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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE MATCH GROUP, INC. DERIVATIVE LITIGATION	No. 368, 2022
	Court Below: Court of Chancery of the State of Delaware
PUBLIC INSPECTION VERSION FILED JANUARY 27, 2023	CONSOLIDATED
	C.A. No. 2020-0505 MTZ

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PRELIMINARY STATEMENT

The Court must determine, in this appeal, whether to overrule *MFW*[1] by holding that the business judgment rule will protect controller transactions even if (i) members of the special committee are not independent, and (ii) only one of *MFW*'s two requirements is satisfied. *MFW* reduced the protection of minority stockholders, affirming the Court of Chancery's new standard, that a controller could avoid the entire fairness test if the transaction was "conditioned *ab initio* upon *both* the approval of an *independent*, adequately-empowered special committee that fulfills its *duty of care*; *and* the uncoerced, informed vote of a majority of the minority stockholders."[2]

In *MFW*, whether the special committee was independent was determined, "[b]ased on a highly extensive record," on a motion for summary judgment, not a motion to dismiss.[3] The Court of Chancery found "no dispute of fact that the MFW special committee was comprised *solely* of directors who were independent," and concluded that "the MFW special committee was, as a matter of law, comprised

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[1] *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

[2] *Id*. at 644 (emphasis added).

[3] *Id*. at 654. The Supreme Court acknowledged the *MFW* complaint would have survived a motion to dismiss under the new *MFW* standard, entitling the plaintiffs to discovery on "all of the new prerequisites to the application of the business judgment rule," including the independence of the special committee. *Id*. at 645 n.14.

entirely of independent directors."[4] Defendants' briefs do not address the Court of Chancery's direct holdings, affirmed by this Court, that the committee is only independent if all members are independent. In *MFW*, the controlling stockholder, the Court of Chancery and this Court all recognized that approval by "a special committee of independent directors," not a committee including mostly independent directors, was required.[5]

In this case, the Court of Chancery altered the *MFW* standard, holding that the Match[6] Separation Committee was independent unless Plaintiffs showed that (i) 50% or more of the members were not independent or (ii) the non-independent director dominated or infected the Committee process. The court below did not analyze the opinions in *MFW*.[7] Its failure to consider what the opinions actually said concerning the requirement of an independent committee is plain legal error.

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[4] *In re MFW S'holders Litig.*, 67 A.3d 496, 510, 514 (Del. Ch. 2013) (emphasis added); *see also id.* at 516 (no basis to question good faith "[b]ecause the special committee was comprised entirely of independent directors").

[5] *Id.* at 502, 506, 534; *MFW*, 88 A.3d at 638-640, 642, 644, 645, 654.

[6] Capitalized terms not defined herein have the meaning ascribed in Appellants' Opening Brief (the "AOB").

[7] *In re Match Grp., Inc. Deriv. Litig.*, 2022 WL3970159, at *16 & nn.140-42 (Del. Ch. Sept. 1, 2022).

Defendants' appellate briefing highlights the lower court's error.[8] Defendants' two answering briefs, totaling nearly 20,000 words, cite no Supreme Court authority—because there is none—supporting the trial court's revision of *MFW*'s requirement that the entire special committee must be independent. Instead, Defendants raise every argument they could conceive, whether or not raised below, for this Court to affirm the trial court's judgment. Boiling down Defendants' briefs to properly preserved and presented arguments and applying Delaware law to Plaintiffs' allegations makes the following clear:

First, Defendants cannot evade the trial court's erroneous application of *MFW* by rearguing the entire Committee was independent. Based on McInerney's 20+ year, $58 million+ relationship with Diller and IAC, the trial court correctly held that it is reasonably conceivable McInerney lacked independence. Even under the trial court's erroneous modification of *MFW*, it is reasonably conceivable McInerney dominated or infected the Committee. McInerney was the Committee's lead negotiator and *de facto* Chairman. Defendants did not distinguish the cases indicating those allegations are sufficient.

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[8] *See* Filing ID 68664869 (Answering Brief of the "Match Defendants") ("MAAB"); Filing ID 68758763 (Corrected Answering Brief of the "IAC Defendants") ("IAAB").

Second, the trial court incorrectly applied *MFW* by finding the stockholder vote was fully informed. Defendants concede the Proxy does not disclose McInerney's conflicts. The buried reference to the 10-K/A in a list of documents in the middle of the 682-page Proxy does not indicate the 10-K/A contained material conflict information and is insufficient to satisfy Defendants' duty of disclosure.

Third, the trial court erred by incorrectly interpreting the reorganization exception to the extinguishment of derivative standing by merger. Plaintiffs sufficiently allege that the reshuffling of ownership stakes to New Match—which had the same businesses, assets, minority stockholders, controller and largely identical board—was "*essentially* a reorganization."[9]

Finally, the IAC Defendants' new 3,500+ word argument, seeking an improper advisory opinion, that *MFW* should not apply to non-squeeze out transactions is not only waived, but contradicts their argument that the Separation was subject to, and satisfied, *MFW*. And their desperate argument that this Court should rule *de novo* that the Complaint does not state an entire fairness claim or a

[9] *Ark. Teacher Ret. Sys. v. Countrywide Fin. Corp*., 75 A.3d 888, 894 (Del. 2013) (emphasis added).

claim against Diller, issues the court below did not reach, merely exposes that Defendants are unlikely to prevail on the issues the Court of Chancery decided.

ARGUMENT

I. THE TRIAL COURT ERRED BY RULING THE SEPARATION COMMITTEE SATISFIED *MFW* REQUIREMENTS

The trial court erred in its application of *MFW* and the Opinion must be reversed. Defendants' arguments to the contrary are unavailing, include issues and case law not presented to the court below[10] and invoke extraneous materials not properly considered on a motion to dismiss.[11]

A. The Court Should Not Second Guess the Lower Court's Ruling that It Was Reasonably Conceivable that McInerney Was Not Independent of IAC

Recognizing the Court of Chancery's holding that the Separation Committee was independent, though McInerney was not, is wrong as a matter of law, Defendants primarily argue this Court should reverse the lower court holding that it was reasonably conceivable that McInerney was not independent.[12] The trial court

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[10] Supr. Ct. R. 8; *Shaw v. Elting*, 157 A.3d 152, 169 (Del. 2017) (declining to hear an argument for the first time on appeal because "[o]pponents should have a fair chance to address arguments at the trial court.").

[11] Like they did below, Defendants lob in 18 sets of board and committee meeting minutes, a 41-page banker presentation and various other documents, even though the court below correctly ruled almost none of this could be considered. *Match*, 2022 WL 3970159, at *9 n.80. Defendants' reliance on extraneous documents below should have converted their dismissal motions to motions for summary judgment and is especially improper on appeal.

[12] MAAB 17-19.

did not err by "holistically" considering the Complaint's allegations and concluding it was reasonably conceivable that Plaintiffs can prove McInerney lacks independence from IAC.[13]

During their 20+ year relationship, McInerney made $58 million+ from IAC and its affiliates, including $55 million as an IAC employee, having served as IAC's executive vice president and CFO.[14] McInerney remained on IAC affiliate boards continuously after leaving IAC, including (i) Interval Leisure Group, Inc. ("Interval") from 2008 to 2018, (ii) HSN, Inc. ("HSN") from 2008 to 2017, (iii) Match from 2015 to June 30, 2020, and (iv) New Match beginning July 1, 2020.[15] McInerney "worked for either [] IAC or an affiliate as an employee or director since at least 1999, and continuously since 2003."[16]

Defendants' argument that documents outside the record purportedly show Interval and HSN were spun-off from IAC before the spin-off of Match was not

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[13] *Match*, 2022 WL 3970159, at *19.

[14] A788, ¶67. McInerney and Diller expressed trust and gratitude for each other when McInerney left IAC, A788-89, ¶68, which supports a reasonable inference that their relationship was one of "respect, loyalty, and affection." *Marchand v. Barnhill*, 212 A.3d 805, 819 (Del. 2019).

[15] A762-63, ¶25.

[16] *Match*, 2022 WL 3970159, at *19.

raised below and cannot be considered on appeal.[17] Even if considered, these non-record documents show McInerney helped IAC and Diller spin off other affiliates, consistent with their business model.[18] Over a 20+ year period through the Separation, IAC and Diller employed McInerney and put and retained him on multiple affiliate boards. At the pleading stage, this supports a reasonable inference that the relationship was "persistent and ongoing[.]"[19]

To impugn McInerney's independence, Plaintiffs were not required to plead "a detailed calendar of social interaction"[20] between McInerney and Diller nor establish the materiality of McInerney's "past income from IAC—and fees from services on [IAC-affiliated boards]."[21] McInerney's "past relationships and

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[17] MAAB 18; *supra* n. 10.

[18] A771-73, ¶¶39-40; A803-04, ¶93.

[19] *Match*, 2022 WL 3970159, at *19 (quoting *Voigt v. Metcalf*, 2020 WL 614999, at *15 (Del. Ch. Feb. 10, 2020)).

[20] *Sandys v. Pincus*, 152 A.3d 124, 130 (Del. 2016).

[21] MAAB 20-22. The authorities Defendants cite illustrate that McInerney's IAC-related income should not be viewed in isolation. *See* MAAB 21 (citing *Del. Cty. Emplys' Ret. Fund v. Sanchez*, 124 A.3d 1017, 1019-21 (Del. 2015) (considering allegations "in their totality")); *Friedman v. Dolan*, 2015 WL 4040806, at *7 n.53 (Del. Ch. June 30, 2015) (fees alone did not render directors beholden absent additional ties)). Unlike NYSE Rule 803(A)(2), MAAB 22 (another argument Defendants waived by not raising it below), "the Delaware independence standard is context specific and does not perfectly marry with the standards of the stock exchange" rules. *Sandys*, 152 A.3d at 131.

payments can support 'a reasonable inference of 'owningness' [sic] sufficient to" undermine independence.[22] The trial court rationally inferred from the Complaint's allegations that McInerney's IAC work, compensation and contacts influenced his "great professional success,"[23] so that he harbors a "debt of gratitude and friendship"[24] to IAC and Diller that compromised his ability to consider the Separation on its merits.

B. The Trial Court Erred by Not Requiring the Separation Committee to be Wholly Independent

In *MFW*, the Court of Chancery held its new standard was satisfied because the *MFW* special committee was comprised *solely* and *entirely* of independent directors.[25] In affirming, this Court ruled that the *MFW* approach was "consistent

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[22] *Voigt*, 2020 WL 614999, at *14 n.13. The court below, *see Match*, 2022 WL 3970159, at *19 & nn.166-67, appropriately likened McInerney's relationship with IAC and Diller to the relationship in *Marchand*, where this Court inferred that a director's professional success "was in large measure due to the opportunities and mentoring given to him by" the interested party such that he owed them "an important debt of gratitude and friendship." 212 A.3d at 819-20.

[23] *In re Trados Inc. S'Holder Litig.*, 73 A.3d 17, 54 (Del. Ch. 2013) (acknowledging conflicts are born by "web[s] of interrelationships" and "large[] professional networks.").

[24] *Marchand*, 212 A.3d at 820.

[25] *MFW*, 67 A.3d at 510.

with *Weinberger, Lynch* and their progeny."[26] Defendants cite no Supreme Court case contradicting the requirement that an independent committee must be equivalent to a "wholly independent" board to be able to negotiate at arms' length with a controller.[27]

Defendants argue that by not using the word "wholly," the *MFW* opinions intended to revise *Weinberger*'s formulation of what an independent committee must be.[28] However, *MFW* uses the equivalent terms "solely" and "exclusively" and its standard requires a "special committee of independent directors," not a committee with some independent members. Nothing in the *MFW* opinions suggest that a Meatloaf standard ("*Two Out of Three Ain't Bad*"[29]) is enough to trigger the great procedural consequence of applying business judgment to a controlling stockholder transaction at the summary judgment stage, much less the pleading stage.[30]

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[26] *MFW*, 88 A.3d at 646.

[27] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 709 n.7 (Del. 1983); *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1120-21 (Del. 1994); *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1241 n.33 (Del. 2012); *In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173, 1184 n.43 (Del. 2015).

[28] MAAB 25 n.11.

[29] Jim Steinman (Epic Records 1977).

[30] Under the lower court's standard, presumably three out of five, and four out of seven, committee members would also qualify as an "independent" committee.

Demand futility cases which pre-date *MFW* and cases involving sub-50% stockholders are not relevant to the *MFW* analysis.[31] Demand futility ensures stockholders cannot displace the board's authority to cause the corporation to litigate without showing a majority of directors are incapable of independently considering a litigation demand. The sub-50% stockholder cases cited by the trial court and Defendants protect a stockholder owning less than 50% of shares from being deemed a controller subject to entire fairness unless the stockholder dominated or controlled the board. *MFW* special committees, however, are supposed to protect minority stockholders, not the corporation or large stockholders. The protection of minority stockholders should not be diluted by inappropriately borrowing concepts from other contexts.[32] Moreover, the Court of Chancery opinions Defendants cite cannot alter the standard established and affirmed in *MFW*.

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[31] MAAB 26 (citing *Beam ex. Rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040 (Del. 2004); *Beneville v. York*, 769 A.2d 80 (Del. Ch. 2000); *In re Rouse Props., Inc.*, 2018 WL 1226015 (Del. Ch. Mar. 9, 2018); *FrontFour Cap. Grp. LLC v. Taube*, 2019 WL 1313408 (Del. Ch. Mar. 22, 2019)).

[32] *Trade Desk* contained *dicta* regarding the composition of a special committee outside of *MFW*. It did not address whether *MFW* applies only if every special committee member is independent and disinterested because the plaintiff waived that argument. *City Pension Fund for Firefighters & Police Officers in City of Miami v. The Trade Desk, Inc*., 2022 WL 3009959, at *13 n.130 (Del. Ch. July 29, 2022).

MFW intended to give "a strong incentive for controlling stockholders to accord minority investors the transactional structure that respected scholars believe will provide them the best protection."[33] Minority stockholders are not best protected if special committees can include conflicted directors. The trial court's ruling, if affirmed, will have significant negative consequences for minority stockholders because their protection from and bargaining power against controllers will be greatly diminished.

A controller does not sufficiently neutralize its influence if "independent" committees include conflicted directors.[34] Delaware courts have held that conflicted directors must "totally abstain from participating in the board's consideration of [a] transaction" to avoid liability for that transaction.[35] Abstaining from the board vote alone is not enough. A controller does not totally abstain if the special committee includes a member who is not independent from the controller.

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[33] *MFW*, 88 A.3d at 644 (quoting the trial court).

[34] *Malpiede v. Townson*, 780 A.2d 1075, 1098 (Del. 2001) is irrelevant because it was a third-party merger case where the Court analyzed whether entire fairness applied because "the sole interested director dominated or controlled the remaining directors." *In re Frederick's of Hollywood, Inc.*, 2000 WL 130630, at *7 (Del. Ch. Jan. 31, 2000).

[35] *In re Tri-Star Pictures, Inc., Litig.*, 1995 WL 106520, at *3 (Del. Ch. Mar. 9, 1995) (citing *Weinberger*, 457 A.2d at 711).

C. The Trial Court Erred by Requiring Plaintiffs to Plead McInerney Infected or Dominated the Process

The trial court erred by creating a new rule *sua sponte* that required Plaintiffs to plead that McInerney infected or dominated the process. It relied on *Trade Desk*, which was issued months after oral argument on Defendants' motions to dismiss.[36] Defendants do not cite any Delaware Supreme Court case that supports the "two-step inquiry employed here."[37] The entire concept is illogical—special committee members are supposed to represent only the interests of minority stockholders, not those of conflicted controllers.

Defendants do not address the unfairness and impracticality of the trial court's new pleading stage requirement. Proxy statements and board and committee minutes drafted by lawyers do not reveal the full influence a conflicted director may have had on a committee's process.[38] Plenary discovery through emails, text

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[36] Defendants claim Plaintiffs were not prejudiced because they could appeal. For the same reason it is unfair to require a party to respond to an argument for the first time on appeal, it is unfair for Plaintiffs to appeal new rules created by the trial court *sua sponte* based on case law not submitted by the parties.

[37] Defendants argue this ruling is also supported by *In re GGP, Incorporated Stockholder Litigation*, 2021 WL 2102326 (Del. Ch. May 25, 2021), and "other recent Chancery decisions." MAAB 32. Defendants cite no other Court of Chancery decisions and do not explain why *GGP*, distinguished at AOB 27, applies here.

[38] *See*, *e.g.*, *Krasner v. Moffett*, 826 A.2d 277, 285-86 (Del. 2003) ("the joint proxy statement does not 'directly portray a complete picture' of the special committee

messages and deposition testimony is necessary, but under the lower court's new standard, the case would be dismissed before such discovery occurs. Section 220 is not a substitute for plenary discovery. It is extremely difficult to obtain even a few emails and text messages through Section 220, and certain information, including the controller's internal communications and deposition testimony, is often unavailable. For example, a conflicted director could communicate to the controller the lowest price a committee would accept or the legal and financial advice the committee received, but if the proxy statement and meeting minutes only indicate this director attended committee meetings, the case would be dismissed.

D. The Trial Court Erred by Not Finding It Reasonably Conceivable that McInerney Infected or Dominated the Process

Defendants' limited, ineffective response[39] and reliance on numerous documents the trial court did not consider show it is at least reasonably conceivable Plaintiffs can prove, as the new Court of Chancery standard requires, that McInerney "somehow infected" the Committee's decision-making process.[40]

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process"); *In re MAXXAM, Inc./Federated Dev. S'holders Litig.*, 1997 WL 187317, at *21 (Del. Ch. Apr. 4, 1997) (noting post-trial that evidence demonstrated minutes were drafted "so as to obscure or downplay Connally's dominant role" in the committee's deliberations).

[39] MAAB 32-35.

[40] *Match*, 2022 WL 3970159, at *19.

Defendants told the trial court, and the trial court noted, that McInerney was not the Separation Committee's chairman, even though there was no chairman.[41] Plaintiffs' allegations show that McInerney acted like a chairman and was the Committee's lead negotiator.[42] Defendants now claim being chairman is "meaningless," citing *Trade Desk*'s finding that the chairman did not dominate the committee where plaintiff argued, but had not alleged, the chairman sent an email recommending the financial advisor.[43] This does not compare to Plaintiffs' detailed allegations regarding McInerney's far greater involvement.[44]

Defendants told the trial court, and the trial court noted, that Seymon and McDaniel met with Levin independently.[45] Plaintiffs' allegations show that there was only one meeting between Seymon/McDaniel and Levin and it occurred *after* McInerney and Levin finished negotiating all material economic terms.[46] Defendants did not respond.

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[41] *Id*. at *19 n.170.

[42] AOB 33-34.

[43] MAAB 34 (citing *Trade Desk*, 2022 WL 3009959, at *14).

[44] AOB 32-34 & n.110.

[45] *Match*, 2022 WL 3970159, at *19.

[46] AOB 32-33.

Plaintiffs allege that McInerney was the "lead negotiator for the Separation Committee" with a "close relationship with IAC's lead negotiator, Levin."[47] Plaintiffs cited *Kahn*, *Orchard*, and *Emerging Communications* to support the significance of these allegations, which Defendants fail to distinguish.[48] Nor do Defendants address the allegations that McInerney was the lead negotiator.[49] Instead, Defendants incorrectly contend Plaintiffs failed to plead that McInerney played a leading role and then ask this Court to infer that because Levin was junior to McInerney, Levin would defer to McInerney, not the other way around.[50] Defendants are entitled to no such inference, particularly on a motion to dismiss. It is reasonably conceivable that Plaintiffs can prove the relationship between McInerney and Levin, and McInerney's conflict with IAC, infected the Committee's process.

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[47] A789, ¶¶69-70.

[48] AOB 32 n.102.

[49] Defendants cite to *MAXXAM*, 1997 WL 187317, at *6, and note that unlike that case, McInerney did not unilaterally select the Separation Committee's advisor. MAAB 33 n.16. Unilaterally selecting advisors is not the only way to affect a committee's process.

[50] MAAB 33-34.

Plaintiffs also allege that McInerney controlled the flow of information to the Committee because he negotiated the economic terms in seven private calls with Levin.[51] Defendants now say that McInerney was just the "spokesperson for the Committee" and improperly cite various meeting minutes outside the Complaint, which the trial court did not consider, while asking this Court to draw inferences in their favor that (i) McInerney fully and accurately reported his private discussions with Levin and (ii) legal and financial advisors were responsible for "much of the information flow."[52] Defendants are not entitled to such inferences at the pleading stage.

The trial court erred by ruling it was not reasonably conceivable Plaintiffs can prove that McInerney infected or dominated the Committee's process when he acted as the committee's *de facto* chairman and "lead negotiator."

[51] AOB 32-33.

[52] MAAB 33.

II. THE TRIAL COURT ERRED BY RULING MATERIAL INFORMATION REGARDING MCINERNEY'S CONFLICTS WAS ADEQUATELY DISCLOSED IN THE PROXY

Defendants admit the only reference to the 10-K/A, the sole source they identify as disclosing McInerney's conflicts, is buried on pages 308-09 of the Proxy.

Defendants claim this was "exactly where a reasonable stockholder would expect" to find the 10-K/A reference because it is in the section titled "Where you can find more information."[53] A reasonable stockholder would expect material information about conflicts to be included in the Proxy, not in some other document that is referenced generically at the end of the Proxy. The "Where you can find more information" section is not a "substantive" section of the Proxy but merely a list of ten Match documents and four IAC documents where stockholders who had waded through over 300 pages are directed to find "important information about IAC and Match and their respective financial performance."[54] There is no indication that the 10-K/A contains material information about the Separation Committee members' conflicts.

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[53] MAAB 37.

[54] A410.

Defendants claim "Courts routinely find that documents listed in this section . . . fulfill *MFW*'s disclosure requirement," but cite only *Orman v. Cullman*, 794 A.2d 5, 35 & n.100 (Del. Ch. 2002) and *In re Solera Holdings, Inc. S'Holder Litig.*, 2017 WL 57839, at *10 (Del. Ch. Jan. 5, 2017). Both cases are distinguishable. *Orman* involved a third-party merger where the court found a director's consulting agreement was adequately disclosed because a Form 10-K "included in th[e] Proxy Statement" described it.[55] In *Solera*, the court ruled the identity of compensation committee members was not material, but the information was disclosed in a Form 10-K/A that was incorporated by reference.[56]

Defendants argue material information was not buried and guesswork was not required because the 10-K/A, which was not provided with the Proxy, is only 34 pages long.[57] The 10-K/A reference itself, however, is buried in the middle of the nearly 700-page Proxy. Stockholders could not even guess that material information on McInerney's conflicts would be found in the 10-K/A because the Proxy describes the 10-K/A as providing information about the companies and their financial performance, with no reference to directors or their conflicts.

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[55] 794 A.2d at 5, 33-35 & n.100.

[56] 2017 WL 57839, at *9-11.

[57] MAAB 39-40.

Neither McInerney's conflicts, nor the 10-K/A, is referenced on pages 124-25 of the Proxy, which Defendants incorrectly argue "cover only 'related persons transactions'" under SEC rules "which does not apply to McInerney."[58] Those pages include a discussion of "Relationships Involving Significant Stockholders, Named Executives and Directors." Only Diller's relationship with IAC is discussed. This partial disclosure is materially misleading and incomplete because a reasonable stockholder would expect to see disclosure of the relationship between McInerney and IAC/Diller on that page.[59]

Defendants also argue that, because the 10-K/A was public, stockholders could find it and it was only a few "short clicks" away.[60] Stockholders are not required to sift through all information that is publicly available. The Proxy was required to disclose all material information completely and accurately, not suggest that stockholders conduct a scavenger hunt through public filings to find material facts.

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[58] MAAB 38.

[59] *Appel v. Berkman*, 180 A.3d 1055, 1064 (Del. 2018); AOB 39.

[60] MAAB 39.

III. THE TRIAL COURT ERRED BY RULING HALLANDALE LACKS DERIVATIVE STANDING ON BEHALF OF MATCH

Hallandale has derivative standing because it is reasonably conceivable that Plaintiffs can prove the Separation was a reorganization of Match. Defendants misstate the applicable reorganization exception by placing undue emphasis on the word "mere."[61] *Lewis v. Ward*[62] ratified and reaffirmed the *Lewis v. Anderson*[63] exception that a merger will not eliminate derivative standing where a plaintiff pleads that "the merger is *in reality* a reorganization which does not affect plaintiff's ownership of the business enterprise."[64] Most recently, this Court described the exception as applying "where the merger is *essentially* a reorganization that does not affect the plaintiff's relative ownership in the post-merger enterprise."[65] By considering whether a transaction is "in reality" or "essentially" a reorganization,

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[61] MAAB 44.

[62] 852 A.2d 896 (Del. 2004).

[63] 477 A.2d 1040 (Del. 1984).

[64] *Id*. at 1046 n.10 (emphasis added); *Ward*, 852 A.2d at 904.

[65] *Countrywide*, 75 A.3d at 894 (emphasis added); *Morris v. Spectra Energy Partners (DE) GP*, 246 A.3d 121, 129 (Del. 2021).

the Court looks at the fundamental nature of the transaction because "equity regards substance rather than form."[66]

The exception should apply in circumstances like the Separation to prevent a controller like IAC/Diller from using sophisticated counsel to engage in a complicated transaction that "reshuffles" Match's ownership interests and eliminates minority stockholders' derivative standing.[67] Post-Separation, (1) Match public stockholders, as New Match stockholders, continued to own equity interests in the businesses of Match and maintained nearly the same equity ownership in New Match as they did in Match;[68] (2) IAC's stockholders held directly equity interests in Match's businesses that they formerly held indirectly through IAC;[69] (3) the Match board largely remained the same;[70] and (4) IAC continued to dominate the company.[71] Defendants even concede that they told tax authorities the Separation

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[66] *In re Ezcorp Inc. Consulting Agreement Deriv. Litig.*, 2016 WL 301245, at *8-10 & n.2 (Del. Ch. Jan. 25, 2016).

[67] *Bamford v. Penfold, L.P.*, 2020 WL 967942, at *28 (Del. Ch. Feb. 28, 2020) (citing *Ward*, 852 A.2d at 904; *Schreiber v. Carney*, 447 A.2d 17, 22 (Del. Ch. 1982)).

[68] AOB 15-16, 43; A1050; A847-48, ¶179.

[69] AOB 15-16; A1050.

[70] AOB 43-44.

[71] *Id*.

was just a "reorganization" to secure tax-free treatment for IAC and its stockholders.[72] This reshuffling of ownership stakes in the same Match businesses is essentially a reorganization that does not prevent Match stockholders from pursuing derivative claims.[73]

Defendants argue that the Separation eliminated Match's dual class stock structure and New Match does not have a controlling stockholder so the Separation cannot be a reorganization.[74] Match's minority stockholders, however, remained minority stockholders because IAC transferred its voting control to IAC stockholders, kept the Board dominated by IAC-affiliated directors and imposed

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[72] MAAB 48. Defendants argue that this is a technical tax characterization under federal law (MAAB 48-49), but not all mergers qualify as tax-free reorganizations and Defendants cannot simply waive away representations made to secure favorable tax treatment when they find it convenient to do so.

[73] AOB 42. Defendants, like the trial court, disregard Plaintiffs' well-pled allegations and selectively quote the Complaint. *Compare* AOB 42-45 (addressing each of the trial court's selective quotations and citations) *with* MAAB 46-47 (quoting portions of the same and similar allegations that the trial court identified in the Opinion and that Plaintiffs addressed at AOB 42-45). In a particularly egregious example, Defendants quote part of a sentence in Paragraph 6—"[t]he Separation resulted in a New IAC that was no longer Match's controlling stockholder"—but omit the remainder of the sentence: "although the transactions were structured so that IAC continued to control New Match through other means." *Compare* MAAB 46 *with* A750-51, ¶6; *see also* AOB 43-44 (identifying allegations regarding IAC's continued domination of New Match).

[74] MAAB 47.

restrictive governance provisions on New Match. Thus, it is reasonably conceivable, based upon the Complaint's well-pled allegations, that "IAC is still on the scene, dominating New Match just as it did before the Separation."[75]

Defendants further contend that New Match stockholders held equity in "a different mix of assets," but the only new assets they identify are two properties in Los Angeles that were owned by IAC before the Separation and leased to New IAC by New Match after the Separation.[76] This argument is waived because it was not made below. It is also meritless. IAC exchanged the properties for $120 million of New Match stock, a three year lease and right of first refusal for any future sale, so IAC remained essentially in control of the asset.[77] The business of Match did not change because of this component of the Separation. Match acquired the properties because IAC wanted another $120 million of liquidity.[78]

Defendants' last-ditch comparisons of the Separation to the transactions in *Brokerage Jamie Goldenberg Komen Rev Tru U/A 06/10/08 Jamie L Komen Tr. for*

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[75] A756, ¶15; *see also* AOB 43-44.

[76] MAAB 47-48.

[77] A248; A1121.

[78] In addition, the amount Match paid for the properties was valued at less than 0.6% of the $22 billion Defendants told the trial court Match was worth. A939-40 n.19.

Komen v. Breyer, 2020 WL 3484956 (Del. Ch. June 26, 2020) ("*Fox*"), *Bonime v. Biaggini*, 1984 WL 19830 (Del. Ch. Dec. 7, 1984) and *Ward* likewise fall flat. In *Fox*, only parts of the corporation's businesses were transferred to the new corporation, while a substantial portion was sold to a third party for $71.3 billion. *Bonime* and *Ward* involved mergers of two corporations with distinct boards of directors, officers, assets and stockholders.

IV. THE IAC DEFENDANTS IMPROPERLY SEEK AN ADVISORY OPINION OVERRULING *MFW*

The IAC Defendants' 3,500+ word argument that the "business judgment rule should apply even if one of *MFW*'s protections was not satisfied" must be rejected. They did not make this argument below and waived it.[79] The IAC Defendants, in fact, joined,[80] and continue to join,[81] the Match Defendants in the opposite argument that the Separation is subject to and satisfied *MFW*.[82] Defendants are precluded from making new arguments for the first time in an appellate answering brief because it denies the trial court and Plaintiffs a fair chance to address the arguments.[83] Furthermore, *MFW* ruled that *both* a special committee and stockholder vote are required to obtain business judgment protection. Defendants' new argument asks this Court to overrule *MFW* and hold that satisfying one requirement is enough.

The "interests of justice" are not served by allaying "transactional planners'" supposed "fear" that if controllers provide fewer minority stockholder protections

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[79] *Genger v. TR Inv'rs, LLC*, 26 A.3d 180, 194 (Del. 2011).

[80] B276, 354.

[81] IAAB 6.

[82] A915-33; B397-399, 410-415.

[83] *Supra* n.10.

than what *MFW* requires in non-squeeze out transactions, the transactions will be subject to heightened scrutiny.[84] Defendants are improperly asking for an advisory opinion.[85] The issue before the Court is the Separation; not some other hypothetical or future transaction.

Defendants contend the Separation was structured with "the full *MFW* suite of protections."[86] They argue the Separation was subject to and satisfied *MFW*'s requirements.[87] This Court need not indulge defense counsel and their "transactional planner" colleagues with an advisory opinion on what would have happened if they had structured the Separation differently or made different litigation choices below.[88]

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[84] IAAB 9.

[85] *Stroud v. Milliken Enterprises, Inc.*, 552 A.2d 476, 479 (Del. 1989) (ruling Delaware law is well settled that courts will not issue advisory opinions or adjudicate hypothetical questions).

[86] IAAB 8.

[87] The trial court did not raise any such issue *sua sponte*. IAAB 9. It ruled on Defendants' argument that the Separation was subject to *MFW*.

[88] *Shaw*, 157 A.3d at 169 ("Shirley Shawe urges this Court to consider her new argument under the interests of justice exception because the ruling will have significant implications for future cases. But that is exactly why we should not address her argument.").

V. THE COMPLAINT STATES AN ENTIRE FAIRNESS CLAIM

A determination that the transaction is subject to entire fairness review precludes dismissal of a complaint unless the controlling stockholder "is able to show, conclusively, that the challenged transaction was entirely fair based solely on the allegations of the complaint and the documents integral to it."[89] Defendants ignore the Complaint, motion to dismiss briefing, and oral argument below to reargue that Plaintiffs fail to allege an unfair price.[90] The entire fairness test is not bifurcated because an unfair process can infect price.[91] Defendants do not address the unfair process allegations so their argument can be rejected for that reason alone.[92]

Defendants further ignore the Complaint's allegations regarding why the Separation was financially unfair to Match.

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[89] *Hamilton Partners, L.P. v. Highland Cap. Mgmt., L.P.*, 2014 WL 1813340, at *12 (Del. Ch. May 7, 2014) (citing *MFW*, 88 A.3d at 645 n.14; *Krasner*, 826 A.2d at 285-86); *Berteau v. Glazek*, 2021 WL 2711678, at *15 (Del. Ch. June 30, 2021).

[90] IAAB 24-33.

[91] A1029-1031.

[92] *See, e.g., Garfield v. BlackRock Mortg. Ventures, LLC*, 2019 WL 7168004, at *12 (Del. Ch. Dec. 20, 2019) (finding it reasonably conceivable that an allegedly defective negotiation process infected a reorganization's exchange ratio).

1. Match assumed $1.7 billion of IAC debt, and, in valuing that debt, the Committee accepted IAC's methodology that was $125 million greater than Goldman's methodology.[93]

2. Match assumed 60% of the cost of IAC stock options held by IAC employees, which were in the money by $550 million.[94]

3. Match paid an $850 million special dividend because Diller wanted cash for New IAC to fund acquisitions.[95] The Committee proposed $420 million but agreed to more than double that because IAC wanted more cash.[96]

4. The Separation increased Match's leverage to [redacted] which is higher than (i) Match's leverage ratio at the time of its IPO, (ii) [redacted] and (iii) the [redacted][97] Match was then exposed to ratings downgrades,[98] and

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[93] A752-53, ¶10; A812, ¶108; A819, ¶124; A840-41, ¶164; A1118.

[94] A1118-19; A810-11, ¶106; A827-28, ¶138; A831-32, ¶145; A840-41, ¶164.

[95] A1119; A752-53, ¶10; A803-04, ¶93; A843-44, ¶169.

[96] A810-11, ¶106; A813-14, ¶112; A814-15, ¶114; A825-26, ¶134; A840-41, ¶164; A1119.

[97] A808-09, ¶104; A821, ¶128; IAAB 38.

[98] The Complaint pleads this fact based upon Match's books and records. A807, ¶100; A809-10, ¶105. Defendants argue that Plaintiffs ignore that "Match expected an 'improved credit profile and rating' under the final deal terms,'" IAAB 39, but "[t]he incorporation-by-reference doctrine does not enable a court to weigh evidence

subject to limitations on its ability to do any acquisitions or stock buybacks and withstand contingent liabilities.[99]

5. Match paid for tax attributes that New Match might never be able to use without any right to indemnification from New IAC if the attributes could not be used.[100]

6. Match bought Los Angeles properties at an inflated price and then agreed to lease the properties back to IAC and gave IAC repurchase rights that would dampen any third party's future interest in making an offer to buy the properties.[101]

7. Match supported IAC's sale of $1.5 billion of New Match equity, with New IAC retaining the proceeds—which only benefitted New IAC.[102]

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on a motion to dismiss." *In re CBS Corp. S'holder Class Action & Deriv. Litig.*, 2021 WL 268779, at *18 (Del. Ch. Jan. 27, 2021) (quotation omitted).

[99] A751, ¶7; A807, ¶100; A808-10, ¶¶103-05; A847-48, ¶179.

[100] A806-07, ¶99; A810-11, ¶106; A821-22, ¶129; A840-41, ¶164.

[101] A821-22, ¶129; A827-28, ¶138.

[102] Plaintiffs explained below why *Monroe County Employees Retirement System v. Carlson*, 2010 WL 2376890 (Del. Ch. June 7, 2010) and similar cases are extreme examples of a failure to plead any facts alleging an unfair process or price and are inapplicable here. A1031; A1116-17. Defendants cite yet another extreme case on appeal—*HUMC Holdco, LLC v. MPT of Hoboken TRS, LLC*, 2022 WL 3010640 (Del. Ch. July 29, 2022)—decided after the motion to dismiss argument in this case. IAAB 24-25. The Chancellor described the *HUMC* allegations as even less informative than the allegations at issue in *Monroe*. *HUMC*, 2022 WL 3010640, at *20.

Defendants argue that Plaintiffs do not "address how or why an incremental 2% ownership stake was somehow insufficient to compensate Old Match stockholders for the specific allocational decisions that had to be made."[103] That is wrong because Plaintiffs allege that Match's minority stockholders ended up with a "slightly higher percentage of ownership" but in "a deeply leveraged company with significant potential litigation liabilities and tight limitations on its governance and its ability to enter into strategic transactions."[104] Whether the Separation was entirely fair cannot be resolved at the pleading stage where the allegations are assumed true and reasonable inferences are drawn in Plaintiffs' favor.[105]

Moreover, Plaintiffs are not required to allege the exact amount of damages in the form of a specific exchange ratio, level of debt or fair treatment of tax

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[103] IAAB 42.

[104] A848, ¶179.

[105] Similarly, Defendants' argument that Plaintiffs do not account for IAC's relinquishment of control and the opportunity for minority stockholders to participate in a control premium must await further proceedings. IAAB 34-37. Defendants are not entitled to an inference that some speculative control premium in a potential future transaction proves the immediate costs paid in the Separation are entirely fair. Defendants' argument is also belied by the fact that New Match was precluded from such transactions for at least two years to protect tax free treatment for IAC and IAC/Diller would still influence what transactions New Match could do. A1122; A841-42, ¶166.

liability.[106] Defendants concede the point by asking the Court to infer that IAC conferred "huge value" on the Match minority that exceeded Plaintiffs' allegations of financial unfairness.[107] Even Defendants do not quantify the purported "huge value" they "gave up," because expert discovery, not a motion to dismiss, is the appropriate forum for the quantification of damages.[108]

Finally, Defendants ask the Court to draw improper inferences in their favor that because IAC/Diller's economic interests were greater in Match than in the rest of IAC, they would not act to harm Match.[109] Plaintiffs allege that IAC and Diller were economically motivated to free IAC from its debt, extract cash from Match and position themselves to pursue new business opportunities.[110] In Diller's own words:

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[106] IAAB 25.

[107] IAAB 35.

[108] Defendants cite a compilation of Bloomberg Data, arguing that Match's stock price increased by 8.6% when the final terms were announced. IAAB 38. They are not entitled to that inference because "market price validat[ion of] the deal is a defense-friendly inference that isn't granted at the pleading stage." *Montgomery v. Erickson Air-Crane, Inc*., C.A. No. 8784-VCL, at 70 (Del. Ch. Apr. 15, 2014) (TRANSCRIPT); A836; A1033; A1149-50. Although Delaware courts may take judicial notice of trading prices, whether and to what extent a company's stock price increased or decreased in response to the release of deal terms is a fact issue to be addressed in discovery. A1149-50.

[109] IAAB 29-31.

[110] A753-54, ¶11.

"Spinning off Match is a process of renewal in that IAC the company gets to start inventing again. We are ... shrinking in order to grow again … shrinking with $5 billion or so of cash."[111]

Because it is reasonably conceivable that IAC and Diller secured a Separation favorable to IAC at the expense of Match and its minority stockholders following a flawed Committee process,[112] entire fairness applies.

[111] A803, ¶93; *cf. CBS*, 2021 WL 268779, at *46 (rejecting defendants' argument in entire fairness case that the controller declared economic indifference to the exchange ratio under discussion because the statement implied that the controller would not be indifferent if the parties entertained other ranges).

[112] A1029 (explaining how a flawed process can infect price).

VI. THE COMPLAINT STATES A CLAIM AGAINST DILLER

Equity "regards substance rather than form,"[113] so liability for breaches of fiduciary duty "extends to outsiders who effectively controlled the corporation."[114] It is reasonably conceivable Diller indirectly controlled Match through IAC,[115] and therefore had a fiduciary duty not to benefit himself at the expense of Match's minority stockholders, whose property he controlled, in an interested transaction.[116] The Complaint includes detailed, well-supported allegations that Diller controlled IAC's (and Match's) principal negotiators, who acted for his benefit.[117] Defendants are not entitled to contrary inferences at the pleading stage.

Defendants' hyperbolic arguments have no merit. Diller structures his entities with complicated dual class voting structures so that he retains ultimate control. The only outcome that "would turn Delaware law on its head"[118] is allowing Diller to hide behind IAC to avoid liability for breaching his duty of loyalty in the Separation.

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[113] *Ezcorp*, 2016 WL 301245, at *8-10 & n.2.

[114] *Id.* (collecting authorities).

[115] A757-58, ¶¶19-20; A770-71, ¶¶37-38; A772-73, ¶40; A774-75, ¶44; A788, ¶67. Defendants do not seriously dispute Diller's control over IAC. IAAB 44.

[116] *Ezcorp*, 2016 WL 301245, at *8-10.

[117] A754, ¶13; A760-61, ¶23; A765, ¶27; A774-75, ¶44; A803, ¶91; A816, ¶117; A839, ¶162; A843-44, ¶169; A847-48, ¶179.

[118] IAAB 46.

Plaintiffs do not espouse a "'per se' rule" that "outsider" controllers are liable for any breach.[119] Under Delaware law, such liability is confined to self-interested transactions.[120] *Trenwick* is irrelevant because that case did not involve a controlling stockholder of the parent corporation or allegations of how the defendants wielded control.[121] The veil-piercing standard Defendants claim should apply is invoked when a corporation is insolvent, which is a different claim that *Ezcorp* did not entertain.[122]

Plaintiffs' allegations are sufficient to plead a claim against Diller and withstand Defendants' motions to dismiss.

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[119] IAAB 43-47.

[120] *Ezcorp*, 2016 WL 301245, at *9. Defendants' criticism of *Ezcorp* as "*MFW* creep," IAAB 44, is waived because they made no such argument below. It is also belied by *Ezcorp*'s analysis of decades of Delaware law.

[121] IAAB 45 (citing *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 194 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Tr. v. Billett*, 931 A.2d 438 (Del. 2007)). The court ruled that the parent corporation owed no fiduciary duties to the subsidiary and, in *dicta*, noted that the plaintiff, a post-bankruptcy litigation trust, had not explained how the parent's directors could be deemed a controlling stockholder of the subsidiary. *Trenwick*, 906 A.2d at 194.

[122] IAAB 44-47. *Keenan v. Eshleman*, 2 A.2d 904 (Del. 1938), *Lynch*, 638 A.2d 1110 and *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107 (Del. 1952) do not involve veil-piercing either. IAAB 47.

CONCLUSION

For the reasons stated above and in Appellants' Opening Brief, the dismissal of Plaintiffs' claims should be reversed and the case remanded for prosecution of those claims.

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Dated: January 12, 2023

CERTIFICATE OF SERVICE

I, Jason W. Rigby, hereby certify on this 27th day of January, 2023, that I caused a copy of the foregoing *Public Version of Corrected Appellants' Reply Brief* to be served by eFiling via File & ServeXpress upon the following counsel of record:

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