SPAC THE DECK: WHY THE CONTROL EXERTED BY SPAC SPONSORS SUBJECTS DE-SPAC TRANSACTIONS TO ENTIRE FAIRNESS REVIEW

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ABSTRACT

Special purpose acquisition companies (SPACs), otherwise known as blank check companies, are corporations created to raise capital from investors with the express purpose of using such capital to acquire an already existing business. Much like a traditional merger, the transaction between the SPAC and the target company (formally called the "Initial Business Combination" or colloquially the "de-SPAC transaction") is highly scrutinized in shareholder litigation. However, Delaware courts have not definitively established under which standard these de-SPAC transactions should be reviewed. This Note examines the SPAC structure, evaluates the arguments for the respective standards, and ultimately concludes that Delaware courts should review de-SPAC transactions under the entire fairness standard. Further, this Note argues that SPACs can rebut the presumption of entire fairness and earn business judgment review by following the steps set forth in the seminal decision of *Kahn v. M & F Worldwide Corp.*, which have been found to be applicable to a wide range of corporate transactions.

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INTRODUCTION

A special purpose acquisition company ("SPAC"), also known as a blank-check company, is a corporation that raises capital with the sole purpose of effectuating a business combination with another company.[1] The initial business combination between the SPAC and the target company is colloquially known as a de-SPAC transaction ("de-SPAC transaction" or alternatively "Initial Business Combination").[2] But not all SPACs lead to happy outcomes for investors,[3] and shareholders have taken to the Delaware courts to challenge the de-SPAC transaction.[4]

In the leading SPAC litigation, *In re MultiPlan Corporation Stockholders Litigation*, the Delaware Court of Chancery determined that entire fairness review was appropriate for the de-SPAC transaction at issue, but the Court did not establish entire fairness as the standard over all de-SPAC transactions.[5] This Note seeks to determine whether the SPAC structure should presumptively subject de-SPAC transactions to entire fairness review. Part I of this Note will provide an overview of the SPAC lifecycle and will highlight the role of the SPAC Sponsor throughout. Part II will discuss the potential standards of review. Part III will examine whether the individual, entity, or team that leads the SPAC (collectively the "Sponsor") qualifies as a controlling shareholder, and whether the de-SPAC transaction presents an actionable conflict subjecting the transaction to entire fairness review. Part IV will first discuss how the dual protections established in *Kahn v. M & F Worldwide Corporation*[6] ("*MFW*") can be readily applied to the de-SPAC transaction to provide SPACs an applicable framework to secure business judgment deference; and then Part IV will propose that by strictly following the

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1. Ramey Layne & Brenda Lenahan, *Special Purpose Acquisition Companies: An Introduction*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 6, 2018), https://corpgov.law.harvard.edu/2018/07/06/special-purpose-acquisition-companies-an-introduction/ [https://perma.cc/WPK8-7V7T].

2. *See id.*

3. *See generally* Michael Klausner et al., *A Sober Look at SPACs*, 39 YALE J. ON REG. 228 (2022).

4. *In re* Multiplan Corp. S'holders Litig., Docket No. 2021-0300 (Del. Ch. argued Sept. 21, 2021); Delman v. GigAcquisitions3, Docket No. 2021-0679 (Del. Ch. filed Aug. 4, 2021); *In re* XL Fleet (Pivotal) S'holder Litig., Docket No. 2021-0808 (Del. Ch. filed Sept. 20, 2021).

5. *In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784, 809 (Del. Ch., 2022).

6. Kahn v. M & F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014), *overruled by* Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018).

MFW formalities, a SPAC can earn business judgment deference at the pleadings stage.

I. OVERVIEW OF THE SPAC LIFECYCLE

This Part will provide background on the lifecycle of a SPAC and its typical terms. Section A will discuss the SPAC structure, particularly focusing on its capitalization and voting rights. Section B will outline the role of the SPAC Sponsor in the structure's formation and registration process. Section C will examine the de-SPAC transaction and highlight how the SPAC's Initial Business Combination compares to a traditional corporate merger. And Section D will outline the incentives of Sponsor and non-Sponsor investors to participate in a SPAC.

A. THE SPAC STRUCTURE

SPACs are newly created corporations that raise money through an initial public offering (IPO) with the express purpose of using the funds to acquire one or more existing businesses or assets within a defined term.[7] After raising capital and identifying a target company for the proposed acquisition, known as the Initial Business Combination or de-SPAC transaction, the SPAC puts the transaction to a vote before its investors: they vote whether to (i) approve the merger and (ii) participate in the merged company or redeem their shares at par plus interest.[8] This right of redemption is the defining feature of the SPAC structure. Unlike a traditional corporate merger where shareholders may only be redeemed via appraisal rights if they vote against the transaction, SPAC shareholders may be redeemed irrespective of whether they vote for or

7. Interestingly, SPACs are not a new corporate structure and trace their roots to the blank-check companies of the 1980's. Daniel S. Riemer, *Special Purpose Acquisition Companies: SPAC and Span, or Blank Check Redux?*, 85 WASH. U.L. REV. 931, 934-43 (2007). However, they experienced a renaissance in 2020 and 2021, and SPAC IPOs rose to a newfound level of prominence, accounting for over half the IPO issuances over the period. Klausner et al., *supra* note 3, at 230 ("In both 2020 and 2021 (through November), SPAC IPOs accounted for more than half of total IPOs, and among firms that went public in those years, SPAC mergers accounted for roughly 22 [percent] and 34 [percent], respectively.").

8. *See* Klausner et al., *supra* note 3, at 230.

against the transaction.[9] This redemption mechanism distinguishes SPACs from traditional corporations and creates distinct conflicts, challenges, and incentives.[10] But once a SPAC receives investor approval for the transaction and combines with the target company, the merged company operates like a traditional corporation and the vestiges of the SPAC disappear.

SPACs are created and managed by a group of founders, known as Sponsors, who may be associated with a private equity or hedge fund or otherwise be an independent group of business executives, entrepreneurs, individual investors, or the like.[11] In return for its efforts organizing the SPAC, the Sponsor earns a "promote" of 20 percent ownership in the SPAC's post-IPO shares.[12] The "promote" is structured through a special class of stock, commonly referred to as Founder Shares, where the Sponsor pays a nominal amount, usually $25,000, for the shares.[13] Post IPO, Founder Shares remain a separate class of stock from that held by the public shareholders; importantly, the Founder Shares only convert into commonly held shares if the SPAC completes the de-SPAC transaction.[14] Such conversion typically occurs on a one-for-one basis, but the terms may vary.[15] However, if the SPAC does not complete the de-SPAC transaction, the shares expire worthless.[16]

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9. Layne & Lenahan, *supra* note 1 ("Under stock exchange listing rules, if a shareholder vote is sought, only shareholders who vote against the De-SPAC transaction are required to be offered the ability to redeem their public shares, but SPAC charter documents typically require the offer to be made to all holders.").

10. Due to the right of redemption, the proceeds of the SPAC IPO are placed in escrow in a trust account. Pursuant to the SPAC's charter, "cash in the trust can be used only to (a) acquire a company, (b) contribute to the capital of the company formed by the SPAC's merger, (c) distribute to shareholders in liquidation if the SPAC fails to consummate a merger, or (d) redeem shares." Klausner et al., *supra* note 3, at 237.

11. *Id.* at 230.

12. *Id.* at 232.

13. Layne & Lenahan, *supra* note 1.

14. Hunter Fortney, SPAC Attack: An Examination of SPAC Director Compensation and Its Legal Implications 3-4 (Aug. 11, 2021) (unpublished manuscript), https://ssrn.com/abstract=3911337 [https://perma.cc/29QJ-SVLS].

15. For example, the "exchange ratio upon which the founder shares convert to public shares will be adjusted to gross the founder shares up to 20 [percent] of the total founder shares and public shares and equity-linked securities outstanding." Layne & Lenahan, *supra* note 1.

16. Usha Rodrigues & Mike Stegemoller, *Exit, Voice, and Reputation: The Evolution of Spacs*, 37 DEL. J. CORP. L. 849, 894 (2013).

In contrast, public investors are sold units through the SPAC IPO, usually priced at $10 per unit "of one share of common stock and a fraction of a warrant to purchase a share of common stock in the future."[17]

Additionally, each unit contains the right of redemption, where investors may elect to participate in the proposed de-SPAC transaction or instead redeem their shares at par plus interest; the common stock and warrant are separately tradeable, so should an investor elect to redeem, the investor will keep the warrant originally purchased.[18]

Despite the availability of this option, the entire SPAC structure is designed towards receiving approval for the proposed de-SPAC transaction. The Sponsor and other holders of Founder Shares will typically commit from the outset to vote their shares in favor of the de-SPAC transaction.[19] For example, if "at least 20 [percent] of the SPAC's outstanding shares will be committed to vote in favor of a transaction, [] only 37.5 [percent] of the public shares [are required] to achieve a majority vote and approve the transaction."[20]

Finally, like a traditional merger, SPACs often arrange financing in anticipation of signing the acquisition agreement; however, SPACs typically seek private equity financing, rather than debt.[21] Private investment in public equity ("PIPE") commitments are commonly sought to both finance a portion of the purchase price and to plug whatever gap in funding may arise from the common stockholder redemptions.[22]

For the purposes of this Note, the distinguishing features of the SPAC transaction are the Founder Shares (and subsequent conversion dynamics), the right of redemption afforded to investors, and the role of the Sponsor throughout the SPAC lifecycle.

B. ROLE OF SPAC SPONSORS IN THE FORMATION PROCESS

SPAC Sponsors drive the formation process from incorporation through registration. As previously mentioned, Sponsors are compensated for their efforts in organizing the SPAC through their promote; in return, the nominal funding plus additional investments are put towards the costs

17. Layne & Lenahan, *supra* note 1.
18. Klausner et al., *supra* note 3, at 237.
19. Layne & Lenahan, *supra* note 1.
20. *Id.*
21. *Id.*
22. Klausner et al., *supra* note 3, at 238. *See also* Fortney, *supra* note 14, at 4.

of setting up the SPAC, namely the legal, underwriting, and transaction fees.[23]

To start, the Sponsor works with a legal advisor to incorporate and organize the SPAC, and with underwriters to capitalize the SPAC through an IPO.[24] The SPAC must register with the U.S. Securities and Exchange Commission (SEC) and submit the necessary disclosures.[25]

The Sponsor, with its advisors, creates the bylaws and charter of the SPAC and selects its board of directors.[26] To be listed on either of the largest American stock exchanges–the New York Stock Exchange (NYSE)[27] or the Nasdaq[28]–a majority of the directors must be independent. Much like for a traditional corporation, SPAC directors are selected on account of their industry expertise,[29] investing experience,[30]

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23. Klausner et al., *supra* note 3, at 250-52.

24. *Id.*

25. "A SPAC will go through the typical IPO process of filing a registration statement with the U.S. Securities and Exchange Commission ("SEC"), clearing SEC comments, and undertaking a road show followed by a firm commitment underwriting." Layne & Lenahan, *supra* note 1. *See also* Klausner et al., *supra* note 3, at 236-39.

26. Layne & Lenahan, *supra* note 1.

27. N.Y. STOCK EXCH., NYSE LISTED COMPANY MANUAL: SECTION 303A CORPORATE GOVERNANCE STANDARDS FREQUENTLY ASKED QUESTIONS, https://www.nyse.com/publicdocs/nyse/regulation/nyse/FAQ_NYSE_Listed_Company_Manual_Section_303A_7_28_2021.pdf [https://perma.cc/UG47-R5GV] ("Listed companies must have a majority of independent directors.").

28. NASDAQ, 5600 Corporate Governance Requirements: Rule 5605(b)(1), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series [https://perma.cc/E5DZ-92S8] ("A majority of the board of directors must be comprised of Independent Directors . . . .").

29. For example, one director nominee in a Technology, Media, and Telecommunications (TMT) focused SPAC was a "senior technologist and entrepreneur with more than 25 years of experience in Radio-Frequency and Optical Interconnect Systems and Components and Radio-Frequency Integrated Circuit Semiconductor technologies." GigCapital3, Inc., Amendment No. 4 to Registration Statement (Form S–1/A) 102 (Apr. 29, 2020) [hereinafter GigCapital3, Inc. Registration Statement].

30. Four of the five director nominees in Churchill Capital Corp III served in leadership roles in the investment business (Jeremy Abson, Glenn August, Mark Klein, and Malcolm McDermid). Churchill Cap. Corp III, Amendment No. 3 to Registration Statement (Form S–1/A) 110-11 (Feb. 13, 2020) [hereinafter Churchill Cap. Corp III Registration Statement].

applicable executive experience,[31] or otherwise useful backgrounds.[32] And the Sponsor weighs such criteria in selecting the initial directors for the SPAC.

That said, unlike a traditional corporation where directors are often limited in the number of outside boards they may sit on,[33] SPAC directors often serve on multiple boards of SPACs backed by the same Sponsor.[34] SPAC directorships also vary from traditional corporate directorships in both the size and terms of compensation.[35] Directors are generally compensated through Founder Shares, either granted directly or through economic interests in the SPAC Sponsor itself.[36] As a result, most SPAC registration statements explicitly disclose that "none of [the] executive officers, directors or director nominees have received any cash compensation for services rendered."[37]

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31. For example, in the aforementioned TMT-focused SPAC, one director nominee (John Mikulsky) had extensive experience in leadership roles in the semiconductor space, and another director nominee (Dr. Raluca Dinu) had similar extensive experience in the optics industry. *See* GigCapital3, Inc. Registration Statement, *supra* note 29, at 101-02.

32. *Id.* at 101 ("Mr. Miotto is a financial consultant and a [former] assurance partner . . . deemed to be a[n] 'audit committee financial expert' under SEC rules.").

33. Kosmas Papadopoulos, *Director Overboarding: Global Trends, Definitions, and Impact*, HARV. L. SCH. F. ON CORP. GOVERNANCE 2 (Aug. 5, 2019), https://corpgov.law.harvard.edu/2019/08/05/director-overboarding-global-trends-definitions-and-impact/ [https://perma.cc/UCH5-UW5K] ("A growing number of public companies appear to address overboarding, often by placing limitations on the number of outside boards that a CEO and directors may serve on, and even putting additional limits on audit committee members as well.").

34. *See* Fortney, *supra* note 14, at 11 ("[C]ertain directors may participate in multiple SPACs of the same Sponsor."). In Churchill Capital Corp III, each of the director nominees simultaneously served as a director in Churchill Capital Corp II, and two of the director nominees had previously served as a director in Churchill Capital Corp—both SPACs were backed by the Sponsor of Churchill Capital Corp III. *See* Churchill Cap. Corp III Registration Statement, *supra* note 30, at 110-11.

35. *See* Fortney, *supra* note 14, at 5 ("The payout structure of SPAC Director compensation is materially different than director compensation at most publicly traded companies.").

36. *See id.* at 7 (citing Golden Falcon Acquisition Corp., Prospectus (424B4) 136 (Dec. 21, 2020)). *See also* GigCapital3, Inc. Registration Statement, *supra* note 29, at 75 ("[Directors have] a financial and voting interest in [the] Sponsor that entitles [each of them] to participate in any economic return that the Sponsor receives for its investment in the Company in accordance with terms negotiated with the other holders of financial and voting interests in [the] Sponsor.").

37. Fortney, *supra* note 14, at 6-7 (citing Golden Falcon Acquisition Corp., Prospectus (424B4) 136 (Dec. 21, 2020)). *See also* Churchill Cap. Corp III Registration

Upon completing the formation process, the SPAC is capitalized and its directors may proceed to select a target company to merge with to complete the Initial Business Combination.

C. DE-SPAC TRANSACTIONS

Procedurally, de-SPAC transactions operate similarly to public company mergers: a target company is identified, merger discussions begin, a definitive agreement is signed, and the transaction is then voted upon by the shareholders.[38] Like a traditional public company merger vote, a SPAC must file a proxy statement and hold a shareholder meeting for the vote.[39] However, the redemption right held by common stockholders in a SPAC presents a wrinkle in shareholder voting: the shareholders vote on (i) whether to approve the merger ("for," "against," or "abstain") and (ii) whether to participate in the transaction or to redeem their shares.[40] Common stockholders who voted to redeem will be paid $10.00 per share plus interest in cash from the trust account.[41] And if a SPAC receives the necessary votes to approve the transaction, the SPAC may proceed forward to close the de-SPAC transaction and Sponsors can look to PIPE financing "to replace funds lost to redemptions and thereby reduce dilution."[42]

D. INCENTIVES TO PARTICIPATE IN A SPAC

SPACs offer attractive economics and potential upside for each type of investor. For the Sponsor, Founder Shares provide a mouth-watering opportunity: for just $25,000,[43] Sponsors purchase Founder Shares that

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Statement, *supra* note 30, at 112 ("None of [the] officers or directors have received any compensation for services rendered to [the SPAC] . . . .").

38. Layne & Lenahan, *supra* note 1.

39. Fortney, *supra* note 14, at 4.

40. Layne & Lenahan, *supra* note 1.

41. Klausner et al., *supra* note 3, at 237.

42. *Id.* at 253.

43. While sponsors acquire the Founder Shares for a nominal amount, such as the $25,000 referenced, sponsors provide additional financing by purchasing warrants "equal to the 2.0 [percent] upfront underwriting discount of the IPO . . . plus funds to cover the offering expenses and expenses to find a target, with the aggregate price of the purchased warrants in most recent deals hovering between 2.3 [percent] to 3.0 [percent] of the gross IPO proceeds." Kramer Levin Naftalis & Frankel LLP, *A SPAC Primer, M&A Monitor 2* (Mar. 01, 2021), https://www.kramerlevin.com/en/perspectives-search/a-spac-primer.html [https://perma.cc/5PXQ-8MZB].

may ultimately convert into 20 percent ownership of the SPAC, promising potential profits of tens,[44] if not hundreds of millions of dollars.[45] For retail investors, SPAC common stock offers "a chance to participate in the growth of promising companies."[46] According to Chamath Palihapitiya, a prominent SPAC Sponsor, a SPAC "democratizes access to high-growth companies"[47] and "can give a large swath of investors access to the kind of high-growth companies the well-connected have been making billions of dollars off of for years."[48] There are also benefits for non-Sponsor, non-retail investors, because although participating through common stock is an option, private placements often offer the preferred avenue to participate meaningfully in the SPAC and to share in the upside and attractive economics of the structure.[49]

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44. The Plaintiffs in another ongoing Delaware litigation case highlighted in their Complaint that the respective de-SPAC "merger was a financial windfall for Katz, the Sponsor, inside director Dinu, and the purportedly independent directors. Even though Gig3's stock price had fallen to $7.82 per share on May 6, 2021 (the day the merger was completed), Katz and the Sponsor reaped a return of approximately $39 million from the Merger." Complaint at 10, Delman v. GigAcquisitions3, No. 2021-0679 (Del. Ch. filed Aug. 4, 2021).

45. Complaint, *In re* Multiplan Corp. S'holders Litig., No. 2021-0300 (Del. Ch. filed Apr. 9, 2021). As alleged in the *Multiplan* litigation, "the founder shares, held mainly by [the Sponsor] but still giving the Board members multi-million-dollar windfalls, cost [the Sponsor] just $25,000 yet were worth ***over $300 million*** upon the Merger's closing, representing a personal return on investment of ***1,219,900 [percent]***." *Id.* at 4-5 (emphasis in original).

46. Hester M. Peirce, Comm'r, Sec. & Exch. Comm'n, Remarks at the Fordham Journal of Corporate and Financial Law Symposium: Here to Stay: Wrestling with the Future of the Quickly Maturing SPAC Market (Oct. 22, 2021), https://www.sec.gov/news/speech/peirce-remarks-fordham-journal-102221 [https://perma.cc/48CB-G7SU].

47. Charles Duhigg, *The Pied Piper of SPACs*, NEW YORKER (June 7, 2021), https://www.newyorker.com/magazine/2021/06/07/the-pied-piper-of-spacs [https://perma.cc/35DV-Q6BL].

48. Chamath Palihapitiya, *SPACs Need More Regulation and Oversight*, BLOOMBERG (May 27, 2021), https://www.bloomberg.com/opinion/articles/2021-05-27/spacs-can-take-away-the-insiders-advantage-in-ipos-and-markets [https://perma.cc/N78N-TSJJ].

49. Although the terms of private placements vary with each SPAC, private placements typically offer an opportunity to purchase the underlying security at a discount (convertible notes, common stock, warrants, etc.). *See* Churchill Cap. Corp III, Definitive Proxy Statement (Schedule 14A) 1 (Sept. 18, 2020) ("The Common PIPE Investment is subject to an original issue discount (payable in additional shares of Churchill's Class A common stock) of 1 [percent] for subscriptions of $250,000,000 or

Much like other investors in the SPAC, Sponsors have a common interest in maximizing the value of their shares. But at the outset of the SPAC lifecycle, Sponsors hold Founder Shares while other stockholders hold common shares.[50] Structurally, the interests of common stockholders and the Sponsors diverge around the event that triggers the conversion of Founder Shares to common stock: the de-SPAC transaction.[51] Sponsors maximize the value of their Founder Shares through the consummation of the de-SPAC transaction: if the transaction does not happen, their Founder Shares expire, *worthless*.[52] Theoretically, Sponsors are incentivized to seek a combination with *any* target company over none at all.[53] But once the de-SPAC transaction closes, and the Sponsor's shares convert from Founder Shares to common stock, the interests of the Sponsor and other stockholders realign; as holders of the same class of common stock,[54] they are all similarly motivated to maximize the value of the commonly held shares. But maximizing the value of the common shares is only achieved through combining with the *right* company. This divergence of interests around the de-SPAC transaction creates an inherent conflict, which is heightened as the completion window draws to a close.[55]

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less and 2.5 [percent] for subscriptions of more than $250,000,000 . . . .") [hereinafter Churchill Cap. Corp III, Definitive Proxy Statement].

50. GigCapital 3, Inc. Registration Statement, *supra* note 29, at 112,115 (disclosing that the Sponsor only holds founder shares and no common stock prior to the offering).

51. Churchill Cap. Corp III Registration Statement, *supra* note 30, at 16, 129, F-14 ("The shares of Class B common stock will automatically convert into shares of Class A common stock at the time of a Business Combination on a one-for-one basis, subject to adjustment.").

52. *Id.* at 60 ("The founder shares will be worthless if we do not complete an initial business combination.").

53. Peirce, *supra* note 46 ("What is good for the SPAC [S]ponsor may not be good for the SPAC investors.").

54. Churchill Cap. Corp III, Definitive Proxy Statement, *supra* note 49, at 16, 129, F-12 ("The Founder Shares will automatically convert into shares of Class A common stock upon consummation of a Business Combination on a one-for-one basis, subject to certain adjustments.").

55. *Id.* at 1 (defining "completion window" as the 24-month period following the completion of the registration in which the Sponsor must complete the Initial Business Combination, otherwise the Sponsor must redeem all the Class A common stock at par price and the Founder Shares of Class B common stock expire worthless).

II. STANDARD OF REVIEW FOR DE-SPAC TRANSACTIONS

As SPAC issuance continues to rise, the legal community has been busy eagerly predicting and preparing for a wave of SPAC litigation to follow.[56] Securities class actions against SPAC-related companies have increased from two in 2019, to five in 2020, to twenty-six in 2021.[57] SPAC shareholder lawsuits typically "challenge the de-SPAC transaction" or allege "fiduciary duty and securities law claims in connection with stock drops or other adverse events after the de-SPAC transaction."[58] Although these lawsuits resemble claims brought against a traditional public company, the SPAC's unique structure fosters new challenges. Plaintiffs argue that the structure creates conflicts of interest, misalignment between Sponsor, director, and shareholder interests, and improperly incentivizes the completion of a deal at the shareholders' expense.[59] This Note focuses on state law claims—specifically the

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56. Priya Cherian Huskins, *Why More SPACs Could Lead to More Litigation (and How to Prepare)*, ABA (June 25, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/07/spacs-litigation/ [https://perma.cc/CS2V-25WT]; Jonathan Gordon & Brendan F. Quigley, *SPACs to the Future: What Types of Litigation May Arise for SPACs and SPAC Targets?*, BAKER BOTTS: THOUGHT LEADERSHIP (Nov. 2, 2020), https://www.bakerbotts.com/thought-leadership/publications/2020/november/spacs-to-the-future-what-types-of-litigation-may-arise-for-spacs-and-spac-targets [https://perma.cc/ZDQ9-DQQM].

57. Sierra Jackson, *SPACs Under the Microscope as Lawsuits Mount*, REUTERS (Nov. 1, 2021), www.reuters.com/legal/transactional/spacs-under-microscope-lawsuits-mount-2021-11-01/ [https://perma.cc/9X9L-CKRX].

> Securities class actions against SPAC-related companies have been on the rise since 2019, when there were just two such lawsuits, according to a report from insurance brokerage Woodruff Sawyer. From January 2021 through October 29, 26 securities class actions were filed against SPAC-related companies, a 420 [percent] jump from 2020 when only five suits were brought, according to the data.

Id.

58. *What SPAC Sponsors, Directors and Officers Can Do to Mitigate Their Litigation Exposure*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP (Mar. 17, 2021), https://www.paulweiss.com/practices/litigation/securities-litigation/publications/what-spac-sponsors-directors-and-officers-can-do-to-mitigate-their-litigation-exposure?id=39540 [https://perma.cc/3GWN-P9PW].

59. *See id.*; LITIGATION RISK IN THE SPAC WORLD, QUINN EMANUEL

challenges to de-SPAC transactions of Delaware corporations—and seeks to determine what standard of review should be applied to such de-SPAC transactions.

A. Business Judgment Review

"Delaware's default standard of review is the business judgment rule, a principle of non-review that 'reflects and promotes the role of the board of directors as the proper body to manage the business and affairs of the corporation.'"[60] Business judgment review presumes that directors were informed, acted in good faith, and honestly believed that their actions were in the company's best interests.[61] Business judgment rule is highly deferential: "[u]nless one of its elements is rebutted, 'the court merely looks to see whether the business decision made was rational in the sense of being one logical approach to advancing the corporation's objectives.'"[62] As a result, corporate defendants strive to obtain business judgment review since a board's decision will likely be upheld when such presumptions are applicable.[63]

B. Entire Fairness

However, under Delaware law, it is well established that transactions between a corporation and a controlling stockholder are to be treated with suspicion.[64] These controller transactions are often reviewed under the

URQUHART & SULLIVAN 4 (2020), https://www.quinnemanuel.com/media/l00ldp5d /client-alert-litigation-risk-in-the-spac-world.pdf [https://perma.cc/3J76-9YP5].

60. Firefighters' Pension Sys. of Kansas City, Missouri Tr. v. Presidio, Inc., 251 A.3d 212, 249 (Del. Ch. 2021) (quoting *In re* Trados Inc. S'holder Litig. (Trados I), 2009 WL 2225958, at *6 (Del. Ch. 2009)).

61. Quadrant Structured Prods. Co. v. Vertin, 102 A.3d 155, 183 (Del. Ch. 2014) (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)) ("The rule presumes that 'in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'").

62. *Firefighters' Pension Sys.*, 251 A.3d at 249 (quoting *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 598 (Del. Ch. 2010) (Strine, V.C.)).

63. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 74 (Del. 2006) (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)) ("[W]here business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be 'attributed to any rational business purpose.'").

64. Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 678 (2005)

entire fairness standard, as "[a] controlling stockholder occupies a uniquely advantageous position for extracting differential benefits from the corporation at the expense of minority stockholders."[65] While the presence of a controlling stockholder does not subject *every* controller transaction to entire fairness, transactions where the controller is conflicted do require entire fairness review.[66] At issue in the de-SPAC transaction is whether SPAC Sponsors can be considered conflicted controllers under Delaware law. Specifically, the questions to be determined are (1) whether the Sponsor exerts sufficient control over the SPAC to be considered a controlling shareholder, and (2) whether the Sponsor's holdings are structured in a manner that creates a conflicted transaction. If both questions are answered in the affirmative, then Sponsors will be considered conflicted controllers and the de-SPAC transaction will be subjected to entire fairness review.

1. Transactions Involving Controlling Shareholders Are Treated with Suspicion

In determining whether a stockholder qualifies as a controller, the analysis "must take into account whether the stockholder, as a practical matter, possesses a combination of stock voting power and managerial authority that enables him to control the corporation, if he so wishes."[67] "While every stockholder with majority voting control is a controller, not every controller is a majority stockholder."[68] A stockholder who owns less

("Delaware is more suspicious when the fiduciary who is interested is a controlling stockholder."). *See* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (establishing entire fairness as the standard of review for transactions where a corporation's fiduciaries are conflicted); Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110 (Del. 1994) (applying entire fairness review to a cash-out merger by a controlling shareholder); Tornetta v. Musk, 250 A.3d 793 (Del. Ch. 2019) (extending entire fairness review to an incentive-based compensation agreement between a corporation and its Chairman, CEO, and alleged controlling shareholder).

65. *In re* Ezcorp Inc. Consulting Agreement Derivative Litig., 2016 WL 301245, at *11 (Del. Ch. 2016) (paraphrasing Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 678 (2005)).

66. *In re* Crimson Expl. Inc. S'holders Litig., 2014 WL 5449419, at *12 (Del. Ch. 2014).

67. *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 553 (Del. Ch. 2003).

68. *In re* Tesla Motors, Inc. S'holder Litig., No. 12711, 2020 WL 553902, at *4 n.24 (Del. Ch. 2020) (citing Kahn v. Lynch Commc'n Sys. Inc., 638 A.2d 1110, 1113-14 (Del.

than 50 percent of the corporation's outstanding stock, in other words a minority blockholder, "is not considered to be a controlling stockholder unless it exercises 'such formidable voting and managerial power that [it], as a practical matter, [is] no differently situated than if [it] had majority voting control.'"[69] Such control may exist generally or in regards to a challenged transaction.[70] In determining whether such control exists, "the focus of the [controller] inquiry [is] on the de facto power of a significant (but less than majority) shareholder, which, *when coupled with other factors*, gives that shareholder the ability to dominate the corporate decision-making process."[71]

Controller inquiries therefore start by examining the blockholder's voting power, but "there is no absolute percentage of voting power that is required in order for there to be a finding that a controlling stockholder exists."[72] The court then looks to "other factors,"[73] which have included "managerial supremacy,"[74] "the minority blockholder's role as a company's 'hands-on' CEO and 'inspirational force' who was 'involved in all aspects of the company's business,'"[75] and even where a company's public statements disclosed that the minority blockholder was "'able to exercise significant influence over [the] company' and that a loss of the blockholder 'would have a material adverse effect on [its] business and

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1994) ("[A] shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of a corporation." (internal quotation marks omitted)).

69. *In re* Morton's Rest. Grp. S'holders Litig., 74 A.3d 656, 665 (Del. Ch. 2013) (quoting *In re* PNB Holdings Co. S'holders Litig., 2006 WL 2403999, at *9 (Del. Ch. 2006)). *See also In re Tesla Motors*, 2020 WL 553902, at *4 (quoting Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 307 (Del. 2015)) ("A minority blockholder can, as a matter of law, be a controlling stockholder through 'a combination of potent voting power and management control such that the stockholder could be deemed to have effective control of the board without actually owning a majority of stock.'").

70. *In re Tesla Motors*, 2020 WL 553902, at *4 (citing Carsanaro v. Bloodhound Techs., Inc., 65 A.3d 618, 659 (Del. Ch. 2013) (quoting Williamson v. Cox Commc'ns Inc., 2006 WL 1586375, at *4 (Del. Ch. 2006) ("The requisite degree of control can be shown to exist generally or 'with regard to the particular transaction that is being challenged.'")).

71. *Id.* at *4 (quoting Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co., 2006 WL 2521426, at *4 (Del. Ch. 2006)) (emphasis added).

72. *Id.* (citing *In re* PNB Holdings Co. S'holders Litig., 2006 WL 2403999, at *9 (Del. Ch. 2006)).

73. *Id.* (quoting *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 553 (Del. Ch. 2003)).

74. *Id.*

75. *Id.*

operations.'"[76] Ultimately, the controller analysis is a fact-specific inquiry: whether a minority blockholder qualifies as a controller depends on the unique circumstances of the corporation or transaction.

In 2003, then-Vice Chancellor Leo E. Strine, Jr. set the "benchmark for the minimum degree of managerial clout needed to meet the actual control test where the alleged controller's holdings are well below 50 [percent] of a company's outstanding shares."[77] In *In re Cysive, Inc. Shareholders Litigation*, the court determined that a company's founder (who also served as its Chairman and CEO) only "controlled 36 [percent] of the [outstanding] shares before options"[78] between himself and "his close managerial-subordinate and family member-subordinates"[79] but nevertheless was a controlling shareholder. The court reasoned that the blockholder held "a large enough block of stock to be the dominant force in any contested [company] election . . . especially so when one considers the practical realities of his voting power," which included the votes of his subordinates and family members.[80] In 2013, then-Chancellor Strine reflected on his *Cysive* decision, noting that "this court made, perhaps, its most aggressive finding that a minority blockholder was a controlling stockholder" but ultimately defended the holding, reasoning that:

> [T]he blockholder not only held 35 [percent] of the company's stock, but he was the company's visionary founder, CEO, and chairman . . . [and] exercised more power than a typical CEO because he had placed "two of his close family members in executive positions at the company," which gave the blockholder influence over even "the ordinary managerial operations of the company."[81]

76. *Id.* (quoting *In re* Zhongpin Inc. S'holders Litig., No. CV 7393-VCN, 2014 WL 6735457, at *7 (Del. Ch. 2014) (*rev'd on other grounds*, *In re* Cornerstone Therapeutics Inc. S'holder Litig., 115 A.3d 1173 (Del. 2015))).

77. Larkin v. Shah, 2016 WL 4485447, at *14 (Del. Ch. 2016).

78. *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 535 (Del. Ch. 2003) ("When considering options, this group – taken together – controlled about 40 [percent] of the voting equity.").

79. *Id.*

80. *Id.* at 551-52.

81. *In re* Morton's Rest. Grp. S'holders Litig., 74 A.3d 656, 665-66 (Del. Ch. 2013) (quoting *Cysive*, 836 A.2d at 551-52).

Cysive remains a landmark ruling and, as noted in a 2016 decision, the Court of Chancery has often "invoked the facts of [*Cysive*] as a benchmark" for the controller inquiry.[82]

Since *Cysive*, Delaware "courts have been reluctant to apply the label of controlling stockholder—potentially triggering fiduciary duties—to large, but minority, blockholders."[83] In 2014, the Court of Chancery in *In re Crimson Exploration Inc. Stockholder Litigation* presented a detailed analysis of previous cases[84] where "the parties disputed whether a non-majority stockholder satisfied this actual control test."[85] The *Crimson* analysis highlighted that "[a]bsent a significant showing such as was made" in *Cysive*, Delaware courts are "reluctant" to find the existence of a controlling stockholder. [86] However, that is not to say the court will *never* find a minority blockholder to be a controlling shareholder. The *Crimson* analysis merely highlights that there is not a "linear, sliding-scale approach whereby a larger share percentage makes it substantially more likely that the court will find the stockholder was a controlling stockholder." [87]

For SPACs, where Sponsor shares ultimately convert into 20 percent of the outstanding stock, such a small block, paired with other realities of the structure, may be enough. In another 2014 decision, *In re Zhongpin Inc. Stockholders Litigation*, the Court of Chancery found a complaint sufficiently plead that a company's "founder, Chairman and Chief Executive Officer and [its] largest shareholder" who "only owned 17.3 [percent]"[88] of the outstanding stock, qualified as a controlling

82. Larkin v. Shah, 2016 WL 4485447, at *14 (Del. Ch. 2016) (citing *Morton's Rest. Grp.*, 74 A.3d at 665 ("More than once this court has invoked the facts of *In re Cysive, Inc. Shareholders Litigation* as a benchmark for the minimum degree of managerial clout needed to meet the actual control test where the alleged controller's holdings are well below 50 [percent] of a company's outstanding shares.")); *In re* KKR Financial Holdings LLC S'holder Litig., 101 A.3d 980, 991 (Del. Ch. 2014) (examining the facts in *Cysive* and its progeny to highlight the evolution of the controller standard). *Cf. In re* Crimson Expl. Inc. S'holders Litig., 2014 WL 5449419, at *11 (Del. Ch. 2014) (using *Cysive*'s facts to illustrate the sort of extreme showing needed to earn the title of controller). *See also In re* PNB Holdings Co. S'holders Litig., 2006 WL 2403999, at *10 (Del. Ch. 2006).

83. *In re Crimson*, 2014 WL 5449419, at *12.

84. *Id.* at *10-12.

85. *Id.*

86. *Id.* at *12.

87. *See id.* at *10-12.

88. *In re* Zhongpin Inc. S'holders Litig., No. 7393, 2014 WL 6735457, at *7 (Del. Ch. 2014), *rev'd on other grounds, In re* Cornerstone Therapeutics Inc., S'holder Litig.,

shareholder. Importantly, the company's 10-K explicitly stated that (i) he maintained "significant influence over [company] management and affairs," (ii) he was "substantially" relied upon to manage company operations, and (iii) his loss would have a "material adverse effect" on the company's "business and operations."[89] In 2018, the Court of Chancery found it "reasonably conceivable" that Elon Musk, a "22.1 [percent] stockholder"[90] in Tesla Motors and, at the time, its Chairman and CEO, could be considered a controlling stockholder on account of his "voting influence, his domination of the Board[,] . . . his extraordinary influence within the Company generally, the Board level conflicts that diminished the Board's resistance to Musk's influence, and the Company's and Musk's own acknowledgements of his outsized influence."[91] Again, while voting share is an important consideration, "the determinative factor in [the] controlling stockholder jurisprudence" *is and remains* "the 'ability' to control, rather than the actual exercise of control. . . ."[92]

2. *Conflicted Controller Transactions Require Entire Fairness*

"Entire fairness is not triggered solely because a company has a controlling stockholder. The controller also must engage in a conflicted transaction."[93] "Under current law, the entire fairness framework governs any transaction between a controller and the controlled corporation in which the controller receives a non-ratable benefit."[94] Conflicted controller transactions "fall into one of two categories: (a) transactions where the controller stands on both sides; and (b) transactions where the controller competes with the common stockholders for consideration."[95]

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115 A.3d 1173 (Del. 2015) (quoting Zhongpin's Annual Report on Form 10–K, filed on March 18, 2013).

89. *Id.* at *6-8 (quoting Zhongpin's Annual Report on Form 10–K, filed on March 18, 2013).

90. *In re* Tesla Motors, Inc. S'holder Litig., No. 12711, 2018 WL 1560293, at *4 (Del. Ch. 2018).

91. *Id.* at *19.

92. *In re* Tesla Motors, Inc. S'holder Litig., No. 12711, 2020 WL 553902, at *5 (Del. Ch. 2020) (quoting Superior Vision Servs. v. ReliaStar Life Ins., 2006 WL 2521426, at *4 (Del. Ch. 2006)).

93. *In re* Crimson Expl. Inc. S'holders Litig., 2014 WL 5449419, at *12 (Del. Ch. 2014).

94. *In re* Ezcorp Inc. Consulting Agreement Deriv. Litig., No. 9962, 2016 WL 301245, at *11 (Del. Ch. 2016).

95. *In re Crimson*, 2014 WL 5449419, at *12.

These "transactions where the controller competes with the common stockholders for consideration" are "situations where the controller does not stand on both sides of the transaction, but nonetheless receives different consideration or derives some unique benefit from the transaction not shared with the common stockholders."[96] Generally, these competing-for-consideration transactions can be thought of as cases of (1) disparate consideration, (2) differential consideration, or (3) unique benefits.[97] Much like the controller analysis, the conflicted transaction analysis is a fact-specific inquiry that considers both the form and substance of the transaction at issue.

"Delaware courts have applied the entire fairness framework to a variety of transactions in which controlling stockholders have received non-ratable benefits. . . ."[98] Specifically, "Delaware decisions have applied the entire fairness framework to compensation arrangements, consulting agreements, services agreements, and similar transactions between a controller or its affiliate and the controlled entity."[99] Such examples are clear instances where a controller stands on both sides of a transaction.

Less clear are instances where a "transaction appear[s] superficially to treat all stockholders equally" but practically provides a non-ratable

96. *Id.*

97. In a 2021 decision, Vice Chancellor Slights highlighted the types of one-sided controller transactions which create an actionable conflict:

> This court has identified three examples where a controller might compete with the minority in a manner that creates a legally cognizable conflict: "(1) where the controller receives greater monetary consideration for its shares than the minority stockholders; (2) where the controller takes a different form of consideration than the minority stockholders; and (3) where the controller gets a 'unique benefit' by extracting something uniquely valuable to the controller, even if the controller nominally receives the same consideration as all other stockholders."

Flannery v. Genomic Health, Inc., No. 2020-0492, 2021 WL 3615540, at *17 (Del. Ch. 2021) (quoting IRA Tr. FBO Bobbie Ahmed v. Crane, 2017 WL 7053964, at *6 (Del. Ch. 2017)). The 2021 decision builds upon a 2014 decision, in which the Court categorized such transactions as (1) "disparate consideration" cases, (2) "continuing stake" cases, and (3) "unique benefit" cases. *In re Crimson*, 2014 WL 5449419 at *14.

98. *In re Ezcorp*, 2016 WL 301245, at *13.

99. *See id.* at *15.

benefit to the controller.[100] The court examined this theory of non-ratable benefits in a recent 2021 decision *In re CBS Corp. Stockholder Class Action & Derivative Litigation*, highlighting the previous decision in *IRA Trust FBO Bobbie Ahmed v. Crane* to be "instructive" in the non-ratable benefits analysis.[101] In *IRA Trust*, the court "found it reasonably conceivable that a non-ratable benefit was extracted" in a recapitalization that "appeared superficially to treat all stockholders equally" but was allegedly "motivated to allow the controller to perpetuate its control in future transactions."[102] In *In re CBS Corp.*, plaintiffs alleged that the controlling shareholder engineered a merger to bail out her holding company's investment in the target company, which would in turn make the holding company a more attractive prospect for a future sale.[103] The Court similarly looked past the superficial appearance of the challenged transaction and found such particularly pled allegations created a reasonable inference of a non-ratable benefit.[104]

3. *Entire Fairness May be Required for Additional Transaction Specific Reasons*

Beyond the Sponsor's status as a conflicted controller, entire fairness review may be required for the de-SPAC transaction where (1) directors are interested in the transaction or (2) they are not sufficiently independent due to their outstanding personal or working relationships with the Sponsor.

a. Approval by Interested Directors Requires Entire Fairness Review

When "evidence in the record suggests that a majority of the board of directors were interested in the transaction," an entire fairness analysis is required.[105] "A director is interested in a transaction if 'he or she will receive a personal financial benefit from a transaction that is not equally

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100. *In re* CBS Corp. Stockholder Class Action & Derivative Litig., 2021 WL 268779, at *36 (Del. Ch. 2021), *as corrected* (Feb. 4, 2021).

101. *Id.* (citing IRA Tr. FBO Bobbie Ahmed v. Crane, No. 12742, 2017 WL 7053964 (Del. Ch. 2017)).

102. *Id.*

103. *Id.*

104. *Id.*

105. *In re* Tele-Commc'ns, Inc. S'holders Litig., No. Civ.A.16470, 2005 WL 3642727, at *8 (Del. Ch. 2005).

shared by the stockholders.'"[106] "Directors are 'self-interested' when they appear on 'both sides of a transaction' or expect to 'derive any [material] personal financial benefit from it in the sense of self-dealing.'"[107] An incidental interest may be permitted, but a substantial interest is disqualifying.[108] Directors are afforded a presumption of disinterest and independence and shareholder-plaintiffs carry the burden of demonstrating that directors' self-interest materially affected their independence.[109] To rebut this presumption, "the benefit received by the director and not shared with stockholders must be 'of a sufficiently material importance, in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties . . . without being influenced by her overriding personal interest . . . .'"[110] Such determinations are fact-specific, driven by the particular circumstances of both the transaction and the director's personal situation.[111]

b. Approval by Directors Who Lack Independence Requires Entire Fairness Review

"Independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences."[112] Directors "lack independence where they

106. *In re* Trados Inc. S'holder Litig., No. 1512, 2009 WL 2225958, at *6 (Del. Ch. 2009) (quoting Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993)).

107. Calesa Assocs., L.P. v. Am. Cap., No. 10557, 2016 WL 770251, at *11 (Del. Ch. 2016) (citing Orman v. Cullman, 794 A.2d 5, 23 (Del. Ch. 2002) (alterations in original)).

108. *In re* Tele-Commc'ns, Inc. S'holders Litig., No. CIV.A. 16470, 2005 WL 3642727, at *8 (Del. Ch. Dec. 21, 2005) (quoting Cinerama v. Technicolor, 663 A.2d 1156, 1169 (Del. 1995) ("'[T]o be disqualifying, the nature of the director interest must be substantial,' not merely 'incidental.'")).

109. *Id.* (citing Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 363 (Del. 1993) ("In order to rebut the presumption of director disinterestedness and independence, a stockholder must show that the directors' self-interest materially affected their independence.")).

110. *In re Trados*, 2009 WL 2225958, at *6 (quoting *In re* Gen. Motors Class H S'holders Litig., 734 A.2d 611, 617 (Del. Ch. 1999) (alterations in original)).

111. *In re* CBS Corp. S'holder Class Action & Derivative Litig., No. 2020-0111-JRS, 2021 WL 268779, at *29 (Del. Ch. Jan. 27, 2021), *as corrected* (Feb. 4, 2021) ("As commentators have noted, Delaware's independence analysis is context-specific and fact-intensive.") (citing Usha Rodrigues, *The Fetishization of Independence*, 33 J. CORP. L. 447, 470-76 (2008)).

112. Aronson v. Lewis, 473 A.2d 805, 816 (Del. 1984).

were 'beholden' to . . . or so under [the controller's] influence that their discretion would be sterilized.'"[113] Moreover, "it is not enough to charge that a director was nominated by or elected at the behest of those controlling the outcome of a corporate election. That is the usual way a person becomes a corporate director."[114] Instead, the focus is on "the care, attention and sense of individual responsibility to the performance of" the director's duties, which "generally touches on independence."[115] To succeed, "a plaintiff must allege a 'constellation of facts that, taken together, create a reasonable doubt about [the director]'s ability to objectively'" exercise her discretion in light of personal or business relationships with the party in question.[116]

As previously described in Section I.B, to secure a listing on either of America's largest stock exchanges, a SPAC's board of directors must be organized to have a majority of independent directors.[117] However, the independence determinations of an exchange do not replace the court's independence analysis.[118] A director who qualifies as independent under either listing standard may not qualify as independent under Delaware law.[119] That said, "'[t]he fact that a director qualifies as independent for

113. *Calesa Assocs., L.P.*, 2016 WL 770251, at *11 (alterations in original); *In re* BGC Partners, Inc. Deriv. Litig., No. 2018-0722, 2021 WL 4271788, at *6 (Del. Ch. 2021) (quoting Del. Cty. Emps. Ret. Fund v. Sanchez, 124 A.3d 1017, 1023 n.25 (Del. 2015) ("A director 'subject to the interested party's dominion or beholden to that interested party' lacks independence.")).

114. *Aronson*, 473 A.2d at 816.

115. *Id.*

116. *In re* BGC Partners, Inc., 2019 WL 4745121, at *9 (Del. Ch. 2019) (quoting *In re* Oracle Corp. Deriv. Litig., No. 2017-0337, 2018 WL 1381331, at *18 (Del. Ch. 2018) (alterations in original)); Gail Weinstein et al., *Conflicted Controllers, the "800-Pound Gorillas": Part II–BGC,* HARV. L. SCH. FORUM ON CORP. GOVERNANCE 2 (Nov. 7, 2019), https://corpgov.law.harvard.edu/2019/11/07/conflicted-controllers-the-800-pound-gorillas-part-ii-bgc/ [https://perma.cc/ML8K-GC9G] ("*BGC* underscores that the evaluation must be based on 'the constellation of facts,' considered 'in totality,' relating to the director's business and personal relationships with the controller or other interested party.").

117. *See supra* notes 27-28 and accompanying text.

118. Klein v. H.I.G. Cap., L.L.C., No. 2017-0862, 2018 WL 6719717, at *11 (Del. Ch. 2018) ("It is true, as defendants point out, that exchange listing rules do 'not operate as a surrogate for[] this Court's analysis of independence under Delaware law . . . .'" (alterations in original)).

119. As Chief Justice Strine explained in *Sandys v. Pincus*, "the Delaware independence standard is context specific and does not perfectly marry with the standards of the stock exchange in all cases, but the criteria NASDAQ has articulated as bearing on

purposes of a governing listing standard is therefore a helpful fact which, all else equal, makes it more likely that the director is independent for purposes of Delaware law' and that the 'opposite is likewise true.'"[120]

Particular attention should be paid to whether a SPAC director is sufficiently independent to vote against consummating the de-SPAC transaction. Business, as well as personal relationships, can threaten such independence. In *Marchand v. Barnhill*, for example, the Court determined that "very warm and thick personal ties of respect, loyalty, and affection"[121] between a company's director and the family of the company's current CEO created a reasonable doubt that the director could "impartially or objectively assess whether to bring a lawsuit against" the CEO.[122] There, the director was a recently retired executive who had worked at the company for 28 years, and the complaint alleged that the CEO's family not only supported the director's career, but it also led a campaign to raise money and name a building in the director's honor at the local university.[123] Such "deep business and personal ties . . . raise a reasonable doubt" over a director's independence.[124] In a SPAC, the directors are not faced with the question of bringing a lawsuit against the CEO; instead, the directors must evaluate the terms of the proposed Initial Business Combination and determine whether to approve the transaction. Thus, the question raised in the SPAC context is whether the directors possess sufficiently "deep business and personal ties" to the Sponsor to ultimately jeopardize the directors' ability to independently evaluate the de-SPAC transaction.[125]

independence are relevant under Delaware law and likely influenced by [Delaware] law." 152 A.3d 124, 131 (Del. 2016).

120. *Klein*, 2018 WL 6719717, at *12, n.109 (quoting *In re* Ezcorp Inc. Consulting Agreement Deriv. Litig., No. 9962, 2016 WL 301245, at *36 (Del. Ch. 2016) (alterations in original)).

121. 212 A.3d 805, 819 (Del. 2019). Specifically, it was a "reasonable inference that there [were] very warm and thick personal ties of respect, loyalty, and affection between" a recently retired, longtime employee, and now director of the family-run company and the son of the company's founder serving as its current CEO and Chairman "which create[d] a reasonable doubt that [the director] could have impartially decided whether to sue" the CEO and his subordinate. *Id.*

122. *Id.* at 808-09 (quoting *In re* Oracle Corp. Derivative Litig., 824 A.2d 917, 942 (Del. Ch. 2003)).

123. *Id.* at 808-16.

124. *Id.* at 808.

125. *Id.*

III. WHY ENTIRE FAIRNESS IS THE PROPER STANDARD OF REVIEW

This Part will discuss why entire fairness is the proper standard under which de-SPAC transactions should be reviewed. Section A will illustrate why SPAC Sponsors qualify as controlling shareholders. Section B will explain how the transaction provides the Sponsor with unique benefits non-ratably shared with the other common stockholders, thereby making the transaction a conflicted transaction. And Section C will demonstrate that beyond presenting a conflicted controller transaction subjecting the de-SPAC transaction to entire fairness, SPAC directors are interested and lack independence, presenting alternative arguments that each require entire fairness review.

A. SPAC SPONSORS QUALIFY AS CONTROLLING SHAREHOLDERS

As discussed in Part I, each SPAC structure varies but, by-and-large, Sponsors lead the effort to incorporate the corporation, pick the board members, own Founder Shares, sometimes own additional warrants, and to some extent provide influence or at least prestige to the corporation.[126] SPAC registration statements provide the best insight into what these "other factors" look like in practice and what a court will likely consider in its controller analysis. This Note has selected four SPACs to serve as case studies and guide the analysis: Churchill Capital Corp III ("Churchill"),[127] FinServ Acquisition Corp.,[128] Gores Holdings III, Inc.,[129] and Northern Genesis Acquisition Corp. II.[130] These SPACs were chosen on the following factors: (1) their registration statements were respectively prepared in different years; (2) the corporations are represented by different law firms; and (3) each SPAC had announced and closed their respective de-SPAC transactions at the time of this Note's publication. While the specifics of each SPAC will ultimately determine

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126. *See supra* Section I.A.

127. *See* Churchill Cap. Corp III Registration Statement, *supra* note 30.

128. *See* FinServ Acquisition Corp., Amendment No. 2 to Registration Statement (Form S–1/A) (Oct. 25, 2019) [hereinafter FinServ Acquisition Corp. Registration Statement].

129. *See* Gores Holdings III, Inc., Amendment No. 1 to Registration Statement (Form S–1/A) (Aug. 29, 2018) [hereinafter Gores Holdings III, Inc. Registration Statement].

130. *See* Northern Genesis Acquisition Corp. II, Amendment No. 2 to Registration Statement (Form S–1/A) (Jan. 8, 2021) [hereinafter Northern Genesis Acquisition Corp. II Registration Statement].

the outcome of the controller analysis, between their significant voting share and the presence of such "other factors," SPAC Sponsors will likely qualify as controlling shareholders under Delaware law.[131]

In deciding whether a SPAC Sponsor will qualify as a controlling shareholder, the controller analysis starts by examining the minority blockholder's voting share and consulting the registration statement for further details of her influence and responsibilities within the SPAC. For example, upon consummation of the initial offering, the SPAC "[S]ponsor will own 20 [percent] of [the] issued and outstanding shares of common stock (assuming [the Sponsor] does not purchase any units in [the] offering)."[132] With Founder Shares subject to transfer restrictions, should a SPAC "seek stockholder approval of [its] initial business combination," it can "expect that [its] initial stockholders and their permitted transferees will own at least 20 [percent] of [the] outstanding shares of common stock at the time of any such stockholder vote."[133] Having established that a SPAC Sponsor will typically control at least 20 [percent] of the vote, the "other factors" can then be considered.

As previously discussed, "other factors"[134] have included (1) "managerial supremacy,"[135] (2) "the minority blockholder's role as a company's 'hands-on' CEO and 'inspirational force' who was 'involved in all aspects of the company's business,'"[136] and (3) company "public statements acknowledging that the minority blockholder '[is] able to exercise significant influence over [the] company' and that a loss of the blockholder 'would have a material adverse effect on [its] business and operations.'"[137] These "other factors" will be discussed in turn.

In terms of "managerial supremacy," Sponsors maintain effective operational control over the SPAC.[138] Until a SPAC "complete[s] [the]

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131. *In re* Tesla Motors, Inc. S'holder Litig., No. CV 12711-VCS, 2018 WL 1560293, at *14 (Del. Ch. 2018) (quoting Superior Vision Servs. v. ReliaStar Life Ins. Co., 2006 WL 2521426, at *4 (Del. Ch. 2006)).

132. Northern Genesis Acquisition Corp. II Registration Statement, *supra* note 130, at 45.

133. Churchill Cap. Corp III Registration Statement, *supra* note 30, at 45.

134. *In re* Tesla Motors, Inc. S'holder Litig., No. 12711, 2020 WL 553902, at *4 (Del. Ch. 2020) (quoting *Superior Vision*, 2006 WL 2521426, at *4).

135. *Id.* (quoting *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 552 (Del. Ch. 2003)).

136. *Id.*

137. *Id.* (quoting *In re* Zhongpin Inc. S'holders Litig., No. CV 7393-VCN, 2014 WL 6735457, at *7 (Del. Ch. 2014)).

138. *Id.* (quoting *Cysive*, 836 A.2d at 552).

initial business combination, [it] will have no operations and will generate no operating revenues."[139] SPACs "do not intend to have any full-time employees prior to the completion of [the] initial business combination."[140] Instead, directors serve as principal officers.[141] So, unlike a traditional corporation where directors oversee officers who then manage and operate the business, SPAC directors control *and* manage everything. In addition to establishing the board's size, structure, and terms as part of the SPAC formation process, the Sponsors also select the initial directors.[142] Effectively, the Sponsors stack the deck in their favor: the initial directors are carefully selected to ensure they vote "for" the Initial Business Combination. In some instances, "holders of [the Founder Shares] will have the right to elect all of [the] directors prior to consummation of [the] initial business combination and holders of [the] public shares will not have the right to vote on the election of directors during such time."[143] Moreover, the Sponsors, through their selection and control over the directors, have complete "managerial supremacy"[144] over the only action a SPAC will take: choosing a merger partner. SPAC management, in other words its directors, "will have virtually unrestricted flexibility in identifying and selecting one or more prospective target businesses . . . ."[145] In short, Sponsors maintain clear "managerial supremacy" over the SPAC.

As discussed in Section I.B, SPAC Sponsors drive the formation process and, in many respects, could be considered an "inspirational force" behind the endeavor.[146] Beyond providing skills and expertise, the SPAC Sponsor lends its reputation in return for outside capital. Specifically, the Sponsor provides startup capital, structures the SPAC,

139. FinServ Acquisition Corp. Registration Statement, *supra* note 128, at 26; Churchill Cap. Corp III Registration Statement, *supra* note 30, at 31.

140. FinServ Acquisition Corp. Registration Statement, *supra* note 128, at 45; Churchill Cap. Corp III Registration Statement, *supra* note 30, at 49.

141. *See* FinServ Acquisition Corp. Registration Statement, *supra* note 128, at 100; Churchill Cap. Corp III Registration Statement, *supra* note 30, at 110.

142. *See* Northern Genesis Acquisition Corp. II Registration Statement, *supra* note 130, at 89.

143. Churchill Cap. Corp III Registration Statement, *supra* note 30, at 111.

144. *In re* Tesla Motors, Inc. S'holder Litig., No. 12711, 2020 WL 553902, at *4 (quoting *In re* Cysive Inc. S'holders Litig., 836 A.2d 531, 552 (Del. Ch. 2003)).

145. Churchill Cap. Corp III Registration Statement, *supra* note 30, at 88; GigCapital 3 Registration Statement *supra* note 29, at 41 ("[Management] will have virtually unrestricted flexibility in identifying and selecting a prospective acquisition candidate.").

146. *In re Tesla Motors*, 2020 WL 553902, at *4 (quoting *Cysive*, 836 A.2d at 552).

appoints its directors, and often takes a leadership position within it.[147] It is not uncommon for a SPAC Sponsor to take on the role of CEO, Chairman, or both.[148] Much like the controlling shareholder in *Cysive*, a SPAC Sponsor will likely exercise "more power than a typical CEO."[149]

Just as public statements of the company can acknowledge the minority blockholder's influence and impact over the company, SPAC Sponsors can make similar averments in registration statements and other publicly filed reports.[150] Of the four case studies selected, none plainly state that "a loss of the blockholder 'would have a material adverse effect on our business and operations.'"[151] However, each SPAC has recognized that its Sponsors maintain "significant influence"[152] or have the ability to "effectively influence the outcome" of matters.[153]

In sum, the "other factors" referenced in previous controller inquiries exist similarly in SPACs. Although the controller inquiry is a fact-specific determination, SPAC Sponsors are likely to be considered controlling shareholders: they maintain a 20 percent voting share at minimum, have

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147. *See supra* Section I.B.

148. *See* Churchill Cap. Corp III Registration Statement, *supra* note 30, at 110 (Founder, Chairman, and CEO of SPAC Sponsor took on role of SPAC Chairman and CEO); Gores Holdings III, Inc. Registration Statement, *supra* note 129, at 114 (Founder, Chairman, and CEO of SPAC Sponsor took on role of SPAC Chairman).

149. *In re* Morton's Rest. Grp., Inc. S'holders Litig., 74 A.3d 656, 665-66 (Del. Ch. 2013) (quoting *Cysive*, 836 A.2d at 551-52).

150. *In re Tesla Motors*, 2020 WL 553902, at *4 (quoting *In re* Zhongpin Inc. S'holders Litig., No. CV 7393-VCN, 2014 WL 6735457, at *7 (Del. Ch. 2014)).

151. *Id.*

152. FinServ Acquisition Corp. Registration Statement, *supra* note 128, at 110-11 ("Because of this ownership block, our initial stockholders . . . will have significant influence over the outcome of all matters requiring approval by our stockholders."); Churchill Cap. Corp III Registration Statement, *supra* note 30, at 57-58 ("[A]s a result of their substantial ownership in our company, our initial stockholders may exert a substantial influence on other actions requiring a stockholder vote, potentially in a manner that you do not support, including . . . approval of major corporate transactions.").

153. Northern Genesis Acquisition Corp. II Registration Statement, *supra* note 130, at 95-96 ("Because of this ownership block, our sponsor may be able to effectively influence the outcome of all matters requiring approval by our stockholders, amendments to our amended and restated certificate of incorporation and approval of significant corporate transactions, including approval of our initial business combination."); Gores Holdings III, Inc. Registration Statement, *supra* note 129, at 125 ("Because of this ownership block, our initial stockholders may be able to effectively influence the outcome of all matters requiring approval by our stockholders, including the election of directors, amendments to our amended and restated certificate of incorporation and approval of significant corporate transactions.").

full control over managerial decisions, drive the formation process, and exert significant influence over corporate decisions. In short, "*when coupled with other factors*," SPAC Sponsors "dominate the corporate decision-making process."[154]

B. SPAC Sponsor Share Conversion is a Conflicted Transaction

Conflicted controller transactions "fall into one of two categories: (a) transactions where the controller stands on both sides; and (b) transactions where the controller competes with the common stockholders for consideration."[155] In other words, "the entire fairness framework governs any transaction between a controller and the controlled corporation in which the controller receives a non-ratable benefit."[156] As previously described, examples of a non-ratable benefit include, but are not limited to, cases of (1) disparate consideration, (2) differential consideration, or (3) unique benefits.[157] In a SPAC, the sponsors are not alleged to stand on both sides of the transaction;[158] sponsors are instead alleged to receive two non-ratable benefits in association with the de-SPAC transaction: (i) Founder Share conversion to common stock and (ii) purchase of private placement warrants.

1. Founder Share Conversion to Common Stock

At issue in the de-SPAC transaction is whether the conversion of Founder Shares into common shares at the time of the Initial Business Combination constitute a "non-ratable benefit"[159] or a "unique benefit"

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154. *In re* Tesla Motors, Inc. S'holder Litig., 2018 WL 1560293, at *14 (Del. Ch. Mar. 28, 2018) (quoting Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co., 2006 WL 2521426, at *4 (Del. Ch. Aug. 25, 2006)) (emphasis added).

155. *In re* Crimson Expl. Inc. S'holder Litig., 2014 WL 5449419, at *12 (Del. Ch. Oct. 24, 2014).

156. *In re* Ezcorp Inc. Consulting Agreement Derivative Litig., 2016 WL 301245, at *11 (Del. Ch. Jan. 25, 2016).

157. *See supra* note 97 and accompanying text.

158. *See* Opening Brief in Support of Defendants' Motion to Dismiss at 28, *In re* MultiPlan Corp. S'holders Litig. (Del. Ch. Apr. 9, 2021) (No. 2021-0300-LWW) ("There are no allegations in the Complaint that Sponsor or any of the other Defendants stood on both sides of the Acquisition.").

159. *In re* Ezcorp Inc. Consulting Agreement Derivative Litig., 2016 WL 301245, at *11 (Del. Ch. Jan. 25, 2016).

creating an actionable conflict.[160] In the leading SPAC litigation and challenge to the de-SPAC transaction, *In re MultiPlan Corp. Stockholders Litigation*, the plaintiffs allege that the SPAC's Sponsor "received a non-ratable benefit to the exclusion of the Company's other stockholders" through the conversion of 20 million Founder Shares, purchased for only $25,000, which were then "worth approximately $305 million" upon conversion at the time of the merger's closing.[161] The plaintiffs further point out that not only did the Sponsor receive a unique benefit, but the Sponsor also had "unique interests inherent to Founder Shares" that diverged from the interests of common stockholders.[162] If the Sponsor "failed to complete an Initial Business Combination," the Sponsor would be wiped out, as its Founder Shares would be worthless.[163] Where "public stockholders would prefer no Initial Business Combination at all if the proposed deal was perceived as being worth less than $10 per share," the plaintiffs allege that the Sponsor "(and all Founder Shareholders) had a strong incentive to conceal bad news about the merger target in order to avoid the deal's rejection."[164] The defendants contend that the Founder Share conversion is a "structural feature of the SPAC—which was disclosed in the Churchill IPO documents, would have been triggered in any de-SPAC transaction, and was not unique to the Acquisition" at issue.[165] The defendants note that "all Class A shares participated in the Acquisition on the same terms, and [further argue that] Delaware courts 'routinely' recognize that providing decision-makers with equity incentives 'aligns those decision-makers' interests with stockholder interests; maximizing price.'"[166] The defendants continue by highlighting the additional measures taken by the Sponsor, particularly the lockup

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160. Flannery v. Genomic Health, Inc., 2021 WL 3615540, at *1317 (Del. Ch. Aug. 16, 2021) (quoting IRA Tr. FBO Bobbie Ahmed v. Crane, 2017 WL 7053964, at *6 (Del. Ch. Dec. 11, 2017)).

161. Plaintiffs' Omnibus Answering Brief in Opposition to Defendants' Motions to Dismiss at 32-33, *In re* MultiPlan Corp. S'holder Litig. (Del. Ch. Apr. 09, 2021) (No. 2021-0300-LWW).

162. *Id.* at 33.

163. *See id.*

164. *Id.*

165. Opening Brief in Support of Defendants' Motion to Dismiss at 30, *In re* MultiPlan Corp. S'holders Litig., (Del. Ch. Apr. 09, 2021) (No. 2021-0300-LWW).

166. *Id.* at 30 n.80 (quoting *In re* BioClinica, Inc. S'holder Litig., 2013 WL 5631233, at *5 (Del. Ch. Oct. 16, 2013) ("Delaware courts recognize that stock ownership by decision-makers aligns those decision-makers' interests with stockholder interests; maximizing price . . . . Courts have therefore routinely held that an interest in options vesting does not violate the duty of loyalty.")).

provisions and vesting schedule tied to the performance of the common stock, to ensure an alignment of interests with common stockholders.[167] But the defendants' arguments are unconvincing and a misapplication of Delaware law.

The defendants' first contention, that the Founder Share conversion "was not unique to the Acquisition,"[168] ignores the case law which establishes that the benefit received must be unique to the controller over other public shareholders, not that the benefit is so unique that it only appears in the transaction at issue.

Next, the defendants' argument that the Sponsor participated in the transaction "on the *same terms* as all other Churchill shares"[169] by definition would mean that the Sponsor received ratable benefits as the common stockholders. But again, this ignores the case law, particularly *In re CBS Corp. Stockholder Class Action & Derivative Litig.*, where the Court held that even if a "transaction appear[s] superficially to treat all stockholders equally,"[170] the transaction may practically provide a non-ratable benefit to the controller.

Defendants' argument defending the Founder Share conversion on the grounds that equity incentives are well-recognized by Delaware courts as a means to align the interests of decision-makers and stockholders likewise misses the mark.[171] First, Founder Shares are not like other equity incentives. Typical equity incentives are tied to operational metrics, share price, or other strategic goals. Founder shares are solely tied to the

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167. *See id.* at 31-32.

168. *Id.* at 30.

169. *Id.* at 29 ("[T]he shares held by Sponsor and the other Defendants participated in the Acquisition on the *same terms* as all other Churchill shares . . . .").

170. *In re* CBS Corp. S'holder Class Action & Derivative Litig., 2021 WL 268779, at *36 (Del. Ch. Jan. 27, 2021), *as corrected* (Feb. 4, 2021).

171. Opening Brief in Support of Defendants' Motion to Dismiss at 30 n.80, *In re* MultiPlan Corp. S'holder Litig., (Del. Ch. Apr. 9, 2021) (No. 2021-0300-LWW) ("[S]ince all Class A shares participated in the Acquisition on the same terms, and Delaware courts 'routinely' recognize that providing decision-makers with equity incentives 'aligns those decision-makers' interests with stockholder interests; maximizing price.'") (quoting *In re* BioClinica, Inc. S'holder Litig., 2013 WL 5631233, at *5 (Del. Ch. Oct. 16, 2013) ("Delaware courts recognize that stock ownership by decision-makers aligns those decision-makers' interests with stockholder interests; maximizing price . . . . Courts have therefore routinely held that an interest in options vesting does not violate the duty of loyalty.")).

consummation of an initial business transaction.[172] Through their status as controllers via their effective vote share and control of the board, Sponsors maintain control over the accomplishment of such an event. In contrast, executives only maintain *some* control over meeting the target metrics in a typical equity incentive plan. Directors are "self-interested when they . . . expect to 'derive any [material] personal financial benefit from [a transaction] in the sense of self-dealing.'"[173] The *MultiPlan* plaintiffs allege that the director-defendants would receive millions of dollars from their Founder Shares; at the pleading stage, such well-pled allegations present a reasonable inference of self-dealing.[174]

Finally, the defendants argue that stock ownership by decision-makers aligns the interests of decision-makers and shareholders around the common goal of maximizing stock price.[175] While generally true, this argument diverges from the reality of SPACs in two ways. In a typical company, "[a]t bottom, controlling stockholders have 'interests identical to other stockholders: to maximize the value of [their] shares.'"[176] That remains true in SPACs in both the abstract and on a long-term basis. But the realities of the structure and inherent incentives muddy the waters. Controllers do share a common interest with other stockholders:

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172. *Id.* at 1 ("Following approval of a de-SPAC transaction, the founder shares convert into 20 [percent] of the SPAC's common stock immediately before the closing of the proposed transaction, and the sponsor then participates in the proposed transaction on the same terms as all other SPAC stockholders.").

173. Calesa Assoc., L.P. v. Am. Cap., Ltd., 2016 WL 770251, at *11 (Del. Ch. Feb. 29, 2016) (citing Orman v. Cullman, 794 A.2d 5, 23 (Del. Ch. 2002)).

174. *See* Plaintiffs' Omnibus Answering Brief in Opposition to Defendants' Motions to Dismiss at 37, *In re* MultiPlan Corp. S'holder Litig., (Del. Ch. Apr. 9, 2021) (No. 2021-0300-LWW) (plaintiffs alleged that the directors collectively comprising a majority of the Board "were self-interested in effectuating the Merger because they each received millions of dollars in proceeds from their Founder Shares that would not have been available had the Merger been rejected.").

175. Opening Brief in Support of Defendants' Motion to Dismiss at 30 n.80, *In re* MultiPlan Corp. S'holder Litig., (Del. Ch. Apr. 9, 2021) (No. 2021-0300-LWW) ("[S]ince all Class A shares participated in the Acquisition on the same terms, and Delaware courts 'routinely' recognize that providing decision-makers with equity incentives 'aligns those decision-makers' interests with stockholder interests; maximizing price.'") (quoting *In re* BioClinica, Inc. S'holder Litig., 2013 WL 5631233, at *5 (Del. Ch. Oct. 16, 2013) ("Delaware courts recognize that stock ownership by decision-makers aligns those decision-makers' interests with stockholder interests; maximizing price . . . . Courts have therefore routinely held that an interest in options vesting does not violate the duty of loyalty.")).

176. Flannery v. Genomic Health, Inc., 2021 WL 3615540, at *17 (Del. Ch. Aug. 16, 2021) (quoting *Morton's*, 74 A.3d at 666-67).

maximizing the value of their shares. But in the short-term, those interests decidedly diverge. At the outset, controllers act to maximize the value of their shares through effectuating a de-SPAC transaction: if no combination is consummated, their Founder Shares expire worthless. Thus, controllers are incentivized to choose *any* initial business combination over none at all. In contrast to controllers, common stockholders only maximize the value of their shares by combining with the *right* company; and if such an opportunity is unavailable, common stockholders prefer no deal (and will thus redeem their shares) over *any* deal. But when the Founder Shares do convert to common stock, the interests of controllers and other stockholders realign in maximizing the value of the commonly held shares. Although Delaware courts have recognized that a controller's efforts to seek the best price may cure any deficiencies in a sale process,[177] SPACs are the acquiring party in the merger, so this reasoning is not directly comparable. There is no such lodestar of the "best price" available.

Simply stated, the Founder Share conversion, which occurs as part of the de-SPAC transaction, is only available to the holders of Founder Shares, namely the controlling SPAC Sponsors. That is a unique benefit to the controller. So, while it is true that the controllers participate "on the *same terms*"[178] as the common stockholders, that participation only takes place *after* the Founder Share conversion occurs. Therefore, although the de-SPAC transaction "appear[s] superficially to treat all stockholders equally,"[179] it is likely an actionable conflict under Delaware law.[180]

177. *See id.* (citing Goodwin v. Live Entm't, Inc., 1999 WL 64265, at *27 (Del. Ch. Jan. 25, 1999), aff'd, 741 A.2d 16 (Del. 1999) (noting a controller's "natural desire to obtain the best price for its shares"). *See also In re* Synthes, Inc. S'holder Litig., 50 A.3d 1022, 1035 (Del. Ch. Aug. 17, 2012) (explaining a controller's "natural incentive to obtain the best price for [its] shares")).

178. Opening Brief in Support of Defendants' Motion to Dismiss at 29, *In re* MultiPlan Corp. S'holder Litig., (Del. Ch. Apr. 09, 2021) (No. 2021-0300-LWW) ("[T]he shares held by Sponsor and the other Defendants participated in the Acquisition on the *same terms* as all other Churchill shares . . . .").

179. *In re* CBS Corp. S'holder Class Action & Derivative Litig., 2021 WL 268779, at *36 (Del. Ch. Jan. 27, 2021), as corrected (Feb. 4, 2021).

180. *See* Flannery v. Genomic Health, Inc., 2021 WL 3615540, at *17 (Del. Ch. Aug. 16, 2021) (quoting IRA Tr. FBO Bobbie Ahmed v. Crane, 2017 WL 7053964, at *6 (Del. Ch. Dec. 11, 2017)).

2. *Purchase of Private Placement Warrants*

Alternatively, the opportunity afforded to the SPAC Sponsors to provide a private investment presents an additional unique benefit to the Sponsors. "In advance of signing an acquisition agreement, the SPAC will often arrange committed debt or equity financing, such as a PIPE commitment, to finance a portion of the purchase price for the business combination and thereafter publicly announce both the acquisition agreement and the committed financing."[181] When such an opportunity is uniquely afforded to the holder of Founder Shares, it can be considered a non-ratable or unique benefit.

In *MultiPlan*, the plaintiffs allege that "at the same time as the IPO, the Sponsor purchased $23 million in private placement warrants . . . ."[182] Specifically, the "Sponsor purchased 23 million Private Placement Warrants for $1.00 each. On the record date, these Private Placement Warrants had appreciated in value to be worth $50.6 million."[183] In addition, "[s]ome of the consideration contemplated by the Merger Agreement came from PIPE Investors, who agreed to buy shares and warrants worth $1.3 billion."[184] Defendants argue that "[t]he private placement warrants—which only have value if the Company's stock price reaches $12.50 or $11.50 (depending on the warrant) at least one year after the Acquisition—likewise aligned the interests of Sponsor" and the public stockholders.[185] But that argument again misses the point of the conflicted transaction inquiry: common stockholders were not afforded the opportunity to participate in this aspect of the transaction, therefore this qualifies as a non-ratable or unique benefit to the controller. As such,

181. Layne & Lenahan, *supra* note 1.

182. Plaintiffs' Omnibus Answering Brief in Opposition to Defendants' Motions to Dismiss at 32-33, *In re* MultiPlan Corp. S'holder Litig., 15 (Del. Ch. Apr. 9, 2021) (No. 2021-0300-LWW).

183. *Id.* at 35 (citing Complaint ¶ 57 (citing Churchill Cap. Corp III, Definitive Proxy Statement (Schedule 14A), at 116 (Sept. 18, 2020)).

184. *Id.* at 18 (citing Complaint ¶ 57 (citing Churchill Cap. Corp III, Definitive Proxy Statement (Schedule 14A), at 100 (Sept. 18, 2020)).

185. Reply Brief in Further Support of Defendants' Motion to Dismiss at 11, *In re* MultiPlan Corp. S'holder Litig., (Del. Ch. Apr. 09, 2021) (No. 2021-0300-LWW) (citing Opening Brief in Support of Defendants' Motion to Dismiss at 11, *In re* MultiPlan Corp. S'holder Litig., (Del. Ch. Apr. 09, 2021) (No. 2021-0300-LWW).

it is an actionable conflict which subjects the de-SPAC transaction to entire fairness review.[186]

C. Alternative Arguments Support the Entire Fairness Standard

Entire fairness may be required for a de-SPAC transaction where a majority of the directors are (i) interested in the transaction or (ii) lack independence on account of their preexisting personal or working relationships with the Sponsor.

1. Directors Compensated with Founder Shares Are Interested in the Transaction

An "open question with respect to SPACs is whether the Founder Shares will be sufficiently material so as to create a conflict of interest for the directors."[187] To start, "SPAC directors are more highly compensated than directors at typical public companies."[188] Specifically, "the director of the median SPAC received 29,375 Founder Shares, while the director of the average SPAC received 38,981 Founder[] Shares."[189] As a result, "the average SPAC director receives approximately $400,000 in director compensation if the SPAC consummates a transaction, but receives nothing if no deal is completed."[190] Typically, directors are only compensated through Founder Shares, and SPAC registration statements explicitly state that "none of [the executive] officers[,] directors [or director nominees] . . . have received *any cash compensation* for services

186. *See* Flannery v. Genomic Health, Inc., 2021 WL 3615540, at *17 (Del. Ch. Aug. 16, 2021) (quoting IRA Tr. FBO Bobbie Ahmed v. Crane, 2017 WL 7053964, at *6 (Del. Ch. Dec. 11, 2017)).

187. Fortney, *supra* note 14, at 11.

188. *Id.* at 8 (citing Rebecca Burton & Peter Kim, *S&P 500 Director Compensation Trends in 2020*, WILLISTOWERSWATSON (Dec. 15, 2020), https://www.willistowerswatson.com/en-US/Insights/2020/12/S-P-500-director-compensation-trends-in-2020 [https://perma.cc/7H25-7UMA] ("In 2019, the average director of an S&P 500 company received $290,053 in compensation, of which $107,500 was cash and the remainder was stock or options. This is ~25 [percent] less than the average SPAC director earns.")).

189. *Id.* at 6.

190. *Id.* at 5.

rendered. . . ."[191] In comparison, "public company directors typically are paid cash or a mix of cash and stock, and the payment does not depend on the occurrence of a particular event, such as a merger."[192]

"Specific information about the wealth of particular individuals is not generally available" at the pleading stage, so "magnitude of the remuneration" when paired with other factors is generally sufficient to "support an inference of materiality."[193] At the pleading stage, plaintiffs can thus point to the size of the compensation, along with additional facts such as whether the director compensation is the primary source of income, how the director income compares to the director's net worth, or whether the director has been previously employed by the Sponsor, to support their allegation of materiality.[194]

2. *Directors with Preexisting Sponsor Relationship Are Not Sufficiently Independent*

A director's independence and ability to impartially make a business decision is a context specific determination. For example, "the decision whether to sue someone is materially different and more important than the decision whether to part company with that person on a vote about corporate governance, and [Delaware] law's precedent recognizes that the nature of the decision at issue must be considered in determining whether a director is independent."[195] The decision to vote for or against a SPAC's initial business combination is of considerable importance to the SPAC's directors. The SPAC's entire purpose is to effectuate an initial business combination and the value of the Sponsor's Founder Shares is dependent on the outcome of the vote. In some instances, a Sponsor's Founder Shares could be worth several hundred million dollars if the Initial

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191. *Id.* at 7 (citing Golden Falcon Acquisition Corp., Prospectus (424B4), at 136 (Dec. 21, 2020)). *See also* Northern Genesis Acquisition Corp. II Registration Statement, *supra* note 130, at 89.

192. Fortney, *supra* note 187, at 5 (citing Rebecca Burton & Peter Kim, *S&P 500 Director Compensation Trends in 2020*, WILLISTOWERSWATSON (Dec. 15, 2020), https://www.willistowerswatson.com/en-US/Insights/2020/12/S-P-500-director-compensation-trends-in-2020 [https://perma.cc/M8DG-5FN6]).

193. Voigt v. Metcalf, 2020 WL 614999, at *15 (Del. Ch. Feb. 10, 2020).

194. *See* Plaintiffs' Omnibus Answering Brief in Opposition to Defendants' Motions to Dismiss, at 37-38, *In re* MultiPlan Corp. S'holder Litig., (Del. Ch. Apr. 9, 2021) (No. 2021-0300-LWW). Plaintiffs allege that compensation of $3.2 million, $8.7 million, and $43.6 million for director defendants can be presumed to be material at the pleading stage. *Id.*

195. Marchand v. Barnhill, 212 A.3d 805, 819 (Del. 2019).

Business Combination is effectuated. Voting against the transaction is similarly adversarial to the decision to sue and may be more consequential monetarily. Moreover, SPAC "directors are being compensated not by the corporation, but by a group of interested shareholders–i.e., the Sponsor–that unilaterally appointed the directors, thus making the directors even less likely to be considered independent from the Sponsor."[196]

D. Recent Delaware Decisions Point to Entire Fairness as the Appropriate Standard of Review

Three 2022 Delaware court decisions point towards entire fairness as the appropriate standard of review; however, these decisions have not yet established whether entire fairness is to be presumed generally for de-SPAC transactions.[197]

In January 2022, Vice Chancellor Lori W. Will issued a decision in the aforementioned *MutliPlan* litigation, finding that entire fairness was the appropriate standard at the motion to dismiss stage.[198] There, the plaintiffs pointed to and successfully pled that entire fairness should apply for "two independent–and individually sufficient–reasons[:]. . . [(1)], the de-SPAC [transaction], including the opportunity to redeem, was a conflicted controller transaction" and "[(2)], a majority of the [SPAC board] was conflicted either because the directors were self-interested or because they lack independence from" the Sponsor.[199]

In evaluating the argument for finding a conflicted controller transaction, Vice Chancellor Will focused on the "unique benefit" inquiry, examining the Sponsor's holdings throughout the transaction before ultimately concluding that one,[200] if not multiple, unique benefits

196. Fortney, *supra* note 187, at 11.

197. *See In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784 (Del. Ch. Jan. 3, 2022); Blue v. Fireman, No. CV 2021-0268-MTZ, 2022 WL 593899 (Del. Ch. Feb. 28, 2022); *In re* Lordstown Motors Corp. S'holders Litig., No. CV 2021-1066-LWW, 2022 WL 678597 (Del. Ch. Mar. 7, 2022).

198. "Given the allegations of the Complaint, . . . [and] for purposes of the motions to dismiss, the alleged disclosure violations sufficiently give rise to a lack of overall fairness." *In re MultiPlan Corp.*, 268 A.3d at 816-17.

199. *Id.* at 809.

200. *Id.* at 810 (finding the allegations identified a unique benefit "when Class A stockholders held redemption rights . . . [the founder] (who controlled the Sponsor) had an economic interest in 70 [percent] of the Class B shares [and both] the Class B shares and the Private Placement Warrants held by the Sponsor would be worthless if [the SPAC] did not complete" an initial business combination).

could be reasonably inferred.[201] Notably, the defendants contended that "that the Sponsor's promote (in the form of [Founder Shares]) cannot trigger entire fairness because this 'structural feature' would appear in 'any de-SPAC transaction' and 'was not unique to the [a]cquisition.'"[202] But Vice Chancellor Will found this argument unconvincing, reasoning that the use of this structure "by other SPACs does not cure it of conflicts[,] [n]or does the technical legality of the de-SPAC mechanics."[203] Interestingly, Vice Chancellor Will did not go so far as to hold that entire fairness should therefore be appropriate for all de-SPAC transactions.

As for the plaintiffs' second argument that a majority of the board was conflicted, Vice Chancellor Will examined the potential conflicts, first considering the directors' self-interest then lack of independence, before finding both theories supported entire fairness review.[204] In evaluating director self-interest, Vice Chancellor Will not only contemplated the directors' interests as alleged, but also discussed their interests in a hypothetical value-decreasing merger based on the SPAC structure; in both scenarios, she found, the directors' interest would exceed the threshold of materiality at the motion to dismiss stage, thus supporting entire fairness.[205] As for the directors' lack of independence, Vice Chancellor Will considered both the business and personal relationships between the directors and the Sponsor, finding that "the directors each had a personal or employment relationship with or received lucrative business opportunities from [the Sponsor,]" and "the existence of [those] interests and relationships is enough to defeat a motion to dismiss."[206]

Having concluded on multiple grounds that entire fairness was the appropriate standard of review, and that the plaintiffs sufficiently met

201. *Id.* at 811 ("It can also be reasonably inferred that [the founder] gained a unique benefit from the redemption offer itself—it brought him one step closer to consummating a transaction that allegedly benefitted him to the detriment of Class A stockholders.").

202. *Id.* at 812 (quoting Opening Brief in Support of Defendants' Motion to Dismiss at 30, *In re* MultiPlan Corp. S'holders Litig. (Del. Ch. Apr. 9, 2021) (No. 2021-0300-LWW)).

203. *Id.*

204. *Id.* at 812-16.

205. *Id.* at 810 (reasoning that if even if a significant discount was applied to the directors' shares, "the directors holding the fewest amount of founder shares would still hold shares worth over half a million dollars post-merger . . . [which] is presumptively material at the motion to dismiss stage.").

206. *Id.* at 814-15.

their pleading burdens, Vice Chancellor Will denied the defendants' motion to dismiss, and the case has proceeded into discovery.[207]

In February 2022, the Court of Chancery again examined a de-SPAC transaction in *Blue v. Fireman*, holding that entire fairness was the appropriate standard of review for the plaintiffs' fiduciary duty claim, but, at the same time, noting that the decision was based on the actions of the controlling shareholder leading up to the transaction, rather than the SPAC structure itself.[208] Specifically, the target company in the de-SPAC transaction had raised debt financing in multiple instances from the defendant-creditors in the years leading up to the de-SPAC transaction.[209] The debt holdings gave the defendant-creditors voting control over the target company, and as the target company finalized the terms of its de-SPAC transaction, the defendant-creditors demanded amendments to its debt holdings and threatened to withhold support to the de-SPAC transaction without such changes effectuated.[210] Ultimately, the board assented to the amendments, and the de-SPAC transaction closed.[211] The plaintiffs challenged the de-SPAC transaction as a conflicted controller transaction, arguing that it diverted value from the plaintiffs and should be reviewed under entire fairness.[212] Vice Chancellor Morgan T. Zurn agreed, finding the defendant-creditors to be controllers, as the terms of the debt provided them with 83 percent of the target company's voting power.[213] Importantly, Vice Chancellor Zurn turned to the "unique benefit" inquiry utilized by Vice Chancellor Will in evaluating whether the de-SPAC transaction presented a conflicted controller transaction, finding that defendant-creditors competed with the target company's "common stockholders by extracting a different benefit (the [a]mendments) out of the Merger consideration."[214] Thus, entire fairness applied.[215]

Lastly, in March 2022, the Court of Chancery denied a motion to stay a putative class action challenging a de-SPAC transaction pending the

207. *In re* Multiplan Corp. S'holders Litig., Docket No. 2021-0300 (Del. Ch. argued Sept. 21, 2021). *See generally id.*

208. *See generally* Blue v. Fireman, 2022 WL 593899 (Del. Ch. Feb. 28, 2022).

209. *Id.* at *1-4.

210. *Id.*

211. *Id.* at *4.

212. *Id.*

213. *Id.* at *3, 16.

214. *Id.* at *17.

215. *Id.*

resolution of a federal securities class action but commented no further on the prospective standard of review over the transaction.[216] Again writing for the court, Vice Chancellor Will noted that "allegations that the defendants breached their fiduciary duties of loyalty and impaired the exercise of stockholders' redemption rights in the context of a de-SPAC transaction . . . raise 'novel issues' akin to those that this court was presented with in a matter of first impression earlier this year."[217] The Vice Chancellor noted that the two class actions addressed "fundamentally different" issues: where the securities class action alleged "false and misleading disclosures," the fiduciary duties class action argued "that the defendants harmed the putative class members by impairing the informed exercise of their redemption rights to the defendants' benefit."[218] Due to Delaware's "substantial interest in addressing the issues presented by this case . . . [and the] limited overlap—in terms of the parties, issues, and potential remedies—between" the two actions, the motion to stay was denied.[219]

Of these three decisions examining de-SPAC transactions, two decisions found entire fairness review appropriate but only one decision based its findings on the underlying SPAC structure.[220] Thus, an open question remains as to whether Delaware courts will presume entire fairness as the standard of review for every de-SPAC transaction going forward.[221]

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216. *See generally In re* Lordstown Motors Corp. S'holders Litig., No. CV 2021-1066-LWW, 2022 WL 678597 (Del. Ch. Mar. 7, 2022).

217. *Id.* at *3 (citing *In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784, 812 (Del. Ch. Jan. 3, 2022)).

218. *Id.* at *4.

219. *Id.* at *5.

220. *In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784, 809 (Del. Ch. Jan. 3, 2022).

221. Of note, two of the leading academics on SPACs have argued in a recent paper that entire fairness is the appropriate standard of review for the de-SPAC transaction. *See generally* Michael Klausner & Michael Ohlrogge, *SPAC Governance: In Need of Judicial Review* (Stan. L. & Econ. Olin, Working Paper No. 564, 2021), https://ssrn.com/abstract=3967693 [https://perma.cc/8F9D-QDE7] (concluding "that unless truly independent directors approve a merger and oversee disclosures to shareholders, the sponsor's and board's actions should be subject to entire fairness review.").

IV. APPLYING *MFW* FORMALITIES TO DE-SPAC TRANSACTIONS SHOULD SECURE BUSINESS JUDGMENT REVIEW

In *Kahn v. M & F Worldwide Corp.*, the Supreme Court of Delaware established that "business judgment is the standard of review that should govern mergers between a controlling stockholder and its corporate subsidiary, 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."[222] Based upon this seminal decision and the case law which has followed, applying the *MFW* formalities to a de-SPAC transaction should similarly earn business judgment review.

A. ADDITIONAL PROTECTIONS ARE REQUIRED FOR CONFLICTED CONTROLLER TRANSACTIONS TO SECURE BUSINESS JUDGMENT REVIEW

Delaware law "has required that transaction[s] [with conflicted controllers] be reviewed for substantive fairness even if the transaction was negotiated by independent directors or approved by the minority stockholders."[223] Much like an "800–pound gorilla whose urgent hunger . . . is likely to frighten less powerful primates,"[224] a conflicted controller "is able to exert coercive influence over the board and unaffiliated stockholders" in the corporation.[225] Approval by the minority stockholders is similarly insufficient to cleanse a conflicted controller transaction "because, in such instances, the stockholder vote is presumed

222. 88 A.3d 635, 644 (Del. 2014), *overruled by* Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018).

223. Tornetta v. Musk, 250 A.3d 793, 800 (Del. Ch. 2019) (quoting Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 678 (2005)).

224. *In re* Pure Res., Inc. S'holders Litig., 808 A.2d 421, 436 (Del. Ch. 2002) (Strine, V.C.). Specifically, then-Vice Chancellor Strine colorfully described a controlling stockholder as an "800–pound gorilla whose urgent hunger for the rest of the bananas is likely to frighten less powerful primates like putatively independent directors who might well have been hand-picked by the gorilla (and who at the very least owed their seats on the board to his support)." *Id.*

225. Tornetta v. Musk, 250 A.3d 793, 800 (Del. Ch. 2019).

statutory protections of disinterested board and stockholder approval, because both protections are potentially undermined by the influence of the controller."[227]

B. *MFW* Protections Provide Applicable Safeguards

"*MFW* provides a roadmap that allows fiduciaries to engage in conflicted controller transactions worthy of pleadings stage business judgment deference."[228] Specifically, "*MFW*'s 'dual protections' are meant to 'neutralize' the conflicted controller's 'presumptively coercive influence' so that judicial second-guessing is no longer required."[229] The "comprehensive set of procedural protections—that the *[MFW]* court summarized as 'disinterested board and stockholder approval'—operate to restore the court's confidence in both constituencies' decisions."[230]

Case law has established that "*[MFW]* does apply to conflicted one-side controller transactions."[231] In *Larkin v. Shah*, the court wrote that "[t]he dual procedural protections referenced in [*MFW*] operate similarly in the one-sided controller context."[232] A year later, in *In re Martha Stewart Living Omnimedia, Inc. Stockholder Litigation*, the court found "business judgment deference is appropriate at the pleadings stage" where

227. *In re* CBS Corp. S'holder Class Action & Derivative Litig., 2021 WL 268779, at *33 (Del. Ch. Jan. 27, 2021), *as corrected* (Feb. 4, 2021) (quoting *In re* Crimson Expl. Inc. S'holder Litig., 2014 WL 5449419, at *9 (Del. Ch. Oct. 24, 2014)).

228. *Tornetta*, 250 A.3d at 810.

229. *Id.* (quoting *In re* Rouse Prop., 2018 WL 1226015, at *1 (Del. Ch. Mar. 9, 2018)).

230. The court listed the following six conditions that, if met, reduce the standard of review in "controller buyout" contexts to business judgment:

> (i) [T]he controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.

Larkin v. Shah, C.A. No. 10918-VCS, 2016 WL 4485447, at *9 n. 53 (Del. Ch. Aug. 25, 2016) (citing *M & F Worldwide*, 88 A.3d at 645).

231. *In re* Martha Stewart Living Omnimedia, Inc. S'holder Litig., C.A. No. 11202-VCS, 2017 WL 3568089, at *2 (Del. Ch. Aug. 18, 2017).

232. 2016 WL 4485447, at *9, *11 ("[T]ransactions involving a conflicted controller . . . remain subject to entire fairness review absent the robust suite of procedural protections listed in *M & F Worldwide*.").

"the Company's former controlling stockholder and namesake, Martha Stewart," "followed the [*MFW*] road map with precision and [the dual protections] were in place at the moment Stewart began to negotiate for consideration over and above what would be paid to the other stockholders."[233] Later, in *Tornetta v. Musk*, the court highlighted that had the board followed the applicable *MFW* framework,[234] "[b]usiness judgment deference at the pleadings stage would then be justified."[235] As courts have applied the *MFW* jurisprudence to a variety of corporate transactions, extending its protections to the de-SPAC transaction, which is inherently a one-sided conflicted controller transaction, would likely be a permissible next step.[236]

C. *MFW* FORMALITIES CAN BE EASILY APPLIED TO DE-SPAC TRANSACTIONS

The typical de-SPAC transaction process has much of the necessary framework already in place to meet "*MFW*'s dual requirements—approval by an independent Special Committee and an affirmative vote by a majority of the minority stockholders . . . ."[237] Although a typical de-SPAC transaction does not seek approval by an independent Special Committee,[238] SPACs are required by the exchanges to have a majority of

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233. 2017 WL 3568089, at *1-2.

234. Specifically, Vice Chancellor Slights wrote:

> Had the Board ensured from the outset of "substantive economic negotiations" that both of Tesla's qualified decision makers—an independent, fully functioning Compensation Committee *and* the minority stockholders—were able to engage in an informed review of the Award, followed by meaningful (i.e., otherwise uncoerced) approval, the Court's reflexive suspicion of Musk's coercive influence over the outcome would be abated. Business judgment deference at the pleadings stage would then be justified.

Tornetta v. Musk, 250 A.3d 793, 812 (Del. Ch. 2019) (quoting Olenik v. Lodzinski, 208 A.3d 704, 715 (Del. 2019)).

235. *Id.*

236. *In re Martha Stewart Living*, 2017 WL 3568089, at *2.

237. Flood v. Synutra Int'l, Inc., 195 A.3d 754, 756 (Del. 2018).

238. There is no reference to a Special Committee by name or substance in the registration statements of the four SPACs selected as case studies.

the board comprised of independent directors.[239] As discussed in Section I.C, the typical de-SPAC transaction solicits *and* requires the affirmative vote of minority shareholders to proceed; however since the SPAC Sponsor controls 20 percent voting share, "only 37.5 [percent] of the public shares [are needed] to achieve a majority vote and approve the transaction."[240] Therefore, to meet the *MFW* requirements and earn business judgment deference, three subtle changes are needed: (1) conditioning the business combination *ab initio* on meeting the following two requirements, (2) raising the approval threshold of other shareholders to be a majority of the minority, and (3) introducing an adequately empowered independent Special Committee.[241]

First, "what is critical for the application of the business judgment rule is that the controller accept that no transaction goes forward without [S]pecial [C]ommittee and disinterested stockholder approval early in the process and before there has been any economic horse trading."[242] Conditioning the de-SPAC transaction *ab initio* upon the approval of an independent Special Committee and the affirmative vote of the majority of the minority accomplishes exactly that.[243] In a traditional merger, "the correct time at which to determine if the [*MFW*] *ab initio* requirement has been met is the point where the controlling stockholder actually sits down with an acquiror to negotiate for" the non-ratable benefit.[244] For a de-

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239. NASDAQ, *supra* note 28; N.Y. STOCK EXCH., *supra* note 27.

240. Layne & Lenahan, *supra* note 1.

241. Kahn v. M & F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014), *overruled on other grounds by* Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018) (rev'd on other grounds).

> [B]usiness judgment is the standard of review that should govern mergers between a controlling stockholder and its corporate subsidiary, 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.

Id.

242. Flood v. Synutra Int'l, Inc., 195 A.3d 754, 756 (Del. 2018).

243. *M & F Worldwide*, 88 A.3d at 644-46.

244. *In re* Martha Stewart Living Omnimedia, Inc. S'holder Litig., C.A. No. 11202-VCS, 2017 WL 3568089, at *19 (Del. Ch. Aug. 18, 2017). "In the parlance of *In re MFW*, the 'get-go' of the process in the disparate consideration case is the moment the controller and third party begin to negotiate." *Id.* (quoting *In re* MFW S'holders Litig., 67 A.3d 496, 530 (Del. Ch. 2013), *aff'd sub nom. M&F Worldwide*, 88 A.3d 635).

SPAC transaction, the point of inquiry is comparable to a traditional merger: when the target company is identified and the SPAC Sponsor "actually sits down" to negotiate.[245] Effectively, the business combination should be conditioned before there is "any economic horse trading."[246] Alternatively, a SPAC could instead include such conditions in the registration statement to codify the appropriate negotiation procedures and ensure that they will be met.

Next, the public vote threshold needed to approve the de-SPAC transaction must be raised to a majority of the public shares held. Section I.A discussed the common SPAC structure, where "at least 20 [percent] of the SPAC's outstanding shares will be committed to vote in favor of a transaction, requiring only 37.5 [percent] of the public shares to achieve a majority vote and approve the transaction."[247] But to meet the *MFW* requirements, such threshold needs to be raised above 50 percent of the publicly held shares.[248] The solicitation process does not require further changes beyond increasing the public vote threshold to satisfy the majority of the minority standard.

Finally, a SPAC must create an independent Special Committee to evaluate and approve the Initial Business Combination. "Delaware law has long encouraged boards to form [S]pecial [C]ommittees when confronted with a conflicted transaction to neutralize the influence any conflicted board members might have on the decision-making process."[249] The typical SPAC is already structured to do so: to be listed on either major U.S. stock exchange, a SPAC must have a board comprised of a majority of independent directors. [250] With independent directors already in place, a SPAC can satisfy the *MFW* framework by creating an adequately empowered[251] Special Committee comprised of only its

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245. *In re Martha Stewart Living*, 2017 WL 3568089, at *19.

246. *Synutra*, 195 A.3d at 756.

247. Layne & Lenahan, *supra* note 1.

248. *M&F Worldwide*, 88 A.3d at 644 ("[T]he uncoerced, informed vote of a majority of the minority stockholders.").

249. *In re* CBS Corp. S'holder Class Action & Derivative Litig., No. 2020-0111-JRS, 2021 WL 268779, at *39 (Del. Ch. Jan. 27, 2021), *as corrected* (Feb. 4, 2021). *See id.* at *41 n.441-45 (summarizing issues in Delaware case law regarding how much negotiating power independent directors practically possess in conflicted controller transactions).

250. NASDAQ, *supra* note 28; N.Y. STOCK EXCH., *supra* note 27.

251. The Delaware "Supreme Court has recognized that the requisite degree of fiduciary independence may nevertheless be found lacking if the committee and controller fail, at least, to attempt to ensure that the committee is empowered to negotiate

in place, a SPAC can satisfy the *MFW* framework by creating an adequately empowered[251] Special Committee comprised of only its independent directors to evaluate and approve the Initial Business Combination.

D. CASE STUDIES ILLUSTRATE THE APPLICATION OF *MFW* FORMALITIES

The SPACs previously discussed in Section I.B and Section III.D again provide worthwhile case studies to understand how the *MFW* formalities translate to the SPAC setting.[252] This analysis will make two assumptions, that: (1) each SPAC had properly conditioned the Initial Business Combination *ab initio*[253] on the dual formalities–approval by a Special Committee and by a vote of majority of the minority stockholders,[254] and (2) each Special Committee was comprised of directors identified as independent by the SPAC. Therefore, this analysis will look at the vote totals and perform a Delaware-law-driven, context-specific determination of director independence to determine whether the *MFW* protections would have been met in each instance.

1. Churchill Capital Corp III

In July 2020, Churchill entered into a merger agreement to acquire MultiPlan, "a leading value-added provider of data analytics and technology-enabled end-to-end cost management solutions to the U.S. healthcare industry as measured by revenue and claims."[255] In October 2020, Churchill held a Special Meeting for shareholders to vote upon the merger.[256] At the time of the vote, the Sponsor held 27,500,000 shares of

251. The Delaware "Supreme Court has recognized that the requisite degree of fiduciary independence may nevertheless be found lacking if the committee and controller fail, at least, to attempt to ensure that the committee is empowered to negotiate free of outside influence." *In re* CBS Corp. Class Action, 2021 WL 268779, at *39 (citing Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1115 (Del. 1994)).

252. The de-SPAC transactions proposed by the Sponsors of Churchill Capital Corp III and GigCapital3, Inc. to their respective shareholders will be analyzed in detail in this Section.

253. *See supra* Section III.C.

254. Kahn v. M & F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014), *overruled by* Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018).

255. Churchill Cap. Corp III Proxy Statement, *supra* note 49, at 4.

256. MultiPlan Corp., Current Report (Form 8–K), at 2 (Oct. 8, 2020).

investors.[258] Of the 137,500,000 shares of common stock entitled to vote, 105,067,599 voted "for," 7,954,840 "against," and 22,533 "abstained."[259] Including the Sponsor-pledged shares, Churchill received a 76.4 percent vote share approving the merger;[260] without the Sponsor pledged shares, Churchill received a 70.5 percent vote share, satisfying the majority of minority test.[261]

As for the potential creation of an independent and adequately empowered Special Committee, at the time of merger discussions, the Churchill Board of Directors was comprised of eight directors,[262] five of whom were identified as independent directors.[263] Churchill's proxy statement notes that the "independent directors evaluated and unanimously approved, as members of the Churchill Board, the Merger Agreement and the related agreements and the transactions contemplated thereby . . . ."[264] But each of these five purported independent directors had ties to the Sponsor, which raise suspicions of independence under Delaware law.[265] To start, each purported independent director held economic interests in Founder Shares through "ownership of membership interests in the Sponsor"[266] as follows:

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258. *Id.*, at 30, F-14 ("Holders of Class A common stock and Class B common stock will vote together as a single class on all other matters submitted to a vote of stockholders except as required by law.").

259. MultiPlan Corp., Current Report (Form 8–K), at 27 (Oct. 8, 2020).

260. *Id.* 105,067,599 votes "for" divided by the 137,500,000 outstanding shares equates to 76.4 percent.

261. *Id.* First subtract the 27,500,000 Sponsor held votes "for" from the total 105,067,599 votes "for," then divide the result by the 110,000,000 non-Sponsor held shares to reach 70.5 percent.

262. "The Churchill Board consists of eight members." Churchill Cap. Corp III Proxy Statement, *supra* note 49, at 149.

263. *Id.* "The Churchill Board has determined that each of Jeremy Paul Abson, Glenn R. August, Malcolm S. McDermid, Bonnie Jonas and Karen G. Mills is an independent director under applicable SEC and NYSE rules."

264. *Id.* at 110.

265. *See supra* Section II.B.2.

266. Churchill Cap. Corp III Proxy Statement, *supra* note 49, at 248. The registration statement disclosed that:

> Glenn R. August, . . . Bonnie Jonas, Karen G. Mills . . . have an economic interest in shares of Churchill's common stock through his or her ownership of membership interests in the Sponsor, but do not beneficially own any of Churchill's common stock. In addition, Jeremy Abson and Steve McDermid may be deemed to have an

Director	Founder Shares[267]	Aggregate Market Value[268]
Jeremy Abson	294,985	$3,271,384
Glenn R. August	3,933,137	$43,618,489
Malcom S. McDermid	786,672	$8,724,192
Karen G. Mills	294,985	$3,271,384
Bonnie Jonas	294,985	$3,271,384

Beyond their Founder Shares, these directors also held economic interests in the Private Placement Warrants held by the Sponsor.[269] Several of these directors simultaneously served or have served on other boards of SPACs backed by the Sponsor Churchill:

Director[270]	Churchill Capital Corp	Churchill Capital Corp II
Jeremy Abson	No Role	Director
Glenn R. August	No Role	Director
Malcom S. McDermid	Former Director	Director
Karen G. Mills	Director	Director
Bonnie Jonas	Director	No Role

> indirect economic interest in the founder shares and private placement warrants purchased by the Sponsor as a result of . . . having membership interests in the Sponsor, and Mr. Abson and Mr. McDermid's respective affiliation with such entities.

Id.

267. *Id.*

268. *Id.* at 30. Aggregate market value determined by converting founder shares one-for-one to common stock "based upon the closing price of $11.09 per share on the NYSE on September 14, 2020, the record date for the special meeting." *Id.*

269. Plaintiffs' Omnibus Answering Brief in Opposition to Defendants' Motions to Dismiss, at 41, *In re* MultiPlan Corp. S'holders Litigation, No. 2021-0300-LWW (Del. Ch. Apr. 9, 2021) (noting "the Directors had economic interests in the Sponsor's $23 million in Private Placement Warrants.") (citing Churchill Capital Corp III, Current Report (Form 8–K), at 2 (Feb. 19, 2020) (Ex. D)).

269. Churchill Cap. Corp III Proxy Statement, *supra* note 49, at 147-49.

270. *Id.*

To echo the plaintiffs in the ongoing *MultiPlan* litigation, even "[p]utting aside their personal profit motive in this Merger, none of the directors can qualify as independent from the" Sponsor.[271] Serving as a director for Churchill "was not a one-time multi-million-dollar payday for these directors."[272] Instead, it was but one of several opportunities afforded to these directors by the Sponsor. Participating in—or having the prospect to participate in—a series of multi-million dollar directorship opportunities likely presents sufficiently "deep business and personal ties . . . [to] raise a reasonable doubt" over the directors' independence.[273] Beyond the business ties, which likely imperil the directors' independence, the structure of the directors' responsibilities raises further questions.[274] Prior to consummating the Initial Business Combination, only the Sponsor could elect or remove the Churchill directors.[275] And at the outset of the SPAC, the "directors have agreed (and their permitted transferees will agree) to vote any Founder Shares and any public shares held by them in favor of [the] initial business combination."[276] Further, the directors could be removed at any point by the Sponsor, and pledged

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271. Plaintiffs' Omnibus Answering Brief in Opposition to Defendants' Motions to Dismiss, at 38, *In re MultiPlan Corp.*, No. 2021-0300-LWW ("Putting aside their personal profit motive in this Merger, none of the directors can qualify as independent from the [Sponsor] and none are entitled to dismissal."). For the plaintiffs' full arguments regarding why the director defendants do not qualify as independent, see *id.* at 38-42.

272. *Id.* at 38-39.

273. Marchand v. Barnhill, 212 A.3d 805, 808-09 (Del. 2019).

274. Plaintiffs' Omnibus Answering Brief in Opposition to Defendants' Motions to Dismiss at 39, *In re MultiPlan Corp.*, No. 2021-0300-LWW (arguing that the Sponsor "structured the Founder Shares to give him the unilateral and exclusive power to elect and remove any directors at any time").

275. Churchill Capital Corp III, Amendment No. 3 to Registration Statement (Form S–1/A), at 13 (Feb. 13, 2020) ("Prior to the consummation of our initial business combination, only holders of [Founder Shares] will have the right to vote on the election of directors."). Churchill Cap. Corp III Registration Statement, *supra* note 30, at 13. Further:

> [A]ny or all of the directors may be removed from office at any time, but only for cause and only by the affirmative vote of holders of a majority of the voting power of all then outstanding shares of our capital stock entitled to vote generally in the election of directors, voting together as a single class.

Id. at 138.

276. *Id.* at 34.

the outset of the SPAC, the "directors have agreed (and their permitted transferees will agree) to vote any Founder Shares and any public shares held by them in favor of [the] initial business combination."[276] Further, the directors could be removed at any point by the Sponsor, and pledged to vote for the Initial Business Combination from the get-go, so their level of independence is questionable at best. Had these directors independently identified the target company, led the due diligence, and conducted the negotiations, an inference of independence could be found. But instead, it was the Sponsor who led the entire process.[277] All things considered, the specifics here likely present a "constellation of facts that, taken together, create a reasonable doubt about [the director]'s ability to objectively" exercise her discretion as a director.[278]

2. GigCapital3, Inc.

In December 2020, GigCapital3, Inc. ("GigCapital3") entered into a merger agreement with Lightning Systems,[279] "a leading electric vehicle designer and manufacturer, providing complete electrification solutions for commercial fleets."[280] GigCapital3 held a special meeting of shareholders in April 2021 to vote on the Initial Business Combination.[281] All of the common stock entitled to vote was counted as a single class,[282]

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276. *Id.* at 34.

277. Churchill Cap. Corp III Proxy Statement, *supra* note 49, at 102-07 (documenting the involvement of the Sponsor at each step of the transaction, from sourcing through approval of the final Merger Agreement).

278. *In re* BGC Partners, Inc., 2019 WL 4745121, at *9 (Del. Ch. Sept. 30, 2019) (quoting *In re* Oracle Corp. Derivative Litig., 2018 WL 1381331, at *18 (Del. Ch. Mar. 19, 2018); Gail Weinstein, Brian T. Mangino & Andrew J. Colosimo, *Conflicted Controllers, the "800-Pound Gorillas": Part II—BGC,* HARV. L. LAW SCHOOL F. ON CORP. GOVERNANCE (Nov. 7, 2019), https://corpgov.law.harvard.edu/2019/11/07/conflicted-controllers-the-800-pound-gorillas-part-ii-bgc/ [https://perma.cc/W7Y6-LZHX] ("BGC underscores that the evaluation must be based on 'the constellation of facts,' considered in totality,' relating to the director's business and personal relationships with the controller or other interested party.").

279. Proxy Statement for Special Meeting of GigCapital3, Inc. (Rule 424(b)(3)), at 31 (Mar. 26, 2021) [hereinafter GigCapital3, Inc. Special Meeting Proxy Statement].

280. *Id.* at 259.

281. GigCapital3, Inc., Current Report (Form 8–K), at Item 5.07 (Apr. 22, 2021).

282. GigCapital3, Inc. Special Meeting Proxy Statement, *supra* note 279, at 126 ("[C]onsummat[ing] the Business Combination only if it is approved by the affirmative vote (online or by proxy) of the holders of a majority of the outstanding shares of our Common Stock entitled to vote and actually cast thereon online at the Special Meeting, voting as a single class.").

to vote.[284] With the Sponsor and the directors having pledged their Founder Shares from the outset to approve the transaction,[285] 56.2 percent of the outstanding common stock voted to approve the transaction.[286] Without counting the pre-pledged Sponsor- and director-held shares, only 43.3 percent of the other outstanding common stockholders approved the transaction, falling short of the majority of the minority standard.[287] As a result, this de-SPAC transaction would not have been afforded business judgment review.

Even if this vote had satisfied the majority of the minority standard, it is unlikely that an independent and adequately empowered Special Committee could have been created for the similar reasons discussed in Churchill's proposed acquisition of MultiPlan: the directors' business ties to the Sponsor and the structural limitations of their directorship raise reasonable doubt concerning their ability to exercise independent judgment.[288] At the time of merger discussions, the GigCapital3 board of directors consisted of six directors,[289] with four directors identified as independent under the listing requirements.[290] "Directors are 'self-interested' when they appear on 'both sides of a transaction' or expect to 'derive any [material] personal financial benefit from it in the sense of self-dealing.'"[291] Each of the four purportedly independent directors held

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284. *Id.* at 37 ("On the record date, there were 25,893,479 shares of Common Stock outstanding and entitled to vote, of which 20,000,000 are public shares and 5,893,479 are Initial Stockholder Shares and Insider Shares held by [the] Initial Stockholders.").

285. *Id.* at 20 (disclosing that prior to the IPO, the company "entered into agreements with [its] Initial Stockholders and each of [its] directors and officers, pursuant to which each agreed to vote any shares of Common Stock owned by them in favor of the Business Combination Proposal").

286. Out of the 25,893,479 shares of common stock outstanding and entitled to vote, 14,555,716 shares voted "for," 256,855 shares voted "against," and 17,017 shares abstained. GigCapital3, Inc., Current Report (Form 8–K), at Item 5.07 (Apr. 22, 2021). 14,555,716 votes "for" divided by the 25,893,479 shares outstanding equates to 56.2 percent.

287. First subtract the 5,893,479 Sponsor held votes "for" from the total 14,555,716 votes "for," then divide the result by the 20,000,000 non-Sponsor held shares to reach 43.3 percent. GigCapital3, Inc. Special Meeting Proxy Statement, *supra* note 279, at 37; GigCapital3, Inc., Current Report (Form 8–K), at Item 5.07 (Apr. 22, 2021).

288. *See supra* Section III.D.1.

289. GigCapital3, Inc. Special Meeting Proxy Statement, *supra* note 279, at 214-18.

290. *Id.* at 218 ("Messrs. Miotto, Mikulsky, Wang and Betti-Berutto are the Company's independent directors.").

291. Calesa Associates, L.P. v. Am. Capital, Ltd., 2016 WL 770251, at *11 (Del. Ch. Feb. 29, 2016) (citing Orman v. Cullman, 794 A.2d 5, 23 (Del. Ch. 2002)).

economic interests in the SPAC Sponsor;[292] and two directors were granted an additional 5,000 insider shares "in consideration of future services."[293] According to the proxy materials, the Sponsor shares and warrants were worth $63.1 million[294] and $8.8 million,[295] respectively, heading into the special meeting, while the additional insider shares held by the two directors were worth $55,950.[296] While the economic interests at stake in this transaction are noticeably smaller than what the directors of Churchill held,[297] these interests are still sizeable and are still materially greater than $0. If no transaction is consummated, these Sponsor interests expire worthless and the common stock will be redeemed near par.[298] As the plaintiffs in the pending litigation allege, these directors "were self-

292. GigCapital3, Inc., Amendment No. 4 to Registration Statement (Form S–1/A), at 75 (Apr. 29, 2020) ("[T]he manager of [the] Sponsor, and Mr. Miotto, one of [the] independent directors, have formed an LLC named GigFounders, LLC, of which 90 [percent] is owned by Drs. Katz and Dinu, who are husband and wife, and 10 [percent] is owned by Mr. Miotto . . . .").

> Messrs. Mikulsky, Wang and Betti-Berutto, . . . each have a financial and voting interest in [the] Sponsor that entitles each of them to participate in any economic return that the Sponsor receives for its investment in the Company in accordance with terms negotiated with the other holders of financial and voting interests in [the] Sponsor.

Id.

293. The Company "issue[d] 5,000 insider shares to each of Messrs. Betti-Berutto and Wang in consideration of future services to [it] as the Hardware Chief Technical Officer and Software Chief Technical Officer, respectively." *Id.* at 48.

294. GigCapital3, Inc. Special Meeting Proxy Statement, *supra* note 279, at 5 ("The 5,635,000 Initial Stockholder Shares owned by the Sponsor would have had an aggregate market value of $63.1 million based upon the closing price of $11.19 per public share on the NYSE on March 19, 2021, the most recent practicable date prior to the date of this proxy statement/prospectus.").

295. *Id.* at 5 ("The 650,000 private placement units held by the Sponsor would have had an aggregate market value of $8.8 million based upon the closing price of $13.59 per public unit on the NYSE on March 19, 2021, the most recent practicable date prior to the date of this proxy statement/prospectus.").

296. Determined by multiplying the 5,000 insider shares by "the closing price of $11.19 per public share on the NYSE on March 19, 2021." *Id.*

297. *See supra* Section III.D.1.

298. GigCapital3, Inc. Special Meeting Proxy Statement, *supra* note 279, at 81 ("If [the SPAC is] unable to complete an initial business combination by the applicable deadline, [the] public stockholders may receive only approximately $10.00 per share."); *Id.* at 90 ("The Initial Stockholder Shares will be worthless if we do not complete a business combination by the applicable deadline.").

interested in effectuating the Merger because they each stood to receive proceeds from their interest in the Sponsor's Initial Stockholder Shares (and, in the case of [the two aforementioned directors], their own Initial Stockholder Shares), which would not have been available had the Merger been rejected."[299] As a result, these directors were not truly free to exercise independent judgment in evaluating the transaction.

Beyond the financial incentives directly at play in this transaction, the directors were similarly faced with opportunities to participate in other lucrative directorship opportunities under this Sponsor.[300] Each of the four purportedly independent directors had professional relationships with the two previous SPACs led by the Sponsor:

Director[301]	**GigCapital, Inc. (GIG1)**	**GigCapital2, Inc. (GIG2)**
Neil Miotto	Director	Director
John Mikulsky	Director	Director
Andrea Betti-Berutto	No Role	Hardware Chief Technical Officer
Peter Wang	Former Director	Software Chief Technical Officer

Directorship in GigCapital3 was "not a one-time payday for these directors."[302] The directors enjoy "substantial roles in GigCapital, the umbrella organization for [the Sponsor]'s many Gig entities."[303] As the plaintiffs allege, the Sponsor "ensured the loyalty of each Director by giving them *multiple* value-creating opportunities."[304] Such "deep business and personal ties . . . raise a reasonable doubt" over a director's independence.[305]

299. Delman v. GigAcquisitions3, LLC, Plaintiff's Answering Brief in Opposition to Defendants' Motion to Dismiss, at 32-33, Docket No. 2021-0679 (Del. Ch. Aug. 4, 2021).

300. GigCapital3, Inc. Special Meeting Proxy Statement, *supra* note 279, at 215-17.

301. *Id.* (detailing the previous work experiences and credentials of each director); See GigCapital3, Inc. Registration Statement, *supra* note 29, at 3, 96-99 (disclosing the previous SPACs and describing the directors' relationship with each).

302. Delman v. GigAcquisitions3, LLC, Plaintiff's Answering Brief in Opposition to Defendants' Motion to Dismiss, 36, Docket No. 2021-0679 (Del. Ch. Aug. 4, 2021).

303. *Id.*

304. *Id.*

305. Marchand v. Barnhill, 212 A.3d 805, 808 (Del. 2019).

Realistically, it is again unclear how much independence these directors could actually exercise based upon the terms of their directorships. Directors "lack independence where they were 'beholden' to . . . or so under [the controller's] influence that their discretion would be sterilized.'"[306] At the outset, the directors pledged to vote for the Initial Business Combination irrespective of how the non-Sponsor held common stock votes.[307] The Sponsor planned to "exert control at least until the completion of [the] business combination."[308] The independent directors are granted some specific powers, notably "to review on a quarterly basis all payments that were made to [the] Sponsor, executive officers or [respective] affiliates."[309] But their participation and approval is not generally needed in the one action the SPAC will take: selecting a merger partner.[310] Without providing the directors enumerated responsibilities in the process, or at least a role in the negotiation and approval of the merger agreement, the directors cede their responsibilities to the Sponsor-controller. It is apparent that, by looking at the provided background of

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306. Calesa Associates, L.P. v. Am. Capital, Ltd., 2016 WL 770251, at *11 (Del. Ch. Feb. 29, 2016) (citing Orman v. Cullman, 794 A.2d 5, 24 (Del. Ch. 2002)); *In re* BGC Partners, Inc. Derivative Litig., 2021 WL 4271788, at *6 (Del. Ch. Sept. 20, 2021) (quoting Del. Cty. Emps. Ret. Fund v. Sanchez, 124 A.3d 1017, 1023 n.25 (Del. 2015)) ("A director 'subject to the interested party's dominion or beholden to that interested party' lacks independence.").

307. *See* GigCapital3, Inc. Registration Statement, *supra* note 29, at 32 ("[The] initial stockholders have agreed to vote in favor of such initial business combination, regardless of how our public stockholders vote.").

308. Effectively, the Sponsor would remain in control irrespective of the circumstances before the Initial Business Combination:

> [Without an annual meeting,] all of the current directors will continue in office until at least the completion of the business combination. If there is an annual meeting, the entire Board of Directors will be considered for election, however [the] initial stockholders, because of their ownership position, will have considerable influence regarding the outcome. Accordingly, [the] initial stockholders will continue to exert control at least until the completion of our business combination.

Id. at 56.

309. *Id.* at 117.

310. "[A]pproval of a majority of [the] disinterested independent directors" is however needed should the SPAC elect to pursue "an initial business combination with an entity that is affiliated with any of [the] Sponsor, officers or directors" to ensure "that the business combination is fair to [the] unaffiliated stockholders from a financial point of view." *Id.* at 118.

the business combination, that is exactly what happened: the Sponsor-controller and his wife, a listed non-independent director, led the target selection process, from sourcing to negotiating the merger agreement.[311] With little, if any, involvement in the Initial Business Combination process, the purportedly "independent" directors in GigCapital3 were certainly not independent under Delaware law, thereby this transaction would fail under the second prong of the *MFW* analysis.

CONCLUSION

Determining whether the de-SPAC transaction merits business judgment deference or entire fairness review is a matter of first impression for Delaware courts but will soon be resolved as several cases sit before the Court of Chancery.[312] While some elements of the de-SPAC transaction resemble a traditional corporate merger,[313] other aspects are unique and present new challenges for the court to consider.[314] But Delaware courts are well equipped for this inquiry, as "[i]t is the very nature of equity to look beyond form to the substance of an arrangement."[315] For the de-SPAC transaction, the "difference in form, which is a product of transactional creativity, should not affect how the law views the substance of what truly occurred."[316]

Looking to the facts of the specific transaction at issue, Delaware courts can determine whether business judgment deference or entire fairness is the appropriate standard of review.[317] An examination of the SPAC Sponsor's role throughout the SPAC lifecycle reveals that the Sponsor exerts a sufficient level of control to be considered a controlling

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311. GigCapital3, Inc. Special Meeting Proxy Statement, *supra* note 279, 147-57 (Mar. 26, 2021) (detailing the background of the transaction; the independent directors infrequently appear in the step-by-step details).

312. *In re* MultiPlan Corp. S'holders Litigation, Docket No. 2021-0300 (Del. Ch. Apr. 09, 2021); Delman v. GigAcquisitions3, LLC, Docket No. 2021-0679 (Del. Ch. Aug. 04, 2021); *In re* XL Fleet (Pivotal) S'holder Litig., Docket No. 2021-0808 (Del. Ch. Sept. 20, 2021).

313. *See supra* Section I.C.

314. *See id.*

315. *See* Gatz v. Ponsoldt, 925 A.2d 1265, 1280 (Del. 2007). *See also* EDIX Media Grp., Inc. v. Mahani, 2006 WL 3742595, at *9 n.40 (Del. Ch. Dec. 12, 2006) ("Whatever the industry terminology, however, this Court looks to the substance of the transaction, not its label.").

316. *Gatz* 925 A.2d at 1280.

317. *See supra* Part II.

shareholder.[318] Looking at the terms of the de-SPAC transaction, Sponsors receive unique benefits[319] that are not ratably[320] shared with the non-Sponsor holders of common stock: although the holders of common stock appear to participate in the transaction on the same terms, the conversion of Founder Shares to common stock and opportunities to participate in private placements are not available to the non-Sponsor common stockholders.[321] Alternative arguments further support the entire fairness standard.[322] The SPAC directors are interested[323] in the transaction through their ownership of Founder Shares, and multiple directorships in other Sponsor-backed SPACs present sufficiently deep business ties between the directors and the Sponsor to create a reasonable doubt of independence.[324] Between the existence of a conflicted controller transaction and of interested directors who additionally lack independence, Delaware courts should find that entire fairness is the proper standard of review.[325]

To earn business judgment deference, SPACs should look to the dual formalities of *MFW*, which have been used in a variety of situations to secure business judgment review where entire fairness would otherwise be the operative standard.[326] Conflicted controller transactions require additional protections to secure business judgment deference,[327] and the *MFW* formalities provide a roadmap for SPACs to follow.[328] These formalities could easily be applied to the de-SPAC process and only a few small changes are required before they are met.[329] Using the two leading SPAC litigations as case studies in applying the *MFW* framework, it is clear that further changes are required before SPACs can secure business judgment review.[330] Once SPACs restructure directorship terms to remove interest in transactions and limit board participation, SPACs can

318. *See supra* Section III.A.

319. *See supra* Section III.B. *In re* Crimson Expl. Inc. S'holder Litig., 2014 WL 5449419, at *12 (Del. Ch. Oct. 24, 2014).

320. *See supra* Section III.B. *In re* CBS Corp. S'holder Class Action & Derivative Litig., 2021 WL 268779, at *36 (Del. Ch. Jan. 27, 2021), as corrected (Feb. 4, 2021).

321. *See supra* Sections III.B.1 and III.B.2.

322. *See supra* Sections III.C.1 and III.C.2.

323. *See supra* Section III.C.1.

324. *See supra* Section III.C.2.

325. *See supra* Part III.

326. *See supra* Part IV.

327. *See supra* Section IV.A.

328. *See supra* Section IV.B.

329. *See supra* Section IV.C.

330. *See supra* Section IV.C.

earn business judgment deference by following the proposed *MFW* framework.