IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE MULTIPLAN CORP. STOCKHOLDERS LITIGATION	CONSOLIDATED C.A. No. 2021-0300-LWW

OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

This action is brought on behalf of a putative class of investors in a special purpose acquisition company or "SPAC." The sole purpose of a SPAC is to pool investor capital, identify potential targets, and make an acquisition, typically within a 24-month window; otherwise, the SPAC unwinds and returns capital to its investors. Although SPACs have been prevalent in the M&A market in 2021, the SPAC structure is not new and has been utilized for decades.

Generally, a SPAC is sponsored by an experienced dealmaker who can raise capital. Because the SPAC has no business except to find an acquisition target, the sponsor typically controls the SPAC through a separate class of "founder shares" until such time as the SPAC stockholders are asked to vote on a "de-SPAC" transaction. Shares in the SPAC are offered to the public at $10 per share, and stockholders have the right to redeem their shares and receive their money back (plus interest) in lieu of a de-SPAC transaction if they do not wish to participate in the post-transaction company. Following approval of a de-SPAC transaction, the founder shares convert into 20% 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.

Everybody knows this from the outset. The SPAC structure, including the sponsor's incentives if a deal is consummated, are fully disclosed to investors in the

SPAC offering documents. Investors participate with eyes-wide-open in these investments because they believe in the SPAC sponsor and the powerful financial incentives hardwired into the SPAC structure to produce a value-maximizing transaction for all. This is exactly what happened here.

Plaintiffs are investors in MultiPlan Corporation (f/k/a Churchill Capital Corp III) ("Churchill" or the "Company"), a SPAC sponsored by Michael Klein, the former Vice Chairman of Citigroup, Inc. ("Citi") and a trusted advisor to heads of state and business leaders across many industries. Following Churchill's initial public offering in early 2020, Mr. Klein served as Churchill's Chairman and CEO.

Consistent with its purpose, Churchill raised billions of dollars in capital and evaluated several dozen potential acquisition targets. Ultimately, its board of directors decided to acquire MultiPlan, Inc. ("MultiPlan"), a healthcare data analytics and technology management solutions company. In July 2020, Churchill announced that it would acquire MultiPlan (the "Acquisition") after months of due diligence, but also long before the end of the 24-month window for Churchill to consummate a de-SPAC transaction. Mr. Klein made a significant personal commitment to the Acquisition, agreeing that the shares of common stock he would receive upon the conversion of his founder shares would be subject to an 18-month lockup, and that nearly 60% of those shares would *unvest* in connection with the Acquisition until the post-Acquisition company's stock price exceeds $12.50 for any

40 trading days in a 60 consecutive day period. Churchill stockholders voted overwhelmingly to approve the Acquisition, which closed on October 8, 2020, with Churchill being renamed MultiPlan Corporation.

After the Acquisition closed, short sellers sought to drive down the price of the Company's stock. Most notably, on November 11, 2020, Muddy Waters Capital LLC ("Muddy Waters"), a hedge fund that was heavily short in the SPAC market in general and in the Company in particular, published a report in which it alleged that the Company's business and value was not as robust as the Acquisition price implied and that the Company was about to lose its biggest customer (the "Muddy Waters Report"). The Company's CEO immediately responded to the Muddy Waters Report on November 12, 2020, refuting its conclusions and detailing its errors during the Company's third-quarter earnings call. Nevertheless, the Muddy Waters Report caused its desired effect, and the Company's stock price declined before recovering over the ensuing weeks to its pre-Muddy Waters Report price. The Company's stock price has since continued to trade below its IPO price, but Plaintiffs do not plead any facts demonstrating that the trading price is connected to the Muddy Waters allegations or any other alleged wrongdoing. Indeed, as Plaintiffs knew when they filed their Complaint (five months after the Muddy Waters Report), the Company's reported financial results have continued to be positive and the Company has not lost any of its largest customers.

Based on nothing more than the self-interested misinformation in the Muddy Waters Report and the fully-disclosed SPAC structure in which Plaintiffs knowingly invested, Plaintiffs now seek to turn their apparent disappointment with the Company's current trading price into an entire fairness case. Plaintiffs' claims must be dismissed, however, for several reasons.

First, as explained in the Company's brief, Plaintiffs' claims challenging the Acquisition are derivative and/or seek relief that is duplicative of relief that belongs to the Company. Churchill was the acquiror in the Acquisition and the only alleged harm that Plaintiffs allege is an "overpayment" for MultiPlan, which is a harm to the Company, not to the Company stockholders directly. Plaintiffs have not made a demand on the Company's board, nor alleged that demand is excused, as required by Court of Chancery Rule 23.1, and their claims must therefore be dismissed. *See* Point I, *infra*.

Second, even if Plaintiffs' claims challenging the Acquisition are direct, Plaintiffs still fail to state a claim because the Acquisition is subject to business judgment review. While Mr. Klein and his affiliated entities controlled Churchill before the Acquisition, the Acquisition was not a "conflicted controller" transaction because neither Mr. Klein nor any of his affiliates stood on both sides of the Acquisition or competed with Churchill's public stockholders for consideration in the Acquisition. The Churchill board was also disinterested and independent with respect to the Acquisition. Plaintiffs' attempt to impugn the board by alleging that certain directors received founder shares fails because the founder shares aligned the interests of the directors who received them with Churchill's other stockholders to identify and execute a value-maximizing transaction. *See* Point II, *infra*.

Third, in an effort to plead a fiduciary duty claim, Plaintiffs allege, in each of their claims, that they were harmed by "not exercising their redemption rights prior to the [Acquisition]."[1] This alleged harm, however, cannot form the basis for a claim for breach of fiduciary duty (including the duty of disclosure) because the redemption rights are *contractual* rights set forth in Churchill's certificate of incorporation. Delaware law is clear that where an alleged right arises from a certificate of incorporation, the duty arises out of the parties' *legal* relationship, not an equitable one, and thus can only be enforced through a claim for breach of contract or quasi-contract (*i.e.*, the implied covenant of good faith and fair dealing), which Plaintiffs do not assert. *See* Point III, *infra*.

Fourth, Plaintiffs' allegations that the Acquisition proxy was false and misleading in light of the Muddy Waters Report fail to state a claim because Plaintiffs do not plead any facts demonstrating that the allegations in the Muddy Waters Report were true, much less that any Defendant knew of such facts or

[1] Compl. ¶¶ 104, 112, 121, 128.

believed them to be true. To the contrary, as Plaintiffs knew when they filed the Complaint in this action, the allegations in the Muddy Waters Report were unsubstantiated and, in fact, have been shown to be false given the Company's subsequent positive financial results and the lack of any disclosure concerning the loss of any material customer. In essence, all Plaintiffs allege is that the specious Muddy Waters Report resulted in a stock drop. *See* Point IV, *infra*.

Fifth, regardless of the applicable standard of review, Plaintiffs' claims against the members of the Churchill board should be dismissed on the independent ground that Churchill's certificate of incorporation exculpates them from liability for breaches of the duty of care, as permitted under 8 *Del. C.* § 102(b)(7), and Plaintiffs fail to plead facts demonstrating that the Churchill directors acted in bad faith or otherwise breached their duty of loyalty in connection with the Acquisition. *See* Point V, *infra*.

Finally, Plaintiffs' claim against The Klein Group, LLC ("The Klein Group") for aiding and abetting breaches of fiduciary duty by the Churchill board should be dismissed on either of two independent grounds: (i) the failure to state a predicate breach of fiduciary duty claim; or (ii) the failure to plead facts showing "knowing participation" in any such breach by The Klein Group. *See* Point VI, *infra*.

The Complaint should be dismissed with prejudice as to all Defendants (defined below).

FACTUAL BACKGROUND[2]

A. The Parties And Relevant Non-Parties

Plaintiffs allege that they have "been the beneficial owner[s] of[] Churchill stock at all relevant times, including prior to the September 14, 2020 record date for the [Acquisition]."[3]

Defendant Michael Klein served as Churchill's CEO, President, and Chairman of its board of directors (the "Board") before the Acquisition, and he currently serves as a member of the Company's board of directors.[4] Defendants Jeremy Paul Abson, Glenn R. August, Michael Eck, Mark Klein, Malcom S. McDermid, and Karen G. Mills served as members of the Board before the Acquisition and are all experienced professionals with highly successful careers in their own right.[5] Defendant Jay Taragin served as Churchill's CFO before the Acquisition.[6] Defendant Churchill Sponsor III, LLC ("Sponsor") is a limited

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[2] This background draws "from the allegations in the Complaint, documents integral to the Complaint and matters of which [the Court] may take judicial notice," including judicially noticeable facts available in public filings with the Securities and Exchange Commission (the "SEC"). *In re Martha Stewart Living Omnimedia, Inc. S'holder Litig.*, 2017 WL 3568089, at *3 (Del. Ch. Aug. 18, 2017).

[3] Compl. ¶ 19.

[4] *Id.* ¶ 21.

[5] *Id.* ¶¶ 23–28; *see also* September 18, 2020 Company Definitive Schedule 14A (the "Proxy") at 147–48 (Ex. A). References to "Ex. __" refer to the exhibits attached to the Transmittal Declaration of Bradley R. Aronstam, filed with this brief.

[6] Compl. ¶ 22.

liability company affiliated with Mr. Klein that purchased and held Churchill's founder shares.[7] Defendant The Klein Group is a financial advisor that the Board engaged in connection with its search for an acquisition target.[8] Plaintiffs allege that Defendant M. Klein and Company, LLC ("M. Klein & Co.") is controlled by Mr. Klein, and that its "subsidiaries and/or affiliates included [] Sponsor and Klein Group."[9] Messrs. Abson, August, Eck, Mark Klein, Michael Klein, McDermid, and Taragin, Ms. Mills, Sponsor, The Klein Group, and M. Klein & Co. are referred to collectively as "Defendants."[10]

MultiPlan provided data analytics and technology management solutions to the U.S. healthcare industry. Churchill acquired MultiPlan on October 8, 2020; Churchill was then renamed MultiPlan Corporation.[11]

Non-party Hellman & Friedman ("H&F") is a private equity firm that owned a large stake in MultiPlan before the Acquisition and now owns approximately 32% of the Company.[12]

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[7] *Id.* ¶ 30.

[8] *Id.* ¶ 31.

[9] *Id.*

[10] The Company is named as a defendant in the Complaint, but the Complaint does not assert any cause of action against the Company.

[11] Compl. ¶ 35.

[12] *Id.* ¶ 36.

B. Churchill's IPO

On February 19, 2020, Churchill completed its IPO of 110 million units. Each unit consisted of one share of Class A common stock and one-fourth of a warrant. The units were sold for $10 per unit, generating gross proceeds of $1.1 billion.[13] The units were offered pursuant to a February 13, 2020 Amended Form S-1 Registration Statement (the "Registration Statement") and a February 14, 2020 Form 424B4 Prospectus (the "Prospectus"). In the Registration Statement and Prospectus, Churchill explained that it was a SPAC formed for the express purpose of effecting a merger or other business combination.[14] Churchill disclosed that its "completion window" for a business combination was 24 months after its IPO.[15] Under Churchill's Amended and Restated Certificate of Incorporation (the "Charter"), if Churchill did not complete a business combination within its completion window, it would return all of the proceeds from its IPO plus interest, cease operations, and wind up.[16] The Charter also provided holders of Class A common stock with the right to redeem any or all of their shares at the IPO price plus interest instead of choosing to hold their shares in the post-business combination entity.[17]

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[13] *Id.* ¶ 56.

[14] Registration Statement at 2 (Ex. B); Prospectus at 2 (Ex. C).

[15] Registration Statement at 1 (Ex. B); Prospectus at 1 (Ex. C).

[16] Charter § 9.2 (Ex. D); *see also* Registration Statement at 26–27 (Ex. B).

[17] Charter § 9.2 (Ex. D); *see also* Registration Statement at 20–21 (Ex. B).

The Registration Statement and Prospectus detailed the structure of Churchill's Board and management, as well as Churchill's relationships with Mr. Klein, Sponsor, and M. Klein & Co. The Registration Statement and Prospectus also described Sponsor's purchase of the Class B founder shares, explained that those shares would convert into 20% of Churchill's Class A shares immediately before any de-SPAC transaction, that they would be "worthless" if Churchill did not enter into a business combination within the completion window, and that this created a potential conflict of interest:

> ***Since our initial stockholders will lose their entire investment in us if our initial business combination is not completed (other than with respect to any public shares they may hold), a conflict of interest may arise in determining whether a particular business combination target is appropriate for our initial business combination****. . . .* The founder shares will be worthless if we do not complete an initial business combination.[18]

The Registration Statement and Prospectus also explained that the founder shares were subject to a lock-up agreement, providing that those shares could not be sold until one year after a business combination, unless: (i) the post-merger entity "complete[s] a liquidation, merger, stock exchange, reorganization or other similar transaction after [the merger] that results in all of [the Company's] public stockholders having the right to exchange their shares of common stock for cash,

[18] Registration Statement at 53 (Ex. B) (emphasis in original); Prospectus at 53 (emphasis in original) (Ex. C).

securities, or other property"; or (ii) "the closing price of [the] common stock equals or exceeds $12.00 per share (as adjusted for stock splits, stock dividends, reorganizations, recapitalizations and the like) for any 20 trading days within any 30-trading day period commencing at least 150 days after" the merger.[19] The Prospectus further explained that, in connection with Churchill's IPO, Sponsor purchased 23 million private placement warrants at $1 per warrant, and that each warrant entitled Sponsor to purchase a share of Churchill Class A common stock for $11.50.[20]

The Registration Statement and Prospectus further disclosed that the Churchill Board may engage an affiliate of Mr. Klein to act as Churchill's financial advisor in connection with any business combination, and that such advisor would likely be paid on a contingent basis:

> We may engage M. Klein and Company, or another affiliate of our sponsor, as a financial advisor in connection with our initial business combination and pay such affiliate a customary financial advisory fee in an amount that constitutes a market standard financial advisory fee . . . . The payment of such fee would likely be conditioned upon the completion of the initial business combination. Therefore, our sponsor may have additional financial interests in the completion of the initial business combination. These financial interests may influence the advice any such affiliate provides us as our financial advisor, which

[19] Registration Statement at 15 (Ex. B); Prospectus at 15 (Ex. C). As explained below, Mr. Klein agreed to additional lock-up restrictions in connection with the Acquisition. *See* Factual Background Point C, *infra*.

[20] Prospectus at 16 (Ex. C).

advice would contribute to our decision on whether to pursue a business combination with any particular target.[21]

C. Churchill's Due Diligence Of MultiPlan And The Acquisition Negotiations

Following its IPO, Churchill began looking for an acquisition target. Churchill worked closely with Mr. Klein and benefitted from his deep experience in and familiarity with the M&A marketplace generally and SPACs in particular.[22] The Klein Group assisted in this process at the Board's direction by providing analytical support in evaluating potential targets, as well as a range of advisory services regarding M&A and capital market activities, including structuring advice, capital markets analyses, and capital raising, marketing, investor relations, and due diligence support.[23] Churchill sought to identify companies that had (i) a strong management team, (ii) a competitive advantage, (iii) significant streams of recurring revenue, (iv) significant total addressable market and growth expansion opportunities, (v) an opportunity for operational improvement, (vi) attractive steady-state margins and high incremental margins, and (vii) significant cash

[21] Registration Statement at 52 (Ex. B); Prospectus at 52 (Ex. C).

[22] Compl. ¶¶ 21, 55.

[23] Proxy at 102 (Ex. A). As a SPAC with no day-to-day business of its own, Churchill did not have any employees and, thus, the Board had to rely on external advisors to provide day-to-day business support in its search for a potential acquisition target.

flow.[24] Churchill also sought to identify companies that would benefit from the expertise of its operating partners and from being a publicly-held entity.[25]

Representatives of Churchill had contact with, and commenced initial preliminary due diligence on, several dozen potential targets. Ultimately, Churchill identified MultiPlan as the most attractive potential acquisition target.[26]

On March 3, 2020, Mr. Klein met with MultiPlan CEO Mark Tabak and MultiPlan director Allen Thorpe, who was also a partner at H&F, to discuss a potential transaction between MultiPlan and Churchill at a potential enterprise value of approximately $12 billion. MultiPlan, however, was not interested in pursuing a potential transaction with Churchill at the time.[27]

About six weeks later, on April 17, 2020, Churchill reiterated its potential interest in acquiring MultiPlan, but at a revised enterprise value of $10.5 billion, taking into consideration then-current market conditions, including the COVID-19 pandemic and the trading multiples of companies with characteristics similar to MultiPlan. Churchill's proposal was subject to the satisfactory completion of due diligence and based upon the assumptions that (i) MultiPlan would be

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 102–03.

sufficiently de-levered to support its strategic plan and to maintain a capital structure that would be reasonable compared to its publicly-traded peers, (ii) the board of directors of the post-combination company would be a balanced and independent board (and not one majority controlled by H&F), (iii) H&F and the other MultiPlan stockholders would rollover a significant stake of their equity in MultiPlan in any transaction, and (iv) Churchill and its advisors would have wide-ranging access to complete their due diligence, including the ability to speak with certain significant MultiPlan customers.[28]

For the next ten days, Mr. Klein and representatives of The Klein Group continued to speak with MultiPlan and H&F about a potential transaction. On April 27, 2020, MultiPlan agreed to allow Churchill to commence due diligence.[29] Throughout May 2020, Churchill engaged in a business and financial review of MultiPlan, and Churchill, MultiPlan, and their respective advisors held numerous diligence calls.[30] On May 7, Churchill met with Citi to discuss a potential acquisition of MultiPlan, and subsequently engaged Citi to act as a financial and capital markets advisor in connection with the Acquisition.[31]

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[28] *Id.* at 103.

[29] *Id.*

[30] *Id.*

[31] *Id.*

Following its initial due diligence efforts, the Churchill Board decided to prioritize a potential business combination with MultiPlan. Churchill's decision to focus on MultiPlan was the result of, among other things: (i) a determination that other potential targets were not as attractive as MultiPlan due to a combination of their business prospects, overall strategy, management teams, size, valuation, and market conditions; and (ii) Churchill's belief that MultiPlan had a strong business, strong growth prospects, and a strong management team, and that MultiPlan would not be constrained in its ability to grow its business as a result of de-levering and becoming a public company.[32]

On May 8, 2020, Mr. Klein and representatives of The Klein Group reaffirmed to Mr. Thorpe Churchill's proposal to acquire MultiPlan for an enterprise value of $10.5 billion, subject to the same assumptions discussed on April 17, 2020.[33] Mr. Thorpe responded that MultiPlan did not believe that $10.5 billion represented sufficient value for MultiPlan's stockholders, and that MultiPlan was unwilling to agree to the governance and post-closing ownership proposals discussed on April 17.[34]

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[32] *Id.*

[33] *Id.*

[34] *Id.* at 103–04.

On May 18, 2020, Mr. Klein informed Mr. Thorpe that, based on the work Churchill had performed, including the results of its initial due diligence, evaluation of then-market conditions, and the trading multiples of companies with characteristics similar to MultiPlan, and subject to the assumptions and conditions previously discussed, Churchill would be willing to explore a potential acquisition of MultiPlan for an enterprise value of $11 billion.[35] Later that day, Mr. Thorpe informed Mr. Klein that MultiPlan would be willing to continue to explore a potential transaction on that basis.[36]

Churchill's due diligence of MultiPlan continued until July 12, 2020, when Churchill and MultiPlan agreed to the Acquisition. Throughout this period, Churchill and its advisors, including The Klein Group, continued their broader review of MultiPlan's business. Churchill also hired a leading consulting firm to assist and advise it in the due diligence process, including with regard to MultiPlan's market opportunities, competitive landscape, potential growth, and strategic plans.[37]

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[35] *Id.* at 104.

[36] *Id.*

[37] *Id.* at 104–07.

On June 2, 2020, Mr. Klein discussed the ongoing due diligence efforts with Mr. Thorpe and informed him of Churchill's continued interest in MultiPlan.[38] A few days later, on June 5, Mr. Klein and Mr. Thorpe, together with their respective advisors, discussed the strategy of marketing MultiPlan's products and services, as well as strategies to utilize MultiPlan's technology and data to enhance and extend its product offerings.[39] On June 30, 2020, the Board discussed the potential business combination with MultiPlan, and Mr. Klein updated the Board on the proposed timeline of the transaction, the potential structure of the transaction, and the status of discussions with MultiPlan.[40] Mr. Klein also updated the Board on other potential target companies that Churchill management had considered acquiring.[41]

On July 6, 2020, the Board met with its advisors, including The Klein Group and Citi, to discuss the potential business combination with MultiPlan. Mr. Klein updated the Board on Churchill's due diligence review and the proposed timeline of the potential transaction.[42] Mr. Klein discussed MultiPlan's financial profile with

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[38] *Id.* at 105.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 106.

the Board, as well as the strategic rationale for the transaction.[43] Citi discussed its preliminary views on the valuation of MultiPlan implied by the terms of the potential transaction, the potential benefits of such a transaction, and the potential reaction in the capital markets to the transaction.[44]

Three days later, on July 9, the Board met again with its advisors, including The Klein Group and Citi, to discuss the potential acquisition of MultiPlan. Mr. Klein updated the Board on the status of the proposed transaction. Citi reviewed with the Board its perspective on MultiPlan's valuation as implied by the terms of the proposed transaction, how that valuation compared to similar companies, the benefits to Churchill stockholders of consummating the transaction, and the potential for growth of MultiPlan's business through an acquisition strategy.[45]

On July 12, 2020, the Board again met with its advisors, including The Klein Group and Citi, to discuss the Acquisition.[46] The Board considered the information gained from the due diligence review of MultiPlan's business, including MultiPlan's comprehensive and diverse data, intellectual property, and network assets, its payor

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[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 107.

customers, and its ability to enhance, extend, and expand its platform.[47] The Board also considered MultiPlan's prospects for growth, and its ability to expand the reach of its proprietary platform.[48] The Board then unanimously approved the Acquisition and, later that same day, Churchill and MultiPlan executed a merger agreement.[49]

Importantly, in connection with the Acquisition and to further demonstrate his personal commitment to the Acquisition as being in the best interests of Churchill stockholders, Mr. Klein (and Sponsor) agreed to additional restrictions on Mr. Klein's founder shares and warrants. Specifically, Mr. Klein agreed (i) not to sell *any* of the Class A common stock Sponsor received in the Acquisition as a result of its founder shares or 4,800,000 of its warrants until at least 18 months after the Acquisition;[50] and (ii) that 12,404,080 of Sponsor's founder shares (or nearly 60%) and 4,800,000 of its IPO private placement warrants (or nearly 21%) would un-vest as of the closing of the Acquisition and will only re-vest if, at some time one year after the Acquisition but before five years after the Acquisition, the

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47 *Id.* at 9.

48 *Id.*

49 *Id.* at 106–08.

50 *Id.* at 24–25.

Company's Class A common stock exceeds $12.50 for any 40 trading days in a 60 consecutive day period.[51]

D. The Proxy And Stockholder Vote

On September 18, 2020, Churchill filed the Proxy with the SEC. Among other things, the Proxy described the redemption rights that Churchill provided to its Class A stockholders pursuant to its Charter, as well as the procedure for exercising such rights in connection with the Acquisition:

> Pursuant to Churchill's current certificate of incorporation, a holder of public shares may demand that Churchill redeem such shares for cash if the business combination is consummated. Holders of public shares will be entitled to receive cash for these shares only if they (i) demand that Churchill redeem their shares for cash no later than the second business day prior to the vote on the business combination proposal by delivering their stock to Churchill's transfer agent prior to the vote at the meeting and (ii) affirmatively vote "for" or "against" the business combination proposal.[52]

The Proxy also described the founder shares and warrants held by Mr. Klein (through Sponsor),[53] and explained that the founder shares would convert into Class A common stock in connection with the Acquisition, but that those shares and warrants would be "worthless" if Churchill did not enter into a business combination within its completion window. The Proxy explained (again) that this meant that

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[51] *Id.* at 25. If the shares and warrants do not re-vest by the end of the five-year period, they will be forfeited and canceled.

[52] *Id.* at 29.

[53] *Id.* at 248.

Mr. Klein (and Sponsor) may have an "interest" in the Acquisition that was "different from, or in addition to, those of Churchill stockholders generally."[54] The Proxy also described the "economic interest" and possible "indirect economic interest" that certain members of the Board have in the founder shares, as well as the possible "indirect economic interest" that Messrs. Abson and McDermid may have in Sponsor's warrants.[55]

The Proxy also disclosed that Churchill had engaged The Klein Group in connection with the Acquisition, The Klein Group's affiliation with Mr. Klein, the fees The Klein Group stood to earn if the Acquisition was completed, and that Churchill's Board had approved the engagement:

> Churchill has engaged [The Klein Group] to act as Churchill's financial advisor in connection with the [Acquisition] and as a placement agent in connection with the [private investment in public equity transactions occurring in connection with the Acquisition]. Pursuant to this engagement, Churchill will pay [The Klein Group] a transaction fee of $15,000,000 and a placement fee of $15,500,000 . . . , which shall be conditioned upon the completion of the [Acquisition] and such engagement shall be terminated in full at such time. Therefore, [The Klein Group] and Michael Klein have financial interests in the completion of the [Acquisition] in addition to the financial interest of the Sponsor. The engagement of [The Klein Group] and the payment of the fees described above have been approved by Churchill's audit committee and the [] Board in accordance with Churchill's related persons transaction policy.[56]

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[54] *Id.* at 30, 116.

[55] *Id.* at 248; *see also* Compl. ¶¶ 60, 67.

[56] Proxy at 30 (Ex. A).

On October 7, 2020, Churchill's stockholders voted overwhelmingly in favor of the Acquisition. Over 70% of the shares unaffiliated with Mr. Klein voted for the Acquisition, and over 90% of the unaffiliated shares that were voted were cast in favor of the Acquisition.[57] The Acquisition closed the next day.[58]

E. The Muddy Waters Report And The Company's Response

On November 11, 2020, approximately one month after the Acquisition closed, privately-owned investment firm Muddy Waters published a so-called "research report" titled *MultiPlan: Private Equity Necrophilia Meets the Great 2020 Money Grab*, which asserted that the Company was in the process of losing its largest client, UnitedHealthcare ("UHC"), and that, in 2018, MultiPlan "released revenue reserves, dropping them from approximately 30% to 10% of revenue, which we believe enabled [MultiPlan] to show 2018 EBITDA growth amid shrinking sales."[59]

Muddy Waters is not an independent research firm offering unbiased, fact-driven reports. Far from it. Muddy Waters, owned and controlled by its founder and CEO, Carson Block, is a hedge fund that is heavily short in the SPAC market in general and in the Company in particular.[60] Muddy Waters, therefore, has much to

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[57] October 9, 2020 Company Form 8-K at 7–8, 27 (Ex. E).

[58] *Id.* at 2.

[59] Muddy Waters Report at 2 (Ex. F).

[60] *Id.*

gain from seeing the Company's stock price decline. And Mr. Block, who has been described as "the most brazen, profane short-seller on the planet today," has not been shy about trying to benefit his short position in the Company, calling SPACS "dog sh*t" and "a cynical predatory play," and stating that "the [SPAC] market is a scam."[61]

On November 12, 2020, the day after the Muddy Waters Report was published, the Company held its earnings call for the third quarter of 2020. During the call, Company CEO Mark Tabak refuted the conclusions in the Muddy Waters Report upon which Plaintiffs rely:

> The first assertion made by the short seller is that UnitedHealthcare is planning to exit the relationship with [the Company] and, in effect, in-source what we've been doing and what we've been using, and they plan to use a reference pricing tool with a consumer advocacy service called Naviguard. That is absolutely false. Our business with UnitedHealthcare continues to grow every quarter. . . . [The short seller also asserts that] MultiPlan used financial engineering to prop up its earnings to show better financial performance in 2018. Again, this is absolutely false. Revenue reserves at MultiPlan are small, and changes to those reserves had [a] completely immaterial impact on our 2018 revenues. . . . Revenue reserves are small in the context of our total revenue, not the 10% to 30% type of figures described in the short seller's manifesto.[62]

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[61] Michelle Celarier, Institutional Investor, *The Rage of Carson Block* (April 19, 2021), at 3 (Ex. G); Sonali Basak, Bloomberg, *Carson Block Steps Up SPAC Attacks, Citing 'Predatory' Behavior* (April 5, 2021), at 1 (Ex. H).

[62] November 12, 2020 Company Earnings Call Transcript at 5, 7 (the "Earnings Call Transcript") (Ex. I).

Although the Company's stock price declined after the Muddy Waters Report was published, falling from a closing price of $8.73 on November 10, 2020, to a closing price of $7.01 on November 11, 2020, and to a closing price of $6.27 on November 12, 2020, the price quickly rebounded to its pre-Muddy Waters Report level, closing at $9.70 on December 22, 2020.[63]

The conclusions in the Muddy Waters Report have proven to be baseless. For example, on March 10, 2021 (before Plaintiffs filed their first complaint in this action), the Company announced its financial results for the fourth quarter and fiscal year ended December 31, 2020. Mr. Tabak, the Company's CEO, stated that the Company "had a milestone fourth quarter in terms of both performance and execution of our growth plan. . . . After reporting stronger than expected results in the third-quarter, we delivered even stronger fourth quarter results despite pandemic conditions and their impact on elective healthcare service."[64]

On May 13, 2021, the Company announced its financial results for the first quarter of 2021 ended March 31, 2021, which were again positive. Mr. Tabak stated:

> [The Company's] performance during the first quarter demonstrated the continued strength of our company. . . . Despite the ongoing effects of the COVID-19 pandemic on our business, both revenue and Adjusted EBITDA for the first quarter were in-line with the prior quarter and the

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[63] Company Historical Stock Price Chart (Ex. J). "The Court may take judicial notice of the price of [the Company's] stock." *Weiss v. Samsonite Corp.*, 741 A.2d 366, 375 n.26 (Del. Ch.), *aff'd*, 746 A.2d 277 (Del. 1999) (TABLE).

[64] March 10, 2021 Company Form 8-K, Ex. 99.1 at 1 (Ex. K).

expectations we communicated earlier this year, underscoring the recurring nature of our business and positioning us to maintain momentum in 2021.[65]

Furthermore, in its public filings since the Muddy Waters Report, the Company has continued to state, as it did in the Proxy, that "[t]wo customers individually accounted for 35% and 20% of [its] revenues,"[66] and the Company has not reported any material change (or anticipated change) in its business with any of its largest customers, much less a loss of such customers.

F. Procedural History

Plaintiff Kwame Amo filed his putative class action complaint challenging the Acquisition on March 25, 2021. Plaintiff Anthony Franchi filed an almost identical putative class action complaint on April 9, 2021. Plaintiffs, who are represented by the same counsel, filed a proposed stipulation and order consolidating the action and designating Mr. Franchi's pleading as the operative Complaint, which the Court granted on April 14, 2021. Defendants and the Company filed motions to dismiss the Complaint on May 3, 2021.

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[65] May 13, 2021 Company Form 8-K, Ex. 99.1 at 1 (Ex. L).

[66] Proxy at 233–34 (Ex. A); March 16, 2021 Company Form 10-K (the "2020 10-K") at 65 (Ex. M); May 14, 2021 Company Form 10-Q at 34 (Ex. N).

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE DERIVATIVE AND SHOULD BE DISMISSED DUE TO PLAINTIFFS' FAILURE TO COMPLY WITH RULE 23.1

For the reasons explained in the Company's Opening Brief, which Defendants hereby adopt, Plaintiffs' claims challenging the Acquisition are derivative and/or seek relief that is duplicative of claims belonging to the Company. Plaintiffs have not made a demand on the Company's board or alleged that a pre-suit demand is excused, as required by Court of Chancery Rule 23.1. Accordingly, Plaintiffs' claims should be dismissed under Rules 23.1 and 12(b)(6).

II. EVEN IF PLAINTIFFS' CLAIMS ARE DIRECT, THE ACQUISITION IS SUBJECT TO BUSINESS JUDGMENT REVIEW

A complaint should be dismissed under Court of Chancery Rule 12(b)(6) if, assuming the well-pled facts to be true, the plaintiff would be unable to recover under "any reasonably conceivable set of circumstances susceptible of proof."[67] Although the Court must "accept as true all of the well-pleaded allegations of fact and draw reasonable inferences in the plaintiff's favor," the Court may only draw reasonable inferences "that logically flow from the face of the complaint."[68] The Court need not "accept every strained interpretation of the allegations proposed by the

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[67] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 897 (Del. 2002)).

[68] *Id.*

plaintiff,"[69] "credit conclusory allegations that are unsupported by specific facts,"[70] or "draw unreasonable inferences in the plaintiff's favor."[71]

Delaware's default standard of review is the business judgment rule, which "is a presumption that in making a business decision, the board of directors acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company."[72] Plaintiffs bear the burden of rebutting that presumption.[73] Plaintiffs allege that the business judgment presumption has been rebutted and that the Acquisition is subject to entire fairness review. For the reasons explained below, these allegations fail.

A. The Acquisition Was Not A Conflicted Controller Transaction

Plaintiffs first allege that the business judgment presumption has been rebutted because Sponsor was Churchill's controlling stockholder, and "[t]he massive windfalls available to Sponsor [in any merger as a result of the founder shares] . . . separate from any benefit to stockholders created a clear conflict of

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[69] *Id.*

[70] *Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 100 (Del. 2013).

[71] *Id.*

[72] *Solomon v. Armstrong*, 747 A.2d 1098, 1111 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000) (TABLE).

[73] *Id.* at 1111–12.

interest with respect to any proposed deal, thus warranting entire fairness review of any deal."[74]

"Entire fairness is not triggered solely because a company has a controlling stockholder."[75] Rather, for entire fairness to apply, "[t]he controller also must engage in a conflicted transaction."[76] "Conflicted transactions include those in which the controller stands on both sides of the deal (for example, when a parent acquires its subsidiary), as well as those in which the controller stands on only one side of the deal but 'competes with the common stockholders for consideration.'"[77] Neither test is met here.

There are no allegations in the Complaint that Sponsor or any of the other Defendants stood on both sides of the Acquisition. Indeed, the Acquisition was an arm's-length transaction between two unaffiliated parties and, as such, the Complaint contains no allegations whatsoever about any relationship between any Defendant and MultiPlan or its pre-Acquisition stockholders.

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[74] Compl. ¶ 7.

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

[76] *Id.*

[77] *Larkin v. Shah*, 2016 WL 4485447, at *8 (Del. Ch. Aug. 25, 2016) (quoting *Crimson*, 2014 WL 5449419, at *12).

There are likewise no allegations in the Complaint that Sponsor or any Defendant competed with public stockholders for Acquisition consideration. An alleged controlling stockholder "competes with common stockholders for consideration" when the controller (i) "receive[s] more consideration for their shares . . . than the minority common stockholders"; (ii) "receives different consideration" than the minority stockholders; or (iii) "extract[s] something uniquely valuable to the controller, even if the controller nominally receives the same consideration as all other stockholders."[78] Sponsor and Churchill's other stockholders did not "compete" for consideration. As explained in the Company's Opening Brief, the Acquisition involved Churchill *acquiring* MultiPlan for cash and Churchill stock. Consequently, after the Acquisition, Churchill stockholders owned the exact same shares of stock that they held before the Acquisition.

None of the Defendants received any greater or different consideration than other Churchill stockholders in the Acquisition. The Class B founder shares that converted into Class A shares as part of the Acquisition were identical to the Class A shares held by Plaintiffs and all public stockholders. As a result, the shares held by Sponsor and the other Defendants participated in the Acquisition on the *same terms* as all other Churchill shares, resulting in Mr. Klein (and other recipients of

[78] *Crimson*, 2014 WL 5449419, at *12–13.

founder shares) owning 4.2% of the outstanding common stock of the post-Acquisition entity and Churchill's other pre-Acquisition stockholders collectively owning 16% of the post-Acquisition entity.[79] This 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—in no way involved "competition for consideration" between Sponsor or any of the other Defendants, on the one hand, and Churchill's other pre-Acquisition stockholders, on the other. Quite the opposite, since 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."[80] In short, there is no piece of the "pie"

[79] Compl. ¶ 64.

[80] *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."); *In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *13 n.64 (Del. Ch. Feb. 29, 2012) (rejecting argument that directors were interested due to vesting of stock options because "the directors' interests would be aligned with the shareholders in seeking the highest price for their shares reasonably available"); *Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *8 (Del. Ch. Nov. 30, 2007) (accelerated vesting of options did not render directors interested because the "interests of the shareholders and directors [were] aligned in obtaining the highest price").

that Sponsor or any of the other Defendants took away from Plaintiffs and other Class A stockholders as a result of the Acquisition.

Further undercutting Plaintiffs' assertion that the founder shares were simply a windfall for doing any deal (putting aside the substantial reputational risk that just doing "any deal" could have for Mr. Klein and the Churchill Board members), Mr. Klein demonstrated his personal commitment to the Acquisition as being in the best interests of Churchill's stockholders by agreeing not to sell any of the Class A common stock he received in the Acquisition as a result of Sponsor's founder shares until at least 18 months after the Acquisition.[81] This lockup provided Mr. Klein with a significant, personal financial incentive to ensure that any acquisition would be successful in the long-term.[82]

In addition, 60% of Mr. Klein's (and Sponsor's) common stock *un*-vested in connection with the Acquisition and will only *re*-vest if the Company's stock price exceeds $12.50 for any 40 trading days in a 60 consecutive day period.[83] Mr. Klein's

[81] Proxy at 24 (Ex. A).

[82] *See In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 662 (Del. Ch. 2013) ("large shareholders have strong incentives to maximize the value of their shares"); *Rudd v. Brown*, 2020 WL 5494526, at *11 (Del. Ch. Sept. 11, 2020) ("Delaware law recognizes that '[a] director who is also a shareholder of his corporation is more likely to have interests that are aligned with the other shareholders of that corporation as it is in his best interest, as a shareholder, to negotiate a transaction that will result in the largest return for all shareholders.'").

[83] Proxy at 238 (Ex. A).

interests in Sponsor's $23 million investment in private placement warrants likewise only have value if the Company's stock price reaches $12.50 at least one year after the Acquisition or $11.50 (depending on the warrant),[84] further aligning Mr. Klein's personal financial interests with the long-term interests of Churchill's other stockholders.

Moreover, Plaintiffs now seek to attack the very economic incentives that were fully disclosed and known to them *before* they invested in Churchill and that were hardwired into Churchill's SPAC structure.[85] This is inequitable and not permitted under Delaware law. For example, in *In re SmileDirectClub, Inc. Deriv. Litig.*, the Court dismissed claims challenging a company's purchase of stock and LLC units from the company's board members and their affiliates because the company's IPO documents disclosed that the company "intend[ed]" to undertake those "Insider Transactions."[86] The Court held that "[i]n view of the Prospectus's thorough disclosures about the Company's plans to complete the Insider Transactions at the IPO price, 'it would seem to follow that plaintiff would be barred from suing by reason of its knowledge of the alleged wrong when it purchased the

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[84] *Id.*

[85] *See* Registration Statement at 2, 52 (Ex. B); Prospectus at 2, 53 (Ex. C); Compl. ¶ 43.

[86] 2021 WL 2182827, at *12 (Del. Ch. May 28, 2021).

stock.'"[87] The same is true here. Plaintiffs invested in Churchill with full knowledge of its SPAC structure, including the precise manner in which the founder shares would convert into common stock if Churchill effected a business combination. Plaintiffs are, thus, estopped from challenging that structure.

Plaintiffs' contention that Mr. Klein and the Board were looking to do just "any deal" to realize their financial interests also flies in the face of the record and common sense. The Board spent months conducting due diligence on all aspects of MultiPlan's business before agreeing to the Acquisition. It also retained external legal and financial advisors, as well as a consulting firm, to assist in its due diligence of MultiPlan's business and prospects. The notion that the Board would undertake such efforts as a ruse simply to realize their financial interests defies common sense,

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[87] *Id.* (quoting *7547 P'rs v. Beck*, 1995 WL 106490, at *3 (Del. Ch. Feb. 24, 1995); *see also Goodman v. Futrovsky*, 213 A.2d 899, 902–03 (Del. 1965) (holding that when "[f]ull disclosure of [a contract between the corporation and its controlling stockholder] was made in the Prospectus under which the stock was offered to the public," stockholders purchased stock "with full knowledge" of the contract and, thus, "acquiesce[d]" to it and "will not be heard to now claim that they" were unaware of the contract and assert a claim based on it); *Beck*, 1995 WL 106490, at *2–3 ("A claim of inadequate disclosure is often made when the market price drops below the offering price. . . . Assuming adequate disclosure, and there has been no claim to the contrary, it would seem to follow that plaintiff would be barred from suing by reason of its knowledge of the alleged wrong when it purchased the stock."), *aff'd*, 682 A.2d 160 (Del. 1996).

as well as the fundamental presumption under Delaware law that directors act in good faith.[88]

Furthermore, when the Acquisition was announced, Churchill still had 19 months of its 24-month completion window remaining.[89] There was no reason for it to do just "any" deal at that point. Mr. Klein and the Churchill Board had as much incentive as anyone to pass on the Acquisition if they did not believe that it would be in the best long-term interests of Churchill and all of its stockholders.[90]

Finally, Plaintiffs' allegation that Mr. Klein "had opportunities to skim side payments" in connection with the Acquisition because he allegedly "caused a $30.5 million 'advisory' fee to be paid to the Klein Group,"[91] also fails to demonstrate that the Acquisition was a conflicted controller transaction. The Klein Group's

[88] *Hindlin v. Gottwald*, 2020 WL 4206570, at *5 (Del. Ch. July 22, 2020) ("Presumptive inferences of wrongdoing cannot be squared with Delaware's business judgment rule, which presumes corporate fiduciaries have acted in good faith and with due care. In the absence of pled facts, the Court cannot presume wrongdoing.").

[89] Compl. ¶¶ 56–57, 63.

[90] *Morton's*, 74 A.3d at 667 (large stockholder's immediate need for liquidity would only constitute "a disabling conflict of interest" if there was "'a crisis, a fire sale'").

[91] Compl. ¶ 81.

contingent fee was "routine"[92] and did not "create inherent conflicts."[93] The fee was approved by Churchill's Board,[94] which was disinterested and independent as demonstrated below,[95] and—at approximately 0.5% of the value of the Acquisition—the fee was in line with or below market precedents.[96] That the Board engaged Mr. Klein's affiliates to provide services to the Board in connection with searching for a de-SPAC transaction is unsurprising given that a SPAC has no employees or day-to-day business operations of its own. And, again, the prospect of the Board engaging Mr. Klein's affiliates to provide such services to Churchill in connection with the search for a de-SPAC transaction was fully disclosed to

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[92] *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *11 (Del. Ch. Oct. 13, 2011); *In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *23 (Del. Ch. May 20, 2011), *as revised* (May 24, 2011).

[93] *Inter-Loc. Pension Fund GCC/IBT v. Calgon Carbon Corp.*, 2019 WL 479082, at *12 (Del. Ch. Jan. 25, 2019), *aff'd*, 237 A.3d 818 (Del. 2020) (TABLE).

[94] *See* Proxy at 30 (Ex. A) ("The engagement of [The Klein Group] and the payment of [its] fees . . . have been approved by Churchill's audit committee and the Churchill Board in accordance with Churchill's related persons transaction policy.").

[95] *See* Point II.B, *infra*.

[96] *Calgon Carbon Corp.*, 2019 WL 479082, at *7, *12 (holding that "a $2 million announcement fee and a second contingent fee equal to 1.44% of the ultimate consummated transaction value" did not even satisfy the 8 *Del. C.* § 220 "credible basis" standard, which "is the lowest burden of proof known in [Delaware] law"); *In re Panera Bread Co.*, 2020 WL 506684, at *32 (Del. Ch. Jan. 31, 2020) ($40 million banker fee, $32 million of which was contingent on a merger closing, created "financial incentives [that] were commonplace and unremarkable").

prospective investors in Churchill's offering documents,[97] and the terms of The Klein Group's engagement were detailed in the Proxy for stockholders to consider in deciding whether to redeem their shares.[98]

B. The Board Was Disinterested and Independent With Respect To The Acquisition

Plaintiffs also contend that the entire fairness standard applies because a majority of the Board was either interested or not independent with respect to the Acquisition.[99] To rebut the presumption of the business judgment rule on this basis, Plaintiffs must "plead facts demonstrating 'that a *majority* of the director defendants'" are interested or not independent with respect to the Acquisition.[100] As explained below, Plaintiffs do not meet this burden and, even if they could, Churchill stockholders approved the Acquisition in a fully informed vote, which cleanses the Acquisition and again makes it subject to business judgment review.

A director is deemed "interested" in a transaction if the director "will receive a personal financial benefit from a transaction that is not equally shared by the stockholders," or "a corporate decision will have a materially detrimental impact on

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[97] Registration Statement at 52 (Ex. B); Prospectus at 52 (Ex. C).

[98] Proxy at 30 (Ex. A).

[99] Compl. ¶¶ 62, 80.

[100] *Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002) (emphasis in original).

a director, but not on the corporation and the stockholders."[101] "'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.'"[102]

"Importantly, being nominated or elected by a director who controls the outcome is insufficient by itself to reasonably doubt a director's independence because '[t]hat is the usual way a person becomes a corporate director.'"[103] "[R]ather, the nature of the relationships between [an interested controlling stockholder and a director] must demonstrate that the director is beholden to the stockholder."[104] Specifically, any alleged benefit provided by the allegedly conflicted stockholder to the allegedly beholden director "must be alleged to be *material* to that director," *i.e.*, "the alleged benefit [must be] significant enough *'in the context of the director's economic circumstances*, as to have made it improbable that the director could perform her fiduciary duties to the shareholders without being influenced by her overriding personal interest.'"[105]

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[101] *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993); *see also Beam v. Stewart*, 845 A.2d 1040, 1049 n.21 (Del. 2004) (same).

[102] *Inter-Mktg. Grp. USA, Inc. v. Armstrong*, 2019 WL 417849, at *4 (Del. Ch. Jan. 31, 2019) (quoting *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984)).

[103] *McElrath v. Kalanick*, 224 A.3d 982, 995 (Del. 2020) (quoting *Aronson*, 473 A.2d at 816).

[104] *Beam*, 845 A.2d at 1054 n.37.

[105] *Orman*, 794 A.2d at 23 (emphasis in original).

At the time of the Acquisition, the Board consisted of eight directors: Messrs. Abson, August, Eck, Mark Klein, Michael Klein, and McDermid, and Mses. Jonas and Mills.[106] Thus, for Plaintiffs to trigger entire fairness review based on the alleged lack of disinterestedness or independence of the Board, they must demonstrate that at least five of those directors are interested or not independent with respect to the Acquisition.

Plaintiffs allege that the members of the Board were interested or not independent with respect to the Acquisition for the following reasons:

> (a) Mark Klein is [Mr.] Klein's brother; (b) Mark Klein and Eck each work at M. Klein & Co.; (c) [Mr.] Klein granted to each of Abson, August, McDermid, Mills, Eck, and Jonas founder shares worth millions of dollars (so long as Churchill completed an acquisition); (d) [Mr.] Klein appointed Abson, August, Mark Klein, McDermid, Mills, and Jonas to multiple boards of directors of other "Churchill" SPACs; and (e) [Mr.] Klein allowed Abson and McDermid to buy a portion of [Mr.] Klein's $23 million in private placement warrants.[107]

None of these reasons demonstrates a lack of disinterestedness or independence.[108]

The facts that Mark Klein is Michael Klein's brother and that Mark Klein and Mr. Eck work at M. Klein & Co. are irrelevant because, as demonstrated above, Mr.

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[106] Proxy at 147 (Ex. A).

[107] Compl. ¶ 60.

[108] Although not material to the analysis of the Board's disinterestedness and independence, Plaintiffs' allegation that Mr. McDermid serves as a director of Churchill Capital Corp. V is incorrect.

Klein and Sponsor are not conflicted with respect to the Acquisition.[109] A director's alleged connection to a stockholder who is not conflicted with regard to a transaction does not impugn the disinterestedness or independence of that director.[110]

With regard to certain directors' receipt of founder shares in connection with their service on the Churchill Board and/or interests in Sponsor's warrants, again, as explained above, far from creating an issue of interestedness or lack of independence, the interests of the holders of those shares aligned with the interests of Churchill's common stockholders in maximizing Churchill's long-term value.[111] In addition, like Mr. Klein's founder shares, the other directors' founder shares are also subject to the initial lock-up agreement, prohibiting the Class A shares into which they converted from being sold for at least one year after the Acquisition, subject to limited exceptions.[112] Thus, like Mr. Klein (and Sponsor), any directors

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[109] *See* Point II.A, *supra*.

[110] *See Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 179 (Del. Ch. 2005) ("In this case, the evidence only shows that Becker had a longstanding friendship with Schwartz. This alone does not render Becker interested in the BFC Transaction or prove he lacked independence, especially where, as discussed elsewhere in this opinion, Schwartz was not interested in the Transaction and did not lack independence."), *aff'd*, 906 A.2d 114 (Del. 2006); *In re Dow Chem. Co. Deriv. Litig.*, 2010 WL 66769, at *8 (Del. Ch. Jan. 11, 2010) (whether CEO dominated the board was "irrelevant" for purposes of determining the board's independence because the CEO was not conflicted in regard to the challenged transaction).

[111] *BioClinica*, 2013 WL 5631233, at *5; *Micromet*, 2012 WL 681785, at *13 n.64; *Globis*, 2007 WL 4292024, at *8.

[112] Registration Statement at 15 (Ex. B); Prospectus at 15 (Ex. C).

who held founder shares had every reason to pass on the Acquisition if they did not believe that it was a value-maximizing transaction for Churchill and all of its stockholders.

Plaintiffs' allegation that, because Mr. Klein appointed certain members of the Board "to multiple boards of directors of other 'Churchill' SPACs," those directors are not independent with respect to the Acquisition, fails because Mr. Klein is not conflicted with respect to the Acquisition.[113] Moreover, Plaintiffs fail to allege that these directorships were material to any of the directors—all of whom, as noted above, have had long, successful business careers.[114] As a matter of law, an alleged benefit does "not cast doubt on a director's independence, where the plaintiffs have not alleged that [it] was material to the director."[115] "The concept of materiality is an inherently comparative one, requiring consideration of whether something is material to something else."[116] Plaintiffs have not "offered any evidence that might show that [allegedly serving on the boards of directors of other Churchill SPACs]

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[113] *Benihana*, 891 A.2d at 179; *Dow Chem. Co.*, 2010 WL 66769, at *8.

[114] Factual Background Point A, *supra*.

[115] *In re MFW S'holders Litig.*, 67 A.3d 496, 513 n.62 (Del. Ch. 2013), *aff'd sub nom. Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

[116] *Id.*

was material in any way to [any of the directors], given [their] personal economic circumstances."[117]

Plaintiffs also make the conclusory assertion that "each 'Churchill' SPAC business combination presents a multi-million-dollar *opportunity* for" these directors,[118] but Plaintiffs fail to allege any actual benefit that anyone received as a result of serving on the board of directors on another "'Churchill' SPAC." Nor are there allegations concerning the amounts these directors earn from other employment, their total assets, or their overall net worth, which are necessary to plead materiality. Without such allegations, Plaintiffs' contention that serving as a director for other "'Churchill' SPACs" made members of the Board not independent with respect to the Acquisition fails as a matter of law.[119]

Finally, even if a majority of the members of the Board were interested or not independent, the Acquisition would still be subject to business judgment rule review because, as demonstrated below,[120] Churchill stockholders approved the Acquisition

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[117] *Id.* at 513.

[118] Compl. ¶ 61 (emphasis added).

[119] *See In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 206 (Del. Ch. 2007) ("'The fact that several director defendants sat on the same boards of directors of other companies does not in itself establish lack of independence.'").

[120] *See* Point IV, *infra*.

in a fully informed vote.[121] Because the Acquisition is subject to business judgment review, it is "insulate[d] . . . from all attacks other than on the grounds of waste."[122] Plaintiffs do not adequately plead waste and, thus, their claims fail.

III. PLAINTIFFS' PURPORTED BREACH OF FIDUCIARY DUTY CLAIMS RELATING TO REDEMPTION RIGHTS SHOULD BE DISMISSED BECAUSE THE CLAIMS ARE GOVERNED BY CONTRACT

Plaintiffs purport to assert claims for breach of fiduciary duty based on allegations that the Proxy was "false and misleading" and, "[a]s a result, Plaintiff[s] and the Class were harmed by not exercising their redemption rights prior to the [Acquisition]."[123] As explained in the Company's Opening Brief, this alleged harm is not compensable through a direct claim for breach of fiduciary duty. In addition, this alleged harm cannot form the basis for any claim for breach of fiduciary duty (including the duty of disclosure) because the redemption rights are contractual rights set forth in Churchill's Charter.[124]

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[121] *See Larkin*, 2016 WL 4485447, at *1 ("In the absence of a controlling stockholder that extracted personal benefits, the effect of disinterested stockholder approval of the merger is review under the irrebuttable business judgment rule, even if the transaction might otherwise have been subject to the entire fairness standard due to conflicts faced by individual directors.").

[122] *In re KKR Fin. Hldgs. LLC S'holder Litig.*, 101 A.3d 980, 1001 (Del. Ch. 2014), *aff'd sub nom. Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304 (Del. 2015).

[123] Compl. ¶¶ 103, 104, 111, 112, 121.

[124] *See* Charter § 9.2 (Ex. D).

Where an alleged right "arises from [a] Certificate provision," "the duty sought to be enforced arises out of the parties' contractual, as opposed to their fiduciary, relationship," and any fiduciary duty claim is "preclude[d]."[125] As stated by the Delaware Supreme Court in *Nemec v. Shrader*:

> It is a well-settled principle that where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim. In that specific context, any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous.[126]

Here, there are no common law or equitable redemption rights. The terms of Plaintiffs' redemption rights are contained entirely within a *contract*—Churchill's Charter. Thus, any claim relating to the exercise or failure to exercise Plaintiffs' contractual redemption rights must be asserted as a claim for breach of contract or quasi-contract (*i.e.*, a claim for breach of the implied covenant of good faith and fair dealing). Indeed, "the implied covenant of good faith and fair dealing defines the

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[125] *Gale v. Bershad*, 1998 WL 118022, at *5 (Del. Ch. Mar. 4, 1998); *see also In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 619 (Del. Ch. 1999) ("[A] board's alleged evasion or breach of a charter provision for the benefit of a particular class of stockholders [can] be asserted only as a contract claim, not as a claim for breach of fiduciary duty."); *Madison Realty P'rs 7, LLC v. Ag ISA, LLC*, 2001 WL 406268, at *6 (Del. Ch. Apr. 17, 2001) ("As this Court has held, if the dispute 'relates to obligations expressly treated by contract, it will be governed by contract principles.' Here, the fiduciary claims relate to obligations that are expressly treated by the Partnership Agreement . . . . Accordingly, the fiduciary claims alleged in Counts II and III must be dismissed.").

[126] 991 A.2d 1120, 1129 (Del. 2010).

duties of parties to a contract and is analogous to the role of fiduciary law in defining the duties owed by fiduciaries."[127]

Churchill's Charter explicitly provides that the corporation—not its directors or officers—affords a redemption right in certain circumstances: "[p]rior to the consummation of the initial Business Combination, the *Corporation* shall provide all holders of Offering Shares with the opportunity to have their Offering Shares redeemed upon the consummation of the initial Business Combination . . . ."[128] Thus, a claim for breach of contract based on the redemption right in Churchill's Charter cannot be asserted against Defendants,[129] as any potential recovery would need to come from the Company.[130]

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[127] *Blue Chip Cap. Fund II Ltd. P'ship v. Tubergen*, 906 A.2d 827, 833 (Del. Ch. 2006).

[128] Charter, § 9.2 (Ex. D) (emphasis added). "The court may take judicial notice of a[] . . . charter provision in resolving a motion addressed to the pleadings." *McMillan v. Intercargo Corp.*, 768 A.2d 492, 501 n.40 (Del. Ch. 2000).

[129] *See MCG Cap. Corp. v. Maginn*, 2010 WL 1782271, at *11 (Del. Ch. May 5, 2010) ("[U]nder Delaware law corporate officers and directors are not parties to a contract simply because the corporation they serve is a party to the contract. Accordingly, the individual defendants [officers and directors of Jenzabar] cannot be joined as defendants on Counts One, Two, Nine, and Ten on the theory that they are personally responsible for breaching . . . [Jenzabar's] Charter. If there was a breaching party, it was Jenzabar, acting through its directors."); *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012) ("Certificates of incorporation are regarded as contracts between the shareholders and the corporation, and are judicially interpreted as such.").

[130] *See Blue Chip*, 906 A.2d at 834 (holding that claim based on a charter provision needed to be asserted as a breach of contract claim—not a breach of fiduciary duty

Even Plaintiffs seem to recognize this fact by requesting, "[w]ith respect to Class members who had the right to seek redemption and still hold their shares," that the Court "equitably re-open[] the redemption window to allow them to redeem their shares, as per the terms of the Company's foundational documents."[131] Such a "re-opening" would not allow stockholders to require Defendants—who never contracted to provide any Churchill stockholder with a redemption right—to redeem their shares. Indeed, that result is impermissible under the fundamental principle of contract law that "only a party to a contract may be sued for breach of that contract."[132]

Finally, even if Plaintiffs' failure to exercise their contractual redemption rights based on an allegedly misleading proxy could form the basis for a claim for breach of fiduciary duty, that claim would still fail because, as explained below, the Proxy was not false or misleading as a matter of law.[133]

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claim—and that any remedy would come from the company as long as that would provide stockholders a "full remedy").

[131] Compl. ¶ H pp. 41–42.

[132] *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 817 A.2d 160, 172 (Del. 2002) (holding that directors of limited partnership's corporate general partner could not be liable for a claim for breach of the limited partnership agreement because they did not sign the agreement); *see also Am. Legacy Found. v. Lorillard Tobacco Co.*, 831 A.2d 335, 343 (Del. Ch. 2003) ("There is no doubt that a fundamental principal of contract law provides that only parties to a contract are bound by that contract.") (citing 11 cases).

[133] *See* Point IV, *infra*.

IV. PLAINTIFFS FAIL TO STATE A CLAIM THAT THE ACQUISITION PROXY WAS FALSE OR MISLEADING

To state a claim for breach of the duty of disclosure, Plaintiffs must plead a material misstatement or omission in the Proxy. "The burden of establishing materiality rests with the plaintiff, who 'must demonstrate a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.'"[134]

As explained in the Company's Opening Brief, Plaintiffs' claim that they "approved the acquisition of MultiPlan based on false and misleading information" in the Proxy should be dismissed because any alleged harm resulting from Churchill's acquisition of MultiPlan was suffered by the Company as an entity, and any remedy would similarly flow to the Company.

In any event, Plaintiffs' disclosure claims fail to state a claim. Each of the five reasons why Plaintiffs claim that the Proxy was false or misleading fails as a matter of law.

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[134] *Gantler v. Stephens*, 965 A.2d 695, 710 (Del. 2009) (quoting *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992)).

A. All Material Information Regarding MultiPlan's Customer Concentration And Competitive Landscape Was Disclosed

Citing the Muddy Waters Report, Plaintiffs allege that (i) "the Proxy entirely fails to mention the imminent departure of UHC, MultiPlan's largest client, which provided 35% of its revenues in 2019,"[135] and (ii) "relatedly, the Proxy entirely fails to mention that UHC would transfer its accounts to Naviguard, UHC's newly formed competitor."[136]

This Court has stated that the report of a self-interested short seller, such as the Muddy Waters Report, may be insufficient to satisfy even the "credible basis" standard under Section 220 of the Delaware General Corporation Law, which "sets the lowest possible burden of proof."[137] Therefore, such a document should not serve as a basis for Plaintiffs to meet their burden of pleading a "reasonably conceivable" claim on a Rule 12(b)(6) motion to dismiss.

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[135] Compl. ¶ 84.

[136] *Id.* ¶ 85.

[137] *Haque v. Tesla Motors, Inc.*, 2017 WL 448594, at *4, 11 (Del. Ch. Feb. 2, 2017) ("This court has previously held 'that negative news articles alone are insufficient bases on which to justify a Section 220 demand.' This is all the more true when those articles are not written by independent news agencies, but by authors with a personal interest in swaying the public perception of the Company, such as short sellers.").

The allegations in the Muddy Waters Report are also conclusory and its conclusions were immediately refuted by the Company[138] and demonstrated to be false by the public record facts. As discussed above, since the Muddy Waters Report was issued, the Company has issued two quarters of financial results, both of which have been positive, and the Company has never stated in any of its public disclosures that it has lost or is in the process of losing any of its largest customers.[139] Rather, revenues from its top customers have stayed constant. And, indeed, if the Company were to lose a material customer, it would be required to disclose that fact to its stockholders.[140] Moreover, although the Company's stock price declined after the Muddy Waters Report was published, it quickly rebounded and exceeded its pre-Muddy Waters Report level,[141] and Plaintiffs do not plead any facts showing that the

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[138] Earnings Call Transcript at 5 (Ex. I).

[139] Factual Background Point E, *supra*. Additionally, Naviguard—a new, niche entrant to the healthcare scene—is not a competitor to the Company, which offers broad-based, comprehensive management solutions. *See, e.g.*, Earnings Call Transcript at 6 (Ex. I).

[140] Item 303 of Regulation S-K requires disclosure of "material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition." 17 C.F.R. § 229.303. The SEC has specifically stated that Item 303 requires disclosure of "the likely non-renewal of a material contract." Management's Discussion & Analysis of Fin. Condition & Results of Operations, SEC Release No. 6835, 1989 WL 1092885, at *4 (May 18, 1989).

[141] *See* Company Historical Stock Price Chart (Ex. J).

Company's more recent trading price is connected to the Muddy Waters allegations or any other alleged wrongdoing.

Even assuming, for the sake of argument, that there was any truth to the Muddy Waters allegations (and there is not), Plaintiffs also do not plead any facts showing that any Defendants knew or believed the Muddy Waters allegations regarding UHC to be true at the time the Proxy was issued, or that Defendants had any information contradicting the Proxy disclosures at that time. As a matter of law, fiduciaries are not required to disclose information that they do not know,[142] or to speculate about events that may occur,[143] much less disclose information that is simply not true.

Putting aside the flaws in Plaintiffs' claim, the Proxy in fact disclosed detailed information about MultiPlan's customer concentration and the potentially outsized impact the loss of any of these customers could have on MultiPlan's business. For instance, the Proxy stated that "MultiPlan's success is dependent on retaining, and the success of, its customers as MultiPlan depends on a core group of customers for

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[142] *See City of Miami Gen. Emps. v. Comstock*, 2016 WL 4464156, at *12 (Del. Ch. Aug. 24, 2016) (finding disclosure allegations failed to state a claim where plaintiff did not allege the board had actual knowledge of the alleged fact), *aff'd*, 158 A.3d 885 (Del. 2017) (TABLE).

[143] *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 145 (Del. 1997) ("Speculation is not an appropriate subject for a proxy disclosure.").

a significant portion of its revenues."[144] It also stated that "[i]f significant customers terminate or do not renew or extend their contracts with MultiPlan, MultiPlan's business, financial condition, and results of operations could be adversely affected," and that "[i]f MultiPlan loses any one of its largest customers, one of MultiPlan's largest customers reduces its use of MultiPlan's services, or if any one of MultiPlan's largest customers negotiates less favorable terms with MultiPlan, then MultiPlan will lose revenue, which would materially adversely affect MultiPlan's business, financial condition and results of operations."[145] More specifically, the Proxy disclosed that:

> Two customers individually accounted for 35% and 20% of revenues during the year ended December 31, 2019. During the year ended December 31, 2018, two customers individually accounted for 30% and 20% of revenues. During the year ended December 31, 2017, two customers individually accounted for 31% and 18% of revenues.[146]

The Proxy further warned that "MultiPlan's contracts with these two largest customers are terminable without cause on relatively short notice."[147]

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[144] Proxy at 46 (Ex. A).

[145] *Id.* at 46–47.

[146] *Id.* at 233–34. Further, the Company's 2020 10-K confirmed that revenues from its top two customers remained constant: "Our two largest customers accounted for approximately 35% and 20%, respectively, of our full year 2020 revenues." 2020 10-K at 16 (Ex. M).

[147] *Id.* at 47.

The Proxy also disclosed the nature of the competitive landscape in which MultiPlan operates. The Proxy informed investors that "[p]ricing is highly competitive across all of MultiPlan's lines of service," and that "many of MultiPlan's current and potential competitors have greater financial and marketing resources than MultiPlan and continued consolidation in the industry will likely increase the number of competitors that have greater resources than MultiPlan."[148] It also stated that "[i]f MultiPlan does not compete effectively in its markets, MultiPlan's business, financial condition and results of operations may be materially and adversely affected."[149]

In sum, nothing more was required to be disclosed, and it is not reasonably conceivable that Churchill stockholders were misled about the risks surrounding MultiPlan's customer concentration and the competitive landscape for its business.

B. All Material Information Regarding MultiPlan's Anticipated Revenue And Adjusted EBITDA Growth Was Disclosed

Plaintiffs allege that the Proxy "touted MultiPlan's anticipated revenue and adjusted EBITDA growth, when Churchill management knew, or should have known, that MultiPlan's sales were shrinking and it faced pricing pressure," and that "[t]his was not, as [an August 18, 2020] analyst day presentation" stated,

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[148] *Id.* at 47–48.

[149] *Id.* at 48.

"'idiosyncratic customer behavior,' but rather a business facing existential threats."[150]

Again, to the extent these allegations are based on the Muddy Waters Report, they fail for the reasons discussed above, including that Plaintiffs do not plead any *facts* to support their assertions, let alone show that any Defendant knew that the Company's anticipated revenue and adjusted EBITDA growth numbers, as disclosed in the Proxy, were false and misleading (or even had any reason to doubt their accuracy). Indeed, on March 10, 2021, in announcing its financial results for the fourth quarter and fiscal year ended December 31, 2020, the Company stated that "[a]fter reporting stronger than expected results in the third-quarter, we delivered even stronger fourth quarter results despite pandemic conditions and their impact on elective healthcare service."[151]

In any event, the Proxy disclosed MultiPlan's historical financial information, including what Plaintiff characterizes as a "stark downward trend in actual revenue and adjusted EBITDA over the previous three years," and an explanation of the methodology and assumptions used to calculate anticipated revenue and adjusted EBITDA.[152] Accordingly, Churchill stockholders had sufficient information to

[150] Compl. ¶ 86.

[151] March 10, 2021 Company Form 8-K, Ex. 99.1 at 1 (Ex. K).

[152] Compl. ¶ 71; *see also* Proxy at 36, 38, 214 (Ex. A).

make their own determination about MultiPlan's anticipated revenue and adjusted EBITDA growth. Plaintiffs' allegation is nothing more than a substantive disagreement with the Board's assessment of anticipated revenue and adjusted EBITDA, which does not state a claim.[153] Furthermore, as explained above, the Proxy disclosed the risks that MultiPlan faced with regard to its customer base and the competitive landscape for its business.[154]

C. All Material Information Regarding MultiPlan's 2018 Adjusted EBITDA Was Disclosed

Plaintiffs allege—again, based solely on the Muddy Waters Report—that the Proxy "presents a materially misleading 2018 adjusted EBITDA number, because it was inflated by an undisclosed accounting sleight of hand."[155] According to Plaintiffs, in 2018, MultiPlan released "revenue reserves from approximately [10]% to [30]% of revenue in order to buoy earnings," and because of this "undisclosed accounting trick, the Proxy misleadingly showed MultiPlan's earnings growing, despite a decline in revenues (which have been shrinking for years)."[156] This

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[153] *See In re Atheros Commc'ns, Inc.*, 2011 WL 864928, at *10 (Del. Ch. Mar. 4, 2011) ("'disagreement on the appropriate valuation methodologies . . . simply cannot be the basis of a disclosure claim'") (quoting *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *6 (Del. Ch. Dec. 18, 2009)); *Comstock*, 2016 WL 4464156, at *15; *In re Solera Hldgs., Inc. S'holder Litig.*, 2017 WL 57839, at *12 (Del. Ch. Jan. 5, 2017).

[154] *See* Point IV.A, *supra*.

[155] Compl. ¶ 87.

[156] *Id.*

unsubstantiated conclusion from the Muddy Waters Report was directly refuted by the Company's CEO:

> [Muddy Waters asserts that] MultiPlan used financial engineering to prop up its earnings to show better financial performance in 2018. Again, this is absolutely false. Revenue reserves at MultiPlan are small, and changes to those reserves had completely immaterial impact on our 2018 revenues. . . . Revenue reserves are small in the context of our total revenue, not the 10% to 30% type of figures described in the short seller's manifesto.[157]

Again, Plaintiffs fail to plead any facts to support the assertions in the Muddy Waters Report, which are based solely on the alleged statements of a former executive,[158] much less to show that any Defendant knew or believed such assertions to be true, which is dispositive of these allegations.

Regardless, as discussed above, the Proxy disclosed MultiPlan's historical financial information, including MultiPlan's 2018 adjusted EBITDA and revenue, and the methodology used to calculate these figures.[159] Plaintiffs' substantive disagreements with disclosed financial metrics and the disclosed methodologies used to calculate them do not state a disclosure claim.

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[157] Earnings Call Transcript at 5, 7 (Ex. I).

[158] Muddy Waters Report at 12 (Ex. F).

[159] *See* Point IV.B, *supra*.

D. All Material Information Regarding H&F's Continued Commitment As An Owner Was Disclosed

Again relying on the Muddy Waters Report, Plaintiffs allege that the Proxy "misleadingly presents H&F's continued commitment as owners of MultiPlan as a reason for Churchill stockholders to support the [Acquisition]" when, "[i]n reality, H&F desperately wanted to exit its investment in MultiPlan—a fact well-known in the industry, according to Muddy Waters . . . ."[160] Plaintiffs purport to support this allegation with the further contention that, "[w]hile the Proxy depicts H&F as owning 60.5% of the post-[Acquisition] company, according to more recent filings it owns only 32%."[161]

Plaintiffs misread the Proxy, which instead stated that the "Board believed that H&F *and other current indirect stockholders of MultiPlan* . . . continuing to own more than a majority of the post-combination company on a pro forma basis reflected such stockholders' belief in and commitment to the continued growth prospects of MultiPlan going forward."[162] The Proxy did not depict H&F as owning 60.5% of the post-Acquisition company; it depicted H&F as owning between 31% and 35% of the post-Acquisition company, depending on how many

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[160] Compl. ¶ 88.

[161] *Id.*

[162] Proxy at 109 (emphasis added) (Ex. A).

Churchill stockholders redeemed their shares in connection with the Acquisition.[163] Indeed, the Form 8-K that the Company filed with the SEC the day after the Acquisition closed shows H&F owning 32% of the post-Acquisition company.[164] Simply put, Plaintiffs' misreading of the Proxy does not (and cannot) state a disclosure claim.

V. THE COMPLAINT DOES NOT STATE A NON-EXCULPATED CLAIM AGAINST THE CHURCHILL DIRECTORS

Churchill's Charter contains an exculpatory provision, eliminating director liability for breaches of the duty of care.[165] "[P]laintiffs must plead a non-exculpated claim for breach of fiduciary duty against an independent director protected by an exculpatory charter provision, or that director will be entitled to be dismissed from the suit. [This] rule applies regardless of the underlying standard of review for the transaction."[166]

To plead a non-exculpated claim against any member of the Board, Plaintiffs must plead "facts supporting a rational inference that the director harbored self-interest adverse to the stockholders' interests, acted to advance the self-interest of an

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163 *Id.* at 247.

164 October 9, 2020 Company Form 8-K at 7 (Ex. E).

165 Charter § 8.1 (Ex. D).

166 *In re Cornerstone Therapeutics Inc., S'holder Litig.*, 115 A.3d 1173, 1179 (Del. 2015).

interested party from whom they could not be presumed to act independently, or acted in bad faith."[167]

As demonstrated above, Plaintiffs fail to plead facts showing that any member of the Board had a self-interest in the Acquisition that was adverse to the interests of Churchill's stockholders or lacked independence from someone with such an interest. To the contrary, the interests of the Board were fully aligned with the interests of Churchill's stockholders in connection with the Acquisition.[168]

Absent such interests, Plaintiffs must plead that the members of the Board acted in bad faith, which requires pleading an "extreme set of facts."[169] In particular, Plaintiffs must allege that the members of the Board acted with "scienter,"[170] *i.e.*, "'intentionally fail[ing] to act in the face of a known duty to act, demonstrating a conscious disregard for . . . duties.'"[171] Nowhere in the Complaint do Plaintiffs allege any facts demonstrating that any member of the Board acted in bad faith or with scienter or with a conscious disregard of duties. Accordingly, Plaintiffs' claims against the Churchill directors should be dismissed.

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[167] *Id.* at 1179–80.

[168] *See* Point II, *supra*.

[169] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009).

[170] *In re USG Corp. S'holder Litig.*, 2020 WL 5126671, at *26 (Del. Ch. Aug. 31, 2020).

[171] *Alloy*, 2011 WL 4863716, at *7 (quoting *Lyondell*, 970 A.2d at 243).

VI. THE COMPLAINT DOES NOT STATE AN AIDING AND ABETTING CLAIM AGAINST THE KLEIN GROUP

Plaintiffs' aiding and abetting claim against The Klein Group should be dismissed on either of two independent grounds. First, as explained above and in the Company's Opening Brief, Plaintiffs have failed to adequately plead an underlying claim for breach of fiduciary duty and, thus, the claim that The Klein Group aided and abetted such a breach "may be summarily dismissed."[172]

Second, even assuming Plaintiffs had adequately pled a primary claim for breach of fiduciary duty, their aiding and abetting claim fails for the separate and independent reason that they have not pled "knowing participation" by The Klein Group. "Knowing participation" requires an allegation that The Klein Group "act[ed] with the knowledge that the conduct advocated or assisted constitutes such a breach."[173] "Knowing participation has been described as a *stringent* standard that turn[s] on proof of scienter."[174] "[T]he requirement that the aider and abettor act with *scienter* makes an aiding and abetting claim among the most difficult to

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[172] *See KKR*, 101 A.3d at 1003 ("An aiding and abetting claim 'may be summarily dismissed based upon the failure of the breach of fiduciary duty claims against the director defendants.'").

[173] *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001).

[174] *Lee v. Pincus*, 2014 WL 6066108, at *13 (Del. Ch. Nov. 14, 2014) (alteration in original) (emphasis added) (internal quotation marks omitted); *see also In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 750 (Del. Ch. 2016) (describing the standard for pleading the "requisite scienter" element of an aiding and abetting claim as a "high burden"), *aff'd*, 156 A.3d 697 (Del. 2017) (TABLE).

prove."[175] The third party must actually know that the board is breaching its fiduciary duties, and it must participate in the breach by "misleading" the board, creating an "informational vacuum," or otherwise "purposely induc[ing]" the breach.[176]

Plaintiffs have failed to plead facts satisfying this "stringent" standard. The only allegations about The Klein Group in the Complaint are that "Klein Group's $30.5 million advisory fee paid in connection with the Transactions gave Klein Group strong financial incentive to ensure that the [Acquisition] was effectuated . . . regardless of the Transactions' fairness to Churchill's public Class A stockholders,"[177] and the conclusory assertion that The Klein Group allegedly "knew" that the "valuation analyses" that the Board provided to Churchill stockholders in connection with the Acquisition "were materially misleading, and that the Director Defendants and the Controller Defendants stood to profit immensely from the [Acquisition]."[178]

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175 *See RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 865–66 (Del. 2015) (emphasis in original).

176 *Houseman v. Sagerman*, 2014 WL 1600724, at *9 (Del. Ch. Apr. 16, 2014); *see also Malpiede*, 780 A.2d at 1098 (third party must "participate[] in the board's decisions, conspire[] with [the] board, or otherwise cause[] the board to make the decisions at issue").

177 Compl. ¶ 126; *see also id.* ¶¶ 11, 31, 50, 63, and 81.

178 *Id.* ¶ 127.

Plaintiffs' allegations about The Klein Group's fee structure are insufficient to allege knowing participation because "'contingent fees charged by investment bankers do not create inherent conflicts.'"[179] As the Court stated in *Tilden v. Cunningham*: "I reject Plaintiff's proposition that the Court may infer that a financial advisor knowingly participated in a breach of fiduciary duty merely because the advisor negotiated a fee structure that incented it to assist its client in reaching the goal of a consummated transaction."[180]

With regard to Plaintiffs' allegations about the valuation analyses that the Board provided to Churchill stockholders in connection with the Acquisition, those analyses were not materially misleading in any way, as demonstrated above.[181] Moreover, no facts are pled to show what information The Klein Group knew and withheld from the Board. "Without allegations that [the board's financial advisor] actively concealed information to which it knew the Board lacked access, or

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[179] *Calgon Carbon Corp.*, 2019 WL 479082, at *12.

[180] 2018 WL 5307706, at *18 (Del. Ch. Oct. 26, 2018). *Accord Smurfit-Stone*, 2011 WL 2028076, at *23 ("Contingent fees for financial advisors in a merger context are somewhat 'routine' and previously have been upheld by Delaware courts."); *Lee*, 2014 WL 6066108, at *14 ("[I]t is not reasonable to infer here that, simply by receiving fees (that are not alleged to be unreasonable) for acting as underwriters in the secondary offering, the Underwriter Defendants 'participated in the [Zynga] board's decisions, conspired with [the] board, or otherwise caused the board to make the decisions at issue.'") (quoting *Malpiede*, 780 A.2d at 1098) (alterations in original).

[181] *See* Point IV, *supra*.

promoted the failure of a required disclosure by the Board"—none of which are present here—"the Plaintiffs fail to adequately plead knowing participation in a breach of duty."[182]

CONCLUSION

For all of these reasons, the Complaint should be dismissed in its entirety and with prejudice as to Defendants.

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182 *Houseman*, 2014 WL 1600724, at *9.