief from the Defendants for the benefit of KHC" omitted that Plaintiff made this decision during the pendency of the Prior Action when it had represented to the Court that its financial stake in Kraft Heinz motivated it to supervise the action and Co-Lead Counsel. (A251.) On the contrary, Plaintiff has apparently owned a single share for almost three years and well before the Court's decision in the Prior Action.

G. Plaintiff Switched Course Again and Filed an Independent Action Seeking to Reopen the Prior Action.

Instead of attempting to argue that the independent Board's good faith decision to reject Plaintiff's litigation demand was in any way wrongful, on November 28, 2023, Plaintiff filed an independent action to set aside the dismissal of the Prior Action. (A235.) Plaintiff alleged that its 2023 Section 220 inspection "yielded startling information that revealed the falsity of [Kraft Heinz's] prior proxy disclosures." (A241.) The only specific information that Plaintiff identified was the June 1, 2019 Cahill email to Abel and Behring (A14), in which Cahill suggested the termination of his consulting agreement and changes in his compensation arrangements, which the Company ultimately approved and disclosed. (A241.)

The Complaint purported to assert five claims for relief, only two of which are relevant here. Count I, entitled "relief from judgment," sought relief from the Court of Chancery's Rule 23.1 dismissal of Plaintiff's Prior Complaint pursuant to

Rule 60(b)(2) & (3) and for purported fraud on the Court, based on Erste's purportedly "newly discovered evidence" regarding Cahill's consulting arrangement with Kraft Heinz and receipt of stock options in 2019. (A342.) Count II, entitled "false disclosures," alleged that six of the individual defendants (Cahill, Zoghbi, Behring, La Lande, Castro-Neves, and Lemann (together, the "Disclosure Defendants")) breached their fiduciary duties by not "correcting" the Company's disclosures about Cahill and Zoghbi's compensation arrangements in the 2019 and 2020 proxy statements, which Plaintiff alleges were false and misleading. (*Id.*) Because the dismissal of Counts I and II would be dispositive of the other claims that Plaintiff sought to assert, the parties agreed to brief the motions to dismiss these claims in the first instance. (OB 4; Op. 16 n.80.)

H. The Court of Chancery Dismissed the Complaint with Prejudice, and Plaintiff Appealed.

On August 8, 2024, the Vice Chancellor issued the memorandum opinion and orders that dismissed the Complaint with prejudice for failure to state a claim for relief. (Op. 29.) The Court concluded that the Complaint failed to adequately plead that relief from the judgment in the Prior Action was warranted under Rule 60(b)(2) for newly discovered evidence, Rule 60(b)(3) for purported fraud, or for purported fraud on the court. (Op. 17–27.) The Court also concluded that the Complaint failed to adequately allege a breach of fiduciary duty for purportedly false disclosures. (Op. 27–29.)

Plaintiff appealed, contending that the Vice Chancellor erred and should be reversed. The Vice Chancellor's analysis was correct and should be affirmed.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFF DID NOT PROPERLY ALLEGE RELIEF FROM THE JUDGMENT WAS WARRANTED UNDER RULE 60(b)(3) (COUNT I) FOR PURPORTED FRAUD.

A. Question Presented

Did the Court of Chancery correctly dismiss Plaintiff's claim for relief from the judgment because the Complaint failed to adequately plead that relief was warranted under Rule 60(b)(3) for purported fraud made by an adverse party in the course of the Prior Action? (Op. 22–25, 26–27; A401–A405; A508–511.)

B. Scope of Review

This Court reviews *de novo* the dismissal of a complaint under Rule 12(b)(6) for failure to state a claim for relief. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 167–68 (Del. 2006). Where a Rule 12(b)(6) motion is addressed to an independent action under Rule 60, the standards and policies of Rule 60 are considered when evaluating whether the Complaint has stated a claim for relief. *Franklin* v. *Glenhill Advisors LLC*, 2023 WL 569192, at *5 (Del. Ch. Jan. 27, 2023), *aff'd*, 304 A.3d 950 (Del. 2023) (TABLE).

C. Merits of the Argument

In its Complaint, Plaintiff alleged that the judgment in the Prior Action should be reopened both for purported fraud upon the court and for fraud within the meaning of Rule 60(b)(3) concerning the disclosures about Cahill's and Zoghbi's

compensation arrangements. (A342.) The Court of Chancery correctly held and reasoned that Plaintiff failed to plead relief under either theory.[3]

Plaintiff does not challenge on appeal—and thus waives any argument concerning—the Vice Chancellor's dismissal of Count I on the basis of Plaintiff's allegations concerning Zoghbi. (Op. 25–26; OB 18–27); *Murphy* v. *State*, 632 A.2d 1150, 1152 (Del. 1993) ("The failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal.") (footnote omitted). Plaintiff's arguments as to the disclosures about Cahill also fall short of the mark.

1. As Plaintiff Does Not Dispute, the Vice Chancellor Correctly Held That Plaintiff Failed to Adequately Plead a Fraud upon the Court.

A party alleging that relief from a judgment is warranted on the ground that the opposing party committed a fraud on the court "bears a heavy burden." *MCA*, 785 A.2d at 639. "[T]o establish such a claim requires a showing of the most egregious conduct involving a corruption of the judicial process itself." *Id.* (internal quotation marks omitted). "Examples include 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." *Franklin*, 2023 WL 569192, at *10 (internal quotation marks and citation omitted). Plaintiff's "sinister suspicions and

[3] The Vice Chancellor did not reach the merits of Defendants' other arguments supporting dismissal of Count I. (Op. 27.)

dark imaginings of duplicitous conduct are not enough to sustain this heavy burden." *Chang* v. *Child.'s Advoc. Ctr. of Del., Inc.*, 2016 WL 3636539, at *1 (Del. Ch. June 29, 2016) (internal quotation marks and brackets omitted).

The Vice Chancellor held that the Complaint did not contain well pleaded allegations that supported a fraud on the court. (Op. 24–25.) The Vice Chancellor reasoned that "[t]he only conduct [Plaintiff] raises that is arguably linked to the judicial process is defense counsel's statements in the Prior Action" but "[t]hese statements were addressing allegations in the Prior Action Complaint about Cahill's consultancy." (*Id.* at 25.) There was "no well-pleaded allegation supporting a reasonable inference that counsel gave false information to this court." (*Id.*) Instead, Plaintiff "merely challenge[d] statements made in SEC filings—outside the judicial process." (*Id.*)

On appeal, Plaintiff does not dispute that the Vice Chancellor correctly held that the Complaint failed to plead a fraud upon the court. (*See* OB 18–27.) Nor does Plaintiff dispute that its allegations of fraud were premised on statements made in SEC filings outside of the judicial process and outside the litigation itself. (*Id.*)

2. The Vice Chancellor Correctly Held That Plaintiff Failed to Adequately Plead Relief from the Judgment Was Warranted under Rule 60(b)(3) for Alleged Fraud by an Adverse Party.

Instead, on appeal, Plaintiff argues only that the Vice Chancellor "did not analyze whether [Plaintiff] satisfied the Rule 60(b)(3) standard for fraud between

the parties" and "improperly collapsed" the tests for fraud under Rule 60(3) and for fraud upon the court. (OB 21, 23.) Plaintiff is mistaken because both tests required Plaintiff to allege fraud, amounting to unfair litigation tactics, during the course of the Prior Action. As Plaintiff has conceded, its allegations of fraud were premised on allegedly "false proxy statement disclosures" concerning Cahill's consultancy that all predated Plaintiff's April 27, 2020 amended complaint. (OB 23.) Plaintiff did not allege well-pleaded facts permitting the inference of any fraud by any defendant or Kraft Heinz directed at Plaintiff during the course of the litigation.

A party seeking relief from a judgment for fraud under Rule 60(b)(3) for fraud "of an adverse party" bears the burden of pleading, and then later proving by clear and convincing evidence, that the opposing party committed fraud that "prevented the moving party from fully and fairly presenting his case." *Wilson* v. *Montague*, 19 A.3d 302, 2011 WL 1661561, at *3 (Del. May 3, 2011) (TABLE) (emphasis omitted). Delaware courts will exercise their discretion to deny claims such as Plaintiff's where they are "merely an attempt to relitigate the case or if the court otherwise concludes that fraud or misrepresentation has not been established." *Id.*

As courts have repeatedly held and commentators noted, "Rule 60(b)(3) concerns litigation-related fraud perpetrated in the course of litigation that interferes with the process of adjudication." *Smith* v. *Tipsord*, 2021 WL 3525230, at *1 (D. Del. Aug. 11, 2021) (explaining that "[t]ypical Rule 60(b)(3) fraud cases involve

fraud or misstatements perpetrated in the course of litigation or other misconduct aimed directly at the trial process"); *accord In re Hope 7 Monroe St. Ltd. P'ship*, 743 F.3d 867, 875 (D.C. Cir. 2014) (holding movant "cannot rest a motion for relief under Rule 60(b)(3) on allegations that [opposing parties] committed fraud or misconduct in making the underlying loan"); *Roger Edwards, LLC* v. *Fiddes & Son Ltd.*, 427 F.3d 129, 134 (1st Cir. 2005) (explaining that Rule 60(b)(3) is concerned with "fraud perpetrated in the course of litigation" and conduct outside of the litigation, which would be "the subject-matter of litigation, meant to be investigated through the discovery process and resolved by the evidence at trial"). "The fraud addressed in Rule 60(b)(3) involves unfair litigation tactics, something that occurs after the litigation has commenced and before judgment, something that is aimed at subverting the litigation process itself." 12 *Moore's Federal Practice*, § 60.43[1][e] (Matthew Bender 3d Ed.).

The Vice Chancellor correctly concluded that Plaintiff's Complaint failed to adequately plead fraud during the course of the litigation. (Op. 23–24; *see also id.* 27 ("Erste was not deceived and this court was not defrauded.") The Vice Chancellor further correctly reasoned that "'[t]he purported fraud is Kraft Heinz's public statements that Cahill was 'a former consultant whose consulting agreement had been terminated'" but that "[t]he relevant disclosures pre-date the April 27, 2020 amended complaint in the Prior Action" and were made "outside the judicial

process." (*Id.* at 24.) With respect to statements by defense counsel at oral argument and by defendants in briefs, the Vice Chancellor correctly reasoned that they did not plead fraud because "[t]hese statements were addressing allegations in the Prior Action complaint about Cahill's consultancy." (*Id.* at 25.)

Plaintiff's argument that Rule 60(b)(3) encompasses both "intrinsic" and "extrinsic" fraud does not help it. Plaintiff mischaracterizes the pre-Rule 60(b)(3) distinction between "intrinsic" and "extrinsic" fraud to suggest it could encompass fraud not made in the course of the litigation. (OB 25–26.) But the historical distinction was much narrower. As explained by a treatise that Plaintiff cited, a litigant could obtain relief for "extrinsic" fraud, which was collateral to the matter to be tried and determined by the judgment in question. Charles Alan Wright et al., *Federal Practice and Procedure* § 2860 (2024 update). A litigant typically could not obtain relief for "intrinsic" fraud, which was one obtained by false evidence, perjured testimony, or other matter presented and considered in judgment sought to be reopened. *Id.* The "clearest and most important consequence of the [prior] rule was that a judgment could not be successfully attacked on the ground that it had been obtained by perjury." *Id.*; *Moore's Federal Practice*, § 60.43[1][b] ("[P]erjury at trial was the classic example of 'intrinsic' fraud for which, before Rule 60(b)(3), there could be no relief).

As discussed above, however, the Vice Chancellor's analysis was not confined to the historical, narrow distinction of intrinsic and extrinsic fraud. Instead, the Vice Chancellor correctly observed that Plaintiff could not plead relief under Rule 60(b)(3) because Plaintiff only challenged extra-litigation disclosures in proxy statements made before Plaintiff filed the amended complaint in the Prior Action.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFF DID NOT PROPERLY ALLEGE RELIEF FROM THE JUDGMENT WAS WARRANTED UNDER RULE 60(b)(2) (COUNT I) FOR PURPORTEDLY NEWLY DISCOVERED EVIDENCE.

A. Question Presented

Did the Court of Chancery correctly dismiss Plaintiff's claim for relief from the judgment because the Complaint failed to adequately plead that relief was warranted under Rule 60(b)(2) for purported newly discovered evidence? (Op. 19–22; 26–27; A391–A394; A496–A499.)

B. Scope of Review

This Court reviews *de novo* the dismissal of a complaint under Rule 12(b)(6) for failure to state a claim for relief. *Gen. Motors*, 897 A.2d at 167–68. Where a Rule 12(b)(6) motion is addressed to an independent action under Rule 60, the standards and policies of Rule 60 are considered when evaluating whether the Complaint has stated a claim for relief. *Franklin*, 2023 WL 569192, at *5.

C. Merits of the Argument

Plaintiff's Complaint alleged that the judgment in the Prior Action should be reopened on the basis of purportedly newly discovered evidence under Rule 60(b)(2), concerning the disclosures about Cahill's and Zoghbi's compensation arrangements in the 2019 and 2020 Proxy Statements. (A241–A242.) The Court of Chancery correctly held that Plaintiff failed to plead relief under Rule 60(b)(2), reasoning the Complaint lacked well-pleaded factual allegations that the purportedly

newly discovered evidence could not have been discovered before the dismissal of the Prior Action had Plaintiff exercised reasonable diligence.[4]

Plaintiff does not challenge on appeal—and thus waives any argument concerning—the Vice Chancellor's dismissal of Count I on the basis of Plaintiff's allegations concerning Zoghbi. (Op. 25–26; OB 28–37); *Murphy*, 632 A.2d at 1152. Plaintiff's arguments as to the disclosures about Cahill also fail to plead a reasonably conceivable claim that the judgment in the Prior Action should be reopened for purportedly newly discovered evidence.

1. The Vice Chancellor Correctly Held That Plaintiff Failed to Adequately Plead That the Purportedly Newly Discovered Evidence Could Not Have Been Discovered Before The Dismissal of the Prior Action Had Plaintiff Exercised Reasonable Diligence.

"Delaware law is clear that reopening a judgment based on new evidence is disfavored." *Okla. Firefighters Pension & Ret. Sys.* v. *Corbat*, 2018 WL 1254958, at *2 (Del. Ch. Mar. 12, 2018). A party seeking relief under Rule 60(b)(2) must show that the newly discovered evidence "could not, in the exercise of reasonable diligence, have been discovered for use" before the judgment. *Levine* v. *Smith*, 591 A.2d 194, 202 (Del. 1991), *overruled on other grounds by Brehm* v. *Eisner*, 746 A.2d 244 (Del. 2000); *accord Riker* v. *Teucrium Trading, LLC*, 2021 WL 1779317,

[4] The Vice Chancellor did not reach the merits of Defendants' other arguments supporting dismissal of Count I. (Op. 27.)

at *3 (Del. Ch. May 3, 2021); *see also Wimbledon Fund LP* v. *SV Special Situations Fund LP*, 2011 WL 378827, at *5 n.32 (Del. Ch. Feb. 4, 2011) (collecting cases). Under this well-settled law, it was thus Plaintiff's burden to plead factual allegations demonstrating that it could not have discovered the purportedly new evidence before the dismissal in the Prior Action.

Plaintiff alleged that four documents purportedly contained the "newly discovered evidence" about Cahill's consulting arrangement: (i) the June 2019 Compensation Committee minutes, (ii) the June 2019 Compensation Committee presentation, (iii) the June 2019 Cahill email, and (iv) the 2023 Working Group Report. (Op. at 20.) Without the information in these documents, Plaintiff asserted that it could not have alleged in the Prior Complaint that Cahill's consultancy continued after July 1, 2019. (Op. at 20–21.) Plaintiff admitted that it pursued a pre-suit inspection demand under 8 *Del. C.* § 220 as to other issues. (A238.) The Complaint, however, contained no well-pleaded factual allegations about Plaintiff's exercise of diligence to discover the information in these four documents before the dismissal in the Prior Action.

The Vice Chancellor correctly concluded that Plaintiff failed to satisfy its pleading burden. The Vice Chancellor reasoned that the Complaint lacked factual allegations that would permit the inference that Plaintiff could not have discovered the information in these documents before the dismissal in the Prior Action. (Op.

20–22; 25–26.) Instead, the Vice Chancellor reasoned that "reasonable diligence on Erste's part—either through its books and records demand or a thorough review of Kraft Heinz's public filings—would have uncovered this information" before the dismissal in the Prior Action. (Op. 1.) The Vice Chancellor observed that Kraft Heinz disclosed "in August 2019 that Cahill had received an award of 500,000 options" and Plaintiff "would have known this by searching public sources." (*Id.* at 21.) Kraft Heinz also disclosed Cahill's "options in its 2020 proxy statement, which preceded the filing of the Prior Action amended complaint." (*Id.*) The Vice Chancellor further reasoned that Plaintiff would have been able to allege that Cahill's consultancy continued beyond July 1, 2019 because the June 2019 Compensation Committee minutes and presentation that Plaintiff relies on as newly discovered evidence "are the sort of documents routinely provided in response to Section 220 demands." (*Id.* at 21–22.) Together, those documents discussed Cahill's receipt of a "one-time grant of #500,000 stock options" under a section discussing "advisors" and explained the "Committee discussed proposed changes to Mr. Cahill's compensation arrangement" without stating that Mr. Cahill's consultancy would be terminated, A16, A18, although the consulting agreement was in fact terminated.

Moreover, the Vice Chancellor correctly reasoned that Plaintiff failed to plead the exercise of reasonable diligence because Plaintiff in fact raised the issue of

Cahill's stock options as a basis to challenge his independence during Plaintiff's prior appeal to this Court in 2022. (Op. 1, 21.) During that appeal, using the 2019 and 2020 proxy statements and Cahill's Form 4, Plaintiff argued that Cahill's stock options "were disclosed in August 2019" and that Cahill's consultancy continued beyond July 1, 2019 because "Cahill's economic arrangements had not severed as of the operative date" and "Cahill's consulting arrangement and significant compensation by KHC" extended "beyond the operative date for demand futility." (B159, B172.) There is no reason those same allegations—wrong as they may be—could not have been made in the Court of Chancery in the Prior Action, too. Indeed, as the Vice Chancellor concluded, such allegations both could and should have been asserted as part of the complaint in the Prior Action if Plaintiff wished to pursue them. A do-over under Rule 60(b) is not appropriate here.

2. Plaintiff's Contention That the Court of Chancery Erroneously Analyzed Its Ability to Uncover Cahill's Ongoing Consultancy Through Its Section 220 Inspection Is Incorrect and Contorts the Rule 60(b)(2) Standard.

Plaintiff argues that the Vice Chancellor "erroneously ruled that Erste's Section 220 demand 'cannot be read to include documents about compensation or consulting arrangements'" and that inspection of the 2019 Compensation Committee minutes and presentation would not have allowed Plaintiff to understand Cahill's new arrangement. (OB 35.) Both arguments lack merit.

First, Plaintiff's contention that its December 2019 Section 220 demand

requested the 2019 Compensation Committee minutes and presentation is inaccurate. (OB 36.) Plaintiff cannot credibly argue that any of the Section 220 demand's categories sought information concerning Cahill's compensation or consulting arrangements. Instead, Plaintiff resorts to mischaracterizing its request seeking 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." (*Id.*) Plaintiff contends this request encompassed "the ongoing consulting relationship between Cahill and Behring." (*Id.*) But Cahill's consulting arrangement was with *Kraft Heinz*—not Behring personally or with any other member of the board, which is what Plaintiff's request sought. (*Supra*, pp. 6–7.) Plaintiff thus did not even *try* to seek the information it now claims is "newly discovered" concerning Cahill's consulting relationship.

In re U.S. Robotics Corp. Shareholders Litigation, 1999 WL 160154 (Del. Ch. Mar. 15, 1999), on which the Vice Chancellor relied, is on point. There, where the plaintiff sought relief under Rule 60(b)(2) based on "newly discovered" information about the company's financial prospects, which existed as of the time of trial, relief was denied because the "[t]he only reason that class counsel did not discover [the evidence] is that *they did not ask*." *Id.*, at *10-11 (emphasis added).

Wimbledon Fund is also instructive. There, the court denied a Rule 60(b)(2) motion where the party made a strategic decision to forego discovery before summary judgment and failed to file a Rule 56(f) affidavit. 2011 WL 378827, at *5.

Plaintiff attempts to distinguish *U.S. Robotics* and *Wimbledon Fund* as "inapt" because plaintiff could not have taken discovery in the Prior Action (OB 34–35.) But it was Plaintiff's burden to allege facts supporting an inference that Plaintiff exercised reasonable diligence. (*Supra*, pp. 29–30.) In the context of derivative actions, using the "tools at hand" by conducting a thorough pre-suit inspection under Section 220 and review of publicly available documents is the hallmark of reasonable diligence. *White* v. *Panic*, 783 A.2d 543, 557 & n.54 (Del. 2001). It was not error to conclude that Plaintiff failed to allege that it could not have obtained the information in the June 2019 Compensation Committee minutes and presentation had it pursued a thorough Section 220 inspection.

Plaintiff's argument that it could not have demanded the minutes and presentation based on "mere speculation that the Company's director compensation disclosures could be inaccurate" is yet another contortion. (OB 34.) Plaintiff cannot dispute that its demand sought to "assess the ability of the Board to impartially consider a demand for action," (B12), which is a proper purpose for a Section 220 demand. *See In re Facebook, Inc. Section 220 Litig.*, 2019 WL 2320842, at *16 (Del. Ch. May 31, 2019) ("It is well settled that the desire to investigate director

independence is a proper purpose, particularly in instances where the stockholder seeks to investigate whether demand upon the board to pursue claims on behalf of the company would be futile.") (footnote and citations omitted). Had Plaintiff sought the minutes and materials concerning Cahill's *consulting arrangement* with Kraft Heinz to determine whether to allege he lacked independence because of that arrangement—as the Prior Complaint ultimately alleged, Plaintiff could have obtained the June 2019 minutes and presentation before it filed suit.

In all events, Plaintiff's argument misperceives its burden to plead relief under Rule 60(b)(2). It was not enough for Plaintiff to plead that it issued a Section 220 demand seeking documents concerning Cahill's consulting relationship. Plaintiff was required to plead factual allegations showing *that* Plaintiff attempted to obtain documents concerning Cahill's consulting relationship but in the exercise of reasonable diligence *it could not have done so* before the dismissal. Plaintiff was thus required to plead facts concerning its Section 220 negotiations with Kraft Heinz and whether it, *in fact*, pressed for (or even asked for) information concerning Cahill's consulting relationship or, having failed to obtain such information, filed a Section 220 inspection to compel production.

Riker highlights Plaintiff's pleading failure. In that case, the court denied a Rule 60(b)(2) motion because the movant "did not follow up to probe the full extent of [nonmovant's] communications with [nonparty] concerning a potential $5 million

transaction" during cross-examination or "ask [nonmovant] basic questions concerning, for example, what [nonmovant] said to [nonparty] and vice versa" where it was "not as if that subject never came up" more generally in the lawsuit. 2021 WL 1779317, at *4.

Federal courts applying the analogous federal rule have similarly found that the failure to press for the production of documents or information constitutes a lack of reasonable diligence. In *Miller* v. *Baker Implement Co.*, the court affirmed the denial of a Rule 60(b)(2) motion, reasoning that the movant did not exercise reasonable diligence where it waited to move to compel responses to interrogatories until after the court ruled on its opponent's summary judgment motion. 439 F.3d 407, 414 (8th Cir. 2006). And in *Nishimoto* v. *County of San Diego*, the court affirmed the denial of a Rule 60(b)(2) motion where the movant exhibited a "lack of diligence in trying to procure the evidence as she never moved to compel the County to produce its documents." 850 F. App'x 493, 496 (9th Cir. 2021).

Second, Plaintiff's argument that the Vice Chancellor erred "in characterizing as 'cumulative' Cahill's June 1, 2019 email and the [Working Group Report]" falls flat. (OB 37.) As discussed above, the Vice Chancellor correctly found that Plaintiff could have obtained the information necessary to allege that Cahill received the 500,000 stock options and that his consulting arrangement continued beyond July 1, 2019 from Kraft Heinz's public disclosures and the Compensation Committee

minutes and materials. (*Supra*, pp. 30–32.) Plaintiff ignores this and instead hypothesizes what Defendants' argument would have been had Plaintiff advanced its theory. (OB 37.) But Plaintiff knows the documents are cumulative because it described the documents as *containing essentially the same information* to the Vice Chancellor in its answering brief below: "The slide presented to the Compensation Committee is consistent with the Report and with Cahill's June 1, 2019 email. It presents a change to Cahill's compensation, without suggesting the termination of Cahill's status as a consultant. Similarly, the Compensation Committee minutes refer to a proposed change 'to Mr. Cahill's compensation arrangement . . . .'" (A464–A465.) Plaintiff's argument also overlooks that it argued substantially a variant of its new theory in its 2022 appeal before this Court, using only information from Kraft Heinz's public disclosures that existed before it filed the Prior Complaint. (*Supra*, pp. 15–16.)

Moreover, much of the 2023 Working Group Report would constitute "new evidence," not "newly discovered evidence" under Rule 60(b)(2) because it was created years *after* the Prior Action dismissal. Delaware law is settled that "newly discovered evidence" must have been "*in existence and hidden at the time of judgment*." *Bachtle* v. *Bachtle*, 494 A.2d 1253, 1255–56 (Del. 1985) (quoting *Ryan* v. *United States Lines Co.*, 303 F.2d 430, 434 (2d Cir. 1962) (emphasis added)); *accord Ralston* v. *DSCYF*, 308 A.3d 149, 166 (Del. 2023) (affirming trial court,

reasoning that evidence father completed a case plan did not exist at the time of the judgment and so was not newly discovered).

3. Plaintiff Cannot Plead Reasonable Diligence by Merely Relying on the 2019 Proxy Statement.

Plaintiff's argument that it was entitled to rely on the accuracy of the 2019 proxy statement is another attempt to avoid its pleading burden in this independent action seeking relief under Rule 60(b)(2). (OB 31–32.) As discussed above, in an independent action, Rule 60(b)(2) places an affirmative burden on Plaintiff to plead and later prove that the claimed newly discovered evidence *could not have been discovered* before the judgment had the Plaintiff exercised reasonable diligence. (*Supra*, pp. 29–30.) Plaintiff's argument that it did not need to do anything beyond rely on the 2019 proxy statement to demonstrate reasonable diligence is fundamentally at odds with the governing—and well-settled—standard.

Plaintiff argues that "reasonable diligence" for purposes of satisfying Rule 60(b)(2) to reopen a judgment should be the same as in the context of pleading whether a plaintiff is on inquiry notice of a claim. (OB 32–33.) That argument is misguided. In the inquiry notice context, the issue is when a potential plaintiff should be charged with notice of a potential claim such that its failure to commence litigation sooner bars its ability to even bring the claim. By contrast, in the Rule 60(b)(2) context, the focus is on whether the claimed newly discovered evidence could possibly have been discovered before the judgment—concerning claims the

plaintiff knew of and presumably thoroughly investigated—had the plaintiff acted. As noted above, Rule 60(b)(2) motions are routinely denied where a party has sought discovery, been rebuffed and failed to move to compel. (*Supra*, pp. 35–36.) To further the policy goal of ensuring the finality of judgments, Rule 60(b)(2) simply does not permit inaction where action could have uncovered the information.

III. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFF FAILED TO STATE A BREACH OF FIDUCIARY DUTY CLAIM (COUNT II) FOR ALLEGEDLY FALSE DISCLOSURES

A. Question Presented

Did the Complaint allege a reasonably conceivable direct claim for breach of fiduciary duty for allegedly false disclosures? (Op. 27–29; A418–A420; A515–A517.)

B. Scope of Review

This Court reviews *de novo* the dismissal of a complaint under Rule 12(b)(6) for failure to state a claim for relief. *Gen. Motors*, 897 A.2d at 167–68.

C. Merits of the Argument

Count II of Plaintiff's Complaint alleges that the Disclosure Defendants breached their fiduciary duties because they purportedly knew that the Company's 2019 Proxy Statement falsely and misleadingly described both Cahill's and Zoghbi's compensation arrangements, and "acted disloyally" in not "correcting" the 2019 Proxy or the 2020 Proxy. (A344.) The Vice Chancellor held that Count II failed to state a claim because Plaintiff failed to plead the elements of reasonable reliance, causation, resulting damages, and scienter regarding the proxy statements concerning either Cahill or Zoghbi.[5] (Op. 27–29.)

[5] The Vice Chancellor did not reach the merits of Defendants' arguments that Count II should be dismissed for failure to plead falsity or because the claims are time-barred. (A411–A418; A517–A522.)

On appeal, Plaintiff does not challenge the dismissal of Count II as to any disclosures concerning Zoghbi. (OB 38–41.) Any challenge by Plaintiff is thus waived, and the Vice Chancellor's dismissal of Count II should be affirmed in that respect as to all Disclosure Defendants. *Murphy*, 632 A.2d at 1152. Plaintiff's arguments concerning the disclosures about Cahill all fail to rescue Plaintiff's deficient Complaint.

First, as the Vice Chancellor correctly held, Plaintiff's Complaint failed to plead reasonable reliance, causation, and damages because "Count II is aimed at recovering the attorneys' fees and expenses Erste incurred due to its own litigation strategy." (Op. 28.) It was Plaintiff's tactical choice to "bring the complaint in the Prior Action based on documents procured in its Section 220 demand and public filings it reviewed" while "opt[ing] not to seek books and records about compensation or to review relevant Kraft Heinz public statements (such as the Form 4 filings)." (*Id.* at 28–29.) The Vice Chancellor reasoned that Plaintiff "neglected to review the 2020 proxy statement, which would have allowed it to raise Cahill's receipt of options . . . in its amended complaint"—instead Plaintiff improperly waited "to debut its disclosure-related theory on appeal." (*Id.* at 29.)

Plaintiff's argument that it did rely on the 2019 and 2020 Proxy Statements is no more than an improper attempt to create a presumption of reliance for fiduciary duty disclosure claims that are not based on requests for stockholder action and do

not seek vindication of stockholders' economic or voting rights. (OB 40 (citing Plaintiff's Argument II)); *cf. Dohmen* v. *Goodman*, 234 A.3d 1161, 1172 (Del. 2020) (explaining that a breach of fiduciary duty claim founded on alleged false disclosures seeking compensatory damages in the absence of a request stockholder action would have to demonstrate "reliance and causation to recover the compensatory damages sought"); *Malone* v. *Brincat*, 722 A.2d 5, 12 (Del. 1998) (explaining that only breach of fiduciary duty claims "arising out of disclosure violations in connection with a request for stockholder action" are exempt from pleading "the elements of reliance, causation and actual quantifiable monetary damages"). Plaintiff was required to plead factual allegations that its reliance on the proxy statements—in the context of publicly available information and information it could have obtained by a Section 220 inspection—was reasonable. The Vice Chancellor correctly found Plaintiff's Complaint's allegations wanting.

Second, Count II remains subject to dismissal because Plaintiff waived any argument that it had pleaded the required elements of reasonable reliance, causation, and damages by not addressing them in it answering brief. The Vice Chancellor correctly found that the Complaint made "no effort" to plead these elements. (Op. 28.) The Complaint did not plead factual allegations concerning Plaintiff's pre-suit investigation—other than to note its existence—and its analysis of Cahill's consulting arrangement and the Company's public disclosures. (A238.) In response

to Defendants' opening brief, Plaintiff's answering brief relied instead on the presumption of reasonable reliance and causation applicable to claims founded on disclosures seeking stockholder action for the vindication of stockholder's voting and economic rights, as well as the per se damages rules applicable where a stockholder seeks nominal damages for alleged breach of fiduciary duty. (A477–A478.); *see Dohmen*, 234 A.3d at 1172 (explaining that a breach of fiduciary duty claim founded on alleged false disclosures seeking compensatory damages in the absence of a request stockholder action would have to demonstrate "reliance and causation to recover the compensatory damages sought"); *Malone*, 722 A.2d at 12 (explaining that only breach of fiduciary duty claims "arising out of disclosure violations in connection with a request for stockholder action" are exempt from pleading "the elements of reliance, causation and actual quantifiable monetary damages"). The Vice Chancellor thus correctly found Plaintiff had waived any argument that its Complaint satisfied these elements. (Op. 28 n.138 ("Erste's answering brief also makes no attempt to argue that it has pleaded these elements. *See Emerald Partners* v. *Berlin*, 2003 WL 21003437, at *43 n.145 (Del. Ch. Apr. 28, 2003) ("[I]ssues not briefed are deemed waived."), *aff'd*, 840 A.2d 641 (Del. 2003) (TABLE)).)

Plaintiff's argument that all of Defendants' arguments turned on the "false premise that the facts respecting Cahill were accurately and publicly disclosed by

April 2020" is wrong. (OB 40.) Defendants also argued that Plaintiff failed to allege the elements of reasonable reliance, causation, and damages due to Plaintiff's own litigation strategy—to which Plaintiff failed to respond in its answering brief below. (A419–A420; *cf.* A475–A478.)

Finally, Count II failed to plead that the Disclosure Defendants' acted with scienter. (Op. 29.) As the Vice Chancellor held, Plaintiff failed to plead the Disclosure Defendants "'knew'" false statements were being used to 'create a false [litigation] record.'" (*Id.* (citing ¶ 292).) There are no well-pleaded allegations showing the Disclosure Defendants were considering the risk of derivative litigation when the 2019 and 2020 Proxies were issued. (*Supra*, Argument I.) Indeed, the 2019 Proxy Statement and 2020 Proxy Statement were filed well before the Prior Complaint was filed on April 27, 2020, and well before the defendants in the Prior Action moved to dismiss on June 12, 2020. Plaintiff argues that the Vice Chancellor referred back to its "insufficient diligence." (OB 40.) But Plaintiff ignores that the Complaint's critical failing is the absence of well-pleaded facts about the Disclosure Defendants' conduct in connection with the challenged proxy statements to permit any inference that they knowingly made false statements to Plaintiff to create a false litigation record in the Prior Action.

CONCLUSION

Accordingly, Plaintiff failed to adequately plead both that relief from the judgment in the Prior Action was warranted (Count I) and that the Complaint stated a claim for breach of fiduciary duty for allegedly false disclosures against the Disclosure Defendants (Count II). The Vice Chancellor's dismissal of Plaintiff's Complaint should thus be affirmed.

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

By: */s/ Matthew D. Stachel*
Matthew D. Stachel (No. 5419)
1313 N. Market Street, Suite 806
Post Office Box 32
Wilmington, DE 19899-0032
(302) 655-4410

Attorneys for Appellees/Defendants-Below The Kraft Heinz Company, Bernardo Hees, Alexandre Behring, Jorge Paulo Lemann, Marcel Herrmann Telles, Paulo Basilio, David Knopf, Eduardo Pelleissone, John Cahill, George Zoghbi, Rashida La Lande, and Joao M. Castro-Neves

OF COUNSEL:

Daniel J. Kramer
Andrew J. Ehrlich
Robert N. Kravitz
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

POTTER ANDERSON & CORROON LLP

By: */s/ Michael A. Pittenger*
Michael A. Pittenger (No. 3212)
Jacqueline A. Rogers (No. 5793)
Camilia R. Katkocin (No. 7216)
1313 N. Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801
(302) 984-6000

Attorneys for Appellees/Defendants Below 3G Capital, Inc., 3G Capital Partners Ltd., 3G Capital Partners II LP, 3G Global Food Holdings GP LP, 3G Global Food Holdings LP, and HK3 18 LP

OF COUNSEL:

Sandra C. Goldstein
Stefan Atkinson
Kevin M. Neylan, Jr.
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800

Dated: November 20, 2024

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2024, the foregoing *Appellees' Answering Brief* was caused to be served upon the following counsel of record via File & Serve*Xpress*:

Joel E. Friedlander, Esq.
Jeffrey M. Gorris, Esq.
Christopher M. Foulds, Esq.
Matthew D. Venuti, Esq.
FRIEDLANDER & GORRIS PA
1201 N. Market Street, Suite 2200
Wilmington, DE 19801

Michael A. Pittenger, Esq.
Jacqueline Rogers, Esq.
Camilia R. Katkocin, Esq.
POTTER ANDERSON & CORROON LLP
1313 N. Market Street, 6th Floor
Wilmington, DE 19801

/s/ Matthew D. Stachel
Matthew D. Stachel (No. 5419)