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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| 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,<br><br>Plaintiffs Below,<br>Appellants,<br><br>v.<br><br>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,<br><br>Defendants Below,<br>Appellees | No. 157, 2025<br><br>Court Below:<br>Court of Chancery of the State of Delaware<br><br>C.A. No. 2024-0738-JTL |

# BIOTE APPELLEES AND HAYMAKER APPELLEES' ANSWERING BRIEF ON APPEAL

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## NATURE OF PROCEEDINGS[1]

Appellants and plaintiffs-below, the Yosaki and Mioko Trust (collectively, "Appellants/Plaintiffs"), commenced this action in July 2024, asserting three causes of action relating to the BCA transaction ("Transaction"): (1) breach of fiduciary duty against Weber, Beer, and Conlon; (2) aiding and abetting such breach against Cooley, Haymaker Sponsor, and Heyer; and (3) unjust enrichment against all defendants.[2] Each of these claims is derivative; yet Appellants/Plaintiffs later amended the complaint to remove all allegations of current Holdings equity ownership or continuing harm.[3]

The fiduciary duty claim focuses on pre-Transaction equity compensation that Holdings awarded to Weber and Beer, as well as a post-Transaction employment contract with the BioTE Companies for Conlon, which Appellants/Plaintiffs allege vested as a direct result of the Transaction.[4] Weber received an incentive award of

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[1] Unless noted, this filing: uses terms defined in Appellants' corrected opening brief ("OB"; D.I. 21); adds emphasis; omits internal quotations marks and citations. Appellants' appendix (D.I. 16, 17) is cited "A[page number]." Appellees' appendix is cited "B[page number]."

[2] A49-A53.

[3] A1, A90.

[4] OB at 9-10, 12, 14.

Holdings units that vested upon the Transaction closing.[5] Beer received phantom equity awards scheduled to vest in quarterly installments following a change of control—a condition satisfied by the Transaction.[6] And Conlon allegedly secured a lucrative employment contract after the Transaction, though the complaint does not specify how or whether the contract related to the Transaction.[7]

Appellants/Plaintiffs allege that these equity incentives motivated Weber, Beer, and Conlon to mislead Donovitz (who controlled Holdings at the time) into closing the Transaction, purportedly to the detriment of Holdings' members.[8] They also contend that Weber, Beer, and Conlon concealed material information relating to BCA and Transaction from Donovitz, including the risk that redemptions by Haymaker SPAC's stockholders would be high, leaving Haymaker SPAC with little or no cash.[9]

In August 2024, Weber, Beer, Conlon, Cooley, Haymaker Sponsor and Heyer moved to dismiss on the bases that, among others, Appellants/Plaintiffs' claims were

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[5] B315.

[6] B315-B316.

[7] OB at 10.

[8] OB at 13-14.

[9] OB at 12-13.

derivative, not direct; that Appellants/Plaintiffs did not meet the requirements of Court of Chancery Rule 23.1; and that Appellants/Plaintiffs lacked standing.[10] Heyer and Haymaker Sponsor (together, the "Haymaker" Defendants") also moved to dismiss on the basis that Appellants/Plaintiffs had failed to state a claim for aiding and abetting a fiduciary breach.[11] The trial court heard argument in March 2025 and granted the motions from the bench,[12] holding:

> The plaintiffs have sought to assert claims challenging a de-SPAC transaction. They have styled their claims as direct causes of action challenging a merger. But in this de-SPAC transaction, there was no merger. What the plaintiffs have actually challenged is a dilutive stock issuance.
>
> Under binding Delaware Supreme Court authority, those claims are derivative. The plaintiffs have failed to plead standing both by neglecting to plead demand futility and by failing to plead stockholder status.
>
> Even if the claims were not derivative, it is undisputed at this stage that the plaintiffs have sold their shares and therefore lost standing to proceed. The claims are therefore dismissed.[13]

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[10] A6, A80-82 (Haymaker Defendant's Opening Brief), A95-102 (Biote Defendants' Opening Brief), A104 (Cooley's Joinder).

[11] A74-79.

[12] A12-A13.

[13] A262; *see also* A262-A275 (explaining basis for ruling). The trial court did not reach the Haymaker Defendants' arguments regarding the aiding and abetting claims.

Appellants/Plaintiffs appealed, claiming that the trial court: (1) misconstrued their wrongful dilution claims as direct; and (2) erroneously held they lacked standing because they voluntarily sold their Holdings equity stake after the Transaction.[14] Appellants/Plaintiffs are wrong.

[14] OB at 5-6.

## SUMMARY OF ARGUMENT

1. **Denied**. The trial court correctly held that Appellants/Plaintiffs' claims of alleged wrongful dilution are derivative, not direct, under *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), and *Brookfield Asset Management, Inc. v. Rosson*, 261 A.3d 1251 (Del. 2021). Applying the *Tooley* framework, the trial court found that the harm from dilution and any resulting recovery would be shared proportionally by all unitholders, rather than being unique to the Appellants/Plaintiffs. The trial court emphasized that, under controlling Delaware law, claims for cash and equity dilution—such as those asserted here—are "only and always derivative" (A270), no matter how a plaintiff characterizes them. As a result, the claims could not proceed as direct actions and were dismissed for failure to comply with the requirements for derivative suits.

2. **Denied**. The trial court correctly held that, even assuming the claims are direct, Appellants/Plaintiffs lack standing under *Urdan v. WR Capital Partners, LLC*, 244 A.3d 668 (Del. 2020), because they voluntarily relinquished their units after the Transaction.

## STATEMENT OF FACTS

### A. Parties and Relevant Non-Parties

Non-party Donovitz founded the BioTE companies[15] and controlled Holdings at all relevant times before the Transaction.[16]

Non-party Holdings is a Delaware limited liability company[17] that served as a holding company for Medical, the primary operating company.[18] Holdings executed the BCA in December 2021,[19] and closed the Transaction in May 2022.[20]

Appellants/Plaintiffs are former Holdings unitholders.[21]

Appellees and defendants-below Weber, Beer and Conlon—referred to as the Insider Defendants—held positions at Medical.[22] Weber served as Medical's Chief Executive Officer.[23] Beer served as Medical's Executive Chairman of the Board of

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[15] OB at 8.

[16] OB at 6, 8; *see* OB at 9 (Donovitz hired Weber and Beer).

[17] A20.

[18] OB at 8.

[19] A38.

[20] OB at 8.

[21] A19.

[22] OB at 9-10

[23] OB at 9.

Managers.[24] Conlon served as both Medical's and Holdings' General Counsel and Vice President of Business Development.[25]

Appellee and defendant-below Haymaker Sponsor was a limited liability company organized under Delaware law.[26] Prior to the Transaction, Haymaker Sponsor controlled non-party Haymaker SPAC, a Delaware corporation.[27] After the Transaction, Haymaker SPAC became manager of Holdings and renamed itself biote Corp. ("PubCo").[28]

Appellee and defendant-below Heyer was Chief Executive Officer and Managing Member of Haymaker Sponsor.[29]

Appellee and defendant-below Cooley is a limited liability partnership organized under California law.[30] Cooley served as outside counsel to Holdings in connection with the Transaction.[31]

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[24] OB at 9.

[25] OB at 10.

[26] A23.

[27] A23.

[28] A23-A24.

[29] A23.

[30] A23.

[31] A23.

### B. Biote's History

Donovitz founded the BioTE companies in 2012 to provide training to medical professionals to administer hormone therapy through pellet-based delivery systems.[32] Donovitz controlled Holdings, which in turn controlled Medical.[33] The Appellants/Plaintiffs allege that Donovitz hired Weber in 2019, Beer in early 2021, and Conlon at some point before the Transaction.[34] Weber was granted an incentive unit award in 2019, which vested when the Transaction closed.[35] Beer was granted a phantom equity award in 2021, which was subject to continued employment at the BioTE companies following a business combination, and was to vest in quarterly installments following a change in control (which occurred with the closing of the Transaction).[36] The Appellants/Plaintiffs also allege that Conlon received "a lucrative compensation package" after the Transaction without specifying any causal link between the two.[37]

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[32] OB at 8.

[33] OB at 6, 8.

[34] OB at 9-10.

[35] OB at 9; B316.

[36] OB at 9; B316.

[37] OB at 10; A22.

In mid-2021, Holdings initiated conversations with Haymaker SPAC and Haymaker Sponsor regarding a potential transaction.[38] Holdings executed a letter of intent with Haymaker SPAC in July 2021.[39] The parties executed the BCA in December 2021.[40] Donovitz signed for Holdings, Holdings' manager (BioTE Management LLC), and himself.[41] Weber signed as the BCA "Members' Representative" for Holdings' members.[42] The Transaction closed on May 26, 2022.[43]

### C. The Transaction Is An "Up-C" Structure, Not A Merger

In the proceedings below, Appellants/Plaintiffs incorrectly described the Transaction as a merger involving an exchange of Holdings units for PubCo shares[44]

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[38] OB at 10.

[39] OB at 10.

[40] OB at 10.

[41] B505-B506.

[42] B413, B427, B507.

[43] OB at 12.

[44] *E.g.*, A14-55 (amended complaint), A106-65 (motion to dismiss opposition), A215-76 (argument and ruling transcript) at A245, A246, A248, A252 ("My understanding is Holdings merged into and under the Haymaker SPAC which was renamed as BioTE Corp."), A262 ("The plaintiffs have sought to assert claims challenging a de-SPAC transaction. They have styled their claims as direct causes of action challenging a merger. But in this de-SPAC transaction, there was no merger. What the plaintiffs have actually challenged is a dilutive stock issuance.").

but the trial court unequivocally rejected that characterization and emphasized there was no merger.[45] The trial court also admonished their counsel, noting "[i]t's like you made something up and said something that absolutely was not true by calling this deal a merger when nowhere does it involve a merger," and instructed, "let's not use the M word. Because there is no merger."[46]

Instead, the Transaction was structured as a cross-issuance of equity between Holdings and Haymaker SPAC,[47] resulting in an "Up-C" structure[48] designed to preserve tax-favorable treatment for Holdings' pre-Transaction unitholders.[49]

Before closing, Holdings converted from a Nevada to a Delaware LLC and recapitalized into a single class of common units.[50] That conversion was not

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[45] *E.g.*, A253-57, A262 ("there was no merger"), A270 (same), A272 (same), A263 ("The de-SPAC transaction did not involve a merger.").

[46] A253-57; A262 ("there was no merger"), A270 (same), A272 (same), A263 ("The de-SPAC transaction did not involve a merger.").

[47] A263, A270; *see also* B434.

[48] Because Up-C structures are "head-hurtingly complex transaction[s]" (A256), a general overview is attached as B1-B8 for reference.

[49] A263.

[50] A263-64; *see also* A20, A92, A150, A155-56.

governed by the BCA.[51] And, under DGCL § 265, Holdings was the same entity pre- and post-conversion.[52]

At closing, Holdings issued units to Haymaker SPAC in exchange for cash and newly issued Haymaker SPAC Class V shares.[53] Haymaker SPAC then became the sole managing member of Holdings[54] and renamed itself biote Corp.[55]

After closing, Holdings distributed the Haymaker SPAC Class V shares to its pre-Transaction members.[56] Haymaker SPAC (renamed) continued as a publicly traded entity, with (a) its pre-Transaction stockholders holding 49% of its equity and voting power through Class A shares, and (b) Holdings' pre-Transaction members holding 51% of its equity and voting power through a combination of Holdings' units and Haymaker SPAC Class V shares.[57] Under Holdings' post-closing

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[51] A263-64; *see also* A249-50; B414.

[52] A222.

[53] A264; B419, B434 ("The Company [Holdings] shall issue . . . to the Buyer [Haymaker SPAC] the Closing Company Units" defined as "a number of Company Units equal to the aggregate number of outstanding shares of Buyer Class A Common Stock issued and outstanding as of immediately prior to the Closing.").

[54] A264.

[55] A23-A24.

[56] A264; *see also* B434-35.

[57] A264.

operating agreement, each unitholder had the right to exchange one Holdings' unit and one Haymaker SPAC Class V share for one publicly traded Class A share.[58]

### D. Appellants/Plaintiffs Sold Their Equity Post-Transaction

Appellants/Plaintiffs admit that they, "years" after the Transaction,[59] voluntarily exchanged their Holdings' units and Haymaker SPAC Class V shares for publicly traded Class A shares, and then voluntarily sold that PubCo stock.[60]

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[58] A264; *see also* A150, A219, A249-50, A251; B516, B549-50.

[59] A153.

[60] A153.

## ARGUMENT

## I. THE TRIAL COURT CORRECTLY HELD THAT THE APPELLANTS/PLAINTIFFS' CLAIMS ARE DERIVATIVE

### A. Questions Presented

Whether the trial court correctly held that Appellants/Plaintiffs' claims for breach of fiduciary duty (against Weber, Beer, and Conlon), aiding and abetting a breach of fiduciary duty (against Haymaker Sponsor and Heyer), and unjust enrichment (against all defendants) were derivative?[61]

### B. Scope Of Review

Whether a claim is direct or derivative is a question that this Court reviews *de novo*.[62]

### C. Merits Of Argument

#### 1. Rule 23.1 And Derivative Standing

Under Delaware law, the authority to initiate litigation on behalf of a business entity resides with its board of directors, not individual stockholders.[63] Rule 23.1 codifies this principle, mandating that a derivative stockholder plaintiff must either: (1) make a demand on the board and demonstrate wrongful refusal; or (2) plead with

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[61] A221-A223, A258-A261, A270-A274.

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

[63] *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 120 (Del. Ch. 2009).

particularity facts establishing demand futility.[64] The demand requirement extends to LLCs.[65]

The *Tooley* test governs (direct or derivative) claim classification and asks: (1) Who suffered the alleged harm—the entity or equity holder individually; and (2) Who benefits from a recovery—the entity or equity holder individually?[66] The analysis focuses on the substantive allegations, not a plaintiff's characterization.[67]

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[64] *Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008); Ct. Ch. R. 23.1.

[65] *See, e.g.*, *Ishimaru v. Fung*, 2005 WL 2899680, at *12 (Del. Ch. Oct. 26, 2005) ("Similarly, we have applied the *Aronson* test to demand futility in the LLC context."); *VGS, Inc. v. Castiel*, 2003 WL 723285, at *11 (Del. Ch. Mar. 10, 2003) ("Under Delaware law, an individual plaintiff can only bring a derivative claim against an LLC without first making a demand of the board if such demand would have been futile.").

[66] *Brookfield Asset Mgmt.*, 261 A.3d at 1262-63.

[67] *See In re Massey Energy Co. Deriv. & Class Action Litig.*, 160 A.3d 484, 502 (Del. Ch. 2017).

### 2. Appellants/Plaintiffs' Claims Are Derivative

Appellants/Plaintiffs' core claim is wrongful dilution from equity that Holdings issued to the Insider Defendants.[68] That claim is derivative under Delaware law.[69]

Appellants/Plaintiffs' reliance on *Tooley* is unpersuasive. Their assertion of "individualized harm"—specifically, diminished voting power—ignores the substantive basis of their claim.[70] Dilution alone is legally insufficient to establish direct harm, as equity dilution occurs routinely in lawful contexts, such as IPOs and

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[68] *E.g.*, OB at 14, 17, 21 n.5, 23 ("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."), 26 (alleging a "diversion of value"); A16 (alleging equity was "diluted by over 35%"), A17 (alleging "dilution of . . . equity and voting power"), A39 (alleging "ill-gotten gains would have otherwise gone to Holdings' shareholders as part of the [Transaction] but, instead, ended up diluting . . . post-[Transaction] ownership percentage and voting power"), A48 (alleging "ownership interests damaged and diluted"), A50, A124 ("ownership and voting power was diluted by more than 35%"), A240 (alleging equity was "devalued and diluted"), A248 (alleging equity was "diluted as a result of both Weber and Beer becoming members of Holdings and taking a large component of the merger consideration").

[69] *Brookfield Asset Mgmt.*, 261 A.3d at 1266 ("The claim is derivative because they allege an overpayment (or over-issuance) of shares . . . constituting harm to the corporation for which it has a claim to compel the restoration of the value of the overpayment."); *Feldman v. Cutaia*, 956 A.2d 644 (Del. Ch. 2007) (holding equity dilution claims are derivative), *aff'd*, 951 A.2d 727 (Del. 2008).

[70] OB at 18.

incentive awards, without creating direct claims.[71] The true gravamen of Appellants/Plaintiffs' complaint is that the Insider Defendants received Holdings equity unfairly due to inadequate consideration.[72] Holdings—not Appellants/Plaintiffs—was the counterparty in those transactions: Weber's equity came via Holdings' incentive awards; Beer's through Holdings' phantom equity; and Conlon's via a Holdings compensation package. Consequently, the alleged harm was suffered by Holdings, and any remedy would accrue to Holdings.[73] The claim is exclusively derivative.

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[71] *E.g.*, *Siegel v. Cantor Fitzgerald, L.P.*, 2025 WL 1074604, at *8 (Del. Ch. Apr. 10, 2025) ("Stockholders lack a 'fundamental' right to any fixed percentage of the voting power. And '[d]ilution is not per se wrongful.' Were it otherwise, existing stockholders would have a cognizable direct claim whenever a corporation issues new equity.") (footnotes omitted); *Hindlin v. Gottwald*, 2020 WL 4206570, at *4 (Del. Ch. July 22, 2020) ("Dilution, of course, is not *per se* wrongful. As a matter of basic arithmetic, shareholders are diluted every time a company issues new equity. To survive dismissal on a wrongful dilution claim, therefore, a plaintiff must plead not only that he was diluted, but also that the defendants *did something wrongful* that caused him to be *improperly* diluted.") (emphasis in original) (footnote omitted).

[72] OB at 10; B315-B316.

[73] *E.g.*, *Brookfield Asset Mgmt.*, 261 A.3d at 1266–67 ("To the extent the corporation's issuance of equity does not result in a shift in control from a diversified group of public equity holders to a controlling interest, (a circumstance where our law, e.g., *Revlon*, already provides for a direct claim), holding Plaintiffs' claims to be exclusively derivative under *Tooley* is logical and re-establishes a consistent rule that equity overpayment/dilution claims, absent more, are exclusively derivative.") (footnote omitted).

### 3. *Parnes* Does Not Apply

Appellants/Plaintiffs' reliance on *Parnes v. Bally Entertainment Corp.*[74] is misplaced.

*Parnes* established a limited exception permitting direct claims only where stockholders "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."[75] However, Delaware Courts apply that exception "very narrowly."[76] The mere fact that an insider received a payment in connection with a merger does not automatically create a direct claim under *Parnes,* because such a claim is based on the flawed syllogism that: (a) the payment constituted part of the acquiror's total consideration; (b) the target board had a duty to distribute that consideration equally to all the stockholders; and (c) the board's failure to do so inherently tainted the merger with unfair dealing.[77] Instead, for a side transaction to trigger the *Parnes* exception, three conditions must be met: (1) the payment must divert merger consideration away from stockholders (not merely from the acquiror); (2) the diversion must stem from misconduct by the defendants; and (3) the diversion must

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[74] 722 A.2d 1243 (Del. 1999).

[75] *Id.* at 1245.

[76] *Blue v. Fireman*, 2022 WL 593899, at *8 (Del. Ch. Feb. 28, 2022).

[77] *Id.* at *9.

materially affect the merger's process or price, thereby impugning its fairness or validity.[78] Those conditions are not present here.

***First***, as discussed above, the Transaction was not a merger and did not eliminate Holdings ownership stakes.[79] Appellants/Plaintiffs cite no case applying *Parnes* to a non-merger transaction,[80] and "[t]he doctrine of independent legal significance is a bedrock of Delaware corporate law [that] should not easily be displaced."[81] *Parnes* only permits a direct challenge to a merger that extinguishes a stockholder's standing,[82] and Appellants/Plaintiffs retained Holdings equity after the Transaction.[83]

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[78] *Id.* at *11.

[79] B434.

[80] Appellants/Plaintiffs, in note 4 of the OB, recycle a stringcite from their Answering Brief in Opposition to Defendants' Motions to Dismiss to support their argument that *Parnes* applies. *Compare* OB at 19 n.4 *with* A143. All of these cases concern mergers.

[81] *Gunderson v. Trade Desk, Inc.*, 326 A.3d 1264, 1285 (Del. Ch. 2024).

[82] *In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 476–77 (Del. Ch. 2013) (*Parnes* provides for a direct claim when stockholders "challenge the fairness of the merger by which their standing to sue was extinguished") (emphasis added).

[83] OB at 12.

***Second***, Appellants/Plaintiffs' attempt to invoke *Parnes* based on Holdings converting from a Nevada to a Delaware entity before the Transaction[84] ignores that: (a) the trial court held that the conversion was not governed by the BCA, and was separate from the Transaction;[85] (b) the conversion was not a merger and did not eliminate their Holdings' equity stake;[86] (c) Holdings was the same entity before and after conversion;[87] and (d) the conversion did not cause dilution because it was not a change of control triggering vesting of equity grants to Weber or Beer.[88]

***Third***, the equity grants to Weber, Beer, and Conlon do not qualify as "side transactions" under *Parnes*. Weber's Incentive Unit Award originated from her 2019

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[84] OB at 21-22.

[85] A251 ("The BCA doesn't require the conversion."); A263-64*; see also* A20, A92, A150, A155-56. Appellants/Plaintiffs did not brief in the trial court whether the conversion and Transaction should be treated as a single transaction under any of the three step transaction doctrine tests (*see, e.g.*, *Coughlan v. NXP B.V.*, 2011 WL 5299491, at *7 (Del. Ch. Nov. 4, 2011)), or invoke Rule 8's "interests of justice" exception in their Opening Brief, so they have waived those arguments. Supr. Ct. R. 14(b)(vi)(A)(3).

[86] A250-A256.

[87] 8 *Del.C*. § 265(f) ("When an other entity has been converted to a corporation of this State pursuant to this section, the corporation of this State shall, for all purposes of the laws of the State of Delaware, be deemed to be the same entity as the converting other entity.").

[88] B315.

employment agreement,[89] and Beer's phantom equity award derived from his 2021 employment contract.[90] Although Appellants/Plaintiffs allege amendments to these agreements in May 2021,[91] Haymaker had not yet been identified as an acquiror at that time,[92] and the Transaction did not close until May 2022.[93] These equity grants were functions of preexisting employment agreements—not ancillary transactions diverting merger consideration. They predated the BCA by over a year, bore no relationship to the acquiror's consideration pool, and did not materially influence the Transaction's terms or valuation of Holdings. And Conlon's post-Transaction compensation lacks any substantive connection to the Transaction beyond mere chronology.[94]

Under Delaware law, corporations retain broad authority to enter into legitimate, good-faith agreements—such as employment-related equity awards—that may incidentally dilute ownership without creating direct claims.[95] Such

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[89] B315.

[90] B315-B316.

[91] OB at 9.

[92] OB at 9; B193.

[93] OB at 8.

[94] OB at 10.

[95] *Gatz v. Ponsoldt*, 2004 WL 3029868, at *7 (Del. Ch. Nov. 5, 2004) (noting corporations may "enter into (in good faith) numerous transactions" that "result

agreements do not constitute "side transactions" to all change-of-control transactions merely because they include vesting upon a change of control. Consequently, the *Parnes* exception—which requires diversion of merger consideration through improper side transactions materially affecting process or price—is inapposite.

***Fourth***, Appellants/Plaintiffs do not establish entire fairness governs the Transaction.

Entire fairness review applies only where well-pled facts reveal: (1) the transaction involved a controlling stockholder engaged in self-dealing; or (2) that most of the approving directors were grossly negligent, acted in bad faith, or were conflicted.[96] Neither exists here. There is no controlling stockholder self-dealing. Appellants/Plaintiffs concede that Donovitz controlled Holdings[97] and had ultimate authority over the BCA.[98] While they allege that Donovitz was misled,[99] they do not allege that he engaged in wrongdoing, self-dealing, or unfair value extraction[100]—

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legitimately in [] dilution," with any cognizable injury being "inflicted upon the corporation itself").

[96] *Larkin v. Shah*, 2016 WL 4485447, at *8 (Del. Ch. Aug. 25, 2016).

[97] OB at 6, 8.

[98] OB at 6, 8; *see* OB at 9 (noting that Donovitz hired both Weber and Beer).

[99] OB at 1-2, 13-15, 30.

[100] *See, e.g.*, OB 1-2, 13-14.

hallmarks of controller transactions that trigger entire fairness. Nor is there any conflicted or compromised board majority that approved the Transaction—because Appellants/Plaintiffs allege Donovitz controlled Holdings.[101]

The authorities Appellants/Plaintiffs cite are distinguishable; Defendants have previously explained that all of these cases involved controlled transactions.[102] In *Saba Software*, the court found a flawed sales process controlled by a conflicted insider and an unfair price.[103] In *Manti Holdings*, entire fairness applied because the transaction was a conflicted controller deal lacking independent board approval.[104] *Carr* and *Oliver* likewise involved controlling stockholders engaged in self-dealing.[105] Here, no self-dealing controller or conflicted board majority exists. The *Parnes* exception is thus inapplicable.

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[101] OB at 6, 8; *see* OB at 9 (Donovitz hired Weber and Beer).

[102] A200 (distinguishing *Straight Path* and *Houseman*); A201 (distinguishing *Saba*, *Manti Holdings*, *Carr*, and *Oliver*).

[103] *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *18, *21 (Del. Ch. Apr. 11, 2017).

[104] *Manti Hldgs., LLC v. Carlyle Grp. Inc.*, 2022 WL 1815759, at *8 (Del. Ch. June 3, 2022).

[105] *Carr v. New Enter. Assocs., Inc.*, 2018 WL 1472336, at *1 (Del. Ch. Mar. 26, 2018); *Oliver v. Boston Univ.*, 2006 WL 1064169, at *19, *28 (Del. Ch. Apr. 14, 2006).

### 4. Appellants/Plaintiffs' Argument That Their Claims Are Personal Was Waived

Delaware Supreme Court Rule 8 provides that "[o]nly questions fairly presented to the trial court may be presented for review."[106] Appellants/Plaintiffs did not brief in the trial court the argument now found on pages 23-27 of their Opening Brief—that their claims are personal and survived both their voluntary exchange of Holdings units for PubCo shares and their subsequent voluntary sale of those shares.[107] Nor did Appellants/Plaintiffs invoke Rule 8's "interests of justice" exception in their Opening Brief, so they have waived that exception under Delaware Supreme Court Rule 14(b)(vi)(A)(3).[108] The Court should therefore decline to consider those arguments on pages 23-27 of their Opening Brief.

### 5. The Appellants/Plaintiffs' Claims Are Not Personal

Even if the Court considers it, Appellants/Plaintiffs' contention that their claims are personal[109] fails. As discussed above, Appellants/Plaintiffs' core claim is wrongful dilution from equity Holdings issued to the Insider Defendants,[110] which

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[106] Supr. Ct. R. 8.

[107] OB at 23-27.

[108] "The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal."

[109] OB at 23-27.

[110] *E.g.*, OB at 14, 17, 21 n.5, 23, 26.

is derivative under Delaware law. And the authorities Appellants/Plaintiffs cite about "personal claims" do not change that fact.

The Second Circuit's opinion in *Sabby Volatility Warrant Master Fund Ltd. v. Jupiter Wellness, Inc.*,[111] applied settled Delaware law that the right to receive payment of a lawfully declared dividend is a separate property right of the record stockholders and thus is not a right "in the security."[112] Appellants/Plaintiffs cite no authority suggesting that conversion from a Nevada to Delaware entity, or the Transaction, deprived them of a property right analogous to those attaching to a dividend, and they offer no argument supporting such an analogy. Appellants/Plaintiffs thus fail to show *Sabby* is relevant.

*Gatz v. Ponsoldt*[113] is similarly unhelpful. *Gatz* involved controlling stockholders orchestrating a recapitalization that diluted their equity and transferred control to a favored insider.[114] *Gatz*'s conclusion that the recapitalization claim was

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[111] 2025 WL 1363171 (2d Cir. May 12, 2025); cited OB at 24.

[112] 2025 WL 1363171, at *2 (citing *In re Sunstates Corp. S'holder Litig.*, 2001 WL 432447, at *3 (Del. Ch. Apr. 18, 2001)).

[113] 925 A.2d 1265 (Del. 2007).

[114] OB at 25.

"dual-natured" (*i.e.*, both derivative and direct)[115] was based on *In re Tri–Star Pictures, Inc. Litigation*[116] and *Gentile v. Rossette*[117]—which have both been overruled.[118] Moreover, Appellants/Plaintiffs fail to show that either Holdings' conversion from a Nevada to a Delaware entity or the Transaction is analogous to the multi-entity transaction at issue in *Gatz*. Contrary to the Opening Brief's suggestion on pages 25-26, the conversion did not eliminate Appellants/Plaintiffs' equity stake in Holdings. Holdings was the same entity before and after conversion, and the conversion did not cause dilution because it was not a change of control triggering vesting of equity grants to Weber or Beer.[119]

Finally, Appellants/Plaintiffs' argument that "if Plaintiffs lost standing simply because their Class AAA Units in Holdings were exchanged or converted as a consequence of or a precondition to the very transaction they challenge, then—just like in *Sabby*—no one would have standing to enforce those rights" is a strawman.[120]

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[115] 925 A.2d at 1281 (finding Court of Chancery "erred in concluding that that claim was exclusively derivative") (emphasis added).

[116] 634 A.2d 319 (Del. 1993).

[117] 906 A.2d 91 (Del. 2006).

[118] *See Brookfield Asset Mgmt.*, 261 A.3d at 1280; *Tooley*, 845 A.2d at 1037 n.21.

[119] *See* above at 20.

[120] OB at 26-27.

Defendants do not claim that standing was extinguished by the recapitalization—rather, they claim it was extinguished when Appellants/Plaintiffs voluntarily exchanged their Holdings units for PubCo shares and subsequently sold those PubCo shares.[121]

[121] A221-A222.

## II. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFFS DO NOT HAVE STANDING EVEN IF THEIR CLAIMS ARE DIRECT BECAUSE THEY HAVE SOLD THEIR SHARES

### A. Questions Presented

Whether the trial court correctly held that, even if the Appellants/Plaintiffs' claims are direct, they have nevertheless lost standing because they have sold their shares?[122]

### B. Scope of Review

This Court reviews *de novo:* questions of law, including contract interpretation; and rulings on motions to dismiss under Rule 12(b)(6).[123]

### C. Merits of Argument

Appellants/Plaintiffs attempt to avoid *Urdan v. WR Capital Partners, LLC*[124] by asserting that their wrongful dilution claims arose when Holdings converted from a Nevada to a Delaware entity and recapitalized into a single class of common units before the Transaction.[125] But their argument ignores the facts and relevant law—most of which have been addressed above.

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[122] A274-275.

[123] *Urdan v. WR Cap. Partners, LLC*, 244 A.3d 668, 674 (Del. 2020)

[124] 244 A.3d 668.

[125] OB at 28-29.

***First***, Appellants/Plaintiffs argued in the trial court that *Urdan* was distinguishable because it "did not involve a merger."[126] Their argument was misplaced, as neither the conversion nor the Transaction constituted a merger.[127] Appellants/Plaintiffs made no other attempt to distinguish *Urdan* before the trial court and did not invoke Rule 8's "interests of justice" exception in their Opening Brief. Accordingly, they have waived any other arguments on this issue,[128] and *Urdan* applies without opposition.

***Second***, Appellants/Plaintiffs ignore that the trial court held that Holdings' conversion was separate from the Transaction,[129] and they waived any argument to the contrary.[130] As a result, any arguments regarding harm suffered before the Transaction must be confined to the conversion itself. Still, the Opening Brief improperly conflates the conversion and Transaction.[131]

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[126] A154-55

[127] A252-56.

[128] *See* above at n.108.

[129] *See* above at n.85.

[130] *See* above at n.108.

[131] *E.g.*, OB at 10-11, 26.

***Third***, Appellants/Plaintiffs assert that Holdings' conversion extinguished their derivative standing.[132] They cite no authority supporting that proposition and ignore that, under DGCL Section 265(f), Holdings is deemed to be the same entity pre- and post-conversion.[133] Appellants/Plaintiffs retained equity in Holdings after the recapitalization[134] and thus retained derivative standing until they voluntarily exchanged their Holdings' equity for PubCo shares and subsequently sold those shares—actions occurring years after the Transaction closed.[135] Their theory of standing loss during conversion is therefore legally untenable.

***Fourth***, Appellants/Plaintiffs have not established that Holdings' conversion caused the alleged wrongful dilution at issue here. As discussed above, the conversion did not trigger Weber and Beer's incentive awards—the Transaction, as the change-of-control trigger, did.[136] The conversion was not a merger; preserved Appellants/Plaintiffs' ownership percentage in Holdings; and did not trigger vesting

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[132] OB at 23-27.

[133] *See* above at n.87.

[134] OB at 10-11.

[135] A116.

[136] *See* above at 20.

of any equity grants to Insider Defendants.[137] The actual dilution stemmed solely from the Transaction closing—not the conversion.

***Fifth***, Appellants/Plaintiffs' cited authorities about standing after equity is eliminated by a transaction are inapposite,[138] because Appellants/Plaintiffs retained Holdings' equity after the Transaction[139] and only lost standing when they voluntarily exchanged/sold PubCo shares.

***Sixth***, Appellants/Plaintiffs did not present their "perverse incentives" argument, which appears on Opening Brief pages 38 and 39, to the trial court, nor did they invoke Rule 8's "interests of justice" exception in their Opening Brief.[140] Accordingly, they have waived that argument.[141]

Even if they had not, Appellants/Plaintiffs' argument about perverse incentives is, again, a strawman.[142] Delaware law already provides a narrow exception to the continuous ownership rule in *Parnes* and its progeny—which provides for situations where "fiduciaries [attempt] to eliminate their own potential

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[137] *See* above at 18-20.

[138] OB at 33-38.

[139] OB at 10-11.

[140] *See* above at n.106.

[141] *See* above at n.108.

[142] *See* above at 25.

liability through"[143] mergers and other cash-out transactions. That Appellants/Plaintiffs' claims do not fall within *Parnes* is a result of their own actions in voluntarily selling their shares. Appellants/Plaintiffs' citation to *Basho Technologies Holdco B, LLC v. Georgetown Basho Investors, LLC* is entirely irrelevant. Although that case involved controller self-dealing and resulted in post-trial damages, the plaintiffs there kept their shares throughout the entire litigation.[144]

[143] OB at 38.

[144] 2018 WL 3326693, at *2 (Del. Ch. July 6, 2018), *aff'd sub nom. Davenport v. Basho Techs. Holdco B, LLC*, 221 A.3d 100 (Del. 2019) (TABLE) (noting that plaintiffs held shares "at the time of trial").

## CONCLUSION

For these reasons, the trial court's decision should be affirmed. Alternatively, in the event that the Court overrules the trial Court's findings with respect to Appellees/Defendants' arguments with respect to Court of Chancery Rule 23.1 and standing, this Court should remand the matter to the Court of Chancery to rule on the Haymaker Defendants' additional arguments.

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