EFiled: Jan 03 2023 04:12PM EST
Filing ID 68780717
Case Number 368,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

	) No. 368, 2022
	) Case Below: Court of Chancery of the State of Delaware
IN RE MATCH GROUP, INC. DERIVATIVE LITIGATION	) CONSOLIDATED C.A. No. 2020-0505-MTZ
	) **PUBLIC VERSION--** **Filed: January 3, 2023**

ANSWERING BRIEF ON BEHALF OF APPELLEES SHARMISTHA DUBEY, AMANDA GINSBERG, ANN L. MCDANIEL, THOMAS J. MCINERNEY, PAMELA S. SEYMON, ALAN G. SPOON, IAC/INTERACTIVE CORP. AND MATCH GROUP, INC.

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Dated: December 19, 2022

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NATURE OF PROCEEDINGS

This litigation arises out of the transactions (the "Transactions") that gave Old Match[1] freedom from its controlling stockholder, Old IAC, and created New Match, an entirely separate, independent company with increased strategic flexibility, a manageable leverage ratio, and a single class of stock.

The Transactions—which were structured as a reverse spin-off—were conditioned *ab initio* on both approval by an independent special committee (the "Committee") and the uncoerced vote of a majority of the minority stockholders. Over the course of several months of negotiations, the Committee obtained meaningful concessions from Old IAC, including a 57.5% reduction of Old IAC's initial dividend request and a favorable adjustment to the exchange ratio resulting in an additional 2% ownership of New Match for minority stockholders. The Transactions were approved by holders of 75% of the shares held by disinterested Old Match stockholders and coincided with a 114% increase in New Match's stock price between the announcement of the proposed transaction and the date on which the first of the two plaintiffs filed a complaint (January 7, 2021).[2]

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[1] Nominal Defendant Match Group, Inc. (pre-separation Match) is referred to here as "Old Match;" Defendant IAC/Interactive Corp. (now known as Match Group, Inc.) as "New Match"; Pre-separation IAC/Interactive Corp. as "Old IAC"; Defendant IAC Holdings Inc. (now known as IAC Inc.) as "New IAC."

[2] B344.

Notwithstanding the demonstrable benefits negotiated by the Committee, Plaintiffs brought both direct and derivative claims for breach of fiduciary duty, alleging that the Transactions were "grossly unfair" and provided no benefit to Old Match or its minority stockholders. In a carefully reasoned opinion, the Court of Chancery dismissed Plaintiffs' Consolidated Amended Complaint (the "Complaint") in its entirety. The trial court concluded that the Transactions satisfied the requirements of *Kahn v. M & F Worldwide Corp*. ("*MFW*"), 88 A.3d 635 (Del. 2014), *overruled on other grounds by Flood v. Synutra International, Inc.*, 195 A.3d 754 (Del. 2018) and were therefore subject to business judgment review. The trial court found that the three-member Committee was independent, despite its erroneous holding—based solely on stale business connections—that one of the three Committee members (Thomas McInerney) lacked independence from Old IAC, because Plaintiffs failed to plead facts that McInerney either "infected" or "dominated" the Committee. It further held that the minority vote was fully informed, including as to any potential conflict regarding the Committee.

The Court of Chancery also correctly held that neither Construction Industry and Laborers Joint Pension Trust for Southern Nevada Plan A ("Nevada") nor City of Hallandale Beach Police Officers' and Firefighters' Personnel Retirement Trust ("Hallandale") had derivative standing, because they had ceased to be Old Match

stockholders and did not own stock in New Match at the time of the Transactions. The trial court rejected Plaintiffs' argument that the "mere reorganization" exception applied, because the Complaint alleged that New Match was fundamentally different from Old Match. It also correctly concluded that Nevada had lost its direct standing when it sold its New Match stock, limiting Plaintiffs to direct claims on behalf of Hallandale.

Plaintiffs seek reversal of the Court of Chancery's well-reasoned decision, arguing that (i) a majority-independent special committee is insufficient as a matter of law to satisfy the requirements of *MFW*, despite extensive precedent analyzing board and committee independence based on majority principles; (ii) McInerney lacked independence and that he "dominated" and "infected" the Committee, despite the lack of any allegation of strong personal or present financial ties to Old IAC/Diller or domination of the negotiation process; and (iii) New Match is a "mere reorganization" of Old Match, despite Plaintiffs' own allegations that New Match was substantially different from its predecessor.

Plaintiffs' arguments are unavailing. The Court of Chancery's opinion should be affirmed for the following reasons.

First, the dismissal should be affirmed because the entire Committee was independent, obviating the need to even consider Plaintiffs' arguments regarding

the composition of a special committee under *MFW*. Despite the Court of Chancery's holding to the contrary, Plaintiffs did not make the required showing that McInerney, a successful businessman who had been CEO of another public company for more than two years at the time of the Transactions, was beholden in any way to Old IAC. Plaintiffs did not plead that McInerney—whose only relationship with IAC at the time of the Transactions was service on the Old Match Board itself—had any "persistent and ongoing" relationship with IAC that would render him unable to exercise independent judgment. Nor did Plaintiffs allege facts giving rise to a reasonably conceivable inference that McInerney was in any way dependent on his Old Match Board fees, or was otherwise financially dependent on IAC. The trial court incorrectly equated McInerney's service as an independent director of Old Match, and his prior board service at two other companies spun off from IAC years earlier, with the kind of deep personal friendships that this Court has found cast doubt on a director's ability to act independently. The Court of Chancery's determination that McInerney was not independent is inconsistent with Delaware precedent and should be reversed.

Second, even if Plaintiffs' allegations about McInerney were sufficient to impugn his independence, the Court of Chancery's holding that *MFW* was satisfied should be upheld. The Vice Chancellor's approach—finding that a majority-

independent special committee satisfies *MFW* so long as the committee was not dominated or infected by the director lacking independence—is nuanced, flexible, and consistent with bedrock principles of Delaware independence law in other contexts, as well as the reasoning of *MFW* itself. Because Plaintiffs pleaded no facts remotely suggesting that McInerney exercised any improper influence over the Committee's process, let alone "infected" the Committee, the trial court properly concluded that the Committee satisfied *MFW*'s independence requirement. The trial court also correctly held that the joint proxy statement of Old IAC and Old Match (the "Proxy") and the documents it incorporated by reference fully disclosed McInerney's prior relationship with Old IAC.

Finally, the Court of Chancery correctly held that Plaintiffs lacked derivative standing as they were unable to satisfy the continuous ownership requirement, and Plaintiffs' own allegations made clear that New Match was not a "mere reorganization" of Old Match.

For all these reasons, as further explained below, the judgment should be affirmed.

SUMMARY OF ARGUMENT

1. *Denied*. The Court of Chancery's holding that the Committee fulfilled *MFW*'s independent special committee requirement should be affirmed because (i) it is not reasonably conceivable that McInerney—an accomplished and independently successful executive who had not worked for Old IAC for seven years at the time of the Transactions and had no close ties of friendship with Old IAC or Diller—was somehow beholden to Old IAC, and thus the entire Committee was independent, and (ii) even if McInerney lacked independence, which Defendants dispute, the Committee complied with *MFW*'s independence requirement because two of three members were independent, and Plaintiffs failed to plead any facts suggesting that the Committee was "dominated" or "infected" by McInerney.

2. *Denied*. The Court of Chancery correctly concluded that *MFW*'s informed stockholder vote requirement was satisfied because all potentially material information about McInerney was disclosed in Match's 2019 Form 10-K/A, which was incorporated by reference to the Proxy and easy for stockholders to identify, locate, and review. Moreover, because McInerney was independent and did not "dominate" or "infect" the Committee, any disclosures relating to his independence are not material.

3. *Denied.* The Court of Chancery correctly ruled that Hallandale lacked standing to pursue derivative claims on behalf of Match because Hallandale does not satisfy the continuous ownership requirement, and the "mere reorganization" exception does not apply.

4. The Match Defendants join Parts I and II of the IAC Defendants' Brief.

STATEMENT OF FACTS

A. THE PARTIES

Nominal Defendant Old Match was a Delaware corporation and a wholly owned subsidiary of Old IAC. (A756; A773.) Old Match was (and New Match is) a market leader in online dating. (A240; A769.) Before the Transactions resulted in the separation of Old Match from Old IAC in 2020, Old IAC was a Delaware corporation and internet and media holding company. (A770.) As a result of the Transactions, Old Match merged into a merger subsidiary of Old IAC and ceased to exist. (A238-40.) Following the Transactions, Old IAC was renamed Match Group, Inc. ("New Match"). (A100-01.) IAC Holdings, Inc. is a Delaware corporation formed for the purposes of spinning off Old IAC's non-Match businesses; after the Transactions closed, it was renamed IAC/InterActive Corp., Inc. (and now IAC Inc.) ("New IAC"). (A99-100.)

Defendant Barry Diller was Chairman and Senior Executive of Old IAC and holds the same positions at New IAC. (A757-58.) Before the Transactions, Diller and his family held stock representing approximately 42.4% of the total outstanding voting power of Old IAC. (A770.) Before the Transactions, Old IAC owned 80.4% of Old Match's stock and 97.4% of the voting power in Old Match as a result of its ownership of all of Old Match's high-vote Class B common stock.

(A375.) As a result of the Transactions, New IAC owns no shares of New Match, and New Match has only a single class of stock. Diller—who was not a director, officer, or stockholder of Old Match—owned only 6% of the shares of New Match immediately after the Separation. (B265.)

The Complaint names each of the ten former directors of Old Match as individual defendants. (A758-68.) The "Director Defendants" include the three directors who served on the Committee: Thomas McInerney, CEO of Altaba, Inc. ("Altaba") (formerly Yahoo!, Inc.) from 2017-2021; Ann McDaniel, a consultant and former senior vice president of Graham Holdings Company; and Pamela Seymon, who retired from the partnership of Wachtell, Lipton, Rosen & Katz in 2011. (A761-64; A893.) The remaining Director Defendants are Sharmistha Dubey, former CEO of Old Match and then-CEO of New Match; Amanda Ginsberg, former CEO of Old Match; and Alan Spoon, former General Partner and Partner Emeritus of Polaris Partners. (A758-60; A765-67.)

Finally, the Complaint names the Old IAC-nominated directors of Old Match as Defendants (the "IAC Defendants"): Joseph Levin, CEO of Old and New IAC; Glenn Schiffman, then-CFO of Old and New IAC; Mark Stein, Chief Strategy Officer of Old and New IAC; and Gregg Winiarski, former General Counsel of Old and New IAC. (A760-61; A765; A767-68.)

B. THE CHALLENGED TRANSACTIONS

1. The Structure of the Transactions

Plaintiffs' claims challenge the Transactions that created two separate public companies, New Match and New IAC. As part of the Transactions, Old IAC spun off all of its non-Match businesses into New IAC. (A238.) Old IAC—which following the spin-off held Old Match and certain notes and related instruments—was renamed "Match Group, Inc." (A238-39.) Old Match then merged with Old IAC subsidiary Valentine, LLC, with Valentine surviving the merger, and became New Match. (A851.) Old IAC reclassified each share of its Old Match common stock into shares of New Match stock according to an exchange ratio negotiated with the Committee and distributed that reclassified stock to its widely dispersed stockholders. (A238.) Each share of Old Match stock not owned by New Match was exchanged for one share of New Match stock plus either $3.00 in cash or a fraction of a share of New Match stock worth $3.00, at the stockholder's election. (A238.)

The Transactions created a company that was substantially different from Old Match. As Plaintiffs concede, New Match is "capitalized in a vastly different way from the Old Match." (A752.) Additionally, New Match has new board

members, a new capital structure, and, significantly, no longer has a controlling stockholder. (A835-36; A844.)

2. The Committee Is Appointed and Begins Months of Negotiations with Old IAC

On August 7, 2019, Old IAC announced that it was considering the separation of Old Match. (A781.) Shortly thereafter, Diller told Old IAC that he would support a spinoff in which Match would become an independent company with a single class of stock, and did not demand any compensation for IAC's relinquishment of voting control. (A241.) The Old IAC Board communicated to Old Match that any separation would be conditioned from the start upon both the recommendation of a disinterested committee of the Old Match Board and the approval of holders of a majority of the shares held by Old Match's disinterested stockholders. (A241.)

On September 18, 2019, the Old Match Board determined that McDaniel, McInerney, and Seymon were each disinterested and independent and appointed them as the members of the Committee. (B106.) All three directors would receive equal compensation; no chairperson was appointed. (B107.) The Old Match Board empowered the Committee to retain its own financial and legal advisors, "to review and evaluate potential transactions between [Old] IAC or any of its affiliates (other than the Company and its subsidiaries)" and in its "sole discretion"

to direct, negotiate, and approve or disapprove any separation transaction. (A787; B106-07.)

The Committee retained Debevoise & Plimpton ("Debevoise") as its independent counsel. (A243.) On October 3, 2019, the Committee, along with Debevoise, heard detailed presentations from three potential financial advisors and selected Goldman Sachs ("Goldman"). (*Id.*; B157.) On October 10, 2019, Old IAC delivered its initial proposal to Debevoise. (A799.) The proposal envisioned the creation of two separate public companies and the elimination of Old Match's dual-class capital structure, with all stockholders of Old Match and Old IAC receiving stock in New Match with one vote per share. (A799.)

The Committee then engaged in months of negotiations with Old IAC, meeting twenty-one times and receiving frequent input from its independent advisors to achieve Old Match's separation from Old IAC on terms that the Committee determined were beneficial to Old Match's disinterested stockholders. (B154-218.) On the Committee's behalf, McInerney spoke with Old IAC CEO Levin—who was McInerney's subordinate at Old IAC in the 2000s—on several occasions, reporting back to the full Committee each time. (B186-87; B189; B192; B195-96.) On November 21, 2019, the day before the Committee and Old IAC

reached preliminary agreement, the Committee "determined" that McInerney should be the one to "convey the Committee's" counterproposal to Levin. (B196.)

The Committee obtained material concessions from Old IAC: it negotiated the cash payout by Old Match to Old IAC down to $850 million from $2 billion (A799; A825), ensured that New IAC would bear liability if the deal resulted in a tax liability that was not the fault of New Match (A303-05), and bargained for an additional 2% of New Match's stock for Old Match's former stockholders—an increase worth over $800 million to Old Match's public stockholders as of the date the first of the two plaintiffs filed a complaint (January 7, 2021). (A848; B342-43 (New Match market cap was $40.658 billion on January 7, 2021).) Thus, the Old Match stockholders went from owning less of a company (Old Match) with a controlling stockholder, Old IAC, to owning more of a company (New Match) fully open to the market for corporate control because it had no controlling stockholder. (A848.)

3. Old IAC and the Committee Strike a Deal That Is Overwhelmingly Approved by an Informed Majority of Minority Stockholders

On November 22, 2019, the Committee reached preliminary agreement with Old IAC regarding many—but not all—of the terms of the Transactions. (A827.) On December 5, 2019, McDaniel and Seymon met with Levin to discuss "certain

governance-related matters related to New Match," and reached preliminary agreement as to the composition of the New Match board. (A250.) On December 18, 2019, the Committee, Debevoise, and Goldman met and concluded that Old Match stockholders would receive significant benefits from the Transactions—such as IAC's relinquishment of voting control and thus unlocking New Match as a potential M&A target, as well as increased strategic flexibility, enhanced trading liquidity, and the potential for an improved credit profile and lower cost of capital. (A252-53; B128.) The Committee unanimously resolved to recommend the Transactions to the Old Match Board, which later voted to approve the Transactions. (A253; A258-62; A833; B128.)

Old IAC filed a Form S-4 Registration Statement with the Securities and Exchange Commission ("SEC") on February 13, 2020, and an Amendment to the S-4 on April 30, 2020. (A835; *see generally* B222-26.) The Amendment included the Proxy, which notified Old Match's stockholders of a Special Meeting to vote on the Separation, identified the members of the Committee, and detailed the negotiations leading up to the Transactions. (A105; A238-78.) The Proxy incorporated by reference Old Match's 2019 Form 10-K/A. (A410.) The 10-K/A contained extensive information about the professional background of each Committee member, including that McInerney had served as CEO of Old IAC's

retailing division from 2003-05, as CFO of Old IAC from 2005-12, and as a director of two former affiliates of Old IAC (HSN, Inc. ("HSN") and Interval Leisure Group ("Interval Leisure")) within the prior five years. (B230-31.) The Committee members' biographies were also posted on Old Match's website.[3]

On June 25, 2020, Old IAC and Old Match stockholders overwhelmingly approved all proposals required to complete the Transactions, with approximately 75% of the shares held by the disinterested stockholders of Old Match voting to approve. (A755-56.)

C. THE COURT OF CHANCERY GRANTS DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE

On September 1, 2022, the Court of Chancery granted Defendants' motion to dismiss the Complaint, holding that the Transactions satisfied *MFW*'s requirements, that Plaintiffs lacked derivative standing, and that Plaintiff Nevada lacked direct standing. *In re Match Group, Inc. Deriv. Litig.*, 2022 WL 3970159, at *1 (Del. Ch. Sept. 1, 2022) (the "Opinion"). Because the trial court determined that *MFW* was satisfied, it did not reach other grounds for dismissal argued by IAC and Diller in their separate brief below.

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[3] *Corporate Governance*, Match Group, https://web.archive.org/web/20200406095854/https://ir.mtch.com/corporate-governance/board-of-directors/default.aspx (archived April 6, 2020).

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT THE COMMITTEE WAS INDEPENDENT

A. Question Presented

Did the Court of Chancery correctly conclude that the Committee satisfied *MFW*'s independent special committee requirement? (A915-26.)

B. Scope of Review

The Court of Chancery's decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6) is subject to *de novo* review. *City of Ft. Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 716 (Del. 2020).

C. Merits of the Argument

The Court of Chancery's decision that the Committee fulfilled the independence requirement of *MFW* should be affirmed because the Committee was independent, and even if McInerney was not independent, which Defendants dispute, the majority of the Committee was independent and Plaintiffs did not set forth any facts to suggest that McInerney "dominated" or "infected" the negotiation process. On appeal, Plaintiffs ask this Court to conclude that *MFW* requires more, arguing for a *per se* rule that *MFW* cannot be satisfied if plaintiffs can cast doubt on the independence of a single committee member. Delaware law

does not support Plaintiffs' arguments, however, and the Court of Chancery's dismissal under *MFW* should be affirmed.

1. All Three Members of the Committee Were Independent

The Committee satisfies *MFW*'s requirements for the threshold reason that all three members were disinterested and independent.[4] The Court of Chancery incorrectly determined that McInerney lacked independence based on inferences that were not reasonably conceivable in light of Plaintiffs' allegations and this Court's precedent. McInerney was a well-compensated CEO of an unrelated company at the time of the Transactions; he had ceased working at Old IAC seven years earlier, and was not alleged to have any personal ties to either Old IAC or Diller. It would be an unwarranted expansion of Delaware law to impugn a director's presumptive independence based solely on such stale professional ties, and this Court should affirm dismissal of the Complaint under *MFW* on this basis alone.

First, the Court of Chancery erred in finding that Plaintiffs alleged a "persistent and ongoing relationship" between McInerney and IAC based solely on McInerney's service on the Match board at the time of the Transactions and

[4] Defendants did not need to cross-appeal to raise this issue. *See Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 815 n.13 (Del. 2013).

previous service on two IAC-related boards. (Opinion at *19 (quoting *Voigt v. Metcalf*, 2020 WL 614999, at *15 (Del. Ch. Feb. 10, 2020).) The pleaded facts make clear that in late 2019 and early 2020 when the Transactions were negotiated, McInerney's only current "relationship" with Old IAC was his role on the Old Match Board itself; McInerney served as CEO of Altaba, a corporation unaffiliated with IAC, and earned substantial income in that role.[5] McInerney's former service as a director of two former IAC-affiliates (HSN and Interval Leisure)—which ended more than a year before the Transactions—cannot constitute an "ongoing" relationship either; McInerney joined those boards in 2008 while he was still employed at Old IAC, and both companies separated from Old IAC and ceased to be "Old IAC affiliates" more than a decade before the Transactions were negotiated. (A762-63; B230-31.)[6] To infer a "persistent and

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[5] In contrast, the director in *Voigt* had previously worked at a CD&R portfolio company and "[s]ince leaving" 15 years earlier had "predominantly worked" as a CD&R director appointee at CD&R portfolio companies. 2020 WL 614999, at *15. CD&R also identified the director as being within its control in SEC filings, which did not occur with McInerney. *Id.* The Court of Chancery's reference to *Reith v. Lichtenstein* is also misplaced: working for a subsidiary of the controller was the *Reith* director's "principal occupation" at the time of the transaction. 2019 WL 2714065, at *15 (Del. Ch. June 28, 2019).

[6] *HSN, Inc. Completes Spin-off from IAC; Commences NASDAQ Trading Under Symbol HSNI*, HSN (Aug. 21, 2008), https://corporate.hsn.com/newsroom/pressrelease/hsn-inc-completes-spin-off-from-iac-commences-nasdaq-trading-under-symbol-hsni/; *Interval Leisure Group Completes Spin-off From IAC*, Globe Newswire (Aug. 21, 2008),

ongoing relationship" from these facts would be a significant expansion of Delaware law, effectively rendering any former executive perpetually beholden to their former employer no matter their subsequent professional success. At most, McInerney's connections to Old IAC amount to "past business relationships," which are insufficient to impugn his independence at the motion to dismiss stage. *See Franchi v. Firestone*, 2021 WL 5991886, at *5 (Del. Ch. May 10, 2021) (director independent despite present service on two boards associated with the controller because the "vast majority" of past relationships with controller "ended at least ten years" earlier).[7]

Second, despite Plaintiffs' failure to meet their burden of pleading anything that would show close personal ties or even outer-circle friendship, the Court of Chancery equated McInerney's professional ties to the kind of deep ties of friendship and family that this Court has found undermine independence, based only on allegations that McInerney "relied on Old IAC, or its affiliates, as his primary employment for those decades." (Opinion at *19 (citing *Marchand v. Barnhill*, 212 A.3d 805, 820 (Del. 2005) and *Delaware Cnty. Emps. Ret. Fund v.*

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https://www.globenewswire.com/news-release/2008/08/21/383540/10612/en/Interval-Leisure-Group-Completes-Spin-off-From-IAC.html.

[7] Internal citations and quotation marks are omitted except where noted.

Sanchez, 124 A.3d 1017, 1022-24 (Del. 2015)).) But this Court's decisions in *Marchand* and *Sanchez* were based on more than the *length* of the directors' much longer and more proximate tenures; rather, they also turned on the *quality* of the relationships. In particular, this Court observed that the plaintiffs in *Marchand* had pleaded a "deep and longstanding friendship" and "debt of gratitude" because the CEO's family had given the director his first job, "nurtur[ed]" his entire career from executive assistant to CFO, and raised money to name a building after the director. 212 A.3d at 820. Likewise, in *Sanchez* this Court found a director's independence to be impugned based on allegations that the director and controller had a "50-year close friendship" and were "confidantes," and not merely because the director was employed full time by a company over which the interested party had "substantial influence." 124 A.3d at 1020, 1022-23. Plaintiffs here offer no allegations of personal friendship or lifelong loyalty; McInerney is not even alleged to spend time with any IAC executive or employee at restaurants or sporting events, let alone to have any decades-long bond. At most, the facts pleaded about McInerney's time at Old IAC suggest an ordinary, if remunerative, professional relationship. (A762.) Indeed, McInerney's subsequent professional success starkly distinguishes him from the directors determined by this Court to lack independence. *See Marchand*, 212 A.3d at 819-20 (director spent entire 28-

year career at company); *Sanchez*, 124 A.3d at 1019-20 (director had friendship of "half a century" with controller and his "primary source of income" at the time of the challenged transaction was at a company over which the controller had "substantial influence" as its largest stockholder).

Finally, the Court of Chancery failed to require Plaintiffs to satisfy their burden to plead facts supporting an inference that McInerney's past income from IAC—and fees from service on the boards of Old Match and two companies spun off from Old IAC in 2008—was sufficiently material to render him beholden to IAC. *See, e.g.*, *Orman v. Cullman*, 794 A.2d 5, 25 n.50 (Del. Ch. 2002) (a director is beholden when the "controlling entity has the unilateral power . . . to decide whether the challenged director continues to receive a benefit, financial or otherwise"); *Sanchez*, 124 A.3d at 1020-21 (considering director's fees, which made up 30-40% of director's total income, in independence analysis); *Friedman v. Dolan*, 2015 WL 4040806, at *7 n.53 (Del. Ch. June 30, 2015) (directors independent where no credible allegations that directors depended "on their [committee] compensation" or otherwise raised concerns about their livelihoods.). While Plaintiffs make much of McInerney's compensation while employed by Old

IAC nearly a decade before the Transactions, that is not enough.[8] Plaintiffs' allegations that McInerney earned $55 million during his tenure at IAC from 2003 to 2012, undermine, rather than support, any suggestion that his roughly $300,000 per year compensation from board service was material to him such that it would undermine his independence. (A762-63; B8.)

McInerney's considerable professional success after leaving Old IAC, in particular as CEO of Altaba between 2017 and 2021, as well as serving on the boards of two public companies unaffiliated with IAC, further undercuts any reasonable inference that McInerney's alleged financial ties to IAC would impugn his independence. Public filings indicate that McInerney earned at least $2 million per year as an executive of Altaba/Yahoo! since 2017,[9] and $24 million upon the dissolution of Altaba in April 2019, *e.g.*, at least $30 million from Altaba in the

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[8] Delaware courts have looked to the exchange rules as a source of supporting guidance about independence, given the importance of the exchanges in our market system. *See, e.g.*, *In re MFW S'holders Litig.*, 67 A.3d 496, 510 (Del. Ch. 2013), *aff'd sub nom. Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014). McInerney's seven years since leaving IAC far exceeds the three years considered as a bar to be an independent director under exchange rules. NYSE Rule 803(A)(2).

[9] B8.

years before the Transactions.[10] This fact guts any inference that McInerney was financially beholden to IAC.

2. The Court of Chancery Correctly Held That the Committee Satisfied *MFW* Because a Majority of the Committee Was Independent and the Committee Was Not "Infected" or "Dominated"

Even if this Court agrees that McInerney lacks independence (and we respectfully submit that it should not), this Court should nonetheless affirm the Court of Chancery's ruling that the Committee was independent because, under the "weight of [Delaware] authority," *MFW*'s requirements are satisfied so long as (i) a *majority* of a special committee is independent, and (ii) the committee is not "dominated" or "infected" by a non-independent member. (Opinion at *16 n.142, *19.) As the trial court observed, such a rule is consistent with the purpose of a special committee laid out by this Court in *MFW*, which should "function in a manner which indicates that the controlling stockholder did not dictate the terms of the transaction and that the committee exercised real bargaining power at an arms-length," *MFW*, 88 A.3d at 646, and is grounded in Delaware's well-established principles of independence law.

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[10] *See* Altaba Inc. (formerly known as Yahoo!), N-CSRS 15 (Aug. 25, 2020), https://www.altaba.com/sec-filings?field_nir_sec_date_filed_value=2020#views-exposed-form-widget-sec-filings-table.

In seeking reversal, Plaintiffs ask this Court to replace the Court of Chancery's thoughtful, case-specific analysis with a *per se* rule that a single director found at the pleading stage to lack independence will categorically prohibit *MFW*'s application. Plaintiffs' proposed approach should be rejected by this Court because it strays too far from the principles at *MFW*'s core: the dual procedural protections of *MFW* are intended to replicate the "shareholder-protective characteristics of third-party, arm's-length mergers." *Id.* at 644. Delaware law does not require *every individual director* to be independent in true arm's-length dealings; Plaintiffs offer no reason to impose such a rule where a committee stands in for the board to undertake such negotiations. *See Malpiede v. Townson*, 780 A.2d 1075, 1098 (Del. 2001) (negotiations were at arm's length where, despite a conflicted director, "that director did not dominate or control the others"). Indeed, while not directly addressing the composition of the committee, this Court in *MFW* indicated its interest in "the Special Committee's *collective independence*" as well as in the individual independence of its members, and approvingly noted that the independence inquiry should be guided by "well-

established Delaware legal principles," which likewise consider the independence of a committee as a whole. 88 A.3d at 648, 650 (emphasis added).[11]

As the Court of Chancery correctly observed, cases in both the *MFW*-specific and broader committee independence contexts support the two-step inquiry employed here. In *City Pension Fund for Firefighters & Police Officers in the City of Miami v. The Trade Desk, Inc*. ("*Trade Desk*"), the court evaluated a special committee pursuant to *MFW* and concluded that the committee was independent, even though one of the three directors was not.[12] 2022 WL 3009959, at *13 (Del. Ch. July 29, 2022). While the *Trade Desk* court noted that plaintiff had waived any argument that a special committee needed to consist entirely of

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[11] Contrary to Plaintiffs' assertions, the single phrase from a footnote in *Weinberger v. UOP, Inc.*, does not instruct otherwise. 457 A.2d 701, 709 n.7 (Del. 1983). In *Weinberger*, this Court discussed how "an independent negotiating committee" could be "equated to conduct by a theoretical, wholly independent, board of directors." *Id.* The *MFW* court did not adopt this language, but merely stated that its dual protections were "consistent" with *Weinberger*. *MFW*, 88 A.3d at 646. Similarly, the Court of Chancery in *MFW* adopted *Weinberger*'s reference to an "independent negotiating committee" to replicate an "arm's length" transaction without any reference to a "wholly independent" board. *In re MFW S'holders Litig.*, 67 A.3d at 528 n.157.

[12] Because this Court reviews questions of law *de novo* and Plaintiffs have the opportunity to fully brief and argue *Trade Desk* before this Court, their arguments regarding prejudice are moot. In any event, multiple earlier authorities (cited herein) supported the same doctrine, yet Plaintiffs chose to attack the independence of the entire Committee, and failed to allege that McInerney (or any other member) dominated or infected the process. There is no unfairness in Plaintiffs being held to their litigation choices.

independent directors, it specifically noted the general Delaware rule that "outside the *MFW* framework, a plaintiff must plead facts supporting a reason to doubt the independence or disinterestedness of a *majority of the board or a special committee*." *Id.* (emphasis added). The *Trade Desk* court then considered whether the sole interested committee member "somehow infected the special committee's process" so as to "render the entire committee defective" and concluded that he had not. *Id.* at *13-14.

Similarly, in *In re Dell Technologies, Inc. Class V Stockholders Litigation*, when considering the independence of a two-person special committee under *MFW*, the court concluded that if "*either* member was not disinterested and independent, then the plaintiffs have called into question this aspect of the *MFW* requirements." 2020 WL 3096748, at *35 (Del. Ch. June 11, 2020) (emphasis added). In reaching this conclusion, the *Dell* court cited two demand futility cases in which the board was evenly divided between interested and disinterested directors to support its conclusion that an evenly divided special committee lacked the requisite independent majority. *Id.*; *see Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1046 n.8 (Del. 2004) ("If three directors of a six person board are not independent and three directors are independent, there is not a majority of independent directors and demand would be

futile."); *Beneville v. York*, 769 A.2d 80, 84-87 (Del. Ch. 2000) (a board lacks independence if one member of a two member board is not independent). The *Dell* court plainly would not have examined cases that looked at the "majority" if it understood *MFW* to require the independence of each member of the committee.

Other courts evaluating suits claiming that a minority stockholder exercised control over a board committee have undertaken the same analysis. *See In re Rouse Props., Inc.*, 2018 WL 1226015, at *15-17 (Del. Ch. Mar. 9, 2018) (rejecting argument that special committee was beholden to minority stockholder where only two of five members were alleged to lack independence); *FrontFour Cap. Grp. LLC v. Taube*, 2019 WL 1313408, at *22 (Del. Ch. Mar. 22, 2019) (applying entire fairness review because plaintiff had proven that "*at least half of* the Special Committee members were not independent") (emphasis added). Far from being inapposite—as Plaintiffs suggest (AOB 27 n.93)—these cases are instructive: in both contexts, courts must evaluate whether a special committee established for the purpose of evaluating a potential conflicted transaction was controlled by the conflicted party. The key inquiry is whether the individual alleged to have control has "the ability to dominate the *corporate decision-making process*." *In re GGP, Inc. S'holder Litig.*, 2021 WL 2102326, at *15 (Del. Ch. May 25, 2021) (requiring plaintiffs to "allege facts allowing a reasonable inference

that a *majority* of the Special Committee's members were somehow tainted by [the controller]'s dominance" in determining whether a minority stockholder functions as a controller) (emphasis added). The trial court's approach is likewise consistent with the close examination of single-member committees by Delaware courts; there would be no reason for such concern if a single member of *any* committee, no matter the size, could defeat *MFW*'s application. *See Kahn v. Tremont Corp.*, 694 A.2d 422, 430 (Del. 1997) ("If a single member committee is to be used, the member should, like Caesar's wife, be above reproach." (quoting *Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985)).

Furthermore, this approach is consistent with Delaware's "traditional" business judgment rule, both before and after *MFW*. *See Nixon v. Blackwell*, 626 A.2d 1366, 1376 & n.7 (Del. 1993) (applying business judgment rule where "there has been a business decision made by a disinterested and independent corporate decisionmaker" which "could be a disinterested and independent majority of the board of directors or the stockholders"); *Voigt*, 2020 WL 614999, at *10 (business judgment rule would apply "if the Board relied on [a special committee's]

recommendation, unless the Committee itself lacked a disinterested and independent *majority*") (emphasis added).[13]

The two Chancery cases Plaintiffs muster in support of their argument that a *per se* rule should apply are distinguishable on their facts and are not enough to overcome this "weight of authority." (Opinion at *16 n.142.) As the Court of Chancery below correctly noted, the *Franchi* court's conclusion rested solely on a modified quote from *Dell*, in which, as discussed *supra*, there were only two special committee members, and therefore if "any" member lacked independence there would not be an independent majority. (*Id.*) And while the *Franchi* court analyzed the independence of a challenged committee member even after plaintiffs conceded that the majority was independent, but the challenged director's independence needed to be evaluated regardless because Plaintiffs had challenged

[13] In an article discussing the levels of review, Vice Chancellor Laster has stated: "The same principles that govern the inquiry at the board level apply at the committee level, and the court will determine whether there were sufficient directors who voted in favor of the decision to make up a disinterested, independent, and informed *majority of the committee*. So long as the board has not retained some residual approval right or otherwise limited the committee's authority, in which case the board's retention of a portion of its authority undermines the committee's ability to decide the issue and keeps the judicial focus on the board, then *a decision made by a disinterested, independent, and informed majority of the committee receives business judgment deference*." J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1444 (2014) (emphasis added).

the adequacy of the disclosures regarding his independence under *MFW*. 2021 WL 5991886, at *6. Nor does *In re Orchard Enterprises, Inc. Stockholder Litigation* move the needle: while the court found the special committee lacked independence because of one compromised member, plaintiffs had alleged that that member "chaired the Special Committee, served as the Committee's principal negotiator, and acted as the central conduit for the flow of information to and from the Committee," and was paid more than five times as much as the other committee members to reflect his "leading role"—none of which Plaintiffs alleged as to McInerney. 88 A.3d 1, 26 (Del. Ch. 2014).

Further demonstrating the weakness of their argument—and despite the fact that Plaintiffs have had several chances to craft a viable complaint with access to books and records, public information, and Defendants' prior dismissal briefs—the remainder of Plaintiffs' argument in support of a *per se* rule rests on outlandish hypothetical situations not present here. For example, affirming the Court of Chancery's well-reasoned decision would not give a controller a free pass to "place itself on the committee" or stock a committee with an "infected" member as Plaintiffs claim. (AOB at 29-30.) Instead, the trial court's approach—specifically examining whether an interested committee member "infected" or "dominated" the whole—would guard against these unlikely scenarios.

Rather, it is Plaintiffs' proposed rule that would put the Court of Chancery in a straightjacket: requiring entire fairness review every time there is a close call at the pleading stage regarding any committee member's independence—and even when cases present situations that do not give rise to the special concerns that motivated this Court's rule for a higher standard of review in controller squeeze-outs. *See* IAC Defendants' Answering Brief, Pt. I. Plaintiffs' *per se* approach would force courts to deny business judgment review even if the allegedly non-independent member was one of a ten-person committee or played an insignificant role, regardless of the benefits extracted by the committee, gutting *MFW*'s purpose.[14]

In contrast, the Court of Chancery's approach allows courts the flexibility to look carefully at whether a special committee, as a whole, could independently represent the company's and the disinterested stockholders' interests in a conflicted transaction. The Vice Chancellor's holding that Plaintiffs were required to demonstrate that McInerney dominated or infected the independent committee

[14] Plaintiffs' rule would incentivize boards to have single-member committees to avoid the risk of adverse pleading-stage rulings on one of the committee members which this Court has explained are disfavored. *See, e.g.*, *Tremont*, 694 A.2d at 430.

members is consistent with Delaware case law and the objectives of *MFW* and provides a workable exception to the majority of the special committee rule—ensuring that a special committee functions independently and replicates an arm's-length transaction, even if there are questions about an individual committee member's independence. Instead of allowing perfection to be the enemy of the good,[15] courts should conduct precisely the analysis that the Vice Chancellor performed in this case.

3. The Court of Chancery Correctly Held That Plaintiffs Did Not Plead Facts to Remotely Suggest That McInerney "Dominated" or "Infected" the Committee

The Court of Chancery correctly held that Plaintiffs failed to plead any facts leading to a reasonably conceivable inference that McInerney dominated or infected the committee. Engaging in the same analysis laid out in *Trade Desk*, *GGP*, and other recent Chancery decisions, the trial court properly examined the facts pleaded by Plaintiffs—facts supported by books and records and public information—about McInerney's role on the Committee and held that there were no allegations that McInerney "controlled the information flow to his fellow

[15] *See Weinberger*, 457 A.2d at 709 n.7 ("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.").

directors, undermined the Committee's process, or exerted any undue influence or control over" his fellow Committee members. (Opinion at *19.)

Plaintiffs' arguments to the contrary fail. First, McInerney did not "control[] the flow of information on the negotiation of economic terms," as Plaintiffs claim, because he served as spokesperson for the Committee in certain discussions with Old IAC CEO Levin. (AOB at 33; A250.) Rather, as the record and Proxy make clear, McInerney's conversations with Levin were both reported to and vetted by the entire Committee, and Seymon and McDaniel also met with Levin independently to discuss deal terms. (B186; B189; B196; A250.) Moreover, much of the information flow between IAC and the Committee took place through the Committee's independent legal and financial advisors (A244-45; A247-48; A250-252), and there are no allegations that McInerney played an outsized role in their selection.[16] (B161.) Second, Plaintiffs' claim that McInerney lacked independence based on McInerney and Levin's previous business association is not a reasonable inference; McInerney was wealthy and successful in his own right and Levin was substantially junior to McInerney while they both worked at Old IAC (A760-61)—a history more likely to make Levin defer to McInerney than the

[16] *Compare In re MAXXAM, Inc./Federated Dev. S'holders Litig.*, 1997 WL 187317, at *6 (Del. Ch. Apr. 4, 1997) (committee member held a "dominant role" in part because of his unilateral retention of advisors).

opposite. Third, Plaintiffs' allegations that McInerney "acted like a chairman" are meaningless: Plaintiffs acknowledge, as they must, that McInerney was not the chairman and, regardless, serving as chairman does not equate to domination. *See Trade Desk*, 2022 WL 3009959, at *14 (interested chairperson did not dominate disinterested committee members).

Finally, Plaintiffs' conclusory assertion that McInerney undermined the Committee by "work[ing]with Levin" to "dilute" Match stockholders (AOB at 34) is not a reasonable inference when, based on the pleaded facts, Old Match public stockholders indisputably ended up with a larger share of a company in which IAC had relinquished voting control for no consideration. For an inference of dilution to be made, some pled facts must provide an objective basis for arguing that dilution occurred and none have been or could be pled in the fact of the undisputed realities of the Transactions. Likewise, Plaintiffs' assertion that McInerney expressing his "belief" that IAC would accept a deal term equates to "exert[ing] influence" over the committee (AOB at 34) shows that they are grasping at straws. Expressing a belief is plainly not the same as exerting influence. And even a "recommendation"—which this was not—does not support an inference of domination. *See Trade Desk*, 2022 WL 3009959, at *14 (no domination where a

conflicted director passed on a "strong recommendation" about potential financial advisor).

II. THE COURT OF CHANCERY CORRECTLY HELD THAT THE PROXY ADEQUATELY DISCLOSED MCINERNEY'S RELATIONSHIP WITH IAC

A. Question Presented

Did the Court of Chancery correctly conclude that the Proxy and the documents incorporated by reference adequately disclosed McInerney's relationship with IAC? (A926-33.)

B. Scope of Review

The Court of Chancery's decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6) is subject to *de novo* review. *City of Ft. Myers*, 235 A.3d at 716.

C. Merits of the Argument

The Court of Chancery correctly held that facts regarding McInerney's professional history with IAC and its affiliates were fully and fairly disclosed to Old Match's stockholders. (Opinion at *28-29.)

First, information regarding McInerney's professional history with IAC was easily available to Old Match stockholders: it was disclosed in Match's Form 10-K/A, which was incorporated by reference to the Proxy.[17] (A410.) Plaintiffs do

[17] Furthermore, McInerney's relationship with IAC was a matter of public record and accessible to stockholders in a matter of seconds by reviewing his biography on the Old Match website. Including this information in the Proxy would therefore not alter the "total mix" of information available to

not dispute that the 10-K/A included all of the information about McInerney required to adequately inform stockholders of any potential conflicts,[18] nor do they question the well-settled principle of Delaware law that incorporating SEC filings by reference is an appropriate means of disclosing information.[19] (AOB at 36-40.) Plaintiffs argue instead that the information regarding McInerney—despite this disclosure—was "buried" such that it would require "energetic stockholders" to "hunt" for the materials. (AOB 40.) Plaintiffs are wrong.

The Proxy incorporated the Form 10-K/A exactly where a reasonable stockholder would expect it to: in the substantive section of the Proxy entitled "Where you can find more information." (A410.) Courts routinely find that documents listed in this section—where incorporations by reference are located as a matter of course—fulfill *MFW*'s disclosure requirement.[20] Moreover, both the

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stockholders. *Morrison v. Berry*, 191 A.3d 268, 283 (Del. 2018); *see also Sandys v. Pincus*, 152 A.3d 124, 129 n.16 (Del. 2016) ("[W]e can take judicial notice that internet searches can generate articles in reputable newspapers and journals, postings on official company websites, and information on university websites that can be the source of reliable information.").

[18] *In re Orchard* and *Millenco* are inapposite; those cases concerned *complete omissions* of information regarding directors' business relationships. *In re 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).

[19] *See, e.g.*, *Orman*, 794 A.2d at 35 (material consulting contract referenced in incorporated Forms 10-K and 10-K/A was adequately disclosed).

[20] *See, e.g.*, *Orman*, 794 A.2d at 35, 35 n.100 (noting that information in SEC filings incorporated by reference and listed "Under the section entitled

Proxy's Introduction and its Table of Contents made clear that there was additional information and directed stockholders to the relevant section. (A63; A69; A76.) Plaintiffs' argument that stockholders would have expected to find information about McInerney's professional history in other portions of the Proxy (AOB at 39) does not hold water: pages 124-25 cover only "related person transactions" as "determined by reference to Item 404(a) of Regulation S-K under the Securities Act of 1933," which does not apply to McInerney (A225), and pages 174-75 only disclose that certain Old Match Board members were also directors or officers at Old IAC; they do not purport to describe any director's historical business relationships. (A275-76).

Within the section identifying additional documents, the *very first* Old Match SEC filing listed—and hyperlinked—is the Form 10-K/A. (A410.) But even were it not the first filing, reasonable stockholders would expect that pertinent

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'WHERE YOU CAN FIND MORE INFORMATION'" was "sufficiently disclosed"); *see also In re Solera Hldgs., Inc. S'holder Litig.*, 2017 WL 57839, at *10 (Del. Ch. Jan. 5, 2017) (rejecting director interest disclosure claims where SEC filings incorporated by reference in the Proxy disclosed material information about directors); *see also* Solera Holdings, Inc., Definitive Schedule 14A at ii, 110 (Oct. 30, 2015), https://www.sec.gov/Archives/edgar/data/1324245/000119312515358636/d80990ddefm14a.htm/ (proxy statement at issue in *Solera* listed documents incorporated by reference in final "Where you can find more information" section). This Court may take judicial notice of publicly-filed SEC documents. *See, e.g.*, *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 280 n.13 (Del. 2016).

information about a company's directors would be included in periodic SEC filings. *See* 17 C.F.R. § 229.401(e) (requiring annual reports to include information about the "business experience during the past five years of each director"). The 10-K/A was also filed on April 29, 2020, the day before the Proxy itself. *See In re Solera*, 2017 WL 57839, at *10 (10-K/A incorporated into the proxy by reference and filed "just two days earlier" "provided sufficient disclosure"). Far from being "buried" in the Proxy, as Plaintiffs assert, the information regarding the professional backgrounds of the Committee was located *precisely* where any reasonable stockholder would expect to find it, and accessible via four short clicks from the first page of the Proxy.

Furthermore, the "scavenger hunt" cases that Plaintiffs cite are distinguishable: those cases required stockholders to perform quantitative analyses or infer hidden meaning from multiple documents to divine the significance of the disclosures. No such "hunt" was necessary here: the relevant facts about McInerney were on the fourth page of the 34-page document.[21] (B230.) Nor was guess work or calculus required to understand McInerney's biography and prior

[21] *Compare ODS Techs., L.P. v. Marshall* 832 A.2d 1254, 1262 (Del. Ch. 2003) (finding it "incredible to suggest that a reasonable shareholder would identify" the material information that was scattered across a proxy statement, license agreement, warrant issue agreement, and 10-KSB).

business relationships; his employment history for IAC and service on IAC-affiliated boards is straightforward and clearly enumerated.[22] (B230.)

Delaware law does not require that the Proxy needs to "be specific as to what information stockholders are expected to review regarding specific subjects under appropriate headings in the proxy."[23] (AOB at 40.) To the contrary, a "mere failure to organize the documents to meet [the] plaintiff's best case scenario for maximizing the clarity of the information presented does not constitute the kind of omission or misleading half truth necessary for a materially inadequate disclosure." *Galindo*, 2022 WL 226848, at *10 (no disclosure violation where information was disclosed in a 10-Q incorporated by reference).

In any event, because McInerney was in fact independent, and did not have ties to IAC that compromised his independence, "disclosures related to [his] supposed conflicts are immaterial." *Franchi*, 2021 WL 5991886, at *6 (finding no disclosure violation where plaintiffs had failed to allege that any member of the

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[22] *Compare Vento v. Curry*, 2017 WL 1076725, at *3-4 (Del. Ch. Mar. 22, 2017) (disclosure of financial advisor's financial interest in proposed transaction inadequate because searching multiple documents, calculations, and guess work were required to understand materiality).

[23] *See generally In re Solera*, 2017 WL 57839, at *10; *Orman*, 794 A.2d at 35; *Galindo v. Stover*, 2022 WL 226848, at *9-10 (Del. Ch. Jan. 26, 2022) (approving documents incorporated by reference without any description of documents' contents).

special committee was conflicted). Failure to disclose a "nonexistent interest or lack of independence" is not a material disclosure violation. *Orman*, 794 A.2d at 33-34.

III. THE COURT OF CHANCERY CORRECTLY HELD THAT HALLANDALE LACKS DERIVATIVE STANDING

A. Question Presented

Did the Court of Chancery correctly rule that Hallandale lacks standing to bring a derivative claim on behalf of Old Match because the Separation was a merger that extinguished derivative standing and was not simply a "mere reorganization" of Old Match within the meaning of *Lewis v. Anderson*, 477 A.2d 1040, 1046 n.10 (Del. 1984) and *Lewis v. Ward*, 852 A.2d 896, 904 (Del. 2004)? (A937-43.)

B. Scope of Review

"[T]he Delaware Supreme Court reviews questions relating to standing under the *de novo* standard of review." *Brookfield Asset Mgmt., Inc., v. Rosson*, 261 A.3d 1251, 1262 (Del. 2021).

C. Merits of the Argument

The Court of Chancery correctly dismissed Hallandale's derivative claims on the ground that Hallandale lacked standing to sue on behalf of Old Match, applying Delaware's bedrock principle that "[i]n order to bring a derivative claim a plaintiff 'must hold shares not only at the time of the alleged wrong, but

continuously throughout the litigation.'"[24] (Opinion at *11 (citing *In re Massey Energy Co. Deriv. & Class Action Litig.*, 160 A.3d 484, 497-98 (Del. Ch. 2017)).) "A plaintiff who ceases to be a shareholder, whether by reason of a merger or for any other reason, loses standing to continue a derivative suit." (*Id.* (citing *Anderson*, 477 A.2d at 1049).)

Applying this well-established rule, the Vice Chancellor held that Hallandale "lack[s] standing to bring derivative claims on behalf of Old Match" because "Old Match . . . ceased to exist as a result of the Separation." (*Id.* at *12.) Nor could Hallandale assert derivative claims on behalf of New Match because the Separation was consummated before New Match came into existence, and thus before Hallandale became a New Match stockholder. (*Id.* at *13-14 (citing *In re SmileDirectClub, Inc. Deriv. Litig.*, 2021 WL 2182827, at *8 (Del. Ch. May 28,

[24] While the Court of Chancery ruled that *both* Hallandale and Nevada lacked derivative standing, Plaintiffs only appeal this ruling with respect to Hallandale's derivative claims. (Opinion at *12.) ("Both Plaintiffs lack standing to bring derivative claims on behalf of Old Match."); AOB at 41 (arguing that "Hallandale . . . maintained derivative standing post-Separation because the Separation was a reorganization of Match"). As a result, Nevada has waived any right to challenge the Court of Chancery's decision. *See Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 249 A.3d 106, 123 (Del. 2021) ("[A]n appellant waives an argument if he does not argue its merits within the body of his opening brief."); *see also* Supr. Ct. R. 14(b)(vi)(A)(3) (same).

2021) (stockholder lacks derivative standing where challenged transaction occurred before plaintiff became stockholder in the corporation)).)[25]

Hallandale argues that the Court of Chancery erred in holding that it lacked derivative standing because it pleaded that the Separation was a "reorganization of [Old] Match." (AOB at 41.) Initially, Hallandale misstates the rule. Delaware law recognizes a narrow exception to the general rule that a merger extinguishes derivative standing where the transaction constitutes a "*mere* reorganization," an exception that applies only where "the merger is in reality a reorganization which does not affect plaintiff's ownership of the business enterprise," *Ward*, 852 A.2d at 904 (emphasis added), or where "the surviving entity is merely the same corporate structure under a new name." *Bonime v. Biaggini*, 1984 WL 19830, at *3 (Del. Ch. Dec. 7, 1984), *aff'd*, 505 A.2d 451 (Del. 1985) (TABLE). In *Ward*, this Court held that the "mere reorganization" exception was inapplicable and extinguished derivative standing after a stock-for-stock merger of two corporations with distinct

[25] Plaintiffs asserted a grab bag of other arguments before the Court of Chancery in support of their standing to sue derivatively on behalf of Old Match and/or New Match, all of which the Vice Chancellor considered and rejected. *See* Plaintiffs' Omnibus Answering Brief to Motions to Dismiss ("PAB") at A1048-59; Opinion at *11-14. Hallandale did not raise those arguments in its Opening Brief, and has therefore waived them. *See Monzo*, 249 A.3d at 123; *see also* Supr. Ct. R. 14(b)(vi)(A)(3).

"boards of directors, officers, assets and stockholders" was "far more than a corporate reshuffling." 852 A.2d at 904.

These limitations are important. Many corporate transactions, including mergers, could be described as a "reorganization" in some literal sense. If that were enough to preserve derivative standing, the exception would swallow the rule. Accordingly, Delaware courts have applied the "mere reorganization" exception only in narrow circumstances, and not where the transaction involved meaningful changes to what the stockholders owned before and afterward.[26] *See, e.g.*, *Bamford v. Penfold, L.P.*, 2020 WL 967942, at *29 (Del. Ch. Feb. 28, 2020) (post-merger companies had same pre-merger assets and same pre-merger stockholders); *Helfand v. Gambee*, 136 A.2d 558, 562 (Del. Ch. 1957); *Schreiber v. Carney*, 447 A.2d 17, 22 (Del. Ch. 1982) ("The structure of the old and new companies [was] virtually identical."). In contrast, the exception does not apply to transactions that actually change the structure and substance of what the stockholders owned. *See, e.g.*, *Brokerage Jamie Goldenberg Komen Rev Tru U/A 06/10/08 Jamie L Komen Tr. for Komen v. Breyer*, 2020 WL 3484956, at *1, *15 (Del. Ch. June 26, 2020)

[26] Tellingly, Hallandale cites no cases where this Court applied the mere reorganization exception to preserve derivative standing. (AOB at 41-45.)

("*Fox*") ("[a]fter the [merger] closed, New Fox was vastly different than Old Fox"); *see also Ward*, 852 A.2d at 904.

The same is true here. Indeed, the Complaint itself demonstrates the Separation did not create "merely the same corporate structure under a new name." It alleges that:

- "The Separation resulted in a New IAC that was no longer Match's outright controlling stockholder." (A750-51.)
- "New Match [] was capitalized in a vastly different way from the Old Match." (A752.)
- "[Old] Match's minority stockholders received New Match shares in a *different corporation* with limited cash, much higher debt and defensive governance provisions." (A753 (emphasis added).)
- "[T]he Separation resulted in a company . . . buried under a mountain of debt." (A756.)
- The composition of the boards of directors were different. (A768 ("*[A]lmost all* the [Old] Match Board would continue as New Match directors . . . .") (emphasis added).)
- "[Old] Match's minority stockholders . . . ended up with a slightly higher percentage of ownership of Match following the Separation." (A848.)

The Court of Chancery noted the fundamental inconsistency between Hallandale's liability theory and its standing argument: "[Hallandale's] theory of wrongdoing is that the Separation left Old Match public stockholders holding equity in a company with different ownership and inferior assets than the company in which they chose to invest. New Match is not merely a reorganized Old Match." (Opinion at *13.)

The Proxy further makes clear that the Separation resulted in a dramatically different corporation compared to the pre-Separation entity. New Match has a different leverage profile, a different board, and different assets (including two commercial real estate properties in Los Angeles that it did not previously have) than Old Match. (A260; A261; A303.) Most fundamentally, New Match has a different capital structure from Old Match, eliminating Old Match's dual-class stock structure in favor of a single class of "one share one vote" stock. (A258.) Unlike Old Match, New Match does not have a controlling stockholder. (A258.) That is not a mere "reshuffling." *See, e.g.*, *Bamford*, 2020 WL 967942, at *29.

Hallandale's argument that because "[t]he *operating* business of New Match was the same as Old Match . . . New Match was merely a reorganized Old Match" (AOB at 45 (emphasis added)) runs contrary to precedent from this Court and the Court of Chancery, which make clear that the inquiry looks at the entire corporate structure, not just one aspect of the corporation's business. *See, e.g.*, *Bonime*, 1984

WL 19830, at *3 (analyzing "the entire corporate mix"); *Schreiber*, 447 A.2d at 22 (analyzing "the structure of the two corporations"); *Ward*, 852 A.2d at 904 (analyzing the "plaintiff's ownership of the business enterprise"); *Fox*, 2020 WL 3484956, at *15 (analyzing the "corporate structure"). There can be no dispute that the "corporate mix" and "corporate structure" were dramatically altered by the Transactions.

Hallandale's argument that its "allegations that the Separation compromised Match's financial health, [are] not allegations that the Separation changed Match's businesses" is equally flawed. (AOB at 45.) The "mere reorganization" exception applies only where "the merger is in reality a reorganization which does not affect plaintiff's ownership of the business enterprise." *Anderson*, 477 A.2d at 1046 n.10. If a transaction leaves a stockholder with a different mix of assets than they had prior to the transaction, the stockholder's ownership has been affected and the exception does not apply. *See, e.g.*, *Fox*, 2020 WL 3484956, at *15.

Finally, the description of the Transactions as a "reorganization," does not mean the Transactions were a "mere reorganization." (AOB at 42.) As the Complaint acknowledges, the reason the Separation is described as a "reorganization" in the Proxy is because "the Merger [was] intended to qualify as a *tax-free* reorganization" under the federal tax code. (A853 (emphasis added)); *see*

also Internal Revenue Code, 26 *U.S.C.* § 368(a)(1)(A) (providing requirements for tax free mergers). Plaintiffs cannot conflate a technical tax characterization under federal law with a "mere reorganization" as described in *Ward* and *Anderson* and (unsurprisingly) cite no authority for such a proposition.

CONCLUSION

The judgment of the Court of Chancery dismissing the Complaint should be affirmed.

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Dated: December 19, 2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 3, 2023, a copy of the foregoing *[Public Version] Answering Brief on Behalf of Appellees Sharmistha Dubey, Amanda Ginsberg, Ann L. McDaniel, Thomas J. McInerney, Pamela S. Seymon, Alan G. Spoon, IAC/InterActive Corp. and Match Group, Inc.* was served by File & Serve*Xpress* on the following counsel of record:

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