Changing Ex-SPAC-tations: The Case for Requiring Fairness Opinions in de-SPAC Transactions

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In the height of COVID-19, a dormant financial instrument—the Special Purpose Acquisition Company (SPAC)—was revitalized to grant everyday investors access to invest in previously inaccessible private companies. SPACs seem like a deal too good to be true: retail investors simply paid $10 for a share in a public shell company run by a "Sponsor"—an entity usually composed of high-profile investors and Wall Street veterans. With the money raised from these $10 shares, the Sponsor had two years to identify a private company and acquire it, thereby taking the company public and generating returns for the public shareholders. If the Sponsor found a suitable company, they would announce their intent to acquire it to the shareholders. If any shareholder did not like the private company or did not trust the deal would be profitable, they could simply redeem their shares for $10 plus interest and walk away no worse for the wear.

As with all too-good-to-be-true deals, this one had a catch. If the Sponsor did not find a suitable company within two years, the SPAC would liquidate, and the Sponsor would be left with two years of lost time and no profit to show for it. Therefore, the Sponsor was motivated to consummate an acquisition no matter what, a mentality that led to an enormous boom in mergers and acquisitions of private companies by SPACs from 2020–2022. Now, the fallout has begun. Shareholders of SPACs have begun alleging that Sponsors undertook value-destructive deals and misled investors just to avoid the catastrophe of having to liquidate the SPAC. In five recent decisions by the Delaware Chancery Court, SPACs have been denied their Motions to Dismiss these claims by shareholders. This Note reviews these cases, discusses Delaware jurisprudence on disclosures and how that law should apply in the SPAC context, and suggests the Chancery Court or Securities and Exchange Commission could intervene to require third-party

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fairness opinions as an instrument to protect retail investors from the misaligned incentives of Sponsors.

Introduction

During the height of the COVID-19 pandemic, public markets saw one of the biggest increases in initial public offerings (IPOs) in their history.[1] This IPO boom was attributed in part to the resurgence of a latent financial

1. *See* Christine Dobridge, Rebecca John & Berardino Palazzo, *The Post-COVID Stock Listing Boom*, *FEDS Notes*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (last updated June 17, 2022), https://doi.org/10.17016/2380-7172.3125 [https://perma.cc/N9E7-QDC3] (finding "a staggering increase of about 28 percent" in the number of publicly traded companies between August 2020 and December 2021).

instrument: the special purpose acquisition company (SPAC).[2] Well-known companies that went public via a SPAC include Richard Branson's space company Virgin Galactic,[3] neighborhood social media company Nextdoor,[4] and digital-media company BuzzFeed.[5] The SPAC was seen by some as ushering in a new era of public company filings free from much of the red tape typically imposed by the Securities and Exchange Commission (SEC).[6] Others feared that "SPAC mergers are structured to ensure Wall Street insiders receive huge profits and [public] investors pay the cost."[7]

As this Note will discuss, SPACs are shell companies that anyone can invest in, usually for $10 per share.[8] SPACs do not have any business operations. Instead, investors pay $10 per share as a bet that the group who manages the SPAC—usually retired hedge fund Chief Financial Officers (CFOs) and private equity rainmakers—will identify a private company for the SPAC to acquire and thus take public. The SPAC structure is appealing to the average investor (referred to as a retail investor) who typically cannot invest in private companies with the most promising founders, products, or revenue streams. This is because to invest in these types of high-risk, high-reward companies, an individual usually needs to be an "accredited investor."[9] An accredited investor is a "natural person" and must either: be a

2. *Id.*

3. Michael Sheetz, *Virgin Galactic Shares Debut as the Space Tourism Company Begins Trading Under the Ticker SPCE*, CNBC (October 28, 2019, 5:10 PM), https://www.cnbc.com/2019/10/28/virgin-galactic-stock-trading-debut-on-nyse-under-the-ticker-spce.html [https://perma.cc/6M54-NDZL].

4. Pia Singh, *Nextdoor to Go Public in $4.3 Billion SPAC Merger as CEO Looks Toward Expansion*, CNBC (July 6, 2021, 5:21 PM), https://www.cnbc.com/2021/07/06/nextdoor-to-go-public-in-4point3-billion-spac-merger-as-ceo-looks-toward-expansion.html [https://perma.cc/EJP2-GM7J].

5. Benjamin Mullin, *BuzzFeed Reaches Deal to Go Public Via SPAC, Acquire Complex Networks*, WALL ST. J. (June 24, 2021, 11:38 AM), https://www.wsj.com/articles/buzzfeed-nears-deal-to-go-public-via-spac-eyeing-digital-media-rollup-11624485898?mod=article_inline [https://perma.cc/UV3Y-EG62].

6. *E.g.*, Max H. Bazerman & Paresh Patel, *SPACs: What You Need to Know*, HARV. BUS. REV., July–August 2021, at 102, 110 ("Compared with traditional IPOs, SPACs often provide . . . fewer regulatory demands.").

7. *Going Public: SPACS, Direct Listings, Public Offerings, and the Need for Investor Protections: Virtual Hearing Before the Subcomm. on Inv. Prot., Entrepreneurship, and Cap. Markets of the H. Comm. on Fin. Servs.*, 117th Cong. 3 (2021) (Statement of Rep. Maxine Waters, Chairwoman of the Comm. on Fin. Servs.).

8. *What You Need to Know About SPACs – Updated Investor Bulletin*, U.S. SEC. & EXCH. COMM'N (May 25, 2021), https://www.sec.gov/oiea/investor-alerts-and-bulletins/what-you-need-know-about-spacs-investor-bulletin [https://perma.cc/M8FF-LAPT] [hereinafter *SPAC Bulletin*].

9. 15 U.S.C. § 77b(a)(15); *see also* 17 C.F.R. § 230.501(a)(5–6) (explaining that for a "natural person" to qualify as an accredited investor, they must either have an individual net worth of over $1 million or have had individual income of over $200,000 in each of the preceding two years). The reason for this restriction on individuals, according to the SEC, is to protect less-sophisticated investors from financially risky investments. Exemption for Certain Employee Benefit Plans, 52

director, officer, or general partner of the issuer of securities; have a net worth over $1 million; have made over $200,000 in income in each of the previous two years; have certain professional qualifications, designations, or credentials; or be a "knowledgeable employee."[10] By contrast, investment in a SPAC does not require an individual to be an accredited investor because SPACs are public companies with shares available for purchase on many of the standard stock exchanges.

Thus, until recently many retail investors viewed SPACs as vehicles to invest in a risky-but-promising company before it becomes publicly traded. The idea was that the SPAC would provide a vehicle through which retail investors could contribute a little money and hope that the reputation, business acumen, or sheer luck of the SPAC's high-finance managers would turn that small investment into a huge return when the SPAC took a previously inaccessible private company public.

In reality, most SPACs have failed to realize the returns their investors had hoped for. By September 2021, companies that had gone public via SPAC deals had lost about $75 billion in value.[11] And by January 2022, share values for half of the SPACs that had completed deals in the preceding two years were down 40% or more.[12] More recently, in 2022 an exchange-traded fund (ETF) comprised of companies that had gone public via SPAC fell almost 75%.[13] Many of the investors who have invested in SPACs are pension or retirement funds, including, for example, the Teachers Retirement System of Texas.[14] And while there is no data on how those specific investments have gone, the Texas Teacher Retirement System posted a

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Fed. Reg. 3015, 3017, 3018 n.17 (proposed Jan. 30, 1987) (to be codified at 17 C.F.R. pts. 230, 239).

10. 17 C.F.R. § 230.501(a)(4–6, 10–11).

11. Amrith Ramkumar, *SPAC Rout Erases $75 Billion in Startup Value*, WALL ST. J. (Sept. 2, 2021, 6:12 PM) [hereinafter *SPAC Rout*], https://www.wsj.com/articles/spac-rout-erases-75-billion-in-startup-value-11630575180 [https://perma.cc/HN4B-SAP2].

12. Amrith Ramkumar, *The SPAC Ship Is Sinking. Investors Want Their Money Back.*, WALL ST. J. (Jan 21, 2022, 5:30 AM), https://www.wsj.com/articles/the-spac-ship-is-sinking-investors-want-their-money-back-11642761012 [https://perma.cc/J5FS-BJ3T].

13. Craig Coben & Howard Fischer, *The Special Purpose Acquisition Company Fallout Is Going to Be SPAC-Tacular*, FIN. TIMES (Jan. 11, 2023), https://www.ft.com/content/65b96216-afc0-40c2-b763-da4f3ebd4535 [https://perma.cc/LQ4P-SGR7]. This "De-Spac ETF" allowed investors to invest in a fund that invested in companies merging with SPACs. *Id.*; *see also Exchange-Traded Fund (ETF)*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/glossary/exchange-traded-fund-etf [https://perma.cc/Z9WS-8JGS] ("Exchange-traded funds (ETFs) are SEC-registered investment companies that offer investors a way to pool their money in a fund that invests in stocks, bonds, or other assets.").

14. Preeti Singh, *Texas Pension Manager Backs First SPAC Investments*, WALL ST. J. (Dec. 8, 2021), https://www.wsj.com/articles/texas-pension-manager-backs-first-spac-investments-11639002654 [https://perma.cc/L36J-WQMM].

−2.3% return for the fiscal year ending June 30, 2022.[15] Many individual retail investors—from physician assistants to teachers—have also lost a lot of money.[16]

In January 2022, the Delaware Chancery Court issued its first of five rulings against five separate SPACs.[17] Each SPAC has been sued by investors who claim that the SPAC's managers (collectively the Sponsor) undertook value-destructive deals in order to realize enormous personal gains on their nominal investment in the SPAC. These cases are likely the beginning of a wave of litigation against SPACs that the Delaware Chancery Court will see on its docket. And the court thus far has not given much clear guidance on how SPACs can create a structure that is fairer to retail investors moving forward.

This Note attempts to remedy that situation by developing a proposal, based in Delaware precedent and policy, for a bright-line rule regarding SPAC fiduciary responsibilities in disclosing material facts to retail investors. Responding in part to recent empirical research by Andrew Tuch, the Note proposes that a rule requiring fairness opinions by third-party financial advisors in order to consummate a SPAC transaction would protect retail investors against value-destructive deals. The harm that SPACs have caused to the retirement funds, pension funds, and general savings of retail investors makes holding SPACs accountable imperative.

The Note will proceed in three Parts. Part I will discuss the structure of a SPAC and why that structure sets up an inherent conflict of interest between the two main stakeholders in a SPAC: Sponsors and retail investors. It will then discuss how Delaware jurisprudence regarding fiduciary duties—specifically the duty of disclosure and accompanying materiality standard—is intended to protect retail investors from precisely the misaligned incentives inherent in SPACs. Because most SPACs are incorporated in Delaware, the applicable case law covered in this Note will be almost exclusively from either the Delaware Chancery Court (the trial court for all internal business disputes of Delaware corporations) or the Delaware Supreme Court.

Part II will briefly review the five Delaware Chancery cases to date that have denied Motions to Dismiss by SPACs that have allegedly breached their duty of disclosure. It will then situate these decisions within the broader context of the court's jurisprudence as it relates to the duty of disclosure and the definition of information that is "material" for disclosure purposes. This will set up a framework for the types of information the Delaware courts have

15. Rob Kozlowski, *Texas Teachers Posts −2.3% Return, Buoyed by Alternatives*, PENSIONS&INVESTMENTS (Sept. 15, 2022), https://www.pionline.com/pension-funds/texas-teachers-pension-fund-posts-23-return-strengthened-alternatives [https://perma.cc/VUP5-2PCR].

16. *See, e.g.,* Ramkumar, *SPAC Rout, supra* note 11 (profiling a physician assistant who had most of his investment profile in SPACs and lost around $400,000 in the first half of 2021).

17. *In re* Multiplan Corp. S'holders Litig., 268 A.3d 784, 819 (Del. Ch. 2022).

found to be material and therefore necessary to disclose to retail investors in mergers and acquisitions. Finally, Part III will discuss current proposals for SPAC reform and how those proposals either miss the mark or do not go far enough in their calls for greater accountability for Sponsors. The Note concludes with a proposal for requiring fairness opinions to protect future retail investors in the event there is another SPAC boom.

I. SPAC Overview

A. SPAC Structure and Purpose

The process of taking a private company public via SPAC is much faster than the process of a traditional IPO. One analysis found that the typical SPAC merger can take place in five or six months compared with twelve to twenty-four months for a traditional IPO.[18] During COVID-19, the SPAC was revitalized to help private companies bypass the burdensome process of going public.[19] Unlike most public companies, SPACs do not have any operations, sell any product or services, or engage in any business transactions.[20] Instead, a SPAC is a shell company whose sole purpose is to identify and acquire a private company (referred to in this Note as the target). This fills the SPAC's proverbial shell with the private company and converts the private company to a public one without facing the rigor of SEC regulations on IPOs. In short, the purpose of a SPAC is to help private companies "derisk and shorten the IPO process."[21]

A SPAC is controlled by a group called a Sponsor, which creates the SPAC and then handles its day-to-day management.[22] Courts have recognized that "[t]he [S]ponsor of a SPAC controls all aspects of the entity

18. Mike Bellin, *Why Companies Are Joining the SPAC Boom*, PWC (Sept. 22, 2020), https://www.pwc.com/us/en/services/consulting/deals/library/spac-boom.html [https://perma.cc/KNU4-8BD4]; *see also* Ramey Layne & Brenda Lenahan, *Special Purpose Acquisition Companies: An Introduction*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 6, 2018), https://corpgov.law.harvard.edu/2018/07/06/special-purpose-acquisition-companies-an-introduction/ [https://perma.cc/V2Y9-TRUQ] ("SPAC financial statements in the IPO registration statement are very short and can be prepared in a matter of weeks (compared to months for an operating business).").

19. *See* Bazerman & Patel, *supra* note 6 (noting how the number of SPACs created increased from 59 in 2019 to 247 in 2020, and to 295 in just the first quarter of 2021, and explaining how they are a way to "shorten the IPO process" and offer investors "better terms than a traditional IPO would"); *see also* Marcia Lucia Passador, *In Vogue Again: The Re-Rise of SPACs in the IPO Market*, BROOK. J. CORP., FIN. & COM. L., Spring 2022, at 105, 140 (detailing the SPAC "boom" of 2020).

20. Usha Rodrigues & Michael Stegemoller, *Redeeming SPACs* 12, 12 n.76 (U. Ga. Sch. of L. Legal Studies Research Paper Series, Working Paper No. 2021-09, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906196 [https://perma.cc/KY5W-NGTJ].

21. Bazerman & Patel, *supra* note 6.

22. *Id.*

from its creation until the [acquisition of a target]."[23] Sponsors are often limited liability companies (LLCs) formed specifically for the purpose of creating and managing the SPAC.[24] Once the Sponsor forms a SPAC, there are two main transactions it will undertake on the SPAC's behalf. First, the Sponsor will raise cash by offering shares in the SPAC to investors via the IPO. Unlike most public companies, whose shares are bought because investors are excited about the brand, product, or mission of the company, the value of a SPAC share is the underlying promise of the Sponsor to identify and acquire a private company, which the retail investors would not be able to invest in otherwise.[25] Therefore, SPACs sell their shares to investors as a bet that the Sponsor will identify a target that will be worth more than the $10 per share the retail investors paid for the SPAC shares. The second transaction of every SPAC is to merge with a private company, which essentially takes that company public. This transaction is often called a de-SPAC by industry insiders,[26] but this Note will refer to it as the SPAC merger. SPACs have a limited time (typically two years) to identify a target and use the cash raised from the IPO to acquire it—taking that company public through a backdoor process.[27] If the SPAC fails to acquire a target, the SPAC liquidates, and all of the funds raised via the IPO are returned to investors with interest.[28]

After the IPO and prior to the acquisition of a target, the SPAC has two main stakeholders: the Sponsor and the investors.[29] These two stakeholders

23. Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 716 (Del. Ch. 2023). By "control," the court means that Sponsors are controlling shareholders, making SPACs subject to entire fairness review, the most stringent standard of review of Delaware courts. *Id.*; Kahn v. Lynch Commc'ns Sys, Inc., 638 A.2d 1110, 1117 (Del. 1994) (holding that entire fairness review is the "exclusive standard" when examining transactions by a controlling shareholder).

24. Layne & Lenahan, *supra* note 18.

25. *See SPAC Bulletin*, *supra* note 8 (explaining that while SPAC investors rely on Sponsors to "acquire or combine with an operating company," the Sponsors can look across industries to do so and are not obligated to stay within an industry they say they will target); *supra* notes 9–10 and accompanying text (explaining why retail investors normally can't invest); *see also* Special Purpose Acquisition Companies, Shell Companies, and Projections, 87 Fed. Reg. 29458, 29467 (proposed May 13, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249, and 270) [hereinafter SEC Proposal] ("Given that a SPAC does not conduct an operating business, information about the background and experience of the [S]ponsor is often important in assessing a SPAC's prospects for success and may be a relevant factor in the market value of a SPAC's securities.").

26. *E.g.*, Layne & Lenahan, *supra* note 18 ("The De-SPAC process is similar to a public company merger.").

27. Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs*, 39 YALE J. ON REG. 228, 230 (2022).

28. *Id.*

29. Once the SPAC raises capital via its IPO, it often will seek out PIPE (private investment in a public entity) funding. Layne & Lenahan, *supra* note 18. While there is much literature on how PIPE investments also dilute the value of a SPAC, this Note will not focus on the issues presented by PIPE funding.

have vastly different interests in the SPAC's acquisition of a private company. To understand why, it is important to understand how each group expects to receive a return on their investment in the SPAC. Investors invest $10 per share and bet on the Sponsor's ability to identify and acquire a private company that will be worth much more than $10 per share. Their expected gain is based solely on their shares in the SPAC being converted into shares in the acquired, revenue-producing company. Sponsors, meanwhile, invest a nominal fee[30] and their time and effort, and they receive in exchange a portion of the company's post-IPO equity—typically 20%.[31] This 20% equity is referred to as the Sponsor's promote,[32] and Sponsors receive the equity in the form of "Founder Shares."[33] If the Sponsors fails to identify a target for the SPAC, it must return all of the money in the SPAC to their investors with interest.[34] Since the SPAC's sole asset is the cash it raises from investors in an IPO,[35] the Sponsors is left owning 20% of a SPAC that is worth nothing if a SPAC liquidates.[36] Therefore, Sponsors have a strong incentive to identify and acquire a target at all costs.[37]

After the IPO, a SPAC faces one of three potential outcomes. In the first scenario, the SPAC fails to find a target and is forced to liquidate. In this scenario, the retail investor might lose a little bit in terms of the opportunity cost of investing in the SPAC, but their return is net zero because they receive their $10 per share back plus interest.[38] The Sponsor, meanwhile, faces a major opportunity cost in this scenario—they lose two years that they could have spent on other projects and receive no compensation at all for those two years of work. This first scenario can be categorized as neutral for the retail investor and a loss for the Sponsor. Unsurprisingly, because the Sponsor controls the SPAC, this scenario almost never happens: From January 2019

30. *See, e.g.*, Telephonic Bench Ruling on Defendants' Motion to Dismiss at 28, Malork v. Anderson, No. 2022–0260, 2023 WL 4584612 (Del. Ch. July 17, 2023) [hereinafter Malork Transcript] (on file with author) (highlighting that Sponsors paid two-tenths of one cent per Founder Shares in the SPAC).

31. The Sponsor's possession of 20% equity means that immediately upon the IPO, an investor's share is not worth $10 per share but instead only $8 per share. *See* Klausner et al., *supra* note 27, at 268 ("Consider, for instance, a SPAC that raises $800 by selling 80 shares to the public while providing 20 shares to the [S]ponsor for free."). In this simplified example, the SPAC has raised $800 in cash from investors but has 100 outstanding shares after accounting for the "free" promote, meaning that each share is only worth $8 ($800/100 shares = $8/share).

32. *Id.* at 236.

33. Bazerman & Patel, *supra* note 6.

34. Klausner et al., *supra* note 27, at 247.

35. *SPAC Bulletin*, *supra* note 8.

36. Klausner et al., *supra* note 27, at 234.

37. *Id.*

38. *Id.* at 230.

to June 2020, "only six SPACs failed to merge and therefore liquidated," while forty-seven SPACs successfully consummated an acquisition.[39]

In the second scenario, the SPAC identifies and acquires a target, and the post-merger company is worth more than $10 per share. This is a win for both the Sponsor and retail investors because everyone sees a positive return on their investment (of time for the Sponsor and money for the retail investor). The third and final scenario is the one at issue in the five SPAC cases discussed in this Note. In this scenario, the SPAC identifies and acquires a target, but the post-acquisition company is worth less than $10 per share. Because the Sponsor paid almost nothing for its 20% equity stake in the company,[40] any valuation of the company above pennies per share will be a net financial gain for the Sponsor. Indeed, because Sponsors pay only a nominal fee for their 20% equity, Sponsors are virtually *guaranteed* a financial return in the event of a successful acquisition.[41] Meanwhile, any valuation of the new company that is less than $10 per share will be considered a loss for retail investors. That leaves a huge range—between a few pennies per share and $10 per share—where the Sponsor will see a financial gain while the retail investor will see a financial loss on the SPAC acquisition.

This last scenario, which has been called a value-destructive merger,[42] seems like it would be the obvious outcome in almost any SPAC case. Since the Sponsor is only compensated when the SPAC successfully acquires a company, and since the Sponsor makes the decision on which private company the SPAC will acquire, there is little incentive for the Sponsor to spend time and resources researching and conducting diligence on a company that will provide returns to the retail investor. The only external check on this potential abuse is that retail investors will not invest in future SPACs, which is not a strong check against abuse by any individual SPAC. Therefore, the structure of SPACs—specifically, the misaligned incentives between Sponsors and retail investors—makes it hard to see how any retail investor would want to invest in a SPAC at all. So how did SPACs gain prominence as one of the most popular investment vehicles of the COVID years? One potential answer is that SPACs provide protections to retail investors that many investment vehicles do not.

39. *Id.* at 235–36.

40. *See* Malork Transcript, *supra* note 30 and accompanying text.

41. I say "virtually" guaranteed a return because there is a possible valuation of any merged company that would put the per-share value at lower than the pennies per share that a Sponsor paid for its Founders Shares. *See* Klausner et al., *supra* note 27, at 263 (highlighting that only ten of forty-seven SPACs in the study had negative returns while the mean sponsor returns were over $100 million).

42. *See, e.g.*, Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 700 (Del. Ch. 2023) ("The defendants allegedly undertook a value destructive deal that generated returns for the [S]ponsor at the expense of public stockholders.").

B. The Importance of SPAC Disclosures

There are two protections that apply to a SPAC's acquisition of a target that are intended to protect retail investors against Sponsors intentionally seeking out and consummating value-destructive mergers. The first protection—the redemption right—comes from the structure of a SPAC. The second protection—scrutiny under Delaware's highest standard of review, entire fairness—comes from the Delaware courts' jurisprudence. The following sections will explain how these two protections fail to protect retail investors the way they were intended to.

1. The Redemption Right.—During its IPO, the SPAC sells units to investors, which typically consist of "a share, a warrant, and in some cases, a right to acquire a fraction of a share at no cost when the merger closes."[43] Most SPACs sell their shares for $10 per share at the IPO, an arbitrary price chosen by the industry given that SPACs have no real underlying value.[44] Essential to the structure of a SPAC is that anyone who purchases units in the IPO is able to "redeem" the shares before the merger with the private company, meaning they can return their shares to the SPAC and receive back the $10 purchase price plus interest accumulated during the period since the IPO.[45]

Redemption rights are the most powerful tool the retail investor can use to check the Sponsor's ability to close on a value-destructive merger.[46] Prior to the merger closing, the SPAC must put the merger proposal to a vote of its shareholders.[47] Because the SPAC is a public company, this vote is governed by SEC regulations and the Sponsor must issue a proxy statement, which lays out information to shareholders before they vote on any company action.[48] Therefore, a retail investor bases their decision on whether to redeem or not on the information provided by the Sponsor in the definitive proxy statement. However, this seems to place the retail investor at the mercy of the Sponsor and what it decides to disclose.

Indeed, the redemption right fails to protect retail investors in SPACs in two major ways. First and most directly, retail investors base their decision to redeem in large part on information provided by the Sponsor in its proxy

43. Klausner et al., *supra* note 27, at 236.

44. *Id.*

45. *Id.* at 237.

46. *See GigAcquisitions3*, 288 A.3d at 709 ("[T]he redemption right is the central form of stockholder protection and the focus of the harm alleged.").

47. *See, e.g.*, *In re* Multiplan Corp. S'holders Litig., 268 A.3d 784, 797 (Del. Ch. 2022) ("The affirmative vote of a majority of Churchill's stockholders represented at the special meeting was required to approve the merger (assuming a valid quorum)."); *see also SPAC Bulletin*, *supra* note 8 (noting that SPAC shareholders can often vote on merger proposals, unless the Sponsor held enough votes to approve the transaction unilaterally).

48. 15 U.S.C. § 78n(c).

statement. When SPACs either omit or only partially disclose information, retail investors cannot make a fully informed vote on the SPAC merger. The redemption right thus fails to protect them from value-destructive deals.[49] Second, even if retail investors were fully informed before deciding whether to exercise their redemption right, the structure of the redemption right is such that the exercise of the right by some retail investors actually *harms* those retail investors who choose to keep their shares. This is due to "dilution," which happens in several ways to every SPAC.[50]

Dilution is the reduction in the ownership percentage of a share of stock caused by the issuance of new stock.[51] Dilution happens at two main points in a SPAC's lifecycle: when the Founder Shares are granted at the IPO and during redemption.[52] When retail investors exercise their redemption right, the same number of shares are still outstanding in the SPAC while the SPAC's cash reserves have diminished.[53] Not only that, but retail investors are able to vote in favor of the SPAC acquiring the target while simultaneously redeeming their shares, "paradoxically declining to take part in the very transaction they have approved."[54] To compensate for this loss of cash, Sponsors typically seek out a private investment in public equity (PIPE).[55] As a result, PIPE investors often have a greater ownership percentage in SPACs than the original retail investors do.[56] Because of these two factors—inability to make a fully informed vote and the inherent dilution created—the redemption right cannot protect retail investors in the way SPAC proponents have argued it does.

49. *See, e.g.*, *GigAcquisitions3*, 288 A.3d at 724 (holding that the proxy statement's alleged misrepresentation meant that "public stockholders could not make an informed choice about whether to redeem" their shares or invest them in the post-merger entity).

50. *See generally* Michael Klausner, Michael Ohlrogge & Harald Halbhuber, *Net Cash Per Share: The Key to Disclosing SPAC Dilution*, 40 YALE J. REGUL. BULL. 18 (2022) [hereinafter *Net Cash Per Share*] (explaining the concept of dilution in the SPAC context).

51. Akhilesh Ganti, *What Is Dilution in Trading? Definition and Examples*, INVESTOPEDIA (Feb. 18, 2021), https://www.investopedia.com/terms/d/dilution.asp [https://perma.cc/N7D7-2T5C].

52. For more on dilution from Founder Shares, see *supra* note 31. For dilution during redemption, Klausner and his colleagues have found that the median percentage of shares redeemed by retail investors is 73%. Klausner et al., *supra* note 27, at 240.

53. As a simple example, imagine there are 100 shares issued via the IPO at $10 per share and no founders shares are issued. In this case, the SPAC will have $1,000 in cash on hand. If half of the retail investors redeem their shares at the merger stage, then there will still be 100 shares outstanding but only $500 in cash, meaning the net cash per share is only $5. For more on how dilution works at the redemption stage, see Klausner et al., *Net Cash Per Share*, *supra* note 50, at 20.

54. Rodrigues & Stegemoller, *supra* note 20, at 3.

55. Klausner et al., *supra* note 27, at 238–39.

56. *See, e.g.*, Malork Transcript, *supra* note 30, at 9 (noting that the SPAC retail investors owned 8.9% of the post-merger company while PIPE investors owned 15.9% of the post-merger company).

2. *Delaware's Entire Fairness Review*.—Under Delaware law, the board of directors of a company is granted deference in its decision making.[57] The Delaware courts have adhered to this deference by instituting a standard of review for board decision-making known as the business judgment rule, which presumes that "the directors of a corporation act[] . . . in good faith and in the honest belief that the action taken was in the best interests of the company."[58] Although the business judgment rule is the presumed standard of review in most cases, the Delaware courts have carved out an exception for any transaction that "confers a unique benefit on a . . . party that exercises de facto control over the corporation."[59] These cases are frequently referred to as controlling shareholder or conflicted controller transactions; this Note will refer to them as controlling shareholder transactions. Designation as a controlling shareholder is an important step in analyzing a transaction under Delaware law because it changes the standard of review from the deferential business judgment rule to the more exacting "entire fairness" standard.[60]

Although the Delaware Chancery Court has not explicitly held that all Sponsors of SPACs are inherently controlling shareholders, which would subject their decisions to entire fairness, all five SPAC disclosure cases decided so far have come out that way.[61] Indeed, the Sponsor in two of the five cases did not dispute that it was the controlling shareholder of the SPAC.[62] In situations where entire fairness is the standard of review, a defendant must establish "to the *court's* satisfaction that the transaction was the product of both fair dealing *and* fair price."[63] And to meet the obligation of fair dealing, defendants must comply with the "duty of candor" required by Delaware case law.[64]

57. *See* DEL. CODE ANN. tit. 8, § 141(a) (providing that the "business and affairs" of corporations in the state shall be managed by the board of directors, and any statutory directives will act as the exception to that standard rather than the rule).

58. J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1451 (2014) (citation omitted). Notably, the author of this article is currently a Vice Chancellor on the Delaware Chancery Court. *Judicial Officers*, DELAWARE COURTS, https://courts.delaware.gov/chancery/judges.aspx [https://perma.cc/6L4B-8DWN].

59. Laster, *supra* note 58, at 1460.

60. *Id.*

61. *See, e.g.*, Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 713–14, 716 (Del. Ch. 2023) (explaining that the SPAC's structure "makes it reasonably conceivable that the Sponsor was its controlling stockholder" and accordingly applying the entire fairness standard of review).

62. *In re* Multiplan Corp. S'holders Litig., 268 A.3d 784, 809 (Del. Ch. 2022) ("The parties agree that Klein, through his control of the Sponsor, was [the SPAC's] controlling shareholder."); Laidlaw v. GigAcquisitions2, LLC, No. 2021-0821, 2023 WL 2292488, at *8 (Del. Ch. Mar. 1, 2023) ("The parties do not dispute that the Sponsor is properly viewed as the controlling stockholder of Gig2.").

63. Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1163 (Del. 1995) (quoting Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993)).

64. Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

The next Part will explore this so-called duty of candor, explaining how it has evolved into a legal standard recognized by Delaware courts as a "duty of disclosure." It will then discuss how the courts have established a standard for determining whether a fact is material such that it must be disclosed by fiduciaries to shareholders.[65] It will then explore the five SPAC disclosure cases decided by the Chancery Court thus far to see how the court applied the materiality standard to the facts disclosed by the SPACs. Finally, it will situate these SPAC disclosure cases in the broader context of Delaware conflict of interest disclosure cases to show that there is still no clear line in Delaware jurisprudence between insufficient disclosure and disclosure of information which "inundate[s] [shareholders] with an overload of information."[66]

II. The Duty of Disclosure & Materiality in Delaware Cases, Generally

A. *Delaware's Duty of Disclosure and Materiality Standards Defined*

For years, the Delaware courts embraced a loose notion that public companies owed their shareholders a fiduciary "duty of candor" in providing information to shareholders.[67] But, in *Stroud v. Grace*,[68] the court disposed of the "imprecise" duty of candor terminology and instead asserted that "it is more appropriate . . . to speak of a duty of disclosure based on a materiality standard rather than the unhelpful [duty of candor] terminology."[69] To satisfy this duty of disclosure, *Stroud* advised that Delaware law requires boards to "disclose fully and fairly all material facts" that would affect a "contemplated shareholder action."[70] The court further held that it "require[s] proxy voters to have all material information reasonably available before casting their votes."[71] With at least a loose definition of the duty of disclosure in hand, the

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65. For a more detailed overview of the case law up until 1996, see generally Lawrence A. Hamermesh, *Calling off the* Lynch *Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087 (1996).

66. Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1280 (Del. 1994).

67. *E.g.*, *Weinberger*, 457 A.2d at 711; Smith v. Van Gorkom, 488 A.2d 858, 890 (Del. 1985).

68. 606 A.2d 75 (Del. 1992).

69. *Id.* at 84.

70. *Id.* at 85.

71. *Id.* at 87. Notably, in the absence of proxy solicitations requiring shareholder action, the Court said that the Delaware Corporation Law requires only two statutory disclosures. *Id.* at 85. The first is written notice of any meeting at which stockholders "are required or permitted to take any action." DEL. CODE ANN. tit. 8, § 222(a). The second required disclosure is for corporations with capital stock. For such corporations, "a resolution setting forth the amendment proposed, declaring its advisability, and either calling a special meeting of the stockholders entitled to vote in respect thereof for the consideration of such amendment or directing that the amendment proposed be considered at the next annual meeting of the stockholders" is required. DEL. CODE ANN. tit. 8, § 242(b)(1). Absent a proxy solicitation, the Court held, the Delaware General Corporation Law "does not require any further disclosures." *Stroud*, 606 A.2d at 85.

court soon turned to an equally pressing question: What constitutes a "material fact" that a public company must disclose to retail investors to comply with the duty of disclosure?

The Delaware Supreme Court answered this question in *Rosenblatt v. Getty Oil Co*.[72] *Rosenblatt* confirmed what the Delaware Supreme Court had hinted at for a long time: "the materiality standard of [United States Supreme Court case] *TSC Industries, Inc. v. Northway, Inc.*"[73] was the same standard the Delaware courts were to apply.[74] In the same breath, the *Rosenblatt* court held that the term material has a well-accepted meaning in the disclosure context.[75] Incorporating language from the United States Supreme Court into its decision, the court held that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[76] It went on to say that it did not envision the standard to require proof of substantial likelihood that disclosure of the fact would *change* a shareholder's vote.[77] Rather, it said that there must "be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[78]

While Delaware courts continue to say that a fact is material if there is a substantial likelihood that a reasonable shareholder would consider a fact or information important in making a decision, the "total mix" language from *Rosenblatt* is often applied to specific fact patterns to determine whether the omitted information altered all other information available to a shareholder.[79] A brief review of the Delaware Chancery Court cases addressing materiality both of SPAC disclosures and of disclosures in mergers and acquisitions more broadly will provide insight into how the Chancery Court's jurisprudence regarding materiality of disclosed information has evolved over time.

72. 493 A.2d 929 (Del. 1985).

73. 426 U.S. 438 (1976).

74. *Rosenblatt*, 493 A.2d at 944.

75. *Id.*

76. *Id.* (quoting *TSC Industries*, 426 U.S. at 449).

77. *Id.*

78. *Id.* (quoting *TSC Industries*, 426 U.S at 449).

79. *See, e.g.*, Skeen v. Jo-Ann Stores, Inc., 750 A.2d 1170, 1174 (Del. 2000) ("To be actionable, there must be a substantial likelihood that the undisclosed information would significantly alter the total mix of information already provided."); *In re* MONY Group Inc. S'holder Litig., 852 A.2d 9, 27 (Del. Ch. 2004) ("[D]isclosure [in the case] would serve the important purpose of providing information likely to alter the total mix of information available to MONY stockholders."); *In re* Cogent, Inc. S'holder Litig., 7 A.3d 487, 511 (Del. Ch. 2010) (finding it unlikely that the information requested by Plaintiffs would "significantly alter[] the 'total mix' of information made available" to Cogent stockholders).

B. Materiality Determinations in the Five SPAC Cases

As of August 31, 2023, the Delaware Chancery Court has issued five rulings on SPAC disclosure cases.[80] The SPACs at issue all had similar factual backgrounds and procedural postures. First, in each case, the defendant SPAC was controlled by a Sponsor that paid a nominal fee for a 20% stake in the SPAC's post-IPO equity.[81] Because of the presence of a controlling Sponsor, the Vice Chancellor in each case determined that the transaction at issue was a controlling shareholder transaction, thus invoking entire fairness review.[82] Second, the defendant SPAC in all five cases sold IPO units consisting of one common share and one fractional warrant for $10 per unit.[83] The warrants entitled shareholders to purchase fractional shares in the post-merger company at a uniform price of $11.50 per share.[84] As noted above, these features are all typical of SPACs formed after 2009—a period some have called the "third generation" of SPACs.[85] The five SPAC disclosure cases discussed in this Note involve SPACs that were formed during this third generation, specifically between June 2019 and October 2020.

In each of the five cases involving SPAC disclosures, the court had to determine whether the alleged undisclosed or partially disclosed information was material. In the first case, *In re MultiPlan Corp. Stockholders*

80. *In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784 (Del. Ch. 2022); Delman v. GigAcquisitions3, LLC, 288 A.3d 692 (Del. Ch. 2023); Laidlaw v. GigAcquisitions2, LLC, No. 2021-0821, 2023 WL 2292488 (Del. Ch. Mar. 1, 2023); *In re* XL Fleet (Pivotal) S'holder Litig., No. 2021-0808, 2023 WL 4235207 (Del. Ch. June 27, 2023); Malork v. Anderson, No. 2022-0260, 2023 WL 4584612 (Del. Ch. July 17, 2023). The two most recent cases, *XL Fleet* and *Malork*, were dealt with by the Chancery Court in one-sentence dispositions. *XL Fleet*, 2023 WL 4235207, at *1; *Malork*, 2023 WL 4584612, at *1. However, the court provided the substance of both cases in telephonic bench rulings, both of which are on file with the author of this Note. *See* XL Fleet Transcript, *infra* note 111; Malork Transcript, *supra* note 30.

81. *See, e.g.*, *In re MultiPlan*, 268 A.3d at 791 ("The SPAC's [S]ponsor, led by Michael Klein, was compensated for its anticipated efforts in the form of 'founder' shares constituting 20% of the SPAC's equity and purchased for a nominal price."); *GigAcquisitions3*, 288 A.3d at 701 ("In February 2020, shortly after it was incorporated, Gig3 issued founder shares to the Sponsor amounting to approximately 20% of Gig3's post-IPO equity for the nominal sum of $25,000."). *See also supra* note 33 and accompanying text.

82. *See, e.g.*, *In re MultiPlan*, 268 A.3d at 792 ("[E]ntire fairness standard of review applies due to inherent conflicts between the SPAC's fiduciaries and public stockholders in the context of a value-decreasing transaction"); *see also GigAcquisitions3*, 288 A.3d at 716 ("[T]he governance structure of the SPAC makes it reasonably conceivable that the Sponsor was its controlling stockholder.").

83. *See, e.g.*, *GigAcquisitions3*, 288 A.3d at 701 ("Its IPO units are customarily sold for $10 each and consist of a share and a fraction of a warrant.").

84. *See, e.g.*, *id.* at 702 ("Each unit consisted of a share of common stock and three-quarters of a warrant to purchase a share of common stock at an exercise price of $11.50 per share."); *GigAcquisitions2*, 2023 WL 2292488, at *2 (where each unit consisted of the same, but with a full warrant).

85. Klausner et al., *supra* note 27, at 232.

Litigation,[86] the target of the SPAC was a private company called MultiPlan. The proxy statement disclosed that a single client accounted for 35% of MultiPlan's revenues.[87] However, the proxy statement did not disclose the name of the client (United Health Group) *or* that the client was developing "an in-house alternative to MultiPlan that would both eliminate its need for MultiPlan's services and compete with MultiPlan."[88] Although the record did not support any conclusions as to why the SPAC did not disclose this information, the court noted that MultiPlan's client had "publicly discussed" its plan for the in-house alternative by the time the proxy statement was released to shareholders.[89] Thus, either through sheer laziness or willful avoidance, the SPAC did not disclose the existence of the in-house alternative—and the subsequent possibility that Multiplan could soon lose 35% of its revenue—to its public shareholders. The court noted that the plaintiff's claims were viable specifically because the defendant SPAC "failed, disloyally, to disclose information necessary for the plaintiffs to knowledgeably exercise their redemption rights."[90]

In *MultiPlan*, the court recognized that structure of a SPAC creates "inherent conflicts between the SPAC's fiduciaries [the Sponsor] and public stockholders in the context of a value-decreasing transaction."[91] The court found that the nature of the SPAC in *MultiPlan* placed "an even more exacting duty to disclose upon fiduciaries in possession of [material] information."[92] However, the court also recognized that shareholders bought into the IPO fully aware of these conflicts. Indeed, the court said it could imagine a case being dismissed where public stockholders chose "to invest rather than redeem" so long as they were "in possession of all material information about the target."[93] The problem, according to the court, was that the Sponsor withheld knowledge that 35% of the target's revenue was in jeopardy of being lost and that such knowledge was material information.[94] The court held that "[b]ased on the plaintiffs' allegations, it is reasonably conceivable that a [retail investor] would have been substantially likely to find [the undisclosed] information important when deciding whether to redeem her [SPAC] shares."[95]

86. 268 A.3d 784 (Del. Ch. 2022).

87. *Id.* at 797.

88. *Id.* at 816.

89. *Id.* at 797–98.

90. *Id.* at 816.

91. *Id.* at 792.

92. *Id.* at 816. Specifically, the court pointed to the unilateral nature of the Sponsor's disclosures that made them even more prescient. *Id.*

93. *Id.*

94. *Id.* at 797, 816.

95. *Id.* at 816.

Almost exactly one year later, the court handed down its second ruling on SPAC disclosures in *Delman v. GigAcquisitions3, LLC*.[96] There, the plaintiffs alleged that the defendant SPAC Gig3 had failed to disclose two separate items. First, the plaintiffs alleged that the proxy statement made a false statement when it said that the "merger consideration to be paid to [SPAC] stockholders consisted of Gig3 stock *valued at $10 per share*."[97] In reality, the plaintiffs alleged that the "net cash per share at the time the Proxy was filed [was worth] about $5.25 per share."[98] If the net cash per share was proved during discovery to be $5.25 per share, the court held that "the Proxy's statement that Gig3 shares were worth $10 each was false—or at least materially misleading."[99] Second, the plaintiffs alleged that the proxy statement made incomplete disclosure of the future value that Gig3 would receive in its merger with target Lightning eMotors. Specifically, the proxy "reported that Lightning's annual revenues were projected to increase by over 22,100% in five years."[100] Although these "lofty projections" were not materially misleading insofar as they were "forward-looking,"[101] the court held that they could be problematic because they "were not counterbalanced by impartial information."[102]

More recently, in *Laidlaw v. GigAcquisitions2, LLC,*[103] the plaintiffs alleged that the defendant SPAC had also failed to disclose two material facts. First, as in *GigAcquisitions3*, the plaintiffs in *GigAcquisitions2* alleged that the proxy did not disclose net cash per share.[104] Although the proxy statement disclosed "some information relevant" to understanding net cash per share, the "information was incomplete and strewn across various pages."[105] The SPAC in *GigAcquisitions2* took a step closer toward full disclosure than the SPAC in *GigAcquisitions3*, but "providing . . . raw data is a far cry from providing shareholders with a statement of how much net cash underlies each of their shares."[106]

96. 288 A.3d 692 (Del. Ch. 2023).

97. *Id.* at 705 (emphasis added).

98. *Id.* at 725. For a more detailed discussion of net cash per share, see Klausner et al., *supra* note 50.

99. *GigAcquisitions3*, 288 A.3d at 725.

100. *Id.* at 726.

101. The Securities Exchange Act of 1934 provides a safe harbor from liability for "forward-looking" statements made by issuers of securities so long as the statement (whether oral or written) is "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." 15 U.S.C. § 78u-5(c)(1)(A)(i).

102. *GigAcquisitions3*, 288 A.3d at 726.

103. No. 2021-0821, 2023 WL 2292488 (Del. Ch. Mar. 1, 2023).

104. *Id.* at *1.

105. *Id.* at *11.

106. Klausner et al., *supra* note 27, at 288.

In addition to the partial disclosure of net cash per share, the defendant failed to disclose that it had agreed to renegotiate the terms of its PIPE and other agreements after completion of the merger to public stockholders' detriment.[107] These two disclosure failures led the court to deny the SPAC's motion to dismiss the breach of fiduciary duty claim against it.[108]

The Chancery Court has decided two more recent SPAC disclosure cases, *In re XL Fleet (Pivotal) Stockholder Litigation*[109] and *Malork v. Anderson*,[110] and both cases cite heavily to the three aforementioned cases.[111] Although the law has not advanced much in these most recent cases, the most notable aspect is that they were written by *different* judges than the first three cases. While the first three cases were decided by Vice Chancellor Lori W. Will,[112] the fourth case (*In re XL Fleet*) was decided by Chancellor Kathaleen St. J. McCormick.[113] Citing the "similarities between the factual allegations in those cases [decided by Vice Chancellor Will]" and the case in front of her, Chancellor McCormick denied the SPAC's motion to dismiss.[114] Notably, Chancellor McCormick stated that "Vice Chancellor Will has done a lot of the heavy lifting developing the law in this area,"[115] which foreshadowed her substantial citation to the three aforementioned cases.

The most recent ruling on a SPAC's motion to dismiss came from Vice Chancellor Paul A. Fioravanti, who likewise denied the defendant-SPAC's motion to dismiss.[116] In addition to the fact that the two recent cases were decided by new jurists, another important aspect of the *XL Fleet* and *Malork* decisions is that both opinions explicitly call out the lack of a third-party fairness opinion.[117]

In each of the three opinions authored by Vice Chancellor Will, the court found that the Sponsor's failure to disclose facts—knowledge of a competitor's development of an in-house alternative that could wipe out 35%

107. *GigAcquisitions2*, 2023 WL 2292488, at *10.

108. *Id.* at *1.

109. No. 2021-0808, 2023 WL 4235207 (Del. Ch. June 27, 2023).

110. No. 2022-0260, 2023 WL 4584612 (Del. Ch. July 17, 2023).

111. *See, e.g.*, Telephonic Rulings of the Court on Defendants' Motion to Dismiss at 5, *In re* XL Fleet (Pivotal) S'holder Litig., No. 2021-0808, 2023 WL 4235207 (Del. Ch. June 27, 2023) [hereinafter XL Fleet Transcript] ("Vice Chancellor Will has done a lot of the heavy lifting developing the law in this area in decisions like *MultiPlan*, *GigAcquisitions2* and *GigAcquisitions3*.") (on file with author).

112. *See In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784, 791 (Del. Ch. 2022) (indicating Vice Chancellor Will as the opinion's author); Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 699 (Del. Ch. 2023) (same); Laidlaw v. GigAcquisitions2, LLC, No. 2021-0821, 2023 WL 2292488, at *1 (Del. Ch. Mar. 1, 2023) (same).

113. XL Fleet Transcript, *supra* note 111, at 1.

114. *Id.* at 5.

115. *Id.*

116. Malork Transcript, *supra* note 30, at 1, 17.

117. XL Fleet Transcript, *supra* note 111, at 11–12; Malork Transcript, *supra* note 30, at 10.

of the target's revenue (*MultiPlan*), failure to disclose net cash per share and failure to balance revenue projections with an impartial valuation of a target (*GigAcquisitions3*), and failure to disclose net cash per share and renegotiated PIPE and Notes agreements (*GigAcquisitions2*)—could reasonably have been material to retail investors' decision to redeem their shares. This in turn means the information could have altered the "total mix" of information available to retail investors. The two most recent cases are no different.[118]

What seems clear from the SPAC case law is that the court is concerned about two main categories of disclosure violations: failure to disclose information altogether (as in *MultiPlan*) and failure to disclose *all* the information readily available after disclosing some of the material available (as in *GigAcquisitions2* and *GigAcquisitions3*). The Delaware Supreme Court has acknowledged this distinction, noting that the distinction between partial disclosure and traditional disclosure "is that, in the partial disclosure setting, the initial disclosure may sometimes be voluntary rather than mandatory."[119] The idea is that, while defendants do not *have* to disclose information that is non-material, once they choose to they have to disclose everything relevant to that disclosed information, not just the parts that might persuade shareholders to vote the way the defendants want.[120] The next subpart will review Delaware's materiality standard in more detail by reviewing some seminal non-SPAC mergers and conflicts cases.

C. Materiality Determination in Previous Merger and Conflicts Cases

In 1977, the Delaware Supreme Court decided what some commentators have described as "the seminal . . . case" of its disclosure and materiality jurisprudence.[121] In *Lynch v. Vickers Energy Corp.*,[122] the Court addressed what it then labeled as a defendant company's "fiduciary duty . . . [of] 'complete candor' in disclosing fully 'all of the facts and circumstances

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118. *See* XL Fleet Transcript, *supra* note 111, at 29–30 (finding that plaintiffs adequately pled that the proxy was materially deficient because of its omissions as to both net cash-per-share disclosures and valuation of the target, and recognizing that similar omissions were found deficient in the first three SPAC cases); Malork Transcript, *supra* note 30, at 35–36 ("[T]he alleged misrepresentations would have altered the total mix of information available to Decarb's stockholders.").

119. Zirn v. VLI Corp., 681 A.2d 1050, 1057 (Del. 1996).

120. *See* Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1280 (Del. 1994) (holding that once defendants do disclose potentially immaterial information, they must provide shareholders with a full, accurate characterization of that information).

121. Dale A. Oesterle & Alan R. Palmiter, *Judicial Schizophrenia in Shareholder Voting Cases*, 79 IOWA L. REV. 485, 565 (1994). *But cf.* Hamermesh, *supra* note 65, at 1116 (arguing that "[*Lynch*] is best understood not as the tap root of the fiduciary disclosure doctrine, but as merely a growth point, albeit a significant one").

122. 383 A.2d 278 (Del. 1977).

surrounding the' tender offer."[123] *Lynch* involved a partial disclosure to shareholders in the context of a tender offer. The board of defendant-company TransOcean told shareholders that "the Company's net asset value . . . is *not less than* $200,000,000 . . . and could be substantially greater."[124] However, at the time of making this disclosure, TransOcean was in possession of "another estimate . . . fixing the net asset value at $250.8 million."[125] The court found that disclosing only the floor of $200 million and not the higher $250.8 million estimate was a breach of the board's fiduciary duty of disclosure.[126]

Fourteen years later, in *Arnold v. Society for Savings Bancorp, Inc.*,[127] the defendant-company Bancorp was a struggling company seeking to sell itself in four separate parts, with the high profitability of one part keeping the others "afloat."[128] The Chief Executive Officer (CEO) received an offer to purchase only the highly profitable arm of the company while leaving the rest of the company to two other purchasers.[129] The board declined the offer.[130] A few months later, another company expressed interest in structuring a deal to acquire all four parts of Bancorp, and the board approved the bid.[131] The proxy statement to shareholders mentioned generally the previous failed negotiations, but it did not explicitly mention the specifics of the bid on the highly profitable arm of the company or the accompanying estimate of Bancorp's share value.[132] The Delaware Supreme Court held that the board violated its duty of disclosure by not providing specific information about the failed earlier bid, stating that "once defendants traveled down the road of partial disclosure [by sharing that prior negotiations had taken place] . . . they had an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events."[133]

Two years later, in *Zirn v. VLI Corp.*,[134] the Delaware Supreme Court decided on appeal a question of partial disclosure in relation to a proposed acquisition. In *Zirn*, a shareholder sued a corporation for failing to fully disclose information in relation to a tender offer made by a third party. The shareholder alleged that the corporation's filings inappropriately portrayed acquisition as its best option because a patent for its most popular product

123. *Id.* at 279 (quoting Lynch v. Vickers Energy Corp., 351 A.2d 570, 573 (Del. Ch. 1976)).
124. *Id.* at 280.
125. *Id.*
126. *Id.* at 281.
127. 650 A.2d 1270 (Del. 1994).
128. *Id.* at 1274.
129. *Id.*
130. *Id.* at 1275.
131. *Id.*
132. *Id.*
133. *Id.* at 1280.
134. 681 A.2d 1050 (Del. 1996).

had lapsed.[135] Specifically, the shareholder alleged that the filings provided only part of the advice of a retained special patent counsel in relation to the lapsed patent.[136] While the filings revealed the patent counsel's warning that "there [was] a significant possibility of the reconsideration petition not prevailing in the Patent and Trademark Office," it did not include the patent counsel's additional opinion that the corporation possessed "an excellent case on the merits" in prevailing on the patent renewal reconsideration.[137]

The court found that this partial disclosure "gave an unduly pessimistic" outlook on the corporation's chance of successfully renewing its patent, which, in turn, would have "a direct bearing on the individual stockholder's ability to value the corporation accurately."[138] The court held that "any misstatement . . . which misle[ads] stockholders concerning the value of the company would necessarily be material."[139]

D. Summarizing Disclosure Requirements in SPAC and Non-SPAC Cases

These pre-SPAC cases confirm that Delaware courts have refused to adopt a bright-line rule on the materiality standard for disclosures in Delaware jurisprudence.[140] This lack of clarity prevents public company directors—and more specifically for present purposes, SPAC Sponsors—from accurately predicting the kind of information they should include in their proxy statements.

What is most striking across the SPAC cases is how much the defendant SPACs *did* disclose—especially in the *GigAcquisitions3* and *GigAcquisitions2* cases—and the fact that the court held those disclosures were insufficient to immunize the defendants from liability under entire fairness review. As stated earlier, the court held that entire fairness review was warranted because the SPAC's Sponsors were controlling shareholders.[141] In *GigAcquisitions3*, the SPAC's proxy statement fully disclosed that the structure of the SPAC (i.e., the misalignment of retail investors' and the Sponsor's interest) created inherent conflicts that incentivized the Sponsor to consummate a merger—even a value-destructive merger—by the deadline.[142] The purpose of disclosing this structural misalignment was an attempt by the Sponsor to fully disclose that it was

135. *Id.* at 1053.
136. *Id.* at 1055.
137. *Id.* at 1054.
138. *Id.* at 1057.
139. *Id.*
140. Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1281 n.17 (Del. 1994) (citing Basic, Inc. v. Levinson, 485 U.S. 224, 232–37 (1988) and its rejection of a bright-line materiality test).
141. *See supra* notes 61–64 and accompanying text.
142. Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 706 (Del. Ch. 2023).

incentivized to accept a merger that was value-destructive for public stockholders—as it ultimately did[143]—in order to realize a return on its investment.[144]

In *GigAcquisitions2*, meanwhile, the defendant SPAC went even further. In addition to the general conflict of interest between the Sponsor and board on one hand and the retail investors on the other, the proxy explicitly disclosed the precise number of Founder Shares (over four million) that the Sponsor owned.[145] The court in each instance held that under entire fairness, the disclosures—of conflict between the Sponsor and the retail investors and of the precise interest the Sponsor held in Founder Shares—were not sufficient to satisfy the duty of disclosure necessary to establish fair dealing.[146] Therefore, the court denied the defendants' motions to dismiss.[147]

And yet, the same court has said that it could envision a "hypothetical" fact scenario where a SPAC provided "adequate" disclosure.[148] If the full disclosure of Founder Shares owed by the Sponsor in *GigAcquisitions2* was not enough disclosure to satisfy the disclosure requirement under entire fairness review, what more could a SPAC disclose that would allow it to satisfy the fair dealing requirement of entire fairness and avoid liability to shareholders?

The Chancery Court has recently reiterated that "the duty of disclosure demands that fiduciaries disclose facts. It does not demand that fiduciaries 'engage in "self-flagellation" and draw legal conclusions' as to the inferences to be drawn from those facts."[149] Thus, a fiduciary need not envision every possible outcome or implication from any set of facts in its possession to satisfy the duty of disclosure. At the same time, the partial disclosure cases discussed above share a common theme: once a defendant goes "down the road" of partial disclosure, they must go all the way in disclosing facts to shareholders.[150] Additionally, the court has focused on specificity in disclosures, noting that even when defendants share general statements about

143. *Id.* at 707.

144. The SPAC's prospectus, filed shortly after its IPO, stated that the "Sponsor will lose its entire investment . . . if our initial business is not consummated[.]" *Id.* at 702.

145. Laidlaw v. GigAcquisitions2, LLC, No. 2021-0821, 2023 WL 2292488, at *5 (Del. Ch. Mar. 1, 2023).

146. *GigAcquisitions3*, 288 A.3d at 727; *GigAcquisitions2*, 2023 WL 2292488, at *13.

147. *GigAcquistions2*, 2023 WL 2292488, at *14; *GigAcquisitions3*, 288 A.3d at 729.

148. *See In re* Multiplan Corp. S'holders Litig., 268 A.3d 784, 816 (Del. Ch. 2022) (concluding that SPAC shareholder's claims against a Sponsor may not be viable in a hypothetical scenario where "the disclosure is adequate and . . . the SPAC's structure" is the only conflict at issue).

149. Order Granting Motion to Dismiss at 5–6, *In re* Columbia Pipeline Grp., Inc. S'holder Litig., No. 12152-VCL, 2017 WL 898382 (Del. Ch. Mar. 7, 2017) (quoting in part Stroud v. Grace, 606 A.2d 75, 84 n.1 (Del. 1992)).

150. *See supra* note 133 and accompanying text; *see also* Malork Transcript, *supra* note 30, at 31 (quoting Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1280 (Del. 1994) for this same proposition in the SPAC context).

previous negotiations,[151] prior valuations of the company,[152] or only half of outside counsel's evaluation of the company,[153] if the company is in possession of more details, the duty of disclosure has not been met. If SPACs only have to disclose facts, but there must be some level of specificity in those facts, then defendants are left trying to guess how specifically they must disclose the material facts in their possession. Without a bright-line rule, Sponsors may never know if they have disclosed enough, and investors will never be confident they are making a fully informed investment decision.

III. Forging a Road Ahead

Michael Klausner, whose work the Chancery Court has cited in its SPAC decisions,[154] laid out an early case for SPAC disclosure reform.[155] In a 2022 article, he argued that SPACs should be required to disclose three things they are not currently required to disclose: net cash per share, quality of signal conveyed by PIPE financing, and Sponsor and management interest.[156] This Part will briefly touch on each of these proposals before discussing how the SEC has responded to Klausner's article and other calls for SPAC reform. Ultimately, while Klausner and the SEC have made useful suggestions that would do more to protect retail investors from the negative effects of a value-destructive transaction, they do not go far enough. In order to allay the concerns of the Delaware Chancery Court, the SEC should require all SPACs to obtain an independent fairness opinion before proposing the target acquisition to retail investors.

A. SEC Proposal and Klausner Article

1. Klausner's Proposal.—At the end of an empirical article outlining the flawed outcomes of third-generation SPACs, Michael Klausner and his co-authors propose three regulatory interventions that would potentially prevent "systematically bad deals" for non-redeeming retail investors.[157] First, they propose that a SPAC's pre-merger net cash per share should be disclosed.[158] Klausner and one of his co-authors follow this assertion in a more recent article, where they get into the "nuts-and-bolts" of how SPACs

151. *See supra* notes 127–33 and accompanying text.

152. *See supra* notes 122–26 and accompanying text.

153. *See supra* notes 134–39 and accompanying text.

154. *E.g.*, *In re* Multiplan Corp. S'holders Litig., 268 A.3d 784, 793 n.5 (Del. Ch. 2022); Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 701 n.4 (Del. Ch. 2023).

155. *See generally* Klausner et al., *supra* note 27.

156. *Id.* at 287–89.

157. *Id.* at 287.

158. *Id.* at 288.

should calculate net cash per share.[159] Second, Klausner and his co-authors assert that SPACs should disclose price per share paid by the private investors who tag along to infuse the SPAC with more capital ahead of the IPO.[160] This Note does not discuss PIPE funding beyond what has already been discussed, so their proposal is not relevant for the discussion here.

The final suggestion made by Klausner and his co-authors is that SPACs should disclose the Sponsor and management interest in the SPAC.[161] Specifically, they assert that "SPAC proxy statements should be required to clearly disclose how much the [S]ponsor and SPAC management will gain if a merger closes, and how much they have invested and thus will lose if the SPAC liquidates."[162] On its face, this proposal makes a lot of sense. The five SPAC disclosure cases the Delaware Chancery Court has handled so far have contained various levels of disclosure regarding Sponsor interests. And Klausner and his colleagues note that among the cohort of third-generation SPACs they studied, proxy statements "routinely make qualitative statements about Sponsors and SPAC management having conflicting interests" with retail investors while varying "in the transparency of the specifics."[163] Thus, requiring a Sponsor to disclose how much it would gain upon completion of a successful merger would let retail investors know the exact magnitude of the conflict that existed between them and the Sponsor. This disclosure would seemingly fall within the Chancery Court's restriction on the disclosure of only facts, as sharing too much about the millions of dollars Sponsors stand to gain might come close to the "self-flagellation" the court wants to avoid in disclosure cases.[164]

But disclosing the magnitude of how much the Sponsor stands to gain, rather than the mere fact that the Sponsor stands to gain, is a disclosure that is different only in degree, not in kind. Retail investors likely already know that their interests and the Sponsor's interests are misaligned.[165] While it would be helpful for retail investors to know how much a Sponsor stands to gain and even "the post-merger share price needed to make proceeding with the merger more profitable for the [S]ponsor than a liquidation,"[166] all retail investors really care about is whether *their investment* at $10 per share has the potential to be a good deal. In other words, the difference between knowing that a Sponsor will make a gain in virtually any situation except a liquidation and knowing the exact amount of gain a proposed value-

159. Klausner et al., *supra* note 50, at 18.
160. Klausner et al., *supra* note 27, at 288–89.
161. *Id.* at 289–90.
162. *Id.* at 290.
163. *Id.* at 289.
164. *See supra* note 149 and accompanying text.
165. *See supra* text accompanying notes 142–45.
166. Klausner et al., *supra* note 27, at 290.

destructive merger will earn the Sponsor merely makes the conflict of interest that is inherent in the SPAC structure more explicit. And indeed, the retail investors in at least two of the five SPAC cases already decided they had enough information to know about this conflict, even if just vaguely, via the general disclosures SPACs make about misaligned incentives.[167]

The other problem with Klausner's proposal is that just because a SPAC discloses how much the Sponsor stands to gain upon closing of the merger, that does not mean it can predict in a proxy how much gain the Sponsor stands to realize in the long run. The primary reason for this is that most Sponsors' shares are subject to lockup agreements, which prevent the Sponsor from selling its shares for a certain period of time after the merger.[168] Additionally, it is hard to see how the amount that a Sponsor gains *relative to the retail investor* would alter the total mix of information available to a retail investor about the potential return on their specific investment.

2. SEC Proposal.—The SEC has refined the proposals made by Klausner and his colleagues in a recent set of proposed rules regulating SPACs.[169] One additional disclosure the SEC is proposing is "whether the SPAC or SPAC Sponsor received any report, opinion, or appraisal from an outside party regarding the fairness of the de-SPAC transaction."[170] The SEC posits the reason for this suggestion is that "only 15% of de-SPAC transactions disclosed that they were supported by fairness opinions."[171] This was in contrast to traditional merger and acquisition transactions, where "85% of bidders obtain fairness opinions," according to one study cited by the SEC.[172] On the whole, traditional mergers and acquisitions (M&A) transactions that were accompanied by fairness opinions tended to have higher stock prices and positive wealth effects.[173] Attempting to explain the discrepancy between traditional deals and SPAC deals in obtaining fairness opinions, the SEC cited the cost of fairness opinions as the main reason SPAC Sponsors have not historically sought them out.[174] But since Sponsors

167. *See supra* text accompanying notes 142–45.

168. *See* Klausner et al., *supra* note 27, at 263 (noting that most Sponsors in the cohort studied were subject to lockup agreements through the first year following the merger).

169. *See* SEC Proposal, *supra* note 25, at 29463 (proposing "new rules and rule amendments to enhance existing disclosure requirements and investor protections in initial public offerings by SPACs and in de-SPAC transactions").

170. *Id.* at 29527.

171. *Id.* at 29515.

172. *Id.* at 29515 & n.433 (citing Tingting Liu, *The Wealth Effects of Fairness Opinions in Takeovers*, 53 FIN. REV. 533 (2018)).

173. *Id.* at 29515; *see also* Liu, *supra* note 172, at 537 (finding positive wealth effects from fairness opinions in another context).

174. *See* SEC Proposal, *supra* note 25, at 29528 ("The average costs for fairness opinions obtained by SPAC acquirers . . . was approximately $270,000.00.").

have so much to gain in these deals (and, consequently, so much to lose), they should be willing to foot the bill in order to ensure a deal goes through rather than be forced to liquidate. For the reasons outlined below, many of them based on Delaware jurisprudence regarding disclosures, the Chancery Court or SEC should require fairness opinions in all SPAC transactions.

B. *Mandatory Fairness Opinions Would Provide Necessary (But Likely Not Sufficient) Disclosure for SPACs to Satisfy the "Fair Dealing" Requirement of Entire Fairness Review*

Moving forward, it appears that every SPAC merger will be reviewed under the entire fairness standard as a controlling shareholder transaction "due to inherent conflicts between [SPACs'] fiduciaries and public stockholders."[175] To avoid liability for a breach of fiduciary duty under the entire fairness standard, a defendant must show that the transaction in which they engaged was the product of fair dealing and fair price.[176] This Note proposes a solution to the issue of disclosure in the SPAC context that can help courts decide whether the *retail investors* are receiving a fair price and enjoying the benefits of fair dealing. Specifically, SPACs should be required to obtain a fairness opinion by an independent third party. Indeed, the five Delaware cases seem to endorse this position, as the order denying the motion to dismiss in all five cases mentioned the lack of a fairness opinion.[177]

The fact that all five SPAC orders from the Chancery Court have mentioned fairness opinions is critical. Professor Louis Kaplow has argued that legal commands can either be viewed as standards or rules.[178] He further argues that "under a standard, [a court's] first adjudication constitutes a precedent for future enforcement proceedings."[179] Thus, he argues that in certain circumstances, "the first enforcement proceeding essentially transforms [a] standard into a rule."[180] When this happens, courts simply apply a precedent rather than engaging in a legal analysis, and the precedent operates as if it had been the law promulgated in the first place.[181] Eventually, following this logic, courts facing the same legal question may simply rule

175. Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 713 (Del. Ch. 2023).

176. Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1163 (Del. 1995) (quoting Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993)).

177. *See In re* Multiplan Corp. S'holders Litig., 268 A.3d 784, 798 (Del. Ch. 2022) ("The Proxy was not accompanied by an independent third-party valuation or fairness opinion."); *GigAcquisitions3*, 288 A.3d at 727 (same); Laidlaw v. GigAcquisitions2, LLC, No. 2021-0821, 2023 WL 2292488, at *4 (Del. Ch. Mar. 1, 2023) (same); XL Fleet Transcript, *supra* note 111, at 11–12 (same); Malork Transcript, *supra* note 30, at 10 (same).

178. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 568 (1992).

179. *Id.* at 577.

180. *Id.*

181. *Id.*

as previous courts have ruled, with the accumulation of precedents establishing a rule of law having the same force of a statutory rule.[182]

In the five SPAC disclosure cases discussed in this Note, the Chancery Court has taken its long-standing duty of disclosure—a standard under Professor Kaplow's formulation—and found that the SPAC transaction violated the duty in each case. The precedent from these cases—with each opinion noting the lack of a fairness opinion[183]—has laid the groundwork for the establishment of a court-created *rule* requiring SPACs to obtain and disclose to their public shareholders a fairness opinion conducted by a third-party. Indeed, Chancellor McCormick herself has paved the way for the establishment of such a rule. Facing the same legal question in *XL Fleet* as the three SPAC cases before it, the Chancellor relied heavily on the precedent created by Vice Chancellor Will. Although she still engaged in legal analysis, the precedent made by Vice Chancellor Will's opinions in *MultiPlan*, *GigAcquistions2*, and *GigAcquistions3* operated as if it had been the law promulgated in the first place.[184]

Delaware courts have previously stated that there is no duty to obtain a fairness opinion under Delaware law.[185] However, in the wake of the five SPAC disclosure cases—especially *GigAcquisitions3*, where the court explicitly contrasted the case of a SPAC with a case where "the disinterestedness and independence of the directors were not in dispute"[186]—practitioners and scholars alike have started to advise that obtaining a fairness opinion is a beneficial step in demonstrating fair price and fair dealing. Situating the court's decisions within the Kaplow framework, the court's precedent is transforming the general standard of disclosure into a rule requiring fairness opinions in the SPAC context.[187]

Despite this trend in Delaware courts and corporate law scholarship toward a rule requiring fairness opinions, at least one scholar has argued that fairness opinions will not solve the problems with SPACs described in this Note. In a 2023 empirical study, Professor Andrew Tuch analyzed every fairness opinion conducted in SPAC mergers from January 2019 to January

182. *See id.* at 577 n.46 (collecting scholarship making this assertion).

183. In all five SPAC disclosure cases, the court noted the absence of a fairness opinion in the SPAC transaction. *See supra* note 177.

184. *See* XL Fleet Transcript, *supra* note 111, at 5 ("Given the similarities between the factual allegations in [the three cases decided by Vice Chancellor Will] and this case, the outcome here should be unsurprising.").

185. *See* Crescent/Mach I Partners, L.P. v. Turner, 846 A.2d 963, 984 (Del. Ch. 2000) (explaining that independent fairness opinions are "generally not essential" to support an informed business judgment); *see also* Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 727 n.254 (Del. Ch. 2023) (citing *Crescent* as evidence that "there is no duty to obtain a fairness opinion" under Delaware law).

186. *GigAcquisitions3*, 288 A.3d at 728 n.254.

187. *See supra* notes 178–82 and accompanying text.

2023.[188] Of 387 SPAC transactions, fifty-nine, or 15%, received fairness opinions.[189] Professor Tuch's empirical analysis uncovered several problems with the "standard" fairness opinions conducted to date. He argues that these standard fairness opinions do not consider the effects of dilution before the merger[190] or after the merger.[191] He also found that traditional models of valuation, which rely heavily on company-provided financial projections, are less reliable in the SPAC context because financial projections for SPACs are often overstated.[192] Finally, Professor Tuch found that standard fairness opinions use valuations of other comparable SPAC transactions in their opinions that are likely inflated, meaning that advisors gain a "false comfort" that their valuation is market standard when in fact it is possible that all SPAC transactions are inflated.[193]

Professor Tuch's empirical analysis confirms that previous fairness opinions have fallen victim to some or all of these flaws. But as Professor Tuch himself recognizes, "many of these valuation challenges can be overcome."[194] One of the largest problems with the fairness opinions conducted on SPAC transactions to date is that nearly every fairness opinion in Professor Tuch's study was completed by a small bank, usually a "boutique" investment bank.[195] The single fairness opinion conducted by a "major investment bank" provided a "plausible basis" for its opinion that the SPAC transaction was fair to public shareholders of the SPAC.[196] Indeed, Professor Tuch detailed all the ways in which this fairness opinion—conducted by Barclays—sufficiently addressed fairness to the public shareholders.[197] The only reason the fairness opinion was not adequate, according to Professor Tuch, is that it "made simplifying assumptions."[198] But this is hardly a reason to abandon the use of fairness opinions altogether.

The fact that there was methodological rigor to the sole fairness opinion conducted by a major investment bank means that a rule requiring fairness opinion prior to SPAC transactions should consider refining *who* conducts

188. Andrew F. Tuch, *Fairness Opinions and SPAC Reform*, 100 WASH. U. L. REV. 1793, 1820 (2023).

189. *Id.* at 1821.

190. *Id.* at 1813, 1815.

191. *Id.* at 1816–17.

192. *Id.* at 1817.

193. *Id.* at 1819.

194. *Id.* at 1805.

195. *Id.* at 1820. For clarity, Professor Tuch uses the terms "financial advisor" and "investment bank" interchangeably in this piece. *See id.* at 1808 (explaining that fairness opinions are letters by "investment banks or *other* financial advisors" provided to corporate boards) (emphasis added).

196. *Id.* at 1822, 1827.

197. *See id.* at 1827–28 (noting how Barclays "undertook a pro forma analysis to assess the value of the post-merger entity" in contrast to other fairness opinions, and "account[ed] for dilution inherent in the merger" in further contrast with other opinions).

198. *Id.* at 1828–29.

them. Recall the two problems with redemption rights, which are the only protections for retail investors in SPACs today.[199] First, the redemption right relies almost exclusively on the proxy statement, which is promulgated by the Sponsor and thus does not allow retail investors to make a fully informed decision.[200] Under entire fairness review, which applies to controlling shareholder transactions such as SPACs, a proxy statement is required to disclose any fact that might "alter the total mix of information" available to the shareholder.[201] But neither the Chancery Court nor regulators have explicitly stated what information might always be considered material in a proxy statement.[202] While fairness opinions will likely not be sufficient to satisfy the *Rosenblatt* materiality test, they are a necessary component for shareholders to make a fully informed vote on SPAC mergers.[203]

Second, the redemption right inherently harms any retail investor who doesn't exercise the right because their shares are automatically diluted.[204] While requiring fairness opinions would not completely solve for the dilution that occurs because of redemption, it would curtail the rate of redemption. As discussed above, fairness opinions would allow shareholders to make a more informed decision about the proposed SPAC merger. To the extent shareholders redeem due to lack of clarity into the SPAC transaction, fairness opinions would inherently decrease dilution. Additionally, the knowledge that fairness opinions will be issued should incentivize Sponsors to seek out value-additive deals, which would be more appealing to shareholders and decrease redemption further.

Still, at least two problems would linger if a rule requiring SPACs to obtain fairness opinions from major investment banks (however defined) were promulgated. First, as Professor Tuch notes, many major investment banks may not be willing to risk their reputation by offering a fairness opinion that turns out to be wrong.[205] And even assuming major investment banks would be willing to take reputational risks, it could be argued that they would be heavily incentivized to provide favorable opinions in order to receive referrals for future SPAC deals. Second, there is a risk that mandatory fairness opinions would simply shift the focus of litigation from whether a SPAC had met its duty of disclosure to whether the Sponsor disclosed enough

199. *See supra* section I(B)(1).

200. *See supra* notes 48–49 and accompanying text.

201. *See supra* notes 77–78 and accompanying text.

202. *See supra* subpart II(C).

203. While courts have not explicitly stated this, strong evidence from the five SPAC cases indicates that fairness opinions should be seen as necessary to providing full disclosure to shareholders. *See supra* note 177 and accompanying text.

204. *See supra* notes 52–53 and accompanying text.

205. Tuch, *supra* note 188, at 1832.

information to the firm writing the fairness opinion to write a sufficient opinion. These concerns are addressed briefly below.

1. Reputation Risks.—There are two sides to this coin. First, there is the concern that banks will be hesitant, or even refuse, to provide opinions on the fairness of a transaction to public shareholders. The difficulties in obtaining adequate data to make an informed decision have been catalogued briefly in this Note and more robustly in Tuch's article. These difficulties are not to be taken lightly.[206] However, requiring SPACs to obtain fairness opinions from banks could easily set off a chain reaction in the opposite direction. The progression would go like this: SPACs seeking to undertake an acquisition of a private company would know that the acquisition would be subject to a robust fairness opinion, which would encourage value-additive deals *ex ante*. This would reduce the number of redemptions because public shareholders would be more likely to see a SPAC merger through if they had confidence that the deal would be value additive. With the lower number of redemptions, the risk of dilution would be less. And the lower likelihood of dilution would lead to a higher reliability in valuation. This would create a lower risk of reputational harm because fairness opinions would not use inputs that are quite as variable as they are now given the current risk of dilution. With a lower risk of reputational harm, more reputable investment banks would be induced to conduct fairness opinions, which would improve the quality of the fairness opinions as banks competed for the work.

It could be argued that the state of fairness opinions as conveyed in Tuch's article suggests that the chain reaction presented above is unlikely because banks would not be incentivized to create value-additive deals, knowing that fairness opinions right now are not robust. And fairness opinions are not likely to become more robust until more reputable banks enter the fray. But more reputable banks are not likely to enter the fray until there is adequate incentive to do so. That being said, an *ex ante rule* requiring that SPACs obtain robust fairness opinions using the specifications above could be enough to incentivize major investment banks to conduct them. For instance, the rule might require that banks maintain a certain ratio of deals they work on as underwriters to deals they work on as fairness opinion providers. The rule might further require that SPAC public shareholders vote on what bank among a number of alternatives conducts the fairness opinion, thereby using market forces to incentivize banks to bid competitively for the opportunity to do fairness opinions. The goal here is not to exhaust all the possible ways a SPAC could incentivize major investment banks to conduct

206. *See generally id.* at 1811–20 (explaining the numerous "significant difficulties" that financial advisors face in developing fairness opinions for SPAC transactions).

fairness opinions while simultaneously ensuring those fairness opinions protect retail investors. Instead, it is merely to show that such a rule could be crafted, and courts and the SEC should therefore not be so quick to abandon the possibility.

Second, there is a concern that banks will be incentivized to give favorable opinions to SPAC mergers so that they receive future business from the repeat players who create multiple SPACs.[207] This is a viable concern, especially considering that many of the major banks that would give fairness opinions are also repeat players.[208] Professor Tuch also sees this as a potential problem, and he suggests holding banks accountable by creating liability for them under Section 11 of the Securities Act of 1933.[209] But this would simply disincentivize major banks from participating in the SPAC process at all. While empirical analysis would provide more insight, it is likely the case that the risk to banks—liability under Section 11 of the Securities Act—is not worth the reward when so much non-SPAC IPO work is otherwise available. Therefore, a more modest incentive would help curtail this problem.

For instance, Professor Tuch notes that most SPACs use major investment banks as SPAC IPO underwriters, M&A advisors, and/or placement agents, but use smaller banks or other financial advisors if they decide to obtain a fairness opinion.[210] One can imagine a rule requiring SPACs to retain a firm for their fairness opinions that is comparable—using a metric like previous SPAC experience or revenue—to those firms they are using as M&A advisors or underwriters. Refining such a rule is beyond the scope of this Note, but future empirical research could determine effective metrics for ensuring that fairness opinions moving forward will be at least as rigorous as the Barclays fairness opinion. After all, even Professor Tuch acknowledges the Barclays fairness opinion could be the blueprint for methodologically sound fairness opinions moving forward.[211]

2. A Fairness Opinion Rule Would Merely Shift the Focus of SPAC Litigation.—There is a legitimate concern that fairness opinions would merely shift the focus of future litigation from where it is now—whether a SPAC provided adequate disclosure under the loose materiality standard—to a focus on whether the SPAC provided enough information to banks in order for them to conduct a robust fairness opinion. This critique is fair enough, but making decisions without full insight into future financial performance is a feature of any risky investment. Part of the appeal of SPACs

207. *See* Malork Transcript, *supra* note 30, at 4 (referring to the named Sponsor as a "serial SPAC creator").

208. Tuch, *supra* note 188, at 1820.

209. *Id.* at 1835–36.

210. *Id.* at 1820.

211. *See supra* note 197 and accompanying text.

is the opportunity for retail investors to invest in risky companies that are currently inaccessible to them because of the accredited investor rules.[212]

Additionally, if a rule requiring fairness opinions was adopted, it is likely that the rule would be refined further—by the SEC, for example—to prescribe the exact details that a SPAC would need to provide for its fairness opinion. Therefore, even if the litigation focus shifts to whether the SPAC disclosed enough financial information for the bank to conduct a robust fairness opinion, there will be a clearer set of guidelines for courts to follow than the current guidance on what constitutes enough disclosure of material facts overall. Courts can simply ask whether the SPAC provided the information necessary to fill out the fairness opinion, rather than asking whether they provided information that was material to investors. This should not be read to imply that a fairness opinion will be sufficient to satisfy the duty of disclosure. However, even a shift in the focus of litigation to whether the SPAC provided enough information to the bank would be an improvement over the current state of SPAC disclosure.

Conclusion

Once heralded as a way for the everyday retail investor to access previously inaccessible private markets, the SPAC has ended up making the rich richer while leaving the average investor in the lurch. Even sophisticated pension funds have found themselves on the wrong end of SPAC deals. Delaware jurisprudence shows that, in controlling shareholder transactions, the entire fairness standard demands a defendant prove that the challenged transaction was the product of fair dealing and fair price. But SPACs so far have been unable to prove either of these prongs in the Delaware Chancery Court. Given that the Chancery Court is a court of equity, either the court or the SEC should establish a rule requiring SPACs to obtain and disclose to retail investors independent fairness opinions whenever they propose acquisition of a target. This rule would provide impartial information to retail investors to balance the Sponsor's own disclosures and prospectus statements, allowing retail investors to make fully informed decisions regarding their vote for the merger and redemption of their shares.

212. *See supra* notes 8–10 and accompanying text.