IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE YOSAKI TRUST, Russell J. Miller and Mary Miller as co-trustees, and THE MIOKO TRUST, Russell J. Miller and Mary Miller as co-trustees,

Plaintiffs Below-Appellants,

v.

TERESA S. WEBER, MARC D. BEER, MARY ELIZABETH CONLON, HAYMAKER SPONSOR III LLC, a Delaware Entity, STEVEN J. HEYER, and COOLEY LLP, a California entity,

Defendants Below-Appellees.

No. 157, 2025
Court Below:
Court of Chancery
of the State of Delaware
C.A. No. 2024-0738-JTL

APPELLANTS THE YOSAKI TRUST AND THE MIOKO TRUST'S OPENING BRIEF

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NATURE OF THE PROCEEDINGS

The Yosaki Trust and The Mioko Trust (together, "**Plaintiffs**")—former minority unitholders and members of BioTE Holdings, LLC ("**Holdings**")—appeal the Delaware Court of Chancery's dismissal of claims against disloyal BioTE insiders and others who helped them close a conflicted and economically irrational SPAC transaction. Defendants knew for months before the closing that no private investors would invest in a PIPE and almost all SPAC investors would redeem their shares, leaving the SPAC with no cash to contribute. A42-46. But Defendants were undeterred. Ultimately, 98% of the SPAC investors rejected the deal and redeemed their shares, causing Holdings to receive only approximately $12 million – or negative $10 million after liabilities – of the over $317.5 million in "anticipated" SPAC funds. In short, the transaction was disastrous for Plaintiffs, while the Defendants who pushed it through profited at their expense. A36; A46-48. Defendants received $135 million in equity and Plaintiffs' fiduciaries secured approximately 12% of the voting power in the public company by diminishing Plaintiffs' voting power.

Plaintiffs directly challenge the fairness of this SPAC transaction, which only closed because a few disloyal fiduciary insiders breached their duties of loyalty and care. A14-55. Defendants overcame every obstacle put in their way by, among other things, baselessly threatening BioTE's founder and the managing member of

Holdings with $50-70 million in personal liability and misleading him into waiving the only remaining contractual protection (a requirement that the SPAC contribute at least $5 million in net tangible assets for the transaction to proceed). A40-46. These disloyal fiduciaries did not have vested equity in BioTE or Holdings prior to this transaction. A20-21. They engineered this outcome to trigger their incentive awards, receive approximately $70 million in Holdings' securities, secure commensurate voting power in the now publicly traded biote Corp., oust BioTE's founder and Holdings' managing member, and assume control over the post-transaction entities. A28; A34-35; A47.

Plaintiffs filed an Amended Verified Complaint in the Court of Chancery of the State of Delaware, asserting three counts: (1) breach of fiduciary duty against current and former BioTE insiders: Teresa Weber, Marc Beer, and Mary Elizabeth Conlon (together, the "**Insider Defendants**"); (2) aiding and abetting those breaches against the SPAC sponsor, Haymaker Sponsor III LLC ("**Haymaker Sponsor**"), Steven J. Heyer ("**Heyer**" and together with Haymaker Sponsor, the "**Haymaker Defendants**"), and Cooley LLP ("**Cooley**"); and (3) unjust enrichment against all Defendants. A14-55.

The Insider Defendants and the Haymaker Defendants filed motions to dismiss on October 2, 2024, pursuant to Court of Chancery Rules 12(b)(6) and 23.1. Defendants argued that Plaintiffs' claims were (1) derivative in nature and thus barred by Plaintiffs' lack of continuous ownership and their failure to make demand or plead demand futility under Court of Chancery Rule 23.1; (2) insufficiently pled as a matter of substantive Delaware law; and (3) Plaintiffs lacked standing to assert their claims. A56-103. Cooley filed a joinder with those motions to dismiss. A104-05.

On March 14, 2025, the Court of Chancery granted the motions to dismiss and dismissed the complaint with prejudice. A207-14. The Court concluded that all of Plaintiffs' claims were derivative because the alleged harms—dilution of ownership and voting rights, and diversion of transaction consideration—were suffered by all Holdings unitholders, not by Plaintiffs uniquely. A262. The Court also held Plaintiffs lacked standing under *Urdan v. WR Capital Partners, LLC*, 244 A.3d 668 (Del. 2020), and failed to comply with Court of Chancery Rule 23.1 and controlling authority governing derivative claims, including *Tooley v. Donaldson*, *Feldman v. Cutaia*, 951 A.2d 727 (Del. 2008). A263.

Plaintiffs timely filed this appeal to correct two legal errors warranting reversal. ***First***, the Court of Chancery erred in classifying Plaintiffs' claims as derivative rather than direct. The alleged harms—diversion of deal consideration and voting power through a self-interested transaction—directly affected Plaintiffs at the stockholder level, thus falling squarely within the *Tooley* and *Parnes* frameworks for direct claims. ***Second***, even if viewed through the lens of *Urdan*, Plaintiffs maintain standing. Their claims accrued when they held Class AAA Units in Holdings—before the recapitalization that forcibly converted those units into different securities in a markedly different Holdings entity. Plaintiffs' later sale of those new units years later does not extinguish their right to seek redress for fiduciary breaches that occurred while they held the original units.

SUMMARY OF ARGUMENT

This appeal seeks reversal of two legal errors that led the Court of Chancery to dismiss Plaintiffs' claims arising out of a conflicted and value-destructive deSPAC transaction orchestrated by insiders to wrest control of BioTE from its founder and reap personal financial rewards. The lower court erred in both classifying the claims as derivative and concluding that Plaintiffs lacked standing to pursue them. Both rulings are inconsistent with controlling Delaware precedent and, if left undisturbed, would permit fiduciaries to insulate themselves from accountability through transactional design.

1. ***First***, the Court of Chancery wrongly held that Plaintiffs' claims are derivative rather than direct. The complaint does not allege abstract harm to Holdings, but a targeted, personal injury to Plaintiffs themselves—former minority unitholders—who were deceived and diluted in a coercive SPAC transaction engineered by insiders to trigger their own lucrative incentive awards. The transaction diverted more than $135 million in economic value and significant voting power away from legacy unitholders like Plaintiffs and into the hands of conflicted fiduciaries and their allies. These are not general corporate governance grievances. The harm was specific, personal, and transaction-related, falling squarely within the framework for direct claims under *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), and its progeny, including *Parnes v.*

Bally Ent. Corp., 722 A.2d 1243 (Del. 1999), *Houseman v. Sagerman*, 2014 WL 1600724 (Del. Ch. Apr. 16, 2014), and *Blue v. Fireman*, 2022 WL 593899 (Del. Ch. Feb. 28, 2022).

The trial court's misclassification was driven by a formalistic reading of the transaction structure and misapplication of *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251 (Del. 2021). But *Brookfield* did not overrule *Parnes* or displace the settled principle that when fiduciaries extract side payments or self-dealing benefits from a transaction at the expense of legacy owners, the resulting harm is personal and redressable by direct claims. Plaintiffs do not challenge a mere dilution of equity; they challenge a calculated scheme to seize value and, critically, voting power in biote Corp. from them through deception, coercion, and fiduciary betrayal.

2. ***Second***, the trial court erroneously held that Plaintiffs lacked standing under *Urdan v. WR Capital Partners, LLC*, 244 A.3d 668 (Del. 2020), based on the post-transaction sale of Class A Common Units in Holdings and Class V Voting Stock in biote Corp. But *Urdan* is inapposite here. Plaintiffs' claims arose well before the closing of the transaction, when they held entirely different securities: Class AAA Units in Holdings—a Nevada LLC controlled by BioTE's founder. As a precondition of the deal, "immediately prior to the Closing" these original Class AAA Units were involuntarily exchanged or converted into new securities (Class A Common Units), in a recapitalization orchestrated by the very fiduciaries whose

conduct is being challenged. *Urdan* presumes voluntary sales of the same securities that gave rise to the alleged claims. It does not—and should not—bar standing where the plaintiffs' original interests were forcibly converted by the wrongdoing itself.

This Court and the Court of Chancery have consistently recognized that a plaintiff retains standing when fiduciaries deprive the plaintiff of their securities as part of the challenged transaction. *See, e.g., In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108 (Del. Ch. Mar. 31, 2017); *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2018 WL 3120804 (Del. Ch. June 25, 2018); *I.A.T.S.E. Local No. One Pension Fund v. Gen. Elec. Co.*, 2016 WL 7100493 (Del. Ch. Dec. 6, 2016). As these cases make clear, where fiduciaries orchestrate a transaction that eliminates the very securities that anchor the plaintiffs' claims, equity demands that standing be preserved. To hold otherwise would create a roadmap for fiduciaries to engage in misconduct and extinguish liability in one fell swoop.

In short, Plaintiffs have pled viable direct claims for personal harm flowing from a self-interested, deceptive transaction. Their claims accrued when they held Class AAA units in Holdings—before those interests were exchanged or converted through a recapitalization that was part and parcel of the alleged wrongdoing. Under Delaware law, they retain standing to pursue these claims. The judgment of dismissal should be reversed.

STATEMENT OF FACTS

A. BioTE's Growth And The Plaintiffs' Ownership Interests

BioTE was founded in 2012 by Dr. Gary Donovitz ("**Donovitz**"), a board-certified obstetrician-gynecologist and a pioneering figure in hormone replacement therapy. A24. The company specialized in training medical professionals to administer hormone therapy through pellet-based delivery systems. *Id.* Over the next decade, BioTE grew rapidly, achieving widespread adoption of its therapy model across thousands of clinics in the United States. A24-25. By 2021, BioTE had achieved extraordinary financial success, generating $139.4 million in revenue and $32.6 million in net income. A20.

Prior to the transaction, BioTE Holdings, LLC was a privately held Nevada limited liability company that served as the parent company of BioTE Medical, LLC ("**Medical**"), the primary operating company. *Id.* After the transaction, Holdings was a Delaware limited liability company with different members (including Defendants Teresa Weber and Marc Beer), controlled by different entity. A150-51, A155-56. Plaintiffs, the Yosaki Trust and the Mioko Trust, each held a 2.8% ownership interest in Holdings prior to the closing of the challenged transaction. A19-20.

After the transaction closed in May 2022, Plaintiffs' equity interests were dramatically diluted by the triggering of the Insider Defendants' incentive awards and Plaintiffs received substantially less voting power in the publicly traded entity, biote Corp., than they would have otherwise received. A48. Their once-valuable interests in a profitable private company were converted into different securities that could be exchanged for common shares of a debt-laden, thinly traded public company—biote Corp.—with significantly diminished liquidity and value. *Id*.

B. The Insider Defendants' Incentives To Push Through A SPAC Deal

In 2019, Donovitz hired Defendant Teresa Weber ("**Weber**") as CEO of Medical to help raise capital.[1] A20. In early 2021, Donovitz also hired Defendant Marc Beer ("**Beer**") to be Executive Chairman of the Board of Managers of Medical and to assist with securing a capital infusion or strategic transaction. A21; A26. Neither Weber nor Beer had vested equity in Holdings or any of the other BioTE companies prior to the transaction. A20-21.

Weber and Beer negotiated equity incentive compensation triggered upon a financing or change in control, with a higher percentage of equity on a fully diluted basis granted if the financing or change in control was the result of a SPAC transaction. A27. In or about May 2021, Weber and Beer amended their compensation agreements to guarantee each would receive 6% of Holdings' equity if a SPAC deal was consummated—effectively aligning their incentives with closing

[1] Weber was also designated as the CEO of Holdings in pre-Transaction SEC filings by Haymaker SPAC. A20-21.

any SPAC deal, regardless of its merits. A27-28.

Defendant Mary Elizabeth Conlon (“**Conlon**”), who served as General Counsel and Vice President of Business Development of Medical and Holdings, was similarly positioned to benefit from the transaction through a lucrative compensation package despite lacking meaningful corporate legal experience. A22-23.

C. A Hasty Deal With Haymaker Sponsor

In mid-2021, Weber and Beer, without meaningfully pursuing other non-SPAC alternatives, initiated discussions with Haymaker Acquisition Corp. III (“**Haymaker SPAC**”), operated Haymaker Sponsor. A15-16, A28, A31. On July 26, 2021, Holdings executed a letter of intent to merge with Haymaker SPAC. A32. The parties formalized the agreement and disclosed a Business Combination Agreement (“**BCA**”) on December 13, 2021, which contemplated a recapitalization of Holdings immediately prior to causing the company to become publicly traded as “biote Corp.” A32.

Prior to the transaction, Plaintiffs held Class AAA Units in Holdings—a limited liability company organized under the laws of Nevada and managed by BioTE’s founder, Donovitz. A116, A150, A155-56. Immediately prior to the deSPAC transaction, Holdings redomiciled from Nevada to Delaware and underwent a pre-closing recapitalization. A15-16, A62, A150. This recapitalization “immediately prior to the Closing” of the transaction “converted or exchanged (whether by direct exchange, merger or otherwise)"[2] all existing classes of equity in Holdings, including Plaintiffs' Class AAA Units, for a single new class of Holdings units: Class A Common Units. A150, A155-56, A204. Weber and Beer's incentive awards were triggered, they became members of Holdings, and together Weber and Beer received approximately 12% of Holdings on a fully diluted basis. A150.

In the deSPAC transaction, each Holdings member (including new members Weber and Beer) would receive a Class V Voting Share in the public company, biote Corp. (f/k/a Haymaker SPAC), for each newly created Class A Common Unit of Holdings the member held as of the transaction's closing.[3] A150. These Class V Voting Shares had voting rights but did not provide an economic interest. *Id.* Together, Class A Common Units in Holdings and Class V Voting Shares in biote Corp. (*i.e.*, a "paired interest") could be exchanged, upon the holder's election, for common stock in biote Corp. A257-58.

As a result of the recapitalization and deSPAC transaction, Plaintiffs' pre-

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[2] *Haymaker Acquisition Corp. III et al.,* Business Combination Agreement at 2 (Form 8-K) (Dec. 13, 2021) (available at: https://www.sec.gov/Archives/edgar/data/1819253/000119312521356831/d225433dex21.htm); *see In re Santa Fe Pacific S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995) (noting that the court may take judicial notice of facts publicly available in SEC filings).

[3] Given that Weber and Beer's incentive award were triggered by the transaction, Weber and Beer became members of Holdings as part of the recapitalization and received both Class A Common Units in Holdings and Class V Voting Stock in biote Corp.

transaction Class AAA Units in Holdings, a cash-generating private limited liability company organized under the laws of Nevada, were converted into (i) ownership interests in Holdings, now a Delaware limited liability company, with different members (including Weber and Beer, as their incentive awards were triggered), and controlled by a different entity (as Donovitz was ousted as managing member and replaced by biote Corp.), and (ii) voting stock in biote Corp. Plaintiffs also received a right to exchange these paired interests in Holdings and biote Corp. for common stock in biote Corp. A257-58.

D. The SPAC Collapse And Concealment Of Materialized Risks

By late 2021, the SPAC market had fully collapsed. A21-33. Institutional investors declined to fund a PIPE (private investment in public equity) in connection with the transaction, portending dire storm warnings that the transaction could fail, and Haymaker SPAC faced massive redemptions from its public shareholders. A33. Months before the closing on May 26, 2022, Defendants knew the overwhelming majority of Haymaker SPAC investors would redeem their shares and leave the SPAC with virtually no cash to contribute to the post-transaction entity. A42-44. As a result, if Holdings proceeded with the transaction, it would assume significant debt only necessary to fund the transaction and receive almost nothing in return. A46.

Despite this, Defendants never informed Plaintiffs or Donovitz of these facts. Instead, they continued to tout the transaction's benefits and failed to disclose that:

- The SPAC would provide no meaningful cash in the transaction (A46);
- The transaction would saddle Holdings with $125 million in debt, which was only necessary to complete the transaction and pay Defendants their ill-gotten gains (A27, A47);
- biote Corp. would be delisted from NASDAQ (A17); and
- The market for biote Corp. securities would be illiquid (A41).

E. Defendants Mislead Donovitz Into Waiving The Net Tangible Assets Closing Condition Because They Knew The SPAC Would Have Less Than $5 Million To Contribute

The BCA included a Net Tangible Assets Closing Condition, which provided that the transaction could not proceed if Haymaker SPAC did not have at least $5 million in net tangible assets to contribute. A36-37. This closing condition could be waived only with Donovitz's written consent, who held sole voting control of Holdings. *Id.*

Facing the imminent failure of the deal due to overwhelming redemptions, Defendants executed a calculated plan to induce Donovitz into waiving this closing condition. A43-46. Defendant Cooley, acting under the direction of Beer, falsely advised Donovitz that failure to close the deal would expose him to personal liability of up to $70 million. *Id.* Donovitz's fiduciaries never told him that he could kill the broken deal by refusing to waive the closing condition or even that such a closing condition existed. *Id.*

Under pressure, Donovitz signed a technical waiver document, drafted by Cooley, that unwittingly waived the Net Tangible Assets Closing Condition, after being led to believe it related to an unrelated advisory agreement regarding his post-transaction role at BioTE. *Id.* In reality, the waiver cleared the path for the disastrous transaction to proceed.

F. The Value Destructive Transaction Closes

On May 26, 2022, the transaction closed. A47. Rather than receiving the cash and liquidity that was promised, Plaintiffs and other legacy Holdings members were left with securities that could be converted into biote Corp. common stock which was thinly traded, debt-laden, and temporarily delisted. The biote Corp. stock price plummeted nearly 30% within one trading day of the announcement that the transaction had closed. A47.

In contrast, Defendants reaped windfalls:

- Weber and Beer *each* received approximately $34.6 million in Holdings equity and voting power in biote Corp.;
- Conlon received over $1.4 million in biote Corp. stock and a 30% raise;
- Haymaker Defendants received over $64 million in biote Corp. stock, having paid only $25,000 for their founder shares.

A47-48. Altogether, Defendants received approximately $135 million in equity, thereby diluting Plaintiffs' interest in Holdings and voting power in biote Corp. *Id.*

G. Procedural History

Plaintiffs initiated this action on July 12, 2024, in the Delaware Court of Chancery, seeking redress for what they alleged was a calculated scheme by Defendants to enrich themselves at the expense of BioTE's legacy unitholders. A1.

On July 22, 2024, Plaintiffs amended their complaint. A14-55.

Defendants moved to dismiss, asserting that the claims were derivative rather than direct, and that Plaintiffs lacked standing because they no longer held their equity interests. A56-84, A85-103, A104-105. The motions were fully briefed by November 22, 2024, and the parties presented oral argument on March 14, 2025.

At oral argument, the Court of Chancery acknowledged the gravity of the allegations but ultimately granted the motions to dismiss, concluding that Plaintiffs' claims were derivative and Plaintiffs lacked standing under the Delaware Supreme Court's decision in *Urdan v. WR Capital Partners, LLC*. A262-275. The Court of Chancery dismissed Plaintiffs' action with prejudice. A207-14. This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN HOLDING THAT PLAINTIFFS' CLAIMS ARE DERIVATIVE

A. Question Presented

Did the Court of Chancery err in characterizing Plaintiffs' claims as derivative, despite Plaintiffs' allegations that conflicted fiduciaries orchestrated the transaction to divert material deal consideration and voting power to themselves, causing individualized harm to minority unitholders? A207-14.

B. Scope Of Review

This Court reviews *de novo* whether a claim is direct or derivative. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart,* 845 A.2d 1040, 1048 (Del. 2004). This determination implicates both the substantive nature of the claim and a plaintiff's standing to assert it. *See Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1260 (Del. 2021).

C. Merits Of The Argument

The Court of Chancery erred in characterizing Plaintiffs' claims as derivative. A262, A207, A209, A212. However, this is not a simple case of corporate mismanagement or dilution caused by the issuance of equity for insufficient consideration.

Plaintiffs were harmed by disloyal fiduciaries' scheme to conceal the materialization of deal destroying risks (*e.g.*, that the Haymaker SPAC investors would redeem in droves and evaporate the cash consideration for the transaction), induce Donovitz into waiving a key closing condition requiring the SPAC contribute at least $5 million in net tangible assets to the deal, and then funnel transaction consideration away from a few legacy Holdings unitholders, like Plaintiffs, to themselves. A16-18; A27-A33. By forcing through this broken SPAC transaction, Weber and Beer triggered their equity incentive awards, became new members of Holdings, and received approximately 12% of the Class V Voting Stock in biote Corp. from the transaction consideration. This diversion of transaction consideration and voting power in biote Corp. did not harm Holdings; it harmed Plaintiffs by diverting value to Weber and Beer and diminished Plaintiffs' voting power in the new publicly traded entity (biote Corp. f/k/a Haymaker SPAC). Under long-settled Delaware precedent, Plaintiffs' claims are direct or personal.

1. Plaintiffs' Claims Are Direct, Not Derivative.

Delaware law recognizes multiple categories of stockholder claims: derivative claims that belong to the corporation, direct claims that adhere to a stockholder's securities, and personal claims that belong to the individual based on their unique legal rights. *I.A.T.S.E. Local No. One Pension Fund v. General Electric Company*, 2016 WL 7100493, at *1 (Del. Ch. Dec. 6, 2016).

The test for whether a claim is direct or derivative turns on two questions arising out of *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" 845 A.2d 1031, 1032 (Del. 2004); *see also Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1263 (Del. 2021) (reaffirming *Tooley* as the operative test).

Plaintiffs' claims are direct under *Tooley*: (1) Plaintiffs suffered individualized harm, in that they received diminished voting power in biote Corp.; and (2) any recovery should flow to them, not to Holdings (given that Weber and Beer are now members) or biote Corp. *Tooley*, 845 A.2d at 1033. Neither Holdings nor biote Corp. were harmed by this diversion of voting power in biote Corp.; Holdings was merely the conduit used by the fiduciaries to transfer valuable voting rights to themselves.

In *Parnes v. Bally Entertainment Corp.*, the Delaware Supreme Court held that "[a] stockholder who directly attacks the fairness or validity of a merger alleges an injury to stockholders, not the corporation, and may pursue such a [direct] claim even after the merger at issue has been consummated." 722 A.2d 1243, 1244-45 (Del. 1999) (holding a former shareholder plaintiff's complaint "adequately alleges a direct, or individual, claim attacking the fairness of the merger") (citations omitted). "In order to state a direct claim with respect to a merger, a stockholder must challenge the validity of the merger itself, usually by charging the directors with breaches of fiduciary duty resulting in unfair dealing and/or unfair price." *Id.* The Court emphasized that where fiduciaries divert merger consideration that "would otherwise have been shared pro rata among the stockholders," the resulting harm is personal—and the claim is direct. *Id.* at 1245.

Since *Parnes*, Delaware courts have routinely recognized that challenges to management or "directors' conduct during a merger process are direct claims" when a plaintiff alleges a "flawed sales process . . . that delivered unique benefits to management and members of the Board to the detriment of the stockholders[.]"[4]

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[4] *In re Saba Software, Inc. S'holder Litig.,* 2017 WL 1201108, at *17-18 (Del. Ch. Mar. 31, 2017), *as revised* (Apr. 11, 2017); *see also Crescent/Mach I Partners,* 846 A.2d at 973 (characterizing claims as direct when plaintiffs "alleg[ed] that the director defendants breached their fiduciary duties by approving and recommending the merger at an unfair price resulting from an unfair process" when an insider allegedly diverted to themselves "an undue share of the value and growth potential of [the company's] business"); *Manti Holdings, LLC v. Carlyle Grp. Inc.,* 2022 WL 1815759, at *14 (Del. Ch. June 3, 2022) (claim that director bonus diverted merger consideration from stockholders was direct); *Carr v. New Enter. Assocs., Inc.,* 2018 WL 1472336, at *11 (Del. Ch. Mar. 26, 2018) ("breach of fiduciary duty claims concerning the Warrant Transaction are akin to challenging the outcome of a merger and thus are direct."); *Houseman,* 2014 WL 1600724 at *13 ("To survive a motion for judgment on the pleadings, the plaintiff must plead facts supporting an inference that the side payment represented an improper diversion and that, absent the impropriety, the consideration would have gone to the stockholders: such a pleading states a direct claim against the defendant directors."); *Straight Path Commc'ns Inc. Consol. S'holder Litig.,* C.A. No. 2017-0486-SG, 2018 WL 3120804, at *12 (Del. Ch. June 25, 2018) (holding that plaintiff stated a direct claim under *Parnes* and its progeny); *Oliver v. Boston University,* 2006 WL 1064169, *28 and n. 249 (Del. Ch. Apr. 14, 2006) (holding claims arising from "[t]he allocation of merger proceeds . . . at the expense of the common shareholders" were "direct claims because the corporation was not harmed by the challenged conduct-the shareholders were.").

This principle has been consistently reaffirmed. In *Blue v. Fireman*, for example, Vice Chancellor Zurn held that stockholder claims challenging a merger were direct because plaintiffs alleged "improper diversion of material merger consideration that stockholders would otherwise enjoy." 2022 WL 593899, at *11 (Del. Ch. Feb. 28, 2022). Similarly, in *Houseman*, this Court recognized that even a small side payment to directors could form the basis for a direct claim. 2014 WL 1600724, at *13.

Despite this long line of Delaware cases finding that plaintiffs can have direct claims after unfair mergers that result in the diversion of merger consideration to disloyal fiduciaries, the trial court focused on the fact that the transaction was accomplished through an Up-C structure, rather than a traditional merger. A262. But these are distinctions without a difference. *Parnes* and its progeny make it clear that when fiduciaries divert deal value away from legacy unitholders and into their own pockets, the harm is personal, and the claims are direct.

The fiduciary defendants—Weber, Beer, and Conlon—stood to gain tens of millions in equity awards tied to closing the SPAC transaction. A47-48. Weber and Beer's incentives were aligned with closing any deal, at any price, such that Weber and Beer could become members of Holdings and become entitled to transaction proceeds, and Conlon's incentive to close was to secure a lucrative raise and equity grant. Indeed, Haymaker SPAC's SEC filings disclosed that it anticipated that

Weber would receive "net sale proceeds."[5] The Insider Defendants concealed material facts about the collapse of the deal's economics, orchestrated a coercive process, and extracted transaction consideration for themselves (Class V Voting Stock in biote Corp.) that would have otherwise flowed to Holdings legacy unitholders like Plaintiffs. As in *Parnes* and its progeny, that conduct supports direct claims.

2. The deSPAC Transaction Was Functionally A Merger.

Although the transaction was not technically a merger, it functionally operated as one. All of the hallmarks of a merger that justify Delaware courts finding dilution claims are direct are present here. Therefore, the trial court should not have dismissed the importance of the Delaware cases finding that plaintiffs who were squeezed out in a merger can maintain direct claims after the merger.

According to the BCA, "immediately prior to the Closing" of the transaction, Holdings would engage in a recapitalization that "converted or exchanged (whether

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[5] The May 5, 2022 proxy stated that, "provided [Weber] remains in continuous service through the closing date of a 'Change in Control' of Biote (which will include the business combination)," Weber will receive "a specified amount of ***net sale proceeds***. For this purpose, the board of managers has determined that the net sale proceeds from the business combination shall be $555,000,000, and it is therefore expected that Ms. Weber shall receive approximately 3,919,688 shares of Class V voting stock and approximately 3,919,688 Biote Units [*i.e.*, Class A Common Units in Holdings which, with Class V Voting Stock in biote Corp., could be exchanged for shares of biote Corp.]." A28.

by direct exchange, merger or otherwise)"[6] all legacy unitholders' equity interests, including Plaintiffs' Class AAA Units, for newly created Class A Common Units (meaning Plaintiffs' were involuntarily deprived of the securities they held when their causes of action accrued). Additionally, control of Holdings was transferred from Donovitz to biote Corp., as biote Corp. was substituted in as the managing member.

3. ***Brookfield* Did Not Overrule *Parnes* And This Case Falls Within An Exception.**

The Court of Chancery relied heavily on *Brookfield Asset Mgmt., Inc. v. Rosson*, in dismissing Plaintiffs' claims as derivative. 261 A.3d 1251 (Del. 2021). *Brookfield* reaffirmed *Tooley* and clarified the rule that ordinary dilution claims, "absent more," are direct. *Id.* at 1267. But *Brookfield* did not displace the long-standing exception recognized in *Parnes*. Indeed, *Brookfield* expressly distinguished cases where fiduciaries divert merger consideration to themselves for their own benefit. *See id*. at 1264 n.102 (noting that "*Parnes* fits within the *Tooley* framework"). This Court reiterated that the critical distinction is whether the plaintiff's injury was to their stock or to the corporation as a whole.

Here, Plaintiffs do not challenge simple equity dilution or allege that shares

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[6] *Haymaker Acquisition Corp. III et al.,* Business Combination Agreement at 2 (Form 8-K) (Dec. 13, 2021) (available at: https://www.sec.gov/Archives/edgar/data/1819253/000119312521356831/d225433dex21.htm).

were issued for inadequate consideration. A-14. Plaintiffs suffered from a transaction pushed through by the deception of disloyal fiduciary insiders for their own pecuniary gain, causing the diversion of Class V Voting Stock and, thus, voting power in biote Corp., to conflicted insiders. That kind of personal injury falls squarely within the *Parnes* exception.

Delaware courts have continued to apply this rule after *Brookfield*. For example, in *In re GGP, Inc. Stockholder Litig*., the Court of Chancery explained that *Brookfield* does not affect cases where fiduciaries "secured side benefits" through a conflicted deal process. 282 A.3d 37, 50 (Del. Ch. 2022). In *Saba*, the Court upheld direct claims challenging a merger where insiders received unfair compensation through a rushed process. 2017 WL 1201108, at *17-18. And in *Blue v. Fireman*, Vice Chancellor Zurn confirmed that claims are direct where stockholders allege the improper diversion of material merger consideration that they would otherwise have received. 2022 WL 593899, at *5-15 (Del. Ch. Feb. 28, 2022). The facts here are similar—and the outcome should be the same.

4. In The Alternative, Plaintiffs' Claims Are Personal And Survived Any Conversion Or Sale

Even if the Court were to question whether Plaintiffs' claims are properly characterized as direct under the *Tooley* framework, in the alternative, this Court should find that Plaintiffs' claims are personal and survive any subsequent conversion or sale of the securities Plaintiffs received in the transaction.

The claims here may be properly categorized as personal.[7] Delaware law draws a clear distinction between claims that are "in the security"—and may transfer with a sale—and claims that are personal to the original securities holder. Personal claims arise from specific legal rights or individualized harm and do not depend on continued ownership. Plaintiffs here allege precisely such claims: disloyal fiduciaries made targeted misrepresentations and omissions to extract value from them personally, causing individualized injury not shared by the company or the current members of Holdings (which includes Weber and Beer).

The Second Circuit's recent application of Delaware law in *Sabby Volatility Warrant Master Fund Ltd. v. Jupiter Wellness, Inc.*, reinforces this principle. 2025 WL 1363171 (2d Cir. May 12, 2025) (applying Delaware law). In *Sabby*, the court held that a shareholder retained standing to sue for a dividend, even after selling the underlying shares, because the right to receive the dividend had already vested and constituted a personal claim, not a right "in the security" that transferred with the stock. *Id.* at *2. Thus, the *Sabby* plaintiff's right to bring suit was not tied to their continued ownership of the security, but rather to the fact that the plaintiff was the record holder at the time the right accrued. Delaware law, the court emphasized, does

[7] As discussed in further depth in Section II below, if Plaintiffs' claims are found to be personal they would not be subject to the continuous ownership rule. *See Urdan*, 244 A.3d at 677.

not permit a result where no one could enforce such a right: if the seller loses standing by virtue of the sale, but the buyer never acquires the claim, then the right becomes unenforceable. *Id.*

Delaware law also makes clear that when fiduciaries use a recapitalization to strip minority holders of voting power or economic rights, those holders suffer a direct and personal injury. In *Gatz v. Ponsoldt*, the Delaware Supreme Court held that minority stockholders could bring direct fiduciary duty claims where the controlling stockholder orchestrated a recapitalization that diluted their equity and transferred control to a favored insider. 925 A.2d 1265, 1279–81 (Del. 2007). There, the controller arranged for newly issued shares to be allocated to a handpicked individual, in exchange for millions in cash and notes that flowed to the controller. *Id*. at 1272–73. The Court rejected the argument that the harm was derivative, emphasizing that the public shareholders suffered a direct loss of control and economic value. *Id*. at 1279–81. Equity, this Court explained, "looks to substance over form"—and the fact that the benefit may flow through a third party does not alter the personal nature of the injury. *Id*. at 1280–81.

The same logic applies here. The Insider Defendants engineered a recapitalization that eliminated Plaintiffs' Class AAA Units, diluted their interests, triggered Weber and Beer's equity incentive awards, and made Weber and Beer members of Holdings on the eve of the closing of the transaction. Then, the closing transferred voting power in biote Corp. to the members of Holdings, causing Weber and Beer to receive approximately 12% of the Class V Voting Stock in biote Corp. As in *Gatz*, fiduciaries used their control to restructure ownership in a way that expropriated value and voting power from minority holders and transferred it to themselves or their allies. That is precisely the kind of fiduciary-driven recapitalization *Gatz* holds gives rise to a personal claim.

The harm Plaintiffs allege is not a generalized injury to Holdings, but the specific and individualized extraction of governance rights in biote Corp. from Plaintiffs, accomplished through deception and coercion. While the actual issuance of Class V Voting Stock occurred at the closing, the entitlement to receive that voting power—and the corresponding diversion of value—was engineered to occur shortly in advance of the closing. The recapitalization, which forcibly converted Plaintiffs' Class AAA Units in Holdings, was an essential step in completing that wrongful transfer of voting power. As in *Sabby*, the claims do not "travel with the shares" because the rights at issue were personal to Plaintiffs and were extinguished as part of the very transaction being challenged. Plaintiffs' standing survives because they seek redress for the fiduciary misconduct that occurred while they still held their original securities—misconduct that culminated in the loss of their economic and governance rights.

Put differently: if Plaintiffs lost standing simply because their Class AAA

Units in Holdings were exchanged or converted as a consequence of or precondition to the very transaction they challenge, then—just like in *Sabby*—no one would have standing to enforce those rights. The wrongdoers, who received newly created Class A Common Units in Holdings because of the transaction, would have no incentive to sue themselves. And the harmed parties, who no longer hold the original Class AAA Units in Holdings, would be deemed to lack standing. Delaware law does not—and should not—endorse such a result.

II. PLAINTIFFS HAVE STANDING, AS THEIR CLAIMS ACCRUED WHEN PLAINTIFFS ONLY HELD CLASS AAA UNITS AND PLAINTIFFS' SALE OF DIFFERENT SECURITIES IS IRRELEVANT

A. Question Presented

Did the Court of Chancery err in holding that Plaintiffs lacked standing to pursue claims that arose when the Plaintiffs only held legacy Class AAA Units in Holdings based on a rigid application of *Urdan v. WR Capital Partners, LLC*, 244 A.3d 668 (Del. 2020), when, years after the transaction, Plaintiffs converted and sold different Class A Common Units in Holdings that they received as part of the recapitalization that immediately preceded the transaction? A207-14.

B. Scope Of Review

Whether a plaintiff has standing is a question of law, and this Court reviews questions of law *de novo*. *Urdan v. WR Cap. Partners, LLC*, 244 A.3d 668, 674 (Del. 2020).

C. Merits Of The Argument

This appeal presents an opportunity for this Court to clarify the limits of its holding in *Urdan v. WR Capital Partners, LLC*, 244 A.3d 668 (Del. 2020), and to reaffirm foundational equitable principles that prevent fiduciaries from evading accountability through transactional engineering. *Urdan* held that plaintiffs who voluntarily sell their securities generally lose standing to bring direct claims related to that interest. But it did not address a different scenario: where fiduciaries themselves eliminate these securities as part of the transaction being challenged.

This is such a case. Plaintiffs' claims are direct, arose before the recapitalization and the transaction's closing, and concern fiduciary misconduct that occurred while Plaintiffs only held their original Class AAA Units in Holdings. Plaintiffs never sold their Class AAA Units; as the BCA put it, "immediately prior to the Closing" of the transaction these Class AAA Units were "converted or exchanged" for newly created Class A Common Units as part of a recapitalization.[8] Under Delaware law, Plaintiffs retain standing to seek redress.

1. Plaintiffs' Claims Arose Before Closing, While They Only Had Class AAA Units In A Markedly Different Holdings Entity

The gravamen of Plaintiffs' claims is that Insider Defendants breached their fiduciary duties by negotiating and pushing through a self-interested, value-destroying SPAC transaction over all obstacles by, among other things:

- Preferring a SPAC transaction over other strategic alternatives, in order to trigger the grant of a higher percentage of ownership of Holdings to Weber and Beer pursuant to their equity incentive awards (A28, A40-46);
- Agreeing to a material reduction in the agreed-upon equity value of Holdings from $737 million to $555 million, without securing correspondingly significant concessions from the Haymaker Defendants (A119);

[8] *Haymaker Acquisition Corp. III et al.,* Business Combination Agreement at 2 (Form 8-K) (Dec. 13, 2021) (available at: https://www.sec.gov/Archives/edgar/data/1819253/000119312521356831/d225433dex21.htm).

- Misleading Donovitz about the risks of the transaction and knowingly failing to disclose that these risks had materialized, in particular the fact that the Defendants knew by late 2021 and no later than Spring 2022 that an overwhelming majority of the Haymaker SPAC investors would redeem their shares and eviscerate the cash consideration the SPAC anticipated contributing to the transaction (A113, A120);
- Lying to Donovitz about the risk of $50-70 million in personal liability if he pulled Holdings out of the deal (A43); and
- Misleading Donovitz into waiving the Net Tangible Assets Closing Condition in the BCA, thereby removing the last safeguard against a value-destructive transaction (A45-46, A113).

All of these acts occurred prior to the recapitalization, when Plaintiffs only held Class AAA Units in Holdings. As a result of the recapitalization "immediately prior to the Closing" of the transaction,[9] Plaintiffs' Class AAA Units (in a closely held Nevada LLC managed by Donovitz) were "converted or exchanged (whether by direct exchange, merger or otherwise)"[10] for newly created Class A Common Units in Holdings, which (a) was redomiciled to Delaware, (b) held by a different set of members, (c) diluted by 12% by the triggering of Weber and Beer's incentive awards, and (d) controlled by a different managing member (*i.e.*, biote Corp.) after the Insider Defendants pushed out BioTE's founder and Holding's prior managing member, Donovitz. A155-56.

[9] *Haymaker Acquisition Corp. III et al.,* Business Combination Agreement at 2 (Form 8-K) (Dec. 13, 2021) (available at: https://www.sec.gov/Archives/edgar/data/1819253/000119312521356831/d225433dex21.htm).

[10] *Id.*

To the extent Plaintiffs' causes of action were associated with any securities, they were associated with the Class AAA Units in Holdings that Plaintiffs held prior to the recapitalization. Defendants' argument that Plaintiffs' subsequent sale of different securities that didn't exist at the time of the breaches (*i.e.*, biote Corp. common stock, which Plaintiffs received after converting Class A Common Units of Holdings and Class V Voting Stock in biote Corp.) is inapposite and has no bearing on whether the Plaintiffs have standing. Instead, Plaintiffs' claims follow the long line of Delaware cases that hold that when a plaintiff challenges the fairness of a transaction and was deprived of their property rights by that transaction, the plaintiff "retain[s] direct standing after [the] merger has closed." *Blue*, 2022 WL 593899, at *11.

2. *Urdan* Does Not Apply Because The Relevant Securities Were Converted Or Exchanged As Part Of The Challenged Transaction

The Delaware Supreme Court's *Urdan* decision stands for the proposition that a plaintiff loses standing when they voluntarily sell the shares held at the time their causes of action accrued because claims generally "travel with the shares" to the buyer in a sale. 244 A.3d at 675–76. The logic undergirding *Urdan* (which did not involve a merger) breaks down when, as here, the securities to which any claims attached were forcibly converted or exchanged as a precondition to the transaction a plaintiff challenges.

As the Court of Chancery recognized in *Urdan*, "[i]f the plaintiffs had been deprived of their shares by merger, then that distinction would matter, because the plaintiffs could challenge the transaction that deprived them involuntarily of their property rights." 2019 WL 3891720, at *11 (Del. Ch. Aug. 19, 2019). This Court affirmed the trial court's acknowledgment that dilution claims arising out of a merger can be personal in nature, stating that:

> some dilution claims have been considered personal because in select situations—such as . . . a squeeze-out merger that involuntarily separates the stockholder from its stock and dilutes that stockholder in the process—the stock itself either ceases to exist or is not essential to the wrong. In other words, the harm is to the stockholder, not the stock itself.[11]

This "distinction" identified by the Court of Chancery matters here because, while the deSPAC transaction was not a simple merger, the recapitalization was a precondition to the transaction and the Plaintiffs' units were "converted or exchanged" in that recapitalization.

Rather than address this distinction directly, Defendants argued that Plaintiffs' conversion of Class A Common Units in Holdings and Class V Voting Stock in biote Corp. into common stock of biote Corp. and the sale of that common stock, years after the challenged transaction, eliminated Plaintiffs' standing to seek redress. Defendants' argument ignores that Plaintiffs could not have transferred their claims

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[11] *Urdan*, 244 A.3d at 679 (recognizing that some claims do not travel with the sale of shares when "the harm is to the stockholder, not the stock itself.").

to a new buyer through their sale of biote Corp. common stock because the asset to which those claims were attached (Class AAA Units in Holdings) were converted or exchanged as part of the recapitalization. Moreover, the invocation of a contractual right to convert Holdings Class A Common Units and biote Corp. Class V Voting Stock into biote Corp. common stock could never account for the value of Plaintiffs' litigation claims, such they could preserve their litigation claims in a sale of the common stock.

In this scenario, *Urdan*'s logic breaks down, and a more nuanced application of the law should follow. Delaware courts have long held that plaintiffs who challenge the fairness of a merger maintain standing to assert a direct claim after the merger deprives them of the securities they held at the time the causes of action accrued.[12] As Vice Chancellor Zurn succinctly put it in *Blue v. Fireman*, "a target stockholder retains direct standing after a merger has closed to challenge the fairness

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[12] *Parnes,* 722 A.2d at 1245 ("A stockholder who directly attacks the fairness or validity of a merger alleges an injury to the stockholders, not the corporation, and may pursue such a [direct] claim even after the merger at issue has been consummated."); *Morris v. Spectra Energy Partners (DE) GP, LP*, 246 A.3d 121, 131 (Del. 2021) (recognizing that even if a plaintiff lost standing to pursue a derivative claim, a direct claim to challenge the validity of a merger is still an available avenue for relief); *Dieterich v. Harrer*, 857 A.2d 1017, 1028-29 (Del. Ch. 2004) (holding that "a direct attack on the fairness or validity of a merger can be maintained as an individual or direct action."); *see also In re Sunstates Corp. S'holder Litig*., 2001 WL 432447, at *3 (Del. Ch. Apr. 18, 2001) ("One induced to sell shares as a consequence of a breach of fiduciary duty plainly has a claim separate from the ownership of the shares themselves.").

or validity of the merger itself." 2022 WL 593899, at *11. Similarly, in *Parnes v. Bally Ent. Corp.*, the Delaware Supreme Court held that even where a plaintiff no longer owns shares post-merger, she can assert direct claims challenging the fairness of the transaction. 722 A.2d 1243, 1245 (Del. 1999). This Court explained that "a stockholder who directly attacks the fairness or validity of a merger may bring an individual claim," *id*. at 1245–46, and that the merger does not deprive such a plaintiff of standing.

The Court of Chancery has also previously recognized that fiduciary duty claims may persist even when the challenged transaction eliminates the securities to which the claims relate. *See In re Saba Software, Inc. S'holder Litig*., 2017 WL 1201108, at *12 (Del. Ch. Mar. 31, 2017), *as revised* (Apr. 11, 2017); *In re Straight Path Commc'ns Inc. Consol. S'holder Litig*., 2018 WL 3120804, at *14 (Del. Ch. June 25, 2018).

In *Saba*, the court rejected a standing challenge where fiduciaries used their control to divert consideration to themselves in a sale process. The fact that the plaintiffs no longer held their shares did not extinguish their claims. The court noted that "[w]hen a controller improperly uses her control to extract a special benefit in the sale itself, at the expense of the consideration received by stockholders in exchange for their interest in the company, the injury, and the recovery, run directly to the former stockholders." *Id*.

Similarly, in *Houseman v. Sagerman*, 2014 WL 1600724 (Del. Ch. Apr. 16, 2014), the Court declined to dismiss claims brought by former stockholders whose equity had been converted as part of a merger. The *Houseman* court held that "unfair acts of self-dealing throughout the course of a merger transaction should not be immune from stockholder challenge," if the self-dealing "wrongfully take[s] consideration off the table that otherwise would have been shared by stockholders on a pro rata basis." *Houseman*, 2014 WL 1600724, at *6. The focus in *Houseman* was on whether the challenged conduct injured the plaintiffs directly—here, it clearly did.

3. Standing Still Exists When Securities Are Eliminated By The Challenged Transaction And The Harm Is Personal

Delaware courts have repeatedly recognized that when fiduciaries eliminate or forcibly convert a plaintiff's securities as part of the very transaction being challenged, and when the alleged harm is personal rather than derivative, standing still exists, even if the plaintiffs later sell different securities received as consideration. This case fits squarely within that settled principle.

In *I.A.T.S.E. Local No. One Pension Fund v. General Electric Co.*, 2016 WL 7100493 (Del. Ch. Dec. 6, 2016), the Court of Chancery rejected the precise standing argument Defendants advance here. There, the plaintiff's shares in GE Capital were unilaterally terminated by its parent GE, and replaced with shares in GE. The plaintiff later sold those new GE shares. The defendants argued that the claims "traveled with the shares," as in *Activision*, and were lost upon sale. The trial court disagreed, holding that "when a stockholder is squeezed out by a merger, however, in a transaction representing a breach of duty, the transaction involved necessarily severs the relationship between stockholder and entity." *Id.* at *5. The claim, therefore, vests in the original equity holder, not in the consideration received. That conclusion holds whether the plaintiff receives cash or shares in an affiliate—the key inquiry is whether the harm was inflicted as part of a coerced transaction.

The Court's logic in *I.A.T.S.E.* applies directly here. Plaintiffs' Class AAA units were not sold, but forcibly converted or exchanged "immediately prior to the Closing" in a recapitalization that was required to effect the challenged deSPAC transaction. Plaintiffs received different securities in a fundamentally restructured Holdings entity—one domiciled in another state, diluted, and under new control (without BioTE's founder). The transaction, in essence, terminated their original ownership and extinguished their equity in Holdings. As in *I.A.T.S.E.*, the resulting claims did not "travel" with the newly issued stock in biote Corp., and their later sale has no bearing on Plaintiffs' standing.

Plaintiffs' claims are also personal because they stem from specific misrepresentations and omissions aimed at them and their agent, Donovitz—not at the market broadly. The Complaint alleges that the Insider Defendants failed to disclose material information they had a fiduciary duty to share, to influence

Donovitz and Plaintiffs' decisions in connection with the transaction. This aligns with *Noerr v. Greenwood*, 2002 WL 31720734 (Del. Ch. Nov. 22, 2002), where the Court held that disclosure-based fiduciary duty claims are personal to the stockholders who were misled and cannot be asserted by subsequent holders. The *Noerr* court rejected the notion that such claims can be transferred with the stock, because the injury inheres in the deception practiced on the stockholder, not in the stock itself. *Id.* at *4.

Delaware law thus supports Plaintiffs' standing from multiple angles: Like the plaintiff in *I.A.T.S.E.*, Plaintiffs did not voluntarily sell the securities they held when the claims arose; those securities were extinguished by a fiduciary-controlled transaction. Like in *Noerr*, Plaintiffs' harm is personal and based on tailored omissions and misstatements, not general harms to the security itself. And consistent with *Urdan*, Plaintiffs retain standing because their claims do not "travel with the shares" where the securities were forcibly converted as part of the wrongdoing.

Where fiduciaries both engineer the challenged transaction and eliminate the securities to which the claims relate, equity demands that standing persist. Otherwise, fiduciaries would have a roadmap to extinguish liability by eliminating plaintiffs' interests before litigation can be brought—an outcome Delaware courts have rightly refused to endorse.

Defendants may nevertheless argue that *In re Activision Blizzard Inc.*

Stockholder Litig., 124 A.3d 1025 (Del. Ch. 2015), supports their position, because Plaintiffs maintained some form of ownership in the post-transaction entity. But *Activision* is inapposite. There, the court reasoned that claims "traveled with the shares" where plaintiffs continued to hold the same class of stock in the same corporate entity, and asserted fiduciary duty claims on behalf of the corporation.

By contrast, Plaintiffs here did not retain continuous ownership of the *same securities in the same entity* that existed when the fiduciary breaches occurred. Their Class AAA Units in a Nevada LLC were forcibly eliminated through a recapitalization that was a necessary precondition to the transaction. Plaintiffs were then issued different securities in Holdings, that had been restructured, redomiciled to Delaware, with a new capital structure, and controlled by a different entity. That recapitalization terminated their relationship with the original Holdings entity. *Activision's* logic—based on continued ownership in the same entity—is therefore inapplicable.

4. Denying Standing Would Create Perverse Incentives For Fiduciaries

Adopting Defendants' argument that the subsequent sale of different securities received as part of the recapitalization caused Plaintiffs to lose standing would allow fiduciaries to eliminate their own potential liability through coercive recapitalizations and then invoke lack of standing to bar suit. Such a rule would enable corporate insiders to insulate themselves from liability by destroying the very interests that gave rise to the claim.

This Court has rejected similar tactics in cases like *Basho Techs. Holdco B, LLC v. Georgetown Basho Investors, LLC*, where fiduciaries used control rights to entrench themselves and extract unfair terms. 2018 WL 3326693 (Del. Ch. July 6, 2018). There, as here, insiders leveraged financial distress and governance maneuvers to shift value from minority holders to themselves.

The Court should not permit Defendants to convert the continuous ownership rule from a shield for defendants into a sword against stockholders. Equitable standing rules must be applied flexibly to ensure accountability and justice.

CONCLUSION

The Court of Chancery erred in holding that Plaintiffs' claims were derivative and that they lacked standing to pursue them. Plaintiffs allege a direct injury: the deliberate diversion of a material amount of transaction consideration to the Insider Defendants, causing the dilution of Plaintiffs' voting and economic rights, through a conflicted and deceptive transaction orchestrated by fiduciaries for their own enrichment. Under *Tooley, Parnes*, and their progeny, such claims are direct.

The court further erred in applying *Urdan* to bar standing. Plaintiffs' claims accrued while they held Class AAA Units in Holdings, before those interests were involuntarily converted in a recapitalization orchestrated by the fiduciaries as part of the challenged transaction. Delaware law does not—and should not—permit fiduciaries to eliminate plaintiffs' standing by engineering the very transactions that gave rise to the claims.

For these reasons, Plaintiffs respectfully request that this Court reverse the judgment below and remand for further proceedings.

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Respectfully submitted,

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