PUBLIC VERSION
FILED ON: MAY 3, 2022

EFiled: May 03 2022 04:45PM EDT
Filing ID 67581686
Case Number 16,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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DATED: April 18, 2022

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PRELIMINARY STATEMENT

In February 2019, KHC and 3G became embroiled in a multi-faceted corporate governance scandal. KHC disclosed impairments totaling $15.4 billion, an ongoing SEC investigation, and that, due to a dispute with its auditor, KHC was unable to file a timely annual report for fiscal year 2018. (A439 ¶¶15-16; A510-12 ¶¶204-05, 207, 211.) KHC's stock price fell to $32.40 per share, as compared to $59.85 per share six months earlier, a drastic decline for a food and beverage company, which translated into tens of billions of dollars of lost market capitalization. (A503 ¶177; A512 ¶211.)

That same month, the first federal securities class action was filed. (A936; *see* A444 ¶34.) KHC was also served with demands pursuant to 8 *Del. C.* § 220 by stockholders seeking to investigate potential claims based on, among other things, 3G's sale of $1.2 billion of KHC stock on August 7, 2018, shortly after 3G-affiliated KHC senior officers had publicly described the company's operating challenges as "transitory." (A350, A353, A364-415.) The first stockholder derivative actions were filed in the Court of Chancery on July 30, 2019. (OB Ex. A at 8.)

The sole question raised in this appeal is whether Plaintiffs have alleged particularized facts that provide a "reason to doubt" that three out of five specified directors of KHC could bring "impartial business judgment" to bear on whether to

assert against the 3G-affiliated defendants a *Brophy* claim respecting 3G's $1.2 billion stock sale and a claim for indemnification or contribution respecting KHC's federal securities law liability. *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1049 (Del. 2021).

Two directors, Gregory Abel and Tracy Britt Cool, are lieutenants of Warren Buffett at Berkshire. (A451 ¶47; A454 ¶49.) Berkshire owned approximately 27% of KHC, with a "carrying value" of "approximately $13.8 billion" at the relevant time. (B85.) Together, Berkshire and 3G owned 51% of KHC; they formed an admitted "control group." (A433 ¶2; A459 ¶70; A462 ¶77.) The 3G and Berkshire director designees formed a board majority that could dictate the future direction of KHC. By working cooperatively with 3G, Berkshire could leverage the immense value of corporate control. Suing 3G would rupture the control group. It would also cause immense operational and reputational problems for Berkshire, given Berkshire's multi-billion-dollar investments in 3G-managed KHC and RBI, and Buffett's public embrace of 3G and its co-founder Jorge Paulo Lemann. (A451-52 ¶47.) In short, Berkshire had huge extraneous reasons not to "risk the relationship with 3G" (AB at 15) by impartially analyzing the merits and value of KHC's $1.2 billion *Brophy* claim.

Two other directors, Jack Cahill and George Zoghbi, had been deemed not independent by the board of directors of KHC as of July 15, 2019, according to the KHC proxy statement filed on August 2, 2019:

> The Guidelines require that a majority of the directors meet Nasdaq listing standards "independence" requirements. For a director to be considered independent, the Board must affirmatively determine, after reviewing all relevant information, that a director has no direct or indirect material relationship with Kraft Heinz that would interfere with his or her exercise of independent judgment in carrying out his or her responsibilities as a director…. Mr. Cahill, the former Chief Executive Officer of Kraft and a former consultant to Kraft Heinz, and George Zoghbi, our former Chief Operating Officer of the US Commercial business and Special Advisor at Kraft Heinz, are not independent.

(A418-20.) A *subsequent* proxy statement states that Cahill's consulting agreement was "terminated on July 1, 2019," that Cahill was awarded 500,000 stock options "[i]n connection with the termination of his consulting agreement," and that Zoghbi's cash compensation was reduced "[e]ffective July 1, 2019," in exchange for a one-time grant of stock options. (A428.) 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.

The other director in question, Alexandre Van Damme, became a close friend of 3G's Lemann in 2002 and 2003. That close friendship led to the forging of an

intercontinental merger with privately held Interbrew, Van Damme's subsequent roles as outside director and 3G investor in the corporate behemoths AB InBev, RBI, and KHC, and overlapping charitable endeavors with 3G.

There is no dispute about the applicable precedents of this Court. Defendants make no effort to defend the Vice Chancellor's requirement that Plaintiffs plead facts showing that the directors "would be motivated to cover up insider trading." (OB at 20.) For this reason alone, reversal is warranted. Defendants also fight the words and spirit of this Court's precedents. They argue that wealthy individuals and Berkshire cannot be "beholden" to 3G, or have "material" economic arrangements with 3G or "rely on" 3G, or be motivated "to protect 3G." (AB at 2, 3, 4, 5, 12, 14, 16, 18, 22, 26, 35, 38, 40, 41, 45.) The test for demand futility is satisfied because the particularized factual allegations as to all five directors provide reason to doubt that any of them (or at least three of them) could evaluate impartially KHC's claims against the 3G defendants. The ties of each "were *material*, in the sense that the alleged ties could have affected the impartiality of the individual director." *Zuckerberg*, 262 A.3d at 1061.

ARGUMENT

THERE IS REASON TO DOUBT THAT AT LEAST THREE OF THE FIVE DIRECTORS IN QUESTION COULD IMPARTIALLY CONSIDER A LITIGATION DEMAND RESPECTING THE 3G DEFENDANTS

A. There Is Reason To Doubt Abel and Cool Are Independent of 3G

Plaintiffs' opening brief emphasized the "close" and "deep" and "mutually beneficial" "business relationship" and "business partnership" between Berkshire and 3G. (OB at 3, 4, 22, 23, 25, 27.) The single greatest aspect of Berkshire's business partnership with 3G is their co-investment in KHC. That co-investment provides reason to doubt that Berkshire employees serving as KHC directors could impartially consider a litigation demand respecting 3G.

Berkshire co-invested with 3G to buy Heinz and co-invested with 3G to merge Heinz with Kraft and create KHC. (A451 ¶47.) Berkshire owned approximately 27% of KHC. (*Id.*) Berkshire's investment strategy was to entrust 3G with managerial control and for Berkshire and 3G in the aggregate to own a majority of KHC's stock. (A459 ¶70.) In Buffett's words, Heinz was "3G's baby" (A457-58 ¶64), and 3G was Berkshire's "partner" (A451 ¶47).

Berkshire and 3G agreed to vote for each other's director nominees, and they are an admitted "control group." (A433 ¶2; A461-62 ¶¶76-77.) Berkshire and 3G,

working cooperatively, can exercise actual control over KHC and extract the immense value associated with corporate control. KHC's Form 10-K filed in February 2018 disclosed the following risk for public stockholders:

> **The Sponsors have substantial control over us and may have conflicts of interest with us in the future.**
>
> The Sponsors own approximately 51% of our common stock. Six of our 11 directors had been directors of Heinz prior to the closing of the 2015 Merger and remained directors of Kraft Heinz pursuant to the merger agreement. In addition, some of our executive officers, including Bernardo Hees, our Chief Executive Officer, are partners of 3G Capital, one of the Sponsors. As a result, the Sponsors have the potential to exercise influence over management and have substantial control over decisions of our Board of Directors as well as over any action requiring the approval of the holders of our common stock, including adopting any amendments to our charter, electing directors, and approving mergers or sales of substantially all of our capital stock or our assets.

(AR13.)

Berkshire seeks to realize and enhance the $13.8 billion carrying value of its investment in KHC by working cooperatively with 3G. That control group relationship between Berkshire and 3G is material for purposes of assessing demand futility and assessing the independence of Berkshire employee designees Abel and Cool. Defendants make no argument that Abel and Cool can be considered independent if the relationship between Berkshire and 3G is material. Defendants cannot refute that the economic incentive for Berkshire to act cooperatively with 3G

in exercising control over KHC—an enterprise with a market capitalization in the tens of billions of dollars—operates as a material constraint on the ability of Abel and Cool to impartially consider a demand to sue 3G over a $1.2 billion stock sale. Berkshire's $13.8 billion investment in KHC could be greatly diminished by rupturing Berkshire's joint exercise of control with 3G and by putting Berkshire in an antagonistic relationship with KHC's second-largest stockholder and provider of senior management. The question for Berkshire was whether to rupture the control group relationship. Defendants ignore the record in suggesting that Berkshire and 3G interacted "at arm's length in the ordinary course." (AB at 13.)

Defendants cite no case suggesting that the ability to exercise joint control over a mammoth publicly traded corporation is not a bias-creating relationship. The factual allegations here bear no resemblance, for example, to those in *Olenik v. Lodzinski*, 2018 WL 3493092 (Del. Ch. July 20, 2018), *aff'd in part, rev'd in part on other grounds*, 208 A.3d 704 (Del. 2019), in which there were "no well-pled facts that allow an inference that Urban might feel subject to Lodzinski's domination (if any) because Vlasic Group made investments (of unspecified size), spanning nearly three decades, in five Lodzinski-led entities." 2018 WL 3493092 at *18. The control group relationship between Berkshire and 3G also cannot be analogized to the issue in *Zuckerberg* of Netflix obtaining advertising through Facebook, given that the

complaint in that case did "not allege that those purchases were material to Netflix or that Netflix received anything other than arm's length terms under those agreements." 262 A.3d at 1062.

Defendants argue that Berkshire's investment in KHC is not material to Berkshire. That argument is facially implausible considering the size and nature of the investment, and the fact that Warren Buffett served on the Heinz board and then the KHC board from July 2015 through April 2018, with Buffett's potential successor Abel appointed to the KHC board in January 2018. (A450 ¶47; A456 ¶55.) Berkshire had an intense interest in determining how best to deal with 3G after a public scandal in order to maximize the value of an investment for which Berkshire owns a 27% equity interest with director nomination rights in a company worth tens of billions of dollars.

Defendants describe Berkshire's investment in KHC as "valued at $10.5 billion." (AB at 8.) That description is telling given that Defendants provided the Court with an excerpt of Berkshire's Form 10-K filed in February 2020, which discusses the KHC investment at length. (B82-87.) KHC warrants its own line item on the Berkshire balance sheet, with a $13.8 billion valuation. (B86.) KHC is the largest Berkshire investment using the equity method of accounting (B84-85), which is used only when an investing company can exert significant influence over the

investee. Berkshire explained that it evaluated its investment in KHC for impairment—in light of the $3.3 billion differential between the $13.8 billion carrying value and $10.5 billion fair value based on the market price as of December 31, 2019—and concluded that recognition of an impairment loss in earnings was not required due to, among other factors, "our ability and intent to hold the investment until recovery." (B85.)

Berkshire's investment in KHC is qualitatively different than its investments in "cash, cash equivalents, and short-term investments in U.S. Treasury Bills," or its public holdings in "Apple Inc." or "Bank of America Corp." (AB at 15-16.) Berkshire believes it can influence the value of its stake in KHC by billions of dollars, in large part by exercising influence with and through 3G. That ability to influence the value of a single investment by billions of dollars through astute management of its relationship with 3G means that Berkshire is disinclined to "risk the relationship with 3G." (*Id.* at 15.)

By July 2019, Berkshire had decided not to put Berkshire's relationship with 3G at risk. Buffett publicly stated in the immediate aftermath of the scandal at KHC that Berkshire would continue to pursue co-investments with 3G and that Lemann was his "good friend" and "an absolutely outstanding human being." (A452 ¶47.) There is good reason to suspect that Abel and Cool's assessment of a hypothetical

litigation demand would be subject to the extraneous consideration of Buffett's public position of continued collaboration with 3G.

Defendants accuse Plaintiffs of making "no effort to *contextualize* [Berkshire's] alleged investments" with 3G. (AB at 18.) Of course, Plaintiffs plead about the multiple large co-investments between them, and how 3G was described in *Forbes* as Buffett's "favorite deal-making partner" and in *The New York Times* as Buffett's "preferred business partner in striking multibillion-dollar deals." (A451 ¶47; A456 ¶59.) These well-earned appellations cannot be disregarded on a motion to dismiss for demand futility.

Defendants fail to distinguish *Sandys v. Pincus*, 152 A.3d 124 (Del. 2016), which recognized, in the demand futility context, "the importance of a mutually beneficial ongoing business relationship" and "relationships [that] can generate ongoing economic opportunities." *Id.* at 126, 134. This concept is not unique to "venture capitalism in Silicon Valley." (AB at 18.) Berkshire is in the business of sourcing large-scale investment opportunities; it does not merely maintain its holdings from long-ago acquisitions and invest in marketable securities. 3G is a notable provider of such ongoing co-investment opportunities. The ongoing 3G relationship meant that the joint acquisition of Heinz led to the joint formation of RBI, and further led to the joint formation of KHC, and perhaps will lead to future

deals as well. The total existing portfolio and potential future portfolio would be put at risk by causing KHC to sue 3G. *Sandys* did not create a quantification threshold respecting a mutually beneficial ongoing business relationship.

Additionally, the ongoing Berkshire-3G business relationship grew out of a "close," "firm," "longstanding," and continuing personal friendship between Buffett and Lemann. (OB at 7-8.) *Sandys* turned on pleaded facts that gave rise to an inference of a "continuing, close personal friendship." 152 A.3d at 130. Defendants are incorrect in arguing that "Plaintiffs have alleged no similar ties between Buffett and Lemann." (AB at 22.) The allegations here are based on Buffett's own statements and *Dream Big*, which relied on Buffett as a source. (OB at 7-8; A450-452 ¶47; A95.) Defendants argue that an excerpt from *Dream Big* merely noting that Buffett was interviewed as a source is outside the record (AB at 20), even though they concede that substantive excerpts from the book were incorporated by reference into the Complaint (*id.* at 41). Defendants fail to explain how the pleaded descriptions of the Buffett-Lemann friendship (and the business relationship that grew out of it) compare unfavorably to allegations in another case about joint membership in Augusta National Golf Club. (AB at 23-24.)

B. There Is Reason To Doubt Cahill Is Independent of 3G

There is ample reason to infer that Cahill's "ties could have affected [his] impartiality." *Zuckerberg*, 262 A.2d at 1061. The board determined that he lacked independence, he earned lucrative consulting and Board fees, and his son had professional ties to 3G. We are aware of no case other than the Memorandum Opinion in which a Delaware court has held at the pleading stage that a director was independent in the face of (i) a board determination to the contrary and (ii) allegations that a majority of the director's income was derived from board and consulting fees attributable to companies run by defendants.

Defendants rely on cases addressing either (i) the absence of allegations of any "financial interests … on an individual and personal basis," *In re Delta & Pine Land Co. Shareholders Litigation*, 2000 WL 875421, at *8 (Del. Ch. June 21, 2000), (ii) the proposition that "'ordinary director compensation alone is not enough' to show a lack of independence," *Ryan v. Gursahaney*, 2015 WL 1915911, at *8 (Del. Ch. Apr. 28, 2015), *aff'd*, 128 A.3d 991 (Del. 2015) (TABLE), or (iii) relatively small consulting fees with "no allegations of materiality." *White v. Panic*, 783 A.2d 356 (Del. Ch. 2000).

Plaintiffs alleged that in the year leading up to the lawsuit Cahill made at least $735,000 in director and consulting fees from KHC, which accounted for 53% of his

publicly ascertainable income. In *Voigt v. Metcalf*, 2020 WL 614999 (Del. Ch. Feb. 10, 2020), the Court of Chancery held that it was inferable that a director might lack independence because "the magnitude of the remuneration she has received is sufficiently large to support an inference of materiality at the pleading stage, particularly given the allegation in the complaint that most, if not all, of [the director's] income has come from entities affiliated with [an interested party]." *Id.* at 15.

Plaintiffs cited numerous other cases that similarly held materiality could be inferred based on the size of a director's compensation relative to their income. *See, e.g., Del. Cty. Empls. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1020-21 (Del. 2015) (director fees of $165,000 allegedly constituted 30% to 40% of defendant's total annual income); *Cumming ex rel. New Senior Inv. Gp., Inc. v. Edens*, 2018 WL 992877, at *17 (Del. Ch. Feb. 20, 2018) (deeming material fees constituting 60% of director's identifiable income). KHC nitpicks at factual differences between this case and others, but the factual allegations remain that Cahill made a large amount of money from KHC, relative to his publicly ascertainable income, while it was being run by 3G-affiliated senior management.

Defendants insinuate that Plaintiffs ignored Cahill's other sources of income (AB at 27-28), but the arithmetic is no mystery. The 2019 proxy reflects that Cahill

had no full-time job other than his KHC consultancy, and that he served on the boards of American Airlines Group and Colgate Palmolive. (B66.) Based on the proxy statements of all three companies, Plaintiffs divided Cahill's KHC compensation by his total compensation. (AR14-17.)

Defendants' plea to "contextualize" Cahill's compensation improperly asks "the court to draw inferences in their favor, treating the motion to dismiss as if the court could weigh evidence and make findings of fact." *Voigt*, 2020 WL 614999, at *9. Defendants characterize Cahill's income from jobs he held from 2003-2015 (AB at 26-27), but Plaintiffs have no way of knowing how much money Cahill spent, or how much he invested, and with what success, or his recent cash needs. Plaintiffs' allegations of materiality are sufficient at the pleading stage to establish standing under Rule 23.1. *Cf. Morris v. Spectra Energy Partners (DE) GP, LP*, 246 A.3d 121, 139 (Del. 2021) ("If the plaintiff has alleged a viable derivative claim, where it is reasonably conceivable that the claim is material when compared to the merger consideration and could result in the damages pled in the complaint, the plaintiff has satisfied the materiality requirement at the motion to dismiss stage for standing purposes.").

Defendants' "contextualization" is also misleading. Defendants omit nearly $10 million Cahill received from KHC from 2015-2018. (OB at 15-16.) The Court

can take judicial notice of income disclosed in SEC filings, *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 351 & n.7 (Del. 2017); *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 280 & n.13 (Del. 2016), and Rule 8 permits a party to offer additional reasons in support of an argument raised below. *See N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 382-83 (Del. 2014); *Mundy v. Holden*, 204 A.2d 83, 87 (Del. 1964).

Cahill's status as a "prior consultant" appears to have been orchestrated while KHC was expecting derivative litigation, and implemented afterwards. The relevant consulting agreement has a 30-day notice provision to terminate (A134 §3), and it was purportedly "terminated on July 1, 2019" (A423). Yet, KHC's Form 10-K filed on June 5, 2019, described Cahill as a "current consultant," and made no mention of any termination notice. (AR19.) KHC's 2020 proxy statement describes the grant of stock options to Cahill "[i]n connection with the termination of his consulting 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 consulting arrangement and significant compensation by KHC up to and beyond the operative date for demand futility does not lend itself to the argument that he lacks independence for purposes of NASDAQ listing rules but not for Rule 23.1 purposes. Cahill's situation is distinguishable from *Teamsters Union 25 Health Services & Insurance Plan v. Baiera*, 119 A.3d 44 (Del. Ch. 2015), in which the director in question had "severed his ties" nearly three years earlier and had a new full-time job as the "President, CEO, and a director of Bankrate." *Id.* Cahill's economic arrangements had not severed as of the operative date, and he had no full-time job elsewhere. Defendants make no argument to the contrary.

If Cahill cannot act objectively respecting KHC, there is no reason to believe he can act objectively as to 3G, which wields managerial authority at KHC. As this Court recently held, "if our law is to have integrity, Delaware must be cautious about according deference to directors unable to act with objectivity." *Sandys*, 152 A.3d at 133.

Defendants cannot disregard the additional fact of Cahill's son's employment at AB InBev. Defendants' legal argument is based on the significance of a close family member's employment "standing alone." (AB at 34.) This allegation does not stand alone.

Defendants confuse the factual issue by stating that *Dream Big* "discusses a training program at *Brahma*." (AB at 34.) The founders of 3G had bought Brahma in 1989, and grew it through acquisitions into AB InBev. (A441-42 ¶26.a.) 3G carried forward the training program it had begun at Brahma. (A88.) *Dream Big* discusses how 3G co-founder Telles "takes part in the final selection of the trainee program and tells those chosen they can send him messages directly should they feel it necessary." (*Id.*) According to Telles: "With Brahma, I used to give a telephone token…. I am more up to date now." (*Id.*) Telles was a "[c]ontrolling shareholder and Board Member of Anheuser-Busch InBev, previously Ambev," when Cahill's son was hired for AB InBev's trainee program in 2018. (A446-47 ¶43; AR27-29.)

Lastly, Defendants mischaracterize Plaintiffs' argument respecting the significance of the presence of a controller or control group. Plaintiffs do not argue that an independence analysis "is obviated" by the presence of a controller. (AB at 35.) Plaintiffs cited *In re BGC Partners, Inc.*, 2019 WL 4745121 (Del. Ch. Sept. 30, 2019), in which Chancellor Bouchard reasoned that "the presence and influence of a controller is an important factor that should be considered in the director-based focus of the demand futility inquiry under the first prong of *Aronson*, particularly on the issue of independence." *Id.* at *18. Defendants ignore *BGC*.

C. There Is Reason To Doubt Zoghbi Is Independent of 3G

As with Cahill, the board of directors determined that Zoghbi lacks independence due to significant compensation he received from KHC. The arguments as to Cahill apply with equal or greater force as to Zoghbi, who had larger financial entanglements with 3G.

Pursuant to an agreement dated September 6, 2019, Zoghbi was "convert[ed] from "full-time to part-time employment status," "effective" as of July 1, 2019. (B75.) The Complaint alleged that the $400,000 he received as a KHC consultant (based on his new part-time status) made up more than 70% of his publicly ascertainable income. (A447-48 ¶44.)

Defendants insinuate that Plaintiffs miscalculated the percentage of Zoghbi's income attributable to KHC. As with Cahill, Plaintiffs relied on KHC's 2019 proxy statement, which identified Zoghbi's only other position as a director of "Brambles Limited." (B67.) In its 2019 annual report, Brambles disclosed that Zoghbi made $163,000 in director fees for fiscal year 2019. (AR22-23.) $400,000 from KHC is more than 70% of his combined income from KHC and Brambles Limited.

Plaintiffs understated the total amount and percentage of Zoghbi's compensation that was attributable to KHC in 2019. Zoghbi's consulting income from KHC had been $850,000 until it was reduced to $400,000 "[e]ffective July 1,

2019[.]" (A421.) The new agreement, dated September 6, 2019, also entitled Zoghbi to begin receiving $235,000 in director compensation, which means that his annualized income from KHC thereafter was $635,000. (A428.)

As with Cahill, the timing of Zoghbi's new agreement 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.)

Defendants present an even more misleading "contextualization" of Zoghbi's employment history than Cahill's. KHC asks the Court has to consider that "Zoghbi was a Kraft officer," without mentioning that he received $30 million from KHC when it was being run by 3G. (*See* OB 41 (citing to the SEC filings).) Defendants also invoke Zoghbi's supposed "primary employment" as "CEO of Arnott's Biscuits Ltd." (AB at 38.) But the relevant date for assessing demand is July 30, 2019 (OB

Ex. A at 12; A905-906), and Zoghbi did not begin working for Arnott's Biscuits until "March 2, 2020." (AR25.)

Defendants also miss the point about the Federal Securities Action. The Opening Brief explained that the Federal Securities Action sustained scienter-based claims against Zoghbi, which creates a reasonable doubt about his independence from 3G and his other federal co-defendants. Defendants do not mention, much less distinguish, *Pfeiffer v. Toll*, 989 A.2d 683, 690 (Del. Ch. 2010), which held that a director facing the threat of liability in a related securities action could not impartially and independently consider a litigation demand related to the same conduct. Defendants instead pivot to *In re Zimmer Biomet Holdings, Inc. Derivative Litig.*, 2021 WL 3779155 (Del. Ch. Aug. 25, 2021), but in that case, the "securities claims sustained against the directors were non-scienter based." *Id.* at *24. In denying Zoghbi's motion to dismiss the Federal Securities Action, the District Court concluded there was a strong inference that Zoghbi made these false statements with scienter. *Hedick v. The Kraft Heinz Co.*, 2021 WL 3566602, at *11 (N.D. Ill. Aug. 11, 2021). There is reason to doubt that Zoghbi could impartially decide whether to cause KHC to sue his fellow federal co-defendants. Such a suit could end up implicating himself.

Taken together and accepted as true, the allegations about Zoghbi lead to an inference that he might not be impartial.

D. There Is Reason To Doubt Van Damme Is Independent of 3G

The Answering Brief contends that Plaintiffs have not pleaded a sufficient web of connections between Van Damme and 3G to call into question his ability to act objectively. Defendants then spend more than six pages of their brief severing each of his interrelationships with 3G and Lemann, including that he (i) was a member of a controlling family of Interbrew; (ii) knew Telles since 1995; (iii) cultivated a friendship with Lemann and his family in 2002, and worked with Lemann in 2003 to broker the acquisition of Interbrew by AmBev, creating InBev; (iv) was a director of InBev and then AB Inbev ever since; (v) was a director of Burger King and then RBI since 2011; (vi) invested in 3G funds that invested in Burger King and Heinz; and (vii) was a director of DKMS, a charity that is sponsored by 3G founding partners. (AB at 39-45.)

Defendants challenge Plaintiffs' allegations that Van Damme had "deep financial ties, and longstanding business relationship to 3G," by arguing that these allegations are insufficient because the Complaint "contains no particularized allegations' that 3G controls the Boards of AB InBev, RBI or Burger King." (AB at 40.) To the contrary, the Complaint specifically describes and particularizes the

relationship and control 3G has over these entities. (*See e.g.*, A441 ¶¶26-27.) Defendants' reliance on *Ash v. McCall*, 2000 WL 1370341 (Del. Ch. Sept. 15, 2000), is therefore misplaced. *Id.* at *7 ("[I]n short, plaintiffs have not alleged a single fact in support of their domination theory and, as Delaware courts have repeatedly observed, such assumptions will not be made in the context of pre-suit demand.").

Defendants essentially argue that Van Damme is so wealthy that he cannot possibly care about investing alongside 3G, serving on 3G-controlled boards, and maintaining his relationships with 3G's partners. That invites the question of why Van Damme continues to make substantial investments alongside 3G-controlled entities and to serve alongside 3G-nominated directors. There is no rule of law that wealthy individuals are *per se* independent, and are not influenced by close friends, business partners, and confidantes.

Defendants claim that Plaintiffs "cherry-picked" information from *Dream Big* about Van Damme's personal relationship with Lemann (AB at 41), but Plaintiffs closely hewed to the text of the book and pleaded sufficient detail to lead to an inference that they are close friends. "[A]lthough a plaintiff has a pleading stage burden that is elevated in the demand excusal context, that standard does not require a plaintiff to plead a detailed calendar of social interaction to prove that directors have a very substantial personal relationship rendering them unable to act

independently of each other." *Sandys*, 152 A.3d at 130. KHC asks the Court to disregard the allegations that they met with each other's families on "vacation" and urges the Court to find that the interactions, in which their families spent time at the beach together, were "mixed social-business" interactions. (AB at 41.) Defendants are not entitled to inferences. Drawing inferences in Plaintiffs' favor, the allegations support an inference that the relationship is long-standing and continuous, and sufficient to provide a reasonable doubt regarding Van Damme's ability to impartially consider a demand on the board to sue 3G.

Defendants assert that Van Damme's service on the board of DKMS, a charity supported by 3G partners personally and 3G's controlled company, AB InBev, is insufficient because the Complaint does not allege Van Damme "actively solicited such support, or that he had any substantial dealing with those contributors." (AB at 43.) It is perhaps possible that 3G's contributions to Van Damme's charity are a mere coincidence, but that is certainly not the only inference, given their web of connections. KHC tries to distinguish *Cumming v. Edens* on this score, but defendants made the same arguments in that case, which the Court rejected at the pleading stage. 2018 WL 992877, at *15. Van Damme's long, multi-dimensional history of "important personal and business relationship" with Lemann and 3G raises

a reasonable doubt about his independence at the pleading stage. *Marchand v. Barnhill*, 212 A.3d 805, 820 (Del. 2019).

CONCLUSION

For the reasons discussed above and in the opening brief, Plaintiffs respectfully request reversal of the Court of Chancery's dismissal.

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DATED: April 18, 2022

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