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 MULTIPLAN CORPORATION'S MOTION TO DISMISS THE VERIFIED CLASS ACTION COMPLAINT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES & RULES

INTRODUCTION

In February 2020, MultiPlan Corporation (f/k/a Churchill Capital Corp III) (the "Company"), raised investment capital through an initial public offering as a special purpose acquisition company, or "SPAC."[1] In October 2020, the Company acquired the parent entities of MultiPlan, Inc. in a cash and stock transaction. Shortly thereafter, in November 2020, the Company was attacked by a short-seller, triggering a drop in its stock price. Although the Company's stock price has largely recovered, Plaintiffs—pre-acquisition Company stockholders whose interests were diluted as a result of the acquisition—seek to leverage the short-seller's allegations to claim that the acquisition was "grossly mispriced" and "arose from a deeply flawed and unfair process." Plaintiffs purport to assert direct claims on behalf of Company stockholders who "held [Company] stock during the time period from the Record Date through the Closing Date," alleging breaches of fiduciary duty against the Company's former directors and officers and an alleged controlling stockholder group.

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[1] This motion employs different defined terminology than the Verified Class Action Complaint (the "Complaint"), which the Company believes better represents the relationship between the various entities identified in the Complaint. To address any potential confusion, Annex A lists the defined terms used in this motion and their corresponding references in the Complaint.

Despite styling all four counts as direct, Plaintiffs actually assert either derivative claims or seek damages that would flow directly to the Company (and thus only derivatively to Plaintiffs). Each of Plaintiffs' four counts includes the same three claims. ***First***, Plaintiffs' core claim—that Defendants caused the Company to overpay for MultiPlan, Inc. "in a grossly mispriced transaction" that harmed the value of the Plaintiffs' Class A shares—is quintessentially derivative. *See, e.g.*, *El Paso*, 152 A.3d 1248, 1261 (Del. 2016) ("claims of corporate overpayment are normally treated as causing harm solely to the corporation and, thus, are regarded as derivative"). When a company overpays for an asset, the company is directly harmed by that overpayment, while stockholders are affected *indirectly* and can receive a remedy only through the corporation as a whole. Here, where Plaintiffs have failed to make a pre-suit demand on the Board or plead demand futility, Plaintiffs' overpayment claim must be dismissed under Rule 23.1.

Second, the same analysis applies to Plaintiffs' allegations that the Company wasted assets in hiring an investment advisor affiliated with its alleged controller. Such a claim is derivative and belongs to the Company. This claim is likewise subject to dismissal under Rule 23.1.

Finally, Plaintiffs' disclosure claims here—that based on an allegedly misleading proxy statement they voted in favor of the acquisition and held their shares rather than had their shares redeemed—are subject to dismissal under Rule

12(b)(6) because Plaintiffs fail to allege any individually compensable harm or damages recoverable by stockholders distinct from the alleged harm to the entire Company due to the "grossly mispriced" transaction. *See, e.g.*, *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773–76 (Del. 2006) (affirming dismissal of disclosure claim under Rule 12(b)(6) for failure to demonstrate "harm caused to the shareholders *individually*" separate from harm to the company by overpayment) (emphasis in original). Stated differently, Plaintiffs claim that, but for the alleged disclosure deficiencies, the Company would not have overpaid in the acquisition and the value of Plaintiffs' held Class A shares would not have dropped when the short-seller alleged facts suggestive of the alleged overpayment. Such a claim is duplicative of the relief potentially available to the Company for overpayment in the acquisition, and thus should be dismissed consistent with the Supreme Court's decision in *J.P. Morgan*.

At the end of the day, Plaintiffs purport to assert claims that belong to the Company or are duplicative of potential Company relief. The complaint must be dismissed under Rule 23.1 and/or Rule 12(b)(6).

BACKGROUND[2]

A. The Parties

1. Nominal Defendant MultiPlan Corporation

The Company is a leading provider of data analytics and cost management solutions to the U.S. healthcare industry, helping healthcare payors manage the cost of healthcare. The Company is publicly traded on the New York Stock Exchange ("NYSE") under the ticker "MPLN." Compl. ¶ 20. As described below, the Company—formerly named Churchill Capital Corp III—was renamed MultiPlan Corporation on October 8, 2020 after it acquired the parent entities of MultiPlan, Inc. in a cash and stock transaction (the "Acquisition").[3]

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2 The following background is taken from the Complaint, publicly available materials, and documents cited, quoted, or referenced in the Complaint. *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999), *aff'd sub nom Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000) (TABLE); *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *8 n.3 (Del. Ch. Oct. 13, 2011) (courts may rely on the documents incorporated by reference in the pleadings, items subject to judicial notice, and matters of public record). Solely for purposes of this motion, the Company accepts as true the non-conclusory allegations of the Complaint. References to the Complaint are in the form "Compl. ¶ __." Citations to "Ex. __" are exhibits to the Transmittal Declaration of Matthew D. Perri, and are referenced by the short definitions provided therein.

3 While the Complaint lists "MultiPlan Corporation f/k/a Churchill Capital Corp III" as a Defendant (*see* Compl. Caption) and lists "Churchill Capital Corp III" as a Defendant (Compl. ¶ 20), it does not name the Company in any cause of action (*see* Compl. ¶¶ 99–130). Accordingly, references to "Defendants" herein do not include the Company, which is more properly characterized as a Nominal Defendant. To the extent that the Court does not conclude that the Company is a Nominal Defendant in connection with Plaintiffs' derivative claims, *see infra*

2. Director Defendants

The Complaint names seven individuals as "Director Defendants." Compl. ¶¶ 21–28, 32. Five of these individual defendants are former, pre-Acquisition directors of the Company: Jeremy Paul Abson, Mark Klein, Malcom S. McDermid, Karin G. Mills, and Michael Eck. Compl. ¶¶ 22–23, 25–28. The two other individual defendants are pre-Acquisition directors who continue to serve on the Company's Board: Michael Klein and Glenn R. August. Compl. ¶¶ 21, 24. Michael Klein was the Company's pre-Acquisition Chief Executive Officer ("CEO") and Chairman of the Board.[4]

3. Officer Defendants

The Complaint names two individuals as "Officer Defendants": Michael Klein, described above, and Jay Taragin, the Company's pre-Acquisition Chief Financial Officer ("CFO"). Compl. ¶¶ 21–22, 33.

Sections I and II, the Court should dismiss the Company entirely. *See, e.g.*, *Chester Cty. Ret. Sys. v. Collins*, 2016 WL 7117924, at *3 (Del. Ch. Dec. 6, 2016) (granting motion to dismiss where "[a]lthough the plaintiff named the Company as a defendant, it did not assert any claims against the Company"), *aff'd* 165 A.3d 286 (Del. 2017) (TABLE); *see also In re AmTrust Fin. Servs., Inc. S'holder Litig.*, 2020 WL 914563, at *8 n.87 (Del. Ch. Feb. 26, 2020) (dismissing entities named as defendants but not named in any causes of action).

[4] Michael Klein is the founder and managing partner of M. Klein and Company, LLC, a Director of Credit Suisse Group AG, and Clarivate Analytics. Ex. 1 (Proxy) at 171. Previously, he was CEO of Global Banking at Citigroup Inc., CEO of Citi Markets & Banking, Europe, and Co-Head of Global Investment Banking for Salomon Smith Barney. *Id.*

4. Sponsor Defendants

The Complaint names three entities as "Sponsor Defendants": (i) Churchill Sponsor III, LLC, the entity that sponsored the Company's IPO (Compl. ¶ 30); (ii) The Klein Group, LLC, the entity that served as the Company's financial advisor in the Acquisition (Compl. ¶ 31); and (iii) M. Klein and Company, LLC, the entity that served as a strategic advisor to the Company during both its initial public offering and the Acquisition (Compl. ¶ 29).

5. Plaintiffs

The Plaintiffs, Kwame Amo and Anthony Franchi, are alleged to be holders of the Company's Class A common stock purchased before the Acquisition and held to the present. Compl. ¶ 19. Plaintiffs purport to represent a class of "all record and beneficial holders of Churchill common stock who held such stock during the time period from the Record Date [Sept. 14, 2020] through the Closing Date [Oct. 8, 2020]" of the Acquisition. Compl. ¶ 90.

B. The Company's February 2020 Initial Public Offering

The Company was incorporated in Delaware on October 30, 2019 under the name Churchill Capital Corp III and completed its initial public offering on February 19, 2020 (the "IPO"), trading on the New York Stock Exchange under the symbol CCXX.U. Compl. ¶ 56; Ex. 2 (IPO Prospectus) at Preamble. The Company's IPO Prospectus explained that the Company was "a newly incorporated blank check company formed as a Delaware corporation for the purpose of effecting a merger, share exchange, asset acquisition, share purchase, reorganization or similar business combination with one or more businesses." Ex. 2 at 2. A blank check company formed for the purpose of effecting a business combination is commonly referred to as a special purpose acquisition company ("SPAC"). Compl. ¶ 1. The Company's IPO Prospectus also explained that its "completion window" for a business combination was 24 months after its IPO. Ex. 2 at 1. If a business combination was not completed within that window, the Company would return all proceeds from its IPO plus interest and would then cease operations and wind up. *Id.*

The Company's IPO included the sale of 110,000,000 units (each a "Unit") at $10.00 per Unit, which is the standard unit price for a SPAC IPO. *See* Compl. ¶ 56. Each Unit consisted of (i) one share of Class A common stock and (ii) one-fourth of one warrant. *Id.* Each full warrant entitled the holder to purchase one share of Class A common stock at $11.50 per share, exercisable on the later of (a) 30 days after the completion of the anticipated business combination or (b) 12 months from the closing of the IPO. Ex. 2 at Preamble. The warrants would expire five years after the completion of the business combination or earlier if the Company did not complete the business combination. *Id*. Public investors who purchased Units in the IPO would be able to trade them separately as shares (NYSE: CCXX) and warrants (NYSE: CCXX WS) after April 5, 2020 (*i.e.*, 52 days after the February 13, 2020 date of the Prospectus). *Id*.

In addition to the Units sold in its IPO, the Company also issued Class B shares and warrants to Churchill Sponsor III, LLC. Ex. 2 at 14. These Class B shares are sometimes referred to as "founder shares." *Id.* Churchill Sponsor III, LLC purchased all Class B shares for an aggregate purchase price of $25,000. *Id.* The IPO Prospectus explained that these Class B shares would convert into Class A shares on a one-for-one basis immediately before any business combination was consummated such that they would equal to 20% of the Company's outstanding common stock. *Id.* at 15–16. If a business combination was not effected during the completion window, the Class B shares would be "worthless." *Id.* at 53.

These Class B shares were also subject to a "lock-up" which provided that even once converted to Class A shares, the shares could not be sold until one year after a business combination or if the Company completed a post-Acquisition transaction that "that results in all of [the Company's] public stockholders having the right to exchange their shares of common stock for cash, securities, or other property." Ex. 2 at 15. The shares would be released from the lock-up only if the stock price was at least $12.00 per share for any 20 trading days within any 30-trading day period beginning at least 150 days after the Acquisition. *Id.*[5]

Churchill Sponsor III, LLC also purchased $23 million in private placement warrants at $1 per warrant, for a total of 23 million private placement warrants. Compl. ¶ 56; Ex. 3 at 2. Each private placement warrant entitled the Sponsor to purchase one share of Class A common stock at a price of $11.50 per share. Ex. 2 at 16. These warrants were not transferable, assignable, or salable until 30 days after the completion of the initial business combination. *Id.* A portion of the proceeds from the warrants was used as operating capital to finance the Company's search for an acquisition target.

C. <u>The Company's October 2020 Acquisition of MultiPlan, Inc.</u>

Following its IPO, the Company commenced its search for an acquisition target. This search included the evaluation of "several dozen potential targets utilizing [the Company's] global network and the investing, operating and transaction experience of the Sponsor, [the Company's] management team, advisory partners, and the [] Board." Ex. 1 at 102. Representatives of the Company and the

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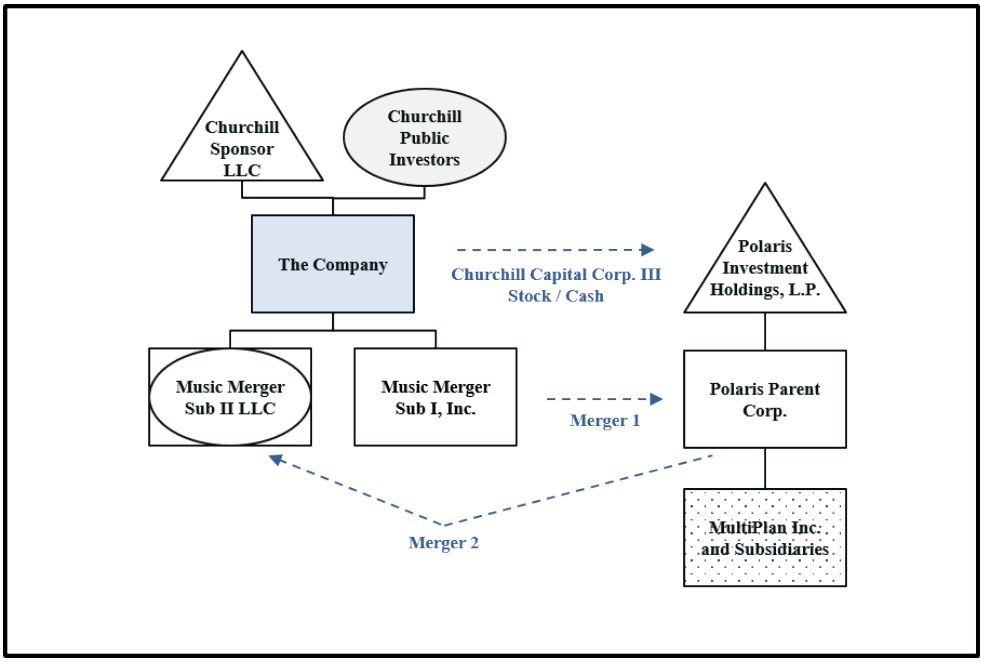
[5] In addition, Churchill Sponsor III, LLC's common stock *un*vested on the closing date of the Acquisition and will *re*vest only if the Company's stock price exceeds $12.50 per share for any 40 trading days in a 60 consecutive day period beginning at least one year after the Acquisition. Ex. 1 (Proxy) at 25, 201. If the stock does not *re*vest by these terms within five years, it is forfeited and canceled. *Id.*

Sponsor "contacted and were contacted by a number of individuals and entities with respect to acquisition opportunities" and subsequently met with "representatives of, and commenced initial preliminary due diligence on, several potential target opportunities." *Id.* Ultimately, the Company identified MultiPlan, Inc. as the most attractive target for a potential Acquisition. *Id.* at 104.

Following several months of due diligence and negotiations, on July 12, 2020, the Company's Board unanimously approved the Acquisition, whereby the Company, through two merger transactions, would acquire Polaris Parent Corp. and Polaris Investment Holdings, L.P., the parent entities of MultiPlan, Inc. *See* Compl. ¶ 63; Ex. 1 at 107. To effectuate the Acquisition, the Company's wholly-owned subsidiaries Music Merger Sub I, Inc., a Delaware corporation, and Music Merger Sub II LLC, a Delaware limited liability company were merged into Polaris Parent Corp. through two mergers. Ex. 1 at Preamble. First, Music Merger Sub I, Inc. merged with and into Polaris Parent Corp. with Polaris Parent Corp. surviving. Second, Polaris Parent Corp. merged with and into Music Merger Sub II LLC with Music Merger Sub II LLC surviving as a wholly-owned subsidiary of the Company. *Id.*



The Acquisition ascribed an enterprise value of $11 billion to MultiPlan, Inc. and reflected an implied valuation of $10 per share. Compl. ¶ 65; Ex 1 (Proxy) at 104.[6] The aggregate consideration paid to the parent entities of MultiPlan, Inc. was $5,678,000,000 in a combination of cash and stock. Ex. 1 at Preamble. The cash portion of the consideration was approximately $1.5 billion, and consisted of the IPO proceeds held in trust (after subtracting amounts paid for valid stockholder redemptions) plus a portion of the proceeds from the Company's private placement of 132,050,000 Class A shares and warrants to purchase an additional 6.5 million shares (the "PIPE Investment"). *Id.*; Ex. 4 (Super 8-K) at 3.

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6 The Acquisition also used $11 billion as the fair market value, which was calculated by adding the approximately $5.7 billion equity value and the approximately $5.3 billion of debt reported by MultiPlan, Inc. as of June 2020. *Id.* at 115.

The stock portion was 415.7 million Class A shares at an implied value of $10 per share. *Id.*; Ex. 1 at 21.

On the first trading day after the announcement of the proposed Acquisition, July 13, 2020, the Company's stock closed at $11.21 per share. Between that date and the closing date of the Acquisition (October 8, 2020), the stock price closed below $10.00 only once: on October 2, 2020 at $9.90. On October 8, 2020, the 50-day moving average was $10.82 per share. Ex. 5 (Company Historical Stock Price).

The Company issued its definitive proxy statement in connection with the Acquisition on September 18, 2020 (the "Proxy"). Ex. 1. Stockholders overwhelmingly approved the Acquisition at a special meeting on October 7, 2020: 105,067,599 votes in favor (76.41%) and 7,954,840 votes against (5.79%). Ex. 4 (Super 8-K) at 27.[7]

In connection with the Acquisition, public investors also had the right to request that their shares be redeemed for a *pro rata* portion of the trust account holding the proceeds from the IPO. Holders of 8,693,855 public shares of Churchill's Class A common stock (6.32% of the outstanding shares) properly

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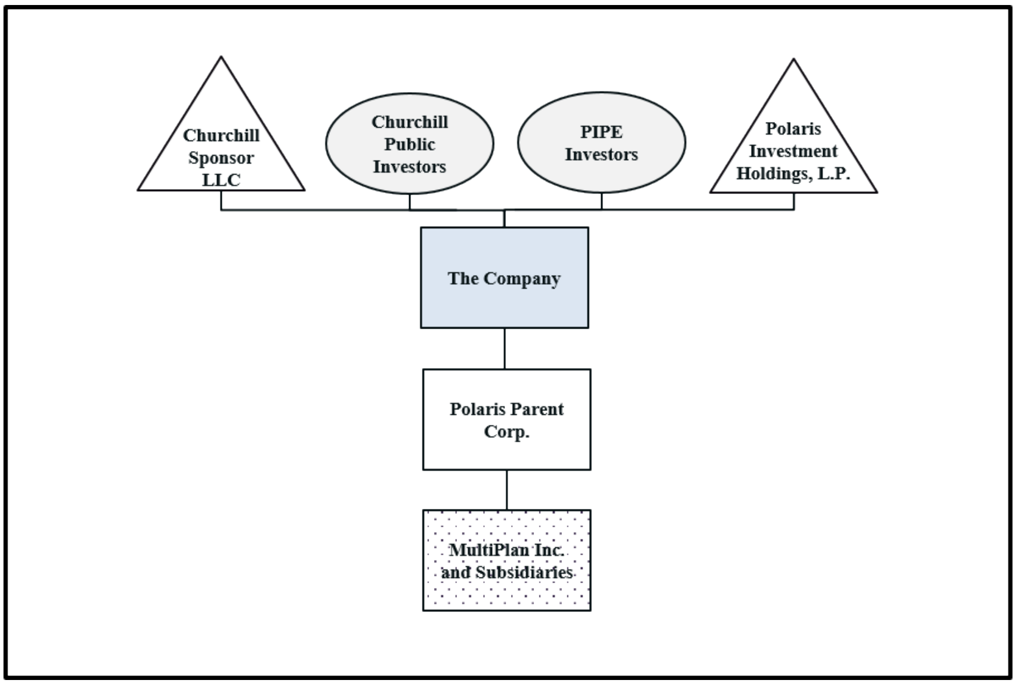
[7] Additionally, 22,533 shares (.02%) affirmatively abstained and 24,455,028 (17.78%) shares did not record a vote. *Id.*

exercised their right to have their shares redeemed for a total of $10.03 per share, for a total of $87.2 million in aggregate redemptions. Ex. 4 (Super 8-K) at 27.[8]

The Acquisition closed on October 8, 2020. *Id.* at 3. Upon closing, the Company wholly owned MultiPlan, Inc. indirectly through its surviving subsidiary Polaris Parent Corp.



8 Even if *all* public stockholders had redeemed their shares, the transaction still could have gone forward as certain Churchill stockholders had entered into a Non-Redemption Agreement, "pursuant to which the Covered Stockholders owning in the aggregate 28,979,500 shares of Churchill's Class A common stock (which as of September 14, 2020, the record date for the special meeting, represented approximately $290,000,000 of funds in the trust account) agreed not to elect to redeem or tender or submit for redemption any shares of Churchill's Class A common stock held by such stockholder." Ex. 1 (Proxy) at 5, 22.

Former owners of MultiPlan, Inc. and PIPE investors received shares of the Company's Class A stock; in addition to stock, former owners of MultiPlan, Inc. also received cash. Through the Acquisition, the ownership of the Company post-Acquisition changed as follows:

Stockholders	**Pre-Acquisition**[9]	**Post-Acquisition**[10]
Public Investors[11]	80%	15.0%
Sponsor	20%	4.1%
MultiPlan Parent Owners[12]	—	61.4%
PIPE Investors[13]	—	19.5%
Total[14]	100%	100%

9 Based on 137,500,000 shares of common stock issued and outstanding as of September 14, 2020. Ex. 1 (Proxy) at 246.

10 Based on 667,461,269 shares of common stock issued and outstanding immediately following the Acquisition. Ex. 4 (Super 8-K) at 6.

11 Pre-Acquisition, the Company's public stockholders held 110,000,000 shares. Post-Acquisition, public stockholders held 101,306,145 shares (110,000,000 less the 8,693,855 shares redeemed by public stockholders). Ex. 4 (Super 8-K) at Exhibit 99.9.

12 Includes H&F Investors (32.0%), GIC Investor (7.4%), Green Equity Investors (5.8%). Other holders, including former Officers and Directors of MultiPlan, Inc. (including Mark Tabak, Dale White, Jeff Doctoroff, and Michael Kim), comprise the remaining 16.2%. Ex. 4 (Super 8-K) at Exhibit 99.9; *id.* at 7.

13 This figure reflects the 132,050,000 Class A shares purchased by investors in the PIPE Investment. Ex. 4 (Super 8-K) at 3.

14 The figures in this table are based on Exhibit 99.9 of the October 8, 2020 Current Report (Form 8-K) and reflect figures included in the Unaudited Pro Forma Condensed and Combined Financial Information. These figures differ from those included in the Beneficial Ownership Table as the latter includes unvested shares and warrants. *Compare* Ex. 4 at 7 *with id.* at Exhibit 99.9.

On October 8, 2020, the Company changed its name to MultiPlan Corporation and on October 9, 2020, its NYSE ticker symbol changed to "MPLN."

Following the Acquisition, the Board composition of the Company also changed. Of the eleven current Directors, only two—Michael Klein and Glenn R. August—were Directors of the Company prior to the Acquisition. Ex. 6. None of the other current directors of the Company—Richard A. Clarke, Anthony Colaluca, Jr., Paul D. Emery, C. Martin Harris, Julie Klapstein, P. Hunter Philbrick, Mark Tabak, Allen R. Thorpe and Bill Veghte—are named as defendants. *Id*.

D. <u>The November 2020 Muddy Waters Report</u>

On November 11, 2020, just over a month after the closing of the Acquisition, hedge fund Muddy Waters Capital LLC ("Muddy Waters") published a report titled: "MultiPlan: Private Equity Necrophilia Meets The Great 2020 Money Grab." Compl. ¶ 47; *see generally* Ex. 7 (Muddy Waters Report). Muddy Waters is a short seller—*i.e.*, it takes positions in companies that it believes are overvalued and stands to make money if the stock price falls. Muddy Waters publishes reports about public companies expressly designed to negatively affect the price of the target company's stock. Muddy Waters has been accused of market manipulation and at least one financial regulator has accused it of "deception." *See* Exs. 8 and 9.

The Muddy Waters report specifically states that Muddy Waters was an interested party and stood to gain should the Company's stock fall following the report:

> You should assume that, as of the publication date of a Muddy Waters report, Muddy Waters Related Persons (possibly along with or through its members, partners, affiliates, employees, and/or consultants), Muddy Waters Related Persons clients and/or investors and/or their clients and/or investors ***have a short position in one or more of the securities of a Covered Issuer*** (and/or options, swaps, and other derivatives related to one or more of these securities), and ***therefore stand to realize significant gains in the event that the prices of either equity or debt securities of a Covered Issuer decline*** or appreciate.

Ex. 7 at 1 (emphases added). Indeed, the Muddy Waters report created a self-fulfilling prophecy—the Company's stock price fell following the report, and Muddy Waters reaped a profit.

The report alleged that at the time of the Acquisition, MultiPlan, Inc. was in the process of losing a major customer who was setting up a competing company, that MultiPlan, Inc. was in financial decline, and that its private equity sponsor had struggled for months to "unload" MultiPlan, Inc. The report also accused the Company of "grievous oversight" in its pre-Acquisition due diligence. Ex. 7 at 2. Following the self-serving report by Muddy Waters, the Company's stock price fell 19.15% to close at $7.01 per share on November 11, 2020. The day prior to filing this motion, the Company's stock price was $9.10. Ex. 5 (Company Historical Stock Price).

E. <u>Plaintiffs' Claims</u>

Plaintiffs assert four purportedly direct counts individually and on behalf of a putative class of the Company's Class A stockholders. Counts I, II, and III are for breach of fiduciary duty against the Director Defendants, Officer Defendants, and Sponsor Defendants, respectively. Count IV is for aiding and abetting breach of fiduciary duty against financial advisor The Klein Group, LLC. While the counts themselves are divided by Defendant, each count asserts an identical set of three claims:

- **The Overpayment Claim**: Plaintiffs' core claim is that the Defendants breached their fiduciary duties by approving the Acquisition and causing the Company to overpay for MultiPlan, Inc. "in a grossly mispriced transaction" (Compl. ¶ 3) that harmed the value of the Plaintiffs' Class A shares when the overpayment came to light post-Acquisition: "a pool of approximately $1 billion of cash pre-deal is now only worth $627 million, reflecting the destruction of over $370 million of stockholder value" (Compl. ¶ 16). *See* Compl. ¶ 102 (Count I); ¶ 110 (Count II); ¶ 120 (Count III); ¶ 127 (Count IV).
- **The Waste Claim**: Plaintiffs next claim that the Defendants breached their fiduciary duties by wasting corporate assets by paying $30.5 million to financial advisor The Klein Group, LLC. *See* Compl. ¶ 50

("This fee was a naked misallocation of corporate value); Compl. ¶ 63 ("Klein Group was paid a fee of ***$30.5 million,*** despite M[ichael] Klein . . . already being tasked with identifying, negotiating, and executing a deal." (emphasis in original)); Compl. ¶ 81 ("The very fact that the Board would approve paying Klein Group anything, much less $30.5 million, is absurd."); *see also* Compl. ¶ 102 (Count I); ¶ 110 (Count II); ¶ 120 (Count III); ¶ 127 (Count IV).

- **The Disclosure Claims**: Plaintiffs finally claim that the disclosures in the pre-Acquisition Proxy were false and misleading—including because the disclosures did not describe the issues later included in the Muddy Waters report—which led to the stockholders voting to approve the Acquisition at an "unfair price" and/or holding their shares rather than requesting redemption at the time of the Acquisition.[15] *See, e.g.*, Compl. ¶ 73 ("After having received these disclosures, . . . stockholders approved the Merger."); Compl. ¶ 83 ("Class A stockholders were not provided with a fully informed decision whether to redeem their shares

[15] In Count II against the Officer Defendants, Plaintiffs also allege that the "August 18, 2020 analyst day presentation" was false and misleading. Compl. ¶ 111. This presentation is not part of the allegations in any other Count.

ahead of the Merger."); *see also* Compl. ¶ 104–105 (Count I); ¶ 112–113 (Count II); ¶ 121–122 (Count III); ¶ 128–129 (Count IV).

As discussed below, the Overpayment Claim and the Waste Claim are derivative claims that belong to the Company; the Disclosure Claims seek relief duplicative of the derivative claims and thus must be dismissed under Rule 12(b)(6).

NATURE AND STAGE OF THE PROCEEDINGS

Prior to the filing of this lawsuit, two federal securities suits were filed in the United States District Court for the Southern District of New York on February 24, 2021 and March 5, 2021, respectively.[16] These identical suits alleged violations of Sections 10(b), 14(a), and 20(a) of the Securities Exchange Act of 1934 against the Company, certain pre-Acquisition officers and directors of the Company, the Company's current CEO and CFO, and the same sponsor and affiliated entities named here based on allegedly false and misleading disclosures in the Proxy. Both federal securities lawsuits were voluntarily dismissed, the second on the eve of this lawsuit being filed. On April 6, 2021, a new federal securities suit was filed in the United States District Court for the Eastern District of New York; it also was

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16 *Srock v. MultiPlan Corporation et al.*, No. 21-1640 (S.D.N.Y.); *Verger v. MultiPlan Corporation et al.*, No. 21-1965 (S.D.N.Y.).

voluntarily dismissed on June 3, 2021.[17] On June 4, 2021, another federal securities suit was filed in the Eastern District of New York. It remains pending.[18]

On March 25, 2021, Plaintiff Kwame Amo filed a complaint in this Court. On April 9, 2021, Plaintiff Anthony Franchi filed a substantially similar complaint. The two actions were consolidated on April 14, 2021 with the complaint filed by Anthony Franchi made the operative complaint.

Neither Plaintiff, nor any other Company stockholder, made a pre-suit demand on the Board.

ARGUMENT

Derivative claims should be dismissed pursuant to Rule 23.1 when a plaintiff who has not made a pre-suit demand fails to plead demand futility. *See* Ct. Ch. R. 23.1; *White v. Panic*, 783 A.2d 543, 550–51 (Del. 2001) ("Where, as in this case, a stockholder plaintiff initiates a derivative action without making a pre-suit demand on the board, Rule 23.1 requires that the complaint allege with particularity the reasons for the plaintiff's failure to demand action from the board.").

Additionally, dismissal should be granted pursuant to Rule 12(b)(6) when a complaint does not allege facts that, if proven, would entitle the plaintiff to relief. Ct. Ch. R. 12(b)(6); *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 737

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17 *Paradis v. MultiPlan Corporation et al.*, No. 21-1853 (E.D.N.Y.).

18 *Kong v. MultiPlan Corporation et al.*, No. 21-3186 (E.D.N.Y.).

(Del. Ch. 2016). While 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 "is not . . . required to accept as true conclusory allegations without specific supporting factual allegations." *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (internal quotation marks omitted). Additionally, the Court must "accept only those reasonable inferences that logically flow from the face of the complaint and is not required to accept every strained interpretation of the allegations proposed by the plaintiff." *Id.* (internal quotation marks omitted).

I. PLAINTIFFS' OVERPAYMENT CLAIM IS DERIVATIVE AND MUST BE DISMISSED UNDER RULE 23.1 FOR FAILURE TO PLEAD DEMAND FUTILITY

In each count, Plaintiffs purport to assert a direct claim that Defendants breached their fiduciary duties to the Class A stockholders by "approving the Merger, which was unfair to public Churchill Class A stockholders." Compl. ¶ 102 (Count I); ¶ 110 (Count II) (same); ¶ 120 (Count III) (same); ¶ 125–27 (Count IV).[19] Plaintiffs claim that the Acquisition was unfair because it was "grossly mispriced"

[19] In Count IV, Plaintiffs allege that Defendant The Klein Group, LLC aided and abetted these breaches of fiduciary duty. Compl. ¶¶ 125–127. Claims of aiding and abetting derivative claims are also derivative and must be dismissed. *See, e.g.*, *Reith v. Lichtenstein*, 2019 WL 2714065, at *19 (Del. Ch. June 28, 2019) ("Prior decisions of this court have validated the unsurprising proposition that an aiding and abetting claim premised on a derivative cause of action is necessarily derivative itself." (citation omitted)).

(*id.* ¶ 3), as evidenced by the fact that post Acquisition, "[a]fter the market learned the facts presented in Muddy Waters' Report, the Company's stock price plummeted and remains below the $10 per share IPO price." *Id.* ¶ 82; *see also id.* ¶ 16 ("[A] pool of approximately $1 billion of cash pre-deal is now only worth $627 million, reflecting the destruction of over $370 million of stockholder value."). Though Plaintiffs purport to assert a direct claim based on the Company's alleged overpayment for MultiPlan, Inc., such claims are quintessentially derivative and not dual-natured. Consequently, as Plaintiffs failed to make a pre-suit demand on the Board or to plead demand futility, the overpayment claim must be dismissed under Rule 23.1.

A. Plaintiffs' Overpayment Claim Is A Quintessential Derivative Claim

Plaintiffs' Overpayment Claim, which asserts only harm and remedy available to the Company, is a quintessential derivative claim regardless of Plaintiffs' framing of it as a "direct" claim. The question of whether an action is direct or derivative is determined by the nature of the wrongs alleged in the complaint, "instead of the plaintiff's characterization of the claim." *In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *9 (Del. Ch. Sept. 30, 2009); *see also Feldman v. Cutaia*, 956 A.2d 644, 659–60 (Del. Ch. 2007) ("[Delaware courts disfavor when] a plaintiff creatively attempt[s] to recast a derivative claim [as a direct claim] by alleging the same fundamental harm in a slightly different way"), *aff'd*, 951 A.2d

727 (Del. 2008); *Dieterich v. Harrer*, 857 A.2d 1017, 1027 (Del. Ch. 2004) (A "claim is not 'direct' simply because it is pleaded that way, and mentioning a merger does not talismanically create a direct action. Instead, the court must look to all the facts of the complaint and determine for itself whether a direct claim exists.").

Under the Delaware Supreme Court's seminal decision *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, the Court's determination of whether a claim is derivative or direct "turn[s] *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of the recovery or other remedy (the corporation or the stockholders, individually)?" 845 A.2d 1031, 1033 (Del. 2004). "To answer the question[s], the reviewing court must look to the body of the complaint and consider the nature of the wrong alleged and the relief requested." *Culverhouse v. Paulson & Co.*, 133 A.3d 195, 198 (Del. 2016); *see also In re Syncor Int'l Corp. S'holders Litig.*, 857 A.2d 994, 997 (Del. Ch. 2004) ("[U]nder *Tooley*, the duty of the court is to look at the nature of the wrong alleged, not merely at the form of words used in the complaint."). To allege a direct claim, a stockholder plaintiff must "demonstrate that the duty breached was owed to the stockholder and that he or she can prevail *without showing an injury to the corporation*"—*i.e.*, an injury "independent of any alleged injury to the corporation." *Tooley*, 845 A.2d at 1038–39 (emphasis added).

Plaintiffs' claim that the Defendants breached their fiduciary duties by approving the Acquisition at too high of a price is a derivative claim. Plaintiffs' claim is based on the Company's alleged overpayment for MultiPlan, Inc., or in other words, that MultiPlan, Inc. was not actually worth $11 billion at the time of the Acquisition. Put differently, Plaintiffs' claim is that the $5.678 billion of consideration that the Company paid for MultiPlan, Inc.—consisting of approximately $1.5 billion in cash and 415.7 million shares of Class A stock at an implied valuation $10 per share—was too much because it rested on an inappropriately high $11 billion enterprise valuation. As a result, Plaintiffs claim, because the Company overpaid for MultiPlan, Inc., the value of Plaintiffs' Class A shares "plummeted" when the "truth" about the overpayment became known after the Acquisition. Compl. ¶¶ 15–16, 74–76, 82.

The Delaware Supreme Court has explained that overpayment claims like this are derivative because—under the *Tooley* analysis—the harm is to the corporation and the remedy flows to the corporation:

> Such claims of corporate overpayment are normally treated as causing harm solely to the corporation and, thus, are regarded as derivative. In *Tooley* terms, the harm is to the corporation, because such claims "naturally assert that the corporation's funds have been wrongfully depleted, which, though harming the corporation directly, harms the stockholders only derivatively so far as their stock loses value." The recovery—"restoration of the improperly reduced value"—flows to the corporation.

El Paso Pipeline GP Co., 152 A.3d at 1261 (claim that company had paid "too much" in a dropdown transaction was derivative) (internal footnotes omitted) (quoting *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006) and *Protas v. Cavanagh*, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012)); *see also, e.g.*, *Reith*, 2019 WL 2714065, at *10 ("In the typical corporate overpayment case, a claim against the corporation's fiduciaries for redress is regarded as exclusively derivative." (quoting *Gentile*, 906 A.2d at 99)).

In other words, when a company overpays for an asset, stockholders are harmed *indirectly* and can receive a remedy only through the corporation as a whole. There is no injury or remedy specific to individual stockholders that is not applicable to all. *See, e.g.*, *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006) ("Normally, claims of corporate overpayment are treated as causing harm solely to the corporation and, thus, are regarded as derivative . . . . Such claims are not normally regarded as direct, because any dilution in value of the corporation's stock is merely the unavoidable result (from an accounting standpoint) of the reduction in value of the entire corporate entity, of which each share of equity represents an equal fraction."); *see also, e.g.*, *In re TerraForm Power, Inc. S'holders Litig.*, 2020 WL 6375859, at *9 (Del. Ch. Oct. 30, 2020) ("In fact, corporate overpayment is the quintessence of a claim belonging to an entity: that fiduciaries, acting in a way that breaches their duties, have caused the entity to exchange assets at a loss."); *Silverberg v. Padda*, 2019 WL 4566909, at *5 (Del. Ch. Sept. 19, 2019) ("claims that a corporation overpaid for corporate financing, thereby diluting the value of its stock, are quintessentially derivative"); *Klein v. H.I.G. Cap., L.L.C.*, 2018 WL 6719717, at *6 (Del. Ch. Dec. 19, 2018) (claims regarding the fairness of consideration and valuation are "a classic form of an 'overpayment' claim" that is "quintessentially derivative").

In re J.P. Morgan Chase & Co. Shareholder Litigation provides a cogent analogy to Plaintiffs' overpayment claim here and confirms its derivative nature. 906 A.2d 808, 812 (Del. Ch. 2005), *aff'd*, 906 A.2d 766 (Del. 2006).[20] There, the plaintiffs, J.P. Morgan stockholders, brought a purportedly direct breach of fiduciary duty claim against the J.P. Morgan board for approving a merger with Bank One at a 14% premium, which the plaintiffs claimed was unnecessary or excessive. *Id.* at 817 ("The plaintiffs' main complaint is that the defendant directors breached their fiduciary duty by approving a merger exchange ratio that paid an unnecessary or excessive premium to Bank One stockholders."). The plaintiffs claimed they were harmed through "dilution of their collective ownership percentage" and sought return of the "proper interest" owed to pre-merger J.P.

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[20] The plaintiffs in *J.P. Morgan* brought two purportedly direct claims—one for overpayment that, as discussed here, the Court of Chancery held was derivative and dismissed pursuant to Rule 23.1 for failure to plead demand futility, and the other based on allegedly misleading proxy disclosures, which the Court dismissed pursuant to Rule 12(b)(6). The plaintiffs appealed only the dismissal of the disclosure-related claim, and the Supreme Court affirmed the dismissal. *See infra* Section III.

Morgan stockholders. *Id.* at 817, 819.

Applying *Tooley*, Vice Chancellor Lamb looked beyond the "form of words used in the complaint" and to "all the facts of the complaint" concluding that "[a]t the heart of their complaint, the plaintiffs claim that JPMC overpaid for Bank One." *Id.* at 817-18.[21] The Court thus concluded that plaintiffs had asserted a derivative rather than direct claim. *Id.* at 819.

As to the first prong of *Tooley*, regarding the harm allegedly suffered, the Court noted that if J.P. Morgan had paid cash for Bank One, the claim "would clearly be derivative" as "JPMC would have suffered the alleged harm by paying too much money for Bank One. Any such cash overpayment would not have harmed the stockholders of JPMC directly. The only harm would have been the natural and foreseeable consequence of the harm to JPMC." *Id.* at 818. In a stock-for-stock merger, the Court held, the result is the same: "The plaintiffs, if they were harmed at all, were harmed indirectly only because of their ownership in JPMC." *Id.* at 819 ("[I]f there was harm suffered by payment of a merger premium, JPMC suffered it.").

As to the second prong of *Tooley*, regarding the remedy from any harm,

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[21] Summarizing the Court of Chancery's decision, the Delaware Supreme Court explained that "stripped of embellishments, the plaintiffs' claim was simply that JPMC was caused to overpay for Bank One." 906 A.2d at 770.

the Court concluded that, just as J.P. Morgan had suffered the harm, if the defendants were found liable, "the remedy will accrue to JPMC." *Id.* The plaintiffs' overpayment claim was therefore derivative. *Id.*; *see also Gentile*, 906 A.2d at 99 ("In the typical corporate overpayment case, a claim against the corporation's fiduciaries for redress is regarded as exclusively derivative, irrespective of whether the currency or form of overpayment is cash or the corporation's stock.").

Here, as in *J.P. Morgan*, the "heart" of Plaintiffs' complaint is that the Defendants breached their fiduciary duties by approving the Acquisition and thus causing the Company to overpay for MultiPlan, Inc. as allegedly evidenced by the post-Acquisition stock drop. *See, e.g.*, Compl. ¶¶ 82, 102. Under the first *Tooley* inquiry, the harm Plaintiffs allege is solely to the Company because it was *the Company* that allegedly overpaid through the cash and stock consideration exchanged with the parent entities of MultiPlan, Inc. *See supra* p. 11. Plaintiffs do not—and cannot—plead any harm that would fall on Plaintiffs *individually* as opposed to on the Company. If in fact there was an overpayment, then every single share would be affected on a *pro rata* basis. Put differently, any harm to Plaintiffs is the *indirect*—*i.e.*, derivative—result of harm to the Company due to the alleged overpayment. Plaintiffs can show no injury "independent of any alleged injury to the corporation." *Tooley*, 845 A.2d at 1038–39. Under the first *Tooley* inquiry, then, the harm allegedly suffered by Plaintiffs from the overpayment is derivative. *See,* *e.g.*, *Gentile*, 906 A.2d at 99 ("[E]qual injury to the shares resulting from a corporate overpayment is not viewed as, or equated with, harm to specific shareholders individually.") (internal quotation marks omitted); *Gerber v. EPE Hldgs., LLC*, 2013 WL 209658, at *12 (Del. Ch. Jan. 18, 2013) ("[The company] suffered all the harm at issue—it paid too much."); *Protas*, 2012 WL 1580969, at *6 ("Claims of overpayment naturally assert that the corporation's funds have been wrongfully depleted, which, though harming the corporation directly, harms the stockholders only derivatively so far as their stock loses value.").

Likewise, under the second *Tooley* inquiry, any remedy from the alleged harm to the Company would flow to the Company, not to the Plaintiffs individually. *See J.P. Morgan Chase*, 906 A.2d at 819 ("[I]f there was harm suffered by payment of a merger premium, JPMC suffered it. Thus, if the defendants are found liable, the remedy will accrue to JPMC."). If, as Plaintiffs allege, the Defendants caused the Company to overpay for MultiPlan, Inc., then the remedy—*i.e.*, the amount of the overpayment—would go to the Company. *See El Paso*, 152 A.3d at 1261 (on $171 million overpayment claim, "[t]he recovery—'restoration of the improperly reduced value'—flows to the corporation" (citation omitted)). Plaintiffs would benefit only indirectly *pro rata* through their holdings in the Company. *Id.* at 1264 ("Were [plaintiff] to recover directly for the alleged decrease in the value of the Partnership's assets, the damages would be proportionate to his ownership interest. The necessity of a *pro rata* recovery to remedy the alleged harm indicates that his claim is derivative.").

Plaintiffs' Overpayment Claim is derivative.

B. Plaintiffs' Overpayment Claim Is Not "Dual-Natured"

Plaintiffs cannot credibly claim that their Overpayment Claim is a "dual-natured" claim (*i.e.*, both direct and derivative). Although the Delaware courts have previously recognized such a dual-natured claim that is a "species of corporate overpayment claim," *Gentile*, 906 A.2d at 99, this concept is not applicable here.

Gentile does not apply here.[22] Under *Gentile*, claims are dual-natured only if they involve (a) a transaction with a controlling stockholder and (b) an improper transfer of economic value *and* voting power to the controlling stockholder. *See Gentile*, 906 A.2d at 99−100 ("a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock *in exchange for assets of the controlling stockholder* that have a lesser value; and …

[22] Moreover, "whether *Gentile* is still good law is debatable." *ACP Master Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *26 n.206 (Del. Ch. July 21, 2017), *aff'd*, 184 A.3d 1291 (Del. 2018) (TABLE). Delaware courts have refused to expand the reach of *Gentile* on a number of occasions and have narrowly limited it to its facts. *See, e.g.*, *El Paso Pipeline*, 152 A.3d at 1266 ("*Gentile* cannot be reconciled with the strong weight of our precedent and it ought to be overruled"); *Reith*, 2019 WL 2714065, at *11 & n.80 ("Since *El Paso*, this Court has handled *Gentile* claims carefully." (collecting cases)); *Sheldon v. Pinto Tech. Ventures, L.P.*, 2019 WL 336985, at *11 (Del. Ch. Jan. 25, 2019) ("declin[ing] to extend *Gentile*"), *aff'd*, 220 A.3d 245 (Del. 2019).

the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders" (emphasis added)).

Even assuming, for purposes of this motion, that the Controller Defendants constituted a controlling stockholder group under Delaware law, the Acquisition was not a conflicted transaction whereby the controller stood on both sides of the deal and controller assets of "lesser value" were exchanged for Class A shares.[23] There are no allegations that the Controller Defendants had any interest or influence over MultiPlan, Inc. or its investors. Moreover, the Controller Defendants' percentage of Company shares did not increase in tandem with a decrease to the Class A stockholders, which is key to the *Gentile* paradigm. In other words, there was no transfer of economic value from the Class A stockholders to the Controller Defendants. *All* stockholders ended up with diluted holdings after the Acquisition—from 20% to 4.1% for the Controller Defendants and from 80% to 15% for the Class A public stockholders. *See supra* p. 14. Nor was there any transfer of voting power

[23] *See, e.g.*, *Reith*, 2019 WL 2714065, at *12 ("It is not clear that the [Equity] Grants even satisfy the first prong of *Gentile* because there is no exchange of shares for assets of the controlling stockholder that have a lesser value. The Equity Grants were for 'current and future services to the Company.' Lawsuits challenging such 'excessive payments of corporate funds' are also traditionally derivative, as under *Tooley* any loss was experienced by, and any recovery would go to, the corporation. The claim is derivative, and in light of *El Paso*, I will not extend *Gentile* to the Equity Grants." (footnotes omitted)).

between the Class A public stockholders and the Controller Defendants, as each Company share has a single vote and thus voting power was similarly diluted for *all* pre-Acquisition stockholders.

Gentile does not apply here, and the Court should decline any invitation to expand its reach.[24]

C. Plaintiffs' Overpayment Claim Must Be Dismissed Because Plaintiffs Have Failed To Plead Demand Futility

A bedrock principle of Delaware corporate law is that "directors, rather than shareholders, manage the business and affairs of the corporation." *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Delaware law "does not permit a stockholder to cause the corporation to expend money and resources in discovery and trial in the stockholder's quixotic pursuit of a purported corporate claim based solely on conclusions, opinions or speculation." *Brehm v. Eisner,* 746 A.2d 244, 255 (Del. 2000). Rather, the decision to commence a lawsuit on behalf of a corporation is a business judgment entrusted to the company's board of directors. *Spiegel v.*

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[24] Moreover, even if Plaintiffs' overpayment claim was "dual-natured" (it is not), Plaintiffs cannot escape Rule 23.1 pleading requirements. *See In re El Paso Pipeline P'rs, L.P. Deriv. Litig.*, 132 A.3d 67, 75 (Del. Ch. 2015) ("Delaware law can and should treat a dual-natured claim as derivative for purposes of Rule 23.1 and the doctrine of demand"), *rev'd on other grounds by El Paso Pipeline GP Co. v. Brinkerhoff*, 152 A.3d 1248 (Del. 2016).

Buntrock, 571 A.2d 767, 772−73 (Del. 1990). A stockholder may usurp this authority only when the board wrongfully refuses a litigation demand or when the stockholder sufficiently alleges that demand would have been futile, as required by Rule 23.1. Ct. Ch. R. 23.1; *see also Stone v. Ritter*, 911 A.2d 362, 366−67 (Del. 2006); *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004). "Stockholders cannot shortcut the board's control over the corporation's litigation decisions without first complying with Court of Chancery Rule 23.1." *City of Birmingham Ret. and Relief Sys. v. Good*, 177 A.3d 47, 55 (Del. 2017).

Here, Plaintiffs did not make a pre-suit demand on the Company's Board. Nor have Plaintiffs attempted to plead demand futility. This is perhaps not surprising because only two of the Company's eleven current directors are named as Defendants in this lawsuit. Whatever the reason, Plaintiffs' failure to plead demand futility necessitates dismissal of their derivative Overpayment Claim pursuant to Rule 23.1.

II. PLAINTIFFS' WASTE CLAIM IS DERIVATIVE AND MUST BE DISMISSED UNDER RULE 23.1 FOR FAILURE TO PLEAD DEMAND FUTILITY

In each count, Plaintiffs purport to assert a direct claim alleging Defendants breached their fiduciary duties to Class A stockholders by retaining The Klein Group, LLC (the "Klein Group"), a financial advisory firm owned by Michael

Klein, in connection with the Acquisition. *See, e.g.*, Compl. ¶¶ 11, 31, 63, 81. The Klein Group received a total of $30.5 million for its advisory services—a sum Plaintiffs call "a naked misallocation of corporate value" including because its services were allegedly redundant to those provided by former investment banker Michael Klein. *Id.* ¶¶ 51, 63; *see also, e.g.*, *id.* ¶ 81 ("The very fact that the Board would approve paying Klein Group anything, much less $30.5 million, is absurd.").

Plaintiffs' allegations amount to a claim for corporate waste—*i.e.*, a transaction in which "what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid." *Saxe v. Brady*, 184 A.2d 602, 610 (Del. Ch. 1962); *see also White*, 783 A.2d at 554 ("[The Delaware Supreme Court has] defined 'waste' to mean 'an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade.'" (quoting *Brehm*, 746 A.2d at 263).

Though Plaintiffs purport to assert a direct claim, Delaware law is clear: a corporate waste claim must be brought derivatively. *See, e.g.*, *J.P. Morgan*, 906 A.2d at 771 ("[C]laims of waste are classically derivative."); *In re Brae Corp. S'holders Litig.*, 1991 WL 80213, at *4 (Del. Ch. May 15, 1991) ("[P]laintiffs' claims . . . state a classic cause of action for waste. This is a cause of action properly brought by the corporation and, if it is to be brought by shareholders, it must be pursued in a derivative action.”). Any harm resulting from the Company’s payment of $30.5 million to the Klein Group was to the corporation instead of to individual stockholders. *See, e.g.*, *Shearin v. E.F. Hutton Grp., Inc.*, 652 A.2d 578, 591 (Del. Ch. 1994) (“A claim for corporate waste is classically derivative, in that it asserts a harm suffered directly by the corporation and proportionally by all shareholders derivatively.”); *see also Kramer v. W. Pac. Indus.*, Inc., 546 A.2d 348, 353 (Del. 1988) (“A claim of mismanagement resulting in corporate waste, if proven, represents a direct wrong to the corporation that is indirectly experienced by all shareholders.”).

Because this is a derivative claim and Plaintiffs have not pleaded demand futility, *see supra* Section I.C, Plaintiffs’ Waste Claim should be dismissed pursuant to Rule 23.1.

III. PLAINTIFFS’ DISCLOSURE CLAIMS FAIL TO PLEAD ANY INDIVIDUALLY COMPENSABLE HARM AND MUST BE DISMISSED UNDER RULE 12(B)(6)

In each count, Plaintiffs purport to assert direct claims based on an allegedly false and misleading Proxy: first, that the disclosures misled Plaintiffs into voting to approve the Acquisition (Compl. ¶¶ 105, 113, 122, 129); and second, that the allegedly misleading disclosures prevented Plaintiffs from exercising their redemption rights at the time of the Acquisition (Compl. ¶¶ 104, 112, 121, 128). Each of these claims alleges the same fundamental harm (which is the same harm alleged in Plaintiffs' core overpayment claim)—*i.e.*, that because the Company overpaid for MultiPlan, Inc., the value of Plaintiffs' Class A shares was diminished when the "truth" about the overpayment became known after the Acquisition.

In other words, Plaintiffs attempt to recast their core—and quintessentially derivative—overpayment claim as disclosure claims by alleging that the overpayment (and subsequent diminution of the value of Plaintiffs' shares) would not have occurred *but for* the alleged Proxy deficiencies. Plaintiffs' claims are subject to dismissal under Rule 12(b)(6) where, as here, Plaintiffs fail to allege any individually compensable harm or damages recoverable by stockholders distinct from the alleged harm to the entire Company due to the purportedly "grossly mispriced" (Compl. ¶ 3) Acquisition. As such, Plaintiffs' disclosure claims are not actionable under Delaware law and must be dismissed under Rule 12(b)(6). *See, e.g.*, *J.P. Morgan*, 906 A.2d at 773–76 (dismissing voting-related overpayment claim under Rule 12(b)(6) for failure to demonstrate "harm caused to the shareholders *individually*" (emphasis in original)); *Lenois v. Lawal*, 2017 WL 5289611, at *20 (Del. Ch. Nov. 7, 2017) ("the *J.P. Morgan* decision disallows Plaintiff's direct claims" where damages from alleged disclosure deficiency would flow to the company); *Thornton v. Bernard Techs.*, Inc., 2009 WL 426179, at *5 (Del. Ch. Feb. 20, 2009) ("Although Plaintiffs' disclosure claims . . . may be direct, unless they show some separate, *individual*, harm those claims are not directly compensable.") (emphasis in original); *see also Feldman*, 956 A.2d at 659–60 ("[A] plaintiff creatively attempting to recast a derivative claim by alleging the same fundamental harm in a slightly different way[] is disfavored by Delaware courts.").

A. <u>Plaintiffs' Voting-Related Disclosure Claim Must Be Dismissed</u>

Each of Plaintiffs' four counts alleges that "members of the Class approved the acquisition of MultiPlan based on false and misleading information." Compl. ¶¶ 105 (Count I), 113 (Count II), 122 (Count III), 129 (Count IV).[25] The Complaint does not specify damages arising from Plaintiffs' approval of the Acquisition aside from a generic request for "damages in an amount to be determined at trial." *See, e.g.*, Compl. ¶ 106. Indeed, the only damages alleged in the Complaint are the reduction in value of Plaintiffs' shares, which Plaintiffs attribute to the market learning "for the first time" post-Acquisition of the alleged "facts" presented in the Muddy Waters report. *See, e.g.*, Compl. ¶¶ 16, 82. Stated plainly, Plaintiffs allege that Class A stockholders were induced through misleading disclosures to approve the Acquisition at too high a price, and when the alleged "truth" was revealed about

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[25] In addition to the Proxy deficiencies alleged in Counts I, III, and IV, Count II alleges an additional purported disclosure deficiency related to the Officer Defendants' statements during the August 18, 2020 analyst day presentation. Because there is nothing substantively different between these alleged disclosure deficiencies, all are addressed together.

the actual value of MultiPlan, Inc., the Class A share price dropped to reflect that lower, previously undisclosed value.

While disclosure claims related to stockholders' right to cast an informed vote are direct, *see, e.g.*, *J.P. Morgan*, 906 A.2d at 772, the Delaware Supreme Court has made clear that they are nonetheless subject to dismissal pursuant to Rule 12(b)(6) for failure to plead individually compensable harm. *See*, *e.g.*, *J.P. Morgan*, 906 A.2d at 771–76; *see also Lenois*, 2017 WL 5289611, at *20; *Thornton*, 2009 WL 426179, at *4–5.

In other words, a disclosure claim fails if a plaintiff seeks damages that would flow to the company directly and stockholders only indirectly. This is because even if the disclosure claim is, on its face, direct, the damages flowing from overpayment belong to the company. *See supra* Section I.A. Such damages are not recoverable by individual stockholders and thus may not be maintained by individual plaintiff stockholders. Allowing such a claim to proceed would lead to the "perverse result that Defendants must pay identical [] damages to both [the company] and the stockholders for the same underlying behavior." *Lenois*, 2017 WL 5289611, at *20. In the words of the Delaware Supreme Court, "[t]hat simply cannot be." *J.P. Morgan*, 906 A.2d at 773.

In *J.P. Morgan*, the Delaware Supreme Court affirmed dismissal of a disclosure claim, which asserted—akin to Plaintiffs' assertions here—breaches of fiduciary duty premised on "inducing JPMC shareholders to approve the merger [with Bank One] with a proxy statement that contained materially inaccurate or incomplete disclosures" that resulted in a "$7 billion overpayment" by J.P. Morgan for Bank One. *J.P. Morgan*, 906 A.2d at 767, 772. The Court determined that though the claim was direct, it was non-actionable as the damages from the alleged overpayment did not belong to plaintiffs, but instead to the company itself:

> Plaintiffs have pled no facts from which $7 billion—or for that matter any quantifiable amount—can be inferred from the claimed infringement of their right to be told the material facts relating to the merger on which they were asked to vote. Although the $7 billion damage figure would be a logical and reasonable consequence (and measure) of the harm caused to JPMC for being caused to overpay for Bank One, that $7 billion figure has no logical or reasonable relationship to the harm caused to the shareholders *individually* for being deprived of their right to cast an informed vote.

906 A.2d at 773. As a result, the Supreme Court affirmed dismissal under Rule 12(b)(6) for failure to state a claim. *See also Sciabacucchi v. Liberty Broadband Corp.*, 2018 WL 3599997, at *17 (Del. Ch. July 26, 2018) (finding "*J.P. Morgan* compel[led] the dismissal of the Plaintiff's [voting-related] disclosure claim" because it was in essence an overpayment claim for which damages were recoverable only by the company itself, not stockholders).

Likewise, in *Thornton v. Bernard Technologies, Inc.*, the Court noted that disclosure claims premised on an alleged impairment of "the stockholders' right to cast an informed vote" appeared direct "at least on their face." 2009 WL 426179, at *3. But that was only the first half of the inquiry. When the harm was to the entire company—in *Thornton*, it was a descent into bankruptcy—plaintiffs could not recover individually because they could show no individually compensable harm: "Although Plaintiffs' disclosure claims to some extent may be direct, unless they show some separate, *individual*, harm those claims are not directly compensable. To hold otherwise would allow Plaintiffs a damage award for the same harm and, presumably, in the same amount, that the Company suffered." *Id.* at *5 (emphasis in original). The same is true whether a plaintiff is asking for monetary damages or for equitable relief—*i.e.*, regardless of the form of the relief sought, the "key question is whether the [remedy] . . . 'would flow only to [the Company, and] not to the shareholder class.'" *Lenois*, 2017 WL 5289611, at *20 (quoting *J.P. Morgan*, 609 A.2d at 772); *see also Sciabacucchi*, 2018 WL 3599997, at *17 n.226 ("[A] plaintiff cannot avoid the holding of *J.P. Morgan* by tacking on a makeweight request for equitable remedies in her complaint." (citing *Lenois*, 2017 WL 5289611, at *20)).

Here, Plaintiffs do not allege any specific harm that arose from the stockholders' approval of the Acquisition due to alleged disclosure deficiencies. Instead, in each count, Plaintiffs conclusorily assert that "members of the Class approved the acquisition of MultiPlan based on false and misleading information." Compl. ¶ 105 (Count I); ¶ 113 (Count II); ¶ 122 (Count III); ¶ 129 (Count IV). The only harm alleged is what ends each count: "damages in an amount to be determined at trial" (*e.g.*, Compl. ¶ 106) due to, as the Complaint makes clear, the reduction in value of Plaintiffs' shares resulting from the Company's alleged overpayment for MultiPlan, Inc. Because the harm from and remedy for any overpayment claim inherently belongs to the Company, *see supra* Section I, Plaintiffs' disclosure-related voting claim must be dismissed as it "simply cannot be" that "the directors of an acquiring corporation [c]ould be liable to pay both the corporation and its shareholders the same compensatory damages for the same injury." *J.P. Morgan*, 906 A.2d at 773.

B. Plaintiffs' Redemption-Related Disclosure Claim Must Be Dismissed

Plaintiffs further claim that due to the allegedly misleading Proxy, they "were not provided with adequate information for their decision whether to redeem their stock" at the time of the Acquisition. Compl. ¶ 89; *see also id.* ¶ 90 (purporting to assert claims on behalf of a class "who held such stock [Company common stock] during the time period from the Record Date through the Closing Date"). As a result, Plaintiffs allege that "those who did not redeem their stock [] suffered substantial damages" (*id.* ¶ 89) when the purported "facts" about the alleged true value of MultiPlan, Inc. were revealed by Muddy Waters and the stock price dropped below the $10 per-share Acquisition price. As a remedy, Plaintiffs claim they are entitled to an equitable reopening of the redemption window or, in the alternative, rescission of the Acquisition with the capital raised in the Company's initial public offering returned to public stockholders as well as "other necessary rescissory damages." Compl. at Prayer for Relief ¶¶ H–I; *see also* Compl. ¶ 104 (Count I); ¶ 112 (Count II); ¶ 121 (Count III); ¶ 128 (Count IV). Stripped to its essence, however, the remedy Plaintiffs actually seek—and the only remedy available to Plaintiffs—is rescissory damages due to the Company's alleged overpayment for MultiPlan, Inc. Again, as discussed *supra* Sections IA and III.A, this is a harm suffered by and remedy belonging to the Company and not to individual stockholders directly, rendering Plaintiffs' redemption-related disclosure claims non-actionable under Rule 12(b)(6). *See, e.g.*, *Lenois*, 2017 WL 5289611, at *20 (dismissing plaintiffs' request for equitable relief as the requested rescissory damages and rescission would "quite obviously to belong to the Company").

Here, as an initial matter, Plaintiffs are essentially seeking relief from a non-defendant party. Any order to rescind the Acquisition and/or somehow reopen the redemption window would need to be imposed on the Company. The Company, however, is not named in any count.[26] Moreover, rescission of the Acquisition is impossible as the parties cannot now be returned to the pre-Acquisition *status quo*.

[26] As noted *supra* p. 15, the Complaint names only two of the post-Acquisition Company's eleven directors, neither of whom has the power to order the requested relief.

See FdG Logistics LLC v. A&R Logistics Hldgs., Inc., 131 A.3d 842, 863 (Del. Ch.) (dismissing claim seeking rescission for failure to state a claim and noting "the ordinary rule is that it is impractical to unwind a consummated merger") (citation omitted), *aff'd*, 148 A.3d 1171 (Del. 2016) (TABLE); *Transkaryotic*, 954 A.2d at 362 ("The merger has happened; the metaphorical merger eggs have been scrambled.") (citation omitted).[27] And even if the Court could order Defendants to redeem the putative class members' shares, any such redemption would materially impact the capital structure of a public company and negatively—and unfairly—impact all Company shares, the vast majority (more than 95%) of which are not held by Defendants. *See* Ex. 1 (Proxy) at 6; *see also Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 796 (Del. Ch. 2017) ("In every instance in which a court of equity is asked to issue an equitable remedy, it must concern itself with the effects upon others of its action." (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Price*, 1989 WL 108412, at *2 (Del. Ch. Sept. 13, 1989))).

Thus, Plaintiffs' only possible remedy is rescissory damages. Plaintiffs are effectively asking the Court to award them the difference between the

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[27] Moreover, a party seeking rescission bears the burden of establishing that the court can restore the *status quo—see, e.g.*, *Creative Rsch. Mfg. v. Advanced Bio-Delivery LLC*, 2007 WL 286735, at *7 (Del. Ch. Jan. 30, 2007)—and Plaintiffs have failed to plead any facts addressing this burden (and indeed, mention rescission only once, and only in the Prayer for Relief).

redemption price—which was $10.03 per share—and the current market price. Plaintiffs here thus have made the same error as the plaintiffs in *Lenois*. There, the plaintiff sought rescissory damages and claimed that the Delaware Supreme Court's decision in *J.P. Morgan* governed only cases seeking compensatory rather than recissory damages. *Lenois*, 2017 WL 5289611, at *20. The Court found that the plaintiff had failed to "complete the analysis" and had "misse[d] the point" of *J.P. Morgan*:

> [R]escissory damages stand in where rescission is not available. Were rescission reasonable and appropriate, I would undo the Transactions and put the Company back together into its previous state. That remedy seems quite obviously to belong to the Company. Rescissory damages, then, would flow to the same party, namely the Company.

Id. at *20. The Court therefore dismissed the disclosure claim. *Id.* ("I find that the *J.P. Morgan* decision disallows Plaintiff's direct claims. This prevents the perverse result that Defendants must pay identical rescissory damages to both [the company] and the stockholders for the same underlying behavior.").

Plaintiffs here have equally "missed the point" of the Supreme Court's *J.P. Morgan* decision—*i.e.*, failing to appreciate that rescissory damages for a corporate overpayment are a remedy that belongs uniquely to the Company, and consequently "would flow to the same party, namely the Company." *Lenois*, 2017 WL 5289611, at *20. Plaintiffs allege no individually compensable harm on their redemption-related disclosure claims separate from that suffered by all stockholders due to the Company's alleged overpayment for MultiPlan, Inc. Plaintiffs' claims for rescissory damages arising from the alleged overpayment are thus not actionable under Delaware law and must be dismissed under Rule 12(b)(6). *See id.*

Moreover, even if the Court were to find that Plaintiffs have alleged an individually compensable harm in their redemption-related disclosure claims (they have not), the claims should still be dismissed on the independent ground that they are "holder" claims which may not be brought as a class action as a matter of Delaware law, and which the Delaware Supreme Court and this Court have both suggested may not be cognizable even when brought as an individual action. *See Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1137 (Del. 2016) (describing the "numerous policy and proof problems" inherent in holder claims); *In re CBS*, 2021 WL 268779, at *21 ("The question remains whether [an individual holder] claim is (or ought to be) cognizable in Delaware law. *In my view of the law, it is not.*" (emphasis added)); *id*. at *3 (dismissing CBS plaintiff stockholder's holder class claims because "so-called 'holder' claims cannot be brought as class claims as a matter of Delaware law").

A "holder claim" is a "cause of action by persons wrongfully induced to *hold* stock instead of selling it." *Citigroup*, 140 A.3d at 1132 (quoting *Small v. Fritz Cos., Inc.*, 65 P.3d 1255, 1256 (Cal. 2003)). Here, Plaintiffs assert that the allegedly misleading Proxy disclosures led them to *hold* their shares through the

Acquisition rather than exercise their redemption rights. *See* Compl. ¶ 104 (Count I) ("Plaintiff and the Class were harmed by not exercising their redemption rights prior to the Merger"—*i.e.*, through holding their stock through the Acquisition); ¶ 112 (Count II) (same), ¶ 121 (Count III) (same), ¶ 128 (Count IV) (same). Consequently, Plaintiffs' redemption-related disclosure claim is analogous to a "holder" claim. Moreover, Plaintiffs' proposed class definition is explicitly premised on the class *holding* their Company stock. *See* Compl. ¶ 90 (defining the proposed class as Company stockholders "*who held such stock* during the time period from the Record Date through the Closing Date" (emphasis added)); *see also* Compl. ¶ 18 (requesting equitable relief on behalf of "public stockholders *who continue to hold* [Company] stock" (emphasis added)).

"[H]older claims cannot be brought as class claims as a matter of Delaware law." *In re CBS*, 2021 WL 268779, at *3. The recent *CBS* decision provides both an explanation for this prohibition and a useful analogy to Plaintiffs' claims here. In *CBS*, the stockholder plaintiffs brought a putative class claim that the CBS directors "breached their fiduciary duties by causing a materially misleading and incomplete Proxy to be issued when CBS's public stockholders were deciding whether (or not) to cash out their investment in advance of the Merger." *Id.* at *17. Vice Chancellor Slights *sua sponte* identified the plaintiffs' claim as a holder claim and thus not cognizable as a class claim under Delaware law:

> At the threshold, I dismiss Plaintiffs' disclosure claim, where they allege that the CBS Board's misleading disclosures caused CBS stockholders to hold rather than sell their stock in advance of the Merger, because so-called "holder" claims cannot be brought as class claims as a matter of Delaware law.

In re CBS, 2021 WL 268779, at *3. Holder claims are not susceptible to class treatment as a matter of law, Vice Chancellor Slights explained, because they are grounded in common law fraud or negligent misrepresentation, both of which require resolution of numerous individual questions of law and fact inappropriate for class-wide determination under well-established Delaware law. *Id.* at *20 & n.277 (citing *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 474 (Del. 1992)). Here, as a matter of law, Plaintiffs' claims on behalf of a class asserting that allegedly false and misleading disclosures in the Proxy led the class to hold their Company stock must be dismissed.

Plaintiffs also fail to state *individual* holder claims. As an initial matter, as noted above, both the Delaware Supreme Court in *Citigroup* and this Court in *CBS* recently expressed skepticism as to whether individual holder claims are cognizable under Delaware law. *See Citigroup*, 140 A.3d at 1135; *In re CBS*, 2021 WL 268779, at *21. In *Citigroup*, former Chief Justice Strine questioned the wisdom of recognizing a common law cause of action against fiduciaries of a Delaware corporation based on "holder" allegations, particularly given the "numerous policy and proof problems" inherent in such claims. 140 A.3d at 1135,

1137. This skepticism was echoed by Vice Chancellor Slights earlier this year in *CBS*—the most recent discussion of holder claims by any Delaware court—in which he concluded that while "[t]he question remains whether that claim is (or ought to be) cognizable in Delaware law[,] [i]*n my view of the law, it is not*." *In re CBS*, 2021 WL 268779, at *21 (emphasis added). In this light, this Court should dismiss Plaintiffs' individual holder claims as non-cognizable.

But even were this Court to find that Delaware law recognizes individual holder claims, despite the contrary recent statements in *Citigroup* and *CBS*, Plaintiffs have failed to plead such a claim. "While Delaware has yet to weigh in on what precisely must be alleged to state a holder claim, likely because the claim itself has been deemed suspect, our law is clear that a claim resting on fraud or negligent misrepresentation must be supported by particularized facts." *In re CBS*, 2021 WL 268779, at *26.[28] Here, Plaintiffs make no effort to meet that high burden. Indeed, Plaintiffs do not even allege that they *would have sought redemption* had they known the supposed "truth" about MultiPlan, Inc. as allegedly revealed by Muddy Waters after the Acquisition closed. *See id.* at *26 n.321 (a "holder" plaintiff must allege specific reliance such as "if the plaintiff had read a truthful account of the

[28] This is particularly true where Plaintiffs' holder claims are based on "alleged misrepresentations [] in publicly available documents" as it remains an open question whether Delaware has adopted a standard that "allow[s] public disclosures to provide a bases for holder claims." *Id*.

corporation's financial status the plaintiff would have sold the stock" and allege "actions, as distinguished from unspoken and unrecorded thoughts and decisions" (quoting *Small v. Fritz*, 65 P.3d 1255, 1265 (Cal. 2003)).

*   *   *

Plaintiffs' disclosure claims should be dismissed under Rule 12(b)(6) as the Complaint fails to allege any individually compensable harm or damages recoverable by Plaintiffs arising from the disclosure claims. The only harm alleged is that the value of Plaintiffs' holdings of Company stock has been harmed post-Acquisition because the Company overpaid to acquire MultiPlan, Inc., and any damages recoverable for overpayment clearly belongs to the Company.

CONCLUSION

For the foregoing reasons, the Company respectfully requests that the Court dismiss the Complaint with prejudice pursuant to Court of Chancery Rules 23.1 and 12(b)(6).

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