IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE KRAFT HEINZ COMPANY DERIVATIVE LITIGATION	CONSOLIDATED C.A. No. 2019-0587-AGB PUBLIC VERSION FILED ON: May 4, 2020

CONSOLIDATED AMENDED VERIFIED STOCKHOLDER DERIVATIVE COMPLAINT

Plaintiffs General Retirement System of the City of Detroit, Police & Fire Retirement System of the City of Detroit, and Erste Asset Management GmbH, by and through their undersigned counsel, submit this Consolidated Amended Verified Stockholder Derivative Complaint against the defendants named herein for breaches of fiduciary duty in their capacities as officers, directors, and/or controlling stockholders of The Kraft Heinz Company ("KHC" or the "Company"). The allegations of this Complaint are based on the knowledge of Plaintiffs as to themselves, and on information and belief, including the investigation of counsel, the review of publicly available information, and the review of books and records produced by KHC in response to Plaintiffs' demands made under 8 *Del. C.* § 220 ("Section 220"), as to all other matters, all of which books and records are expressly incorporated by reference in this Complaint. For the avoidance of doubt, this incorporation by reference does not change the pleading standard applicable to any motion to dismiss that may be filed in this case.

PRELIMINARY STATEMENT

1. This action arises out of the misuse of material, non-public information and related breaches of fiduciary duty by KHC's controlling stockholder, Brazilian-American global investment giant 3G Capital, Inc. (together with its affiliates, "3G").

2. 3G is part of an admitted "control group," along with Berkshire Hathaway Inc. ("Berkshire"), that owns in the aggregate 46.7% of KHC's stock. 3G dominates KHC's eleven-person board of directors (the "Board"). Three Board members are 3G principals. A fourth is a long-time business partner of 3G who vacations with one of 3G's founders. A fifth operates a foundation that invests in 3G and chairs the board of a charity funded in part by 3G. A sixth and seventh were appointed by Berkshire. An eighth and ninth are paid consultants to the Company who the Company considers not independent. 3G exercised managerial control over KHC at all relevant times by embedding 3G partners as KHC's senior officers, including then-CEO Bernardo Hees and then-CFO David Knopf.

3. 3G and Berkshire bought The H.J. Heinz Company ("Heinz") in 2013, and they created KHC in 2015 by causing Heinz to acquire majority control of Kraft Foods Group, Inc. ("Kraft") in a stock-for-stock merger (the "Merger"). 3G hoped to use its trademark strategy of slashing costs on a massive scale. KHC soon fired

thousands of employees, closed plants, used cheaper and lower quality ingredients, and slashed advertising and promotional and product innovation expenditures.

4. 3G's cost-cutting strategy at KHC was an ongoing, spectacular failure. By 2017, cost cutting had decimated KHC's product quality, consumer perception of added value or quality, and supply chain. KHC's largest customer, Walmart, Inc. ("Walmart"), increasingly grabbed market share from KHC through private label offerings. 3G scrambled to cut more costs, which further damaged KHC's iconic brands. [redacted]

5. [redacted] That projection was soon revealed to be unfounded. [redacted] KHC CEO Bernardo Hees, a 3G partner, warned the Board about "accelerating" private label offerings in the United States, driven mainly by Walmart. [redacted] KHC admitted internally that it could not implement the level of cost cuts needed to meet EBITDA projections. [redacted]

6. This lowering of projections reflected a new reality in consumer food retail. At a conference on disruption on April 30, 2018, 3G co-founder and KHC director Jorge Paulo Lemann called himself "a terrified dinosaur" and stated: "I've been living in this cozy world of old brands, big volumes, nothing changing very

much, and you could just focus on being very efficient and you'd be okay, and all of a sudden we are being disrupted in all ways…. We bought brands and we thought they would last forever…. [W]e really have to adjust." KHC management refused to publicly acknowledge this new reality or create long-term projections that reflected it.

7. Amidst the failed cost-cutting and missed projections, problems with accounting compliance surfaced. In the second quarter of 2018, KHC engaged in annual impairment testing, based on projections in place as of April 1, 2018. [redacted] The Company's Controller and Chief Accounting Officer resigned and left the Company a few hours after that meeting. The Company's Chief Ethics and Compliance Officer also announced he would leave the Company. On July 13, 2018, the SEC served the Company with a notice that threatened regulatory action and demanded that KHC preserve documents related to its accounting practices.

8. At the Audit Committee meeting of July 31 to August 1, 2018, management reported that four units (Canada, Latin America, Northeast Asia, and Southeast Asia) had a "fair value" cushion of less than 10% and two other units and eight brands had fair value cushions between 10% and 20%, including U.S

Refrigerated (12%), Kraft Master Brand (13%), and Oscar Mayer (13%). If the impairment testing had used current and realistic projections and other inputs as of August 1, 2018, the fair value cushions, if any, would have been even lower, and the Company would have had to make additional early warning disclosures as to the units/brands listed above.

9. By August 2018, 3G could not have reasonably believed that KHC would achieve even its lowered projected EBITDA or costs savings for fiscal year 2018. In addition to the poor observed results in the first half of fiscal year 2018, expenses surged in July 2018, and competition from private-label brands was increasing.

10. On August 2, 2018, the Board met. [redacted] Hees reported on "unprecedented commercial headwinds in the U.S., pushed by Private Label / deflation from Wal-Mart." [redacted] and Hees explained [redacted] that expenses had ballooned in July 2018.

11. On the Company's August 3, 2018 analyst call, CEO Hees, CFO Knopf, and fellow 3G partner and KHC U.S. Zone President Paulo Basilio misled the

market. They dissembled when an analyst asked "relative to internal forecasts originally from the beginning of the year, is there a change to the full year, just to be clear?" Respecting the unprecedented pricing pressure KHC was facing, they claimed "these negative headwinds, we expect them to fade." Management falsely stated that "our first half performance was slightly better than expected," and that "our first half financial performance was consistent with the type of start of the year we expected, if not somewhat better."

12. On August 7, 2018, 3G sold 20.3 million shares of KHC stock for over $1.2 billion, at a price of approximately $59 per share. At the time, 3G had obtained from its partners and representatives at KHC material, non-public information respecting the significant and increasing risk of a massive impairment and major decline in the value of the business, such as:

- [redacted]
- [redacted]
- Expenses had increased in July 2018, which meant that KHC would not achieve its cost-cutting projections for the remainder of 2018;
- KHC's impairment testing and impairment disclosures were based on April 2018 projections, which 3G knew were stale, and which allowed

critical "fair value" cushions to barely scrape over KHC's 10% reporting threshold;

- 3G had real-time visibility into KHC's top-line growth and margin contraction from "accelerating" and "unprecedented" pricing and market share pressures, including from its largest customer, Walmart, and the lingering fallout from the renegotiation of fundamental contract terms with two of Canada's largest retailers; and
- the SEC had threatened regulatory action and was investigating KHC's accounting practices.

13. On November 1, 2018, KHC reported a sharp decline in earnings for the quarter ended September 30, 2018, as compared to the previous year. KHC also disclosed a $499 million impairment to the value of its brands and goodwill. The following day, KHC's stock dropped by 9.73%, from $56.20 to $50.73 per share.

14. Meanwhile, additional indications accumulated within KHC of looming, massive impairments for major units and trademarks with small fair value cushions. In October 2018, the SEC served a subpoena for information about KHC's accounting practices. [redacted]

KHC's actual fiscal year 2018 EBITDA was just over $7 billion, [redacted] Nevertheless, KHC conducted no interim impairment testing in 2018 respecting its major units and trademarks.

15. On February 21, 2019, KHC disclosed a ***$15.4 billion*** goodwill and intangible asset impairment charge in certain reporting units, primarily U.S. Refrigerated and Canada Retail, and certain intangible assets, primarily the Kraft and Oscar Mayer trademarks. KHC also disclosed that it had received a subpoena from the SEC in October 2018 (without mentioning the document preservation notice in July 2018). KHC's stock price fell 27% on the news, from $47.59 to $34.52 per share.

16. On February 28, 2019, KHC announced that it was unable to timely file its Form 10-K for the fiscal year ended December 29, 2018, due to a dispute with its auditor. The Company further stated that the $15.4 billion impairment was due to triggering events in the fourth quarter of 2018, conveniently avoiding the circumstances in the third quarter, when 3G unloaded KHC shares for $1.2 billion.

17. In April 2019, the Board terminated Hees as CEO and replaced him with another member of 3G's management team.

18. On May 6, 2019, KHC announced that it would restate its financial statements for 2016, 2017, and the first nine months of 2018. KHC revealed longstanding and widespread wrongdoing in its procurement department. The

procurement fraud was tied to KHC's compensation practices, by which bonuses were tied to EBITDA targets. In the face of declining sales due to cost-cutting, procurement division executives front-loaded rebates that should have been recorded over the multi-year terms of the contract.

19. In June 2019, after disclosing a second SEC subpoena addressing its reporting of asset impairments, KHC filed its belated Form 10-K, which disclosed that the United States Department of Justice had joined the SEC's investigation into KHC's accounting practices. KHC further disclosed that its internal investigation had found fundamental material weaknesses in the "risk assessment" portion of its internal controls over financial reporting, resulting in additional material weaknesses with respect to its accounting for supplier contracts and goodwill testing.

20. In August 2019, KHC's new CEO admitted that the massive goodwill impairment was not merely the product of triggering events in the fourth quarter of 2019. The CEO acknowledged that "supply chain losses have been increasing, actually, double digits in the last years." He later admitted that supply chain losses had been increasing 15% year-over-year ("YoY") since the Merger in 2015.

21. In other words, 3G knew by the time of its stock sale in August 2018 that KHC's projections and goodwill valuations were a tottering edifice.

PARTIES AND MATERIAL NON-PARTIES

Plaintiffs

22. Plaintiff Police & Fire Retirement System of the City of Detroit is a beneficial owner of 4,152 shares of KHC stock, and has owned KHC stock continuously since the Merger.

23. Plaintiff General Retirement System of the City of Detroit is a beneficial owner of 3,720 shares of KHC stock, and has owned KHC stock continuously since the Merger.

24. Plaintiff Erste Asset Management GmbH, as legal representative for its VBV Low Carbon World Equities Fund, is a beneficial owner of 13,437 shares of KHC stock, and has owned KHC stock continuously since the Merger.

The 3G Entity Defendants

25. Defendant 3G Capital, Inc. is a Brazilian-American private equity firm founded by Alexandre Behring, Jorge Paulo Lemann, Marcel Herrmann Telles, Carlos Alberto Sicupira, and Roberto Thompson Motta in 2004. 3G Capital describes itself as "a global investment firm focused on long-term value, with a particular emphasis on maximizing the potential of brands and businesses."

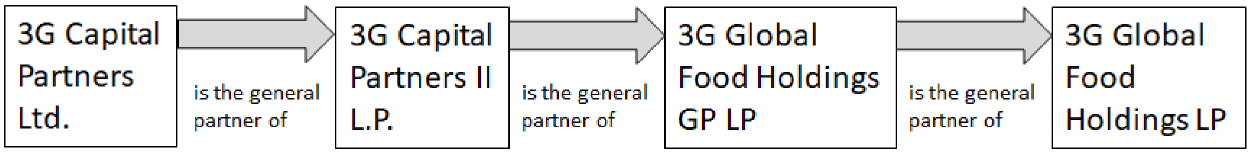
26. 3G and its founding partners have a history of rolling up brand-name companies in specific industries:

(a) In 2004, InBev was created following the merger of Belgian brewer Interbrew and AmBev, a Brazilian brewer controlled by 3G founding partners Lemann, Telles and Sicupira. Anheuser-Busch InBev ("AB InBev") was formed in 2008 following InBev's acquisition of American brewer Anheuser-Busch, creating the world's largest brewer. AB InBev became larger still in October 2016 when it acquired SABMiller. Lemann, Telles and Sicupira describe themselves as "controlling shareholder[s]" of AB InBev.

(b) In 2010, 3G acquired Burger King Worldwide, Inc. ("Burger King"). In 2014, Burger King acquired Canadian coffee and donut chain Tim Hortons, combining to form Restaurant Brands International, Inc. ("RBI"). In 2017, RBI acquired Popeyes Louisiana Kitchen, Inc., expanding RBI's portfolio to more than 22,000 restaurants across more than 100 countries.

(c) In 2013, 3G and Berkshire partnered to acquire Heinz in a transaction valued at $28 billion. In 2015, 3G and Berkshire created KHC by causing Heinz to acquire Kraft through the Merger.

27. KHC describes 3G Capital as an "Affiliate" of the other 3G Entity Defendants (defined below). Behring, Lemann, Motta, Telles and Sicupira control 3G Capital and 3G Capital Partners Ltd., through which the 3G Entity Defendants (together with Berkshire) control KHC as follows:



3G Capital Partners LP is the investment manager of 3G Global Food Holdings LP.

28. Defendant 3G Capital Partners Ltd. is a Cayman Islands exempted company affiliated with 3G Capital.

29. Defendant 3G Capital Partners II LP is a Cayman Islands limited partnership affiliated with 3G Capital.

30. Defendant 3G Global Food Holdings GP LP is a Cayman Islands limited partnership affiliated with 3G Capital.

31. Defendant 3G Global Food Holdings LP ("3G Global") is affiliated with 3G Capital. 3G Global is a party to the Shareholders' Agreement with Berkshire (*see infra* ¶¶ 48, 76-77) pursuant to which those entities control KHC. 3G Global directly owned the 20,630,314 KHC shares that 3G sold on August 7, 2018.

32. Defendant HK3 18 LP ("HK3") is a 3G-affiliated special purpose vehicle formed to effectuate 3G's sale of $1.2 billion of KHC stock. 3G Global transferred 20,630,314 of 3G's shares of KHC stock to HK3 on August 6, 2018. HK3 sold the shares the following day.

33. 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 are referred to herein as the "3G Entity Defendants."

The 3G Individual Defendants

34. Defendant Alexandre Behring was appointed Chairman of KHC's Board effective as of the Merger. He previously served as Chairman of Heinz. Behring served on the Board's Compensation Committee and its Governance Committee. Behring is a co-founder of 3G and has been its managing partner and a director since 2004. Behring has served on the boards of other 3G-affiliated companies, including AB InBev from April 2014 through April 2019, and RBI, for which he now serves as Executive Chairman. Behring is accused of making false and misleading statements herein and in a securities fraud class action styled *In re The Kraft Heinz Company Securities Litigation, Case No. 19-1339* (N.D. Ill.) (the "Securities Fraud Class Action"). As a co-founder, managing partner and a director of 3G Capital who faces a substantial threat of liability here and in the Securities Fraud Class Action, Behring is interested and not independent.

35. Defendant Jorge Paulo Lemann has served on the KHC Board since the Merger. He previously served on Heinz's board. Lemann is a co-founder of 3G and has served on its board since 2004. He is also a self-described "controlling shareholder" of AB InBev. Lemann served on the Board's Compensation Committee and its Governance Committee. As a founding partner and director of 3G Capital, Lemann is interested and not independent.

36. Defendant Marcel Herrmann Telles is a founding partner and board member of 3G. Telles served on the Board from the Merger until June 2019.

37. Defendant Bernardo Hees served as KHC's CEO from the Merger until June 2019. Previously, Hees served as CEO of Heinz, as CEO of Burger King, and as CEO of 3G-controlled America Latina Logistica S/A ("ALL"). Hees was a partner of 3G from July 2010 until June 2019.

38. Defendant David Knopf served as KHC's CFO from October 2017 until August 2019. Previously, Knopf served as KHC's Vice President of Planters and Vice President of Finance. Knopf joined 3G Capital in October 2013 and has been a partner since July 2015.

39. Defendant Paulo Basilio served as KHC's CFO from July 2015 to October 2017. He later served as KHC's U.S. Zone President until August 2019. He has been a partner at 3G since July 2012. Basilio presented at numerous Board meetings and on analyst calls.

40. Defendant Eduardo Pelleissone served in various executive roles at Heinz and then KHC from June 2013 until July 2019. From the Merger until August 2018, he served as KHC's Executive Vice President of Global Operations and held himself out as COO. From August 2018 until July 2019, Pelleissone served as KHC's Executive Vice President of Strategic Projects. A 3G co-founder, managing partner and director, Behring co-founded ALL in 1996, and served as its CEO (from

1998 until 2004 and from September 2012 until May 2013) and as a board member (from 1996 until 2011). Contemporaneously with 3G's sale of KHC stock for $1.2 billion, Pelleissone sold at least 35,000 KHC shares for proceeds in excess of $2.3 million. Four days earlier, Pelleissone had made a Board presentation [redacted]

41. Behring, Lemann, Telles, Hees, Knopf, Basilio, and Pelleissone are collectively referred to as the "3G Individual Defendants." The 3G Entity Defendants and 3G Individual Defendants are collectively referred to as "Defendants."

Non-Party Directors

42. Joao M. Castro-Neves has served on the Board since June 2019. Castro-Neves has been a partner of 3G Capital since July 2018. Before he joined the Board, Castro-Neves served in various executive roles at AB InBev from January 2015 until December 2017, most recently serving as CEO of Anheuser-Busch, AB InBev's North American unit. From January 2005 until December 2014, Castro-Neves served in various executive roles at AmBev. As a current 3G partner with longstanding ties to 3G Capital, Castro-Neves is not independent.

43. John T. Cahill has served as Vice Chairman of the Board since the Merger. Cahill previously served as CEO of Kraft. According to KHC's Schedule

14A filed on August 2, 2019, the Board does not consider Cahill to be independent. 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. Cahill's son, Jack Cahill, works as a District Sales Manager at AB InBev. Jack Cahill started his career at AB InBev as a member of its highly selective management trainee program, a position for which he was hand-picked by Defendant Telles. According to the book *DREAM BIG: How the Brazilian Trio behind 3G Capital – Jorge Paulo Lemann, Marcel Telles and Beto Sicupira – acquired Anheuser-Busch, Burger King and Heinz* ("*Dream Big*"), AB InBev received 74,000 applications for its management trainee program in 2012, out of which only 24 applicants were hired, and Telles "still takes part in the final selection of the trainee program and tells those chosen that they can send him messages directly should they feel necessary." In light of Cahill's income from KHC, his son's career at AB InBev, and the fact that the Board does not consider Cahill to be independent, Cahill is not independent.

44. George Zoghbi has served on KHC's Board since April 2018. According to KHC's Schedule 14A filed on August 2, 2019, the Board does not consider Zoghbi to be independent. Zoghbi has been employed as a Special Advisor to KHC since October 2017, after having served as COO of KHC's U.S. Commercial

business since the Merger. For his role as Special Advisor from October 2017 until July 1, 2019, Zoghbi was paid an annual base salary of $850,000, or approximately 86% of his publicly reported income in 2018, plus annual incentive awards. Effective July 1, 2019, Zoghbi's base salary was reduced to $400,000, which constitutes approximately 74% of his current publicly reported income. Zoghbi is listed as a "Named Executive Officer" in KHC's 2018 proxy statement. Zoghbi faces the prospect of liability as a defendant in the Securities Fraud Class Action. For all these reasons, Zoghbi is not independent.

45. Alexandre Van Damme has served on KHC's Board since April 2018. Van Damme has strong connections to the public companies that 3G Capital and its principals control and to various co-founders of 3G. Given his intricate web of personal, professional and financial ties to 3G and its principals, Van Damme is not independent. Van Damme has known Telles since 1995. Van Damme was introduced by Telles to Lemann in 2002, which led to an ongoing close friendship between Lemann and Van Damme. Lemann and Van Damme are so close that they have watched the samba schools together at the Rio Carnival, summered together with their respective families in the Hamptons, and visited each other in the Swiss Alps. According to *Dream Big*, by May 2003 (when Lemann first proposed a merger of AmBev and Interbrew), Van Damme was "virtually an ally of Lemann." Van Damme served on the board of Interbrew, and he sponsored the AmBev proposal to

the Belgian Interbrew families. Ever since that merger, Van Damme has served on the board of the combined company (originally InBev and now AB InBev). Van Damme is a beneficial owner of Société Familiale d'Investissements S.A., an affiliate of Patrinvest SCA, which holds the interests of some of the founding families of AB InBev, including the Van Damme family. The 3G biographies of Lemann, Telles and Sicupira describe them as "controlling shareholder[s]" of AB InBev. As of January 2, 2019, Patrinvest SCA also held 5,419,230 shares of RBI stock, which shares are now worth approximately $350 million. Van Damme has served on the board of 3G-controlled RBI since its formation in December 2014. From 2011 until December 2014, Van Damme served on the Burger King board of directors. Van Damme invested in the 3G funds that acquired Burger King in 2010, as well as the 3G funds that invested in Heinz in 2013. Van Damme also has connections to 3G and its principals through his charitable interests. Van Damme serves on the board of DKMS, a charitable organization. 3G and its principals have been intimately involved in fundraising efforts for DKMS. In 2016, AB InBev was a "Visionary Sponsor," and 3G founding partners Behring and Roberto Thompson Motta were co-chairs and "Diamond Sponsors," of DKMS's annual Love Gala, the largest annual fundraising event for DKMS. In 2017, Behring and Motta served as "Platinum Sponsors," and Telles as a "Gold Sponsor," of the Love Gala, with Behring and Motta again co-chairing the event. In 2019, Behring, Lemann and

Motta were "Platinum Sponsors" of the Love Gala, and Behring and Motta once again co-chaired the event.

46. Feroz Dewan was appointed to the Board effective October 21, 2016. Dewan has disabling ties to 3G and is not independent. Among other things, Dewan's private foundation, Rise8 (f/k/a The Dewan Foundation), held an investment in 3G Special Situations Fund III, LP worth approximately $4.7 million as of 2016, accounting for more than 12% of the value of Rise8's investment portfolio at the time. Since Dewan personally made all the publicly known gifts to Rise8, Dewan holds a significant personal investment in 3G Special Situations Fund III, LP. Indeed, as reported by *The Wall Street Journal* in 2015, 3G has a practice of inviting its investors to join the boards of companies it acquires. Dewan chairs the board of non-profit The Character Lab, and 3G-controlled RBI is one of the twelve donor foundations and organizations on The Character Lab's website.

47. Gregory Abel has served as a Berkshire designee on the KHC Board since the Merger, and previously served on the Heinz board. In January 2018, Abel was elected to the board of directors of Berkshire and was appointed as its Vice Chairman, Non-Insurance Business Operations. In connection with this appointment, Abel became Executive Chairman of the board of Berkshire Hathaway Energy Company. He previously served as CEO and as President of Berkshire Hathaway Energy Company. Abel is on a short list of candidates to succeed Warren

Buffett as CEO of Berkshire. Abel lacks independence given Berkshire's close co-investing relationship with 3G and Buffett's close friendship with Lemann. In addition to investing $10 billion in the Merger, Berkshire invested $12.4 billion to partner with 3G Capital to acquire Heinz in 2013, and invested another $3 billion in Burger King's acquisition of Tim Hortons in 2014. As of September 30, 2019, Berkshire owned approximately 27% of KHC's and approximately 1.6% of RBI's outstanding shares. Berkshire previously owned a large stake in AB InBev. According to *Forbes*, these co-investments have earned 3G Capital the reputation as "Warren Buffett's favorite deal-making partner." Berkshire's close relationship with 3G Capital stems from Buffett's close friendship with Lemann. Buffett and Lemann have known each other since 1998 when they served together on Gillette's board of directors. According to *Dream Big*, Buffett and Lemann are "longstanding friends" who have a "close relationship" and a "firm friendship." They share the same lifestyle, working habits, and ambitions. Buffett affectionately refers to Lemann as "Georgie." Buffett and Lemann are "so close that Buffett has accompanied Lemann to three workshops with Jim Collins [a business professor and mentor of Lemann] in Colorado in recent years." Buffett attended Lemann's 75th birthday party. As reported by *The New York Times* in 2017, Buffett said of Lemann: "I consider it one of the largest mistakes in my life that we didn't really team up as partners until considerably later…." Even in the wake of KHC's announcement of the $15.4 billion impairment charge, Buffett affirmed that Berkshire would still pursue co-investments with 3G Capital and called Lemann "a good friend" and "an absolutely outstanding human being."

Warren Buffett is left and Lemann's son, Marc Lemann, is right

48. A shareholders' agreement that Berkshire entered into with 3G Global at the time of the Merger (the "Shareholders' Agreement") prevents any of Berkshire's designees from voting to cause KHC to sue 3G's designees on the KHC

Board because a finding of liability would facilitate the removal of the 3G designees under 8 *Del. C.* § 225(c). The Shareholders' Agreement provides that "[Berkshire] agrees it will not ... take any [] action to effect, encourage or facilitate the removal of any 3G Designee elected to the Board therefrom (and shall cause each Affiliate of [Berkshire] that holds Shares, if any, to not ... take any [] such actions) without the consent of the 3G Shareholder." As a Berkshire executive serving on the Board as a Berkshire designee, Abel is an "Affiliate" of Berkshire under the customary definition of the term set forth in the Shareholders' Agreement: "'<u>Affiliate</u>' of any particular Person means any other Person controlling, controlled by or under common control with such particular Person, where 'control' means the possession, directly or indirectly, of the power to direct the management and policies of a Person whether through the ownership of voting securities, contract or otherwise (provided that the Company or any of its Subsidiaries shall not be deemed an Affiliate of any Sponsor Shareholder)." Further, as of August 3, 2019, Abel beneficially owned 42,793 shares of KHC common stock. As an "Affiliate" of Berkshire who "holds shares," Abel is prohibited from "tak[ing] any [] action to effect, encourage or facilitate the removal of any 3G Designee…." This broad prohibition may include the act of voting to cause KHC to sue the 3G-affiliated directors because such action could ultimately "effect, encourage or facilitate the removal" of the 3G-designated directors from the Board. Furthermore, the Shareholders' Agreement binds

Berkshire and 3G Capital together in another legally significant way – *i.e.*, as a "group" for purposes of Section 13(d) of the Exchange Act, as KHC acknowledges in its filings with the SEC.

49. Tracy Britt Cool served as a Berkshire designee on the Board since the Merger until January 2020, having previously been a director of Heinz since 2013. Cool lacks independence by virtue of her personal relationship with Buffett and her career as a longtime Berkshire executive. Cool joined Berkshire in 2009 as a financial assistant to Buffett, a role that he created for her. Cool served as a director of several Berkshire companies, including Benjamin Moore, Larson-Juhl, and Oriental Trading Company, and as the CEO of Berkshire's Pampered Chef subsidiary, and was on the short list to take a top leadership role at Berkshire. Buffett stepped in for Cool's deceased father and walked Cool down the aisle at her wedding in 2013.

50. Timothy Kenesey joined the Board on January 24, 2020, replacing Cool. Kenesey is President and CEO of Berkshire's MedPro Group, the nation's largest healthcare liability insurance company, where he has served since 2001. Kenesey has served as Chairman of Fechheimer Brothers, a Berkshire uniform and apparel company, since 2007, and as Chairman of other smaller Berkshire insurance subsidiaries. Like Abel (and Cool), Kenesey is a longtime Berkshire executive who

owes his livelihood and career to Berkshire and Buffett. Kenesey lacks independence by virtue of his relationship with Berkshire.

51. Jeanne P. Jackson has served as a director of the Board since the Merger. Jackson previously served on Kraft's board from October 2012 to July 2015. Jackson served on the Audit Committee throughout 2018 and 2019.

52. John C. Pope has served as a director of the Board since the Merger. Pope previously served on Kraft's board from August 2012 to July 2015. Pope chaired the Audit Committee throughout 2018 and 2019.

Nominal Defendant

53. Nominal Defendant KHC is a Delaware corporation that was formed upon the Merger of Kraft and Heinz. KHC trades on the NASDAQ Global Select Market under ticker symbol KHC. KHC describes itself as "one of the largest global food and beverage companies, with 2018 net sales of approximately $26 billion."

Other Relevant Non-Parties

54. Berkshire describes itself as "a holding company owning subsidiaries engaged in a number of diverse business activities. The most important of these are insurance businesses conducted on both a primary basis and a reinsurance basis, a freight rail transportation business and a group of utility and energy generation and distribution businesses."

55. Warren E. Buffett is the Chairman and CEO of Berkshire. Buffett served on the KHC Board from the Merger until April 2018.

56. Rashida La Lande has been KHC's Global General Counsel and Corporate Secretary since January 2018. La Lande is a Named Executive Officer of KHC.

SUBSTANTIVE ALLEGATIONS

57. 3G's business model is to buy mature companies, institute rigorous cost-cutting measures, and then to use the stock of those companies as currency to acquire other mature companies and repeat the process. 3G used this serial-acquisition model to create AB InBev, the world's largest brewer, and to acquire Burger King and then merge it with Tim Hortons and then Popeyes Louisiana Kitchen, Inc. 3G tried to deploy the same model with KHC but failed spectacularly.

I. KHC's History and Ownership Structure

58. KHC is currently, and at all relevant times has been, controlled by 3G and Berkshire.

59. As discussed above, 3G and Berkshire have a close working relationship. As reported in *The New York Times*, "3G Capital, the Brazilian private equity firm co-founded by the billionaire financier Jorge Paulo Lemann, has in recent years emerged as Mr. Buffett's preferred business partner in striking multibillion-dollar deals."

60. 3G and Berkshire eventually turned their sights to consolidating Heinz and Kraft, two of the U.S.'s most iconic and enduring food companies.

61. In a Form 425 prospectus filed by Kraft on March 25, 2015, the Kraft and Heinz touted the "history of successful partnerships" between Berkshire and 3G.

A. Heinz

62. Henry John Heinz founded his eponymous company in 1869. By 1905 Heinz, which famously offered 57 varieties of pickles, had grown into the largest domestic producer of pickles, vinegar, and ketchup. Heinz conducted its initial public offering in 1946 and continued to grow internationally in the decades thereafter.

63. Lemann reportedly approached Buffett about acquiring Heinz in December 2012 at a corporate retreat for AB InBev's executives. Lemann next pitched the idea to William R. Johnson, Heinz's then-CEO, and followed up with a formal offer in January 2013. The deal terms were announced in February 2013. Heinz was bought by Berkshire and 3G on June 7, 2013.

64. After the deal closed, Hees and Basilio – both partners of 3G – took over at Heinz as CEO and CFO, respectively. While 3G and Berkshire split ownership of Heinz 50/50, with each company contributing $4 billion in capital as part of the acquisition, 3G took over day-to-day operations. As Buffett told CNBC,

"Heinz w[ould] be 3G's baby," though Buffett did agree to contribute an additional $8 billion in exchange for preferred shares.

B. Kraft

65. In 1903, James L. Kraft started a wholesale cheese business in Chicago. He was subsequently joined by three of his brothers, and the business, which had expanded to processing cheese for retailers, was incorporated as J.L. Kraft & Bros. Company in 1909. During World War I, the Kraft brothers sold processed cheese to the U.S. military. Their company was acquired by National Dairy Products Corporation in 1930, and the combined entity was rechristened Kraftco Corporation in 1969 and Kraft, Inc. in 1976.

66. After a series of strategic transactions, Kraft Foods Inc. became an independent, publicly traded corporation in 2007. On October 1, 2012, that company renamed itself Mondelēz International, Inc. after spinning off its North American grocery business as Kraft Foods Group, Inc., which is the entity that subsequently merged with Heinz to form KHC.

C. The Merger

67. 3G and Berkshire long targeted Kraft for a combination with Heinz. *The New York Times* reported that "[p]lans to merge Kraft and Heinz ha[d] been in the works for years" prior to Buffett and 3G approaching Kraft in 2015.

68. On January 20, 2015, Behring – who was then the chairman of Heinz's board as well as the managing partner of 3G – called Cahill, then the CEO and chairman of Kraft, to arrange a meeting to discuss a potential combination. After Kraft and Heinz entered into a mutual confidentiality agreement, Behring, Buffett, and Lemann sent their initial proposal to Kraft on February 8, 2015.

69. On March 24, 2015, the boards of both Kraft and Heinz unanimously approved an agreement to merge their companies. Kraft and Heinz executed an Agreement and Plan of Merger dated as of March 24, 2015.

70. Under the terms of the agreement, Kraft stockholders would own a 49% stake in the combined company and Heinz stockholders (*i.e.* 3G and Berkshire) would own the remaining 51%, on a fully diluted basis. In addition to the stock in the combined company that they would receive, former stockholders of Kraft would receive a special cash dividend of $16.50 per share, equal to 27% of Kraft's closing price as of March 24, 2015. The aggregate special dividend payment of approximately $10 billion to be paid upon closing was to be fully funded through an equity contribution by Berkshire and 3G.

71. On March 25, 2015, Heinz and Kraft publicly announced their agreement to consummate the Merger. The combined company, KHC, would be the third largest food and beverage company in North America, and would be controlled

by Berkshire and 3G. As *The New York Times* reported after the Merger was announced:

> The stake owned by 3G and Berkshire will remain privately held while the rest of the company's stock will be publicly traded on the Nasdaq. In time, some of the stock controlled by 3G and Berkshire could be sold to public shareholders, but the companies expect to retain effective control even if their equity ownership dips below 50 percent.

72. The eleven-person Board of the combined company was to consist of five members appointed by the former board of Kraft, together with three members appointed by Berkshire and three members appointed by 3G. Thus, the 3G and Berkshire nominees would outnumber Kraft's nominees six to five.

73. On July 1, 2015, 69.59% of Kraft stockholders voted to approve the Merger. The Merger closed the following day, and the combined entity was named "The Kraft Heinz Company." 3G – through 3G Global – appointed Behring, Lemann, and Telles to the Board, while Berkshire appointed Abel, Buffett, and Cool. Five former Kraft directors, including Cahill, also joined the Board.

74. In connection with the Merger, KHC recorded total goodwill associated with the Kraft brands of $29 billion and valued other indefinite-lived intangible assets at $45.1 billion. KHC's SEC filings acknowledged that the value of its intangible assets was material and, as a result, their continued value was reviewed for possible impairments as of the start of the second quarter of each fiscal year, *i.e.*,

the first business day of April, using management projections and other factors to analyze the value of its goodwill and intangible assets.

75. 3G Capital and Berkshire immediately installed affiliated individuals in senior positions at KHC:

- Behring became Chairman of the Board.
- Hees became CEO.
- Basilio, the former CFO of Heinz, became EVP and CFO. Basilio was replaced in those positions on October 1, 2017 by Knopf, a 3G partner who was then 29 years old.
- Bruno Keller, formerly at AB InBev, became President for Kraft Heinz Canada.
- Pedro Drevon, a partner of 3G, became Managing Director for Kraft Heinz in Brazil.
- Marcos Rodrigues, who previously worked under Hees at ALL, became KHC's Head of the Global Center of Excellence.
- Melissa Werneck, who previously worked under Hees at ALL, became KHC's Global Chief People Officer.

76. The day the Merger closed, 3G Global and Berkshire entered into the Shareholders' Agreement, which governs how they vote the KHC common shares they held as of that date with respect to supporting director nominees designated by Berkshire or 3G Global. As disclosed in various Schedule 13G forms subsequently filed by Berkshire and 3G Global with the SEC:

> Pursuant to the Shareholders' Agreement, 3G Global Food Holdings LP has agreed that for so long as Berkshire Hathaway Inc. and its affiliates control Shares representing at least 66% of the voting power

> in election of directors of the Shares owned by Berkshire Hathaway, Inc. as of July 2, 2015, 3G Global Food Holdings LP and its affiliates will vote the Shares in favor of three issuer board nominees designated by Berkshire Hathaway Inc. and not take any action to remove such designees without Berkshire Hathaway Inc.'s consent.
>
> Similarly, Berkshire Hathaway Inc. has agreed that for so long as 3G Global Food Holdings LP and its affiliates control Shares representing at least 66% of the voting power in election of directors of the Shares owned by 3G Global Food Holdings LP and its affiliates as of July 2, 2015, Berkshire Hathaway Inc. and its affiliates will vote the Shares in favor of three issuer board nominees designated by 3G Global Food Holdings LP and not take any action to remove such designees without 3G Global Food Holdings LP's consent.
>
> The Shareholders' Agreement provides that the foregoing support obligations of each party will step down as a result of a reduction in control of Shares by the other party below the applicable 66% threshold described above.

77. 3G and Berkshire agreed in the Shareholders' Agreement not to take any action that could lead to the removal of any of their director designees, which would include asserting duty of loyalty claims. In practice, Berkshire was subordinate to 3G in executing its vision for KHC. KHC considered Berkshire to be part of the "control group" together with 3G, and Buffet stated that KHC "w[ould] be 3G's baby."

78. Since July 2, 2015, neither Berkshire nor 3G Global have sold more than a third of the shares they held as of July 2, 2015, such that the Shareholders' Agreement remains in force.

79. After the close of the Merger, approximately 51% of outstanding KHC common stock was held by 3G (through 3G Global) and Berkshire. The remaining approximately 49% of outstanding KHC common stock was held by the former stockholders of Kraft. As stated in KHC's first proxy statement, filed on March 3, 2016, as a result of their relationships, "Berkshire Hathaway, Mr. Buffett and the 3G Funds may be deemed to be a group for purposes of Section 13(d) of the Exchange Act and therefore may be deemed to hold 618,978,210 shares of [KHC] common stock" of the 1,214,721,361 shares then outstanding (*i.e.*, 50.96%). Specifically, 3G and its affiliates beneficially owned approximately 24.2% and Buffett and Berkshire beneficially owned approximately 26.8% of the total shares then issued and outstanding.

II. 3G Implements Destructive Cost Cutting Measures

80. 3G was known for acquiring mature companies and cutting excess costs by implementing "zero-based budgeting." This is a method of budgeting expenses in which budgets are constructed every year beginning at $0 and all business expenses must be explained and justified for each new period.

81. Before the Merger closed, 3G claimed that it would deliver "best-in-class" profit margin growth for KHC by achieving $1.5 billion in "synergy" and "efficiency" cost-savings.

82. From the moment the Merger was completed, KHC and 3G wanted to prove to Wall Street that they could achieve substantially improved margins through cost cutting and maximizing synergies. Instead of cutting costs in a responsible way, 3G slashed costs indiscriminately to create the illusion of short-term success at the expense of KHC's long-term ability to maintain or grow sales especially given increasing competition from private label brands in the relatively commoditized brands sold by KHC, such as Oscar Mayer bacon and Kraft cheeses.

83. 3G decimated brand support and supply chain performance. Cost cutting was especially sharp in the supply chain side of the business. Once a proud part of Kraft, supply chain management fell into disarray due to operational cost cuts that frustrated customers and interfered with order fulfilment. 3G shuttered distribution centers. Media/marketing/advertising budgets were slashed. R&D suffered deep cuts. 3G cut resources for the unit overseeing KHC's internal controls over financial reporting, the very internal controls KHC would later admit were deficient.

84. Kraft's once venerable reputation as a quality leader became tarnished. 3G changed the composition of KHC's products, such as by increasing the water weight and changing the proportion of more expensive and cheaper meats in its cold cuts. Spoiled product became commonplace and shipments were returned. Food safety issues proliferated. Critical promotional tools were eliminated, and prime

retail shelf-space was lost because Kraft abandoned the long-standing practice of offering customers trade dollars to secure the most visible spots in stores. 3G cut the amounts allocated to integrate software to streamline operations. 3G ordered indiscriminate layoffs of key personnel in marketing and elsewhere. 3G replaced experienced Kraft managers with inexperienced 3G trainees fresh out of school, who were in over their heads.

85. *The New York Times* summarized it well in a September 24, 2019 article, entitled "When Mac & Cheese and Ketchup Don't Mix: The Kraft Heinz Merger Falters," calling the mega merger a "mega-mess" because of 3G's highly "vaunted 'zero-based budgeting' strategy that critics say focuses more on cutting costs than creating products that people want to buy." For instance, 3G's obsession with cost cutting extended to "gathering data on everything from expected travel expenses to estimates of how many paper copies … departments would make that year. Those figures were stuffed into voluminous spreadsheets and given to 3G."

86. 3G fired thousands of longtime, experienced employees. In many instances, these employees, many of whom were senior managers and heads of units, were not replaced.

87. Kraft Canada senior management was decimated, hampering supply chain operations and damaging relationships with vendors. Canadian factories were shuttered resulting in inadequate production of popular products. The supply chain

issues hobbled contractual fill rates for important customers like Walmart. Sales and profitability suffered. Frustrated customers cancelled their contracts with Kraft Canada or demanded renegotiation for terms far less favorable to Kraft. Two of the largest Canadian grocery chains insisted on renegotiating contracts that were highly favorable to KHC on worse terms.

88. Customers cancelled "preferred volume agreements" and demanded "order as needed" contracts. Walmart, KHC's largest customer, cancelled a contract for KHC's Planters nuts after KHC tried to strong-arm Walmart into giving KHC more shelf space and promotions. The net effect was a significant loss in revenues, profitability and goodwill with business partners. KHC and 3G concealed *for two years* that these contracts were cancelled and re-negotiated on far worse terms, and with disastrous effects.

III. KHC's Sales Stagnate and Decrease

89. Following the Merger, legacy Kraft brands had their spending on advertising and promotions and product innovation reduced. This cost-cutting, combined with increased private label competition and changing consumer tastes, caused KHC's sales to trend lower following the Merger. Legacy Kraft brands were particularly impacted by the cannibalistic cost-cutting because they compete in commoditized categories (*e.g.*, cheese, nuts, lunchmeat, and coffee) where private labels were expanding competition, exerting pressure on KHC's ability to charge

prices far in excess of the net commodity costs. For example, sales of Kraft's cheese and dairy declined from $5.619 billion in 2016 to $5.482 billion in 2017. Consumption of Oscar Mayer products, [redacted] fell by 5.8% in 2016, fell by 3.5% in 2017 [redacted]

IV. Unilever Rebuffs 3G

90. Without investing in the quality of iconic brands that would command increasing price points, 3G tried to mask KHC's problems by growth through acquisitions. In February 2017, KHC made a $143 billion bid to take over Unilever, the massive British-Dutch transnational consumer goods company, with the goal of obtaining yet another platform for 3G's strategy of drastic cost cutting. Indeed, numerous sources, including *The Wall Street Journal* on February 20, 2017, reported that this was the "latest foray into the global consumer-goods industry by Brazilian private-equity firm 3G Capital Partners LP," which had intended to impose its "zero base budgeting" methods once the deal was completed.

91. Unilever, an active participant in the packaged goods business, was not fooled by 3G's promises of value creation through aggressive cost cutting including to such critical business functions like advertising and promotion as well as product innovation. According to a *Financial Times* article published on April 27, 2017, Marijn Dekkers, chairman of Unilever, told stockholders at the annual meeting that

KHC's business model was "unsustainable in the long-term," because it was based on "deep cost reductions; a highly leveraged balance sheet; and a relatively low investment level in brands and R&D" – the very issues leading to the downward slope in KHC's sales, profits and ultimately to the massive impairment announced in February 2019.

V. KHC Underperformed 3G's Expectations in FY 2017

92. In October 2017, Defendant Basilio was named President of KHC's U.S. business, and Defendant Knopf replaced Defendant Basilio as KHC's CFO. *Bloomberg* reported that the leadership change was part of an attempt to revive sluggish sales. *Business Insider* reported that "Knopf will have his work cut out for him. The company has not posted any sales growth since the 2015 merger."

93. On January 31, 2018, the Board met. [redacted]

Projected FY 2017	**Actual FY 2017**	**Projected vs. Actual Miss**
[redacted]	[redacted]	[redacted]

1 [redacted]

94. [redacted]

95. [redacted]

96. [redacted]

97. The "accelerating" erosion of KHC's relationship with Walmart was material because, as explained in KHC's Annual Report, filed in February 2018 on Form 10-K, "all of [KHC's] segments have sales to Walmart" with Walmart being KHC's "largest customer … represent[ing] approximately 21% of our net sales in 2017, approximately 22% of our net sales in 2016, and approximately 20% of our net sales in 2015."

98. By early 2017, because of shifting consumer trends towards healthier and more natural products, food companies experienced a particularly sudden shift.

The volume of products sold by big American food firms dropped even as they cut prices for consumers.

99. At the same time, Walmart was the largest grocer in the United States. Walmart had a market share of approximately 26% in 2017 and 2018, with Kroger in a distant second place at approximately 10% of the market. There are several regions of the United States where Walmart's market share of grocery sales is monopolistic.

100. At the end of 2017, Walmart and Amazon were engaged in an escalating grocery war. Walmart knew by no later than 2017 that shoppers, once in the store, are more likely to buy higher-margin goods from other departments, boosting basket sizes and overall profitability. Thus, Walmart became increasingly focused on cutting prices on staple food items and competing with brand name producers such as KHC to attract customers to its stores.

101. Hees also relayed to the Board that the re-negotiation of the contracts with Canadian retailers further dented KHC's EBITDA [redacted]

102. [redacted]

Projected Q4 2017	Actual Q4 2017	Projected vs. Actual Miss
[redacted]	[redacted]	[redacted]

103. [redacted]

104. [redacted]

105. [redacted]

[redacted]

[redacted]

106. [redacted]

107. [redacted]

[redacted]

108. After the market closed on February 15, 2018, KHC conducted a Post-Integration Business Update for analysts and investors. Defendant Hees touted KHC's "unique platform for significant, sustainable growth in the Consumer Staples industry for both our people and our shareholders over the long term" and stated that "developing capabilities that are scalable and best serve customers while focusing on profitable sales will likely prove the best path to sustainability." Knopf stated that "[w]e see the opportunity for consistent, run-rate Organic Net Sales Growth, *i.e.*, NSV, coming from a combination of developed markets growing in line with population growth, plus-or-minus inflation – and developing markets growing better than population growth…." Another KHC representative stated that it was "making significant investments to expand our Go-To-Market capabilities in both traditional retail channels and existing Foodservice channels to capture what we believe to be significant, incremental, organic growth."

109. On a February 16, 2018 investor conference call, Hees, Knopf, and Basilio concealed from the market material facts known internally including through discussions with the Board. Knopf represented that KHC was on track to hit its

internal projections (prepared with 3G) through aggressive (and unrealistic) cost cutting and market-share improvements that he pushed into the second half of 2018: "we're very confident in our ability to grow EBITDA for the full year, and this is going to be driven by a combination of carryover integration savings, new savings initiatives that we mentioned that we have planned for the year as well as commercial gains in the back half of 2018."

110. 3G partners Hees and Knopf failed to disclose what 3G and KHC already knew: that KHC had badly missed 3G's 2017 targets, that KHC's 2018 projections relied on ever-increasing cost-cutting targets that KHC could not achieve, that Canadian retailers had demanded a fundamental change in KHC's contracts, and that KHC was deeply concerned about the acceleration in lost market share and pricing pressures due to Walmart.

111. [redacted] Hees warned the KHC Board about the "accelerating" private label issue in the U.S., which was driven "mainly" by Walmart. [redacted]

Projected Q1 2018	Actual Q1 2018	Projected vs. Actual Miss
[redacted]	[redacted]	[redacted]

112. As later disclosed during a February 25, 2019 interview with CNBC focused on the impairment, Buffett stated that Defendant Lemann had "pointed out that the game had changed in terms of brands ... ***a full year ago*** [*i.e.*, by February 2018]."

113. 3G was unable to achieve necessary cost cutting to support its valuation of KHC's intangible assets. 3G and KHC management elected to keep that information from the market.

VI. KHC Underperforms in the First Quarter of 2018

114. On April 19, 2018, the Board met again. It was Buffett's last Board meeting. KHC noted that Buffett wanted to "decrease[] his travel commitments," notwithstanding that the Board met only 5 times in each of 2016 and 2017, with directors routinely dialing in telephonically to meetings. Instead, the real reason, on information and belief, is that Buffett knew that KHC had reached the practical limit of major cost cutting and that increasing competition from private label brands, especially those being sold by Walmart, was an existing trend threatening KHC's ability to profitably grow its core business. Buffett's resignation was consistent with his pattern of resigning from boards of directors expected to face any controversy or regulatory scrutiny.

115. [redacted]

116. [redacted]

117. KHC management further reported to the Board that KHC's failure to achieve its projected EBITDA, NSV, and margins was due in large part to its continuing inability to realize cost-cutting goals. 3G and KHC management already knew that the cost-cutting projections were wildly off the mark. [redacted]

118. [redacted] (It is now admitted by KHC that the procurement department already lacked sufficient internal controls and resources to prevent fraud.) [redacted]

[redacted]

119. [redacted] 3G and the Board knew that KHC's projections relied on both massive cost cuts and increasing volume, which was unrealistic, given industry trends and the customer landscape.

120. [redacted]

121. [redacted]

122. [redacted]

123. [redacted]

124. [redacted]

[redacted]

125. [redacted]

126. On May 2, 2018, Hees, Knopf, and Basilio participated in a quarterly analyst call. Knopf made a series of false and/or misleading statements, including (i) that "the U.S. was slightly better than our initial expectations," (ii) that for "EBITDA, Q1 performance was slightly better than expected," (iii) when asked about KHC's margins that "we're happy with the performance in Q1. We're running consistent with our plan for the year," and (iv) when asked about the "savings curve," that "we're still kind of on plan to our 2018 targets." These statements were materially false or misleading based on the substantial Q1 misses reported to the Board. Knopf also dissembled when asked about the effects of private label pricing, stating that management was "very confident in the strength of our brands."

127. One analyst asked about Lemann's recent comments about being a "terrified dinosaur" (*see supra* ¶ 6), and asked for more information because "[i]t's hard to know what to kind of make of them." Instead of disclosing what he knew about KHC's deepening problems and repeated failures to meet KHC's non-public projections, Hees covered up what was really going on at KHC. He walked back Lemann's comments, filibustered with positive corporate-speak, such as "[t]he relaunch of the Kraft brand with the Super Bowl campaign with Family Greatly is giving us a lot of excitement," and misdirected with other misleading statements and questions, such as: "So in -- to answer your question, it's changed our capital allocation mindset. My answer is no. Actually, I think it's very in line with what we have been saying for quite some time, right?"

128. Hees spoke optimistically to analysts about KHC's prospects, stating that "we are seeing ongoing improvement in consumption trends in most countries and in most of the key categories that we believe will drive both top- and bottom-line growth into the second half of the year" because KHC "spent the last 2 years on the necessary renovation for our portfolio, largely by focusing on marketing and efficiency and product renovation," including a widening U.S. innovation funnel. Hees said KHC was "playing offense" by "building capabilities to create brand and category advantage to achieve profitable growth [and] investing aggressively in order to see the benefits sooner." Basilio added to the optimism, stating:

> We'll be deploying this different in-store coverage model that ... basically involves replacing some existing third-party merchandising that we own ... to in-house salespeople ... that ... can better execute and understand the category needs with that, and we are leveraging advanced analytics. We started doing this in 2017, ***I can guarantee you that it's paying off, and we are actually doubling down on this***.

(Emphasis added.)

129. Hees guided markets towards an "atypical balance of net sales and EBITDA between first half and second half in 2018" because "the actions we've put in place on the cost side, especially on the procurement manufacturing side, they are very weighted towards the second half of the year." Knopf added that 3G "manage[s] EBITDA dollars, not to margin."

130. On May 3, 2018, KHC filed its quarterly report on Form 10-Q with the SEC for the quarter ended March 31, 2018 stating, among other things, that:

(a) Each goodwill reporting unit and indefinite-lived intangible asset (other than a trademark relating to nutritional beverages in India) "had excess fair value over its carrying value of at least 10% as of April 2, 2017[;]" and

(b) No events had occurred during the quarter indicating it was more likely than not that any asset was impaired.

131. On June 18, 2018, the Audit Committee met. Directors Dewan, Jackson, and Pope attended. Among other members of management, Knopf, La Lande (with her deputy Christopher Anderson), and Christopher Skinger joined. Skinger, KHC's Global Controller and Principal Accounting Officer, left KHC later

that day. Vince Garlati, Skinger's eventual replacement, explained that the annual goodwill impairment testing was underway, but he failed to mention any of the issues plaguing KHC in the US and Canada or how those issues would or should affect the impairment testing.

132. [redacted]

133. According to an Ernst & Young impairment manual, management should consider events and circumstances that have arisen since the valuation date of the annual testing to determine whether to perform an interim impairment test. KHC experienced many of the factors listed, including:

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[2] Under Accounting Standards Codification 350, goodwill is tested at least annually at the reporting unit level, and an impairment must be recognized if the unit's carrying value exceeds its estimated fair value. KHC selected a discounted cash flow method to determine fair value.

- "deterioration in the environment in which the company operates,"
- "Cost Factors,"
- "Overall financial performance,"
- "changes in management or key personnel," and
- "Industry trends."

The Ernst & Young manual emphasizes that "[c]lear documentation of the factors considered, including any necessary supporting evidence or quantitative calculations, will be essential." KHC's management reports were woefully deficient on this score.

134. [redacted] Neither management nor the Audit Committee, however, discussed whether KHC should perform any further analysis or run any sensitivities on the U.S. or Canadian reporting units. Those U.S and Canadian reporting units were by far KHC biggest and most important units and ultimately accounted for the vast majority of the eventual $15.4 billion impairment. KHC's Controller and Chief Accounting Officer resigned and left KHC a few hours after the Audit Committee met on June 18. KHC's Chief Ethics and Compliance Officer also announced he would leave KHC.

135. Effective June 30, 2018, Garlati approved management's quarterly impairment memorandum,[redacted]

136. [redacted]

137. [redacted] When it came to management's own compensation, KHC took a more realistic approach. In June 2018, the Compensation Committee, which was controlled by 3G principals Behring, Lemann and Telles,[4] approved a new compensation plan that was "aligned to" the 2H18 Plan. The new executive compensation plan provided for performance bonuses based on, among other

[3] [redacted]

[4] The lone outside director on the Compensation Committee, Mackey McDonald, left the Board before the next annual report issued.

components, NSV and EBITDA. The threshold U.S. NSV for a performance-based bonus was ***negative*** 0.9%, while the target was 0.2%. The threshold U.S. Segment Adjusted EBITDA Performance for a performance-based bonus was ***negative*** 6.4%, while the target was ***negative*** 3.0%. The low thresholds for the new executive compensation plan allowed KHC Global General Counsel La Lande, for example, to receive $5.7 million for 2018. The low compensation thresholds under the new executive compensation plan call into question the projections and inputs used for impairment testing.

138. [redacted]

139. [redacted]

[redacted]

VII. The SEC Threatens Regulatory Action and Begins Investigating

140. KHC's missed projections and repeated adjustments were only the beginning of its problems. On July 13, 2018, the SEC sent KHC a notice to preserve documents in connection with a threatened regulatory action related to its accounting function. [redacted]

VIII. 3G Sells $1.2 Billion in Stock Based Upon Material, Non-Public Information

141. On July 31, 2018, the Audit Committee met. [redacted]

Projected Q2 2018	Actual Q2 2018	Projected vs. Actual Miss
[redacted]	[redacted]	[redacted]

142. [redacted]

143. [redacted] We identified two goodwill reporting units and eight brands which each had excess fair value over its carrying value of less than 20%."

144. [redacted]

[redacted]

145. On August 1, 2018, the Audit Committee met again. Cahill joined the meeting, even though he was not on the Audit Committee. Knopf, La Lande (with her deputy, Anderson), also attended, along with PwC personnel. [redacted]

146. [redacted]

Unit	Goodwill ($)	Cushion ($)	Discount Rate	LTGR
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Trademark	Carry Value ($)	Cushion ($)	Discount Rate	LTGR
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

147. [redacted]

148. [redacted]

149. 3G and KHC management also that knew there was no reasonable avenue for KHC to achieve its projected EBITDA or costs savings in light of (i) observed results in the first half of fiscal year 2018, (ii) a surge in expenses in July 2018, [redacted] 3G knew that competition from private-label brands was increasing, including from Walmart, which was aggressively lowering prices on food staples to drive retail traffic.

150. [redacted]

151. [redacted]

[redacted]

152. On August 2, 2018, the Board met. 3G partners Behring, Lemann, Telles, Hees, Knopf, and Basilio attended, as did La Lande, her deputy Anderson, and other members of KHC management.

153. Van Damme attended in place of Buffett, having replaced him on the Board. Behring, Lemann, and Telles ran the Governance Committee, which was charged with "identifying qualified individuals for Board membership" and "making recommendations to our Board as to directors' independence." These 3G partners knew Van Damme would be loyal to 3G given his longstanding ties to Lemann and Telles.

154. [redacted]

[redacted]

155. At the Board meeting, Hees made statements that flatly contradicted management's subsequent public statements to analysts. As noted below, management told analysts that Walmart's private-label market-share grab, KHC's cost inflation, and the Canadian retail renegotiations presented "transitory headwinds" or "one-off" occurrences that would "fade."

156. [redacted]

157. [redacted]

[redacted]

158. [redacted]

159. [redacted]

160. [redacted]

161. On August 3, 2018, KHC filed its quarterly report on Form 10-Q with the SEC for the quarter ended June 30, 2018 (the "2Q18 10-Q"). It reported that:

(a) "[F]our of [] 20 reporting units each had excess fair value over its carrying value of less than 10%" and "the goodwill carrying values associated with these reporting units were $4.7 billion for Canada Retail, $424 million for Latin America Exports, $407 million for Northeast Asia, and $326 million for Southeast Asia";

(b) An impairment loss of $101 million "due to net sales and margin declines related to the *Quero* brand in Brazil"; and

(c) "As of April 1, 2018, two brands (*ABC* and *Smart Ones*) each had excess fair value over its carrying value of less than 10%" and "an aggregate carrying value of $665 million."

162. The 2Q18 10-Q further disclosed that KHC "selected the [impairment test] assumptions used in the financial forecasts using historical data, supplemented by current and anticipated market conditions, estimated product category growth rates, management plans, and guideline companies." These disclosures were false and insufficient to warn of the significant likelihood of a near-term impairment, especially given the contrast between management plans used in impairment testing and management plans used in calculating bonuses. Defendants knew that the results of aggressive investments were disappointing and could not produce the NSV

needed to support the EBITDA that would justify KHC's goodwill and intangible asset valuations. KHC's increased total spend in the second half of 2018 was intended to achieve flat NSV after increased expenses.

163. The text of the 2Q18 10-Q was nearly identical to the draft language proposed by Garlati on July 31, 2018, which had failed to disclose the negative information concerning the deterioration in fair value cushions and the accelerating trajectory of KHC towards an impairment. *See supra* ¶¶ 143-144. 3G knew of negative trends that already had or were likely to have a material adverse impact on net sales or revenues or income from continuing operations.

164. The 2Q18 10-Q stated that the *Smart Ones* brand had a (positive) fair value cushion of less than 10%. 3G knew that disclosure was no longer accurate. [redacted]

165. On August 3, 2018, KHC held a conference call with investors and analysts attended by Hees, Knopf, and Basilio. Knopf stated that "organic net sales were down 40 basis points in Q2, sequentially better than Q1 and, as [Hees] said,

somewhat better than what we expected at the time of our last call." Hees stated that "the experience we have today after being -- since Heinz 2013, 5 years into the industry, the knowledge on the categories, the knowledge of the things that do work and things that we have seen that do not work and so on allows us to be much more confident where to put the money or what assets can be turned around and things that can really being within this framework." Knopf added that KHC's "profitability in the quarter in Q3 versus last year is going to be driven by[:]" (1) "the swing from overhead favorability we mentioned last year to a more normal incentive compensation accrual this year to be roughly $75 million to $100 million in the quarter[,]" (2) a "plan to be at the high end of our commercial investments for the year … the high end of the range of the $250 million to $300 million" to "support our second half growth initiatives more strongly" and (3) "additional inflation we noted is running ahead of our savings curve in the short term." Knopf added that "[g]oing forward in Q4, we expect our comparisons to ease and our savings curve to accelerate." Hees also added that "getting our channels … to be in a position, not only the second half but looking at 2019 and '20 in a better way."

166. In response to analyst questions, Hees, Knopf, and Basilio provided assessments that did not track the information conveyed to the Board:

- Knopf asserted that "our first half performance was slightly better than expected," and that "our first half financial performance was consistent with the type of start of the year we expected, if not somewhat better."
- Basilio stated: "So again, we believe that we have strong brands. We have differentiated products. We have a strong innovation pipeline and so far we've been able to drive our brands and products in line with what we perceive to be the value to the consumer …. So today, I can say that the relationship we have with customers are going very well and a very clear connection with all of them."
- Basilio stated: "We are confident that we're expecting sales to grow in U.S. in the second half. I think one component that we are seeing is that you can see that our categories are improving, our categories now are growing. And on top of that, the big headwinds in share that you were seeing, these negative headwinds, we expect them to fade. I can give examples of cold cuts, Ore-Ida, lost distribution that we have, the capacity restrictions we had. Now we have the capacity in place, so we expect to recover the distribution."
- Basilio stated: "So first of all, we are seeing our categories improving, so our categories are running positive today. Many negative shares that we saw in the first half of the year are fading. So it's pretty much just

the combination of improvement in the categories, the negative headwinds that we have fading, investment in innovation and better programming that is giving us this confidence by the second half."

- Hees added: "[F]rom a worldwide standpoint, we have Europe, Middle East and Africa continuing to grow with the same momentum they have in the first half of the year. We do see acceleration in Latin America especially after the strike event in Brazil in May, in June, July and moving forward we do see acceleration in some countries in Asia. [W]e feel confident about the acceleration and the connection between the investment we announced in the beginning of the year and the results you're going to see in the top-line in the second half of the year, Q3, Q4 going into first half 2019."

167. These statements to analysts were materially misleading. They misrepresented or failed to disclose that:

- protecting KHC's topline was already proving costlier than anticipated with KHC already having experienced dramatically increased expenses in July 2018;
- [redacted]
- [redacted]
- KHC had internally recognized increased risk associated with achieving its long-term-growth-rate goals;

- [redacted]
- KHC had received a request to preserve documents received from the SEC with respect to KHC's procurement accounting.

168. [redacted]

169. On August 6, 2018, 3G transferred approximately seven percent of its KHC stake, 20,630,314 shares, to a 3G shell company, defendant HK3. HK3's only asset was the KHC shares. HK3 sold the KHC shares on August 7, 2018 for total proceeds of $1,234,724,292.90.

170. 3G's sale was highly unusual. Historically, 3G had rarely, if ever, sold any shares in its other portfolio companies. As Hees told analysts in February 2018, "[w]e are long-term owners with an unlimited time horizon." 3G had only once before transferred KHC stock, a transfer of approximately 2.8 million shares to an affiliate on September 21, 2016. At the time, 3G affirmed that it had "no current plan or intention to transfer or sell any additional Shares."

171. [redacted]

[redacted]

172. At the time, Piquet was one of nine 3G partners. Seven of the nine were KHC insiders. Four of the seven were embedded within KHC as officers: Hees (KHC CEO), Knopf (KHC CFO), Basilio (US President), and Pedro Drevon (Latin America President). The other three were directors of KHC: Behring, Lemann, and Telles.

173. [redacted]

- [redacted]
- [redacted]
- [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

174. Anderson resigned and left KHC by the end of 2018.

175. 3G knew, prior to its $1.2 billion stock sale, that, among other things: [redacted] (b) KHC would not achieve its aggressive and unrealistic cost-cutting projections going forward; (c) the SEC had threatened regulatory action and was investigating KHC's accounting practices; (d) KHC's largest customer, Walmart, had been "accelerating" (and would continue to "accelerate") its own private label offerings, erode KHC's market share, and exert "unprecedented" pricing pressure; (e) KHC's annual impairment testing, which was performed by KPMG as of April 1, 2018 and conducted just before 3G's sale, revealed significant, eroding fair value cushions for numerous units and trademarks, including dangerously low cushions for the units and trademarks that comprised the ultimate impairment that just barely scraped over KHC's reporting thresholds; and [redacted]

[redacted] 3G was required to disclose this highly material information or abstain from trading. 3G did neither.

176. 3G Capital had access to KHC non-public information through a variety of means before unloading its stock, including:

(a) Hees in his capacity as KHC's CEO, Knopf in his capacity as KHC's CFO, Basilio in his capacity as U.S. Zone President, and Behring, Castro-Neves and Lemann in their capacities as KHC directors and committee members were provided with information concerning KHC's performance and significant developments in real time, before it becomes public.

(b) Because of their representatives on the Board, 3G was copied on Garlati's July 31, 2018 Memorandum regarding 2018 Second Quarter Results (Form 10-Q) disclosing the initial impairment and the two goodwill reporting units and eight brands which each had excess fair value over its carrying value of less than 20%, among other information.

(c) 3G partners Knopf and Basilio, during their respective tenures as CFO, [redacted]

[redacted] By operation of their status at 3G, Knopf and Basilio each owed 3G a duty to provide material information they learned about the Company in their capacity as CFO, including the information received in connection with [redacted]

177. On August 7, 2018, Piquet signed a Form 4 filed by 3G Global disclosing that 3G had sold the 20,630,314 shares at a price of $59.85 per share for total proceeds of $1,234,724,292.90. 3G reaped $653 million more than it would have had it sold after the impairment was announced a few months later. There is no indication that 3G sold pursuant to a Rule 10b5-1 (or analogous) trading plan.

IX. Defendants Continue to Conceal and Misrepresent KHC's Results

178. On September 5, 2018, Hees presented at the Barclays Global Consumer Staples Conference. He emphasized that KHC's new sales initiatives were working and that KHC was transitioning "from an integration phase to a more reinvesting phase in the periods we believe can push organic growth." Hees also stated KHC was "accelerating data-driven components so we can go to the next phase" including "close to 300 in-store operators" and "investing more in C-stores, clubs, dollar stores, drug stores, gas stations, e-commerce, food service … channels that we normally don't have all the data, but they're growing at a faster pace than retailers[.]"

179. Hees's statements concealed [redacted] the fact that the Compensation Committee changed how management would be paid, [redacted]

180. On October 25, 2018, the Board, for a second consecutive meeting, [redacted]

X. The SEC Serves a Subpoena

181. In October 2018, the SEC served a subpoena on KHC concerning its accounting practices. KHC did not disclose the fact that it received the subpoena for months. KHC's receipt of the subpoena triggered an internal investigation conducted by outside counsel related to KHC's procurement practices.

XI. KHC Underperforms 3G's Expectations in Q3

182. On October 24, 2018, the Audit Committee met. Knopf, La Lande, and Garlati joined the meeting.

183. [redacted]

[redacted]

184. [redacted]

185. The next day, October 25, 2018, the full Board met. Hees, Basilio, and Knopf joined the meeting.

186. [redacted]

Projected Q3 2018	Actual Q3 2018	Projected vs. Actual Miss
[redacted]	[redacted]	[redacted]

187. [redacted]

188. [redacted]

189. [redacted]

190. [redacted]

191. [redacted]

192. On October 30, 2018, the Audit Committee met again. Cahill, who was not on the committee, Knopf, Garlati, La Lande, and Werner Basson (KHC's Director of SOX and Financial Controls) attended. [redacted]

193. KHC reported its results for the third quarter of 2018 on November 1, 2018. KHC reported EBITDA of $1.616 billion, down from $1.888 billion for the

third quarter of 2017. KHC reported impairment losses of "$234 million for the three months and $499 million for the nine months ended September 29, 2018," which were recorded in Selling, General, and Administrative Expenses ("SG&A").

194. On a call to discuss KHC's results, Hees stated that "[c]ost is one area we are falling short this year." KHC's strategy was not working because, while comparable sales rose 2.6% in the quarter (the second quarter of growth since the Merger) that growth was boosted by in-store promotions and increased staffing at grocery stores. KHC also stated that it had delayed additional savings projects to avoid operational disruptions.

195. Following the release of this information, the price of KHC's common stock fell 9.73% from a close of $56.20 per share on November 1, 2018, to a close of $50.73 per share on November 2, 2018.

196. On November 2, 2018, KHC filed its Form 10-Q quarterly report for the third quarter of 2018. The 10-Q disclosed that it "[i]n the third quarter of 2018, [KHC] recognized a non-cash impairment loss of $215 million in SG&A related to [its] *Smart Ones* brand. This impairment loss was primarily due to reduced future investment expectations and continued sales declines in the third quarter of 2018."

XII. KHC Underperforms Expectations in Q4 and Hees Warns About 2019

197. On December 4, 2018, the Audit Committee met. Director Cahill, who was not a member of the committee, Knopf, La Lande, and Garlati joined.

198. By this point, the SEC investigation had forced KHC's hand. [redacted]

199. On December 5, 2018, the full Board met. Hees, Knopf, Basilio, and La Lande joined. [redacted]

200. [redacted]

201. [redacted]

202. KHC's actual full-year 2018 EBITDA actually came in at just over $7 billion, [redacted]

[redacted]

XIII. KHC Announces a Massive Goodwill and Intangible Asset Impairment

203. [redacted]

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

204. On February 21, 2019, after the close of trading, KHC announced its Q4 2018 and full year 2018 results, including the massive impairment of $15.4 billion.

205. KHC disclosed that:

> During the fourth quarter, as part of [KHC's] normal quarterly reporting procedures and planning processes, [KHC] concluded that, based on several factors that developed during the fourth quarter, the fair values of certain goodwill and intangible assets were below their carrying amounts. As a result, [KHC] recorded non-cash impairment charges of $15.4 billion to lower the carrying amount of goodwill in certain reporting units, primarily U.S. Refrigerated and Canada Retail, and certain intangible assets, primarily the *Kraft* and *Oscar Mayer* trademarks. These

> charges resulted in a net loss attributable to common shareholders of $12.6 billion and diluted loss per share of $10.34.

206. KHC also announced that it was reducing its quarterly dividend to $0.40 per share, from $0.625 per share, which would purportedly achieve the following goals:

> - Accelerating deleveraging process to provide greater balance sheet flexibility,
> - Rightsizing payout to reflect announced divestitures, as well as those under consideration, and
> - Establishing base dividend that can grow consistent with EBITDA growth over time.

207. KHC finally disclosed the SEC investigation that had been ongoing for months:

> [KHC] received a subpoena in October 2018 from the U.S. Securities and Exchange Commission (the "SEC") associated with an investigation into [KHC's] procurement area, more specifically [KHC's] accounting policies, procedures, and internal controls related to its procurement function, including, but not limited to, agreements, side agreements, and changes or modifications to its agreements with its vendors.
>
> Following this initial SEC document request, [KHC] together with external counsel launched an investigation into the procurement area. In the fourth quarter of 2018, as a result of findings from the investigation, [KHC] recorded a $25 million increase to costs of products sold as an out of period correction as [KHC] determined the amounts were immaterial to the fourth quarter of 2018 and its previously reported 2018 and 2017 interim and year to date periods. Additionally, [KHC] is in the process of implementing certain improvements to its internal controls to mitigate the likelihood of this occurring in the future

> and has taken other remedial measures. [KHC] continues to cooperate fully with the U.S. Securities and Exchange Commission.
>
> At this time, [KHC] does not expect the matters subject to the investigation to be material to its current period or any prior period financial statements.

208. Following the release of this information, the price of KHC's common stock fell 27.46% from a close of $48.18 per share on February 21, 2019 to a close of $34.95 per share on February 22, 2019. This stock drop wiped out more than $16 billion in KHC's market capitalization.

209. After the earnings announcement, the SEC requested additional information concerning "financial reporting, internal controls, and disclosures, [KHC's] assessment of goodwill and intangible asset impairments, and [KHC's] communications with certain shareholders."

210. On February 28, 2019, KHC filed a Form 8-K disclosing additional information about the impairment.

211. Following the earnings call about the foregoing disclosures, KHC filed a Form NT 10-K on February 28, 2019 advising that it would not be "filing by the prescribed due date its Form 10-K for the fiscal year ended December 29, 2018" because of a dispute with its auditor. On the news, KHC's stock fell again from $33.19 to $32.40 per share, or another 2.4%. KHC further stated that the impairment was due to triggering events in Q4 of 2018, even though 3G and KHC management

had witnessed in real-time the continuing and dramatic deterioration in KHC's condition and prospects far earlier.

212. On April 22, 2019, KHC announced that Hees would be replaced with Miguel Patricio, another member of 3G's management team, effective June 30, 2019.

213. KHC's problems continued to mount in May 2019 when it revealed longstanding and widespread wrongdoing in its procurement department that would force KHC to take a $200 million restatement of its financial results since 2016.

214. On May 6, 2019, KHC issued a report on Form 8-K that it would "restate its consolidated financial statements and related disclosures for the years ended December 30, 2017 and December 31, 2016 included in its Annual Reports on Form 10-K, and to restate each of its quarterly and year-to-date periods in fiscal year 2017 and the quarterly and year-to-date periods for the nine months ended September 29, 2018."

215. The basis for the restatement was "[KHC's] procurement area, more specifically [KHC's] accounting policies, procedures, and internal controls related to its procurement function, including, but not limited to, agreements, side agreements, and changes or modifications to its agreements with its suppliers."

216. The fraud and need to restate can be attributed, in large part, to KHC's cost cutting and compensation practices. 3G designees controlled the Compensation Committee.

217. Pursuant to the compensation program, which was subject to the Compensation Committee's oversight, KHC had to achieve, on an annual basis, certain EBITDA targets before a majority of its executives could become entitled to their bonuses, some of which were twice their annual salaries.

218. As KHC's sales slumped due to 3G's draconian cost cutting measures, the procurement and operations teams were under tremendous pressure to boost EBITDA through alternative means. Procurement division executives turned to front-loading rebates instead of recording them over the multi-year terms of the contract, which was the appropriate thing to do.

219. On May 6, 2019, KHC also disclosed that an additional SEC subpoena had been received on March 1, 2019, relating to its financial reporting, internal controls, disclosures, assessment of intangible asset impairments, and communications with shareholders. KHC disclosed that "if the SEC commences legal action as a result of the investigation, [it] could be required to pay significant penalties and become subject to injunctions, cease and desist orders, and other equitable remedies."

220. KHC explained that after receiving a subpoena from the SEC, it, with outside counsel and forensic accountants, "and under the oversight of the Audit Committee, initiated an investigation into the procurement area, which is now substantially complete."

221. The investigation identified several employees in the procurement area who had engaged in misconduct. Premised on that, KHC "recorded adjustments to correct prior period misstatements that increase the total cost of products sold in prior financial periods, which [KHC] does not believe constitute a quantitatively material misstatement to any individual period."

222. The misstatements related to the incorrect timing of when certain "cost and rebate elements associated with complex supplier contracts and arrangements were initially recognized, and once corrected for, [KHC] expects to recognize corresponding decreases to costs of products sold in future financial periods."

223. According to a *CNBC* report published May 7, 2019, entitled "Misconduct at Kraft Heinz puts spotlight on employee pressure to meet bonus targets," the fraud in the procurement division stemmed from "the company's bonus structure that is heavily tied to making annual targets."

224. The report explained that KHC must meet specific EBITDA targets each year "for the majority of its executives to get their bonuses, which for some could more than double their salary." As KHC's sales declined due to the draconian

measures enacted after the Merger to cut costs, pressure to boost EBITDA increased substantially especially on the procurement and operations teams. As later admitted by KHC, its employees were recording savings from KHC's supplier contracts that should have been carried and then taken over a longer time period.

225. Specifically, KHC generally enters into multiyear contracts with suppliers, wherein the supplier grants KHC certain rebates. KHC traditionally record rebates as a reduction to the "Cost of Products Sold", which were recorded on its income statement. The rebates are supposed to be taken over the life of the contracts to account for uncertainties, such as KHC remaining the supplier's customer and additional product being ordered. Instead of waiting to book the rebates over the life of the contract, KHC took the rebates immediately, thereby creating and reporting an inflated, false "reduction" in the Cost of Products Sold. The net effect of this was to artificially increase reported EBITDA.

226. Management's obsession with cost cutting directly led to KHC employees using this form of accounting fraud and other machinations to meet the forecasts set for each of its business units so that certain employees would be eligible for bonuses. In short, the impetus to cut costs led employees to commit fraud to make their otherwise impossible performance targets and become entitled to bonuses.

227. The financial impact of the restatement was approximately $208 million, which KHC described as follows:

> [KHC's] investigation and review described above identified required adjustments of approximately $208 million, of which approximately $27 million was recorded in the previously furnished fourth quarter 2018 cost of products sold. As a result, the cumulative net misstatements to the previously furnished or reported annual and interim financial statements were approximately $181 million, which, when reflected over the relevant periods, resulted in misstatements that are not quantitatively material to any prior year or quarter, but would have been significant to the fourth quarter of 2018 if corrected in that period. The impact of these corrections to previously reported financial statements is an increase to cost of products sold of approximately $25 million in 2015, $26 million in 2016 and $100 million in 2017. The impact to the previously furnished financial statements in 2018 is an increase in cost of products sold of approximately $30 million. These misstatements were also not quantitatively material to any quarter, with the largest correction being a $38 million increase to cost of products sold in the third quarter of 2017.

228. On or about June 7, 2019, KHC disclosed that it had completed the internal investigation into its procurement practices and controls. In its Form 10-K filed that day for 2018 (the "2018 10-K"), KHC reported that its "internal investigation and review identified adjustments that resulted in an understatement of cost of products sold totaling $208 million, including misstatements of $175 million relating to the periods up through September 29, 2018", *to wit*: "$22 million for fiscal year 2018, $94 million for fiscal year 2017, $35 million for fiscal year 2016, and $24 million for fiscal year 2015." KHC's investigations also "identified a

material weakness in the risk assessment component of internal control as [KHC] did not appropriately design controls in response to the risk of misstatement due to changes in [its] business environment." Specifically:

- *Supplier Contracts and Related Arrangements*: We did not design and maintain effective controls over the accounting for supplier contracts and related arrangements. Specifically, certain employees in our procurement organization engaged in misconduct and circumvented controls that included withholding information or directing others to withhold information related to supplier contracts that affected the accounting for certain supplier rebates, incentives, and pricing arrangements, in an attempt to influence the achievement of internal financial targets that became or were perceived to have become increasingly difficult to attain due to changes in our business environment. Additionally, in certain instances, we did not have a sufficient understanding or maintain sufficient documentation of the transaction to determine the appropriate accounting for certain cost and rebate elements and embedded leases. This material weakness resulted in misstatements that were corrected in the restatement included in this Annual Report on Form 10-K.

- *Goodwill and Indefinite-lived Intangible Asset Impairment Testing*: We did not design and maintain effective controls to reassess the level of precision used to review the impairment assessments related to goodwill and indefinite-lived intangible assets as changes in our business environment occurred. Specifically, we did not design and maintain effective controls to reassess the level of precision used in the review of the allocation of cash flow projections to certain brands used as a basis for performing our fourth quarter 2018 interim impairment assessments in response to the significant reduction in, and in certain instances elimination of, the excess fair value over carrying amount of certain brands that resulted from changes in our business environment. This material weakness did not result in a misstatement of any previously issued consolidated financial statements.

229. In August 2019, KHC disclosed its results for the first half of 2019, which included significant sales and earnings misses. KHC's new CEO Patricio made glaring admissions about KHC's conduct and practices. Although KHC's 3G-dominated management had previously created the impression that the problems at KHC manifested themselves only in the fourth quarter of 2018, Patricio admitted that "supply chain losses have been increasing, actually, double digits in the last years."

230. Patricio later admitted during a meeting with securities analysts that supply chain losses were increasing 15% YoY since the Merger. He told analysts that virtually all the highly touted $1.7 billion in "sustainable" "synergies" and "efficiencies" would need to be reinvested back into the KHC in order to revive its decimated infrastructure. In other words, KHC had never recognized any legitimate savings from the Merger.

231. Patricio also admitted during a meeting with securities analysts that "intangibles with less than 20% cushion relative to their carrying value ... means ... there's going to be continued risk of future impairments, given ***any change in forecast or modeling assumption can particularly trigger that***." (Emphasis added.)

232. In sum, 3G and KHC's 3G-dominated management knew about KHC's serial failures to achieve its projections for years. [redacted] The Board

should similarly have been shaken by 3G's sale of $1.2 billion in stock amidst ongoing business pressures [redacted]

Date	FY 2018 Projected EBITDA	Δ to AOP
1/2018	[redacted]	[redacted]
4/2018	[redacted]	[redacted]
7/2018	[redacted]	[redacted]
10/2018	[redacted]	[redacted]
11/2018	[redacted]	[redacted]

233. Instead, KHC's conflicted Board and 3G-dominated management failed to question KHC's public statements, 3G's stock sale, or the quality of KHC's financial controls, projections, or accounting functions. The Board never investigated the propriety of 3G's stock sale.

234. The Individual Defendants' misrepresentations and failure to timely record the asset impairment charge violated federal securities laws and exposed KHC to potentially billions of dollars of liability plus defense costs in the Securities Fraud Class Action.

235. KHC's problems have not ended. For example, its most recent Form 10-K filed with the SEC discloses that:

a. KHC has received additional document requests from governmental or regulatory agencies.

b. the United States Attorney's Office for the Northern District of Illinois is reviewing KHC's actions, working with the SEC, and receiving materials from the SEC;

c. KHC has incurred significant expenses related to legal, accounting, and other professional services in connection with the internal investigation, the SEC investigation, and related legal and regulatory matters; and

d. the attention of KHC's management team has been diverted, and is expected to continue to be diverted, which diversion "has adversely affected, and could continue to adversely affect, our business, financial condition, and cash flows."

236. As a result of the foregoing conduct, KHC was damaged in at least the following ways:

a. 3G misused KHC's proprietary information for to garner illicit profits;

b. KHC incurred costs and is exposed to potential fines in connection with SEC and internal investigations, financial restatements, and the Securities Fraud Class Action;

c. KHC overpaid employees, including Defendants, based upon misstated financial results; and

d. Between May 6, 2018, and March 2, 2019, KHC repurchased 754,230 shares of KHC Stock for an average price of $51.88, spending a total of $39,125,863 at inflated values.

COUNT I
(*Brophy*)

237. Plaintiffs repeat and re-allege each and every allegation above as if set forth fully herein.

238. Defendants owe to KHC fiduciary duties of loyalty, good faith, and care as officers, directors, and/or controlling stockholders.

239. By virtue of their positions as officers, directors, and controlling stockholders and their exercise of control over all aspects of KHC, at all times relevant to the wrongdoing complained of herein Defendants had the power to, and did, control and influence the business and management of KHC's affairs, including its role in the facts and circumstances surrounding the wrongdoing complained of herein.

240. Defendants breached their fiduciary duties in connection with 3G's sale of 20,630,314 shares of KHC common stock on August 7, 2018 by either (a) approving the sale of stock based on material, adverse, nonpublic information, or (b) allowing 3G to effectuate the sale to the detriment of KHC and its minority stockholders.

COUNT II
(*Contribution and Indemnification*)

241. Plaintiffs repeat and re-allege each and every allegation above as if set forth fully herein.

242. KHC is alleged to be liable to private persons, entities and/or classes by virtue of the same facts or circumstances as are alleged herein to give rise to Defendants' liability to KHC. Specifically, KHC is a defendant in the Securities Fraud Class Action. KHC is also the subject of a SEC and DOJ investigation into its procurement practices accounting policies, procedures, and internal controls.

243. KHC's alleged liability in the Securities Fraud Class Action is a result of the conduct described above and arises from the knowing, reckless, disloyal and/or bad faith acts or omissions of Defendants causing the Company to issue false statements and omit material information concerning the likelihood and effect of an impairment, compression in the cushions between fair value and carrying value, and the methodologies used to calculate those cushions.

244. The Securities Fraud Class Action alleges that Defendants caused KHC to issue false and misleading statements to the market that inflated the Company's common stock price and allowed Defendants to sell 3G's shares in KHC at artificially inflated prices.

245. Defendants, as alleged in this action, caused the Company to issue false and misleading statements and omit material information, to wit: that KHC badly missed 3G's 2017 targets; that KHC's 2018 projections relied on ever-increasing cost-cutting targets that KHC could not achieve; that Canadian retailers had demanded fundamental changes in KHC's contracts; and that KHC knew about and mislead the market concerning its reaction to accelerating lost market share and pricing pressures due to Walmart.

246. Defendants caused the Company to issue false statement to the market in connection with KHC's 2Q18 10-Q concerning the likelihood of a near-term impairment, especially given the contrast between management plans used in impairment testing and management plans used in calculating bonuses.

247. Hees, Knopf, and Basilio exposed the Company to liability when they caused the Company to issue false statements during a May 2, 2018 quarterly analyst call concerning EBITDA figures, margins, savings curves, and private label pricing.

248. Defendants, including Hees, caused the Company to issue false statements that Walmart's private-label market-share grab which had reached a critical level, KHC's cost inflation, and the Canadian retail renegotiations presented "transitory headwinds" or "one-off" occurrences that would "fade," but which were in fact escalating.

249. Hees, Knopf, and Basilio exposed the Company to liability during an August 2018 conference call by misleading the market that "negative headwinds, we[re] expect[ed] … to fade," "our first half results came in better-than-expected," and that "our first half financial performance was consistent with the type of start to the year we expected, if not somewhat better[.]"

250. The 3G Individual Defendants breached their fiduciary duties by causing KHC to make false and/or materially misleading statements. The failure to make required disclosures directly served the personal interests of the Defendants by maintaining KHC's stock price and permitting 3G to realize profits from selling KHC stock on August 7, 2018.

251. Additionally, KHC has incurred significant expenses related to legal, accounting, and other professional services in connection with the internal investigation, the SEC investigation, and related legal and regulatory matters. Further, the attention of KHC's management team has been diverted, and is expected to continue to be diverted, which diversion "has adversely affected, and could continue to adversely affect, [its] business, financial condition, and cash flows."

252. Defendants' actions have also caused KHC to overpay employees, including Defendants, based upon misstated financial results, and caused KHC to repurchase its securities at artificially inflated values.

253. KHC is entitled to contribution and indemnification from each Defendant in connection with all such claims that have been, are or may in the future be asserted against KHC by virtue of Defendants' wrongdoing in connection with causing it to issue false and misleading statements in violation of the federal securities laws.

COUNT III
(*Aiding and Abetting*)

254. Plaintiffs repeat and re-allege each and every allegation above as if set forth fully herein.

255. Defendants were aware of each other's fiduciary status. As a result of their relationship under 3G's umbrella of control and due to the 3G Individual Defendants' employment, all of Defendants' acts are imputed to each other and to 3G. The Defendants were the mechanisms through which 3G accomplished the insider trading. The 3G Entity Defendants are liable for having aided and abetted the 3G Individual Defendants' breach of fiduciary duty and vice versa. Defendants' knowledge must be attributed to the entities that they controlled, worked for, acted on behalf of, and used to effectuate the breaches of duty.

256. Defendants had knowledge of, provided substantial assistance in, and knowingly participated in these breaches of fiduciary duties.

257. As a direct and proximate result of the Defendants' actions, KHC has sustained damages, as alleged herein.

RELIEF REQUESTED

WHEREFORE, Plaintiffs demand judgment and against Defendants as follows:

A. Finding that this action is a proper derivative action and Plaintiffs are adequate representatives of KHC's interests;

B. Finding that any demand upon the Board concerning the wrongdoing complained of herein would be futile;

C. Finding that the Defendants breached their fiduciary duties to KHC and its stockholders;

D. Finding that the Defendants misappropriated information;

E. Finding that Defendants are liable for aiding and abetting;

F. Ordering disgorgement of all profits realized and losses avoided by the Defendants on their sales of KHC stock pursuant to their breaches of fiduciary duty under *Brophy* and imposing a constructive trust for the benefit of KHC;

G. Awarding KHC the amount of damages it sustained as a result of Defendants' breaches of fiduciary duties, as well as pre- and post-judgment interest;

H. Awarding Plaintiffs the costs, expenses, and disbursements of this action, including any attorneys' and experts' fees and, if applicable, pre- and post-judgment interest; and

I. Granting such other relief as this Court deems just, equitable, and proper.

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2020, I caused a true and correct copy of the **Public Version - Consolidated Amended Verified Stockholder Derivative Complaint** to be served upon the following counsel by File & Serve*Xpress*:

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