EFiled: Dec 02 2022 03:35PM
EST Filing ID 68490657
Case Number 368,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE MATCH GROUP, INC. DERIVATIVE LITIGATION	No. 368, 2022
	Court Below: Court of Chancery of the State of Delaware
PUBLIC INSPECTION VERSION DATED DECEMBER 2, 2022	CONSOLIDATED
	C.A. No. 2020-0505 MTZ

APPELLANTS' OPENING BRIEF

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Dated: November 17, 2022

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NATURE OF PROCEEDINGS

Plaintiffs/Appellants filed this class and derivative action challenging the separation of IAC/InterActiveCorp ("IAC") from Match Group, Inc. ("Match" or "Old Match") through a series of complicated transactions (the "Separation").[1] IAC was Match's controlling stockholder. IAC initiated and structured the Separation as a tax-free spinoff of its Match stock to IAC stockholders and formed a new entity ("New IAC") that included IAC's non-Match businesses and a cash infusion from Match. IAC left its debt behind in the entity that became "New Match." Match was merged with a subsidiary of New Match with New Match surviving and Match stockholders received stock in New Match. Thus, the Separation resulted in (i) New IAC, which had no debt and was flush with cash, and (ii) New Match, which was engaged in the same businesses as Match but assumed IAC's debt and had less cash and limited strategic flexibility because of, among other things, restrictions that were imposed on New Match to preserve the tax-free treatment for IAC.

The Separation was initiated, timed and structured for the benefit of IAC and should have been subject to entire fairness review because the requirements of *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*") were not satisfied.

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[1] A744, Amended and Supplemented Verified Consolidated Stockholder Class Action and Derivative Complaint (Trans. ID 67047874) (the "Complaint" or "¶__").

The trial court, however, ruled that *MFW* was satisfied, reviewed the Separation under the business judgment standard, determined that Plaintiffs lacked standing to assert derivative claims because Defendants structured the Separation to include a merger, and dismissed the action.[2]

This appeal concerns important issues of Delaware law under *MFW* that, if not reversed, will significantly diminish minority stockholder protections in controlling stockholder transactions. The trial court misapplied *MFW* by ruling that an independent special committee does not need to be *entirely* independent. The trial court ruled that *MFW* was satisfied even though one member (McInerney) of the three-member Separation Committee[3] of Match's board was conflicted based on his decades of employment as an IAC executive officer and board nominee. Special committees under Delaware law are supposed to equate to a "wholly independent board of directors."[4] *MFW*'s procedural protections are intended to replicate an

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[2] *In re Match Group, Inc. Deriv. Litig.*, 2022 WL 3970159 (Del. Ch. Sept. 1, 2022) (the "Opinion").

[3] Old Match's "Separation Committee" consisted of Thomas McInerney ("McInerney"), Pamela Seymon ("Seymon") and Ann McDaniel ("McDaniel"). A754, ¶12.

[4] *Weinberger v. UOP, Inc.,* 457 A.2d 701, 709 (Del. 1983); *Kahn v. Lynch Commc'ns Sys. Inc.*, 638 A.2d 1110, 1117-1120 (Del. 1994); *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1241 n.33 (Del. 2012); *In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173, 1184 n.43 (Del. 2015); *MFW*, 88 A.3d at 500-501.

arm's-length third-party transaction, which will not happen if a controller's agent is on the committee that is responsible for negotiating with the controller.

The trial court further misapplied *MFW* by creating a new standard that applies when a minority of special committee members are conflicted. The trial court ruled that a plaintiff must plead that the minority member(s) "'somehow infect[ed]' or 'dominate[ed]' (sic) the special committee's decisionmaking (sic) process[.]"[5] Neither party argued for the creation of this new rule, let alone briefed whether the Complaint satisfied it. Rather, the trial court created the new rule based, in part, on an issue considered but not resolved in *City Pension Fund for Firefighters & Police Officers in the City of Miami v. The Trade Desk, Inc.*, 2022 WL 3009959 (Del. Ch. July 29, 2022) ("*Trade Desk*"). *Trade Desk* was issued months after oral argument on Defendants' motions to dismiss. Plaintiffs were prejudiced by the trial court's reliance on this post-argument opinion to create a rule that does not exist under Delaware law and denial of an opportunity to address it. The trial court then erroneously ruled that Plaintiffs had not pled that McInerney infected or dominated the Separation Committee's decision making process. As explained herein, even if this modification of *MFW* applied, which Plaintiffs submit it should not, the

[5] *Match*, 2022 WL 3970159, at *16.

Complaint pleads that McInerney was "the dominant member of the [Separation] Committee and played a key role in the negotiations,"[6] which is more than sufficient to satisfy the trial court's new standard.

Finally, the trial court misapplied *MFW* by ruling that the stockholder vote was fully informed. The trial court found that the 689-page Proxy did not disclose material information regarding McInerney's conflicts.[7] The trial court then erroneously ruled that all information in Old Match's Form 10-K/A (the "10-K/A"), where information regarding the conflicts was disclosed, was part of the Proxy's disclosures because it was one of ten documents listed on pages 308-09 of the Proxy as having been incorporated by reference.[8] The Proxy did not disclose that information regarding the Separation Committee member conflicts could be found in the 10-K/A and the Proxy did not reference the 10-K/A in the section where it disclosed information regarding conflicts. If allowed to stand, the trial court's ruling would permit controllers to list any publicly filed document as incorporated by reference and require stockholders to engage in scavenger hunts through thousands

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[6] *Kahn v. Tremont Corp.*, 694 A.2d 422, 429 (Del. 1997).

[7] *Match*, 2022 WL 3970159, at *28. "Proxy" refers to Defendants' Joint Proxy Statement/Prospectus filed with the Securities and Exchange Commission on April 30, 2020. *See* A62.

[8] *Match*, 2022 WL 3970159, at *28.

of pages to find information material to conflicts in controlling stockholder transactions.

The trial court further erred by ruling that Hallandale lacked standing to pursue derivative claims on behalf of Match.[9] The general rule that a merger may eliminate derivative standing does not apply if the merger is merely a reorganization. That exception applies here, as Plaintiffs sufficiently plead that the Separation was just a reshuffling of ownership stakes so that IAC could distribute its Match stock in a tax-free transaction while extracting Match's cash to fund IAC's future business investments. Match stockholders started and finished with stock in the same Match businesses. The inclusion of a merger as one of the Separation's steps does not prevent Match stockholders from pursuing derivative claims.

[9] *Id.* at *12-13.

SUMMARY OF ARGUMENT

1. The trial court committed legal error in ruling the special committee requirement under *MFW* was satisfied because (i) *MFW* does not require the entire special committee to be independent, (ii) Plaintiffs were required to plead that McInerney infected or dominated the Separation Committee's decision making process and (iii) the Complaint did not plead that McInerney infected or dominated the Separation Committee's decision making process.

2. The trial court committed legal error in ruling that the stockholder vote requirement under *MFW* was satisfied because material information regarding McInerney's conflict of interest was disclosed in the 10-K/A that was incorporated by reference in the Proxy.

3. The trial court committed legal error in ruling that the Separation was not a reorganization so Hallandale lacked standing to pursue derivative claims on behalf of Match.

STATEMENT OF FACTS

A. IAC Controlled Match

IAC controlled Match through its ownership of 98% of Match's voting power and 85% of its equity before the Separation.[10] Match's ten-member board consisted of five IAC directors/officers, two Match officers and the three individuals who served on the Separation Committee.[11] IAC and Match were also parties to several other agreements through which IAC maintained its control, including a Tax Sharing Agreement and Master Transaction Agreement (the "2015 Agreements").[12] The 2015 Agreements required Match to comply with certain restrictive covenants in the event IAC decided to effect a tax-free distribution of its Match stock to IAC stockholders.[13] The Separation, however, was not structured pursuant to these 2015 Agreements, which did not require any merger or distribution of all of Match's cash in a dividend.[14]

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[10] A773-74, ¶¶42-43.

[11] A757-768, ¶¶20-30; A774-75, ¶44.

[12] A775-776, ¶¶45-46; A778-80, ¶49-51.

[13] A778-80, ¶¶49-51.

[14] A780, ¶53; A805-06, ¶¶96-98.

B. IAC and Match Form the Separation Committee

In 2019, IAC decided to separate its non-Match businesses from Match, which constituted the bulk of IAC's then-enterprise value and cash flow.[15] IAC and its founder, controlling stockholder and Chairman Barry Diller ("Diller") spoke publicly about a desire to spin-off IAC's Match stock in a tax-efficient transaction to IAC stockholders.[16] On August 9, 2019, IAC filed a Schedule 13D/A disclosing its intention to distribute its interest in Match.[17]

On September 18, 2019, Match's board formed a three-person Separation Committee consisting of McInerney, Seymon and McDaniel.[18]

McInerney had an over twenty-year relationship with IAC and Diller.[19] McInerney worked at IAC from 1999 to 2012, including as CFO, and directly with Diller and numerous other IAC executives, for which he earned over $55 million.[20] McInerney had also served as a director of IAC-affiliated companies since 2008.[21]

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[15] A748, ¶2; A803-04, ¶93; A851-52, ¶192.

[16] A781-83, ¶54-57; A803-04, ¶93.

[17] A783, ¶58.

[18] A754, ¶12; A786-87, ¶64.

[19] A754, ¶12; A762-63, ¶25; A788-89, ¶¶67-70; A860-61, ¶¶210-11.

[20] A788, ¶67.

[21] A789, ¶69.

McInerney and Diller publicly expressed their trust and gratitude for one another.[22] The trial court ruled that McInerney was not independent of IAC.[23]

Seymon has had a relationship with IAC and Diller for over two decades.[24] Seymon was IAC and Diller's legal counsel for eighteen years, including on over thirty-eight deals.[25] After Seymon retired from practicing law, IAC and Diller installed her on Match's board, and hired her husband's law firm as their legal counsel.[26] The trial court, however, ruled that Seymon was independent. The trial court reasoned that Seymon's decades of lucrative work as IAC/Diller's go-to legal advisor was "qualitatively different than a relationship with a coworker, employee or friend."[27]

C. McInerney Was the Dominant Member of the Separation Committee

On October 10, 2019, IAC proposed a significantly different structure from the spinoff of its Match stock than was contemplated by the 2015 Agreements.

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[22] A788-89, ¶68.

[23] *Match*, 2022 WL 3970159, at *18-20.

[24] A790, ¶71.

[25] A790-95, ¶¶71-75.

[26] A763-64, ¶26.

[27] *Match*, 2022 WL 3970159, at *20. The trial court also ruled that McDaniel was independent of IAC. *Id*. at *21.

IAC's proposed structure included, among other things, (i) a reverse spin-off of non-Match assets into a "New IAC," followed by a merger that would result in "New Match" with a single class of voting stock owned by the public stockholders of IAC and Match, (ii) a $2 billion Match dividend financed mostly by debt, (iii) New Match's retention of IAC's debt (the "Exchangeables") and (iv) New Match's purchase of IAC's corporate offices, with a leaseback obligation.[28]

The Separation Committee accepted IAC's proposed structure and countered on October 29, 2019, with a proposed dividend of $420 million and changes to New Match's assumption of the Exchangeables.[29]

On October 30, 2019, McInerney spoke to IAC's principal negotiator Joseph Levin ("Levin"), who was IAC's CEO and a Match director.[30] Levin previously reported to McInerney when McInerney was IAC's CFO.[31] McInerney and Levin discussed, *inter alia*, (i) the dividend, with Levin saying anything less than $1.3 billion was unacceptable; (ii) which company would bear the cost of IAC stock options, which McInerney suggested New Match and New IAC bear equally; (iii)

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[28] A799-801, ¶85; A810-11, ¶106.

[29] A813-14, ¶¶112.

[30] A760-61, ¶23; A789, ¶70; A814-15, ¶114.

[31] A760-61, ¶23; A762-63, ¶25; A789, ¶70.

"New IAC assuming a portion of potential liability arising from certain litigation claims involving Match and IAC," which Levin stated was unacceptable; and (iv) the issuance and sale of $1 billion of New Match equity, with the proceeds going to New IAC.[32] McInerney later supposedly informed the other Separation Committee members about his negotiations with Levin.[33] McInerney and Levin also spoke separately about New Match governance.[34]

The Separation Committee made another proposal on November 8, 2019 that included, *inter alia*, (i) a $740 million dividend; (ii) the issuance and sale of $1.5 billion of New Match equity, with the proceeds going to New IAC; (iii) IAC and Match bearing 50% of the cost of IAC stock options through their conversion into New Match options; and (iv) a modification to the methodology for valuing the Exchangeables that IAC insisted be left in New Match.[35]

On November 11, 2019, McInerney discussed this proposal with Levin and Glenn Schiffman, who was IAC's CFO and a Match director. Levin/Schiffman proposed, *inter alia*, (i) a $1 billion dividend; (ii) further changes to how the

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[32] A814-16, ¶¶114-16, 118.

[33] A816, ¶118.

[34] A818, ¶121.

[35] A821-22, ¶129.

Exchangeables were valued; and (iii) New Match bearing the full cost of IAC stock options.[36] McInerney and Levin again separately discussed post-Separation governance.[37] McInerney supposedly told the other Separation Committee members about his discussion with Levin the next day.[38]

On November 19, 2019, McInerney and Levin discussed the dividend again, including making it available to Match stockholders other than IAC as cash or additional shares of New Match.[39]

On November 21, 2019, McInerney supposedly told the other Separation Committee members about his discussion with Levin.[40] The Separation Committee then proposed, *inter alia*, (i) a pre-Separation dividend of $3.00 per share, after McInerney expressed his "belief that IAC would accept a reduced dividend in the proposed transaction of approximately $3 per share"; (ii) "a cash/stock election merger mechanism in lieu of a dividend"; and (iii) that IAC bear some of the cost of

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[36] A823-24, ¶130.

[37] A824, ¶131.

[38] A824, ¶132.

[39] A824-25, ¶133.

[40] A825-26, ¶134.

IAC stock options.[41] The Separation Committee considered whether IAC would agree that New IAC assume "any potential liabilities relating to certain litigation claims."[42] McInerney personally conveyed this counterproposal to Levin, who stated "he did not believe a 50/50 cost allocation for the [Old] IAC options would be acceptable."[43]

On November 22, 2019, McInerney and Levin "reached a preliminary agreement on the remaining open key transaction terms," except for governance and the methodology for valuing the Exchangeables.[44] They agreed, *inter alia*, (i) Match stockholders (including IAC) could receive a dividend of $3.00 in cash or an additional $3.00 of New Match shares; (ii) if any Match stockholder elected to receive stock in lieu of cash, IAC would receive an additional $3.00 per share in cash; (iii) IAC would bear 25% of the cost of IAC stock options; (iv) Match would assume "all potential liability associated with certain litigation claims" against IAC that were left behind in New Match; (v) New Match would have a classified board;

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[41] A825-27, ¶¶134 & n.172, 136.

[42] A826-27, ¶136.

[43] A827, ¶137.

[44] A827-29, ¶¶138-139.

and (vi) the companies "should begin drafting and negotiating definitive" agreements.[45]

After McInerney and Levin finished negotiating over economic and other material terms, on December 5, 2019, for the first and only time, the other Separation Committee members (Seymon and McDaniel) met with Levin to discuss New Match governance, which McInerney had already repeatedly discussed with Levin.[46]

On December 18, 2019, the Separation Committee met and adopted resolutions approving the transaction, which were subsequently approved by Match's board and memorialized in a transaction agreement (the "Transaction Agreement").[47]

[45] A827-29, ¶¶138, 140.

[46] A829, ¶141.

[47] A831-34, ¶¶144-48.

D. The Separation's Structure

The Separation was structured as follows.

(i) IAC spun-off its non-Match businesses into a new publicly traded corporation, IAC Holdings, Inc., which was renamed "IAC/InteractiveCorp" ("New IAC").[48]

(ii) The original IAC/InteractiveCorp was renamed Match Group, Inc. ("New Match"). This entity retained IAC's obligation for the $1.7 billion of Exchangeables.[49]

(iii) Valentine, LLC ("Merger Sub") (an IAC subsidiary) merged with Match (the "Merger") and survived the Merger.[50] Merger Sub held Match's businesses and Match was renamed Match Group Holdings II, LLC, which became a wholly owned subsidiary of New Match.[51] The Transaction Agreement stated the Merger was intended to qualify as a tax-free reorganization.[52]

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[48] A747-48, ¶1.

[49] *Id.*; A752-53, ¶10; A853-54, ¶¶194-95.

[50] A851, ¶191; A852, ¶193.

[51] *Id.*

[52] A853, ¶194.

In the Merger, Match stockholders (other than IAC) received (i) one share of New Match common stock and (ii) a dividend of either $3.00 in cash (from Match's assets) or a fraction of a share of New Match common stock worth $3.00.[53]

IAC received a $680 million dividend for its Match stock and transferred its Match equity interests to IAC's stockholders, who received New Match stock.[54] New IAC also received $1.4 billion in proceeds for the issuance and sale of 17.3 million New Match shares.[55]

[53] A752, ¶9.

[54] A752-54, ¶¶10-11; A806, ¶98; A840-41, ¶164; A843-44, ¶¶169-70.

[55] A752-53, ¶10; A834, ¶149; A835-36, ¶155; A840-41, ¶164.

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT THE SEPARATION COMMITTEE SATISFIED THE *MFW* REQUIREMENTS

A. Question Presented

Did the trial court err in holding that the Separation Committee satisfied the *MFW* special committee requirement?[56]

B. Scope of Review

The trial court's "formulation and application of the duty of loyalty and duty of care standard of the business judgment rule" involve questions of law which are subject to *de novo* review.[57] The standard of review of a decision granting a motion to dismiss is also *de novo*.[58]

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[56] *Match*, 2022 WL 3970159, at *16. Appellants preserved this issue at A999-013 (Plaintiffs' Omnibus Answering Brief in Opposition to Defendants' Motions to Dismiss the Amended and Supplemented Verified Consolidated Stockholder Class Action and Derivative Complaint (Jan. 25, 2022) (Trans. ID 67256406) ("PAB") at 34-48), and A1123-128 (Transcript of Oral Argument on Defendants' Motions to Dismiss (May 4, 2022) ("Hr'g Tr.") at 54-59).

[57] *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993). Unless stated otherwise, internal citations are omitted herein.

[58] *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019).

C. Merits of the Argument

1. *MFW* Requires that the *Entire* Special Committee be Independent

Defendants have the burden of proving a transaction with a controlling stockholder is entirely fair unless the transaction was approved by (i) an independent special committee, or (ii) the vote of a majority of the minority stockholders,[59] in which case the burden of proving fairness shifts to the plaintiff.[60]

The use of an independent committee stems from *Weinberger v. UOP, Inc.*:

> Although perfection is not possible, or expected, the result here could have been entirely different if UOP had appointed an ***independent negotiating committee*** of its outside directors to deal with Signal ***at arm's length.*** Since fairness in this context can be equated to conduct by a theoretical, ***wholly independent***, board of directors acting upon the matter before them, it is unfortunate that this course apparently was neither considered nor pursued. Particularly in a parent-subsidiary context, a showing that the action taken was as though each of the contending parties had in fact exerted its bargaining power against the other ***at arm's length*** is strong evidence that the transaction meets the test of fairness.[61]

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[59] *Kahn*, 638 A.2d at 1117-1120.

[60] *Id.*

[61] 457 A. 2d at 709 n.7 (emphasis added).

Weinberger established that an independent committee must be equivalent to a "wholly independent" board so that it can negotiate "at arm's length" with the controller. This Court has repeatedly reaffirmed *Weinberger*'s formulation that the committee must be truly independent so it can replicate arm's-length bargaining by a wholly independent board.[62] This Court has never suggested that a committee is independent if only some of its members are independent. Having some directors on a committee who are interested or not independent is not the equivalent of a wholly independent board. It is not arm's-length bargaining if some members of the committee's negotiating team have ties to the other side or have a self-interest. A controller remains on both sides of the negotiating table when those loyal to the controller are on a committee charged with negotiating the transaction. Arm's-length bargaining is not replicated when there is a conflicted special committee member who is privy to the committee's deliberations, including strategy discussions and legal and financial advice, and could be compelled to share that information with the controller due to conflicting loyalties.

[62] *Kahn*, 638 A.2d at 1120-21; *Ams. Mining*, 51 A.3d at 1241 n.33; *Cornerstone*, 115 A.3d at 1184 n.43.

MFW constituted a significant change in Delaware law. After *MFW*, a merger with a controlling stockholder could be subjected to the business judgment standard of review

> *if and only if*: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; ***(ii) the Special Committee is independent;*** (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.[63]

The Court of Chancery opinion in *MFW* quoted *Weinberger*'s formulation for an independent committee that could negotiate at arm's-length.[64] In *MFW*, defendants contended on summary judgment that "the MFW special committee was comprised of independent directors," not that most of the committee members were independent.[65] The Court of Chancery held that summary judgment would be inappropriate "if the MFW special committee was not comprised of directors who qualify as independent under our law."[66] The Court of Chancery considered whether

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[63] 88 A.3d at 645 (first emphasis in original, second emphasis added).

[64] *In re MFW S'holders Litig.*, 67 A.3d 496, 528 n.157 (Del. Ch. 2013).

[65] *Id.* at 499-500.

[66] *Id.* at 501.

each of the three committee members was independent. It did not stop at an analysis of two members (*i.e.*, a determination that a majority of the committee was independent).[67] The Court of Chancery held that "the MFW special committee was, as a matter of law, comprised ***entirely*** of independent directors."[68]

This Court's opinion affirming the Court of Chancery in *MFW* confirmed that a committee of independent directors is required, not a committee with a mixture of independent directors and other directors who are interested and/or not independent.[69] This Court repeatedly referred to a committee of independent directors, not a committee comprised of a majority of independent directors.[70] This Court held that the *MFW* standard included a requirement that "the Special Committee is independent," not that most of the committee is independent.[71] Like the Court of Chancery, this Court also considered whether each of the three

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[67] *Id.* at 510-541.

[68] *Id.* at 514 (emphasis added.); *see also id.* at 516 ("Because the special committee was comprised entirely of independent directors, there is no basis to infer that they did not attempt in good faith to obtain the most favorable price"), 506-07, 523, 534.

[69] *MFW*, 88 A.3d at 638, 642.

[70] *Id.* at 641-43.

[71] *Id.*

committee members was independent.[72] This Court did not say two out of the three members would be good enough.[73]

MFW provided a clear framework and "a strong incentive for controlling stockholders to accord minority investors the transaction structure that respected scholars believe will provide them the best protection."[74] Minority stockholders are not "best protect[ed]" if committees can include members who are loyal to the controller.[75] The purpose of a special committee, under *Weinberger*, *MFW* and other decisions by this Court, is to replicate an arm's-length, third party merger by having fully empowered independent individuals negotiate and approve a transaction, which does not exist if a controller can place individuals loyal to it on a special committee.[76]

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[72] *Id*. at 647-650.

[73] In *Franchi v. Firestone*, 2021 WL 5991886, at *4, *6 (Del. Ch. May 10, 2021), the Court of Chancery interpreted *MFW* this way when it ruled that "[i]f the complaint supports a reasonable inference that [any] member [of the special committee] was not disinterested and independent, then the plaintiffs have called into question this aspect of the *MFW* requirements."

[74] 88 A.3d at 644.

[75] *Id*.

[76] The Proxy did not disclose that the Separation Committee was only partially independent. It represented that the Match board formed "a special committee of independent and disinterested directors" and the "separation committee, consist[ed] entirely of independent and disinterested directors of Match." A241, A258 (Proxy at 140, 157).

2. The Trial Court Erred by Rewriting *MFW* to Create a Majority Standard for Special Committees

The trial court correctly found that one of the three members of the Separation Committee, McInerney, was not independent of IAC.[77] However, the trial court erred by holding that the *MFW* requirement that "the Special Committee is independent"[78] is satisfied unless (i) a majority of the committee was not independent or (ii) the conflicted minority infected or dominated the committee's decision making.[79] The trial court did not cite any opinion of this Court stating that an independent committee means a mostly independent committee or a committee where the independent members are not "dominated" by the conflicted members. That is because this Court's opinions establish that an independent committee of directors means exactly what it says: a committee consisting solely of independent directors.

The trial court erred by finding "[t]he weight of authority requires at least 50% of a special committee to lack independence or disinterestedness before Delaware

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[77] *Match*, 2022 WL 3970159, at *18-20.

[78] *MFW*, 88 A.3d at 645.

[79] *Match*, 2022 WL 3970159, at *16, 18 & nn.140-42.

courts will question the application of *MFW*."[80] This Court's ruling in *MFW* and other prior rulings, including *Weinberger*, are the relevant authorities and they do not support the trial court's aforementioned finding.

The trial court cited *Voigt v. Metcalf*, and claimed that it "found that the business judgment rule would still apply unless the special committee 'lacked a disinterested and independent *majority*.'"[81] The Court of Chancery opinion in *Voigt* does not provide a basis to overrule or modify *MFW*. *MFW* did not even apply in *Voigt* because "defendants did not follow the *MFW* blueprint."[82] Furthermore, the portion of *Voigt* the trial court quoted addressed the standard of review "if it is ***not*** reasonably conceivable that CD&R controlled the Company."[83] IAC indisputably was Match's controlling stockholder.[84]

The trial court also relied on *Dell*, where the Court of Chancery ruled that if "the complaint supports a reasonable inference that either [special committee]

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[80] *Id.* at *16, n.142.

[81] *Id.* (citing 2020 WL 614999, at *10 (Del. Ch. Feb. 10, 2020)).

[82] *Voigt*, 2020 WL 614999, at *10.

[83] *Id.* (emphasis added).

[84] The trial court noted that *Voigt* relied on *In re Orchard Enterprises, Inc. Stockholder Litig.*, 88 A.3d 1 (Del. Ch. 2014), but ignored that *Orchard* refused to shift the burden of proving entire fairness to the plaintiffs where the independence of one member of a five-member special committee was at issue. 88 A.3d at 25-26.

member was not disinterested and independent, then plaintiffs have called into question this aspect of the *MFW* requirements."[85] The committee in *Dell* had two members so the question of whether a majority of a three+ member committee was independent was not at issue. The trial court's interpretation of *Dell* as supporting its "mostly independent" rule was also misplaced because the same Vice Chancellor ruled in *Orchard* that one conflicted member out of a five member special committee was sufficient to preclude shifting the burden of proving entire fairness to the plaintiff.[86]

The trial court further noted that *Dell* cited "*Beam ex. Rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1046, n.8 (Del. 2004); [and] *Beneville v. York*, 769 A.2d 80, 84-87 (Del. Ch. 2000)."[87] The trial court incorrectly interpreted *Stewart* and *York* as "each finding that at least half of the directors at issue must lack independence or disinterestedness to poison the committee under *MFW*."[88] Those were demand futility cases that did not involve a controlling

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[85] *Match*, 2022 WL 3970159, at *16, n.142 (quoting *In re Dell Techs. Inc. Class V S'holders Litig*., 2020 WL 3096748, at *35 (Del. Ch. June 11, 2020)).

[86] 88 A.3d at 24-29. If one conflicted member precludes burden shifting, then one conflicted member should certainly preclude a change in the standard of review.

[87] *Match*, 2022 WL 3970159, at *16, n.142; *Dell*, 2020 WL 3096748, at *35.

[88] *Match*, 2022 WL 3970159, at *16, n.142.

stockholder and were decided many years before *MFW*. *MFW* also cited *Stewart* four times, all for the proposition that mere allegations that directors are friendly or have business relationships are insufficient to rebut the presumption of independence.[89] If this Court intended for *MFW* to have a majority independent rule for special committees based on demand futility cases like *Stewart*, it would have said so in *MFW*.

The trial court made no attempt to address the consequences to minority stockholders of changing the *MFW* standard. This new standard would incentivize controllers to create committees that include conflicted members and remain on both sides of the negotiating table so long as they could argue a majority of the committee members are independent. Controllers could create special committees consisting of the entire board, requiring stockholders challenging the transaction to plead a majority of the board is conflicted as though it were a derivative demand futility case or a case that did not involve a controlling stockholder to avoid the imposition of the business judgment standard of review. This is directly contrary to decades of Delaware law applying entire fairness to transactions with controlling stockholders.

[89] 67 A.3d at 510 n.36, 511 n.50, 514 n.71, 528-29 n.158.

There are also unanswered practical questions that arise from the trial court's new standard. For example, if one member of a three member committee is not independent and one of the two independent members votes against the transaction, has the "independent" committee approved the transaction? Will Delaware courts reconstitute board-created committees by disregarding the participation and votes of interested and non-independent committee members?

3. The Trial Court Erred by Requiring Plaintiffs to Plead McInerney Infected or Dominated the Process

The trial court required Plaintiffs to plead that McInerney, "somehow infect[ed] or dominate[ed] (sic) the special committee's decision making process."[90] No party argued that this was or should have been required of Plaintiffs. The trial court asked no questions at argument and requested no briefing on it.[91] The trial court primarily relied on two opinions to create this new rule, *GGP* and *Trade Desk*.[92] No party cited *GGP* for this proposition.[93] *Trade Desk* was not issued until

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[90] *Match*, 2022 WL 3970159, at *16.

[91] *See* Ct. Ch. R. 16(a).

[92] *Match*, 2022 WL 3970159, at *16, n.141 (citing *In re GGP, Inc., S'holder Litig.*, 2021 WL 2102326, at *15 (Del. Ch. May 25, 2021); *id*. at *19, n.169 (citing *Trade Desk*, 2022 WL 3009959, at *13-14).

[93] The trial court (*Match*, 2022 WL 3970159, at *16) quoted *GGP*, 2021 WL 2102326, which this Court reversed on other grounds, as part of this analysis. *GGP* is distinguishable because the Court of Chancery there considered whether

July 29, 2022, which was nearly three months after the May 4, 2022 oral argument on the motion to dismiss in this action.[94] No party submitted the opinion to the trial court and the trial court did not request briefing on it. Plaintiffs were prejudiced by the trial court's reliance on a case that was issued months after argument without an opportunity to address it.

When a controlling stockholder, like IAC, engages in a self-interested transaction, entire fairness applies because the protections of a disinterested board and stockholder approval are potentially undermined by the controller's influence.[95] *MFW* provides a specific roadmap with procedural protections that must be in place to "create a countervailing, offsetting influence of equal—if not—greater force."[96] This roadmap was not followed. The trial court erred by creating a new roadmap and granting IAC deference under the business judgment standard of review even though IAC failed to irrevocably disable itself from using its control to dictate the

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Brookfield should be determined to be a controlling stockholder with a 35.3% ownership stake. No party in this action argued *GGP* should guide the trial court's analysis of the independence of the Separation Committee.

[94] The trial court cited this opinion a total of eight times in its opinion.

[95] *MFW*, 88 A.3d at 644.

[96] *Id*.

outcome of the Separation negotiations. Thus, the trial court effectively treated this controller transaction as if there was no controller.

The trial court's new rule does not fit within the framework of *MFW*. Testing whether a special committee process was "infected" by the presence of a conflicted member is not necessary under *MFW*. At the pleading stage, a special committee's process is presumptively infected by the mere presence of an individual who is loyal to the controller. Such conflicting loyalties create an obvious path for abuse of the special committee process and increases the likelihood that sensitive and confidential information will be shared with the controller—negotiation strategies, the lowest price a special committee might approve, financial and legal advice specific to the special committee and so on. Indeed, under the trial court's ruling, a controller could simply place itself on the committee so long as other members are independent, which would obviously not replicate arm's-length third-party bargaining.

In addition, the "domination" element of the trial court's new rule is the type of analysis a court undertakes to determine whether a stockholder that owned less than 50% of outstanding shares should nonetheless be considered a controlling

stockholder.[97] Adding a "domination" element to *MFW* is unnecessary because *MFW* only applies when there is a controlling stockholder that could dominate a special committee process in any number of ways, including by placing a conflicted member on the special committee to influence the process for the benefit of the controller. Indeed, here IAC owned 98% of Match's voting power so it was indisputably Match's controlling stockholder.

A requirement that plaintiffs have the burden of pleading that the conflicted special committee member(s) "infected" or "dominated" is also illogical because special committee members are supposed to act in the best interests of the minority stockholders, wholly independent of the controller. Special committee members are supposed to affect the committee's process by serving on the committee. Given the significant consequences of the application of the business judgment standard under *MFW*, the mere presence of a conflicted person on a special committee must presumptively mean that the committee was not independent and could not replicate arm's-length, third-party bargaining.

The trial court's new rule is also impractical because the inner workings of a special committee are not public. Pleading such facts is next to impossible without

[97] *Kahn,* 638 A.2d at 1113-14.

discovery.[98] Stockholders cannot determine without discovery what a committee member who is loyal to the controller might have shared with the controller and how conflicted loyalties might have affected the special committee's decision making process. Stockholders will never be able to access this information if challenges to controlling stockholder transactions are improperly dismissed under the business judgment standard.

4. Even if Required, Plaintiffs' Complaint Pleads that McInerney Infected and Dominated the Separation Committee's Process

It was legal error for the trial court to rule, without briefing or argument, that the Complaint did not plead a "reasonable inference" that McInerney infected or dominated the special committee's decision making process.[99] The trial court did not explain what "somehow infected" means but under any definition, the Complaint pled a reasonable inference that McInerney's conduct met that standard.

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[98] *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 769, 779-780 (Del. 2018) (noting strict adherence to requirements under *MFW* is "particularly appropriate where the courts must address whether the minority stockholders' claims should be dismissed before discovery") (J. Valihura, dissenting). *See also MFW*, 88 A.3d at 646 ("deciding whether an independent committee was effective in negotiating a price is a process so fact-intensive and inextricably intertwined with the merits . . . that a pre-trial determination of burden shifting is often impossible.").

[99] *Match*, 2022 WL 3970159, at *19.

- McInerney (1/3 of the Committee[100]) "was the lead negotiator for the Separation Committee . . . and has a close relationship with IAC's lead negotiator, Levin, [who] served under, and reported to, McInerney while the latter was serving as CFO of IAC."[101] The trial court improperly dismissed the significance of this allegation.[102]
- The Complaint identifies seven calls between McInerney and Levin to negotiate the economic terms of the transaction that the other Committee members did not attend.[103] The trial court, however, noted that the other Committee members (Seymon and McDaniel) met with IAC to discuss governance.[104] That meeting was the ***only time*** Seymon

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[100] A754, ¶12.

[101] A789, ¶¶69-70.

[102] *Match*, 2022 WL 3970159, at *19. *See Kahn*, 694 A.2d at 426, 429–30 (emphasizing conflicts of special committee chair to who "played a key role in negotiations . . . [and] conducted all negotiations over price"); *Orchard*, 88 A.3d at 25-26 (noting the conflict between a special committee member and the controlling stockholder was even more important given the member's "leading role that [he] played in the process"); *In re Emerging Commc'ns, Inc. S'holders Litig,* 2004 WL 1305745, at *35 & n. 162, *37 (Del. Ch. May 3, 2004) (requiring disclosure of past relationships because of the committee member's "role as [a] negotiator[] on behalf of the minority stockholders.").

[103] A814-15, ¶114; A818, ¶121; A823-24, ¶¶130, 131; A824-25, ¶133; A827, ¶¶137, 138.

[104] *Match*, 2022 WL 3970159, at *19.

and McDaniel ever met or spoke with IAC and occurred ***only after*** McInerney and Levin finished negotiations of the economic and other material terms of the Separation.[105]

- The trial court was wrong in ruling that it could not infer from the Complaint's allegations that McInerney controlled the flow of information to the Committee.[106] The Complaint pled that McInerney negotiated the economic and other material terms with Levin on calls[107] from which the other Separation Committee members were excluded. McInerney purportedly updated the other Separation Committee members later, and thus controlled the flow of information on the negotiation of economic terms.[108]
- The trial court, citing Defendants' argument, ruled "Hallandale does not dispute that McInerney was not the Separation Committee chair."[109] The Separation Committee ***had no chairman.*** The reasonable

[105] A829, ¶¶139-141.

[106] *Match*, 2022 WL 3970159, at *19.

[107] A814-16, ¶¶114-116; A818, ¶121; A823-24, ¶¶130, 131; A824-25, ¶133; A827, ¶¶137, 138.

[108] A816, ¶118; A824, ¶132; A825-26, ¶134.

[109] *Match*, 2022 WL 3970159, at *19, n.170 (citing A1159, Hr'g Tr. 90).

inference from the well pled allegations of the Complaint, however, is that McInerney acted like a chairman.[110]

- The trial court also incorrectly ruled that the Complaint did not allege that McInerney undermined the Separation Committee's process.[111] Plaintiffs allege that McInerney worked with Levin to "dilute Match stockholders in order to ensure that IAC received the cash proceeds it desired."[112]
- Finally, the trial court incorrectly ruled that the Complaint did not allege that McInerney exerted influence over the Separation Committee.[113] Plaintiffs alleged that the Separation Committee proposed a dividend of $3.00/share based on McInerney's "belief that IAC would accept" it.[114]

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[110] McInerney's name appears 27 times in the Proxy's Background of the Separation section. A243, A245-50, A253 (Proxy at 142, 144-49, 152). Seymon and McDaniel appear just two times each. A243, A250 (Proxy at 142, 149).

[111] *Match*, 2022 WL 3970159, at *19.

[112] A816, ¶118.

[113] *Match*, 2022 WL 3970159, at *19.

[114] A825-26, ¶134 n.172.

The well-pled allegations of the Complaint are supported by documents publicly filed with the SEC and documents Plaintiffs obtained through Section 220. The trial court was required to assume those allegations were true and afford Plaintiffs all reasonable inferences derived from those allegations. The trial court erred by finding that a reasonable inference could not be drawn from Plaintiffs' allegations that McInerney infected or dominated the Committee's decision making process.

II. THE TRIAL COURT ERRED BY RULING MATERIAL INFORMATION REGARDING MCINERNEY'S CONFLICTS WAS ADEQUATELY DISCLOSED IN THE PROXY

A. Question Presented

Did the trial court err by ruling that material information regarding McInerney's conflicts of interest was adequately disclosed because the 10-K/A was incorporated by reference in the Proxy?[115]

B. Scope of Review

The trial court's grant of a motion to dismiss upon finding material information was adequately disclosed in a separate SEC filing that a proxy statement incorporated by reference presents a question of law subject to *de novo* review.[116]

C. Merits of the Argument

The trial court found that (i) Plaintiffs sufficiently pled that McInerney was not independent of Old IAC, and (ii) McInerney's conflicts were not disclosed in the Proxy, but (iii) pages 308-09 of the Proxy incorporated by reference disclosures made in the 10-K/A, so the stockholder vote was fully informed.[117] The 10-K/A was

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[115] *Match*, 2022 WL 3970159, at *16, *26. This argument was preserved for appeal at A1131-134 (Hr'g Tr. at 62-65). *See also* A1020, A1022-023 (PAB at 55, 57-58).

[116] *See City of Ft. Myers Gen. Empls' Pension Fund v. Haley*, 235 A.3d 702, 716 (Del. 2020); *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010).

[117] *Match*, 2022 WL 3970159, at *18-20, 28-29.

filed with the SEC the day before the Proxy was filed.[118] The trial court cited Proxy pages 1-2, 19 and 308-09 in ruling that "the Proxy incorporates Old Match's 2019 Form 10-K and 2019 Form 10-K/A."[119] This was legal error.

As a threshold matter, Defendants only cited Proxy pages 308-09 to support their incorporation-by-reference argument.[120] Proxy pages 1-2 do not reference the 10-K/A. They reference the 10-K (which does not include information regarding conflicts) for information regarding the "historical consolidated financial statements and related notes for IAC and Match" (pg. 1) and "results of Match's historical operations" (pg. 2).[121] Proxy page 19 also does not reference the 10-K/A.[122] That page again references the 10-K for "historical consolidated financial statements and

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[118] The trial court cited *Wolf v. Assaf*, 1998 WL 326662, at *3 (Del. Ch. June 16, 1998), which no party cited and is distinguishable because there the 10-K was mailed to stockholders with the proxy. *Match*, 2022 WL 3970159, at *28 n.254. The trial court also cited *Galindo v. Stover*, 2022 WL 226848, at *9 (Del. Ch. Jan. 26, 2022). *Match*, 2022 WL 3970159, at *28 n.254.

[119] *Id.* at *28.

[120] A928-29, Opening Brief in Support of Motion to Dismiss the Complaint on Behalf of Defendants Sharmistha Dubey, Amanda Ginsberg, Ann L. McDaniel, Thomas J. McInerney, Pamela S. Seymon, Alan G. Spoon, and IAC/InteractiveCorp., and Nominal Defendant Match (Dec. 10, 2021) (Trans. ID 67158009).

[121] A99.

[122] A118.

accompanying notes" and provides excerpts of information from the 10-K, including on revenue, earnings, dividends and assets for 2015-2019.[123]

The Proxy only cites the 10-K/A at pages 308-09.[124] "[D]isclosure is inadequate if the disclosed information is 'buried' in the proxy materials."[125] In this case, the Proxy itself did not disclose material information. Instead, buried hundreds of pages into the Proxy is a reference to the 10-K/A. Pages 308-09 do not include excerpts of the 10-K/A (like the 10-K on page 19) or even tell stockholders that information regarding conflicts could be found in the 10-K/A. Rather, the Proxy just included the 10-K/A as part of a list of filings that also included the 10-K, seven 8-Ks and two 8-K/As and indicated that these documents contain "important information about IAC and Match and their respective financial performance."[126] Thus, even if a hyper-diligent stockholder found the reference to the 10-K/A, she would not know to read it for information regarding conflicts.[127] No reasonable

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[123] *Id.*

[124] A410-11.

[125] *Vento v. Curry*, 2017 WL 1076725, at *3 (Del. Ch. Mar. 22, 2017) (quoting *Weingarden v. Meenan Oil Co.*, 1985 WL 44705, at *3 (Del. Ch. Jan. 2, 1985)).

[126] A410-11.

[127] The Proxy further incorporates by reference "additional documents that either company may file with the SEC under Section 13(a), 13(c), 14 or 15(d) of the Exchange Act" through the closing of the Separation. A410. If the 10-K/A was

stockholder should be expected to find a list of documents incorporated by reference hundreds of pages into a proxy and then read all of those documents just in case those documents disclosed material information about the conflicts of a special committee member.

Proxy pages 124-25 include a section titled "Relationships Involving Significant Stockholders, Named Executives and Directors,"[128] and pages 174-75 include a section regarding potential conflicts of Match directors in the Separation.[129] The partial and incomplete disclosures on these pages (i) do not disclose McInerney's relationship with Old IAC and Diller and (ii) do not cite the 10-K/A, let alone direct stockholders to review it for additional information regarding conflicts. A reasonable stockholder would expect the Proxy to disclose all material information regarding Separation Committee conflicts on these pages or direct them where to find such additional information.

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incorporated by reference from pages 308-09, then so would all of these other filings that had not even been filed yet.

[128] A225-26.

[129] A275-76. The Proxy's cover page and page 157 also disclosed that the Separation Committee consisted "entirely of independent and disinterested directors." A62-63; A258.

Delaware law does not require energetic stockholders to hunt through lists of SEC filings to piece together material information.[130] If proxies incorporate documents by reference, they should be specific as to what information stockholders are expected to review regarding specific subjects under appropriate headings in the proxy. Furthermore, given the consequence of a fully informed minority vote under *MFW*, material information regarding special committee member conflicts is especially important and should not be buried or hidden in other documents that are referred to once, with no specific guidance, in a 600+ page proxy.[131]

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[130] *ODS Techs., L.P. v. Marshall*, 832 A.2d 1254, 1262 (Del. Ch. 2003).

[131] *Orchard*, 88 A.3d at 21-22; *Millenco L.P. v. meVC Draper Fisher Jurvetson Fund I, Inc.*, 824 A.2d 11, 15 (Del. Ch. 2002); *see Kohn v. Am. Metal Climax, Inc.*, 322 F.Supp. 1331, 1362 (E.D. Pa. 1970) (ruling facts cannot be buried and "[t]he more material the facts, the more they should be brought to the attention of the public. To view it otherwise would be to invite frustration of the policies underlying our disclosure laws") (cited by *Weingarden*, 1985 WL 44705, at *3).

III. THE TRIAL COURT ERRED BY FINDING HALLANDALE LACKS DERIVATIVE STANDING ON BEHALF OF MATCH

A. Question Presented

Did the trial court err by ruling that it was not reasonably conceivable that Hallandale would prove it maintained derivative standing post-Separation because the Separation was a reorganization of Match?[132]

B. Scope of Review

The trial court's decision to dismiss Plaintiffs' derivative claims due to lack of standing is reviewed *de novo*.[133]

C. Merits of the Argument

The rule that a merger eliminates derivative standing[134] does not preclude a derivative claim where the plaintiff pleads that the merger is a reorganization that does not substantially change plaintiffs' ownership in the post-merger enterprise.[135] The trial court erred in ruling Plaintiffs' allegations were insufficient to establish Hallandale's derivative standing based on this exception.

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[132] This issue was preserved at A1049-051 (PAB at 84-86), and A1152-156 (Hr'g. Tr. at 83-87).

[133] *See Brookfield Asset Mgmt, Inc. v. Rosson*, 261 A.3d 1251, 1262 (Del. 2021).

[134] *Lewis v. Anderson*, 477 A.2d 1040, 1046 (Del. 1984); 8 *Del. C.* § 327.

[135] *Lewis*, 477 A.2d at 1046, n.10; *Bamford v. Penfold, L.P.,* 2020 WL 967942, at *29 (Del. Ch. Feb. 28, 2020).

It is reasonably conceivable that Plaintiffs prove the Separation was a reorganization. Prior to the Separation, Match stockholders owned equity interests in the businesses of Match.[136] After the Separation, Match stockholders, as New Match stockholders, continued to own equity interests in the businesses of Match, which had been transferred to New Match.[137] The reshuffling of ownership stakes in the same Match businesses from Match to New Match was a reorganization that does not prevent Match stockholders from pursuing derivative claims.[138] Indeed, the Transaction Agreement and Proxy state that the Separation is intended to qualify as a reorganization.[139]

The trial court disregarded these well-pled allegations and held that "New Match is not merely a reorganized Old Match."[140] The Opinion selectively cites and

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[136] A1050, PAB at 85; A853-54, ¶¶194-195.

[137] *Id*.

[138] *Bamford,* 2020 WL 967942, at *29; *Schreiber v. Carney,* 447 A.2d 17, 22 (Del. Ch. 1982); *Helfand v. Gambee*, 136 A.2d 558, 562 (Del. Ch. 1957).

[139] A1050, PAB at 85 & n.319; A853, ¶194. Although the trial court referenced the Transaction Agreement in other parts of its Opinion (*Match*, 2022 WL 3970159, at *2, *6, n.14 & n.62), it did not address any of the pertinent Transaction Agreement provisions that Plaintiffs reference at Paragraph 194 of the Complaint and cite in footnote 319 of their Motion to Dismiss Answering Brief. A853, ¶194; A1050, PAB at 85 & n.319.

[140] *Match*, 2022 WL 3970159, at *13.

quotes 14 paragraphs[141] from Plaintiffs' 252-paragraph complaint, none of which support the trial court's conclusion. For example, the Opinion quotes a portion of Paragraph 179, which alleges that Old Match's minority stockholders "may have ended up with [only] a slightly higher percentage of ownership of Match following the Separation, perhaps 2% more[.]"[142] This small change in ownership falls within the category of negligible changes that Delaware courts disregard when finding that a mere reorganization has occurred.[143]

The Opinion also cites Paragraphs 21 through 31, which concern some differences in the Old Match and New Match boards.[144] The trial court, however, ignored Paragraph 8, which alleges that the New Match board, like the Old Match

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[141] *See id.* nn. 113-115.

[142] *Id*. at *13; A847-48, ¶179.

[143] *See, e.g., Bamford,* 2020 WL 967942, at *29 (finding a mere reorganization where, before the corporate reshuffling, the company was a shell with no assets or operating business and, after the reorganization, the company held membership interests that plaintiffs and a defendant contributed to it); *Schreiber ,* 447 A.2d at 22 (finding a mere reorganization despite "a slight dilution in the overall stockholdings occasioned by [an] exercise of warrants" that differentiated the old and new companies).

[144] *See, e.g*., *Match*, 2022 WL 3970159, at *13, n.115 (citing Plaintiffs' allegations that identify 7 directors that served on the boards of Match and New Match and 3 Match directors that did not serve on the New Match board); *see also* A758-68, ¶¶21-31; A856, ¶200.

board, would "continue[] to be dominated by Diller and IAC-affiliated individuals and appointees."[145] Paragraph 31 also alleges that the Transaction Agreement ensured that "almost all" of the Match board would continue as New Match directors.[146] Plaintiffs are entitled to a reasonable inference drawn from these allegations that Match's business would be governed the same at New Match as it was at Old Match.

The "defensive governance provisions" the Opinion references from Paragraph 11 to differentiate Old Match from New Match are described fully in Paragraphs 15, 163, 166 and 167.[147] The Complaint alleges that these governance provisions were put in place to ensure IAC's domination of Match before the Separation would continue post-Separation and preserve the *status quo*.[148] In other words, they would ensure continuity, rather than discontinuity, at Match.

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[145] A751-52, ¶8.

[146] *Match*, 2022 WL 3970159, at *13; A768, ¶31.

[147] *Compare* A753-54, ¶11 *with* A756, ¶15; A839-40, ¶163; A841-42, ¶¶166-67.

[148] *Match*, 2022 WL 3970159, at *13; A756, ¶15; A839-40, ¶163; A841-42, ¶¶166-67 (describing entrenching governance provisions that preserved IAC's domination of the board, via classification and membership and appointment rights, as well as limitations on Match's ability to conduct various transactions).

Finally, the Opinion incorrectly characterizes Plaintiffs' theory that the Separation left Old Match stockholders "holding equity in a company with different ownership and inferior assets than the company in which they chose to invest."[149] Old Match stockholders owned stock in an entity that had the same income producing assets before and after the Separation. Post-Separation, New Match had less cash because it was distributed through a dividend and more debt that IAC left behind.[150] These are allegations that the Separation compromised Match's financial health, not allegations that the Separation changed Match's businesses. Indeed, all of IAC's non-Match businesses were transferred to New IAC. The operating business of New Match was the same as Old Match. It is, therefore, at least reasonably conceivable that New Match was merely a reorganized Old Match.

[149] *Match*, 2022 WL 3970159, at *13.

[150] *Id.*

CONCLUSION

For the reasons stated above, the dismissal of Plaintiffs' claims should be reversed and the case remanded for prosecution of those claims.

Dated: November 17, 2022

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