IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE MATCH GROUP, INC. DERIVATIVE LITIGATION	Case No. 368, 2022 Court Below: Court of Chancery of the State of Delaware CONSOLIDATED C.A. No. 2020-0505 MTZ **PUBLIC VERSION** **filed January 12, 2023**

CORRECTED ANSWERING BRIEF OF BARRY DILLER, JOEY LEVIN, GLENN SCHIFFMAN, MARK STEIN, GREGG WINIARSKI, AND IAC HOLDINGS, INC.

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NATURE OF PROCEEDINGS

It is a foundational strength of Delaware law that its courts provide reliable guideposts for transactional planners. An example of that strength was this Court's 2014 decision in *MFW*,[1] resolving a long-standing ambiguity in Delaware law governing the unique context of a squeeze-out merger proposed by a controlling stockholder. The solution *MFW* adopted—requiring the use of both a special committee of independent directors and a majority-of-the-minority stockholder vote to qualify for business judgment review—was aimed at a specific problem. *MFW* achieved doctrinal cohesion by rethinking the implication in *Kahn* v. *Lynch Commc'n Sys., Inc.*[2] that requiring *both* protective devices would not have a different result than utilizing just one in that specific context, namely, a mere shift in the burden of proof on entire fairness.

But since that time, Chancery decisions have expanded *MFW*'s scope to cover transactions—like the one at issue in this case—for which it was never intended. These decisions have been characterized, including by the court below, as "*MFW*

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1 *Kahn* v. *M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*"), *overruled on other grounds by Flood* v. *Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018).

2 638 A.2d 1110 (Del. 1994).

creep."[3] They have undermined the traditional rule that in most transactions with a controlling stockholder, use of any of the three traditional cleansing devices—approval by (i) a board with an independent director majority; (ii) a special committee of independent directors; or (iii) a majority-of-the-minority stockholder vote—would invoke the business judgment rule. In doing so, these post-*MFW* cases gave rise to a judicially bifurcated approach to conflict transactions, with one set of rules addressing conflict transactions generally and another set addressing conflict transactions with a controlling stockholder. Faced with these decisions, transactional parties have felt compelled to employ the *MFW* suite of protections even when both prongs required for squeeze-outs—(ii) and (iii)—were not traditionally required. When they do so, as here, they should remain entitled to the protection of the business judgment rule if it turns out that there is some fault in the use of one protective device. That is especially so when a majority of informed unaffiliated stockholders have decided that a transaction is good for them—the situation that Delaware courts have been most reluctant to second-guess, and rightly so.

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[3] A1093:6-15. *See generally* Lawrence A. Hamermesh et al., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321 (2022) [hereinafter *Hamermesh*].

Here, plaintiffs' brief focuses on one issue—whether distant economic ties rendered a wealthy, non-beholden director non-independent for purposes of a transaction where the controller was not squeezing out the minority, but giving up voting control. The transaction separated one partially public company (Old Match[4]) from its controller public company (Old IAC), in which the unaffiliated stockholders of the controlled company ended up with a *larger* ownership stake than they had before, and in a standalone company (New Match) *without* a controlling stockholder. Thus, the stockholders went from owning less of a controlled company, to owning more of a non-controlled company. The challenged transaction—overwhelmingly approved by the unaffiliated stockholders—is the opposite of a squeeze-out and does not give rise to the unique, context-specific concerns that motivated the doctrine governing controller squeeze-outs.

As set out in the Match Defendants' Answering Brief, this Court should affirm the dismissal of the complaint because *MFW*'s protections were satisfied. But even

[4] Capitalized terms refer to the defined terms in the Answering Brief of Sharmistha Dubey, Amanda Ginsberg, Ann L. McDaniel, Thomas J. McInerney, Pamela S. Seymon, Alan G. Spoon, IAC/Interactive Corp., and Match Group, Inc. (the "Match Defendants' Answering Brief"), filed contemporaneously herewith.

if this Court finds that one of *MFW*'s protections was not satisfied, it should affirm for two related reasons:

First, under traditional Delaware law, either the Separation Committee's approval or the majority-of-the-minority stockholder vote alone was sufficient to invoke the business judgment rule. It is an unwarranted and unwise expansion, and distortion, of *MFW* to hold otherwise. *See* Point I.

Second, this Court may affirm without reaching the *MFW*/standard of review issue. Even if the entire fairness standard applies to a transaction, it does not mean that any complaint states a claim. Plaintiffs have a basic obligation to plead facts supporting a reasonably conceivable inference that the substantive terms of the transaction were unfair. Plaintiffs have not met this burden because they have not pled facts that, if true, suggest that the Separation in which the Old Match unaffiliated stockholders ended up with more of a new company with no controlling stockholder was unfair. *See* Point II.

Finally, *MFW* creep has also provided stockholder-plaintiffs an incentive to press to expand the concept of what a controlling stockholder is, to avoid Delaware's traditional approach to conflict transactions. This incentive is displayed in this case where plaintiffs argue that Barry Diller was the "ultimate human controller" of Old Match even though he owned no stock and thus had no voting control over that company. This "controller" definition expansion would have persons be liable in a fiduciary capacity to stockholders to whom they owe no fiduciary duties under traditional Delaware corporate law principles. Plaintiffs here have a controlling stockholder to sue: a multibillion-dollar market cap public company, IAC. They should not be permitted to pierce its veil to call a person who was not a director, officer, or stockholder of Old Match—Barry Diller—a "dual controller." Delaware law does not look through a well-capitalized public company as if it does not exist to label another person as a controller just so there can be another defendant. *See* Point III.

Each of these arguments rests on foundational corporate law principles upon which Delaware corporations and their directors and stockholders are entitled to rely. Defendants ask this Court to reaffirm these principles to re-instill certainty into areas of Delaware law that have been cast into doubt in recent Chancery decisions unreviewed by this Court.

SUMMARY OF ARGUMENT

1. *Denied.* The IAC Defendants join the Match Defendants' Answering Brief with respect to this argument.

2. *Denied.* The IAC Defendants join the Match Defendants' Answering Brief with respect to this argument.

3. *Denied.* The IAC Defendants join the Match Defendants' Answering Brief with respect to this argument.

4. Under traditional Delaware corporate law principles, approval by either the Separation Committee *or* the majority-of-the-minority stockholder vote alone is sufficient to invoke the business judgment rule. The issue of *MFW* creep was raised sua sponte by the Court of Chancery below. It was not briefed below.

5. Even if the Court concludes that the entire fairness standard governs, the Court should affirm the dismissal because plaintiffs' complaint fails to plead facts supporting an inference that the Separation was unfair. This argument was presented below but was not reached.

6. The Court should affirm dismissal as against Mr. Diller because the complaint fails to plead facts under which he was a controlling stockholder of Old Match. This argument was presented below but was not reached.

STATEMENT OF FACTS

The IAC Defendants incorporate the Statement of Facts in the Match Defendants' Answering Brief.[5]

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[5] Defendants are submitting a joint appendix of record materials that were not included in plaintiffs' appendix.

ARGUMENT

I. THE BUSINESS JUDGMENT RULE SHOULD APPLY EVEN IF ONE OF *MFW*'S PROTECTIONS WAS NOT SATISFIED

A. Question Presented

Should this Court affirm the dismissal of plaintiffs' complaint because under traditional Delaware law, approval of the subject transaction by the Separation Committee *or* by the majority-of-the-minority stockholder vote alone was sufficient to invoke the business judgment rule?

This question was not raised before the Court of Chancery because the transaction parties employed the full *MFW* suite of protections even though both protective measures, though necessary for controller squeeze-outs, were not required in this context. If this Court determines that plaintiffs have met their burden to plead facts showing that one of the protective devices under *MFW* was not sufficiently satisfied, defendants should still be entitled to the protection of the business judgment rule under traditional principles of Delaware corporate law.

B. Scope of Review

This Court may rule on an issue of law that was not "fairly presented" to the court below "when the interests of justice so require." *Reddy* v. *MBKS Co.*, 945 A.2d 1080, 1086 (Del. 2008) (considering issue first raised on appeal where Chancery addressed it sua sponte and appellate consideration "served the interests of justice").

Questions of law are reviewed *de novo*. *Id.* at 1085.

It is in the interests of justice for this Court to review the applicability of *MFW* to controller transactions not involving a squeeze-out. Although the issue was not briefed below, it was raised sua sponte by the Court of Chancery. *See In re Match Grp., Inc. Derivative Litig.*, 2022 WL 3970159, at *15 n.139 (Del. Ch. Sept. 1, 2022) ("Opinion") ("the Separation, a reverse spinoff collapsing a dual class capital structure and restoring some voting control to the minority, is in many ways the opposite of the freeze-out merger that inspired *MFW*" but "under our jurisprudence as it has developed" "*MFW* measures can restore the Separation to business judgment review").[6]

As it now stands, long-standing principles of Delaware law, and the basis for this Court's own decision in *MFW*, have been cast aside, not by this Court, but by unreviewed decisions in Chancery. As a result, transactional planners are required to abide by that incorrect view for fear that if they rely on just one of the traditional safe harbors that would typically suffice to invoke business judgment protection, they will be told that their clients face entire fairness review. This Court should take

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[6] The court also raised the issue during oral argument on defendants' motions to dismiss. *See* A1093:6-15; A1101:23-A1102:1; A1143:24-A1144:6; A1145:10-14.

the opportunity to resolve the issue, so that transactional planners will not confront the same uncertainty and thus inefficiency they faced for a generation under *Lynch*.[7]

C. Merits of Argument

Traditional, bedrock principles of Delaware law recognize that any one of three cleansing mechanisms—approval by (i) a board with an independent director majority; (ii) a special committee of independent directors; or (iii) a majority of unaffiliated stockholders—suffices to invoke the business judgment standard of review in conflicted transactions, including those involving controlling stockholders. *See, e.g.*, *Marciano* v. *Nakash*, 535 A.2d 400, 404-05 (Del. 1987) (entire fairness applies only "where shareholder deadlock prevents ratification [or] where shareholder control by interested directors precludes independent review"); *Friedman* v. *Dolan*, 2015 WL 4040806, at *7-8 (Del. Ch. June 30, 2015) (business judgment governed compensation arrangement with controlling stockholder family approved by independent compensation committee); *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 587-88 (Del. Ch. 2007) (business judgment governed

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7 Given that transaction planners are obliged to employ both prongs of *MFW* in light of the trend in Chancery, *MFW* creep is a phenomenon that may be repeated but is likely to escape appellate review: a denial of a motion to dismiss if one prong is held to be deficient is interlocutory and not likely appealed; and if dismissal is granted on the ground of *MFW* compliance, there may be no occasion for appellate review of whether both prongs were required.

consulting agreement with controlling stockholder approved by the majority independent board); *Canal Cap. Corp.* v. *French*, 1992 WL 159008, at *5-6 (Del. Ch. July 2, 1992) (business judgment governed services agreements with controlling stockholder entities approved by majority independent board); *Puma* v. *Marriott*, 283 A.2d 693, 695 (Del. Ch. 1971) (business judgment governed Marriott's purchase of six companies principally owned by Marriott family members approved by majority independent board); *see also Getty Oil Co.* v. *Skelly Oil Co.*, 267 A.2d 883, 887 (Del. 1970) (business judgment governed dispute involving controlling stockholder where terms of the dispute were not set by the controller but by a third party).[8]

In 1994, this Court in *Lynch* decided that controller squeeze-out mergers present unique circumstances such that minority stockholders need special protection beyond the traditional rules governing conflict transactions. The Court's concern was that, in a squeeze-out, the independent directors and minority

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8 *See also* Hamermesh, *supra* n.3, at 332-44. For additional discussion of the traditional principles, *see* John F. Johnston & Frederick H. Alexander, *The Effect of Disinterested Director Approval of Conflict Transactions Under the ALI Corporate Governance Project—A Practitioner's Perspective*, 48 BUS. LAW. 1393, 1401-05 (1993); Charles Hansen et al., *The Role of Disinterested Directors in "Conflict" Transactions: The ALI Corporate Governance Project and Existing Law*, 45 BUS. LAW. 2083, 2099-103 (1990).

stockholders might cave to the controller because the controller could bypass the merger process by making a tender offer directly to stockholders at a lower price. 638 A.2d at 1116, 1120. Even though tender offers are intrinsically more coercive and less protective of stockholders than mergers, existing law had suggested that a controller could proceed with a squeeze-out tender and not be subject to entire fairness review. *See Solomon* v. *Pathe Commc'ns Corp.*, 672 A.2d 35, 39-40 (Del. 1996) (citing *Lynch* v. *Vickers Energy Corp.*, 351 A.2d 570, 576 (Del. Ch. 1976), *rev'd on other grounds*, 383 A.2d 278 (Del. 1977)). Accordingly, in *Lynch*, this Court stated that regardless of the cleansing devices used, the standard of review in the unique context where bypass of equitable review was threatened—a squeeze-out merger—was entire fairness. 638 A.2d at 1117.

The *Lynch* rule led to a number of problems that this Court solved two decades later in *MFW*. First, *Lynch* led to confusion for transactional planners because the use of two cleansing devices would yield the same result as the use of just one, namely, only a shift in the burden of proof under the entire fairness standard. *See MFW*, 88 A.3d at 642. Second, *Lynch* led to inescapable litigation costs in controller buyouts without benefits for stockholders, because there was no practical way of getting a case dismissed at the pleading stage. *See In re MFW S'holders Litig.*, 67 A.3d 496, 525, 534-35 (Del. Ch. 2013), *aff'd sub nom. MFW*, 88 A.3d 635.

The Court solved those problems in *MFW*, holding that the business judgment rule governed controller buyouts where "the merger is 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." 88 A.3d at 644. The *MFW* framework addresses the bypass problem that led to the rule in *Lynch* because under *MFW*, "the controlling stockholder knows that it cannot bypass the special committee's ability to say no." *Id.* at 644; *see also In re MFW*, 67 A.3d at 503 ("controller's promise that it will not proceed unless the special committee assents" solves the "threat of bypass that was of principal concern in *Lynch*").

MFW thus was a specific solution to a specific problem—controller squeeze-outs—where the dangers of overreaching are particularly grave because a controller could bypass the will of the independent directors and stockholders through a tender offer and evade equitable review. The same dangers are not present outside the context of squeeze-outs. Thus, courts continued to apply the traditional cleansing approach to other controller conflict transactions—such as ones involving compensation—after *Lynch*. *See, e.g.*, *In re Tyson*, 919 A.2d at 587-89, 591-93; *Friedman*, 2015 WL 4040806, at *5-6. These decisions are consistent with others recognizing that business judgment applies when an independent committee approves compensation for executives, including executives affiliated with a controlling stockholder. *See, e.g.*, *Ravenswood Inv. Co.* v. *Winwill*, 2011 WL 2176478, at *4 (Del. Ch. May 31, 2011). That view is also consistent with decisions in the demand futility context, recognizing that demand is not excused simply because a transaction involves a controlling stockholder. *See, e.g.*, *Aronson* v. *Lewis*, 473 A.2d 805, 815-17 (Del. 1984) (demand not excused in challenge to controller compensation; "in the demand context even proof of majority ownership of a company does not strip the directors of the presumptions of independence"); *see also Lenois* v. *Lawal*, 2017 WL 5289611, at *12-14 (Del. Ch. Nov. 7, 2017); *Teamsters Union 25 Health Servs. & Ins. Plan* v. *Baiera*, 119 A.3d 44, 65-68 (Del. Ch. 2015); *In re Kraft Heinz Co. Derivative Litig.*, 2021 WL 6012632, at *6-7 (Del. Ch. Dec. 15, 2021). That is, these decisions viewed the doctrine governing squeeze-out mergers with controlling stockholders as a context-specific rule, leaving the traditional principles of Delaware law to apply to other conflict transactions as they always had.[9]

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[9] For cases commenting on the limitation of the doctrine, *see Sample* v. *Morgan*, 914 A.2d 647, 663-64 & n.52 (Del. Ch. 2007) ("The anomaly of controlling stockholder mergers is an exception" to the general rule that stockholder ratification "precludes claims for breach of fiduciary duty attacking that action"); *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006)
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Nonetheless, recent Chancery decisions have applied *MFW*'s framework to controller transactions other than squeeze-out mergers. *See, e.g.*, *In re Ezcorp Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245, at *12-16 (Del. Ch. Jan. 25, 2016) (advisory services agreements with entities affiliated with controlling stockholder); *IRA Tr. FBO Bobbie Ahmed* v. *Crane*, 2017 WL 7053964, at *11 (Del. Ch. Dec. 11, 2017) (stock reclassification plan that gave controller the ability to perpetuate its voting control); *Tornetta* v. *Musk*, 250 A.3d 793, 809-10 (Del. Ch. 2019) (compensation plan for CEO and controlling stockholder); *Berteau* v. *Glazek*,

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("[T]he *Lynch* line of jurisprudence … has been premised on the notion that when a controller wants the rest of the shares, the controller's power is so potent that independent directors and minority stockholders cannot freely exercise their judgment, fearing retribution from the controller."); *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 617 (Del. Ch. 2005) ("[I]t is perhaps fairest and more sensible to read *Lynch* as being premised on a sincere concern that mergers with controlling stockholders involve an extraordinary potential for the exploitation by powerful insiders of their informational advantages and their voting clout."); *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *10 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006) (split-off transaction was not "akin to a minority freeze-out" and therefore "shareholder ratification will have the effect of maintaining the business judgment rule's presumptions"); *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 435-36 (Del. Ch. 2002) (*Lynch* addressed the "'inherent coercion' that exists when a controlling stockholder announces its desire to buy the minority's shares"); *see also* Itai Fiegenbaum, *The Geography of MFW-Land*, 41 DEL. J. CORP. L. 763, 802 (2017) ("the text, the context, and the underlying policy justifications enumerated in [*MFW*]" show "*MFW*'s holding is limited to the context of going private transactions").

2021 WL 2711678, at *13-15 (Del. Ch. June 30, 2021) (acquisition of controlling stockholders' company). Those cases ignored the lineage of *MFW* as a narrow, context-specific rule designed to remedy a specific problem, and presumed that any conflict transaction with a controller was subject to entire fairness review unless both of *MFW*'s protections were utilized.

That course—taking the solution to a context-specific problem arising from *Lynch* and expanding it to contexts for which it was never intended—has created uncertainty about Delaware law's reliability, and has resulted in practitioners being obliged to apply an *MFW* framework out of an abundance of caution outside the squeeze-out merger context. This expansion bifurcates Delaware's treatment of conflict transactions into two separate categories—one applicable generally to conflict transactions, which receive business judgment rule protection if any one of the traditional cleansing devices is used[10]—and another for the ever-evolving

[10] *See, e.g.*, *Valeant Pharms. Int'l* v. *Jerney*, 921 A.2d 732, 745-46 (Del. Ch. 2007) (approval by a well-functioning independent director compensation committee reaffirms the presumptions of the business judgment rule to an interested transaction); *Cambridge Ret. Sys.* v. *Bosnjak*, 2014 WL 2930869, at *2 (Del. Ch. June 26, 2014) (dismissing claim against directors for option grants where the directors "conditioned [their] grant of each of the challenged equity awards on obtaining stockholder approval, which the stockholders provided"); *Benihana of Tokyo, Inc.* v. *Benihana, Inc.*, 906 A.2d 114, 120 (Del. 2006) ("After approval by disinterested directors, courts review the interested transaction under the business

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category of "controller transactions."[11]

This expansion contradicts traditional Delaware law, under which any one of the three cleansing mechanisms suffices to invoke the business judgment standard in conflicted controller transactions and, by judicial fiat, creates a legislative-like bifurcation in approach that the General Assembly could have, but did not, create in the Delaware General Corporation Law. *See supra* at pp. 10-11.

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judgment rule."); *Gottlieb* v. *Heyden Chem. Corp.*, 91 A.2d 57, 58 (Del. 1952) ("Where there was stockholder ratification … the court will look into the transaction only far enough to see whether the terms are so unequal as to amount to waste.").

This view is also reflected in Section 144(a) of the Delaware General Corporation Law, which "codified judicially acknowledged principles of corporate governance to provide a limited safe harbor for corporate boards to prevent director conflicts of interest from voiding corporate action." *See Cede & Co.* v. *Technicolor, Inc.*, 634 A.2d 345, 365 (Del. 1993), *decision modified on reargument*, 636 A.2d 956 (Del. 1994). Under Section 144, "approval of an interested transaction by either a fully-informed disinterested board of directors, 8 *Del. C.* § 144(a)(1), or the disinterested shareholders, 8 *Del. C.* § 144(a)(2), provides business judgment protection." *Id.* at 366 n.34; *see also In re Cox*, 879 A.2d at 615. As commentators have explained, Section 144, with certain judicial glosses to address specific contexts, tracks the three traditional cleansing mechanisms for conflict transactions that invoke the business judgment rule. *See* Hamermesh, *supra* n.3, at 340-41.

[11] That bifurcation is inconsistent with this Court's teaching that the "classic definition" of the duty of loyalty for directors is "equally applicable to a majority stockholder." *Singer* v. *Magnavox Co.*, 380 A.2d 969, 977 (Del. 1977).

This expansion thus operates to overrule the well-reasoned decisions of Chancery to the contrary, and to apply *MFW* to contexts like executive compensation, where it was not designed to apply. *See In re Tyson*, 919 A.2d at 587-89, 591-93; *Friedman*, 2015 WL 4040806, at *5; *see also Brehm* v. *Eisner*, 746 A.2d 244, 263 (Del. 2000) (a "board's decision on executive compensation is entitled to great deference" and is "the essence of business judgment").[12] This creates efficiency problems for Delaware corporations and their directors and stockholders and, like *Lynch*, forces transactional planners to assume the expansion of *MFW* is the law, because this Court has not had a chance to speak to whether the context-specific solution of *MFW* should become a universal rule, unsettling accepted principles of Delaware law.[13]

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[12] The problem is understated by just looking at decisions. Because it was not believed that controller compensation was subject to *Lynch*, cases were not brought claiming that entire fairness governed when that compensation was approved by an independent committee. After *MFW* creep, there is now uncertainty in this area that threatens to enmesh Delaware courts in second-guessing business judgments made not only by independent directors, but ones supported at the ballot box by investors.

[13] A significant number of public companies in the United States have controlling stockholders. *See* IRRC Institute, *Controlled Companies in the Standard & Poor's 1500: A Follow-Up Review of Performance & Risk* 84-90 (Mar. 2016), https://perma.cc/MAJ7-7A66. Controlling stockholders routinely engage in business with the companies they control; many of those transactions are subject to board or committee approval. It is not sensible to subject all such transactions to

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The nub of the matter is this: *MFW* targeted the specific circumstance of controller squeeze-outs by creating a two-pronged path to business judgment review that had not existed before. It is perverse to expand that bespoke approach to make it *more* onerous than before *MFW* for a non-squeeze-out controller-involved transaction to be reviewed under the business judgment rule.

There is particular utility in ensuring that decisions made by impartial stockholders about what is best for themselves are not second-guessed by courts. *See Williams* v. *Geier*, 671 A.2d 1368, 1381 (Del. 1996) ("[T]he stockholders control their own destiny through informed voting. This is the highest and best form of corporate democracy."); *R.S.M. Inc.* v. *All. Cap. Mgmt. Holdings L.P.*, 790 A.2d 478, 498 (Del. Ch. 2001) ("[I]t seems a misallocation of judicial resources to have courts reassess the fairness of transactions that minority [stockholders] could have blocked themselves."); *see also Corwin* v. *KKR Fin. Holdings LLC*, 125 A.3d 304, 309 n.19 (Del. 2015) (collecting cases demonstrating the long-standing Delaware tradition of judicial deference to disinterested stockholder votes).

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judicial second-guessing if they are not put through an *MFW*-like process. *See* Hamermesh, *supra* n.3, at 339-40.

Today's stockholders do not quiver in fear when they vote; they regularly vote in ways that management and controlling stockholders do not recommend or favor. This has been demonstrated in merger votes,[14] amendments to corporate charters,[15] say-on-pay votes,[16] and in proxy contests and withhold vote campaigns.[17] The idea that stockholders are too fearful to protect their own interests has no empirical basis, and Delaware fiduciary law does not give credit to stockholder votes affected by coercion. *Williams*, 671 A.2d at 1382-84. As *MFW* pointed out, Delaware courts can police any controller brazen enough to seek retribution for an adverse stockholder vote. *See In re MFW*, 67 A.3d at 532-33 & n.172 (collecting cases).

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[14] *See, e.g.*, *Spirit Announces Termination of Merger Agreement with Frontier*, Business Wire (July 27, 2022), https://www.businesswire.com/news/home/20220727005950/en/Spirit-Announces-Termination-of-Merger-Agreement-with-Frontier; *Zoom Announces Termination of Merger Agreement with Five9*, Globe Newswire (Sept. 30, 2021), https://investors.zoom.us/news-releases/news-release-details/zoom-announces-termination-merger-agreement-five9; *see also In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 641 (Del. Ch. 2008) (stockholders voted down Icahn's buyout of Lear Group); *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573 (Del. Ch. 2010) (stockholders voted down merger with Hertz); *Mercier* v. *Inter-Tel (Del.), Inc.*, 929 A.2d 786 (Del. Ch. 2007) (stockholders voted to delay merger until new information convinced them that the offer price was fair); *see also In re MFW*, 67 A.3d at 530-31 & n.167.

[15] Geeyoung Min, *Shareholder Voice in Corporate Charter Amendments*, 43 J. CORP. L. 289, 290-91 (2017) (demonstrating, based on empirical evidence from

(Continued . . .)

The Separation at issue involves the opposite of a squeeze-out, as the court below recognized. *See* Opinion, *15 n.139 ("[T]he Separation … is in many ways the opposite of the freeze-out merger that inspired *MFW*."); *see also In re NCS Healthcare, Inc., S'holders Litig.*, 825 A.2d 240, 255-56 (Del. Ch. 2002), *rev'd sub nom. Omni Care, Inc.* v. *NCS Healthcare, Inc.*, 822 A.2d 397 (Del. 2002)

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the past two decades, that stockholders have gained more control over the amendment process).

[16] PwC's Governance Insights Center, *Boardroom Recap: The 2022 Proxy Season* 4 (Aug. 2022), https://www.pwc.com/us/en/services/governance-insights-center/assets/pwc-boardroom-recap-2022-proxy-season.pdf ("As the 2022 proxy season wrapped up, record numbers of companies failed to receive majority support for say on pay."); Brigid Rosati et al., *A Look Back at the 2022 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 23, 2022), https://corpgov.law.harvard.edu/2022/10/23/a-look-back-at-the-2022-proxy-season/ ("Say-on-pay vote results for 2022 season witnessed a decline in the average support for Russell 3000 companies.") [hereinafter *Rosati*].

[17] Rosati, *supra* n.16 ("Vote No campaigns continued to gain momentum in 2022"); Rusty O'Kelley et al., *Universal Proxy, Increased Activism and Director Vulnerability*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 7, 2022), https://corpgov.law.harvard.edu/2022/12/07/universal-proxy-increased-activism-and-director-vulnerability/ (commenting that "the intersection of the universal proxy, an active environment for traditional shareholder activism, and more assertive institutional investors will bring significant pressure on boards and directors concerning board composition and potential director vulnerabilities"); *see also In re MFW*, 67 A.3d at 531 & n.166 (collecting sources supporting the proposition that "[s]tockholders have mounted more proxy fights, and, as important, wielded the threat of a proxy fight or a 'withhold vote' campaign to secure changes in both corporate policies and the composition of corporate boards").

(transaction that resulted in unaffiliated stockholders becoming "stockholders in a company that has no controlling stockholder or group" was "the obverse of a typical *Revlon* case," and examined "under normal business judgment standards"). Accordingly, the Separation is subject not to the rule set forth in *MFW* but to the traditional rule of Delaware law governing conflict transactions that any one of the traditional safe harbors is sufficient to invoke the business judgment rule.

Accordingly, *either* the approval by the Separation Committee *or* the majority-of-the-minority stockholder vote alone invokes the business judgment rule.

II. THE COMPLAINT FAILS TO STATE AN ENTIRE FAIRNESS CLAIM

A. Question Presented

Even if the entire fairness standard applies, should this Court affirm the dismissal of plaintiffs' complaint for failure to state a claim because plaintiffs failed to plead facts supporting an inference that the Separation was unfair? *See* A1028-35; A1098-1123; A1161-62; B308-33; B357-79.

B. Scope of Review

This Court "may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court." *Unitrin, Inc.* v. *Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (citation omitted). Questions of law are reviewed *de novo*. *Reddy*, 945 A.2d at 1085. The affirmance on alternate grounds of a decision dismissing a complaint is a matter of law and furthers the "interest of orderly procedure and the early termination of litigation." *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995). Although that is rare, *Appel* v. *Berkman*, 180 A.3d 1055, 1064-65 & n.44 (Del. 2018), this case presents a fitting one for such review because plaintiffs have had three bites at the pleading apple, this Court is as well positioned as the trial court to rule on a complaint's sufficiency, and thus review would demonstrate the exemplary efficiency of Delaware's corporate law appellate process.[18]

C. Merits of Argument

Plaintiffs' complaint is their third, attempting to overcome the deficiencies identified in dismissal briefs directed to two prior complaints. Despite all these chances, plaintiffs have failed to meet their burden to plead facts supporting a reasonable inference that the Separation was unfair, notwithstanding that the Separation gave Match's public stockholders a greater percentage of an entity than they owned before and in an entity without a controlling stockholder.

1. Delaware law requires a plaintiff to plead economic unfairness.

Even where the entire fairness standard of review applies and the complaint contains factual allegations of "unfair dealing," a plaintiff must plead specific facts "geared towards proving that the … transactions were executed at an unfair price." *Monroe Cnty. Emps.' Ret. Sys.* v. *Carlson*, 2010 WL 2376890, at *2 (Del. Ch. June 7, 2010); *HUMC Holdco, LLC* v. *MPT of Hoboken TRS, LLC*, 2022 WL

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[18] Since this case was filed, defendants briefed motions to dismiss three times. *See* A51, Dkt. 22; A43, Dkt. 29; A25, Dkt. 69; A24, Dkt. 71; A14, Dkt. 91; A12, Dkt. 92.

3010640, at *20 (Del. Ch. July 29, 2022). Failure to do so requires dismissal. *HUMC*, 2022 WL 3010640, at *20-21.

To plead economic unfairness, a complaint must include "factual allegations demonstrating *why*" the terms alleged to be "unfair" were unfair. *Monroe Cnty.*, 2010 WL 2376890, at *2. Because economic fairness depends on the relative value of the consideration exchanged, a plaintiff must plead why the "*give*" was unfairly bigger than the "*get*." *Id*. ("Simply put, a plaintiff who fails to do this has not stated a claim."). To do so, a complaint must include "factual allegations about those amounts to put them into perspective." *Id.* (dismissing challenge to services agreement between company and controlling stockholder where complaint contained no allegations about the actual value of the controller's services or the cost the company would have paid for comparable services); *HUMC*, 2022 WL 3010640, at *20-21 (same premise for dismissal).

In *Monroe County*, Chancellor Chandler cited *Solomon* v. *Pathe Communications Corp.*, where Chancellor Allen explained that an entire-fairness plaintiff "must do more than allege that a transaction is a self-interested one in order to state a claim"; the plaintiff must "allege some facts which if true would render the transaction unfair." 1995 WL 250374, at *6 (Del. Ch. Apr. 21, 1995), *aff'd*, 672 A.2d 35 (Del. 1996).

Plaintiffs failed to satisfy that pleading burden because the complaint fails to plead how or why the Separation was "unfair" notwithstanding the *pleaded and admitted* facts that: (1) the Separation's exchange ratio allocated a 2% greater ownership interest to the Old Match unaffiliated stockholders[19]—an increase worth over $800 million to those stockholders as of the date the first of the two plaintiffs filed a complaint;[20] (2) IAC's (direct) and Mr. Diller's (indirect) economic interests were far greater in Match than in the rest of IAC, rendering illogical plaintiffs' overall theory that IAC and Diller had any self-interest in harming New Match (*infra* at pp. 29-31); and (3) the Separation conferred substantial value on Old Match's unaffiliated stockholders by Old IAC agreeing to a dual-class collapse that transformed Match into a non-controlled public company and enabled its stockholders to share ratably in a future control premium (*infra* at pp. 34-37).

Not a single allegation in the complaint claims that the Separation was "unfair" taking into account those benefits to the Old Match stockholders. Not a single factual allegation provides a basis to infer that the Separation was "unfair" notwithstanding those benefits.

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[19] A847-48, ¶ 179.

[20] B342 (showing that New Match had a market cap of $40.658 billion on January 7, 2021).

The centerpiece of plaintiffs' opposition below to dismissal based on *Monroe County* was their candid assertion that an entire-fairness plaintiff need not plead "why the exchange ratio is unfair."[21] That is, they claimed that *Monroe County*, *Solomon*, *Golaine* v. *Edwards*,[22] and the many decisions in accord with them had been implicitly overruled as moribund.[23]

Plaintiffs' position is misguided, and inconsistent with settled law. An entire-fairness claim cannot be stated without factual allegations showing why the transaction attacked as unfair was in fact unfair. Plaintiffs nowhere plead that the exchange ratio should have been X, or that a fair level of debt would have been Y, or that a fair treatment of tax liability was Z, etc. Plaintiffs' position is that they need not plead whether the Separation was unfair by $1, $1 billion, or at all.

As explained in *Monroe County*, Delaware law focuses on process because a fair price is more likely to follow a fair process. 2010 WL 2376890, at *2. Nonetheless, "the paramount consideration" is "fair price." *Id.*; *Ams. Mining Corp.* v. *Theriault*, 51 A.3d 1213, 1244 (Del. 2012) (same). Accordingly, even where a complaint makes allegations challenging the process by which a transaction was

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21 A1029.

22 1999 WL 1271882 (Del. Ch. Dec. 21, 1999).

23 A1031.

carried out, it still must be dismissed if it lacks allegations showing that that process resulted in an unfair price.

For example, in *Golaine*, the Court of Chancery held that the plaintiff had failed to state a claim because there were no facts alleged demonstrating a link between the alleged process violations "and the term of the merger agreement most important to the [target's] stockholders—the Exchange Ratio." 1999 WL 1271882, at *8-9 ("the complaint fails to allege any harm flowing from" KKR's "trading only for itself in the early negotiations").

Golaine, *Solomon*, *Monroe County*, and *HUMC* comprise part of a wall of sensible authority making clear that an entire-fairness plaintiff must plead facts—not conclusions—that support a rational inference that the challenged transaction was economically unfair: "Even in a self-interested transaction in order to state a claim a shareholder must allege some facts that tend to show that the transaction was not fair." *Calma ex rel. Citrix Sys., Inc.* v. *Templeton*, 114 A.3d 563, 589 (Del. Ch. 2015) (quoting *Solomon*, 1995 WL 250374, at *5). In *Calma*, the plaintiffs met this burden by pleading facts that, if true, showed economic unfairness. *Id.* (complaint compared transaction price to objective market data of peer companies); *see also Stein* v. *Blankfein*, 2019 WL 2323790, at *7-8 (Del. Ch. May 31, 2019) (comparison of compensation to that of comparable companies); *O'Reilly* v. *Transworld*

Healthcare, Inc., 745 A.2d 902, 930 (Del. Ch. 1999) (comparison of merger price to company's book value); *Davidow* v. *LRN Corp.*, 2020 WL 898097, at *14-15 (Del. Ch. Feb. 25, 2020) (comparison of merger price to self-tender price). But in *Monroe County* and other cases where plaintiffs did not plead facts supporting a reasonable inference of economic unfairness, our courts have dismissed claims attacking conflict transactions. *See also Capella Holdings, Inc.* v. *Anderson*, 2015 WL 4238080, at *5 (Del. Ch. July 8, 2015) (speculative allegations did "not support the $3.17 per share price that is critical to [plaintiff's] effort to demonstrate unfairness").[24]

Furthermore, a reflexive inference from "process" to "price" is unwarranted here given the economic reality—on the pleaded facts—that IAC had no economic interest in harming its own stockholders, who would become stockholders of New Match in the Separation. The IAC stockholders in that position include

[24] This Court's precedents make clear that there must be a detriment to the minority for a claim of unfairness. *Sinclair Oil Corp.* v. *Levien*, 280 A.2d 717, 720 (Del. 1971); *Gabelli & Co.* v. *Liggett Grp. Inc.*, 479 A.2d 276, 281 (Del. 1984); *Summa Corp.* v. *Trans World Airlines, Inc.*, 540 A.2d 403, 407 (Del. 1988). It has long been settled Delaware law that something can benefit a controller and be fair, even without any benefit to the minority, where there is no detriment to the minority. *See, e.g.*, *Nixon* v. *Blackwell*, 626 A.2d 1366, 1377-79 (Del. 1993).

Mr. Diller, who after the Separation owned 6% of New Match,[25] a position worth far more than his 8.4% ownership of New IAC[26] on the first day of trading after the Separation.[27] Given the pleaded economic interests of Old IAC (a direct interest) and Mr. Diller (an indirect interest) in Match—dwarfing their economic interests in the rest of Old IAC—the complaint's *conclusory* allegation that Old IAC and Mr. Diller would seek to hurt Match, in particular by shackling it with excessive debt or preventing its growth, is contradicted by the *pleaded facts* and thus cannot support a rational pleading stage inference of unfairness. *See Brehm*, 746 A.2d at 257

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[25] B262.

[26] A757, ¶ 20.

[27] The pleaded facts demonstrate that the value of Old IAC's direct interest in Old Match and the value of Mr. Diller's indirect interest in Old Match exceeded the value of their interests in the rest of Old IAC by more than 6x:

IAC's Interest in Match	Rest of IAC	Relative Value of Match Interest
$17.41 billion	$2.76 billion	**>6x**

Diller's Indirect Interest in Match	Diller's Interest in Rest of IAC	Relative Value of Match Interest
$1.46 billion	$232 million	**>6x**

See B436 (discussed at A1107-08); *see also* B304-06; B328-29; B363-64.

(affirming dismissal where allegations about CEO's conduct "were illogical and counterintuitive" because the alleged conduct "would dilute the value of [CEO's] own very substantial holdings"); *see also Unitrin*, 651 A.2d at 1380-81 (rejecting argument that directors with substantial stockholdings would not vote like other stockholders in a proxy contest, and reaffirming the traditional rule of Delaware law that "stockholders are presumed to act in their own best economic interests").

No decision of a Delaware court has ever suggested, much less adopted, plaintiffs' proposition that they can state a claim without pleading a reasonably conceivable basis of economic unfairness.[28] It is one thing to say that "process can affect price," or that "one should not be surprised if a tainted price emerges" from "a tainted process."[29] It is quite another to say that a plaintiff does not have to plead how and why the "price" is unfair.

Plaintiffs wrongly argued below that pleading "that the unfair process infected

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[28] The decisions plaintiffs cited below (A1029, nn.247-48) all dealt with complaints containing factual allegations of economic unfairness. *See Garfield* v. *BlackRock Mortg. Ventures, LLC*, 2019 WL 7168004, at *1, *4 (Del. Ch. Dec. 20, 2019) (discussed *infra*); *Howland* v. *Kumar*, 2019 WL 2479738, at *1, *5 (Del. Ch. June 13, 2019) (insider "spring-load[ing]" of options, making the "price" effect obvious); *Gentile* v. *Rossette*, 2010 WL 2171613, at *1 (Del. Ch. May 28, 2010) (founder converted debt at $0.05/share, versus recent conversion at $0.50/share, increasing his equity from 61% to 95%).

[29] A1029, nn.247-48.

the terms of the Separation" was sufficient, citing *Garfield*, 2019 WL 7168004.[30] First, *Garfield* dealt with a complaint that contained allegations supporting an inference that the exchange ratio was unfair. The reorganization resulted in the minority losing potential tax benefits, reduced the company's book value per share from $20.61 to $19.65, and "created benefits for the [controller] … but not for the [minority]." 2019 WL 7168004, at *1, *4, *6. Second, although *Garfield* noted that a "strong record of fair dealing can influence the fair price inquiry," *id.* at *12, it did not purport to establish a rule that any defect in the negotiation process will support an inference of unfair price. Indeed, the Court of Chancery endorsed the reasoning in *Monroe County* just five months ago in dismissing a complaint that did not include adequate factual allegations supporting an inference of unfair price. *HUMC*, 2022 WL 3010640, at *20.

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[30] A1029-30.

Weaker yet, plaintiffs argued below that *Monroe County* and its progeny should be sloughed off as "recycled" following *In re CBS Corp. Stockholder Class Action and Derivative Litigation*, 2021 WL 268779 (Del. Ch. Jan. 27, 2021).[31] Plaintiffs misused *CBS*. Apart from *Monroe County*'s continued utility as shown by *HUMC*, there is no basis to suggest that the court in *CBS* purported to overrule three decades of Chancery decisions. *CBS* addressed a squeeze-in conflicted merger that created benefits for the controller—saving the CBS controller's investment in another controller-controlled company (Viacom)—to the minority stockholders' detriment. 2021 WL 268779, at *4, *15. The *CBS* complaint included detailed factual allegations showing that the board knew the combination "had no strategic or economic value to offset the costs inherent in the merger" and would cause the stock price to plummet. *Id.* at *46 & n.499. It was that detailed fact pleading of economic unfairness that led the court to hold that a special committee with independent members and qualified advisors had to face duty of loyalty claims.

[31] A1031.

2. Plaintiffs plead no facts supporting an inference that the Separation was economically unfair.

Three points show the defective nature of plaintiffs' conclusory allegations of "unfairness":

a. Plaintiffs' claim of unfairness admits but fails to take into account the fact that the Separation transformed Match from a controlled company to one whose control now rests "in a large, fluid, changeable and changing market." *Paramount Commcn's, Inc.* v. *Time, Inc.*, 1989 WL 79880, at *23 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140 (Del. 1989). Plaintiffs cannot satisfy their pleading burden without addressing that key part of the value exchange. *See Monroe Cnty.*, 2010 WL 2376890, at *2. There is no allegation of unfairness in the complaint taking into account the unlocking of control of Match. None.

Delaware courts have recognized for decades that control of a corporation is hugely valuable. Delaware case law has been shaped on this very premise, in determining when the *Revlon* doctrine applies,[32] in the judicial conception of the pro

[32] *Paramount Commc'ns Inc.* v. *QVC Network Inc.*, 637 A.2d 34, 42-43 (Del. 1994) (describing why control of a company is so valuable and invoking *Revlon* if a transaction results in control moving from broadly dispersed stockholders to a single controller).

rata rule in appraisal cases,[33] and in the substantial adjustments made in appraisal cases to correct for minority discounts.[34] By agreeing to a dual-class collapse that transformed Match into a non-controlled company, IAC conferred huge value on the Match minority.

Before the Separation, Old Match had a dual-class ownership structure under which IAC owned 80.4% of Match's stock and controlled 97.4% of Match's voting power.[35] Match's public stockholders held the remainder of the stock, representing 19.6% of the value and 2.6% of the vote.

As a result of the Separation, IAC no longer controls Match. Before the Separation, Old Match had two classes of stock, one with voting power that gave Old IAC voting control. In the Separation, Old IAC gave up voting control and distributed its economic ownership in Old Match to Old IAC's stockholders. New Match now has only a single class of stock with one vote per share, and thus

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[33] *Cavalier Oil Corp.* v. *Harnett*, 564 A.2d 1137, 1144-45 (Del. 1989) (dissenting shareholder entitled to proportionate, pro rata interest in the "true" value of the company's stock).

[34] *Doft & Co.* v. *Travelocity.com Inc.*, 2004 WL 1152338, at *10-11 (Del. Ch. May 21, 2004) ("Relying on recent precedents, the court will adjust the [minority trading value] by adding a 30% control premium.").

[35] A774, ¶ 43.

control of New Match is now "vested in the fluid aggregation of unaffiliated stockholders." *QVC*, 637 A.2d at 43.

The Separation thus unlocked New Match as a potential M&A target, and the Match public stockholders gained "the power to influence corporate direction through the ballot" and were positioned to share ratably in any future control premium. *Id.* The complaint fails to plead a reasonably conceivable claim of unfairness because it ignores the enormous benefit flowing to the Old Match public stockholders from Old IAC relinquishing its high-vote shares. "The existence of a control block of stock in the hands of a single shareholder . . . does have real consequences to the financial value of 'minority' stock." *Time*, 1989 WL 79880, at *23. A controlled company is "a less desirable or less practically achievable target" to a potential acquirer, and therefore the potential for a sale is reduced substantially. *Id.* at *24.[36]

This transaction is the "obverse" of transactions where the public stockholders are foreclosed from a future control premium. *See In re NCS Healthcare*, 825 A.2d at 255. Old IAC's relinquishment of control has the "practical consequence" of

[36] B128 (recognizing that transaction "[u]nlocks Match as a potential M&A target").

enhancing the public stockholders' prospects of a "future control premium or private market transaction." *Time*, 1989 WL 79880, at *23-24. Delaware's sale-of-control jurisprudence is built on the premise that the stockholders' one opportunity to receive a control premium is on the sale of the company, which Old IAC's relinquishment of control allowed for the first time. *See QVC*, 637 A.2d at 43-45 (control premium is an asset of the stockholders in an uncontrolled company). By contrast, had Old IAC not surrendered its control over Old Match, it could have sold its controlling stake to a third party, taken a control premium for itself, and left the Old Match minority public stockholders as the minority in perpetuity. *See Omnicare, Inc.* v. *NCS Healthcare, Inc.*, 818 A.2d 914, 938 (Del. 2003) ("The stockholders with majority voting power . . . had an absolute right to sell or exchange their shares with a third party at any price."); *Cheff* v. *Mathes*, 199 A.2d 548, 555 (Del. 1964) ("[A] substantial block of stock will normally sell at a higher price than that prevailing on the open market, the increment being attributable to a 'control premium.'").[37] Now, any control premium in a sale of Match will be shared by all the Match stockholders ratably.

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[37] Such a sale typically would attract a premium to market of 30% to 50%. *See, e.g.*, *Wilmington Sav. Fund Soc'y, FSB* v. *Foresight Energy LLC*, 2015 WL 7889552, at *9 n.3 (Del. Ch. Dec. 4, 2015); *In re S. Peru Copper Corp. S'holder Derivative*
(Continued . . .)

b. The complaint improperly focuses on the fairness of IAC's *initial* Separation proposal instead of the fairness of the *actual agreed-upon* deal terms:

- Plaintiffs allege that Match's stock price fell by 2.4% when IAC's initial proposal was disclosed,[38] but ignore that Match's stock price increased by 8.6% when the final deal terms were announced on December 19, 2019—a value increase of $1.7 billion.[39]

- Plaintiffs allege that the initial 2.4% decline [redacted] [redacted][41] All of the complaint's allegations about "leverage" are

Litig., 52 A.3d 761, 819 (Del. Ch. 2011) (applying "conservative" control premium of 23.4%), *aff'd sub nom. Ams. Mining Corp.*, 51 A.3d 1213.

[38] A801-02, ¶¶ 87-88.

[39] B342. Having pled the stock market reaction, plaintiffs have included in the pleading record the market's reaction to the deal. *In re Lear*, 967 A.2d at 656 n.65.

[40] A804, ¶ 94; A808, ¶ 103.

[41] B123; *see* A808-09, ¶ 104; A821, ¶ 128.

based on plaintiffs' beliefs (not a factual basis for unfairness in any event) [redacted]

- Plaintiffs allege that Match [redacted][42] but ignore that Match [redacted][43]

Plaintiffs cannot base a claim of unfairness on the terms of IAC's initial proposal. That's like evaluating the game based on the score at the end of the first inning. What matters are the final deal terms.[44]

c. The complaint's allegations of unfairness based on customary contractual provisions to maintain the tax-free status of the Separation (to the benefit of all Match stockholders and IAC) are premised on a hypothetical alternative taxable transaction that never would have—and never has—proceeded in the real world. Below, plaintiffs could not identify *any* public company spinoff *ever* done on a

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[42] A807, ¶ 100; A809, ¶ 105.

[43] B128.

[44] Plaintiffs acknowledge the dramatic increase in New Match's value following the Separation, but claim it was consistent with the overall market increase. A836, ¶ 156. The New Match value increase (85%) outstripped the overall market increase (70%), a fact that debunks plaintiffs' conclusory narrative that New Match was spun off in some hobbled value-destructive way. *Id.*; B344; *see* B434 (discussed at A1104).

taxable basis; it was undisputed that doing the Separation tax-free was valuable to *all* as it prevented almost *half* of the transaction's value being lost to taxes.[45] Plaintiffs cannot ask for an irrational inference that the Separation could have proceeded in a commercially inconceivable way, i.e., as a taxable spin. That is, in a word, unreal.

Plaintiffs have never disputed that under the 2019 Tax Matters Agreement, IAC agreed to take on the risk of potential spinoff tax liability that would otherwise fall on New Match under governing tax law.[46] Instead, plaintiffs focus on the agreement by "both companies … to refrain for two years from engaging in any post-Closing transactions that might jeopardize the Separation's tax-free status." Opinion, *3. In the face of Match's public filings that demonstrate otherwise, plaintiffs claim that Match was locked out of growth by acquisition as a result of those standard restrictions.[47] But plaintiffs cannot and do not plead *facts* suggesting

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[45] *See* B287-88; B317-18; B373-74.

[46] Plaintiffs have not disputed that under U.S. tax law, New Match (not New IAC) would have been at risk if the Separation became taxable by post-Separation conduct, absent agreement otherwise. *See* 26 U.S.C. § 355(c)(2)(A) (if distribution does not qualify as tax-free, "gain shall be recognized to the *distributing corporation*" (emphasis added)); B289-90; B316-17; B375-76.

[47] A844-45, ¶ 171. Plaintiffs' conclusory, non-fact-based allegations are contradicted by objective facts not subject to reasonable dispute: Match bought

(Continued . . .)

that these standard restrictions precluded Match from doing anything that made sense for Match to do. Such unsupported allegations "amount to speculation" and do not support a reasonable inference. *Berteau*, 2021 WL 2711678, at *21.

Moreover, the Tax Matters Agreement allows either party to engage in restricted transactions as long as it gives the other party a tax opinion that the desired transaction will not affect the tax-free status of the deal.[48] Such tax opinions are a common staple of post-spin M&A transactions. Plaintiffs never addressed that escape hatch or explained how or why the Tax Matters Agreement prevents New Match from engaging in "value maximizing transactions."[49]

At bottom, the complaint promotes the inference that the Separation Committee somehow could have secured some additional benefit if it had insisted on a transaction structure that would have increased transaction costs, transferred

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Hyperconnect for $1.7 billion within one year of the Separation. *See* Match Grp., Annual Report (Form 10-K) 47 (Feb. 25, 2021), https://d18rn0p25nwr6d.cloudfront.net/CIK-0000891103/c459b488-446c-40d8-b564-8d1505b1284f.pdf (cited in A835-36, ¶ 155; A853, ¶ 194; A855-57, ¶¶ 199-200). This fact, elided purposely by plaintiffs who asked for another chance to amend so they could mine Match's updated public filings for pleading fodder, *see* A20, Dkt. 77, ¶ 17, belies any inference that Match was harmed by being locked out of the M&A market.

[48] A305; A593-94; *see also* B290-91; B317; B375.

[49] A844-45, ¶ 171.

almost *half* of the value to the tax collectors, benefitted neither party, and would *never have proceeded* in the real world. But it is not reasonable to base a complaint on the presumption that a transaction would proceed in a tax-stupid, unprecedented, and commercially inconceivable way.

* * *

In sum, the complaint makes no fact-based effort to address the Separation as an overall transaction with myriad features—all of which are pleaded but many of which (those positive for the Old Match stockholders) are just ignored. The claim of "unfairness" fails to 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, much less deal with the reality that this incremental ownership stake came on top of the substantial value to Old Match's minority stockholders flowing from the dual-class collapse that unlocked control of Match. That blinkering fails to state a claim.

III. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST MR. DILLER

A. Question Presented

Should this Court reject the per se "ultimate human controller" rule pressed by plaintiffs and affirm the dismissal of plaintiffs' claims against Mr. Diller on the alternative ground that Mr. Diller was not Old Match's controlling stockholder—Old IAC, a multibillion-dollar public company, was? *See* A1037-39, B333-34; B379-83.

B. Scope of Review

See supra Point II.B.

C. Merits of Argument

Consistent with the poor incentives created by *MFW* creep, plaintiffs here argue for a creep in the traditional definition of a "controlling stockholder" under Delaware law. Plaintiffs argue that Old Match had two controlling stockholders—its actual controlling stockholder, Old IAC, and Barry Diller, who owned no stock in Old Match, and held no director or officer position at Old Match. This argument is inconsistent with Delaware law on several important grounds. Regardless of how the Court rules on the other issues, it should reach this issue and dismiss Mr. Diller from the case.

Dismissal as against Mr. Diller is warranted because plaintiffs pled no facts supporting any inference that IAC's corporate veil could be pierced such that any liability that attaches to IAC in its capacity as Old Match's controlling stockholder can also be passed to Mr. Diller solely by reason of Mr. Diller's alleged control over IAC. The issue was briefed below, but not reached by the Court of Chancery given its ruling that the Separation complied with *MFW*. *See* Opinion, *26.[50]

Plaintiffs' claims against Mr. Diller rest on the incorrect premise that he owed fiduciary duties to Old Match as a controller. Drawing on language from *In re Ezcorp*—the decision that may have kicked off *MFW* creep—plaintiffs contend that Old IAC was Old Match's controlling stockholder, and that because Mr. Diller allegedly controlled Old IAC, he also owed fiduciary duties to Old Match as its "ultimate human controller."[51] Latching onto *Ezcorp*'s use of the phrase "ultimate human controller," plaintiffs press—without regard to the specific facts addressed in *Ezcorp*—for a per se rule that "[l]iability for breach[es] of fiduciary duty … extends

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[50] The court below observed that Diller "is not a fiduciary to Old Match stockholders." Opinion, *29.

[51] A1037-39.

to outsiders who effectively controlled the corporation ... [and] it does not matter whether the control is exercised directly or indirectly."[52]

Plaintiffs' per se "ultimate human controller" rule flouts the admonition that "Delaware law does not blithely ignore corporate formalities." *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).[53] Whether Mr. Diller owed fiduciary duties to Old Match and its minority stockholders turns solely on whether he was a controlling stockholder of Old Match, not Old IAC. Plaintiffs conceded that Diller was not Old Match's controlling stockholder, not disputing that he: (1) owned no shares in Old Match; (2) was never a director or officer of Old Match; and (3) had no direct involvement in the negotiation of the Separation.[54]

Thus, Mr. Diller can only be liable to Old Match if the Court pierces IAC's veil to hold Diller liable for IAC's alleged conduct. Plaintiffs advance no grounds

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[52] A1039 (quoting *Ezcorp*, 2016 WL 301245, at *9).

[53] The *Trenwick* court observed that the ultimate stakeholders of a company's subsidiary (its creditors) could not assert fiduciary duty claims against the parent's directors because "if there was a breach of fiduciary duty by conduct at the [parent]-level toward [the subsidiary], the proper defendant is [the parent] itself … not the directors of [the parent]." 906 A.2d at 194.

[54] A757-58, ¶ 20; A799-834, ¶¶ 85-148; A240-53 (Proxy).

for why the court should simply ignore IAC's corporate separateness without so much as a *single* allegation to support veil piercing. Applying an "ultimate human controller" test in the manner plaintiffs urge would turn Delaware law on its head, making it the default rule that the human owners of controlling stockholder-corporations are subject to corporate liabilities regardless of whether a plaintiff has pled any facts from which a court could infer that corporate separateness can be ignored. Yet, a key and intentional attribute of the corporate form is the ability to legally separate ownership from liability. An "ultimate human controller" rule eviscerates that separation, without justification. Delaware's veil piercing and fraudulent conveyance laws already address those situations in which responsibility for corporate liabilities should equitably or legally pass directly to the owners of the corporation. An "ultimate human controller" rule thus addresses a nonexistent problem.

That is so here. Plaintiffs have a controlling stockholder to sue, IAC—a Nasdaq-listed multibillion-dollar market cap company—if they can state a claim. Delaware corporation law is built on the idea that when corporations are well-capitalized, their existence must be respected and not disregarded. The notion that the existence of a public corporation like IAC can be ignored so that an extra or "dual controller" defendant can be named is yet another aspect of *MFW* creep this Court should reject so that those who depend on Delaware law can safely rely on the traditional principles that have made it America's leading corporate law. *See* Hamermesh, *supra* n.3, at 344-48.

Furthermore, *Ezcorp* cannot be read as broadly as plaintiffs espouse. *Ezcorp* undertook an alter ego analysis before concluding that the ultimate human controller could be sued individually for breach of fiduciary duty.[55] The cases *Ezcorp* primarily relied on—*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)—each make clear there is no per se "ultimate human controller" rule, but rather that a plaintiff must allege facts to support piercing the controlling stockholder's veil before corporate separateness will be ignored.[56]

Here, plaintiffs did not allege such facts. On this alternative ground, the dismissal of plaintiffs' claims against Mr. Diller should be affirmed, reaffirming the clarity with which Delaware has traditionally approached this area of law.

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[55] 2016 WL 301245, at *2 (Ezcorp's high-vote stock was owned *solely* by a limited partnership, whose general partner was owned *solely* by a corporation, and that corporation was owned *solely* by one person—the only person who could exercise the controller's voting power).

[56] *See* B380-82.

CONCLUSION

This Court should affirm the dismissal of the complaint.

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2023, a copy of the ***[PUBLIC VERSION] Corrected Answering Brief of Barry Diller, Joey Levin, Glenn Schiffman, Mark Stein, Gregg Winiarski and IAC Holdings, Inc.*** was served by File & Serve *Xpress,* on the following attorneys of record:

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