IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

PLAINTIFFS' OMNIBUS ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE VERIFIED CLASS ACTION COMPLAINT

Mark Lebovitch
Daniel E. Meyer
Margaret Sanborn-Lowing
Joseph W. Caputo (*bar admission pending*)
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

Gregory V. Varallo (Bar No. 2242)
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
500 Delaware Avenue, Suite 901
Wilmington, DE 19801
(302) 364-3601

Attorneys for Plaintiffs Kwame Amo and Anthony Franchi

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Term	Definition
"Board"	The board of directors of Churchill for the period between the Company's IPO and the Merger
"Charter"	Churchill's Amended and Restated Certificate of Incorporation
"Churchill" or the "Company"	MultiPlan Corporation f/k/a Churchill Capital Corp III
"Churchill Units"	The units, consisting of Class A common stock and one-fourth of a Churchill Warrant, offered in connection with Churchill's IPO
"Churchill Warrant"	A warrant to purchase Churchill's Class A common stock
"Founder Shares"	Churchill Class B stock
"Initial Business Combination"	The combination of Churchill with an operating business (and which was completed with MultiPlan)
"IPO"	Initial Public Offering
"Klein Group"	The Klein Group, LLC
"M. Klein"	Defendant Michael Klein, the former CEO, President, and Chairman of Churchill
"Merger"	The October 8, 2020 merger between Churchill and MultiPlan
"Merger Agreement"	The merger agreement entered into by Churchill and MultiPlan on July 12, 2020
"MultiPlan"	The legacy business of Polaris Parent Corp., which was a provider of data analytics and technology-enabled cost management solutions to the U.S. healthcare industry
"Naviguard"	A subsidiary of UHC that provides out-of-network healthcare billing services
"PIPE"	Private investment in public equity
"Private Placement Warrants"	The 23 million warrants the Sponsor purchased in connection with Churchill's IPO
"Proxy"	The Definitive Proxy Statement filed by Churchill on September 18, 2020
"Record Date"	September 14, 2020
"Rule 23.1"	Court of Chancery Rule 23.1
"SEC"	United States Securities and Exchange Commission
"SPAC"	Special Purpose Acquisition Company

Term	Definition
“Sponsor”	Churchill Sponsor III, LLC
“UHC”	UnitedHealth Group

Plaintiffs Kwame Amo and Anthony Franchi (together, "Plaintiffs") respectfully submit this brief in opposition to the motions to dismiss the Verified Class Action Complaint (the "Complaint")[1] filed by: (i) defendants MultiPlan Corporation f/k/a Churchill Capital Corp III ("Churchill" or the "Company");[2] and (ii) defendants Michael Klein, Jay Taragin, Jeremy Paul Abson, Glenn R. August, Mark Klein, Malcom S. McDermid, Karen G. Mills, Michael Eck, M. Klein and Company, LLC, Churchill Sponsor III, LLC, and The Klein Group, LLC.[3]

I. INTRODUCTION

"To Redeem or Not to Redeem; That is the Question."

Although Defendants' motions to dismiss suffer numerous fatal defects, a pervasive and overriding flaw is that Defendants present defenses in search of a complaint. Unable to credibly challenge the pleading actually filed against them, Defendants not only take liberties with the well-pled facts (and well-settled Delaware law), but they rewrite and reconfigure the Complaint beyond recognition. When the Court looks fairly at the actual allegations of the Complaint – and not the hypothetical complaint Defendants wish they were facing – Defendants' broad reliance on straw man arguments to support dispositive motions is glaring.

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[1] Unless indicated, emphasis and alterations are added, and internal quotations and citations are omitted. References to "¶_" are to the Complaint.

[2] Such motion to dismiss is referred to herein as "Company MTD."

[3] Such motion to dismiss is referred to herein as "Controller MTD."

The thesis behind Plaintiffs' Complaint is straightforward: public investors were deceived into investing in a failing business by Defendants, who were seeking to profit by at least hundreds of millions of dollars through a promote that could only be realized following an Initial Business Combination. The conflict of interest between Defendants, who owned Class B Founder Shares, and public holders of Churchill's Class A common stock, is stark. A value-destructive transaction (like the Merger) could wipe out hundreds of millions of dollars of stockholder value (which the Merger did), yet holders of Founder Shares could still make huge sums of money (which the Defendants did).

Through the IPO and other pre-Merger open market trades, Churchill's public investors bought Company shares as a means of parking their cash in a SPAC "bank account" in exchange for a future option. If the Sponsor identified an acquisition candidate, each and every one of the SPAC's investors had a choice whether to (i) stay invested in the company with which the SPAC was merging, or (ii) compel the Company to pay back \$10 plus accrued interest for each share. This case arises because Defendants breached their fiduciary duties in recommending the value-destructive de-SPAC Merger through which MultiPlan became public, including when they misled investors about the deal, thus undermining the redemption option owed to each Class A stockholder. The relief sought is plainly direct and proper for class-wide treatment, while the underlying facts require application of the entire fairness standard of review.

Unable to confront this clear premise, Defendants concocted the case they wished they were facing. At bottom, however, none of Defendants' arguments address Plaintiffs' actual Complaint, much less justify its dismissal.

First, in a desperate attempt to avoid judicial scrutiny, Defendants insist that Plaintiffs are bringing a derivative suit by inaccurately asserting that this case seeks relief arising from "overpayment" or "dilution." Defendants' "direct vs. derivative" briefing ignores the facts and theories of liability that the Complaint actually presents.

The Complaint only asserts individual harm and direct class action breach of duty claims. This suit seeks ***personal recovery*** arising from breaches of duty that undermined a ***personal redemption right*** belonging individually to each Class member. Leaving no doubt on this score, the harm specifically alleged at the end of ***each*** of the four counts in this Complaint states: "As a result, Plaintiff and the Class were harmed by not exercising their redemption rights prior to the Merger." *See* ¶¶104, 112, 121, 128. To be sure, in the face of the directors and Sponsor breaching their respective duties when recommending the Merger, each class member had their own personal choice to make: whether or not to redeem their shares for $10 versus investing in an entity worth less than $10 per share. Defendants undermined that personal choice. These claims are unambiguously direct. The Complaint only asserts individual harm and direct breach of duty claims.

Any finding that this case is derivative necessarily assumes that the Company could pursue the claims. Churchill never had a redemption right to vindicate. To the contrary, Churchill would be liable to honor redemption demands if Class members were given a fair opportunity to so demand. The Company could not be the recipient of an award relating to redemption rights where it would be the payor if redemption rights were exercised. Thus, as a pure matter of logic (and Delaware law), a claim to vindicate the redemption right cannot be derivative.

Seeking to distract from the Complaint's fundamentally direct claims, Defendants recharacterize the Complaint as seeking relief for "overpayment" or "dilution." The Complaint ***never*** uses the word "overpayment." The Complaint's allegations about "dilution" highlight the conflict of interest inherent to conversion of Founder Shares (which thus triggers entire fairness review) and show why ***informed*** investors would rather redeem shares or vote down the Merger entirely than approve the conversion of Founder Shares that enrich Defendants at the expense of Class A stockholders. But Plaintiffs are not seeking damages based on dilution – they *are* seeking the guaranteed $10-plus interest redemption price that Defendants' breaches of duty undermined. Where, as here, the claimed wrong is the undermining of a redemption right provided by a charter to each shareholder individually, and any relief necessarily must be paid to each aggrieved shareholder directly, the claim is direct and Rule 23.1 is inapplicable. *See* Section III.B. below.

Second, Defendants insist that this case presents no conflicts of interest, so entire fairness need not apply. No fair reading of the Complaint's allegations about how Founder Shares work can support this assertion. Plaintiffs made clear in the Complaint that while they are not challenging the legality or wisdom of how Churchill was capitalized (or SPACs generally), M. Klein's decision to structure Founder Shares to create conflicts of interest between Class members, on one hand, and the Sponsor and the Company's directors, on the other, has a legal consequence – application of entire fairness. Blackletter law mandates this conclusion.

Churchill's dual-class structure, consisting of Class A common shares and Class B Founder Shares, inherently and unavoidably creates the conflict. At Churchill's initial public offering, investors put $10 into the SPAC in exchange for a share of Churchill Class A stock (and a fraction of a warrant). The Sponsor's sole job was finding a private operating company it could take public via de-SPAC merger. The Sponsor was compensated through Founder Shares that only cost $25,000 up front but carried absolute control rights prior to a deal, automatically converted into 20% of the fully diluted Class A shares upon the closing of a deal (and would expire worthless absent an Initial Business Combination). The Sponsor chose to pay the CFO and each of its hand-selected directors with Founder Shares (except for M. Klein's brother, who is still conflicted), thus aligning all officers and directors with the Sponsor.

The legal import of the structure that M. Klein, who was the founder, CEO, President, and Chairman of the Board of Churchill, created with this SPAC is clear: the Sponsor and the directors had strong personal incentives to not only find a merger candidate, but to convince as many shareholders as possible not to redeem their shares for cash, thereby letting the deal proceed and preserving cash in the entity. The core premise of this case is that Defendants, seeking to lock in their personal windfall (*i.e.*, receiving 20% of the Company in exchange for just $25,000 in cash), breached their duties in selecting MultiPlan as the merger candidate and then improperly convinced Class members not to redeem and to support the deal. The conflict between the Sponsor and directors, on one hand, and the Class, on the other, is real. The stark misalignment of interests ***alone***, whether viewed through the lens of a controlling stockholder ***or*** interested directors, inevitably triggers entire fairness review of the Merger. *See* Section III.C. below.

Third, Defendants take improper liberties with core factual allegations to deny the Complaint's well-pled disclosure violations. They affirmatively assert that the Company's stock price declined due to a false short seller report rather than the anticipated loss of a material part of the Company's revenue base. This not only veers from the Complaint's well-pled allegations (which must be accepted as true), but affirmatively misrepresents objective facts. As but one example, a March 19, 2021 Barclay's report on the Company includes an entire section entitled, "United Health Client Risk: Some Shift Likely Over Time."[4] And, in July 2021, UHC (MultiPlan's largest customer, which accounted for about 35% of revenue in 2019) announced it would no longer pay some out-of-network claims crucial to MultiPlan's business, causing MultiPlan's stock to drop by another 25%.[5]

Defendants' effort to tar Plaintiffs' claims as resting on a purportedly false short seller report falls flat. Plaintiffs alleged that before the redemption window closed, both the Sponsor and directors knew or should have known, yet concealed, ***both*** that MultiPlan's largest customer (UHC) was creating an in-house division that would render much of the MultiPlan relationship unnecessary ***and*** that the forecasts M. Klein created for use in the Proxy were unreasonably high. Indeed, and tellingly, Defendants entirely ignore that the Company's stock price fell ***below*** the depths reached after the publication of Muddy Waters' report when MultiPlan announced fiscal year 2020 financial results that fell grossly short of those projections. Such allegations of material misrepresentations are actionable. *See* Section III.D. below.

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[4] Steve Valiquette and Jonathan Yong, Multiplan Corp Uncertainty Remains Despite Post-Covid Rebound; Initiate at EW Rating, BARCLAYS (Mar. 19, 2021), at 5-6 (the "Barclays Report") (Ex. A).

[5] Nona Tepper, *MultiPlan says new UnitedHealth claims policy won't have 'material impact' on its 2021 finances*, MODERN HEALTHCARE (July 12, 2021) (Ex. B).

Fourth, Defendants' effort to say these are "holder" claims misses the point about how the SPAC process works. The decision whether to redeem a contractually guaranteed right at a key moment in a SPAC's existence, and the impairment of stockholders' exercise of that right is actionable, whether or not the investor is a current holder, and regardless of whether the investor was deceived into redeeming or not. *See* Section III.E. below.

Fifth, Defendants assert that no fiduciary duty claim is permitted because the redemption right at issue is set forth in the Company's Charter. Perhaps if Plaintiffs alleged that they exercised their redemption right but the Company refused to honor it, then Defendants' insistence on being sued for breach of contract would ring less hollow. However, that is simply not Plaintiffs' claim.

True, the redemption right was set forth in Churchill's Charter. The fact that any stockholder right – be it redemption, supermajority voting standards, or calling a special meeting – appears in a charter hardly absolves fiduciaries of compliance with their duties in connection with that right. Many cases recognize fiduciary duty claims when a board is alleged to have breached duties in connection with stockholders' exercise of rights set forth in a charter. Here, Defendants' disclosures about the deal impaired Class members' ability to make an informed decision about the core question facing them: whether to redeem. Defendants' reliance on inapposite contract law is misplaced. *See* Section III.G. below.

Finally, Klein Group's effort to avoid aiding and abetting liability rests on a misreading of Delaware law. Klein Group is a controlled affiliate of M. Klein and the Sponsor. Plaintiffs are not complaining about the substance of a third-party banker's financial advice or saying an advisor misled the Board. They are alleging that Klein Group's entire involvement (including its formal retention the day the Merger Agreement was signed) made a mockery of any notion of fair process in this conflicted deal and are suing Klein Group because it served as M. Klein's vessel for increasing the Founder Share windfall by yet another $30.5 million in "advisory" fees. Defendants' reliance on aiding and abetting claims involving third party advisors is inapposite. *See* Section III.H. below.

In sum, Defendants' attempts at legal alchemy fair far worse than the financial alchemy underlying M. Klein's SPACs. Defendants' arguments neither confront Plaintiffs' claims nor apply Delaware law with the directness and reliability required to support dismissal. Defendants' motions should be denied in their entirety.

II. STATEMENT OF FACTS

A. The Structure of SPACs In General

Over the past decade, SPACs have evolved from the favored IPO path for Chinese entities looking to sidestep rigorous SEC oversight[6] to a craze through

[6] *See, e.g., In re China Agritech, Inc. S'holder Deriv. Litig.*, 2013 WL 2181514 (Del. Ch. May 21, 2013) (showing an example of a Chinese company accessing the US

which financiers, celebrities, and retired athletes have capitalized by fomenting retail investors' fervor in accessing previously private capital markets.[7] Indeed, as of the filing of the Complaint in April 2021, SPACs had already raised $98.9 billion thus far in 2021, up from $83.4 billion in 2020 and just $13.6 billion in 2019.[8] And, capital raised from SPAC IPOs has become the majority of funds raised across all IPOs. ¶41.

SPACs have changed the way companies, Wall Street, and retail investors alike approach the IPO process. A traditional IPO involves extensive rules about what must (and what must not) be disclosed, resulting in a potentially lengthy regulatory review prior to approval of a registration statement. ¶38. Investors considering a traditional IPO are deciding whether they want to invest in that specific company, either during or after its IPO.

The process of taking a company public via SPAC is different. ¶¶37, 39. A SPAC is a publicly traded shell company created for the purpose of raising capital and then merging with a privately-held business (via a "de-SPAC merger"). ¶37. As a SPAC has no financial results or ongoing operations, the IPO process is more

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securities market through a reverse merger with an inactive corporation that retained its NASDAQ listing).

[7] *See, e.g.*, Craig Harris, *Shaq, Ciara and A-Rod have one, but are SPACs, the latest investment craze, right for you?*, USA TODAY (May 3, 2021).

[8] ¶40; SPAC RESEARCH, https://www.spacresearch.com/ (last visited Aug. 6, 2021) (showing that SPACs have raised $118.1 billion as of the filing of this brief).

streamlined, and investors put money into a SPAC in order to effectively lock in their "opportunity" to participate in the indirect IPO of a to-be-identified company. ¶¶38–39.

In exchange for effectively pre-paying for the opportunity to invest in an as-yet-unidentified company, SPAC investors typically give up the ability to elect or remove directors, and they rely on the SPAC's sponsor to identify a value-enhancing de-SPAC merger, which the SPAC's board is required to assess and approve, consistent with its fiduciary duties. ¶¶39, 51. The sponsor also "purchases" founder shares, a substantial amount of the SPAC's fully diluted equity (normally 20%), for a nominal fee. ¶45.

When a SPAC has its IPO, the managers of the SPAC sell enough equity, often priced at $10 per unit, to raise the capital that the managers seek to support their acquisition efforts. ¶¶43, 56.[9] These units typically consist of one share of common stock and a fractional warrant.[10] The common stock carries redemption rights (in case investors do not like the SPAC's proposed business combination), and the warrants give stockholders the right to purchase shares at a set price in the future.

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[9] *See also* Ramey Layne & Brenda Lenahan, *Special Purpose Acquisition Companies: An Introduction*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (July 6, 2018).

[10] *Id.*

¶43-44.[11] Funds raised through the IPO are placed into a trust account, typically holding 100% of gross IPO proceeds so that stockholders who exercise their redemption rights will recoup at least the value of the stock at IPO. ¶¶43-44.[12]

After the SPAC has sold its shares to the public, the SPAC has a limited amount of time, typically two years, to complete its business combination. ¶43. If the SPAC does not complete its deal within this time, it must return the funds held in trust and dissolve the SPAC. ¶43. Founder shares are rendered worthless if a business combination is not completed. ¶46.

B. M. Klein Structures Churchill to Create Strong Incentives for the Sponsor and the Board to Get a de-SPAC Merger Approved

Few people have founded more SPACs than M. Klein, a former head of Citi's investment bank. ¶¶5, 55. As of the Complaint, M. Klein had founded seven different SPACs under the "Churchill" name, which in aggregate have raised billions of dollars. ¶¶53, 60.

While not unique to Churchill, several aspects of the way M. Klein structured Churchill have consequences under Delaware law. Most important is the use of a dual-class stock structure in which public investors in the SPAC receive Class A shares while the Sponsor and the directors receive Class B Founder Shares. ¶45.[13]

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[11] *Id.*

[12] *Id.*

[13] *Id.*

Churchill's sponsor, Churchill Sponsor III, LLC ("Sponsor"), incorporated Churchill on October 30, 2019 and paid $25,000 to receive all of Churchill's Founder Shares. ¶¶54-56. Because M. Klein completely controlled the Sponsor,[14] the Founder Shares provided M. Klein control over the selection and removal of all Board members and overall management of Churchill prior to any merger. ¶59.

Founder Shares are treated very differently than Class A Shares with respect to any merger. ***First***, Churchill was given 24 months to find a merger partner (the "Initial Business Combination"). ¶57.[15] If the Sponsor failed to complete the Initial Business Combination within 24 months, Churchill was required to redeem 100% of the public shares for $10 plus-interest, and cease operations. ¶¶6, 57. Absent an Initial Business Combination, however, all Founder Shares and warrants would expire worthless. ¶57.

Second, Founder Shares do not convert *ab initio* on a one-to-one basis into Class A shares. Rather, immediately prior to the closing of any merger, the Founder Shares purchased for a mere $25,000 automatically convert to whatever number of Class A shares are necessary to provide the holders of Founder Shares with a cumulative 20% of the pre-closing entity's ***total equity and voting power***. ¶¶45, 56.

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[14] *See* Churchill Capital Corp III, Amendment No. 3 to Form S-1 (Registration Statement) (Feb. 13, 2020), 120 (showing M. Klein was the sole stockholder of M. Klein Associates, Inc., the managing member of the Sponsor) (the "S-1") (Ex. C).

[15] S-1, at Preamble.

This fee structure for the Sponsor is starkly different than the traditional hedge fund fee model. In typical hedge fund (and many private equity investment) structures, the investment manager is paid 2% of the net assets of the fund, plus 20% of any profits to outside investors from the investments chosen by the manager (*i.e.*, the so-called 2 and 20 incentives).[16] The Founder Shares were structured to provide the Sponsor and the Board with 20% of the fully diluted equity of Churchill immediately prior to the closing of a Merger, irrespective of whether the investment chosen creates any profit to outside investors. ¶45. As Andrew Ross Sorkin of *The New York Times* said, "[t]his is not pay for performance. It is pay before performance." ¶45.

Churchill's IPO took place on February 19, 2020. ¶56. Churchill raised $1.1 billion, selling 110 million units at $10 per unit ("Churchill Units"). ¶56. Each Churchill Unit consisted of one share of Churchill Class A common stock and a quarter of a warrant (a whole warrant will be referred to as a "Churchill Warrant"). ¶56. Each Churchill Warrant entitled the holder to purchase a share of Churchill Class A common stock for $11.50 a share.[17] The $1.1 billion raised through the IPO was placed in a trust account. ¶57.[18]

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[16] Elvis Picardo, *Two and Twenty*, INVESTOPEDIA (Mar. 3, 2021).

[17] Churchill Capital Corp III, Form 8-K (Current Report) (Feb. 19, 2020), at 2 (the "8-K") (Ex. D).

[18] *Id.*

Thus, upon the completion of an Initial Business Combination, the Class B Founder Shares would convert into 27.5 million Class A shares.[19] In a "fair" deal, where Class A shares are worth $10 per share both before and after a business combination, owners of the former Founder Shares would realize a profit of nearly $275 million.[20] And, even in a deal that destroyed half the value of the Class A shares (*i.e.*, destroying $550 million in value for the Company's public stockholders), the owners of the former Founder Shares of Churchill would still realize a profit of nearly $137.5 million.[21]

Additionally, at the same time as the IPO, the Sponsor purchased $23 million in private placement warrants ("Private Placement Warrants"). ¶56. The Private Placement Warrants appeared to be valued attractively for the Sponsor (and anyone who held an economic interest in the Sponsor).[22] Like the Founder Shares, Private Placement Warrants would expire worthless absent an Initial Business Combination. ¶57.

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[19] (110 million / 80%) - 110 million = 27.5 million.

[20] (27.5 million * $10) - $25,000 = $274.975 million.

[21] (27.5 million * $5) - $25,000 = $137.475 million.

[22] Indeed, these Private Placement Warrants were worth $50.6 million by market close on the Record Date. Proxy, at 116.

C. M. Klein Packs the Board with Loyalists and Ensures Their Fealty

While M. Klein structured Churchill to let him control the Company and receive a windfall whether or not a deal actually created value for outside investors, M. Klein also ensured that the Board's personal interests aligned with his own. ¶¶53-62. Prior to the Churchill IPO, the Sponsor held all Founder Shares. ¶¶58-59. Those Founders Shares had a key right – the ability to elect all directors prior to the Initial Business Combination. ¶¶58-59.

M. Klein used this power to select the Board members, whom he could both unilaterally elect and remove. ¶¶58-60. Initially, M. Klein appointed himself, as well as Defendants Abson, August, Mark Klein, McDermid, and Mills to the Board. ¶59. M. Klein later added Defendant Eck to the Board. ¶59.

Each of these directors had close personal and/or financial ties to M. Klein. ¶¶60-62. Mark Klein is M. Klein's brother. ¶60. All other Directors received a membership interest in the Sponsor, creating an indirect economic interest in Founder Shares and Private Placement Warrants. ¶60.[23] These membership interests would be worth millions, ***provided that*** Churchill completed (any) de-SPAC merger. ¶¶60, 67. Additionally, all Board members (except for Defendant Eck) have served on the boards of M. Klein's other "Churchill" SPACs. ¶¶60-61. These positions allow members of the Board to receive similar windfalls in other

[23] Proxy, at 248.

ventures, ***provided that*** M. Klein continues to select and retain them for their board service. ¶¶60-61. The following chart sums up these relationships, highlighting the Directors' financial benefits that are dependent on M. Klein. ¶60.

Director	**Director at Other Churchill SPAC**						**Interest in Sponsor**	**Ties to M. Klein**
	I	**II**	**IV**	**V**	**VI**	**VII**		
Jeremy Paul Abson		⚐					Yes	
Glenn R. August		⚐	⚐	⚐	⚐	⚐	Yes	
Mark Klein		⚐	⚐	⚐	⚐	⚐		Brother, M. Klein & Co. Managing Member/ Majority Partner
Malcolm S. McDermid	⚐	⚐	⚐		⚐	⚐	Yes	
Karen G. Mills	⚐	⚐	⚐	⚐	⚐	⚐	Yes	
Michael Eck							Yes	M. Klein & Co. Managing Director

Compensation from directorships at other "Churchill" SPACs is not merely hypothetical. Defendant Mills received 258,279 founder shares and 274,000 private placement warrants at Churchill I.[24] As of August 6, 2021, such founder shares are worth over $6 million. Additionally, following the filing of the Complaint, Churchill IV completed an initial business combination, in which certain Director Defendants received the following equity interests:[25]

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[24] Clarivate Analytics PLC, Amendment No. 1 to Form F-4 (Registration Statement) (Apr. 1, 2019), at 188 (Ex. E).

[25] Churchill Capital Corp IV, Amendment No. 2 to Form S-4 (Registration Statement) (June 14, 2021), at 299 (Ex. F).

Director	Founder Shares		Warrants	
	#	$	#	$
Glenn R. August	7,000,000	$163,660,000	6,858,569	$72,289,317
Malcolm S. McDermid	300,000	$7,014,000	272,510	$2,872,255
Karen G. Mills	500,000	$11,690,000	454,184	$4,787,099

In sum, the Board members' close ties to and dependence on M. Klein for material financial windfalls created a board of M. Klein loyalists, unwilling or unable to say no to him, paving the way for a disastrous merger. ¶62.

D. Churchill Announces a de-SPAC Merger with MultiPlan and the Sponsor and Directors Profit Handsomely

On July 12, 2020, Churchill entered into a merger agreement with MultiPlan (the "Merger Agreement"). ¶63. The Merger Agreement called for a payment of $5.678 billion of cash and stock to merge MultiPlan into a subsidiary of Churchill and for Churchill to rename itself MultiPlan Corporation, thereby making the operating business a publicly traded company. ¶¶64-65.[26] That same day – July 12, 2020 – Churchill formally retained Defendant Klein Group, an affiliate of M. Klein, and agreed to pay it an advisory fee of $30.5 million in connection with the Merger and related financings. ¶63.

Some of the consideration contemplated by the Merger Agreement came from PIPE Investors, who agreed to buy shares and warrants worth $1.3 billion.[27] Entities

[26] Churchill Capital Corp III, Schedule 14A (Definitive Proxy Statement) (September 18, 2020), at Preamble (the "Proxy") (Ex. G).

[27] Proxy, at 100.

related to Defendants M. Klein, Abson, and August all participated as PIPE Investors.[28] This opportunity was not afforded to Class A stockholders in general. The PIPE opportunity would also be eliminated if the deal did not go through.

Churchill set the Record Date for a stockholders' meeting as September 14, 2020, issued the Proxy on September 18, 2020, and held the meeting on October 7, 2020. ¶66. As of the Record Date, the closing price of Churchill common stock was $11.09, which implied a market value of approximately $305 million for the Class B Founder Shares (*i.e.*, the founder shares that had been purchased for $25,000, implying a 1,219,900% gain). ¶67. The following table highlights the value of Founder Shares owned by certain Director Defendants as of the Record Date:[29]

Director	Founder Shares	Implied Value on Record Date @ $11.09 per share
Michael Klein	20,710,281	$229,677,016.29
Jeremy Paul Abson	294,985	$3,271,383.65
Glenn R. August	3,933,137	$43,618,489.33
Malcolm S. McDermid	786,672	$8,724,192.48
Karen G. Mills	294,985	$3,271,383.65
Michael Eck	294,985	$3,271,383.65

Additionally, as of the Record Date, the Private Placement Warrants had also appreciated in value and provided yet another economic incentive benefitting the Sponsor (and anyone who held economic interests in them). Despite the Sponsor

[28] Proxy, at 117.

[29] ¶67.

paying just $23 million for the warrants at the time of the IPO (when Churchill Units were sold for $10 a unit), the total value of the Private Placement Warrants had appreciated to $50.6 million by market close September 14, 2020.[30] Such Private Placement Warrants would expire worthless absent the closing of the Merger. ¶57.

E. The Proxy Assures Churchill Investors that the Board Did Thorough Due Diligence and Presents a Rosy Outlook for MultiPlan

Since MultiPlan was a private entity, Churchill stockholders considering whether to vote in favor of the Merger and/or whether to redeem their shares had no access to prior market disclosures. ¶39. They had to rely solely on the Board and Sponsor for all information about MultiPlan's business and current and forecasted financial condition. ¶39.

Encouraging that reliance, the Proxy highlighted the Board's purported due diligence on MultiPlan, stating:

> After conducting ***extensive due diligence***, along with their familiarity with MultiPlan's business from prior commercial experiences, the Churchill Board and Churchill management ***had knowledge of, and were familiar with,*** MultiPlan's business, financial condition, results of operations (including favorable free cash flow generation and current EBITDA margins, ***as well as the recurring nature of MultiPlan's revenues) and future growth prospects***. The Churchill Board considered the results of the due diligence review of MultiPlan's business, including . . . ***Churchill management having had the opportunity to communicate with senior leaders of several large customers of MultiPlan to better understand the quality and nature***

[30] ¶56; Proxy, at 116.

> ***of those relationships, as well as the competitive environment in which MultiPlan operates***.[31]

Thus, the Board suggested that stockholders should support the deal (rather than redeem their equity for $10 per share plus interest), in part because the Board had purportedly conducted extensive diligence on MultiPlan's business and financial condition. ¶¶69-72. Moreover, the Board did not even obtain an independent third-party valuation or fairness opinion. ¶70. The justification for avoiding this standard element of nearly all public M&A transaction rested on telling investors to rely on M. Klein's personal banking experience and credibility:

> The officers and directors of Churchill, including Mr. Klein, have substantial experience in evaluating the operating and financial merits of companies from a wide range of industries and concluded that their experience and backgrounds, together with the experience and sector expertise of Churchill's financial and other advisors, including KG [Klein Group] and Citi . . .[32]

Investors were given the following projections for MultiPlan, which indicated the Board expected previously declining revenues to improve:[33]

(*$ in thousands*)	**2017A**	**2018A**	**2019A**	**2020E**
Revenue	$1,067,266	$1,040,883	$982,901	$1,085,000 – $1,125,000
Adjusted EBITDA	$812,086	$824,886	$750,350	$845,000 – $875,000

[31] ¶69.

[32] Proxy, at 13.

[33] ¶71.

Again, in representing their extensive due diligence and M. Klein's personal expertise, the Board had assured Churchill's Class A stockholders that these projections were reasonable, even though not vetted by a third party. ¶¶71-73.

At bottom, the Proxy touted the Board's purported reasons for recommending the Merger, including:

- ***"Attractive Valuation"***
- ***"Reasonable Aggregate Consideration"***
- ***"Opportunities for Growth in Revenues, Adjusted EBITDA and Free Cash Flow"***
- ***Industry Leadership in End-to-End Healthcare Cost Management and Value-Add Claims Payment Processing in the U.S. Healthcare Industry as measured by revenue and claims processed"***

¶68.

Ultimately, and presumably relying on these disclosures, most Churchill stockholders supported the Merger on October 7, 2020, with only 8,693,855 shares (6.32% of outstanding shares) being redeemed.[34] The post-Merger entity's stock began to trade on the New York Stock Exchange under the ticker "MPLN." ¶73.

F. The Truth Emerges About MultiPlan's Failing Business

Less than a month after closing, on November 11, 2020, Muddy Waters published a report entitled, *MultiPlan: Private Equity Necrophilia Meets The Great*

[34] Company MTD, at 12.

2020 Money Grab (the "Muddy Waters Report"). ¶75. The Muddy Waters Report highlighted a number of facts inconsistent with the Proxy or other Company disclosures. ¶75. Among other things, the Muddy Waters Report claimed:

- MultiPlan was in the process of losing its largest client, UHC. In 2019, UHC accounted for 35% of MultiPlan's revenues. ¶¶84-85.[35] Thus, instead of realizing an opportunity for revenue growth, as the Proxy touted, MultiPlan was losing a massive existing customer.

- UHC was forming a competitor to MultiPlan, Naviguard, which purportedly offered significantly lower prices and fewer conflicts of interests than MultiPlan. UHC apparently planned to move all of its key accounts from MultiPlan to Naviguard by the end of 2022. The Proxy entirely fails to mention Naviguard, despite UHC's plans to create that entity having been public since the spring of 2020, and despite Churchill's purported "extensive due diligence" during which it communicated with MultiPlan's large customers.

- Notwithstanding the departure of UHC and the formation of Naviguard, MultiPlan was already in decline, with revenues falling consistently in recent years. MultiPlan, however, tried to mask its financial condition through an accounting sleight of hand. According to Muddy Waters, in 2018, MultiPlan released revenue reserves, dropping them from approximately 30% to 10% of revenue and allowing them to show EBITDA growth that year despite slumping sales. Nevertheless, the Proxy disclosed significant expected growth in revenue and EBITDA for fiscal year 2020.

- MultiPlan had been facing declining revenues due to, in part, increased competition and pricing pressures. In certain instances, insurers were cutting commissions paid to MultiPlan in half, from 12% to 6%. Misleadingly, during an analyst day presentation on August 18, 2020, declines in 2018 and 2019 revenue were attributed to "idiosyncratic customer behavior." M. Klein participated in this presentation.

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[35] *See also* Barclays Report, at 5-6.

The Company's stock to plunged to $6.27 the next day, or 37.3% below the IPO price. ¶76.

G. The Company Fails to Meet the Proxy's Projections and Its Stock Remains Below the $10 per share IPO Price

In the many months following the Muddy Waters Report, and despite Defendants' factual representations that the Muddy Waters report was incorrect, the Company's stock price has remained below Churchill's $10 per share IPO price. Indeed, as demonstrated by the chart below, in March 2021 the Company's stock actually fell ***below*** the depths of freefall following the Muddy Waters Report (*i.e.*, under $6 per share):

This drastic decline in the Company's stock price coincided with its announcement of its fiscal year 2020 results. ¶77. These results were significantly below the projections contained in the Proxy. ¶77. Since the Proxy itself was filed on September 18, 2020, the Board at least had MultiPlan's actual financials for the first half of fiscal year 2020. ¶77. As demonstrated by the table below, and despite the Board's purported "extensive due diligence," the Company's revenues fell 13.6% below the ***low*** end of the range of projections provided in the Proxy; the Company's adjusted EBITDA fell 16.5% below the ***low*** end of the range of projections provided in the Proxy:

(***$ in thousands***)	**2020 Expected in Proxy**[36]	**2020 Actual**[37]
Revenue	$1,085,00 – $1,125,000	$937,763
Adjusted EBITDA	$845,000 – $875,000	$706,313

In July 2021, worries about loss of business from UHC came to fruition. That month, UHC – MultiPlan's largest customer, which accounted for about 35% of revenue in 2019 – announced it would no longer pay some out-of-network claims crucial to MultiPlan's business. In response, MultiPlan's stock dropped by 25%.[38]

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[36] ¶77.

[37] ¶77.

[38] Nona Tepper, *MultiPlan says new UnitedHealth claims policy won't have 'material impact' on its 2021 finances*, MODERN HEALTHCARE (July 12, 2021) (Ex. B).

III. ARGUMENT

A. Applicable Standard for a Motion to Dismiss

"The pleading requirements to survive a Rule 12(b)(6) motion . . . 'are minimal.'" *OTK Assocs., LLC v. Friedman*, 85 A.3d 696, 724 (Del. Ch. 2014) (quoting *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011)). The Court must: (i) "accept all well-pleaded factual allegations" as true; (ii) deem "even vague allegations" as "well-pleaded" if they give sufficient notice; (iii) "draw all reasonable inferences in favor of the plaintiff"; and (iv) "deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances." *Id.* at 725.

B. Plaintiffs' Breach of Fiduciary Duty Claims Are Plainly Direct

Consistent with their tactic of presenting defenses in search of a complaint, Defendants rewrite the Complaint to assert that Plaintiffs must satisfy Rule 23.1. Not so. Plaintiffs allege only direct breach of fiduciary duty claims.

1. Churchill Stockholders Suffered Individual Harm When Defendants Deceived Them into Not Redeeming Their Shares

Counts I-III assert direct and Class claims against the Director Defendants, Officer Defendants, and Controller Defendants for breaching their fiduciary duties by prioritizing their own interests over those of public Churchill Class A stockholders when soliciting approval of the Merger. ¶¶102, 110, 120.

In determining whether a claim is direct or derivative, the Court considers: "(1) who suffered the alleged harm . . . ; and (2) who would receive the benefit of any recovery or other remedy . . . . " *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).

Here, for numerous reasons discussed in turn, it is the stockholders included in the Class – not the Company – that suffered injury through the impairment of their right to make an informed decision whether to redeem their shares prior to the Merger. Likewise, it is the Class member stockholders – not the Company – that would receive any recovery or remedy the Court awards. In other words, while the existence of a redemption right as part of a merger may be unique to the SPAC space, claims arising from impairment of that redemption right are textbook direct.

First, Delaware courts have long held that "a wrongful impairment by fiduciaries of the stockholders' voting power or freedom works a personal injury to the stockholders, not to the corporate entity . . . ." *In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 79 (Del. Ch. 1999). As explained further in Section III.D. below, Defendants wrongfully impaired stockholders' ability to make an informed decision whether to redeem their shares prior to the Merger.

The Complaint left no ambiguity about the nature of the harm inflicted. Each of the counts includes the following two paragraphs, which are irreconcilable with Defendants' revisionist efforts:

> 104. As a result, Plaintiff and the Class were harmed by not exercising their redemption rights prior to the Merger.
>
> 105. In addition, members of the Class approved the acquisition of MultiPlan based on false and misleading information.

See ¶¶104-105; *see also* ¶¶112-113; 121-122; 128-129.

Thus, both the right owed – a redemption right that each individual stockholder could have exercised in their personal capacity – and the conduct impairing that right – issuance of misleading disclosures that caused investors not to exercise their personal redemption right – give rise to individual claims. *See The Williams Cos. S'holder Litig.*, 2021 WL 754593, at *20 (Del. Ch. Feb. 26, 2021) (holding that plaintiffs' claims were direct because the stockholders' voting abilities were infringed upon, thereby harming the stockholders rather than the company); *see also Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 212 (Del. Ch. 2006) (citing *Dieterich v. Harrer*, 857 A.2d 1017, 1029 (Del. Ch. 2004)) ("[O]ur law has treated claims by stockholders that corporate disclosures in connection with a stockholder vote or tender were materially misleading as direct claims belonging to the stockholders who were asked to vote or tender.").

Second, the harm to the Class's redemption rights is necessarily distinct from any harm to Churchill itself because Churchill never had a redemption right. Indeed, it was the Company's responsibility to repay the stockholders' $10 per share (plus interest) should they choose to redeem. Having received false disclosures, thus being denied the chance to make an informed decision as to whether to redeem, the stockholders were injured by Defendants' breach of their fiduciary duties.

Had Class members exercised their redemption rights, the Company would be liable for paying out the money, not receiving it. As of the date of the filing of the operative Complaint, Class members would have benefitted by nearly $338 million had they exercised their redemption rights, and the Company would have paid out that amount.[39] A transaction in which the Company was the counterparty to aggrieved stockholders is the very antithesis of a derivative claim for the Company's benefit.[40]

Third, Plaintiffs only seek (and will establish their entitlement to) a form of relief and recovery that is patently individual in nature. The claims in the Complaint

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[39] (110,000,000 IPO Class A shares - 8,693,855 Class A shares redeemed) * ($10.00 - $6.27).

[40] This is precisely why the cases on which Defendants rely are distinguishable. Plaintiffs in *Lenois v. Lawal* "offer[ed] no explanation as to why [] damages ought to be owed to the stockholder and not [the Company]." 2017 WL 5289611, at *20 (Del. Ch. Nov. 7, 2017). Here, however, it is clear that the relief Plaintiffs seek must flow directly to stockholders, rather than the Company (since the Company never had any redemption rights, only redemption obligations). Similarly, the court in *Thornton* held that the bankrupt company could not make new disclosures and hold new elections—it was in Chapter 7 liquidation. *See Thornton v. Bernard Techs., Inc.*, 2009 WL 426179, at *4 (Del. Ch. Feb. 20, 2009). Here, either the redemption window can be reopened, or the Defendants can be held personally liable for their breaches.

do not seek any benefit for the Company arising from any "overpayment," which is the heart of Defendants' assertion that the claims are derivative.[41] Indeed, the word "overpayment" ***never*** appears in the Complaint. Any fair and credible interpretation of the Complaint must look to the recovery specifically sought in the Prayer for Relief: an award of money damages to the Class, an opening of the redemption window to allow stockholders the option to redeem their shares, rescission of the Merger, and/or a return of the capital raised from public stockholders.

These forms of relief are plainly direct and would be owed directly to stockholders who are also Class members. None of these forms of relief are consistent with a derivative claim. Therefore, Plaintiffs have satisfied the *Tooley* standard for pleading a direct claim.

C. The Merger Was A Conflicted Controller Transaction and Approved by Interested Directors, Both of Which Mandate Entire Fairness Review

Next, Defendants befuddlingly deny that M. Klein, the Sponsor, and the Board had different interests in the Merger than Class A stockholders, instead arguing that the business judgment rule applies. Company MTD, at 32, 34; Controller MTD, at 4, 26-27, 36, 41. Not so. The conflicts resulting in this deal are manifest, requiring

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[41] Defendants' cases are inapposite. Plaintiffs in *In re J.P. Morgan Shareholder Litigation* specifically alleged that shareholders paid a "significant acquisition premium," causing "a substantial dilution of JPMC shareholders' stake." Complaint, *J.P. Morgan*, Consolidated C.A. No. 531-N (Del Ch. Sept. 2, 2004). Plaintiffs have made no such allegations here. Further, Plaintiffs have not alleged any "dual-natured" claims, so Defendants' arguments to that extent are irrelevant.

application of entire fairness review for the independently sufficient reasons that (i) M. Klein was a conflicted controller of Churchill and (ii) a majority of the Board was personally interested in the Merger.

1. The Merger was a Conflicted Controller Transaction

Defendants specifically admit that "Mr. Klein and his affiliated entities controlled Churchill." Controller MTD, at 4. Defendants, however, argue that the Merger was not a conflicted transaction. Controller MTD, at 28. In doing so, Defendants ignore well-settled principles of Delaware law and the economic realities of the Merger for M. Klein.

Under black-letter Delaware law, a controller engages in a conflicted transaction subject to entire fairness review when: (i) the controller stands on both sides, or (ii) the controller competes with the common stockholders for consideration. *In re Viacom Inc. S'holders Litig.*, 2020 WL 7711128, at *11 (Del. Ch. Dec. 29, 2020), *as corrected* (Dec. 30, 2020). A controller competes with common stockholders for consideration when the controller: (i) receives greater monetary consideration for its shares than the minority stockholders; (ii) takes a different form of consideration than the minority stockholders; or (iii) gets a unique benefit by extracting something uniquely valuable to the controller, even if the controller nominally receives the same consideration as all other stockholders. *Id.*

"Under current law, the entire fairness framework governs any transaction between a controller and the controlled corporation in which the controller receives a non-ratable benefit." *In re Ezcorp Inc. Consulting Agreement Deriv. Litig.*, 2016 WL 301245, at *11 (Del. Ch. Jan. 25, 2016). Courts employ such exacting review because "[a] controlling stockholder occupies a uniquely advantageous position for extracting differential benefits from the corporation at the expense of minority stockholders." *Id*. (citing Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 678 (2005)). Non-ratable benefits arise in a number of forms and in a wide variety of transaction. *See Ezcorp*, 2016 WL 301245, at *12-15 (collecting cases).

Here, M. Klein received a non-ratable benefit to the exclusion of the Company's other stockholders, such that the Merger is subject to entire fairness review. Through the Sponsor, M. Klein paid $25,000 for Class B Founder Shares that would convert to 20% equity ownership of Churchill immediately before a deal closed, but would be worthless if the deal were rejected. ¶6. So long as the Company completed an Initial Business Combination and the post-transaction company did not go bankrupt, then M. Klein would realize vast profits. Upon the Merger's closing, the Class B Founder Shares were worth approximately ***$305 million***, representing a ***1,219,900% gain*** on Sponsor's mere $25,000 investment. ¶¶9, 67.

M. Klein personally held over 20 million founder shares, representing over $229 million in market value, as compensation for finding a merger partner. ¶67. And, despite the plunge in the Company's stock price, those Founder Shares were still worth nearly $172.5 million as of the filing of the operative Complaint.

The interests of holders of the Company's Class A common stock diverged starkly from M. Klein's. If Churchill failed to complete an Initial Business Combination, rather than seeing their stock be cancelled and worthless, Class A stockholders would get their money back (plus interest). Thus, public stockholders would prefer no Initial Business Combination at all if the proposed deal was perceived as being worth less than $10 per share. The notion of aligned interests where, as here, M. Klein could still profit by $172.5 million from the Merger while Class A stockholders lose nearly $338 million requires the ability to conceive of "parallel divergencies" and produces overwhelming cognitive dissonance. Put simply, M. Klein (and all Founder Shareholders) had a strong incentive to conceal bad news about the merger target in order to avoid the deal's rejection.

As if the unique interests inherent to Founder Shares were not enough to trigger entire fairness – and they are – M. Klein also caused Churchill to retain his personal vehicle, Klein Group, as its financial advisor in connection with the Merger and related financing transactions. ¶¶31, 81. That is, in exchange for essentially giving himself financial advice, M. Klein received a ***$30.5 million "advisory fee***"[42] – half of which was contingent on completing the Merger.[43] ¶¶63, 81. *See In re Delphi Fin. Grp. S'holder Litig.*, 2012 WL 729232, at *13 (Del. Ch. Mar. 6, 2012) (controller's interests were not "aligned with those of the Class A stockholders" where controller would receive greater consideration in the proposed merger by way of his Class B shares and additional consideration paid to his own investment advisory firm). Contrary to Defendants' arguments, disclosure of the fee does not make it equitable or eliminate the controller's conflicts. *See, e.g.*, *Coster v. UIP Cos., Inc.*, 2021 WL 2644094, at *6 (Del. June 28, 2021) ("Under Delaware law, director actions are twice-tested, first for legal authorization, and second for equity.").[44]

Finally, M. Klein enriched himself even further through Private Placement Warrants, the value of which depended on the Company's stock price. In connection

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[42] Defendants' aiding and abetting-related arguments regarding the advisory fee are discussed below in Section III.H.

[43] Proxy, at 30.

[44] Furthermore, Defendants' argument that this fee was "routine" and devoid of "inherent conflicts" is specious. There is nothing at all routine about a controller causing the company he controls to retain his own personal banking vehicle to represent the board, especially when the controller is charged with providing such services in his capacities as officer and director. This is a naked transfer of over $30 million to the controller. *See LC Cap. Master Fund, Ltd. v. James*, 990 A.2d 435, 446 (Del. Ch. 2010) ("To have added a dollop of crème fraiche on top of the merger consideration to be offered to the preferred would itself, in these circumstances, have amounted to a breach of fiduciary duty.").

with the IPO, the Sponsor purchased 23 million Private Placement Warrants for $1.00 each. ¶57. On the record date, these Private Placement Warrants had appreciated in value to be worth $50.6 million.[45] Even after the stock plummeted to $5.55 a share when the markets closed on March 31, 2021, the Company still valued the Private Placement Warrants at ***$29.3 million***.[46]

Given the unique structure of a SPAC (in particular the preset redemption option), the disparate consideration M. Klein received from Founder Shares, and the way the economic interests of those securities diverged from that of public Class A stockholders, the necessity for entire fairness review is clear.

The facts of *In re Tele-Communications, Inc. Shareholders Litigation* ("*TCI*"), subjecting the transactions to entire fairness review, are analogous. 2005 WL 3642727 (Del. Ch. Dec. 21, 2005). The *TCI* Court applied entire fairness to a stock-for-stock merger involving high-vote and single-vote stock. *Id.* at *8. The special committee had agreed to an extra premium for the high-vote stock, resulting in the high-vote stock receiving $376 million more in consideration than the single-vote stock. *Id.* at *7. Given that "a clear and significant benefit of nearly $300 million accrued primarily . . . to such directors controlling such a large vote of the

[45] Proxy, at 116.

[46] MultiPlan Corporation, Form 10-Q (Quarterly Report) (May 14, 2021), at 16 (the "10-Q") (Ex. H).

corporation, at the expense of another class of shareholders to whom was owed a fiduciary duty," the Court applied the entire fairness standard. *Id.*

The mere fact that M. Klein's premium was pre-determined rather than approved at the time of the Merger by the board is of no logical or legal consequence. Similarly irrelevant is the conversion of Founder Shares into a disproportionate amount of Class A shares immediately before the Merger closed. The differential treatment and controller's divergent incentives trigger fairness review, not the timing of when the differential is approved. M. Klein wanted a deal. He got one and made over $100 million from his ownership of Founder Shares even as the Company's stock price plummeted. Class A stockholders wanted a good deal. They did not get one and lost nearly $338 million by foregoing their redemption rights. Therefore, the Merger is subject to – and fails – entire fairness review.

2. A Completely Conflicted Board Approved the Merger

The Board's interests in and disparate consideration from the Merger are as misaligned as M. Klein's (albeit with a less eye-popping economic windfall), thus independently requiring entire fairness review.

a. *The Board Was Self-Interested in The Merger*

"Directors are 'self-interested' when they appear on both sides of a transaction or expect to derive any [material] personal financial benefit from it in the sense of self-dealing." *Calesa Assocs., L.P. v. Am. Cap., Ltd.*, 2016 WL 770251, at *11 (Del.

Ch. Feb. 29, 2016). When a majority of the board "labors under actual conflicts of interest," entire fairness review applies. *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 44 (Del. Ch. 2013).

For the same reasons set forth in the preceding section with respect to M. Klein, Defendants Abson, August, McDermid, Mills, and Eck (collectively comprising a majority of the Board) were self-interested in effectuating the Merger because they each received millions of dollars in proceeds from their Founder Shares that would not have been available had the Merger been rejected. ¶67. And, even if the Company's stock price fell below $10 per share, such directors were still poised to profit immensely while public stockholders would suffer losses. *See In re Trados Inc. S'holder Litig.*, 2009 WL 2225958, at *6 (Del. Ch. July 24, 2009) ("A director is interested in a transaction if he or she will receive a personal financial benefit from a transaction that is not equally shared by the stockholders.").

As of the Record Date, Defendants Abson, Mills, and Eck's Founder Shares had an implied market value of ***$3,271,383.65***. ¶67. Defendant McDermid's Founder Shares were worth ***$8,724,192.48***, and Defendant August's were worth ***$43,618,489.33***. ¶67. At this procedural stage, such compensation is presumed to be material to these Director Defendants. *See, e.g.*, *Frank v. Elgamal*, 2012 WL 1096090, at *11 (Del. Ch. Mar. 30, 2012) (assuming for purposes of a motion to dismiss that a $250,000 fee was material); *Orman v. Cullman,* 794 A.2d 5, 31 (Del.

Ch. 2002) ("I think it would be naïve to say, as a matter of law, that $3.3 million is immaterial."); *Voigt v. Metcalf*, 2020 WL 614999, at *15 (Del. Ch. Feb. 10, 2020) (noting that materiality of compensation to a fiduciary is generally unknowable before full-blown merits discovery).

Only one of the Company's directors – M. Klein's brother, Mark Klein – did not receive Founder Shares. ¶67. Thus, a majority of the Board was interested in the Merger which, for the reasons explained above, was not entirely fair.

b. *The Board Was Not Independent from M. Klein*

Putting aside their personal profit motive in this Merger, none of the directors can qualify as independent from the M. Klein and none are entitled to dismissal. "[L]ack of independence can be shown when a plaintiff pleads facts [] establish[ing] that the directors are beholden to [the controlling person] or so under their influence that their discretion would be sterilized." *Orman*, 794 A.2d at 24. Where a majority of a board approving a merger lacks independence, entire fairness is the appropriate standard of review. *Trados*, 73 A.3d at 43.

First, M. Klein appointed Defendants Abson, August, Mark Klein, McDermid, and Mills to serve as directors on other SPACs founded by M. Klein. ¶¶23-27, 60. In so doing, M. Klein provided those individuals with the opportunity to receive windfall-creating founder shares in other "Churchill" SPACs. ¶¶60-61. Thus, while sufficient to create personal self-interest even if viewed in isolation, the

Merger was not a one-time multi-million-dollar payday for these directors. Here, M. Klein ensured the loyalty of each non-sibling Director by giving them ***multiple*** multi-million-dollar windfall opportunities. *Id.*

For instance, Defendant Mills received 258,279 founder shares and 274,000 private placement warrants at Churchill I, another M. Klein SPAC.[47] As of August 6, 2021, such founder shares are worth $6 million. Additionally, following the filing of the Complaint, Churchill IV completed its initial business combination, in which the below Director Defendants received valuable equity interests:

Director	**Founder Shares**		**Warrants**	
	#[48]	**$**	**#**	**$**
Glenn R. August	7,000,000	$163,660,000	6,858,569	$72,289,317
Malcolm S. McDermid	300,000	$7,014,000	272,510	$2,872,255
Karen G. Mills	500,000	$11,690,000	454,184	$4,787,099

Given these paydays, the notion that the directors would oppose a poorly-vetted deal that M. Klein recommended in order to protect the Class A stockholders simply defies human nature. ¶62.

Second, even if merely appointing a director to a board is insufficient to render the designee beholden, here, M. Klein structured the Founder Shares to give him the unilateral and exclusive power to elect and remove any directors at any time. ¶59.

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[47] Clarivate Analytics PLC, Amendment No. 1 to Form F-4 (Registration Statement) (Apr. 1, 2019), at 188 (Ex. E).

[48] Churchill Capital Corp IV, Amendment No. 2 to Form S-4 (Registration Statement) (June 14, 2021), at 299 (Ex. F).

That officers and directors have been appointed by a controller is an important consideration when determining whether such officers and directors are beholden. *See, e.g.*, *In re BGC Partners, Inc.*, 2019 WL 4745121, at *12 & n.118 (Del. Ch. Sept. 30, 2019). Here, the Directors' lavish compensation and continuity on the Board impeded each from being able to oppose M. Klein's objectives to protect Class A holders. *See Cambridge Ret. Sys. v. Bosnjak*, 2014 WL 2930869, at *3 (Del. Ch. June 26, 2014) (holding that "five of the six members of the [] board . . . [were] personally interested in their own compensation for their service as directors, which is the subject of the claims in this litigation").

"Delaware decisions have long worried about a controller's potential ability to take retributive action against outside directors if they did not support the controller's chosen transaction and whether it could cause them to support a deal that was not in the best interests of the . . . stockholders." *Ezcorp*, 2016 WL 301245, at *41.[49] There is more than ample reason to conclude that M. Klein's unfettered ability to elect and remove directors impairs their ability to stand up to him to defend the rights of powerless Class A stockholders.

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[49] *See also* Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1287 (2017) (explaining that even allegedly independent directors have "substantial incentives to keep the controller satisfied" when their "initial election and retention solely depend on the controller").

Third, the Directors had economic interests in the Sponsor's $23 million in Private Placement Warrants.[50] ¶60. The Private Placement Warrants were valued attractively for the Sponsor (and anyone who held an economic interest in the Sponsor). Like Founder Shares, the Directors' direct and indirect interests in Private Placement Warrants were worthless if the Initial Business Combination failed.[51]

Fourth, Mark Klein is M. Klein's brother. ¶25. "When it comes to life's more intimate relationships concerning friendship and family, our law cannot ignore the social nature of humans or that they are motivated by things other than money, such as love, friendship, and collegiality." *Marchand v. Barnhill*, 212 A.3d 805, 818 (Del. 2019).

Lastly, putting aside receipt of Founder Shares and Private Placement Warrants, the eligibility to receive sponsor shares on the boards of other M. Klein-controlled SPACs, and Mark Klein's obvious fealty to his brother, Director Defendants Mark Klein and Eck also lack independence under Delaware law because of their services as employees of additional M. Klein-affiliated entities. In this regard, Mark Klein has served as a managing member and majority partner of Defendant M. Klein & Co., a strategic advisory firm founded by brother M. Klein, since 2010. ¶25. Similarly, Defendant Eck is a Managing Director at M. Klein &

[50] 8-K, at 2.

[51] Proxy, at 116.

Co., where he has been employed since 2016.[52] ¶28. At a minimum, it is reasonably inferable that Mark Klein and Eck were beholden to M. Klein given their personal interest in continued employment at M. Klein controlled entities.

D. Class A Shareholders Were Misled by Affirmatively False and Misleading Disclosures

The Directors' approval of the Merger – itself a breach of duty that cannot satisfy entire fairness review – is inextricably intertwined with their solicitation of its approval. Acting on each of the Defendants' personal interests in effectuating the Merger, they affirmatively used false and misleading disclosures that (i) caused public stockholders to approve the Merger and not redeem their shares and (ii)

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[52] *See Emerald P'rs v. Berlin,* 2003 WL 21003437, at *3 (Del. Ch. Apr. 28, 2003) (holding in post-trial opinion that director who had been an employee of controller for more than ten years was not disinterested and independent in decision to evaluate controller's proposed merger), *aff'd,* 840 A.2d 641 (Del. 2003); *In re Primedia Inc. Deriv. Litig.,* 910 A.2d 248, 261 n.45 (Del. Ch. 2006) (holding on motion to dismiss that directors who had "substantial past or current relationships, both of a business and of a personal nature, with [a controller]" were not independent); *In re Ply Gem Indus., Inc. S'holders Litig.,* 2001 WL 1192206, at *1 (Del. Ch. Sept. 28, 2001) (recognizing that "past benefits conferred by [the allegedly dominating director], or conferred as the result of [that director's] position with Ply Gem, may establish an obligation or debt (a sense of 'owingness') upon which a reasonable doubt as to a director's loyalty to a corporation may be premised"); *In re New Valley Corp. Deriv. Litig.,,* 2001 WL 50212, at *7 (Del. Ch. Jan. 11, 2001) (observing when considering allegations of interest and lack of independence that "[t]he facts alleged in the complaint show that all the members of the current Board have current or past business, personal, and employment relationships with each other and the entities involved").

allowed Defendants to profit immensely merely from the consummation of the Initial Business Combination.

1. <u>The Director Defendants Breached Their Duty to Fully and Fairly Disclose All Material Information to Class A Shareholders</u>

Corporate fiduciaries have a "duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action." *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998). That is, "[w]hen directors submit to the stockholders a transaction that requires stockholder approval (such as a merger, sale of assets, or charter amendment) or which requires a stockholder investment decision (such as tendering shares or making an appraisal election), the directors of a Delaware corporation are required to disclose fully and fairly all material information within the board's control." *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 16-17 (Del. Ch. 2014). "A fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id.* at 17.

The Merger implicates both of the above circumstances: the Merger could not proceed if not approved by Class A holders, and each individual Class A holder had the right to receive all material information when making a personal and distinct investment decision whether to redeem. Specifically, Plaintiffs and all other Class members enjoyed a Charter-created right, at a predetermined moment in time – *i.e.*, right before the closing of the de-SPAC Merger that would convert Churchill into an operating company – to either exercise the redemption right or remain shareholders in the company. Exercising that right was tantamount to a decision to ***tender*** their shares to receive $10-plus-interest. The alternative was to choose to support the deal in lieu of the redemption payment.

"Breaches of the duty of disclosure always impinge upon the stockholder franchise and stockholders' right to make an informed decision on corporate affairs." *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 916-17 (Del. Ch. 1999); *see also Orchard Enters.*, 88 A.3d at 47 ("[Q]uasi-appraisal damages are one possible remedy for breaches of the duty of disclosure.").

Here, Defendants submitted the Proxy ***both*** to solicit approval of the Merger ***and*** provide public stockholders with the option to redeem their shares – an investment decision akin to tendering shares at a contractually predetermined price. Rather than allow stockholders to make a properly informed investment decision, however, Defendants disseminated the Proxy and other public disclosures that were materially misleading and contained material omissions. As a result, stockholders were deprived of information material to making their decision.

a. *Defendants Owed a Heightened Duty of Disclosure in Connection with the Redemption Right*

The Class A stockholders' decision whether to redeem is like their decision whether to participate in a tender offer, *i.e.*, holders of Class A stock had the option to exchange their stock for relatively fixed sum of $10 per share plus interest. In a tender offer, "the exacting duty of disclosure imposed upon corporate fiduciaries is even 'more onerous' than in a contested offer . . . because . . . the disclosures are unilateral and not counterbalanced by opposing points of view." *Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051, 1057 (Del. Ch. 1987). As with self-tenders, here there are "built-in conflicts of interest between the fiduciaries responsible for conducting the offer and the stockholders to whom the offer is directed." *Id.*

Plaintiffs here – faced with the decision whether to redeem their investment in the SPAC or accept the deal generated by the Board – "are entitled to disclosure of all material facts pertinent to the decisions they are being asked to make." *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 447 (Del. Ch. 2002). That is, the disclosures "must contain the information that 'a reasonable investor would consider important in tendering his stock,' including the information necessary to make a reasoned decision . . . ." *Id.* at 448.

In *Eisenberg*, the Court held that defendants' disclosures were deficient based on, *inter alia*, their failure to disclose certain material facts relevant to the fairness of the tender offer price. 537 A.2d at 1060. The Court opined that "[s]hareholders are entitled to be informed of information in the fiduciaries' possession that is material to the fairness of the price." *Id*. at 1059. Here, Defendants' disclosures regarding the Merger were entirely unilateral, subjecting them to a heightened disclosure duty, which they violated by concealing material facts relevant to the health of MultiPlan's business, even as they highlighted their "extensive due diligence."

Tellingly, about 6% of holders of Class A stockholder redeemed their shares, an extraordinarily low number for SPACs.[53] ***At the very least***, it is reasonably inferable that so few stockholders redeemed due to Defendants' misleading disclosures regarding the Merger, which are detailed below.

b. *The Proxy Misleadingly Omitted That MultiPlan's Biggest Customer Was Developing an In-House Replacement*

The Proxy referenced MultiPlan's dependence on a single customer for 35% of revenues but concealed that the customer was UHC *and that UHC was in the process of developing an in-house alternative to MultiPlan*. ¶13. Identifying UHC as MultiPlan's key customer was essential, since UHC had announced its intention to create its own data analytics platform to provide services duplicative of those provided by MultiPlan by late May or early June 2020, well before the Merger was announced. ¶12.

The loss of one of its biggest customers – and the addition of a competitor – would inevitably slash MultiPlan's earnings, yet Defendants failed to disclose any

[53] Mean and median redemptions for SPACs that merged between January 2019 and June 2020 were 58% and 73%, respectively. Michael Klausner *et al.*, *A Sober Look at SPACs*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Nov. 19, 2020), https://corpgov.law.harvard.edu/2020/11/19/a-sober-look-at-spacs/.

of this material information to investors. *Id.* When deciding whether to redeem shares for $10 plus interest or support a de-SPAC Merger, pre-deal investors patently need to know that the operating company they are about to merge with is itself about to lose 35% of its revenues.

Defendants' argument on this score – besides plainly raising a factual dispute improper at the pleading stage – rests on a serious factual distortion. Trying to throw mud at Plaintiffs for resting a case on a "false short seller" report, Defendants assert that UHC remains a customer and that MultiPlan is, in effect, doing just dandy. Controller MTD, at 23-25, 47-51. While the Court must accept the Complaint's contrary allegations in all events, Plaintiffs note that ***UHC did, in fact, create Naviguard, which is, in fact, a threat to MultiPlan's future growth.*** As discussed in a March 2021 analyst report issued by Barclays, "NaviGuard seems to be one of [UHC's] offerings" "that 'compete' with its vendors and other entities in the marketplace," thus posing a "client risk" given the "shift likely over time."[54] And, in the months following the Muddy Waters Report, the Company's stock has plummeted to even further lows (likely due to the Company's failure to meet projections set forth in the Proxy, as discussed further below):[55]

[54] Barclays Report, at 5.

[55] While a plaintiff's wholesale reliance on a short seller report that appears to be unsubstantiated has raised questions in isolated cases (*see, e.g.*, *Haque v. Tesla*

In July 2021, worries about loss of business from UHC came to fruition. That month, UHC – MultiPlan's largest customer, which accounted for about 35% of revenue in 2019 – announced it would no longer pay some out-of-network claims crucial to MultiPlan's business. In response, MultiPlan's stock dropped by 25%.[56]

Motors, Inc., 2017 WL 448594, at *11 (Del. Ch. Feb. 2, 2017)), those facts are wholly distinguishable from the case at bar. At bottom, the Company has not performed positively since the Merger.

[56] Nona Tepper, *MultiPlan says new UnitedHealth claims policy won't have 'material impact' on its 2021 finances*, MODERN HEALTHCARE (July 12, 2021) (Ex. B).

Whether or not MultiPlan can weather this storm does not change the fact that the creation of Naviguard is itself material to any Churchill investor assessing whether to redeem or invest in MultiPlan. Thus, Defendants' argument would not prevail even on a summary judgment standard. At the very least, discovery is needed to address defendants' extraneous factual defenses.

c. *Defendants Obfuscated MultiPlan's Historical Performance*

Independent of UHC's formation of Naviguard, Defendants' disclosures regarding MultiPlan's recent and anticipated revenues and EBITDA were false. A joint presentation by Churchill and MultiPlan, which included M. Klein, given to analysts on August 18, 2020 attributed these revenue declines in 2018 and 2019 to "idiosyncratic customer behavior." ¶75.

The Complaint alleges, however, that in fact, revenues were diminishing, in part, due to increased competition and pricing pressures. ¶75. Some insurers were cutting commissions paid to MultiPlan in half, from 12% to 6%. ¶75. The Complaint adds that MultiPlan masked its financial condition by releasing revenue reserves in 2018, dropping them from approximately 30% to 10% of revenue, thus allowing them to show EBITDA growth that year despite slumping sales. ¶75. Gaming reserves to improve purported financial results is fraudulent, and as alleged is plainly actionable.

d. *The Proxy Disclosed Grossly Overoptimistic Revenue and Adjusted EBITDA Projections*

Despite consistent declines in both revenues and adjusted EBITDA, the Proxy disclosed drastic expected growth in those financial metrics for fiscal year 2020:

(*$ in thousands*)	**2017A**	**2018A**	**2019A**	**2020E**
Revenue	$1,067,266	$1,040,883	$982,901	$1,085,000 – $1,125,000
Adjusted EBITDA	$812,086	$824,886	$750,350	$845,000 – $875,000

Class A stockholders were advised in the Proxy that the Board relied on these projections as reasonable.

The timing surrounding the Proxy filing and the later reporting of widely divergent financial results supports an inference of falsity in the Proxy. The Proxy was filed on September 18, 2020. Thus, the Board had ***actual*** financials for ***at least half of fiscal year 2020*** when formulating and disclosing these projections. ¶¶71, 77. Nevertheless, when the post-Merger company announced its fiscal year 2020 financial results on March 10, 2021, MultiPlan reported revenues ***13.6% below the low end*** of the projected range, and an adjusted EBITDA ***16.5% below the low end*** of the projected range. ¶77:

(*$ in thousands*)	**2020 Expected in Proxy**[57]	**2020 Actual**[58]
Revenue	$1,085,00 – $1,125,000	$937,763
Adjusted EBITDA	$845,000 – $875,000	$706,313

[57] ¶77.

[58] ¶77.

Given such gross misses, especially by a purported financial expert like M. Klein and a Board that affirmatively touted its extensive due diligence, it is reasonable to infer that Defendants intentionally misled public Class A Churchill stockholders regarding the financial health of MultiPlan in order to induce approval of the Merger and the waiver of redemption rights. Ultimately, Class A stockholders were entitled to be presented with fair and reasonable projections. *See Pure Resources*, 808 A.2d at 450 ("[F]ailure to disclose the information [regarding valuation analyses] will deprive the stockholders of information material to making an informed decision whether the [deal price] is favorable to them.").

e. *In the Alternative, Defendants Falsely Touted Their Extensive Due Diligence of MultiPlan*

These material omissions and misrepresentations in the Proxy and other public disclosures come against a backdrop of the Board touting its "extensive due diligence." ¶¶13, 69, 77, 84-85. Indeed, the Proxy highlighted the Board's "knowledge of, and [] familiar[ity] with . . . the recurring nature of MultiPlan's revenues[] and future growth prospects," and that "Churchill management [] had the opportunity to communicate with senior leaders of several large customers of MultiPlan to better understand the quality and nature of those relationships, as well as the competitive environment in which MultiPlan operates." ¶69.

Defendants cannot have it both ways. Either they did conduct extensive due diligence, and then failed to disclose or misleadingly disclosed mission-critical flaws in MultiPlan's business prospects, or Defendants simply did not do their job but still told investors "trust us." Either way, Defendants breached their duty of disclosure.

E. Defendants' Effort to Reframe Their Impairment of Class Members' Exercise of Redemption Rights As "Holder" Claims Fails

Defendants assert that Plaintiffs' claims should be dismissed because they are "holder" claims which may not be brought as a class action. Company MTD, at 45. Putting aside that even if these were "holder" claims, they could be pursued as pleaded, Defendants' sustained refusal to acknowledge that Plaintiffs' claims rest on Defendants' impairing investors' charter-created redemption rights fails.

Although Delaware law is unsettled as it relates to recognizing holder claims, the Court need not parse that issue here. Vice Chancellor Slights' analysis in *In re CBS Corporation Stockholder Class Action & Derivative Litigation* is instructive. 2021 WL 268779, at *20 (Del. Ch. Jan. 27, 2021), *as corrected* (Feb. 4, 2021). There, the *CBS* Court explained, a "textbook 'holder' claim" involves "a cause of action by persons wrongfully induced to hold stock instead of selling it." Thus, "a holder claim is predicated on a stockholder's claim that she did not act at all." *Id.* at *23. "Delaware law distinguishes between disclosures seeking stockholder action and disclosures that do not seek stockholder action." *Id.* The latter requires proof of causation and reliance, while the former does not. *Id.*

The *CBS* Court well-articulated the distinction between the two types of claims, explaining that "disclosures relating to 'investment decisions,' such as 'purchasing and tendering stock or making an appraisal election,' [are] calls for stockholder action" and "these disclosures reflect instances where 'directors request discretionary stockholder action." *Id.* (quoting *Dohmen v. Goodman*, 234 A.3d 1161, 1168 (Del. 2020) (emphasis in original). That is, "[i]n such instances, it follows logically that when stockholders act following the disclosure, a reasonable inference can be drawn that the stockholder relied upon the disclosure and that, assuming it is 'material,' any harm flowing from the stockholder's action proximately resulted from such reliance." *Id.*

When investors are asked to make an affirmative choice – be it to approve a merger, accept a tender offer at a set value, or exchange shares for a predetermined redemption price – such claims are not "holder" claims subject to a heightened pleading standard and are actionable in a direct suit by investors whose discretionary decision was tainted by the misrepresentations.

Here, Plaintiffs had to make not one, but two choices – whether to approve the Merger and whether to redeem their shares. Indeed, Churchill stockholders could ***only*** redeem if they voted (either for or against) the Merger.[59] ¶13. Through the

[59] Oddly, SPACs like Churchill allow stockholders to vote ***for*** the business combination yet ***also*** redeem their shares. Proxy, at 14. If a stockholder wants to

patently false and misleading disclosures, Defendants undermined those choices. Plaintiffs' claims here arose out of a disclosure requesting stockholder action, similar to the "investment decisions" recognized by the *CBS* court, such as "purchasing and tendering stock or making an appraisal election." *Id.*

In sum, Plaintiffs were part of an investor class induced into supporting the Merger by misinformation regarding the acquisition due to Defendants' breach of their fiduciary duties. Thus, Plaintiffs do not have to provide proof of causation, reliance, and damages, and Defendants' "holder" claim argument fails.

F. The Complaint Pleads Non-Exculpated Claims Against The Directors

Because the Director Defendants were self-interested in the Merger, acted in a manner reflecting their beholdenness to M. Klein rather than the public stockholders to whom they owed fiduciary duties, and made materially false and misleading disclosures that impaired stockholders' rights to redeem their shares, they are not exculpated from liability. "When the entire fairness standard of review applies, 'the inherently interested nature of those transactions' renders the claims 'inextricably intertwined with issues of loyalty.'" *In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 490 (Del. Ch. 2013) (quoting *Emerald P'rs v. Berlin*, 787 A.2d

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redeem its shares, this course of action makes sense if it also holds warrants, *i.e.*, if the deal is approved, then the warrant holders still have option value. Such empty voting, however, undermines the cleansing effect of a stockholder vote embraced by cases such as *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) and *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015).

85, 93 (Del. 2001)); *see also Orman*, 794 A.2d at 41-42 (denying defendants' argument that directors were exculpated from liability because plaintiff "pled facts which make it reasonable to question the independence and disinterest of a majority of the Board that decided what information to include in the Proxy Statement").

Thus, the Director Defendants are not exculpated from liability.

G. The Fact That Class Members' Redemption Rights Originate from the Charter Does Not Preclude Breach of Fiduciary Duty Claims

Defendants assert that because the redemption right is found in the Charter, any claim relating to that right must be a breach of contract claim, and not a breach of fiduciary duty claim. Controller MTD, at 42. Defendants' assertion that Class members' redemption rights are not subject to fiduciary duties is incongruous with both Delaware law and common sense.

In connection with the Merger, stockholders functionally had a right to tender their shares for $10 plus interest. ¶18. The Charter provision granting the stockholders the right to redeem is not in dispute. Controller MTD, at 42. Indeed, the Charter states:

> Prior 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 . . . for cash equal to the applicable redemption price per share . . .[60]

[60] Churchill Capital Corp III, Amended and Restated Certificate of Incorporation, at §9.2(a) (the "Charter") (Ex. I).

Defendants assert that because the right of redemption is contained in the Charter, fiduciary duties do not apply. Controller MTD, at 42-43. This claim rests on a misapplication of case law, beginning with their misuse of *Nemec v. Shrader*, which states:

> 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.

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

This passage does not mean that if a right originates from a corporate charter, no fiduciary duties attach to the provision of that right. Rather, a claim squarely based on the refusal by the Company to honor the right itself would rest on simple contract law rather than fiduciary duty principles because the contract already dictates precisely what the Company must do. But the above-quoted provision does not mean that fiduciary duties do not apply to any and all claims related in any tangential way to a charter right. Indeed, to assert otherwise is absurd.

For instance, according to Defendants' logic, interference with voting rights (as designated in a charter) would only give rise to a breach of contract claim. Such a conclusion, however, cannot be correct. *See, e.g.*, *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995). As explained throughout this brief, Plaintiffs' claims rest squarely on Defendants' disloyal breaches of their duty by approving a self-interested transaction and inducing stockholders to approve the Merger and forego redemption by concealing and distorting material information. *See, e.g.*, *Orchard Enters.*, 88 A.3d at 16-17 (direct fiduciary duty claims arising when shareholders must decide whether or not to participate in a tender offer). The fact that redemption rights arise from the charter is a complete *non-sequitur*.

Defendants' own cases highlight this distinction.[61] These cases involve a company choosing to redeem stock at a rate specified in the company's charter rather than a higher rate (*Gale v. Bershad*, 1998 WL 118022 at *1, 5 (Del. Ch. Mar. 4, 1998)), determining allocations of proceeds among different classes of stockholder (*In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 619 (Del. Ch. Mar. 22, 1999) (noting also that breaching a provision for a particular class of stock is governed by contract)), and determining whether capital contributions based on a partnership agreement could end without giving notice as specified by the partnership agreement. *Madison Realty Partners 7, LLC v. AG ISA, LLC* 2001 WL 406268 at *1, 6 (Del. Ch. April 17, 2001). In all these cases, the charter specified the exact rights of parties in a given situation. The plaintiffs in those cases then sought to obtain more than the rights expressly granted to them by the charter by

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[61] Controller MTD, at 43.

seeking to impose fiduciary duties. The Court's response was to not grant additional consideration as the charter expressly addressed the rights of each party.

Here, however, Plaintiffs do not allege that Defendants failed to honor contractual rights in the Charter. Rather, Plaintiffs allege that Defendants breached their fiduciary duties in conjunction with a right found in the Charter, *i.e.*, they misled stockholders into not exercising their redemption rights. The issue is whether an entirely self-interested Board prevented stockholders from protecting themselves via a charter-based redemption right by misrepresenting and withholding key information. ¶¶84-87. Regardless of the source of the redemption option, Defendants had a fiduciary obligation to provide information to permit investors to make an informed determination whether to redeem, and Defendants breached that obligation. *C.f. Dieckman v. Regency GP LP*, 155 A.3d 358, 368 (Del. 2017) (even when a contract waives fiduciary duties and specifies minimum disclosure requirements and, the implied covenant of good faith and fair dealing still imposes on directors "an obligation not to mislead" investors when issuing a proxy).

H. The Complaint Adequately Alleges that the Klein Group Aided and Abetted the Klein Defendants' Fiduciary Duty Breaches

Defendants' arguments for dismissal of the aiding and abetting claim against Klein Group are misplaced. First, the assertion that there is no "underlying claim for breach of fiduciary duty" (Controller MTD, at 58; *see also* Company MTD, at 21) fails for the reasons explained above.

Defendants' second argument for dismissal of the aiding and abetting claims is that Plaintiffs allegedly "have not pled 'knowing participation' by The Klein Group." Controller MTD, at 58; *see also* Company MTD, at 21. This fails because it assumes the Klein Group is an independent third party when, in fact, it is sued here as a fully controlled affiliate of M. Klein, and Klein Group's guilty misconduct is fully analogous to M. Klein's misconduct.

To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must allege: (i) an underlying breach of fiduciary duty, (ii) that the alleged aider and abettor knowingly participated in that breach, and (iii) damages resulting from the breach. *See Louisiana Mun. Police Employees' Ret. Sys. v. Fertitta*, 2009 WL 2263406, at *7 n.27 (Del. Ch. July 28, 2009) ("*Landry's*"). Here, Plaintiffs have pled sufficiently each factor to state an aiding and abetting claim.

To argue that Plaintiffs did not allege Klein Group's knowing participation in Defendants' breaches of duty ignores the obvious fact that M. Klein controlled each of Churchill, Sponsor, and Klein Group. Ignoring the inter-relatedness of the parties, Defendants rely almost entirely on aiding and abetting cases involving true third parties, rather than corporate entities controlled by the principal wrongdoer.

"Knowing participation in a . . . fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach." *Id.* (quoting *Gatz v. Ponsoldt*, 925 A.2d 1265, 1276 (Del. 2007)). Here, the Klein Group's knowledge is M. Klein's knowledge, and his wrongdoing is imputable for aiding and abetting purposes.

Klein Group was founded and is controlled by M. Klein, Churchill's CEO, president, and Chairman. ¶21. Klein Group is a wholly-owned subsidiary of M. Klein & Co., a global strategic advisory firm also founded by M. Klein, at which Defendants Mark Klein and Eck are also employed. ¶¶25, 28-29. To infer that the Klein Group were unaware of Defendants' conduct is simply preposterous.

Contrary to Defendants' assertions otherwise, Plaintiffs are not challenging the concept of a contingent fee to an investment banker. That would be silly. Rather, Plaintiffs are stating that it is improper for the Controller himself to impose a $30.5 million fee paid to one of his controlled entities in exchange for work he was already charged with – identifying, negotiating, and executing a deal in his capacity as Churchill's CEO, president, and Chairman.

The aiding and abetting claim in this case is most analogous to the facts in *Landry's*. 2009 WL 2263406, at *7 n.27. There, the Court upheld aiding and abetting claims where controlled entities served as "vehicles with little existence other than to serve [Defendant's] purposes in the acquisition." *Id.* Here, too, the "Klein Group essentially served as an intermediary vehicle for M. Klein to facilitate the Transactions and garner support for the unfair Merger, while also enabling M. Klein to syphon additional value away from the Company and its stockholders via the $30.5 million advisory fee." ¶127. "It would elevate form too far over substance to suggest, in the procedural posture of a Rule 12(b)(6) motion, that it is not a reasonable inference that facts known to [M. Klein] were also known to [The Klein Group]." *Landry's*, 2009 WL 2263406, at *7 n. 27.

Defendants' cases are inapposite. In *Malpiede v. Townson*, for instance, the Delaware Supreme Court upheld the Chancery Court's dismissal of aiding and abetting claims on the basis that the "merger agreement was the product of arm's-length negotiations and [] arm's-length negotiations are inconsistent with participation in a fiduciary breach." 780 A.2d 1075, 1098 (Del. 2001). Further, the Supreme Court found that "there [was] no dispute that only one of the [Company's] directors who approved the merger had a conflict of interest, and that director did not dominate or control the others." *Id.*[62]

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[62] In addition to *Malpiede*, Defendants' other cases involve facts different than those here. *See Lee v. Pincus*, 2014 WL 6066108, at *13 (Del. Ch. Nov. 14, 2014) (finding that plaintiff did not plead facts inferring that the Underwriter Defendants – with ***no purported ties to the Director Defendants*** – knew they were facilitating a breach of fiduciary duty); *Houseman v. Sagerman*, 2014 WL 1600724, at *9 (Del. Ch. Apr. 16, 2014) (plaintiffs alleged knowing participation had to be inferred from, *inter alia*, the investment bank's agreement to provide limited services rather than a panoply of financial services); *Tilden v. Cunningham*, 2018 WL 5307706 (Del. Ch. Oct. 26, 2018) (dismissal based merely on the third party advisor having negotiated a fee structure that incentivized it to assist its client and having revised its analysis during the course of its engagement).

In contrast, here, as explained above in Section III.C., M. Klein controlled both the Board approving the Merger and the financial advisory firm retained by the Board. Defendants simply cannot assert that the Merger or the retention of M. Klein's own vehicle was the product of arm's length negotiations or did not encompass a conflict of interest.

I. Policy Considerations Favor Denying Defendants' Motion

For all the reasons set forth above, Defendants' effort to rewrite the facts and theories of liability that were actually alleged in the Complaint fails as a matter of longstanding Delaware law. Moreover, Plaintiffs respectfully submit that besides the legal defects, policy considerations also militate against Defendants' positions.

The Complaint squarely frames the policy implications underlying this action. While the currently popular structure of many SPACs can be economically and socially beneficial, some of the people creating and controlling SPACs like Churchill have acted as if core Delaware law concepts do not apply to their actions. ¶¶1-4. However, entire fairness review applies to any corporate structure inherently creating a material divergence of interests between managers and common stockholders in a transaction and, thus, should apply here. *Id*.

Notably, the entire fairness standard of judicial review is just that, a standard for reviewing the substance and fairness of a transaction, not a substantive prohibition on a particular corporate structure or transaction. If a conflicted corporate structure (like many of today's SPACs) can still employ a fair process and lead to a fair price, the concerns underlying the entire fairness standard are satisfied, and no liability will ensue. A controller's ability to navigate conflicts through structural protections and substantive outcomes is the premise underlying both the *MFW* doctrine and cases finding fairness despite presumptive conflicts triggering heightened review. *See, e.g.*, *Kahn v. M&F Worldwide*, 88 A.3d at 646-47 (noting that the negotiation of a transaction by an effective special committee or approval by a fully informed, uncoerced vote of a majority of the minority may lead to a burden shift to plaintiff to show entire fairness); *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2011 WL 227634, at *2 (Del. Ch. Jan. 14, 2011) (post-trial decision applying entire fairness review and finding the transaction to be entirely fair).

Through the Complaint, Plaintiffs seek to ensure that the people who run SPACs and enjoy disparate benefits from the closing of a de-SPAC merger, including Defendants in this action, recognize the conflicts inherent in the corporate structure they created and that their merger-related actions may be subject to entire fairness review. As described in the Complaint and above, Defendants' decision to recommend an unfair Merger following an unfair process via materially misleading disclosures genuinely and severely harmed stockholders' ability to exercise their redemption right. The Sponsor's and Director Defendants' misaligned interest in seeing the Merger approved regardless of bad news about MultiPlan, all while limiting redemptions, inextricably led to false and misleading disclosures in connection with the Merger.

Long-standing Delaware law supports reviewing the deal for entire fairness. If Delaware law makes clear that controllers of SPACs, like controllers of all other Delaware corporations, must be held to account if their conduct fails to mitigate and instead exacerbates the conflicts inherent to the entity they created and manage, common stockholders will see better *ex ante* outcomes.

While Plaintiffs were open about the positive policy implications of a ruling in their favor, Defendants' dismissal arguments elide the grave policy implications of a ruling in their favor. A brief consideration of those implications is warranted.

Fundamentally, Defendants' arguments require the Court to ignore both the conflicts arising from the use of founder shares to compensate sponsors and SPAC directors, and the economic and legal significance of the redemption option provided to many SPACs' common stockholders.

The reality of SPACs structured like Churchill is that the redemption option is the pivotal moment for both the entity and its investors to navigate the divergence of interests arising from sponsor shares. The ability to make an informed decision about whether to redeem common shares for their IPO value plus interest, versus choosing to remain invested in a transaction despite the massive windfalls paid to the sponsor and other fiduciaries, is essential in making SPACs function properly.

If, however, the Court were to rule that Plaintiffs' claims were derivative (which they are not), the ability of Delaware law to review misconduct in SPACs would be limited. That is because the whole concept of the SPAC structure contemplates board turnover when the de-SPAC merger closes. If conflicted sponsors and directors know that Rule 23.1 will insulate them from post-closing judicial review of their pre-closing misconduct, the law will effectively insulate such misconduct.

Similarly, ruling that a decision not to redeem is governed exclusively by contract or is just a non-actionable "holder" claim is tantamount to saying that Delaware law has no place governing SPAC entities. Conflicted sponsors and directors — such as the Defendants here — should not be incentivized to mislead their common stockholders into foregoing their redemption rights, knowing that this Court will not review those actions. Not only is that outcome inconsistent with longstanding precedent, it would be a very bad policy outcome.

In sum, Defendants' dismissal arguments, if accepted, would effectively insulate all SPACs from application of Delaware law. A decision applying entire fairness review to the facts alleged in this case, on the other hand, would merely remind SPAC sponsors and directors to either ensure that their particular SPAC structure, or their actions within a conflicted structure, should better take into account common stockholder interests. Thus, policy considerations strongly favor the Court denying Defendants' motions to dismiss.

IV. CONCLUSION

For the reasons explained above, Plaintiffs respectfully request that the Court deny the Defendants' motions to dismiss in their entirety.

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BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ *Gregory V. Varallo*
Gregory V. Varallo (Bar No. 2242)
500 Delaware Avenue, Suite 901
Wilmington, Delaware 19801
(302) 364-3601

Attorneys for Plaintiffs Kwame Amo and Anthony Franchi

WORDS: 15,089

OF COUNSEL:

Mark Lebovitch
Daniel E. Meyer
Margaret Sanborn-Lowing
Joseph W. Caputo (*bar admission pending*)
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, New York 10020
(212) 554-1400

D. Seamus Kaskela
KASKELA LAW LLC
18 Campus Boulevard, Suite 100
Newtown Square, PA 19073
(484) 258-1585

Richard A. Maniskas
RM LAW, P.C.
1055 Westlakes Dr., Ste. 300
Berwyn, PA 19312
(484) 258-1585