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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: DECEMBER 20, 2024**

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The sheer length of Defendants' answering brief ("DAB") cannot hide the lack of legal or factual support for the opinion below on the narrow questions raised in this appeal.

Plaintiff Erste seeks to reopen a dismissal under Court of Chancery Rule 23.1 predicated on a determination that a single director—John Cahill—was independent. That determination was based on an allegation, itself based on Kraft Heinz's proxy statement disclosures, that Cahill's consulting arrangement with Kraft Heinz terminated in advance of the date for assessing demand futility. Post-dismissal, Erste discovered the falsity of Kraft Heinz's proxy statement disclosures respecting the purported termination of Cahill's consultancy. Erste appeals the denial of relief from judgment under Court of Chancery Rules 60(b)(2) and 60(b)(3), as well as the dismissal of Erste's claim to recover its litigation costs as individual damages for disloyal disclosures.

Defendants' answering brief does not dispute the following contentions in Plaintiff's opening brief ("POB"):

- The supposed termination of Cahill's consultancy was an outcome-determinative fact respecting Cahill's independence, under the

precedents cited by the Court of Chancery and by the parties in the Prior Action. (POB 14-16, 23-24.)

- Section 220 of the Delaware General Corporation Law did not empower Plaintiffs to seek backup documentation to verify the accuracy of federally mandated disclosures under 17 C.F.R. § 229.402(k) respecting director compensation. (*Id*. at 33-35.)
- If Plaintiffs had not alleged in the Prior Action that Cahill's consultancy had terminated, Defendants could have asked the Court of Chancery to take judicial notice of the Kraft Heinz proxy disclosures to that effect. (*Id*. at 2, 32.)
- The Court of Chancery properly rejected Defendants' efforts below to defend the accuracy of Kraft Heinz's proxy disclosures respecting the supposed termination of Cahill's consultancy. The opinion below referred to Cahill's "recut consulting arrangement," his "new arrangement," and the "fact that Cahill provided consulting services to Kraft Heinz on new terms." (*Id*. at 4, 36-37.)
- The Court of Chancery applied an erroneous legal test to Erste's claim under Court of Chancery Rule 60(b)(3). The Court of Chancery

erroneously conflated the test for "fraud" under Rule 60(b)(3) with the test for "fraud upon the Court" under the penultimate sentence of Rule 60 (*id.* at 19-22), and erroneously limited fraud under Rule 60(b)(3) to "extrinsic" fraud, even though the plain text of Rule 60(b)(3) includes "intrinsic" fraud. (*Id.* at 25-27).

Unable to support the Court of Chancery's reasoning, Defendants argue that no fraud occurred in the "course of litigation" because the 2019 Proxy and the 2020 Proxy were filed before the filing of the consolidated amended complaint. (DAB 24-26.) Defendants ignore that the 2019 Proxy was filed *after* the first derivative complaint in the Court of Chancery had been filed and that the falsity of the 2019 Proxy set up a demand futility defense. Defendants' authorities are inapt because Erste is not seeking Rule 60(b)(3) relief based on a fraud relating to the substance of the underlying derivative claims.

For purposes of Rule 60(b)(2), Defendants avoid the key question whether it was reasonably diligent for Erste to rely on the accuracy of the statements in the 2019 Proxy that Cahill's consultancy had been terminated. Defendants cite inapt rulings about the ability to unearth facts in discovery, which is unavailable in the Rule 23.1 context. Defendants point to a Form 4 about the award to Cahill of 500,000 stock options, but it did not say those stock options represented ongoing

consultancy compensation. (A37-38; A329 ¶ 252.) Defendants contend that documentation about Cahill's ongoing consultancy could have been obtained in a Section 220 proceeding, without engaging the case law about how 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 Global Opportunities Master Fund v. W. Corp*., 2006 WL 2947486, at *3 (Del. Ch. Oct. 12, 2006).

As to Erste's claim respecting disloyal disclosures, Defendants maintain that Erste failed to plead reliance, despite Erste's allegation that the 2019 Proxy was the basis for Plaintiffs in the Prior Action having alleged that Cahill's consultancy had been terminated. (*E.g.,* A336 ¶ 268.) To rebut scienter, Defendants argue that 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." (DAB 44.) Erste is not required to plead a conspiracy among the Disclosure Defendants to mount a false defense. Erste pleaded how each of the Disclosure Defendants knew the actual facts respecting Cahill's new consulting arrangement. (A253-54 ¶¶ 40-41; A259 ¶ 56; A261-62 ¶¶ 65-66.) Erste also pleaded the chronology of then-pending litigation. (A326-31 ¶¶ 240-53.) Defendants argue waiver despite Erste having addressed below the arguments Defendants had briefed.

ARGUMENT

I. FALSE DIRECTOR COMPENSATION DISCLOSURES MADE IN THE COURSE OF LITIGATION PREVENTED ERSTE FROM FAIRLY AND ADEQUATELY PRESENTING ITS CASE

Defendants do not attempt to refute Erste's arguments that the Court of Chancery erred by not applying the proper standard for reopening a judgment under Court of Chancery Rule 60(b)(3). (POB 19-27; DAB 21-27.) Nor do Defendants argue that dismissal was warranted under the standard for Rule 60(b)(3) relief articulated in *MCA, Inc. v. Matsushita Electric Indus. Co.*, 785 A.2d 625, 639 (Del. 2001), about whether Erste was prevented from fairly and adequately presenting its case.

Instead, Defendants make an argument not relied upon by the Court of Chancery that the false and misleading disclosures in the 2019 Proxy and 2020 Proxy respecting the supposed termination of Cahill's consultancy were not made during the "course of litigation." (DAB 24-25.) According to Defendants, it somehow matters that the consolidated amended complaint was filed after the 2020 Proxy.

Defendants are wrong as a matter of law, and their argument makes no sense as a matter of fact. Plaintiffs were defrauded into making a false allegation that led to Cahill being declared independent.

The federal authorities articulating the concept of "in the course of litigation" draw a distinction that is not helpful for Defendants:

> In parsing Rule 60(b)(3), an initial, and important, distinction to grasp is between fraud or misstatements that are committed during the course of a commercial transaction (such as a false statement about the quality of goods being sold), and fraud or misstatements perpetrated in the course of litigation (such as perjury of a witness or the introduction of a false document into evidence). The former is the subject-matter of litigation, meant to be investigated through the discovery process and resolved by the evidence at trial.

Roger Edwards, LLC v. Fiddes & Son Ltd., 427 F.3d 129, 134 (1st Cir. 2005); *see In re Hope 7 Monroe St. Ltd. P'ship*, 743 F.3d 867, 875 (D.C. Cir. 2014) (following *Roger Edwards*). As *Moore's Federal Practice* explains, Rule 60(b)(3) is intended to address fraud "involv[ing] unfair litigation tactics, . . . something that is aimed at subverting the litigation process itself." 12 *Moore's Federal Practice* § 60.43[1][e] (3d ed. 2024).

The false disclosures in the 2019 Proxy and the 2020 Proxy were not made "during the course of a commercial transaction" that was "the subject-matter of litigation." *Roger Edwards*, 427 F.3d at 134. The underlying subject matter of the litigation was the sale of Kraft Heinz stock by 3G in 2018 and disclosures concerning financial controls and the business performance of Kraft Heinz that allegedly violated the federal securities laws. (A268-326; A344-50.) Kraft Heinz's false

disclosures in the 2019 Proxy and 2020 Proxy concerning the purported termination of Cahill's consultancy were perpetrated in the course of litigation and involved unfair litigation tactics because Kraft Heinz made them in the context of threatened and pending derivative litigation and they supported a motion to dismiss based on lack of demand futility. (A326-38.)

In April 2019, a Kraft Heinz stockholder made a Section 220 demand concerning 3G's stock sale. (A326 ¶ 240.) In May 2019, a stockholder federal derivative action was filed against officers and directors of Kraft Heinz, including Cahill. (A326 ¶¶ 241-42.) The operative date for assessing demand futility was July 30, 2019, the date of the filing of the first derivative complaint consolidated into the Prior Action. (A97; A336 ¶ 267; A339 ¶ 278.)

In that context, on August 2, 2019, Kraft Heinz issued the 2019 Proxy, which falsely refers to Cahill as "a former consultant to Kraft Heinz" and falsely states that his "advisory and consulting arrangement terminated on July 1, 2019." (A23; A26; A36; A331 ¶ 256.) Kraft Heinz filed the 2020 Proxy on March 27, 2020, which contains the same false disclosures and the additional false disclosure that Cahill received a one-time grant of 500,000 stock options "[i]n connection with the termination of his consulting agreement." (A56; A58; A65; A332 ¶ 258.) The false proxy disclosures about the supposed termination of Cahill's consultancy on July 1,

2019 formed the basis for a legal argument that Cahill was independent of 3G for purposes of assessing demand futility as of July 30, 2019.

As explained in the opening brief (POB 19-27), the Court of Chancery recited erroneous legal standards when denying relief under Court of Chancery Rule 60(b)(3) on the ground that the 2019 Proxy and 2020 Proxy were "outside the judicial process" and not "arguably linked to the judicial process." (POB Ex. A at 24.) Defendants' federal authorities create no basis for denying Rule 60(b)(3) relief because the false disclosures about the supposed termination of Cahill's consultancy were made in the course of litigation and they prevented Erste from fairly and adequately presenting its case.

II. DEFENDANTS CONTORT THE PLEADING BURDEN FOR RULE 60(B)(2) RELIEF

Erste pleaded that Plaintiffs' allegation in the Prior Action about the supposed termination of Cahill's consultancy on July 1, 2019, was "based on public disclosures in the 2019 Proxy," and that "Plaintiffs were entitled to assume the accuracy of the pertinent public disclosures, which were also subject to judicial notice." (A336 ¶ 268.) Erste's opening brief explained that it was reasonable for Plaintiffs to rely on the accuracy of federally mandated disclosures respecting director compensation when drafting a stockholder derivative complaint, and that underlying documentation to verify the accuracy of the director compensation disclosures was not available through Section 220. (POB 31-35.)

The sole element of Court of Chancery Rule 60(b)(2) at issue is whether the newly discovered evidence "could not, in the exercise of reasonable diligence, have been discovered for use at the trial." *Levine v. Smith*, 591 A.2d 194, 202 (Del. 1991) (internal quotation marks omitted) (quoting *In re Missouri-Kansas Pipe Line Co.*, A.2d 273, 278 (Del. 1938)), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *accord Riker v. Teucrium Trading, LLC*, 2021 WL 1779317, at *3 (Del. Ch. May 3, 2021) (quoting *Levine*, 591 A.2d at 202)). Defendants cite pertinent authority, but they twist it to erase the basic notion of reasonable diligence:

"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." (DAB 29-30; *see also id.* at 38 ("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…. [T]he focus is on whether the claimed newly discovered evidence could possibly have been discovered before the judgment ….").) The Court of Chancery similarly twisted the same element by describing Cahill's provision of consulting services on new terms as "knowable to Erste before the Prior Action was dismissed." (POB Ex. A at 21.)

The operative question is whether it would be an "exercise of reasonable diligence" for a stockholder plaintiff to demand verification of the accuracy of director compensation disclosures before filing a derivative lawsuit. The 2019 Proxy and 2020 Proxy both flatly state that Cahill is a "former consultant" whose consultancy "terminated on July 1, 2019." (A23; A26; A36; A56; A58; A65.) When Erste and other Plaintiffs in the Prior Action were filing stockholder derivative complaints in late 2019 and early 2020 (A39-40) were they obliged, as a matter of reasonable diligence, to demand verification of the statements in the 2019 Proxy that Cahill was no longer a paid consultant to Kraft Heinz? Alternatively, could Erste

have learned through reasonable diligence that, contrary to Kraft Heinz's express statements in the 2019 Proxy, Kraft Heinz had replaced a written consultancy contract to pay Cahill $500,000 annually with an oral contract in which Cahill was granted 500,000 stock options that would vest over three years for the provision of ongoing consultancy services? (A14-18; A210-12; A327-31 ¶¶ 243-53.)

Defendants' answering brief fails to address the legal principles applicable to these questions. Defendants devote more than one page of argument without legal citations to the following proposition: "Plaintiff Cannot Plead Reasonable Diligence by Merely Relying on the 2019 Proxy Statement." (DAB 38-39.) Defendants offer no response to the following propositions of law in Erste's opening brief:

- Item 402(k) of Regulation S-K requires proxy statement disclosure of all director compensation earned or paid and narrative disclosure of any material factors necessary to understand the director compensation, including consulting fees, and the terms of any non-standard compensation arrangement. (POB 31.)
- "Shareholders are entitled to rely upon the truthfulness of all information disseminated to them by the directors they elect to manage the corporate enterprise." (*Id.*)

- "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.'" (*Id*. (quoting *Ryan v. Gifford*, 918 A.2d 341, 360 (Del. Ch. 2007)).)
- "Delaware courts take judicial notice of information filed with the SEC." (*Id*. at 32.)
- "[T]he Court of Chancery will limit or deny any [Section 220] inspection to the extent that the requested information is available in the corporation's public filings.'" (*Id*. at 33-34 (quoting *Polygon*, 2006 WL 2947486, at *3).)
- "If the stockholder cannot present a credible basis … from which the court can infer wrongdoing or mismanagement, it is likely that the stockholder's [Section 220] demand is an indiscriminate fishing expedition.'" (*Id*. at 34 (first alteration in original) (internal quotation marks omitted) (quoting *AmerisourceBergen Corp. v. Lebanon Cnty. Emps.' Ret. Fund*, 243 A.3d 417, 428 (Del. 2020)).)r

Defendants' argument starts from the same mistaken starting point as the Court of Chancery's brief analysis—that "Compensation Committee minutes and

presentations are the sort of documents routinely provided in response to the Section 220 demands." (POB Ex. A at 21-22.) The pertinent question is whether Compensation Committee minutes and presentations are routinely available for inspection when a stockholder plaintiff wants to verify the accuracy of director compensation disclosures mandated by Item 402(k) of Regulation S-K. Defendants posit a legal regime contrary to the legal propositions identified above. It is a legal regime that stockholders plaintiffs, corporate defendants, and the Court of Chancery would never countenance.

According to Defendants, Erste merely needed to ask: "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." (DAB 35.) Defendants ignore why a stockholder plaintiff should be expected to inquire into a publicly disclosed consultancy arrangement that Kraft Heinz stated had been "terminated," or why a stockholder plaintiff should expect the Court of Chancery to compel the inspection of backup documentation verifying a publicly disclosed fact.

Defendants argue that Erste's Section 220 demand seeking documents about any "relationships" between or among any directors of Kraft Heinz, apart from their

service as directors, cannot properly be interpreted as encompassing Cahill's consulting work with Behring because "Cahill's consulting arrangement was with *Kraft Heinz*—not Behring personally." (*Id.* at 33.) If that distinction is correct, Defendants draw the wrong conclusion from it. Kraft Heinz was obliged to publicly disclose Cahill's consulting "arrangement" with Kraft Heinz. Erste appropriately used Section 220 to seek documents about "relationships" that did not need to be publicly disclosed. Given Kraft Heinz's public disclosure requirements, and Kraft Heinz's public disclosures that Cahill's consultancy "arrangement" had "terminated" (A26; A36), Erste was not obliged, as a matter of reasonable diligence, to seek information pursuant to Section 220 about that consultancy arrangement or "plead facts concerning its Section 220 negotiations with Kraft Heinz." (DAB 35.)

Defendants proffer no Rule 60(b)(2) authority analogous to the procedural posture of a Section 220 inspection and a stockholder derivative complaint that embraced Kraft Heinz's declaratory statements in the 2019 Proxy about a terminated consulting arrangement with an outside director. The newly discovered evidence could not become available simply by following up in discovery, or by asking more questions during cross-examination. (*See id*. at 35-36.)

Defendants elide the truth in arguing that Erste "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." (*Id*. at 37.) The additional publicly disclosed information was in the 2020 Proxy, which stated: "In connection with the termination of his consulting agreement, Mr. Cahill received a one-time grant of 500,000 stock options." (A58.) A Form 4 filed on August 20, 2019 had described the option grant, without providing any rationale for it. (A37-38.) The advocacy during the appeal of the Prior Action discussed these public disclosures, without Plaintiffs having any awareness that Cahill had entered into a new consulting arrangement. Plaintiffs hypothesized that Kraft Heinz was "conniving to pay [Cahill] differently without requiring any further consulting work." (B171; DAB 16 (internal quotation marks omitted).)

Defendants do not dispute that "[t]he 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." (POB 14.) Only with the benefit of the newly discovered evidence was Erste able to persuade the Court of Chancery, over Defendants' insistence to the contrary, that Cahill and Kraft Heinz had entered into a "new arrangement" by which "Cahill provided consulting services to Kraft Heinz on new terms." (POB Ex. A at 21, 22 n.108.) Only now are Defendants willing to accept that conclusion, which flatly contradicts what Kraft Heinz disclosed in the 2019 Proxy and the 2020 Proxy (and in subsequent proxy statements). As of the

date for assessing demand futility, July 30, 2019, Cahill was working closely as a consultant with the 3G-affiliated senior management of Kraft Heinz, and Cahill was dependent on them and the 3G-dominated Compensation Committee to retain his consulting position and obtain the multi-million-dollar benefit of the full vesting of the stock option award over the span of three years. (A327-31 ¶¶ 243-54.)

III. ERSTE PLEADED THE ELEMENTS OF AN INDIVIDUAL CLAIM OF DAMAGES BASED ON DISLOYAL FALSE DISCLOSURES

Defendants make three arguments to support the Court of Chancery's dismissal of Count II. None have merit.

First, Defendants characterize the Court of Chancery's criticism of Erste's "litigation strategy" (POB Ex. A at 28) as Erste's failure to plead 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." (DAB 42.) But as explained in Argument II, *supra*, it was perfectly reasonable for Erste to rely on the accuracy of Kraft Heinz's declarations in the 2019 Proxy and the 2020 Proxy that Cahill's consultancy arrangement had terminated on July 1, 2019. Indeed, Defendants insisted below on the accuracy of the proxy statement disclosures, even in the face of the newly discovered evidence.

Second, Erste did not waive in its answering brief below that Erste had pleaded the required elements. (*Id*.) Erste was responding below to an opening brief that disputed the falsity of the 2019 Proxy (A414-16) and then regurgitated for purposes of the other elements of a disclosure claim the argument that the truth about Cahill's consultancy was fully disclosed:

> But, even if the 2019 Proxy Statement's disclosures about Cahill and Zoghbi were false and misleading (which they were not), Plaintiff fails

> to plead that it reasonably relied on them in connection with the Prior Action, because, as discussed above, the Company indisputably disclosed all of the facts about the changes in Cahill's and Zoghbi's consulting arrangements and compensation in subsequent SEC filings before Erste and the other plaintiffs filed the Complaint in the Prior Action.
>
> . . .
>
> Nor can Plaintiff show causation and damages, because 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.) Erste appropriately and sufficiently responded in its answering brief below that all of Defendants' arguments concerning Count II "turn on the false premise that the facts respecting Cahill were accurately and publicly disclosed by April 2020." (A475-76.) Erste further argued how each element was satisfied:

> The proxy statements were materially false and misleading respecting Cahill's status and compensation, the Disclosure Defendants knew they were false and misleading, and Erste is entitled to individual compensatory damages for needless costs incurred litigating demand futility based on false and misleading proxy statements on which Erste was entitled to rely.

(A477.)

Third, as to scienter, Defendants argue that Erste was obliged to plead facts that the Disclosure Defendants knew that the 2019 Proxy would be used to create a false litigation record. (DAB 44.) Defendants are misreading the allegations of

Count II. Paragraph 291 alleges that "[t]he Disclosure Defendants knew the actual facts" about Cahill's revised consulting arrangements and "also knew that the 2019 Proxy falsely and misleadingly described the changes" to his consulting arrangement. (A344 ¶ 291.) Other paragraphs of the Complaint describe how each Disclosure Defendant was positioned to know the actual facts. (A253-54 ¶¶ 40-41; A259 ¶ 56; A261-62 ¶¶ 65-66.) Knowingly making false disclosures is sufficient for purposes of pleading scienter. *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998) ("[D]irectors who knowingly disseminate false information that results in corporate injury or damage to an individual stockholder violate their fiduciary duty, and may be held accountable in a manner appropriate to the circumstances."). Count II is sufficiently pleaded without reference to Paragraph 292, which alleges that the Disclosure Defendants acted with scienter in not correcting false disclosures in the 2019 Proxy or the 2020 Proxy that they knew were being used to create a false record in the Prior Action. (A344 ¶ 392.)

CONCLUSION

For all the foregoing reasons and those stated in the opening brief, 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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