SPAC TO THE FUTURE

UNDER DELAWARE LAW, IS THE BUSINESS JUDGMENT RULE CATEGORICALLY UNOBTAINABLE FOR SPECIAL PURPOSE ACQUISITION COMPANIES?

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I. INTRODUCTION

2020 remains an unforgettable year in history because of the COVID-19 pandemic. But in the corporate world, 2020 was also memorable because of the special purpose acquisition company ("SPAC") boom.[1] In 2020, there were more SPAC initial public offerings ("IPOs") than in the previous ten years combined—248 SPAC IPOs raised over $83 billion in capital, which more than sextupled the number from 2019 and quadrupled the amount raised by $69 billion.[2] And because Delaware remains both the corporate capital of the world and ideal place to incorporate, corporate lawyers and business insiders are anxiously waiting to see how the Delaware courts handle issues that arise from the unprecedented SPAC boom.[3]

A SPAC is a popular, modern investment vehicle used to raise capital through an IPO for the sole purpose of merging with a private company to then become a combined public company.[4] The speed at which SPACs can take private companies public is the main reason in which they remain attractive.[5] Unlike the target company that the SPAC merges with, the SPAC has no assets and limited operating expenses, e.g., the initial

[1] *In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784, 793 (Del. Ch. 2022); Hunter Fortney, *SPAC Attack: An Examination of SPAC Director Compensation and Its Legal Implications*, JOHN M. OLIN CENTER FOR LAW, ECONOMICS, AND BUSINESS FELLOWS' DISCUSSION PAPER SERIES 1, 2 (Dec. 7, 2021); Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs*, 39 YALE J. REG. 228, 230 (2022) [hereinafter Ruan et al.]. This change was made to avoid confusion in citations *infra*.

[2] *MultiPlan*, 268 A.3d at 793; Jim Ducayet, Josh DuClos & Becky Shafer, *SPACs and Delaware Fiduciary Duties*, BLOOMBERG LAW, at 2, https://www.sidley.com/-/media/publications/spacs-and-delaware-fiduciary-duties.pdf?la=en; Fortney, *supra* note 1, at 2 n.1.

[3] Del. Div. of Corp., Annual Report Statistics, https://corp.delaware.gov/stats/ (last visited Mar. 9, 2023) [hereinafter *Delaware Annual Report*]. In 2021, Delaware added 336,407 new business entities. *Id.* And nearly 67% of the fortune 500 companies are domiciled here in Delaware. *Id.* For more context, as of February 2022, there were over a half-dozen SPAC cases filed in the Court of Chancery alone. Jenny Hochenberg & Justin C. Clarke, *SPAC Litigation: Current State and Beyond*, 55 The Review of Securities & Commodities Regulation 33, 35 (Feb. 23, 2022), https://www.cravath.com/a/web/s1q7XMGjLjQMubcJsjWCFp/3DuuWK/hochenberg_clarke_rscr_final-b.pdf.

[4] *MultiPlan*, 268 A.3d at 791; Fortney, *supra* note 1, at 2; *see generally* Ducayet et al., *supra* note 2; SEC Office of Investor Education and Advocacy Bulletin, *What You Need to Know About SPACs – Updated Investor Bulletin*, (May 25, 2021), https://www.sec.gov/oiea/investor-alerts-and-bulletins/what-you-need-know-about-spacs-investor-bulletin [hereinafter *SEC Bulletin*].

[5] *See* Logan A. Krulish, *Defending the De-SPAC Merger: What Standard of Review Applies?* 74 BAYLOR L. REV. 491, 495 (2022); John Luttig, *SPAC Attack: Everything a Founder or Investor Should Know*, LUTTIG'S LEARNINGS (July 17, 2020), https://luttig.substack.com/p/spac-attack-everything-a-founder; Ducayet et al., *supra* note 2, at 2; *cf.* Ruan et al., *supra* note 1, at 277–78.

contribution by the sponsor.[6] "The SPAC structure represents a careful balance between investor protections and an effective acquisition tool—providing benefits to investors, sponsors, and sellers of target businesses."[7] In short, not only do SPACs provide private companies a faster and less burdensome path to become public, but they also allow private companies to go public that would otherwise be unable to, due to the broken IPO process.[8] Especially given how the traditional IPO process has become stagnant, SPACs have indubitably become part of the financial fabric and deserve to be tweaked, not eviscerated.[9]

Now, in 2023, the Delaware Court of Chancery[10] provided us with two seminal cases involving SPACs: *In re MultiPlan Corp. S'holders Litig.* ("*MultiPlan*")[11] and *Delman v. GigAcquisitions3, LLC* ("*Gig3*").[12] *MultiPlan* left questions unanswered, whereas *Gig3* remained skeptical of SPACs but nonetheless provided SPAC dealmakers with guidance. Part I of this Comment explains the innate structural and mechanical features of SPACs. Part II analyzes *MultiPlan*, a case of first impression in Delaware, and what questions it left open. Part III analyzes *Gig3* and provides its likely implications. Finally, Part IV offers possible solutions for SPAC dealmakers and shows what SPACs must do moving forward to achieve the business judgment rule.

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[6] Krulish, s*upra* note 5, at 491.

[7] Latham & Watkins, *Special Purpose Acquisition Companies (SPACs)*, https://www.lw.com/practices/SPAC (last visited Mar. 9, 2023).

[8] Usha Rodrigues & Mike Stegemoller, *Exit, Voice, and Reputation: The Evolution of SPACs*, 37 DEL. J. CORP. L. 849, 874. It is beyond the scope of this Comment to truly delve into the traditional IPO process and why it no longer functions as intended; however, for more of an understanding and comparison to other business entities, please see John Lambert, *Why so many companies are choosing SPACs over IPOs*, KPMG SPAC INTEL HUB, https://advisory.kpmg.us/articles/2021/why-choosing-spac-over-ipo.html (last visited Mar. 3, 2023); Luttig, *supra* note 5; Fortney, *supra* note 1, at 2 & n.2.

[9] *See* Fortney, *supra* note 1, at 2 & n.2 (citing Lambert, *supra* note 8); Jonathan R. Macey & Douglas K. Moll, THE LAW OF BUS. ORGS. 250–53 (14th ed. 2020); Ruan et al., *supra* note 1, at 278 ("[Although o]ne can certainly imagine a better SPAC.").

[10] For a brief description of the Court of Chancery, please see Austin R. Niggebrugge, *The Importance of Maintaining the Partnership Between the First State's Court of Chancery and CCLD*, DEL. J. CORP. L.: BLOG (Jan. 6, 2023), https://djcl.org/the-importance-of-maintaining-the-partnership-between-the-first-states-court-of-chancery-and-ccld/.

[11] 268 A.3d 784 (Del. Ch. 2022).

[12] No. 2021-0679-LWW, 2023 WL 29325 (Del. Ch. Jan. 4, 2023). For a case summary, please see Alyssa Atkisson, Delman v. Gigacquisitions3, LLC *Case Summary*, 47 DEL. J. CORP. L. 331 (2023). This case is also provided in this issue. Delman v. Gigacquisitions3, LLC, 47 DEL. J. CORP. L. 333 (2023). *Editor's Note*: This case is scheduled for publication in the Atlantic Reporter but as of the date of publication in the *Delaware Journal of Corporate Law*, we do not possess a cite to that reporter. As such, it is cited here to Westlaw.

A. *The Three Phases of SPACs Simplified*[13]

While there is no specific blueprint for a SPAC, it generally follows three phases:

- The first phase—the IPO phase—lasts around eight weeks and includes: engaging with counsel and auditors, selling founder shares, preparing and filing an S-1 in response to SEC comments, negotiating the underwriting and ancillary agreements, and then conducting the road show with pricing and closing.[14]
- The second phase—the target search and negotiation phase—lasts up to nineteen months and includes initial costs: regular SEC filings, identifying a target business, conducting due diligence, arranging PIPE[15] and/or debt financing, preparing a proxy statement/tender offer, and signing the acquisition agreement.[16] The acquisition is also known as the "initial business combination."[17]
- The third phase—the approval/closing phase—lasts between three and five months.[18] It consists of announcing the acquisition agreement, filing a preliminary proxy statement/tender offer, meeting with SPAC investors, getting shareholder approval, redeeming public shares, closing the transaction, and filing Super 8-K.[19]

Put different:

> [SPACs] go public as a pile of cash, then commence a time-limited hunt for an acquisition target – a private company

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[13] Ramey Layne & Brenda Lenahan, *Special Purpose Acquisition Companies: An Introduction*, HARV. L. SCH. F. ON CORP. GOVERNANCE, (July 6, 2018), https://corpgov.law.harvard.edu/2018/07/06/special-purpose-acquisition-companies-an-introduction/.

[14] *Id.* A SPAC roadshow occurs when the "SPAC and target management actively market proposed mergers to potential investors[.]" Ruan et al., *supra* note 1, at 237–38.

[15] *See infra* Section I.B.3. PIPE stands for private investment in public equity. Ducayet et al., *supra* note 2, at 2; Michael D. Klausner & Michael Ohlrogge, *SPAC Governance: In Need of Judicial Review*, SSRN 1, 5 (Nov. 19, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3967693.

[16] Layne & Lenahan, *supra* note 13.

[17] *SEC Bulletin*, *supra* note 4. For the sake of consistency, I will refer to the process of the SPAC merging with the private company as the "de-SPAC merger."

[18] Layne & Lenahan, *supra* note 13.

[19] Layne & Lenahan, *supra* note 13.

> looking to access the public markets. In this subsequent acquisition, termed the "de-SPAC [merger]," the once-private firm instantly becomes public. The de-SPAC [merger] is thus the functional equivalent of an IPO, effected via merger rather than public offering.[20]

B. *The Structural and Mechanical Features of SPACs*

1. Formation, Purpose, and Sponsors

A SPAC is usually formed when an individual or management group, also known as its sponsor,[21] incorporates a blank check company for the sole purpose of identifying a private target company to merge with to take it public, i.e., the de-SPAC merger.[22] Sponsors are typically LLCs.[23] SPAC sponsors contribute the initial capital into the SPAC to earn an increase on original investment of the common stock and warrants.[24] Common stock in the SPAC goes for at least $10.00 and the warrants typically go for $11.50.[25] Critically, however, the sponsor can essentially control the SPAC.[26] The SEC stated that if you invest in a SPAC at the IPO stage, you are relying on the reputation of the sponsor.[27] Sponsors take a huge risk investing their own money, time, and labor at the outset and are the pertinent player that brings in the money for stockholders.[28] In a situation in which there is a high quality sponsor, everyone wins.[29]

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[20] Usha Rodrigues & Michael Stegemoller, *Redeeming SPACs*, UNIV. OF GA. SCH. OF L. 1, 2 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906196 (footnote omitted).

[21] Well-known celebrities, such as Shaquille O'Neil and Alex Rodriguez, have become SPAC sponsors. Fortney, *supra* note 1, at 3 n.5.

[22] *MultiPlan*, 268 A.3d at 793; Rodrigues & Stegemoller, *supra* note 8, at 871 (describing a blank check company as a shell company that has neither assets, nor operating history); Krulish, *supra* note 5, at 492, 495 (noting that at the IPO, the SPAC has not identified the private company, so, investors write "blank checks" without a clue as to where the SPAC will thereafter spend that money).

[23] Klausner & Ohlrogge, *supra* note 15, at 4. Sponsors can also be private equity funds or may be owned and controlled by an individual group that has no other institutional affiliations. Klausner & Ohlrogge, *supra* note 15, at 4; Ruan et al., *supra* note 1, at 236.

[24] Ducayet et al., *supra* note 2, at 2.

[25] Klausner & Ohlrogge, *supra* note 15, at 4. Warrants are "compensation paid to hedge funds that park cash in a SPAC so that it can establish itself as a public company." Ruan et al., *supra* note 1, at 279.

[26] Ruan et al., *supra* note 1, at 234 n.12; Klausner & Ohlrogge, *supra* note 15, at 5.

[27] *See SEC Bulletin*, *supra* note 4; *see generally* Rodrigues & Stegemoller, *supra* note 8.

[28] *See* Usha Rodrigues & Michael Stegemoller, *Disclosure's Limits*, 40 YALE J. REG. 37, 40–41; *see also* Ruan et al., *supra* note 1, at 256.

[29] *See* Ruan et al., *supra* note 1, at 256, 259.

2. Sponsor and Director Compensation

Because the sponsor organizes the SPAC, it is usually compensated through a "promote," which is structured through special stock, i.e., the founder shares—which cannot be liquidized—and normally allows the sponsor to take 20% of the SPAC's post-IPO equity.[30] Because of the sponsor's founder shares, the sponsor has the unilateral power to appoint the SPAC's board of directors.[31] The sponsor is likely to compensate those directors with founder shares, as well.[32] A sponsor and board presumptively have the incentive to decrease the redemptions to increase the chance of finalizing a de-SPAC merger, which helps them, but does not help the public stockholders, who would be better off with liquidation of the SPAC or redeeming their shares before the de-SPAC merger.[33]

3. IPOs and PIPE Investments

Approximately 93% of all U.S. IPOs are entities registered in Delaware.[34] An IPO is a transaction in which a private company goes public; that is, to raise substantial amounts of capital by making a public offering of its securities through an underwriter.[35] A traditional IPO involves a company that has grown to a scale and determines that it has the resources and structures in place to satisfy the SEC reporting requirements to become a public company.[36] Thus, the principal benefit of going public is raising money for expansion.[37] In contrast, a SPAC raises capital from investors before identifying the target company.[38] SPACs do that through public stockholders and often use third-party private

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[30] Sponsors are responsible for administering the SPAC, e.g., incorporating it, appointing its directors, and managing its IPO. *Gig3*, 2023 WL 29325, at *2; Klausner & Ohlrogge, *supra* note 15, at 4; AJ Harris, *SPAC The Deck: Why the Control Exerted by SPAC Sponsors Subjects De-SPAC Transactions to Entire Fairness Review*, 27 FORDHAM J. CORP. & FIN. L. 563, 567 (2022). Founder shares are Class B shares that give the sponsor up to 20% of the total shares after the completion of the IPO. David Larsen & Steven Nebb, *Valuing Founder Shares and other SPAC Investments*, Kroll, LLC (June 21, 2021), https://www.duffandphelps.com/insights/publications/valuation-insights/valuation-insights-second-quarter-2021/valuing-founder-shares-and-other-spac-investments. Notably, however, those shares are normally subject to a lock-up agreement, which "prohibit[s] the [s]ponsor from transferring, assigning, or selling the shares until a set time." *Gig3*, 2023 WL 29325, at *3.

[31] Klausner & Ohlrogge, *supra* note 15, at 5.

[32] *See generally* Fortney, *supra* note 1.

[33] Klausner & Ohlrogge, *supra* note 15, at 6.

[34] *Delaware Annual Report*, *supra* note 3.

[35] Macey & Moll, *supra* note 9, at 250–51.

[36] *SEC Bulletin*, *supra* note 4.

[37] Macey & Moll, *supra* note 9, at 250.

[38] Ducayet et al., *supra* note 2, at 2.

investments in the form of public equity ("PIPE") to finance the transaction and to ensure that the deal will reach the cash requirements.[39] PIPE provides protection for the SPAC because it compensates for the cash withdrawn from the trust by the redeeming public stockholders.[40] Notably, however, the number of companies going public through traditional IPOs has steadily declined for over two decades with no anticipation of improving.[41]

2020 was the first year in which SPAC IPOs outnumbered traditional IPOs; additionally, there were more SPAC IPOs than in the previous ten years combined.[42] The SPAC IPO process concludes quicker than the traditional operating company's and can be completed as soon as two months.[43] SPACs' financial statements in the IPO registration statement are very short because they have no existing assets and low initial operating costs; therefore, it takes only a matter of weeks to prepare.[44] And because securities may not be sold until the registration becomes effective, that is appealing.[45] In comparison, a traditional operating company's IPO registration could take many months.[46] Additionally, SPACs are attractive because they have a safe harbor under federal securities laws for private actions for any misstatements or omissions in financial projections and other forward-looking projections; traditional IPOs do not.[47] "The primary regulatory difference between SPACs and IPOs related to the communication of information is the treatment of projections and other forward-looking statements[]"; SPACs are governed by the regulations of mergers, whereas traditional IPOs are not.[48]

In 2013, only ten SPACs went public and raised $1.4 billion in cash to fund de-SPAC mergers.[49] From 2014 through 2017, during which time almost 80 SPAC IPOs closed, SPACs raised approximately $19 billion in

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[39] Ducayet et al., *supra* note 2, at 2; Klausner & Ohlrogge, *supra* note 15, at 5.

[40] Ruan et al., *supra* note 1, at 241.

[41] Macey & Moll, *supra* note 9, at 251. For context, in 1997 there were roughly 9,000 public companies, whereas in 2020, there were 4,300. Macey & Moll, *supra* note 9, at 251. Further, in 1999 there were 486 traditional IPOs, whereas in 2020, there were only 159. Macey & Moll, *supra* note 9, at 251.

[42] Larsen & Nebb, *supra* note 30; Fortney, *supra* note 1, at 2 n.1.

[43] Ducayet et al., *supra* note 2, at 2.

[44] Hochenberg & Clarke, *supra* note 3, at 44; Layne & Lenahan, *supra* note 13.

[45] *See* Macey & Moll, *supra* note 9, at 252.

[46] Layne & Lenahan, *supra* note 13.

[47] Ruan et al., *supra* note 1, at 234–35, 271 n.74 (citing 15 U.S.C. §78u-5 (2018)).

[48] Ruan et al., *supra* note 1, at 271.

[49] *In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784, 793 (Del. Ch. 2022).

gross proceeds.[50] SPAC IPOs had a 66% industry focus: 38% energy, 19% other/various, 14% technology, 9% healthcare, 8% consumer, 7% industrial, and 6% media.[51] By 2019, SPAC IPOs reached 59 with $13.6 billion raised.[52] 2014 through 2020 saw over 430 SPAC IPOs closed, which raised approximately $114 billion in gross proceeds.[53] Moreover, in 2020, 248 SPAC IPOs raised over $83 billion in capital, which more than sextupled the amount from 2019 and quadrupled the amount raised by $69 billion.[54] 2021 continued to provide even more growth; March 2021 alone consisted of a record 109 SPACs issued.[55] As of April 1, 2021, there were 298 SPAC IPOs that raised over $97 billion, with an additional 247 SPACs that filed for an IPO that had not yet closed.[56] In October 2021, 57 SPACs began trading, which was the highest amount since March of that year.[57] Thus, through a SPAC transaction, a private company can confidently become a publicly traded company quicker and can control the pricing and deal terms in comparison to traditional IPOs.[58]

4. Trust Accounts

The funds raised from public investors through the SPAC IPO are placed into a trust account.[59] Under the SPAC's charter, the funds in the trust account can only be used to redeem public shares tendered in connection with the de-SPAC merger, to fund the de-SPAC merger, and for liquidation of the SPAC.[60] The funds that are deposited into the trust account are normally invested in short-term U.S. government securities or held in cash.[61]

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[50] Layne & Lenahan, *supra* note 13 (providing that 2014 saw $1.7B; 2015 saw $3.83B; 2016 saw $3.49B; and 2017 saw $9.69B in gross proceeds).

[51] Layne & Lenahan, *supra* note 13.

[52] *MultiPlan*, 268 A.3d at 793.

[53] Vinson & Elkins LLP, *Special Purpose Acquisition Companies*, https://www.velaw.com/practices/special-purpose-acquisition-companies/ (last visited Mar. 9, 2023).

[54] *MultiPlan*, 268 A.3d at 793; Fortney, *supra* note 1, at 2 n.1; Ducayet et al., *supra* note 2, at 2.

[55] Yun Li, *SPAC Issuance Jumps to the Highest Since March as Deals Rush to Market before Year-End*, CNBC (Nov. 3, 2021, 1:07 PM), https://www.cnbc.com/2021/11/03/spac-issuance-jumps-to-the-highest-since-march-as-deals-rush-to-market-before-year-end.html.

[56] Ducayet et al., *supra* note 2, at 2.

[57] Li, *supra* note 55.

[58] *SEC Bulletin*, *supra* note 4; Lambert, *supra* note 8.

[59] Layne & Lenahan, *supra* note 13.

[60] Ruan et al., *supra* note 1, at 237; Rodrigues & Stegemoller, *supra* note 8, at 892–93 ("Liquidation means that the sponsors receive nothing; indeed, if a private placement occurred, the sponsors would be out of pocket for the SPAC expenses.").

[61] Layne & Lenahan, *supra* note 13 (elaborating that the cash is only "released to fund (i) the business combination, (ii) redemption of common stock pursuant to a mandatory

5. Stockholders' Voting and Redemption Rights

Investors in a SPAC IPO receive a unit of one share of redeemable voting common stock in the SPAC and a fraction of a warrant to purchase common stock if the SPAC successfully completes the de-SPAC merger.[62] The redemption right of public stockholders to liquidize their shares is the most prominent feature of a SPAC because it affords them protection.[63] If a SPAC finds a private company to merge with or acquire, its public stockholders will vote on the merger pursuant to a proxy statement, usually organized by the board, which needs to disclose all the material information about the proposed transaction.[64] At that time, stockholders will have the choice, separate from their voting rights, to remain invested in the transaction, or redeem their pro rata share of the aggregate amount from the investment in the trust account, in full, with interest.[65] The ability to exercise a redemption right occurs at a pivotal moment for public stockholders because, after that vote, the SPAC essentially changes from a trust account into an operating company.[66] Without that protection, a value-decreasing de-SPAC merger will harm the investors.[67]

6. State-Law Disclosures

Whenever the board recommends shareholder action, it must disclose all material information to allow public stockholders to make informed decisions.[68] Delaware adopts the federal securities laws standard for materiality.[69] Financial data need not include everything; rather, just

redemption offer [], (iii) payment of the deferred underwriting discount[,] and (iv) if any amounts remain, to cover transaction expenses and working capital of the company post-De-SPAC [merger].").

[62] Ducayet et al., *supra* note 2, at 2.

[63] Delman v. GigAcquisitions3, LLC, No. 2021-0679-LWW, 2023 WL 29325, at *12 (Del. Ch. Jan. 4, 2023).

[64] Ducayet et al., *supra* note 2, at 4–5. Because the sponsor normally controls 20% of voting shares, only 37.5% of the public shares are needed for a majority vote approval for the de-SPAC merger. Harris, *supra* note 30, at 605.

[65] *SEC Bulletin*, *supra* note 4; Ducayet et al., *supra* note 2, at 2. That redemption right is usually in the SPAC's charter and terms of the trust. Klausner & Ohlrogge, *supra* note 15, at 7.

[66] *SEC Bulletin*, *supra* note 4.

[67] Klausner & Ohlrogge, *supra* note 15, at 7.

[68] *In re* Trulia, Inc. S'holder Litig., 129 A.3d 884, 899 (Del. Ch. 2016) ("Under Delaware law, when directors solicit stockholder action, they must 'disclose fully and fairly all material information within the board's control.'") (quoting Stroud v. Grace, 606 A.2d 75, 84 (Del. 1992)); *see also* Ducayet et al., *supra* note 2, at 4–5.

[69] *Trulia*, 129 A.3d at 899.

the material information.[70] Information is material if a reasonable stockholder would recognize a substantial likelihood that the information would significantly alter the "total mix" of information available.[71] During the de-SPAC merger, target companies "can and often do disclose financial projections in connection with the transaction, and those projections are frequently included in PIPE marketing materials that are eventually filed by the SPAC and in proxy statements provided to SPAC investors."[72]

SPACs' voting schemes, investor protections, and outcomes are free from the uncertainties that attach to the typical IPO and, therefore, attract more investors due to the ease and efficiency at which they are brought to the public market.[73] Having explained what a SPAC is and how it operates, it is now appropriate to analyze the seminal Delaware Court of Chancery decisions: first with *MultiPlan*, a matter of first impression in Delaware, and then *Gig3*. Both were decided by Vice Chancellor Lori W. Will.

II. *MULTIPLAN*

A. *Facts*

Defendant Churchill Capital Corp. III ("Churchill") was formed in October 2019 as a SPAC.[74] Co-defendant Michael Klein ("Klein") incorporated Churchill via fellow co-defendant Churchill Sponsor III, LLC (the "Sponsor").[75] The managing member of the Sponsor was M. Klein Associates, Inc., whose sole stockholder was Klein.[76] Because of that, Klein had the exclusive power to not only unilaterally appoint himself as Churchill's CEO, but also handpick his board of directors (the "Board"); all of whom had prior or ongoing connections with Klein, including his brother.[77] All of the Board, except his brother, indirectly received economic interests via founder shares and warrants.[78]

On February 19, 2020, Churchill went public with a $1.1 billion IPO, all of which was put into a trust account throughout the process of

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[70] McMullin v. Beran, 765 A.2d 910, 925 (Del. 2000); *see also* Ducayet et al., *supra* note 2, at 4.

[71] *MultiPlan*, 268 A.3d at 816.

[72] Ducayet et al., *supra* note 2, at 5.

[73] *See* Rodrigues & Stegemoller, *supra* note 8, at 874.

[74] *MultiPlan*, 268 A.3d at 793.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 794–95.

[78] *MultiPlan*, 268 A.3d at 794–95.

searching for a target company.[79] Churchill sold 110,000 units at $10 per unit, with each unit containing one share of Class A common stock and a quarter of a warrant with an exercise price of $11.50.[80] Churchill's Class A shares comprised 80% of its outstanding stock, whereas Class B founder shares that were purchased by the Sponsor for an upfront capital contribution of $25,000 filled the remaining 20%.[81] If Churchill completed the de-SPAC merger, then the founder shares would convert to Class A shares at a one-to-one ratio.[82] In addition, the Sponsor was compensated through an option to purchase warrants in the SPAC in which Churchill made a private placement of 23,000,000 warrants to the Sponsor at $1 each.[83]

Churchill selected Polaris Parent Corp. ("MultiPlan"), the parent company of MultiPlan, Inc., and began negotiations with it in spring of 2020.[84] On July 12, 2020, the Board unanimously approved the de-SPAC merger with MultiPlan.[85] That same day, Churchill retained The Klein Group LLC, a wholly owned subsidiary of defendant M. Klein & Co., as its financial advisor.[86] On July 13, 2020, the de-SPAC merger and related finances were announced, which had an implied value of $11 billion.[87] Churchill set the record date for the vote and issued the proxy statement, which listed the "attractive valuation" and "opportunities for growth in revenues, adjusted EBITDA and free cash flow[.]"[88] The Board also described its "extensive due diligence" that consisted of communication with "senior leaders of several large customers of MultiPlan."[89] The proxy statement disclosed that MultiPlan was dependent on a single customer for 35% of its revenues; however, it did not disclose that that customer had plans to create an in-house data analytics platform that would compete with MultiPlan, and by the end of 2022, remove the accounts that it had with MultiPlan.[90] That customer's plan had been publicly discussed by

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[79] *Id.* at 793, 795.

[80] *Id.* at 794.

[81] *Id.* (the 20% stake "was the Sponsor's *chosen* form of compensation.") (emphasis added).

[82] *MultiPlan*, 268 A.3d at 794.

[83] *Id.* Those warrants, like typical warrants, had an exercise price of $11.50. *Id.*

[84] *Id.* at 796. MultiPlan is a healthcare industry-focused data analytics and cost management solutions provider. *MultiPlan*, 268 A.3d at 796.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 797.

[88] *MultiPlan*, 268 A.3d at 797. EBITDA is an acronym for earnings before interest, taxes, depreciation, and amortization.

[89] *Id.*

[90] *Id.* at 797–98.

June 2020.[91] Despite the Board's self-proclaimed due diligence, it did not couple the proxy statement to its stockholders with an independent third-party's valuation or fairness opinion; rather, it was prepared by Churchill management with assistance from The Klein Group LLC.[92] Churchill's stock closed on the record date at $11.09 per share, and the implied value of formerly Class B shares held by the Sponsor, once converted to Class A common stock, was roughly $305 million; Klein's interest alone was roughly $230 million.[93]

Assuming a valid quorum, a vote of the majority of Churchill's stockholders at the meeting was needed to approve the de-SPAC merger.[94] Fewer than 10% of Churchill's public investors opted to exercise their redemption rights; on October 7, 2020, the stockholders overwhelmingly voted to approve the de-SPAC merger.[95] MultiPlan then became a wholly owned subsidiary of Churchill, and later, Churchill renamed itself to MultiPlan Corporation ("Public MultiPlan").[96] Then, on November 11, 2020, an equity research firm published a report that discussed the customer's in-house competitor to MultiPlan, after which, Public MultiPlan's stock fell to $6.27 the next day.[97] Litigation followed.[98]

B. *Procedural History*

Plaintiffs held shares of Churchill before it became Public MultiPlan.[99] In late March and early April 2021, they alleged four counts (though only three will be addressed for the purposes of this Comment): counts I, II, and III were direct claims for breach of fiduciary duties against Churchill's controlling stockholder, directors, and officers.[100] Plaintiffs argued that the defendants put their own interests above Class A stockholders, and that they issued a false and misleading proxy statement that impaired Class A stockholders' ability to exercise their redemption and voting rights.[101] On May 3, 2021, defendants moved to dismiss the

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[91] *Id.*
[92] *MultiPlan*, 268 A.3d at 798.
[93] *Id.*
[94] *Id.* at 797–98.
[95] *Id.*
[96] *MultiPlan*, 268 A.3d at 796.
[97] *Id.* at 798.
[98] *Id.*
[99] *Id.*
[100] *MultiPlan*, 268 A.3d at 798–99.
[101] *Id.*

complaint pursuant to Court of Chancery Rule 12(b)(6) for failing to state a claim.[102]

C. *Court's Analysis*

1. Standard of Review

The Court made clear that the pleadings standards for a Rule 12(b)(6) motion are minimal and the operative test is of reasonable conceivability, i.e., whether there is a possibility of recovery.[103] The plaintiffs' well-pleaded factual allegations are credited in full and receive all reasonable inferences in their favor; not in the defendants' favor.[104]

The Court made its intentions known that "well-worn fiduciary principles are applied to the plaintiffs' claims despite the novel issues presented."[105] There was no dispute that Churchill's controlling stockholder, directors, and officers owed fiduciary duties of loyalty and care to the common stockholders.[106] The duty of disclosure, implicated by loyalty and care, was applicable due to Churchill's lack of communication with the stockholders, and the duty of loyalty was implicated because there was reason to believe that the Board lacked good faith in approving the disclosure.[107]

Delaware's default standard of review is the business judgment rule, a staple in Delaware corporate law. The rule stands for the "presumption that in making a business decision, the board of directors acted on an informed basis, in good faith[,] and in the honest belief that the action was taken in the best interests of the company."[108] However, here, the plaintiffs argued that the business judgment rule was rebutted and, thus, entire fairness was more appropriate because: 1) the de-SPAC merger was a conflicted controller transaction; and 2) a majority of the Board was either self-interested or lacked independence from Klein.[109] Directors are self-interested in a situation in which they expect to derive any material personal financial benefit from a transaction, i.e., self-dealing.[110] If a director is subject to the interested party's dominion, or beholden to that

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[102] *Id.*
[103] *Id.*
[104] *MultiPlan*, 268 A.3d at 799.
[105] *Id.* at 792 (internal quotation mark and ciations omitted).
[106] *Id.* at 799–800.
[107] *Id.*
[108] *MultiPlan*, 268 A.3d at 809.
[109] *Id.*
[110] *Id.* at 813.

interest, then that party lacks independence.[111] Entire fairness is applicable when the complaint alleges "facts supporting a reasonable inference that there were not enough sufficiently informed, disinterested individuals who acted in good faith when taking the challenged actions to comprise a board majority."[112]

The entire fairness standard was not triggered by the single fact that Klein, as the Sponsor, was the controlling stockholder.[113] In addition, the plaintiffs needed to prove that Klein engaged in a conflicted transaction in which he stood on both sides or competed with the stockholders for consideration.[114] Only the latter was at issue.[115] The controller competes with the stockholders when the controller:

> (1) receives greater monetary consideration for its shares than the minority stockholders; (2) takes a different form of consideration than the minority stockholders; or (3) receives a unique benefit by extracting something uniquely valuable to the controller, even if the controller nominally receives the same consideration as all other stockholders to the detriment of the minority.[116]

The Court focused on the third category.[117] At large, the defendants argued that Klein did not compete with Churchill's public stockholders because he received no greater consideration than other Churchill stockholders in the de-SPAC merger.[118] The defendants argued: first, that nineteen months remained in the completion window to finalize a merger, and because of that, the directors would have pursued other deals had they known that the de-SPAC merger would have been value decreasing.[119] Second, that the plaintiffs should be estopped from challenging the same economic incentives that were disclosed to them before they invested in Churchill.[120] Third, that Sponsor's founder shares cannot trigger entire fairness because they appeared in all de-SPAC mergers and, therefore, were not unique.[121]

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[111] *Id.* at 814.
[112] *MultiPlan*, 268 A.3d at 812 (citation omitted).
[113] *Id.* at 809 & n.150.
[114] *Id.*
[115] *Id.*
[116] *MultiPlan*, 268 A.3d at 810 (quotation marks omitted).
[117] *Id.*
[118] *Id.*
[119] *Id.* at 811.
[120] *MultiPlan*, 268 A.3d at 811.
[121] *Id.* at 812.

For defendants' first argument, the Court said that "[t]ime left in the completion window does not change the potential for misaligned incentives."[122] The Court reasoned that it was logical to expect that MultiPlan was identified as the best target, given how MultiPlan was pursued in the first place.[123] For defendants' second argument, the Court said that the innate structure of the SPAC and Klein's incentives were disclosed in the prospectus but that the transaction at issue was not.[124] The Court reasoned that the plaintiffs did not agree that they did not require all material information to make the redemption choice.[125] For defendants' third argument, the Court reasoned that the prior usage of the SPAC structure by other SPACs did not cure it from conflicts, nor from the technical legality of the de-SPAC merger mechanics.[126] Under Delaware law, corporate acts must be twice tested, once in law and again in equity.[127]

"[I]nequitable action does not become permissible simply because it is legally possible."[128] Thus, the Court found in favor of entire fairness because, at the motion to dismiss stage, it could not overlook the reasonably conceivable assumption that Klein needed to complete a de-SPAC merger, or else the Class B founder shares and warrants would be worthless and that that was a special benefit to Klein at the exclusion of, and detriment to, the minority Class A stockholders.[129] Further, the Court noted that Klein unilaterally appointed each of the directors to the Board and retained unilateral power to remove them.[130] Although merely being appointed is insufficient in itself, the Court reasoned that given the future opportunities to be considered for directorships and, even though the actual extent of those relationships was not clear, it was still enough to defeat a motion to dismiss because those directors each had personal or employment relationships with Klein.[131] Finally, the Court agreed with plaintiffs and said that a more than one half-million-dollar payout for the consummation of the de-SPAC merger at the motion to dismiss stage was material.[132]

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[122] *Id.* at 811.
[123] *Id.*
[124] *MultiPlan*, 268 A.3d at 812.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *MultiPlan*, 268 A.3d at 812 n.161 (quoting Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971)).
[129] *Id.*
[130] *Id.* at 814.
[131] *Id.* at 814–15.
[132] *MultiPlan*, 268 A.3d at 813–14.

2. Entire Fairness Analysis

Under entire fairness, defendants must demonstrate that the transaction is entirely fair, including both fair price and fair dealing to the corporation and its stockholders.[133] "Fair price relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock."[134] "Fair dealing embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained."[135]

The Court reasoned that, given Klein's control of the Class B shares and his ties to the Board, it was reasonably conceivable that he "had the power to control, influence, and cause—and *actually did control, influence, and cause—the Company to enter into the Merger*[,]" both as the controlling stockholder and as an officer thereby obtaining a financial benefit in a value decreasing de-SPAC merger at the expense of the Class A stockholders.[136]

The Court found that all material information was not disclosed in the proxy statement to the common stockholders for them to properly effectuate their choice of redemption because it did not disclose that MultiPlan's largest customer was going in-house and it did not contain opposing points of view about the de-SPAC merger.[137] "Information is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote—or, in this instance, in deciding whether to redeem—such that it would be viewed as significantly alter[ing] the total mix of information made available."[138] The Court explained that it was reasonably conceivable that Class A stockholders would have found that information important to exercise their redemption rights.[139] Notably, however, discovery or trial could have reached a different outcome.[140]

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[133] *Id.* at 815.
[134] *Id.* (quoting Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983)).
[135] *Id.* (quoting *Weinberger*, 457 A.2d at 711).
[136] *MultiPlan*, 268 A.3d at 817 (emphasis added).
[137] *Id.* at 816.
[138] *Id.* (internal quoation marks and citations omitted).
[139] *Id.*
[140] *MultiPlan*, 268 A.3d at 816–17.

D. *Outcome*

After that opinion was rendered, the parties settled for roughly $33 million, subject to the Court's approval.[141]

E. *Practical Implications*

Ultimately, the Court correctly decided *MultiPlan*. The SPAC fiduciaries failed to disclose all material information to the public stockholders in the proxy statement; notably, they did not disclose that MultiPlan's customer that was responsible for 35% of its revenues was going in-house to compete with the post de-SPAC merger entity, which was public knowledge.[142] The Court's narrow holding reinforces to Delaware, and the rest of the country, that despite the contemporary significance of the 2020 SPAC boom, Delaware's well-worn fiduciary principles remain a staple despite the novel issues that come with SPACs. Nonetheless, questions remained.

1. Questions Left Unanswered

a. Unresolved Hypothetical

There is no dispute that SPACs are legal; however, the Court took issue with the second prong of the twice tested rule: whether the de-SPAC merger was equitable to public stockholders.[143] Its holding focused on a misleading proxy statement in the context of stockholders' redemption rights, not whether the fiduciaries breached their common law duties by merely having an interest in the SPAC itself; in particular, the Court said that:

> This conclusion does not address the validity of a *hypothetical claim where the disclosure is adequate and the allegations rest solely on the premise that fiduciaries were necessarily interested given the SPAC's structure.* The core, direct harm presented in this case concerns the impairment of stockholder redemption rights. *If public stockholders, in*

[141] *MultiPlan Corporation Announces Settlement of Delaware Litigation*, BUSINESSWIRE (Nov. 17, 2022), https://www.businesswire.com/news/home/20221117006191/en/MultiPlan-Corporation-Announces-Settlement-of-Delaware-Litigation.

[142] *MultiPlan*, 268 A.3d at 797–98, 812, 816.

[143] *Id.* at 812.

> *possession of all material information about the target, had chosen to invest rather than redeem, one can imagine a different outcome.*[144]

The Court admitted that "[t]he defendants' argument might [have] be[en] persuasive if it had been made about the Proxy and the plaintiffs had opted not to redeem despite adequate disclosures—but that [was] not the universe alleged in the Complaint."[145] SPACs' main attraction, the speed at which they can take a private company public, must contain accurate disclosure, as well. Thus, speed comes from accuracy, they are not mutually exclusive.

However, after *MultiPlan*, the million-dollar question presented itself. Assuming an adequate proxy statement disclosing all material information to stockholders so that they can effectively exercise their redemption rights in a fully informed manner, how can a SPAC convince the Court of Chancery that the transaction was equitable so that it can obtain the business judgment rule?

b. Implementing a *Corwin* Cleanse Following *MultiPlan*

SPAC disputes, like the rest of Delaware corporate law, turn on the standard of review. However, as mentioned *supra*, if there was adequate disclosure of all material information in the proxy statement, the outcome could have been different, despite the fiduciaries' interests.[146] Thus, pursuant to *Corwin v. KKR Financial Holdings LLC*,[147] there was supposedly a way to insulate SPAC fiduciaries under the business judgment rule, even in a situation in which directors held founder shares and were not independent.[148]

In *Corwin*, the Delaware Supreme Court held that when a transaction that would apply the entire fairness standard is approved by a fully informed and uncoerced vote of a majority of disinterested stockholders, the business judgment rule is applicable, unless there is a conflicted controlling stockholder.[149] There, the Supreme Court noted that

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[144] *Id.* at 816 (emphasis added).

[145] *Id.* at 812.

[146] *MultiPlan*, 268 A.3d at 812, 816.

[147] 125 A.3d 304, 306 (Del. 2015); James Jian Hu & Andrew Hammond, *Avoiding "Entire Fairness" Review in Claims against SPAC Boards through Corwin*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (June 25, 2022), https://corpgov.law.harvard.edu/2022/06/25/avoiding-entire-fairness-review-in-claims-against-spac-boards-through-corwin/.

[148] Hu & Hammond, *supra* note 147.

[149] *See Corwin*, A.3d at 308–09; *see also* Hu & Hammond, *supra* note 147.

"[f]or sound policy reasons, Delaware corporate law has long been reluctant to second-guess the judgment of a disinterested stockholder majority that determines that a transaction with a party other than a controlling stockholder is in their best interests."[150] That cleansing effect implied that a fully informed and uncoerced vote of disinterested stockholders would be acceptable in the SPAC context, even in a situation in which a majority of the board was conflicted, unless there was a controlling stockholder who was also conflicted.[151] Thus, for all of 2022, it appeared that absent a conflicted and controlling stockholder, a fully informed and uncoerced vote by a majority of the disinterested public stockholders should have been able to cleanse the SPAC and insulate the board from entire fairness.[152] The Court addressed, *inter alia*, exactly that claim in *Gig3*.

III. *GIG3*

A. *Facts*

In February 2020, GigCapital3, Inc. ("Gig3") incorporated in Delaware and formed as a SPAC.[153] Gig3 fell within the structural norms associated with SPACs.[154] Its sponsor was defendant GigAcquisitions3, LLC (the "Sponsor"), a Delaware LLC.[155] Shortly after Gig3 was incorporated, it issued founder shares to the Sponsor for the sum of $25,000, which amounted to 20% of Gig3's post-IPO equity.[156] That equated to roughly five million founder shares at $0.005 per share.[157] The founder shares differed from those that were later offered to the public because they could not be redeemed, lacked liquidation rights, and had a lock-up provision that prevented the Sponsor from transferring, assigning, or selling the shares for one year or if the stock reached a particular target price.[158]

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[150] *Corwin*, A.3d at 306; *see also* Hu & Hammond, *supra* note 147.

[151] Hu & Hammond, *supra* note 147.

[152] Hu & Hammond, *supra* note 147.

[153] Delman v. GigAcquisitions3, LLC, No. 2021-0679-LWW, 2023 WL 29325, at *2 (Del. Ch. Jan. 4, 2023).

[154] *Id.*

[155] *Id.*

[156] *Id.* at *3. The Court refers to the founder shares as "Initial Stockholder Shares," but for the sake of consistency, I will refer to them as "founder shares." *See Gig3*, 2023 WL 29325, at *3.

[157] *Id.*

[158] *Id.* at *3, *16 n.169.

On May 18, 2020, Gig3 completed its IPO in which it sold 20 million units to public investors at $10 per unit; it raised $200 million in proceeds.[159] On February 25, 2020, the units were offered via a Form S-1 Registration Statement, and on May 13, 2020, via the prospectus.[160] The prospectus disclosed and clarified the conflict of interests between the Sponsor and Gig3's stockholders and stated that, if liquidation of the SPAC occurred, then the founder shares would be worthless.[161] Each founder share had a share of common stock and three-quarters of a warrant at a price of $11.50 per share.[162] The completion window was eighteen months; if Gig3 identified a target, those public stockholders could redeem their shares of $10 plus interest, but keep the warrants included in the IPO units.[163] The IPO proceeds were deposited in a trust.[164]

Co-defendant, Avi Katz, was a "serial founder of SPACs" and sat on the Board for Gig3, in addition to serving as its Executive Chairman, Secretary, President, and CEO.[165] Katz also had a controlling interest in the Sponsor and was its managing member.[166] Katz appointed his spouse and the rest of defendants, all of whom had prior, ongoing, and possible future opportunities with him.[167]

After the IPO, Gig3's officers and directors identified Lightning eMotors Inc. ("Lightning") as a target for the de-SPAC merger.[168] Katz and his spouse "dominated" Gig3's negotiations with Lightning.[169] The financial advisors had stakes in the de-SPAC merger and, even so, the Board did not ask them for a fairness opinion.[170] On December 9, 2020, the Board approved the proposed de-SPAC merger with Lightning.[171] The next day, the parties announced that they entered into a merger agreement.[172]

On March 22, 2021, Gig3's proxy statement was filed with the SEC; it also informed the stockholders of a special meeting that would occur on

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[159] *Id.* at *3.
[160] *Gig3*, 2023 WL 29325, at *3.
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Gig3*, 2023 WL 29325, at *4. "The cash in the trust was earmarked for the exclusive purposes of redeeming shares in the first instance, contributing the remainder to a merger, or returning funds to stockholders in the event of a liquidation." *Id.*
[165] *Id.*
[166] *Id.*
[167] *Gig3*, 2023 WL 29325, at *4.
[168] *Id.* at *5. Lightning was an electric vehicle manufacturer focused on zero-emission, medium duty vocational vehicles and shuttle buses. *Id.*
[169] *Id.* at *16.
[170] *Gig3*, 2023 WL 29325, at *24.
[171] *Id.* at *5.
[172] *Id.*

April 21 in which stockholders would vote on the de-SPAC merger.[173] Stockholders were also informed of their deadline to exercise their redemption rights and that redemption entitled them to approximately $10.10 per share from the trust, even if they chose to vote against the merger.[174] As the prospectus did, the proxy statement also informed the stockholders of conflicts between them and Gig3's Sponsor and Board in a clear and unambiguous way.[175] Approval of the de-SPAC merger required an affirmative stockholder vote of a majority of the votes cast at the meeting.[176] Stockholders overwhelmingly approved of the transaction.[177]

On May 6, 2021, upon closing, Gig3 changed its name to Lightning eMotors, Inc.[178] Subsequently, Lightning eMotors, Inc. elected a nine-member board; three of Gig3's Board members retained positions on the new board.[179] On April 15, before the vote, Gig3's stock price traded around the redemption price at $10.07, but by the May 6 closing date, its stock price fell to $7.82 per share.[180] Despite that, however, the founder shares were worth more than $39 million when the de-SPAC merger closed.[181] On May 17, Lightning eMotors, Inc. issued a press release announcing its 2021 first quarter results, projections, and its 2022 predictions.[182] However, by August 2, Lightning eMotors, Inc.'s stock price fell to $6.57 per share, and as of the day before the opinion was filed, trading closed at $.041 per share.[183]

B. *Procedural History*

Plaintiff, Richard Delman, held stock in Gig3 since August 26, 2020.[184] On August 4, 2021, he filed a putative class action complaint on behalf of himself and current and former Gig3 stockholders.[185] He asserted three claims, but only two are examined here. Count I was a direct claim for breach of fiduciary duty against six members of the Gig3 Board and

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[173] *Id.* at *6.
[174] *Gig3*, 2023 WL 29325, at *6.
[175] *Id.* at *7.
[176] *Id.*
[177] *Id.* 98% of the votes approved of it and 29% elected to redeem 5.8 million shares. *Gig3*, 2023 WL 29325, at *7.
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Gig3*, 2023 WL 29325, at *7.
[182] *Id.*
[183] *Id.* at *16 n.170.
[184] *Id.* at *7.
[185] *Gig3*, 2023 WL 29325, at *7.

count II was a direct claim for breach of fiduciary duty against Katz and the Sponsor as the controlling stockholder of Gig3.[186] On August 31, 2021, the defendants moved to dismiss the complaint pursuant to Court of Chancery Rule 12(b)(6).[187]

C. *Court's Analysis*

The Court began by laying out the Rule 12(b)(6) standard.[188] Then it noted that the breach of fiduciary claims brought were similar to those in *MultiPlan*;[189] in essence, that the defendants prioritized their own financial, personal, and/or reputational interests by approving the unfair de-SPAC merger.[190] However, the Court pointed out that the main difference between *Gig3* and *MultiPlan* was "the manner in which stockholders' redemption rights were allegedly compromised."[191]

The Court explained that the defendants owed fiduciary duties in the SPAC context because a SPAC, organized as a Delaware corporation, is still a corporation under Delaware law.[192] Defendants attempted to assert that their duties of loyalty and care extended only to the redemption right because it was provided in Gig3's charter.[193] However, the Court pointed out that the plaintiff did not claim that Gig3 breached its obligation to provide him with a redemption right; rather, plaintiff claimed that the defendants disloyalty hindered his ability to exercise it.[194] The Court further noted that Gig3's charter did not speak to the actions that its fiduciaries must undertake in connection with that right.[195] Additionally, it stated that "[r]equiring the defendants to abide by their fiduciary duties would neither 'rewrite the contract' nor 'undermine the primacy of contract law.'"[196]

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[186] *Id.*
[187] *Id.* at *8.
[188] *Id.* The same pleading standard as *MultiPlan*.
[189] *Gig3*, 2023 WL 29325, at *8.
[190] *Id.*
[191] *Id.*
[192] *Id.* at *11.
[193] *Gig3*, 2023 WL 29325, at *12.
[194] *Id.*
[195] *Id.*
[196] *See id.*, nn.131–32 (footnote omitted). The question of how the Court will address a situation in which the charter directly addresses fiduciaries' duties in connection with that right is beyond the scope of this Comment. However, for examples of cases in which those issues arose, please see Nemec v. Shrader, 991 A.2d 1120, 1126, 1129 (Del. 2010) ("addressing a claim where the 'nature and scope of the [d]irectors' duties,' when causing the company to exercise a right to redeem shares acquired under a stock plan agreement, were 'defined solely by reference to that contract'"); Gale v. Bershad, No. Civ. A. 15714, 1998 WL 118022, at *5 (Del. Ch. Mar.

1. Standard of Review

Entire fairness applied because of the inherent conflicts between Gig3's fiduciaries and the public stockholders given how the fiduciaries would rather have a value-decreasing de-SPAC merger to the detriment of the public stockholders.[197] The plaintiff's argument was two-fold: first, that the de-SPAC merger was a conflicted controller transaction; and second, that a majority of the Board was self-interested or not independent.[198] Entire fairness is triggered in a situation in which there is a controlling stockholder and that controller engages in a conflicted transaction.[199] A stockholder is controlling if it owns a majority of interest in the corporation or less than a majority, but nonetheless, exercises control over the business affairs of the corporation, i.e., soft control.[200] Directors lack independence in situations in which they are beholden to an interested party under that party's influence.[201]

The defendants put forth the best possible arguments left open after *MultiPlan*. They pointed to the validity of a hypothetical claim where the disclosure is adequate, and the allegations rest solely on the premise that fiduciaries were necessarily interested given the SPAC's structure.[202] They asked the Court to first focus on whether the plaintiff showed that the proxy statement informing the redemption choice was materially false or misleading.[203] The Court responded that the plaintiffs advanced deficient disclosures that were "inextricably intertwined" with disloyal behavior, not that they put forth a straightforward claim of disclosure.[204] Had plaintiffs done so, defendants argument would have been viable and, possibly, the Court would have reached a different outcome.[205] However, the Court could not "wear blinders" and reasoned that "quintessential

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4, 1998) ("addressing a claim regarding breach of a preferred stockholder's explicit rights provided for in a charter").

[197] *Gig3*, 2023 WL 29325, at *13.

[198] *Id.*

[199] *Id.* at *15–16.

[200] *Id.* (explaining that soft control occurs in a situation in which the controller possesses "a potent combination of stock voting power and managerial authority that enables [them] to control the corporation, if [they] so wish[.]") (internal quotation marks and citations omitted); *see also Gig3*, 2023 WL 29325, at *15 n.158 (citing *In re* Tesla Motors, Inc. S'holder Litig., Consol. Civ. A. No. 12711-VCS, 2018 WL 1560293, at *19 (Del. Ch. Mar. 28, 2018)) (holding that CEO who owned 22% in stock *exercised substantial influence* over the corporation and board) (emphasis added).

[201] *Id.* at *18.

[202] *Id.* at *21; *see also MultiPlan*, 268 A.3d at 816.

[203] *Gig3*, 2023 WL 29325, at *13; *see also MultiPlan*, 268 A.3d at 816.

[204] *Gig3*, 2023 WL 29325, at *13.

[205] *Id.*

Delaware concerns" would go unresolved if the analysis began and ended with materiality; to view the disclosures "in a vacuum" would evade any meaningful analysis of whether the redemption choice was manipulated by perverse incentives at the stockholders' expense.[206]

Next, the defendants argued that the misaligned economic incentives should carry little to no weight because they were disclosed twice; once in the prospectus and again in the proxy statement.[207] In essence, defendants argued an estoppel theory due to the apparent assent to the conflicts by the stockholders.[208] The Court found that the plaintiff did not waive loyalty claims by tacitly consenting to a conflicted arrangement when investing.[209] Thus, the Court found that neither Delaware corporate law allows for a waiver of directors' duty of loyalty, nor do features of SPACs permit otherwise.[210]

Unlike in *MultiPlan*, here, the Court emphasized its skepticism of the innate structural features and mechanics of a SPAC.[211] The Court reasoned that the Sponsor controlled all aspects of the entity from its creation until the de-SPAC merger, had "unrivaled authority" of Gig3's business affairs, and that the Sponsor filled the Board with individuals with whom Katz had close ties and influence over.[212]

The Court found that it was reasonably conceivable that the Sponsor, through its ownership, received a unique benefit from its ownership of the founder shares and private placement units in two ways.[213] First, the Sponsor's interests bifurcated from public stockholders' between the choice of bad deal and liquidation.[214] Second, the Sponsor had an interest in minimizing redemptions after the de-SPAC merger agreement was signed.[215] By lowering the number of redemptions, the Sponsor effectuated the probability that the de-SPAC merger would succeed and, along with it, the increased value of its founder shares.[216] Therefore, the Sponsor competed with public stockholders for the money in the trust.[217] In addition, the other Board members all stood to receive a

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[206] *Id.*
[207] *Id.* at *14.
[208] *Gig3*, 2023 WL 29325, at *14.
[209] *Id.*
[210] *Id.* (explaining that Delaware corporate law does not allow for a waiver of the directors' duty of loyalty).
[211] *Id.* at *15 n.159.
[212] *Gig3*, 2023 WL 29325, at *15–16.
[213] *Id.*
[214] *Id.*
[215] *Id.* at *17.
[216] *Gig3*, 2023 WL 29325, at *17.
[217] *Id.*

windfall of an implied market value of $39 million, which was not easily dismissive.[218] The Court further noted that the Board members held multiple positions with Katz's GigCapital Global enterprise and given the totality of those relationships, future opportunities, as well.[219]

As discussed *supra* Section II.E.1.b., *MultiPlan* left open the possibility that a *Corwin* cleanse could have insulated SPAC board-level conflicts under the default business judgment rule.[220] However, here, the Court rejected that argument for two reasons: first, because it found that the proxy statement was materially false and misleading; and second, the public stockholders' vote lacked economic incentive because they had no economic stake in the vote, i.e., they had no reason to vote against the bad deal.[221]

2. Entire Fairness Analysis

Entire fairness normally prevents dismissal at the pleading stage.[222] But nonetheless, dismissal may be appropriate if the defendants demonstrate that the challenged act was entirely fair, including both fair price and fair dealing.[223] The duty of disclosure is encompassed in the fair dealing facet of the test, and directors' lack of candor is considered in the broader context of unfair dealing.[224] Plaintiff alleged some facts that stockholders' redemption decisions were compromised by defendants' unfair dealing in two ways: first, Gig3's failure to disclose the cash per share that Gig3 would invest in the post-de-SPAC entity diluted the shares and was material.[225] Second, the incomplete disclosure of the value that Gig3 and its non-redeeming stockholders expected to receive.[226] The problem was that Lightning's projections were not counterbalanced by unbiased information such that stockholders were kept in the dark.[227] And notably, the proxy statement was silent as to Lightning's true prospects,

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[218] *Id.*

[219] *Id.* at *17–18. Indeed they did, see generally Laidlaw v. GigAcquisitions2, LLC, No. 2021-0821-LWW, 2023 WL 2292488 (Del. Ch. Mar. 1, 2023).

[220] *Gig3*, 2023 WL 29325, at *19.

[221] *Id.* at *19–20.

[222] *Id.*

[223] *Id.*

[224] *Gig3*, 2023 WL 29325, at *20.

[225] *Id.* at *21; Kevin M. LaCroix, *Will Del. Court's Ruling Mean a SPAC Lawsuit "Gold Rush"?*, THE D&O DIARY (Jan. 12, 2023), https://www.dandodiary.com/2023/01/articles/uncategorized/will-del-courts-ruling-mean-a-spac-lawsuit-gold-rush/.

[226] *Gig3*, 2023 WL 29325, at *21.

[227] *Id.* at *24.

even though the Board had good reason to question Lightning's future capabilities.[228]

The Court agreed and found that Lightning's business model was easily obtainable and did not meet the due diligence expected for a board of a Delaware corporation undertaking a major transaction.[229] As a result, public stockholders could not adequately decide which choice to make: redeem or remain invested in a risky venture.[230] Thus, it was neither a product of fair price, nor fair dealing.[231]

3. Exculpatory Provision in Gig3's Charter

Gig3's charter included an exculpatory provision that eliminated director personal liability for breaches of care under DGCL Section 102(b)(7).[232] The Court found that the defendants were still liable because the issues of care were also "inextricably intertwined" with the issues of loyalty and that Delaware corporate law does not allow for a waiver of the directors' duty of loyalty.[233]

D. *Practical Implications*

Ultimately, the Court decided correctly in *Gig3* as well, due to the failure to disclose all material information in the proxy statement to public stockholders which impaired their ability to make an informed, fair redemption decision about the likely dilution of net cash per share post de-SPAC merger.[234] Notably, the Court denied the *Corwin* cleanse argument because it found that the vote was empty and "meaningless" due to the separation of stockholders' redemption and voting rights; the vote did not reflect investors' collective economic preferences.[235] The Court said that "[t]he vote could have held greater importance if stockholders' voting and economic interest had been 'recoupled' by requiring redeeming stockholders to vote against the deal[,]" which would help good deals move forward and bad deals not to.[236] It follows that a *Corwin* cleanse could still insulate SPAC fiduciaries provided that the vote was fully

[228] *Id.*
[229] *Id.*
[230] *Gig3*, 2023 WL 29325, at *24.
[231] *Id.* at *24–25.
[232] *Id.*
[233] *Id.*
[234] *Gig3*, 2023 WL 29325, at *25; *see also* LaCroix, *supra* note 225.
[235] *Gig3*, 2023 WL 29325, at *19–20.
[236] *Id.* at n.207 (citing Rodrigues & Stegemoller, *supra* note 28, at 42–43).

informed.[237] But then again, if the redemption decision was fully informed and, therefore fair, there would not be a "reasonably conceivable *MultiPlan* claim[,]" i.e., a breach of fiduciary duty claim based on a false or misleading proxy statement.[238]

Further, just because entire fairness applies, it does not mean that the defendants will lose at trial. In both *MultiPlan* and *Gig3*, the Court ruled on the disputes at the motion to dismiss stage.[239] Nonetheless, trial is expensive.[240] And because "cash value dilution was not a standard part of SPAC transaction disclosures[]" as an industry norm, it could open the floodgates to similar claims in which plaintiff's lawyers eye anything that trades below $10.[241] All those cases would be overwhelming.[242] Furthermore, the Delaware Supreme Court did not rule on *MultiPlan* and it remains to be seen whether the defendants in *Gig3* will appeal, let alone proceed to trial. Accordingly, there must be a middle ground between SPACs evolving to protect innocent investors, while also being protected by the business judgment rule when those innocent investors transform into ignorant investors in a situation in which all material information is disclosed and SPAC fiduciaries make noticeable efforts to protect stockholders' interests by refraining from imposing their own interests.

IV. ADEQUATE DISCLOSURE, RECOUPLED VOTING AND REDEMPTION RIGHTS, AND AN INDEPENDENT BOARD SHOULD RENDER THE BUSINESS JUDGMENT RULE OBTAINABLE

Under Delaware law, corporate acts must be twice tested: first in law and again in equity.[243] There is no dispute that SPACs are legal.[244] And there is no dispute that SPAC fiduciaries owe common law duties to its stockholders.[245] Thus, convincing the Court that SPAC fiduciaries should obtain the business judgment rule does not revolve around the legality of SPACs. Instead, they must convince the Court that SPACs are equitable for the public stockholders. *MultiPlan* and *Gig3* are instructive. It is time

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[237] *See id.*

[238] *Id.* at n.207.

[239] *MultiPlan*, 268 A.3d at 799; *Gig3*, 2023 WL 29325, at *8.

[240] *See Delaware Court of Chancery Denies Motion to Dismiss Claims Against SPAC Directors and Holds Entire Fairness Applies*, SULLIVAN & CROMWELL LLP 1, 3 (Jan. 6, 2023), https://www.sullcrom.com/files/upload/sc-publication-delaware-spac-decision-requires-entire-fairness-review.pdf; *see also* LaCroix, *supra* note 225.

[241] LaCroix, *supra* note 225.

[242] LaCroix, *supra* note 225.

[243] *MultiPlan*, 268 A.3d at 812.

[244] *See id.*

[245] *Id.* at 799–800; *Gig3*, 2023 WL 29325, at *11.

for SPACs to adapt and evolve, just as they have done throughout the decades.[246] Ironically, part of the answer lies with a feature from SPACs' past.[247] It is *sine qua non* that SPAC fiduciaries provide adequate disclosure and recouple the voting and redemption rights. In doing so, in a situation in which there is a board-level conflict, those adjustments coupled together should make a *Corwin* cleanse available. Notably, however, the *Corwin* cleanse applies in a situation in which there is a board-level conflict and no conflicted controller; so, to enhance the chance of obtaining the business judgment rule, SPAC sponsors should *ab initio* appoint an independent board and special independent committees that are compensated with cash, not founder shares, to avoid soft control.[248] If those adjustments are made, the Court, despite its skepticism, should not render the business judgment rule categorically unobtainable.

In both *MultiPlan* and *Gig3*, the issue was whether the SPAC fiduciaries breached their fiduciary duties of loyalty, care, and disclosure to stockholders by competing with them for consideration and failing to provide adequate disclosure thereby inhibiting them from exercising their redemption rights, i.e., a *MultiPlan* claim.[249] But neither case addressed "the validity of a hypothetical claim where the disclosure is adequate and the allegations rest solely on the premise that fiduciaries were necessarily interested given the SPAC's structure."[250] In both cases, the Court found that the proxy statements did not disclose all material information and, therefore, the fiduciaries breached their duties of loyalty, care, and disclosure.[251] Thus, adequate disclosure that provides stockholders with a full and fair opportunity to redeem should still avail boards to a *Corwin* cleanse, despite a board-level conflict, because: first, the vote would be deemed meaningful, instead of meaningless and empty; and second, courts will not second guess public stockholders' uncoerced and collective economic preferences.[252] However, both adequate disclosure and

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[246] *See generally* Rodrigues & Stegemoller, *supra* note 8.

[247] *See* discussion *infra* pp. 320–21 accompanying notes 261–65.

[248] *See Gig3*, 2023 WL 29325, at *19; Fortney, *supra* note 1, at 15; Klausner & Ohlrogge, *supra* note 15, at 6–7.

[249] *See MultiPlan*, 268 A.3d at 797–98, 816 (the SPAC failed to disclose a large customer of the target who planned to soon compete with the post-de-SPAC merger entity, especially because that plan was public knowledge); *see also Gig3*, 2023 WL 29325, at *19, *21–23 (the SPAC failed to disclose the anticipated dilution of net cash per share post de-SPAC merger for non-redeeming stockholders).

[250] *MultiPlan*, 268 A.3d at 816; *Gig3*, 2023 WL 29325, at *21.

[251] *MultiPlan*, 268 A.3d at 792; *Gig3*, 2023 WL 29325, at *19.

[252] *Gig3*, 2023 WL 29325, at *19 (explaining that a decision-making mechanism is what legitimizes stockholders' collective view and is afforded deference under Delaware law); *Corwin v. KKR Fin. Holdings LLC*, 125 A.2d 304, 312–14 (Del. 2015). The stockholder vote essentially blesses and forgives the sinning board.

recoupled voting and redemption rights must be present for the business judgment rule to apply.[253]

First and foremost, to stand a chance, SPACs' proxy statements must be tweaked to satisfy adequate disclosure of all material information to provide stockholders with a full and fair opportunity to redeem. Disclosure to stockholders about dilution and conflicts already exist, but nonetheless, the procedures must be improved.[254] The SEC believes that disclosures lack clarity; it proposes that sponsors be required to disclose to stockholders that the sponsors' incentives are to make any deal, and if the de-SPAC merger finalizes, their shares will be diluted by at least 20%.[255] SPACs should be more specific though and provide disclosure assuming redemptions at percentages: 10%, 20%, 30%, 40%, 50%, etc., to keep non-redeeming stockholders apprised.[256] SPAC proxy statements are already clear about the conflicts between the fiduciaries who own founder shares and the stockholders who do not; however, they must go further.[257] SPACs must disclose how much the SPAC fiduciaries would gain should the de-SPAC merger finalize juxtaposed against how much they will lose if the SPAC liquidates.[258] Moreover, sponsors must disclose the de-SPAC merger share price that is needed to make it profitable.[259] If those adjustments are made, public stockholders have no credible arguments for them not having all the material information available to make a full and fair decision about whether to redeem.[260] It is a reasonable position that, in a situation in which public stockholders possess all material information, innocent investors turn into ignorant investors. However, adequate disclosure alone is likely insufficient.

Second, SPACs should reimplement the recoupling of the voting and redemption rights to reflect public stockholders' collective economic preferences, i.e., if you vote no, then you must redeem.[261] Notably, SPACs did that in the 1990s and 2000s, but moved away from that protection

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[253] *See Gig3*, 2023 WL 29325, at *20 n.207.

[254] *See, e.g.*, Rodrigues & Stegemoller, *supra* note 28, at 38. "Whether a SPAC has disclosed all material information regarding cash per share … is a fact dependent analysis … [that looks at, *inter alia*,] the number of warrants, the size of the PIPE, and the amount of advisor and other fees." *Gig3*, 2023 WL 29325, at *23 n.234.

[255] Rodrigues & Stegemoller, *supra* note 28, at 38.

[256] Ruan et al., s*upra* note 1, at 288–89.

[257] Ruan et al., *supra* note 1, at 289.

[258] Ruan et al., *supra* note 1, at 290.

[259] Ruan et al., *supra* note 1, at 290.

[260] *See MultiPlan*, 268 A.3d at 816 ("The core, direct harm presented in this case concerns the impairment of stockholder redemption rights. If public stockholders, in possession of all material information about the target, had chosen to invest rather than redeem, one can imagine a different outcome."); *see also Gig3*, 2023 WL 29325, at *20 n.207.

[261] *Gig3*, 2023 WL 29325, at *20 n.207.

mechanism because sponsors started to acquire larger PIPE funds that covered the redeeming stockholders' investments that were taken from the trust.[262] They should return to it; hence, SPAC to the future. As it stands, SPAC stockholders have the right to vote on a de-SPAC merger, regardless of whether they redeem their shares.[263] Stockholders have incentive to do that because if there is a successful de-SPAC merger, the warrants—which are separate from their voting and redemption rights—remain in the SPAC and will be valuable if the stock subsequently trades above $11.50.[264] In *Gig3*, the Court explained that the stockholders needed an economic stake for the vote to be meaningful; without it, it was meaningless and empty because:

> The right to redeem is the primary means protecting stockholders from a forced investment in a transaction they believe is ill-conceived … [t]o hold otherwise would lead to the illogical outcome that SPAC directors owe fiduciary duties in connection with the "empty" vote on the merger, but not the redemption choice that is of far greater consequence to stockholders.[265]

I agree. There is a difference between standing to lose something that you own versus standing not to gain something for free that you do not own. The redemption right "legitimizes the stockholder vote as a decision-making mechanism [under] the premise that stockholders with economic ownership are expressing their collective view as to whether a particular course of action serves the corporate goal of stockholder wealth maximization."[266] The Court was concerned for those investors who did not redeem because their shares were diluted.[267] Put different, nonredeemed shares are not necessarily retained shares.[268] Legal researchers Usha Rodrigues and Michael Stegemoller propose that "[i]f

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[262] Rodrigues & Stegemoller, *supra* note 28, at 40–41 ("A bargain struck with a PIPE investor provided the dependable capital needed to fund an acquisition that could not rely on an amount certain in the trust account."). In essence, the reputation of the sponsor attracts investors, and that money invested goes into the trust account, which subsequently compensates for the money withdrawn by the redeeming stockholders. *See* Ruan et al., *supra* note 1, at 239, 241, 245; *see also* Harris, *supra* note 30, at 588.

[263] *Gig3*, 2023 WL 29325, at *20; Klausner & Ohlrogge, *supra* note 15, at 8; Rodrigues & Stegemoller, *supra* note 28, at 41.

[264] Rodrigues & Stegemoller, *supra* note 28, at 41.

[265] *Gig3*, 2023 WL 29325, at *12 (footnote omitted).

[266] *Id.* at *19.

[267] *Id.* at *17, *21–23.

[268] Ruan et al., *supra* note 1, at 243.

more than 50% of shareholders vote no, then the deal should not go forward — and all shareholders get their money back [plus interest]."[269] That would help ensure that good deals go forward and bad deals do not;[270] thus, nullifying a board-level conflict under a *Corwin* cleanse, absent a conflicted controller.

Third, SPAC sponsors should appoint a majority independent board that is compensated in cash, not founder shares, to buttress the avoidance of soft control.[271] In the hypothetical *supra*, "necessarily interested given the SPAC's structure" means that the sponsor and board compete with stockholders via founder shares and that the board is beholden to the sponsor.[272] Sponsors should make every effort to appoint a majority independent board, which would help eliminate those perverse interests in the SPAC structure.[273] The Court in both *MultiPlan* and *Gig3* found that, because the board was compensated via founder shares, it, therefore, breached its duty of loyalty by competing with stockholders for a unique benefit that was not available to the general stockholders.[274] Directors' compensation with founder shares is dependent on the occurrence of the de-SPAC merger; paying them with cash, irrespective of completion of a de-SPAC merger, eliminates their perverse incentives of endorsing a devalued de-SPAC merger.[275] The practical effect is that it necessitates long-term investment from sponsors because they now need to pay those directors regardless of the completion of the de-SPAC merger.[276] Finally, independent directors should not pledge their votes for the de-SPAC merger without considering how the common stockholders vote.[277] In an ideal situation, however, a *Corwin* cleanse would not be needed because the board would neither compete with stockholders for consideration, nor be beholden to the sponsor.

As for sponsors, they need to avoid soft control and "unrivaled authority"; they should not appoint their family to the board, "dominate" the negotiations between the SPAC and the target company, or retain the

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[269] *See* Rodrigues & Stegemoller, *supra* note 28, at 43.

[270] Rodrigues & Stegemoller, *supra* note 28, at 43.

[271] *See* Fortney, *supra* note 1, at 15; *see also* Harris, *supra* note 30, at 589–90.

[272] *MultiPlan*, 268 A.3d at 816.

[273] *See* Fortney, *supra* note 1, at 15–16; *see also* Klausner & Ohlrogge, *supra* note 15, at 6–7.

[274] *MultiPlan*, 268 A.3d at 811; *Gig3*, 2023 WL 29325, at *16–17.

[275] *See* Fortney, *supra* note 1, at 15.

[276] Additionally, sponsors would not have their "people" with them who have proven successful in their previous SPAC ventures. *See* Klausner & Ohlrogge, *supra* note 15, at 7; Harris, *supra* note 30, at 614–15. However, as it stands, from the sponsor's point of view, it is either face an independent board or face entire fairness in Delaware and proceed to trial.

[277] *See* Harris, *supra* note 30, at 614–15.

unilateral power to remove them.[278] Rather, sponsors should, *ab initio*, appoint an independent board; special independent committees to seek the target company and negotiate the de-SPAC merger; obtain independent financial advisors that are paid in cash;[279] and, although not required under Delaware law, obtain a neutral third-party fairness opinion that provides unbiased and impartial information with opposing views.[280] Finally, sponsors should choose to adjust their compensation that is both lower, adjusted for redemptions, and more aligned with the post-de-SPAC merger entity.[281] Those adjustments and responsibilities should be enumerated in the SPAC's charter.[282] And if those adjustments are made, that would leave

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[278] *MultiPlan*, 268 A.3d at 794, 814–15; *Gig3*, 2023 WL 29325, at *5, *15–16; Harris, *supra* note 30, at 589–90.

[279] *Cf. Gig3*, 2023 WL 29325, at *2, *24. And SPACs should compensate their underwriters with nonredeemable shares. Ruan et al., *supra* note 1, at 299.

[280] *Gig3*, 2023 WL 29325, at *24. Although not necessary under Delaware law, obtaining an independent fairness opinion can help tilt the scales in favor of business judgment review. *See id*. at n.254; *see also* Harris, *supra* note 30, at 614–15. Further, in a footnote, the Court in *Gig3* dismissed the *MFW* framework's applicability in the de-SPAC merger context. *Gig3*, 2023 WL 29325, at *19 n.201 (referring to the Delaware Supreme Court's affirmation in Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014)) [hereinafter *MFW*]. There is no doubt that *MFW* and the instant scenario's de-SPAC merger indeed differs. *See id*. However, the reasons for *MFW*'s development and implementation may still provide useful in the de-SPAC merger context. The *MFW* framework "*replicates* an arm's-length, disinterested third-party, market deal (essentially fulfilling entire fairness review's role and purpose), then the court forgoes the otherwise applicable exacting review standard and deferentially looks only for business judgment." Andrew J. Czerkawski, *Court of Chancery Expands MFW to Conflicted Controller Executive Compensation Awards*, DEL. J. CORP. L.: BLOG (forthcoming 2023) (discussing *MFW*'s application to board of directors' conflicted controller-executive compensation decisions and what must be done to assuage the Court's skepticism to procure pleadings-stage business judgment deference) (emphasis in original).

Notably, in the de-SPAC merger context, if the sponsor and board, *ab initio*, go the extra mile and comply with *MFW*'s dual protections, then the de-SPAC merger assumes the form of an arm's-length, market deal. And an arm's length deal essentially front loads entire fairness. Since a de-SPAC merger's *MFW* compliant special independent committee, *ab initio*, will identify the target and negotiate the deal, the sponsor and board members' relinquishment of any influence on the de-SPAC merger might alleviate the Court's skepticism over their perverse economic incentives. Thus, an *MFW* compliant de-SPAC merger could potentially ameliorate the Court's concern over the deal's fairness to the disinterested stockholders, such that the defending fiduciaries might procure pleadings-stage business judgment deference. *See id.* And finally, if the defending fiduciaries can show that the de-SPAC merger complied with *MFW*'s framework, then they bolster their chance for a post-trial favorable outcome. *Id.*

[281] *MultiPlan*, A.3d at 794 (the 20% promote of founder shares "was the Sponsor's *chosen* form of compensation.") (emphasis added); Ruan et al., *supra* note 1, at 298–99. Sponsors may view choosing to lower their compensation as a pyrrhic victory. But keeping founder shares and merely having to lower their own compensation is still a victory, nonetheless.

[282] *See* Harris, *supra* note 30, at 615 ("Without providing the directors enumerated responsibilities in the process, or at least a role in the negotiation and approval of the [de-SPAC] merger agreement, the directors cede their responsibilities to the Sponsor-controller.").

the sponsor as the only fiduciary "necessarily interested given the SPAC's structure."

In that narrow dispute, if a sponsor makes the adjustments *supra*, then the Court should give credible weight to facts in the sponsor's favor and find that entire fairness is not triggered because sponsors would not dominate the corporate decision-making process via soft control.[283] Entire fairness is not triggered by the single fact that a sponsor is the controlling stockholder; rather, the plaintiffs also need to prove that the sponsor engaged in a conflicted transaction in which he competed with the stockholders for consideration.[284] The Court should dismiss the claim on the first requirement—that the sponsor is no longer a controlling stockholder because the sponsor, *ab initio*, went to appropriate lengths to distance itself from controlling and imposing its own economic incentives on the stockholders.[285] Soft control occurs in a situation in which the controller possesses "a potent combination of stock voting power and managerial authority that enables [them] to control the corporation, if [they] so wish[]."[286] Merely having power to control the corporation if they so wish does not mean that the sponsor *actually does control, influence, and cause the SPAC to enter into the de-SPAC merger*.[287] Although the sponsor still would have economic incentive for the de-SPAC merger because of founder shares and private placement of warrants, the sponsor would not provide the disclosure to the stockholders, search for the target company, or negotiate the de-SPAC merger. Instead, the majority independent board approves the de-SPAC merger and special independent committees would insulate stockholders from the sponsor's perverse

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[283] *Cf.* Harris, *supra* note 30, at 589–90 (citing *In re* Tesla Motors, Inc. S'holder Litig., Consol. Civ. A. No. 12711-VCS, 2018 WL 1560293, at *4 (Del. Ch. Mar. 28, 2018)).

[284] *See MultiPlan*, A.3d at 809 (noting that the parties agreed that the Sponsor was a controller); *but see Gig3*, 2023 WL 29325, at *15 (noting that defendants contested whether the Sponsor was a controller).

[285] *MultiPlan*, 268 A.3d at 809 n.150 (citing IRA Tr. FBO Bobbie Ahmed v. Crane, Consol. Civ. A. No. 12742-CB, 2017 WL 7053964, at *6 (Del. Ch. Dec. 11, 2017, *revised* Jan. 26, 2018)) ("explaining that the presence of a controller, without more, does 'not automatically subject [the controller's conduct] to entire fairness review'"); *see also Gig3*, 2023 WL 29325, at *15, *17 (explaining that the Sponsor reduced the risk of a failed de-SPAC merger by minimizing redemptions). It follows that, sponsors excluding themselves from communication with stockholders by appointing an independent board and special independent committees, eliminates that imposition as a controller.

[286] *Gig3*, 2023 WL 29325, at *15 (internal quotation marks and citation omitted).

[287] *MultiPlan*, A.3d at 817 (finding that it was reasonably conceivable that the sponsor "had the power to control, influence, and cause—*and actually did control, influence, and cause*—the Company to enter into the Merger.") (emphasis added); *see also Gig3*, 2023 WL 29325, at *15–16 n.158 (citing *Tesla*, 2018 WL 1560293, at *19) (holding that CEO who owned 22% in stock *exercised substantial influence* over the corporation and board) (emphasis added).

incentives.[288] Thus, having that inherent power, but not abusing it, should weigh in the sponsor's favor.[289]

If someone invests in a SPAC at the investment stage, then they are betting on the reputation of the sponsor.[290] There is no dispute that sponsors invest a lot of their own money, time, labor, expertise, and skill, and in a situation in which there is a high quality sponsor, everyone wins.[291] "With better incentive alignment and lower costs, one would think that worthy sponsors, with the help of their underwriters, should be able to attract IPO investors with a longer-term interest."[292] Thus, because high quality sponsors are valuable to a successful SPAC and its investors, they should be compensated as such without a breach of loyalty and care. Sponsors should obtain the business judgment rule if they take the necessary steps to ensure that stockholders are protected against imposition of sponsors' own compensation sought, especially if there is a firm majority vote of the disinterested stockholders who are privy to all material information related to the de-SPAC merger.

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[288] *See* Ruan et al., *supra* note 1, at 247 (noting that the sponsor is likely to be disinclined to be fully forthcoming in disclosing details of the proposed de-SPAC merger). Taking the sponsor out of the disclosure process eliminates that conflict.

[289] With great power, comes great responsibility. And to whom much is given, much is required.

[290] *See SEC Bulletin*, *supra* note 4; *see generally* Rodrigues & Stegemoller, *supra* note 8; Harris, *supra* note 30, at 588.

[291] *See* Ruan et al., *supra* note 1, at 256, 259, 279; *see also* Harris, *supra* note 30, at 588. Sponsors are responsible for administering the SPAC, e.g., incorporating it, appointing its directors, and managing its IPO. *Gig3*, 2023 WL 29325, at *2.

[292] Ruan et al., *supra* note 1, at 279. It is also worth noting that earnout and lock-up provisions subject some of the sponsor's shares to cancellation unless the stock price post de-SPAC merger reaches a specified number or until a specified time passes. *See Gig3*, 2023 WL 29325, at *16 n.169; *see also* Ruan et al., *supra* note 1, at 247, 263. Michael Klausner, Michael Ohlrogge, and Emily Ruan do not believe that earnout provisions will have a positive impact on dilution or the sponsor's incentive to enter a value-enhancing de-SPAC merger. Ruan et al., *supra* note 1, at 247. However, continuing to utilize both of those provisions will prevent a high number of redemptions and, therefore, dilution. It is reasonably conceivable that those provisions encourage sponsors to stay invested in the post-de-SPAC merger entity for its long-term performance, which can only help protect stockholders' investments because it shows that a sponsor, especially a high-quality one, wants a value-enhancing de-SPAC merger and the post-de-SPAC merger entity to thrive. *See* Gig3, 2023 WL 29325, at *17 ("Drawing all inferences in the plaintiff's favor, the Sponsor might have desired to take the money in hand and focus on the next 'Gig' SPAC[.]"). And in that situation, everyone wins because the incentives are aligned. I believe that the Court should look favorably upon SPACs having lock-up and earnout provisions at the pleadings stage, should the sponsor make the adjustments proposed above the line. Specifically, sponsors must choose to lower their compensation. *See Gig3*, 2023 WL 29325, at *16 n.169; *see also* Ruan et al., *supra* note 1, at 298–99. Again, not a pyrrhic victory, but a victory, nonetheless.

V. CONCLUSION

Despite the negative press and palpable skepticism, SPACs are a diamond in the rough.[293] We should not throw the SPAC baby out with the SPAC bathwater.[294] Considering how they rejuvenated the traditional IPO process, which was broken and stagnant, SPACs should be tweaked, not eviscerated.[295] The Court correctly decided both *MultiPlan* and *Gig3*, providing much needed guidance for SPAC dealmakers. Those two cases, however, represent unique fact patterns that do not reflect all SPACs broadly. Those cases and facts should not presuppose that all future disputes involving SPACs should be reviewed under entire fairness, should the illustrated recommendations be followed. Because SPACs' unique features are what make them versatile and appealing to so many businesspeople across the country, they, therefore, need to evolve. SPACs must provide adequate disclosures that include potential dilution, recouple voting and redemption rights (as they did in the past), and sponsors should *ab initio* appoint an independent board and special independent committees that are compensated with cash, not founder shares, to ensure that sponsors' incentives are nullified to an acceptable extent. Those adjustments, taken together, should reduce the Court's skepticism; thus, allowing SPAC fiduciaries to win at the pleading stage under, hopefully, business judgment or, at the least, entire fairness.

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[293] *See* Rodrigues & Stegemoller, *supra* note 28, at 43.
[294] Rodrigues & Stegemoller, *supra* note 28, at 43.
[295] *See* Fortney, *supra* note 1, at 2; *see also* Macey & Moll, *supra* note 9, at 251.