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 REPLY BRIEF

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I. <u>INTRODUCTION</u>

The Court of Chancery's ruling rests on a mischaracterization of Plaintiffs' claims. This case is about fiduciary ***fraud***, not flawed process. Fiduciaries concealed material facts, engineered a coercive recapitalization, and stripped Plaintiffs of equity and control to enrich themselves. Appellees attempt to defend that misconduct by obscuring its nature, misapplying Delaware precedent, and leaning on form over substance. But their arguments fail for three reasons.

First, Appellees invoke the Transaction's "Up-C" structure to avoid entire fairness review. But Delaware law rejects transactional formalism. When fiduciaries use complex structuring to extract value from equity holders, courts look to substance over form. And as this Court and federal regulators alike have recognized, de-SPAC transactions are especially prone to abuse and demand exacting scrutiny.

Second, Plaintiffs assert direct claims—not derivative ones—because the fiduciaries' misconduct impacted them personally. The recapitalization eliminated their equity and transferred voting and economic control to conflicted insiders. These are not generalized grievances about corporate mismanagement; they are individualized allegations of self-dealing under *Parnes* and *Tooley*.

Third, Appellees argue Plaintiffs lack standing based on post-Transaction events. But Delaware law is clear: standing is determined at the time of the harm. Plaintiffs held Class AAA Units when fiduciaries executed the recapitalization that extinguished their rights and transferred value to themselves. Under *Parnes*, *Blue*, and *Gatz*, that timing is dispositive. *Urdan*—on which Appellees rely—does not apply: that case involved a voluntary stock sale through a negotiated repurchase agreement, not a coercive, fiduciary-engineered recapitalization that eliminated equity without consent.

This case presents an important issue of first impression: whether fiduciaries can insulate themselves from review by engineering a transaction that functionally mirrors a conflicted merger, but wears the formal label of an asset acquisition. The answer must be no. Delaware fiduciary law guards against substance-erasing formalism and ensures that equity holders can seek redress for direct, personal harm.

Accordingly, the Court of Chancery's dismissal should be ***reversed***.

II. ARGUMENT

A. Plaintiffs' Claims Are Direct Because They Challenge Fiduciary Misconduct Prior to and as Part of a de-SPAC Transaction.

Plaintiffs challenge a conflicted transaction that eliminated their contractually protected Class AAA equity and transferred control to insiders. Delaware law treats such conduct as direct and subject to entire fairness review, regardless of whether the transaction is styled as a merger, an asset acquisition, or an "Up-C." When fiduciaries strip specific equityholders of rights and reallocate that value to themselves, they inflict a direct and individualized injury. Courts ***emphasize substance over form***, especially when fiduciary duties are implicated.

i. The Structure of the Transaction Triggers Entire Fairness Review.

Under Delaware law, entire fairness review applies when fiduciaries are on both sides of a transaction. *In re MultiPlan Corp. S'holders Litig.*, 268 A.3d 784, 809 (Del. Ch. 2022) (cleaned up).

Indeed, nearly all de-SPAC transactions automatically implicate the second prong of this test. *See, e.g., In re Hennessy Cap. Acquisition Corp. IV S'holder Litig.*, 318 A.3d 306, 318–19 (Del. Ch. 2024), aff'd, No. 245, 2024, 2024 WL 5114140 (Del. Dec. 16, 2024). A de-SPAC transaction is a business combination where interests of outside common stockholders of a SPAC[1] are combined with the

[1] A shell corporation that previously made an IPO with the dedicated purpose of *later* subsuming an existing private entity that is often unidentified at the time of IPO. The equity capital

interests of legacy insiders of a private entity that is the subject of the acquisition. *See MultiPlan* 268 A.3d at 793–94. The purpose of this business combination is to serve as a functional IPO for the private entity but avoid the disclosure and fiduciary duties normally required in a traditional IPO because, on paper, the IPO happened before the combination.[2] *See id.* at 796–97.

In a typical de-SPAC transaction—and as is the case here—the equity and voting interests are *not* distributed pro rata, they are given a lopsided structure favoring the legacy insiders. *See Hennessy* 318 A.3d at 318–19. This Court previously affirmed a Chancery Court decision applying the entire fairness standard and observing that "features of founder shares compensating the SPAC's sponsors and fiduciaries—namely, the lack of liquidation and redemption rights—create[s] an inherent conflict of interest." *See id.* at 318. Thus, even the most honestly executed de-SPAC would automatically implicate entire fairness review because the structure of the transaction is inherently unequal. *See id.*

However, in this case, not only were there structural conflicts inherent, but the fiduciaries who engineered the transaction were also conflicted. The transaction

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provided by investors is stored in a trust until the time of the combination. When the combination occurs, investors in the SPAC have the option to "buy into" the corporation or redeem the value of their initial investment, plus interest.

[2] The SEC has recently changed the rules for de-SPAC disclosure requirements to address this very issue. *See* 88 Fed. Reg. 23410, 23413 (Apr. 3, 2024).

reallocated voting and economic control from legacy holders to a new class of insiders with a vested financial interest in completing the transaction—regardless of its fairness to the existing equity holders. A16–18; A27–A33. The structure of the transaction ensured that insiders would be rewarded if the deal closed, while legacy holders, like Plaintiffs, bore the entire risk. *Id.* As Plaintiffs allege, the waiver of the Net Tangible Assets condition—secured only through fraudulent coercion of Dr. Gary Donovitz—was essential to finalizing the deal. The waiver was obtained not by negotiation, but by fraud: fiduciaries concealed material financial information, threatened personal liability, and coerced Donovitz into signing under duress. Without that waiver from Donovitz, the deal would not have proceeded, and Plaintiffs would not have been individually harmed. A36–37; A43–A46.

The insiders' influence extended not just to closing mechanics, but also to the entire negotiation and approval process. The transaction was not subject to a vote by disinterested equity holders, nor did any independent committee evaluate its fairness. *Id.* The process was tightly controlled by conflicted fiduciaries whose economic benefits were directly tied to the outcome. These circumstances bear all the hallmarks of self-dealing. Entire fairness is not merely appropriate—it is essential to preserve the accountability Delaware law demands of those who owe fiduciary duties.

ii. Appellees' "Up-C" Argument is Formalistic and Legally Irrelevant.

Appellees seek refuge in the fact that the Transaction was structured as an "Up-C." But an "Up-C" is a tax-motivated capital structure, not a transactional form that shields fiduciaries from judicial scrutiny. B1–8. Mergers, acquisitions, and recapitalizations can all adopt an Up-C framework. *Id*. Appellees' assertion that this structure neutralizes fiduciary obligations misstates Delaware law, which evaluates substance over form and demands loyalty regardless of technical design.

As the Delaware Supreme Court made clear in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, fiduciary duties are evaluated based on the process and outcome of the transaction, not on its formal classification. 506 A.2d 173, 179 (Del. 1986). In *Weinberger v. UOP, Inc.*, the Delaware Supreme Court held that when a transaction is conflicted, the burden is on the fiduciaries to prove both fair dealing and fair price. 457 A.2d 701, 710 (Del. 1983). That burden applies regardless of how the transaction is styled. As this Court enunciated in *Schnell v. Chris-Craft Industries*, Inc., and re-affirmed in *In re Tri-Star Pictures, Inc., Litig.*, "inequitable action does not become permissible simply because it is legally possible." 285 A.2d 437, 439 (Del. 1971); 634 A.2d 319, 332 (Del. 1993) (cleaned up). And in *Gatz v. Ponsoldt*, the Chancery Court emphasized that the structure of a transaction will not shield fiduciaries from scrutiny when (as here) that structure is used to obscure conflicts or manipulate process. 925 A.2d 1265, 1279 (Del. 2007).

Federal regulators have embraced this same substance-over-form principle. In adopting its Final Rule on de-SPAC transactions, the SEC emphasized that the core investor protection concerns do not depend on whether a transaction is labeled a merger, asset purchase, or some hybrid structure. "SPAC transactions raise similar investor protection concerns regardless of how they are structured." 88 Fed. Reg. 23410, 23413 (Apr. 3, 2024). In affirmation of this principle, the new SEC Rule imposed uniform disclosure and liability requirements on *all* de-SPAC transactions. *Id*. The agency's rationale is unambiguous: regardless of form, these transactions consistently present structural conflicts and are nothing more than attempts to avoid the rigorous disclosure requirements of a traditional IPO.

Here, the functional reality is unmistakable. The transaction transferred voting and economic control to Haymaker insiders, eliminated legacy Class AAA Units, and triggered equity compensation that personally enriched the fiduciaries who structured the deal. A44–A48; A65–A70. Even Appellees concede that legacy holders lost majority voting control after the Transaction. AB at 16. This is not a mere technical adjustment—it is a fundamental change in ownership and control that squarely implicates fiduciary obligations.

Appellees' assertion that the deal was merely an asset acquisition is not only factually inaccurate—it is legally irrelevant. To accept Appellees' position would give fiduciaries a blueprint to evade judicial scrutiny simply by rebranding selfserving transactions as something else to escape legal liability. Such an approach undermines the very core of Delaware fiduciary law, which exists to ensure loyalty, fairness, and accountability—not to reward sophisticated transactional structuring. *See, e.g., Revlon*, 506 A.2d at 179; *Gatz* 925 A.2d at 1279.

iii. Plaintiffs' Claims Are Direct, Not Derivative.

Plaintiffs allege specific, individualized harm: the elimination of their Class AAA Units (the "**Units**") and the transfer of voting and economic control to Haymaker insiders through a self-interested transaction. These Units carried unique contractual rights and priority protections that were stripped without consent. This is not a generalized grievance about corporate mismanagement, but a direct injury inflicted by fiduciaries who restructured the Company to eliminate Plaintiffs' position and reallocate value to themselves. Under long-standing Delaware precedent, including *Parnes v. Bally Ent. Corp.*, 722 A.2d 1243 (Del. 1999), and *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), such claims are properly characterized as direct.

Importantly, Delaware courts have recognized that *Tooley* does not govern in every case. As the Delaware Supreme Court explained in *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1127 (Del. 2016), before applying *Tooley*, "a more important initial question has to be answered: does the plaintiff seek to bring a claim belonging to her personally or one belonging to the corporation itself?" *Id.* (quoting *NAF*

Holdings, LLC v. Li & Fung (Trading) Ltd., 118 A.3d 175, 180 (Del.2015)). Where harm arises from fiduciary misrepresentations and reliance by the plaintiff, the claim is direct. Here, Plaintiffs allege harm related directly and uniquely to their own interests resulting from fiduciary misrepresentation. Accordingly, *Tooley* should not control.

Even if *Tooley* applies, it requires courts to ask two questions: (1) Who suffered the alleged harm—the corporation or the individual stockholder? and (2) Who would receive the benefit of any recovery—the corporation or the individual stockholder? 845 A.2d at 1033. Here, both questions point to Plaintiffs: they suffered the harm, and they would receive the benefit of any remedy—whether rescission of insider compensation, disgorgement, or damages for value lost.

Plaintiffs do not assert harm to the *corporate* enterprise. They do not allege that BioTE was mismanaged or that its assets were wasted. Instead, they allege that insider fiduciaries used their control to eliminate Plaintiffs' interests, reallocate value to themselves, and extract personal gain from a transaction that was never subject to proper approval. These are the quintessential facts that Delaware law recognizes as supporting direct claims.

In *Parnes*, this Court held that a stockholder who directly challenges the fairness or validity of a business combination transaction affecting their rights is entitled to pursue direct relief because they have alleged an injury to the stockholders directly, not the corporation. 722 A.2d at 1245. The Up-C structure does not alter that entitlement. What matters is that Plaintiffs' Class AAA Units were eliminated as a result of fiduciary coercion, concealment, and manipulation.

Plaintiffs identify concrete steps taken by fiduciaries to engineer an outcome that would benefit them at the expense of the legacy equity holders: coercing Dr. Donovitz into waiving closing conditions (A44–A46), withholding material information about SPAC redemptions and financing (A44–A48), and executing a recapitalization that stripped Plaintiffs of their original rights (A65–A70). These actions constitute direct breaches of duty.

Moreover, Delaware courts have repeatedly recognized the direct nature of claims arising from impairment of available information by fiduciaries in the context of de-SPAC transactions. *See Multiplan*, 268 A.3d at 806–07. In *Multiplan*, the court found that fiduciary failures in SPAC transactions—including conflicts of interest and omissions—could support direct liability. The court reached a nearly identical holding in *Delman v. GigAcquisitions3, LLC*, 288 A.3d 692, 709 (Del. Ch. 2023).

Accepting Appellees' argument would create a dangerous precedent: one in which fiduciaries can extinguish equity, enrich themselves, and then evade review by characterizing any resulting claim as a derivative grievance. That is neither fair nor the law. As Delaware courts and federal regulators have increasingly recognized, de-SPAC transactions present unique opportunities for fiduciary abuse precisely because of their complexity, opacity, and insider-driven design. *Id.* Delaware law must be especially vigilant in that context.

In sum, Plaintiffs stated direct claims. They allege personal harm, seek individualized equitable relief, and identify fiduciary conduct that extracted value from a specific class of equityholders. Under *Parnes*, *Tooley*, *Citigroup*, and the emerging body of de-SPAC jurisprudence, those claims are not merely actionable—they are precisely the kind of claims Delaware law is designed to remedy.

This Court should so hold. This case presents an opportunity for this Court to confirm that Delaware law does not allow fiduciaries to avoid traditional duties and accountability by structuring a de-SPAC transaction as an asset acquisition rather than a merger. Plaintiffs respectfully submit that they may not. Delaware fiduciary standards apply by substance, not labels, and cannot be sidestepped through transactional engineering.

B. Plaintiffs Had Standing When the Harm Occurred.

Delaware law is unambiguous: the right to bring direct fiduciary claims vests when the harm arises. Plaintiffs held their Class AAA Units at the time of the fiduciary breach—the engineered recapitalization that eliminated those units and redistributed equity and control to insiders. That is when their claims accrued. Appellees' argument—that Plaintiffs lost standing by subsequently selling different securities issued under a recapitalized structure—rests on a mischaracterization of the claims, the facts, and controlling precedent.

Appellees attempt to obscure the timeline by focusing on post-Transaction events. But Plaintiffs do not challenge governance after the Transaction closed or claim harm from the sale of replacement securities. Plaintiffs challenge a transaction that occurred while they held equity and that unfairly deprived them of meaningful ownership, voting rights, and economic participation. Delaware courts have repeatedly recognized standing in analogous circumstances.

i. Plaintiffs Held Their Class AAA Units at the Time the Fiduciary Breaches Occurred.

Under well-settled Delaware law, standing to bring a direct claim for breach of fiduciary duty turns on whether the plaintiff held the relevant equity interest at the time of the alleged wrongdoing—not whether plaintiff continues to hold shares under the transformed capital structure. The Supreme Court of Delaware has repeatedly emphasized that direct claims belong to the equity holder who suffers personal harm at the time of the misconduct. Plaintiffs meet such standard. They held their Class AAA Units at the time the fiduciaries executed a recapitalization that extinguished those units and reallocated voting power and economic value to themselves. That recapitalization was not merely adjacent to the harm—it was core mechanism of the harm. And it occurred while Plaintiffs were still equity holders.

Delaware's leading authority on the timing of direct claims is *Parnes*, in which this Court held that "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 claim even after the merger at issue has been consummated." 722 A.2d at 1245. In *Parnes*, the plaintiff challenged a merger after it had already been completed, and the Court held that she had standing because she held her shares at the time of the alleged misconduct and the claim was direct. *Id.* The same reasoning applies here: Plaintiffs directly challenge the fairness of a fiduciary-orchestrated recapitalization, and they held their Class AAA Units at the time it was executed. Under *Parnes*, that is sufficient to confer standing.

The Delaware Chancery Court has reaffirmed this principle. For example, in *Blue v. Fireman*, Chancellor Zurn rejected an argument that post-transaction structural changes defeated standing to challenge pre-transaction fiduciary misconduct. 2022 WL 593899, at *14 (Del. Ch. Feb. 28, 2022). Applying *Parnes* and its progeny, the Court held that an improper "side transaction" intertwined with a larger deal rendered that deal unfair. *Id*. Because the misconduct was tied to the deal's fairness, the plaintiffs had standing, even though they no longer held equity. That admonition forecloses Appellees' position. They seek to characterize the equity transformation as a neutral step, while simultaneously using it to retroactively strip Plaintiffs of standing. But as *Blue* confirms, fiduciaries cannot invoke post-transaction structural changes—particularly those tied to the challenged misconduct—as a shield against judicial scrutiny.

Here, Plaintiffs held Class AAA Units—carrying economic and governance rights—in BioTE Holdings up to and through the moment of the harm. *See* A18–A20 (detailing Plaintiffs' Class AAA holdings), A44–A46 (describing timing of recapitalization and Donovitz's coerced waiver), A67–A70 (laying out sequencing of recapitalization and closing). These units represented more than economic participation; they embodied voting control and contractual protections that Appellees were duty-bound to respect. Instead, Defendants engineered a recapitalization that extinguished those units, redistributed value to insiders, and positioned themselves to capture the de-SPAC Transaction's upside.

The harm was neither hypothetical nor contingent on post-closing events. It occurred when Plaintiffs' Class AAA Units were extinguished and replaced with a less favorable capital structure designed to facilitate closing. Delaware law asks only whether the plaintiff held the interest at the time of harm, not whether they retained replacement securities afterward. *See Parnes*, 722 A.2d at 1246; *Tooley*, 845 A.2d at 1033; *Blue*, 2022 WL 593899, at *14.

Appellees argue that receiving replacement securities as part of the recapitalization somehow erases or reduces it into a contractual issue. That argument misstates Delaware law. Delaware courts have never required a plaintiff to remain a shareholder after a coercive transaction to assert claims arising from it. Indeed, in *Gatz*, the court allowed former shareholders to assert direct claims based on a recapitalization that enriched insiders, emphasizing that what matters is when the harm occurred and who suffered it—not whether plaintiffs still held shares. 925 A.2d at 1277.

Moreover, the replacement equity here was not a negotiated exchange. Plaintiffs had no meaningful ability to reject the recapitalization or retain their Class AAA Units. The transformation was a coerced, unilateral move driven by fiduciaries to secure a closing to enrich themselves while wiping out legacy holders. *See* A44–A48. In that context, the replacement equity cannot be construed as an intervening act that nullifies the original harm.

To hold otherwise would invite fiduciaries to eliminate disfavored equity, issue diluted securities, and then wait for aggrieved holders to sell. The fiduciaries could then declare the claims extinguished—regardless of misconduct. Delaware law does not tolerate such formalistic traps. *See Blue*, 2022 WL 593899, at *14.

Plaintiffs held equity at the critical moment—the recapitalization that caused the harm. Plaintiffs' claims accrued then, and the later, coerced sale of structurally different securities, has no bearing on standing. Plaintiffs seek equitable relief tailored to the direct harm they suffered. That includes disgorgement of benefits wrongfully obtained by insiders, recission of compensation tied to the Transaction, and damages corresponding to the lost value of Class AAA Units. Delaware law empowers this Court to provide meaningful redress for fiduciary breaches without requiring the Transaction itself to be unwound. *Thorpe v. CERBCO, Inc.,* 676 A.2d 436, 445 (Del. 1996).

ii. The Recapitalization Was a Mechanism of Harm, Not a Separate Act.

Appellees argue the recapitalization was a preliminary, procedural step—unrelated to the de-SPAC Transaction or the harm Plaintiffs assert. That argument, which is disputed, is contradicted by the record and irreconcilable with Delaware law which analyzes fair process by "looking at the [t]ransaction as a whole." *See In re Sears Hometown & Outlet Stores, Inc. S'holder Litig.*, 309 A.3d 474, 520 (Del. Ch. 2023), modified on reargument, (Del. Ch. 2024) (Laster, V.C., analyzing a transaction that was "really two deals in one" as a whole in order to properly evaluate whether corporate fiduciaries utilized fair process). The recapitalization was the central vehicle through which fiduciaries eliminated Plaintiffs' equity and redistributed value and control to themselves. It was not an incidental precondition to closing—it was the act that inflicted the injury and triggered the claim.

Framing the recapitalization as a benign antecedent misstates its role in the Transaction and its impact on Plaintiffs' rights. The Business Combination Agreement ("BCA") expressly conditioned closing on Holdings' recapitalization. *See* BCA §8.1[3]; B174–75, 179; (requiring that "Buyer shall have at least $5,000,001

[3] Haymaker Acquisition Corp. III et al., Business Combination Agreement at 2 (Form 8-K) (Dec. 13, 2021) (available at:

of net tangible assets" at closing and "Recapitalization of Biote must have been effectuated"); A36–37; A43–A46 (outlining the pre-closing restructuring sequence). The recapitalization—engineered by the same self-interested fiduciaries accused of wrongdoing—was a legal prerequisite that extinguished the Class AAA Units, stripped legacy holders of rights, and imposed a control-consolidating structure. The recapitalization did not merely precede the harm—it operationalized it. It extinguished Plaintiffs' ownership and stripped their economic and governance rights through a fiduciary-directed recapitalization designed to benefit Haymaker and other insiders. The recapitalization is inseparable from the misconduct. Indeed, it is the mechanism of the wrongdoing that Plaintiffs challenge.

In *Gatz*, the Court of Chancery considered whether a recapitalization following a self-dealing transaction could support a direct claim by minority shareholders. 925 A.2d at 1277. The plaintiffs alleged that insiders inflated the preferred shares' liquidation value to extract disproportionate value in a later recapitalization. Although the court dismissed the complaint for failure to plead sufficient facts showing causation, it acknowledged that a direct claim might lie if plaintiffs could show the transaction conferred outsized benefits to insiders "at the expense of the public shareholders." *Id*. at *1–2.

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https://www.sec.gov/Archives/edgar/data/1819253/000119312521356831/d225433dex21.htm); *see also* OB at 30 fn. 9.

Similarly, in *Avacus Partners, L.P. v. Brian*, the court held that recapitalizations or stock issuances that impair shareholder voting power or entrench corporate insiders may give rise to direct claims. 1990 WL 161909, at *7 (Del. Ch. Oct. 24, 1990). As the court explained, "[a]n entrenchment claim will be an individual claim when the shareholder alleges that the entrenching activity directly impairs some right she possesses as a shareholder, such as the right to vote her shares." *Id*. The court declined to dismiss dilution and entrenchment claims stemming from transactions that disproportionately advantaged insiders while undermining existing shareholder control.

The record confirms Plaintiff's allegation that the recapitalization was not a standalone action, but an integral part of the Transaction itself. *See* A62–63, A150. It was designed to extinguish legacy equity, strip protections, and ensure that Haymaker insiders controlled the combined company. The scheme eliminated Plaintiff's Class AAA Units replaced them with diluted equity, and enabled closing of the de-SPAC despite key conditions remaining unmet. The result was a fiduciary windfall and a fundamental loss for Plaintiffs, who were stripped of meaningful governance rights and economic value. *See id*.; OB at 10–16:

Appellees' attempt to portray the recapitalization as benign mischaracterizes both the timeline and the law. Their claim that it was "necessary for tax purposes" or merely "internal restructuring" finds no support in the BCA or record. *See* AB at

19. In truth, the BCA legally required the recapitalization, which occurred contemporaneously with the closing. *See* BCA[4] Recitals ("immediately prior to the Closing, the Company will effectuate a recapitalization . . ."). That timing reinforces—not undermines—the causal connection.

The recapitalization was coercive: Defendants misled Donovitz, the controlling Class AAA manager, into waiving protective conditions by misrepresenting the SPAC's financial health, threatening him with fabricated personal liability, and failing to advise him that he and the other legacy owners (including Appellants) could avoid the transaction. *See* A114, A139. That waiver enabled the recapitalization and closing. Plaintiffs had no meaningful opportunity to evaluate the terms or preserve their equity; The recapitalization was imposed by fiduciaries intent on closing a deal that delivered over $135 million in equity to insiders. *See* A47–A48.

Delaware precedent rejects artificially severing steps within an integrated fiduciary scheme. *See Sears*, 309 A.3d at 535 ("A court can consider who set events in motion and under what circumstances . . ."). Courts examine such transactions holistically, recognizing that value extraction often unfolds through multi-step mechanics. In *In re Tesla Motors, Inc. Stockholder Litigation*, the Court declined to

[4] *See supra* fn. 3.

isolate discrete board decisions—like valuation or diligence—from the challenged merger. Instead, it assessed the entire course of conduct—including pre-closing steps—as a continuous breach of fiduciary duty. *See* 2022 WL 1237185, at *29–32 (Del. Ch. Apr. 27, 2022).

That same logic applies here: the recapitalization, waiver, control reallocation, and closing were part of a single course of fiduciary misconduct. Plaintiffs have never suggested that the recapitalization constitutes a standalone harm, but, as a ***deliberate and necessary predicate*** that enabled the entire Transaction and caused direct injury to their equity. That is what distinguishes this case from those where recapitalizations are subject to derivative scrutiny or treated as background steps.

Even Appellees' own documents undermine their effort to dissociate the recapitalization from the Transaction: the BCA lists the recapitalization and closing as part of a unified process. *See* BCA §5.21[5]. There is no language suggesting Plaintiffs consented to or could alter the recapitalization terms. The recapitalization was a *fait accompli*—executed by fiduciaries, designed to transfer value, and triggered without Plaintiffs' approval.

The causal link between the fiduciaries' conduct and the harm is direct—not speculative—and well-supported by the record. As the SPAC struggled to meet

[5] *See supra* fn. 3.

closing conditions, fiduciaries used coercion to force Donovitz to waive critical protections. *See* A44–A46. With safeguards removed, the fiduciaries implemented a recapitalization that eliminated the Class AAA Units and transferred control to insiders, enabling a closing that delivered outsized gains. *See* A44–A48. These facts establish fiduciary harm. Delaware law requires nothing more to confer standing.

In sum, the recapitalization was not a preliminary step. It was the fulcrum of the Transaction, used to eliminate Plaintiffs' equity and shift control. Delaware precedent makes clear that fiduciaries may be held liable for using corporate structure to extract value, and courts reject artificial compartmentalization. Appellees' effort to recast the recapitalization as harmless "pre-closing cleanup" fails factually and legally. This Court should reject that narrative and recognize the recapitalization for what it was: the fiduciary-designed mechanism that enabled the harm Plaintiffs now challenge.

iii. Plaintiffs Did Not Voluntarily Waive or Sell Their Claims—and Urdan Does Not Apply.

Appellees invoke *Urdan v. WR Capital Partners, LLC*, 244 A.3d 668 (Del. 2020), arguing that Plaintiffs lack standing because they no longer hold equity in BioTE Holdings. But this misreads *Urdan*, misconstrues the Transaction, and disregards Delaware law protecting equity holders from fiduciary misconduct occurring while they still hold their interests.

In *Urdan*, the plaintiffs voluntarily sold their shares through an arms-length repurchase agreement that conveyed "all right, title, and interest" in the stock and expressly waived any right to sue. *Id*. at 675–76. The Court found that this contractual relinquishment of both equity and claims extinguished standing. *Id*. at 676. But *Urdan* turned on the plaintiff's knowing consent in a negotiated sale. It does not apply, as here, the equity was eliminated through a coercive recapitalization designed and executed by the fiduciaries themselves.

That holding has no bearing here. Plaintiffs never entered into a stock repurchase agreement. They did not sell or relinquish their Class AAA Units. Their units were unilaterally extinguished through a fiduciary-driven recapitalization executed without consent, consideration, or contractual agreement. *See* A44–A46. The harm Plaintiffs allege—the elimination of their equity—occurred while they still held it. That is what matters under *Parnes*. 722 A.2d at 1246.

Delaware law has never held—and *Urdan* does not suggest—that standing is defeated merely because the plaintiff no longer owns equity at the time of suit. What matters is whether the plaintiff held the equity interest when the harm occurred. *Parnes*, 722 A.2d at 1246. In *Parnes*, the Court upheld a direct fiduciary claim based on a transaction that diverted merger consideration to insiders, because the plaintiff alleged she was harmed while still a stockholder. *Id.* Although *Brookfield Asset Mgmt., Inc. v. Rosson,* 261 A.3d 1251 (Del. 2021), noted in dicta that *Parnes* involved a merger, the Court did not limit its rationale to that form. The key principle remains: fiduciaries cannot restructure equity to extract value from specific stockholders without facing direct claims.

Nor does *Urdan* support the broad proposition that "any post-closing sale of equity extinguishes standing," as Appellees suggest. Delaware courts have expressly rejected that view. In *Blue*, the court refused to allow fiduciaries to defeat standing by invoking a recapitalization they had orchestrated, explaining: "[a] defendant cannot rely on the very act that is alleged to be wrongful as the basis for denying the plaintiff standing to challenge it." 2022 WL 593899, at *14. The issue is not whether Plaintiffs hold post-recapitalization securities, but whether they held equity when the fiduciary breach occurred. They did.

Appellees' claim that Plaintiffs waived arguments distinguishing *Urdan* is equally unfounded. Plaintiffs raised these points below and in their Opening Brief: that the Class AAA Units were forcibly extinguished; no contractual waiver occurred; and *Urdan* turns on contract, not standing doctrine. *See* A69–A70; OB at 30–33. Appellees' waiver argument is an attempt to avoid the merits.

Moreover, a rule that threats post-Transaction conduct as a bar to suit would invite the very fiduciary gamesmanship Delaware courts have warned against. It would allow fiduciaries to eliminate or recharacterize equity through coercive restructuring, wait for the holders of impaired securities to sell, and then invoke those later events to evade review. Such a rule would embolden fiduciaries to eliminate equity through coercive restructuring, strip rights from investors, and then escape liability by pointing to the result of their own misconduct. That is not, and has never been, the law in Delaware.

The Second Circuit recently rejected this exact theory in *Sabby Volatility Warrant Master Fund Ltd. v. Jupiter Wellness, Inc.*, 2025 WL 1363171 (2d Cir. May 12, 2025), applying Delaware law. The court held that a plaintiff retained standing to assert a breach of contract claim after selling its shares, because the alleged injury—the failure to pay a declared dividend—occurred while the plaintiff held the stock. *Id*. at *2–3. Personal rights, such as the right to a declared dividend, "do not travel with the sale of a security[,]" and survive a post-record-date sale. *Id*. at *2. Though *Sabby* involved a contract claim, it reinforces the principle that standing turns on when and how the harm occurred—not on continued ownership of transformed or replacement securities. *Id.*

Moreover, *Sabby* limits *Urdan* to claims "in the security," not personal rights that vest at the time of fiduciary breach. *Id.* That distinction directly undercuts Appellees' attempt to stretch *Urdan* into a sweeping bar against post-transaction suits.

Finally, whether Plaintiffs waived or sold their rights is a fact intensive inquiry that cannot be resolved on the pleadings. *See e.g.*, *In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 478–80 (Del. Ch. 2013) (specific factual allegations that would indicate scienter when taken as true at the motion to dismiss stage, are sufficient to survive a motion to dismiss). Appellees ask the Court to infer relinquishment from post-transaction conduct alone, without discovery or a factual record. That is improper.

In short, *Urdan* involved a voluntary, arms-length agreement with no reservation of claims. Plaintiffs here were subjected to a coercive recapitalization imposed by fiduciaries. Their Class AAA Units were eliminated—not sold—and their claims accrued at the moment of that elimination. Therefore, Appellees' attempt to use *Urdan* as a shield for fiduciary misconduct is both legally and factually unsupported.

III. <u>CONCLUSION</u>

For the foregoing reasons, and those stated in Plaintiffs' Opening Brief, the Court of Chancery's judgment should be reversed. Plaintiffs have stated direct claims for fiduciary misconduct that caused personal harm and retain standing to pursue those claims. The matter should be remanded for further proceedings on the merits.

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Respectfully submitted,

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