IN THE SUPREME COURT OF THE STATE OF DELAWARE

JASON MCKENZIE, Plaintiff Below, Appellant, v. BDO USA, P.C., KELLY JOHNSON, WAYNE BERSON, TONY ARGIZ, MIKE CAMPBELL, MARK ELLENBOGEN, MARIA KARALIS, NATALIE KOTLYAR, HOON LEE, MONIKA LOVING, JOHN MARQUARDT, TIFFANY PRUDHOMME, and STEVEN SHILL, Defendants Below, Appellees.	No. 82, 2026 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2025-0264-LWW **PUBLIC VERSION** Filed: April 28, 2026

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

The Plaintiff-Below, Jason McKenzie, was an equity partner at BDO USA, LLP ("BDO" or the "Company"). When McKenzie became uncomfortable with certain practices at BDO, he voiced his concerns to his superiors. When BDO failed to adequately address McKenzie's concerns, he made the decision to retire. When McKenzie announced his intentions, the Company's Board of Directors used it as a pretext to divest McKenzie of his equity, converting him from an equity partner to a non-equity partner to retaliate against him for his whistleblowing activities.

At the times relevant to this case, BDO was organized as a limited liability partnership (LLP) and governed by a board of directors (the "Board") with powers akin to the board of a corporation, as set forth in the Amended and Restated Partnership Agreement dated September 19, 2020 (the "Partnership Agreement"). The Partnership Agreement does not eliminate fiduciary duties. There is an exculpation clause, eliminating liability for directors and other covered persons—but that exculpation does not apply to any act or omission resulting from "fraud, bad faith or willful misconduct." A055-A056 (Compl., Ex. A § 14.14). BDO subsequently converted to BDO USA, P.C.

Under Delaware law, where an alternative entity chooses to be governed by a board akin to a corporate board, the directors owe fiduciary duties in their capacity as directors. Further, even where a company's governing documents afford the board of directors discretion, it is black letter Delaware law that the discretion must be exercised in good faith. Concurrent with these principles, the Delaware Revised Uniform Partnership Act (the "DRUPA" or the "Partnership Act") expressly prohibits parties from eliminating the covenant of good faith and fair dealing in a partnership agreement. 6 *Del. C.* § 15-103(b)(3).

The Court of Chancery's decision in this case runs contrary to these fundamental principles of Delaware law. Here, the Court held that the bad faith and improper motives pled in the Complaint did not matter and that the discretion in the Company's Partnership Agreement allowed the Board to divest an equity partner at any time, for any reason—including bad faith reasons. Further, the Court incorrectly held that boards of partnerships have no fiduciary duties because the only fiduciary duties in a company organized as a partnership are the limited fiduciary duties that individual partners owe one-another. The Supreme Court should reverse these holdings.

SUMMARY OF ARGUMENT ON APPEAL

1. The Court of Chancery erred when it held that the Verified Complaint failed to state a claim for breach of contract. The Court of Chancery should have upheld Delaware law that recognizes that where a contract provides a party "discretion"—even complete or sole discretion—that discretion must still be exercised in good faith. In dismissing the claim under Court of Chancery Rule 12(b)(6), the Court of Chancery held that McKenzie could not recover under any set of facts, meaning that even if discovery were to show that bad faith was the Board's sole motive, McKenzie would not be entitled to relief. That is inconsistent with well-established Delaware law. Because the Court of Chancery ruled that the Board was permitted to exercise its discretion however it wanted, including in bad faith, the Court of Chancery improperly disregarded the specific allegations of bad faith in the Complaint.

2. The Court of Chancery erred when it held that the Verified Compliant failed to state a claim for the breach of the implied covenant of good faith and fair dealing, which cannot be eliminated in a partnership agreement. The Court of Chancery should have upheld Delaware law, which (i) requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct that has the effect of preventing the other party to the contract from receiving the fruits of the

bargain, and (ii) holds that even vesting of sole or absolute discretion does not relieve the Board of its obligation to use that discretion consistently with the implied covenant. To the extent the Court of Chancery did not find a breach of an express contract term, the Court should have recognized a contractual gap: the contract does not address what happens when a partner expresses his intention to retire, and the Board decides to divest him in retaliation. Had the parties contemplated that scenario, they would have prohibited it. Allowing the Board to divest partners for bad faith reasons frustrates the fruits of the bargain struck in the Partnership Agreement.

3. The Court of Chancery erred when it held that where a partnership elects to be governed by a board of directors, the duties of those directors are limited to certain narrow fiduciary duties that partners owe one-another. The Court of Chancery should have upheld Delaware law that recognizes that where an alternative entity chooses to be governed by a board of directors, the directors have fiduciary duties as directors.

4. The Court of Chancery erred when it held that the Verified Complaint failed to allege a cognizable breach of fiduciary duty. The Court of Chancery should have upheld Delaware law recognizing that fiduciary duties run from a board to equity holders *qua* equity holders. The Court of Chancery improperly ruled that an

action cannot be a breach of fiduciary duty in principle if it, in practice, only affects one person. But that is not Delaware law. A breach of fiduciary duty derives its character from the nature of the relationship between the fiduciary and the persons to whom the duty is owed, and is agnostic as to the number of persons who must be affected by the breach. The Court of Chancery further erred when it found that the breach of fiduciary duty claim was duplicative of the breach of contract claim because the breach was "inextricably tied to the terms of the Partnership Agreement." The Court of Chancery should have upheld Delaware law that recognizes that a breach of fiduciary duty can also arise from conduct that violates a contract.

5. The Court of Chancery erred when it declined to accept the truth of the Verified Complaint's allegations and the reasonable inferences flowing from those allegations. The Court of Chancery determined factual issues contradicting the allegations of the Complaint: specifically, that the benefit of stripping McKenzie's equity was "not material" to the directors. The Court of Chancery should not have made such a factual determination at the motion to dismiss stage.

STATEMENT OF FACTS

The Verified Complaint alleges the following relevant facts.

I. McKenzie was an equity partner at BDO

McKenzie became a partner at BDO on November 1, 2016, when BDO acquired his prior firm, McPhillips, Roberts & Deans. A009 (Compl. ¶ 20). BDO had an equity partner tier and a non-equity partner tier. Equity partners were referred to as Variable Share Partners ("VSPs"), and non-equity partners were Fixed Share Partners ("FSPs"). A009 (Compl. ¶ 21).

McKenzie was a Variable Share Partner. A009 (Compl. ¶ 21). As a Variable Share Partner, McKenzie's compensation was determined by the number of Variable Share Partner units he held. A009 (Compl. ¶ 22).

At all relevant times, the Partnership Agreement was in effect. A007-A008 (Compl. ¶ 7); A019-A061 (Compl., Ex. A). Under the Partnership Agreement, BDO is governed by the Board. A020-A026 (Compl., Ex. A §§ 2.1-2.17). The Partnership Agreement does not eliminate fiduciary duties. Instead, it eliminates liability for directors and other covered persons—but that exculpation does not apply to any act or omission resulting from "fraud, bad faith or willful misconduct." A055-A056 (Compl., Ex. A §14.14).

II. In March 2023, McKenzie informed BDO of his intention to leave in April 2024.

At a certain point, McKenzie became uncomfortable with certain practices at BDO. A009-A010 (Compl. ¶ 23). McKenzie voiced those concerns, but BDO did not address the issues to McKenzie's satisfaction. A009-A010 (Compl. ¶ 23).

McKenzie decided that he would end his career at BDO and wanted to do so in an orderly manner. A009-A010 (Compl. ¶ 23). To aid the transition process, in March 2023, McKenzie informed Mat Demong, BDO's East Region Managing Partner, that McKenzie intended to leave BDO at the end of April 2024, the end of its upcoming fiscal year. A009-A010 (Compl. ¶ 23). Demong told McKenzie that BDO's CEO and chair of the Board, Wayne Berson, had requested that McKenzie email Berson his plans. A010 (Compl. ¶ 24). Demong told McKenzie that the purpose of this email was so that Berson could support Demong's hiring efforts in the Norfolk office. A010 (Compl. ¶ 24).

McKenzie had no reason to believe that anything was amiss or that his partners were planning anything against him. A010 (Compl. ¶ 25). Accordingly, McKenzie sent Berson an email stating that he was "planning to leave BDO at the end of our next fiscal year in April 2024." A010 (Compl. ¶ 25). McKenzie also shared some of his concerns about the management of BDO, which had been the impetus for his departure. A010-A011 (Compl. ¶ 26). Despite these concerns, McKenzie remained committed to an orderly transition. A009-A011 (Compl. ¶¶ 23, 26).

III. The Board reacts in bad faith by stripping McKenzie of his equity.

Instead of working collaboratively with McKenzie towards his orderly exit, the BDO Board seized on McKenzie's email, deciding that—the express language of the email to the contrary—it constituted an immediate resignation. A011 (Compl. ¶ 27). Within three weeks, the BDO Board stripped McKenzie of his Variable Share Partner units and converted them to non-equity units. A011 (Compl. ¶ 28). The Board's purported justification was that converting McKenzie to non-equity would somehow make his departure financially "simpler." A011 (Compl. ¶ 28).

In reality, stripping his equity was meant to enrich the other Variable Share Partners, including the members of the Board, at McKenzie's expense. A012-A013 (Compl. ¶34). McKenzie objected to the conversion of his equity, specifically raising the concern that he would be deprived of substantial value if there was a liquidity event. A011 (Compl. ¶ 29). BDO, acting through its National Managing Partner, Matthew Becker, reassured McKenzie that there was no reason to expect an impending liquidity event, and that Becker would be "shocked" if BDO engaged in a liquidity event. A011 (Compl. ¶ 29).

At the time Becker made these representations, Becker knew that—to the contrary—BDO was actively engaged in effecting a liquidity event. A012 (Compl. ¶ 30). BDO was in the process of converting to a professional corporation, which would then be sold to an employee stock option plan ("ESOP"). A012 (Compl. ¶ 30). The transaction that followed a few months later was structured to provide a self-tender in connection with the creation of the ESOP and hence a liquidity event (the "ESOP Liquidity Event") for the Variable Share Partners. A012 (Compl. ¶ 30).

Indeed, the day after McKenzie's conversation with Becker, April 26, 2023, BDO announced its conversion from a partnership to a Delaware professional association, the first step towards its ultimate conversion to a professional corporation. A012 (Compl. ¶ 31). The day after that announcement, April 27, 2023, the Board sent McKenzie a revised "unit allocation memo" in which they memorialized the Board's divesting him of his 631 Variable Share Partner units and the conversion of those units into 669 non-equity Fixed Share Partner units. A012 (Compl. ¶ 32). As a further sign of the Board's bad faith, the price at which the

Board converted McKenzie's equity units to non-equity was an inequitable price that did not reflect the full value of the equity units. A014 (Compl. ¶ 39).

The Board unilaterally stripped McKenzie of his equity units to reallocate the benefits of those equity units to themselves and other equity holders in retaliation for McKenzie voicing his concerns about management. A011-A012 (Compl. ¶¶ 27-30). The Complaint alleges that the Board's actions violated the Partnership Agreement, including the implied covenant of good faith and fair dealing contained therein, as well as the Board's fiduciary duties. A014-A016 (Compl. ¶¶ 37-46).

The Complaint alleges that the Partnership Agreement does not permit the Board to divest a Variable Share Partner—including in the context of his planned departure—simply to transfer the benefit of his equity to themselves and other equity holders. A015 (Compl. ¶ 41). The Complaint alleges that, to the contrary, the Partnership Agreement sets forth specific procedures under Article 12 for addressing the exit of a Variable Share Partner, and these procedures take into account the fact that a Variable Share Partner holds equity (unlike a Fixed Share Partner). A013, A016 (Compl. ¶¶ 35, 41). Instead of following the procedures under Article 12 for the treatment of a departing equity partner, the Board chose to strip McKenzie of his equity to punish him for his whistleblowing activities and to avoid giving him the benefit of a planned liquidity event. A011-A013 (Compl. ¶¶ 27-32, 35).

IV. The Court of Chancery Proceeding

On March 3, 2025, McKenzie filed the Complaint. Defendants moved to dismiss, and the Court heard oral argument on October 21, 2025. At oral argument, Defendants argued that all of McKenzie's claims must fail because the Board had absolute discretion to divest McKenzie—even in bad faith. Defendants relied on Section 2.1(b) of the Partnership Agreement, but Defendants also raised a new argument at oral argument, not presented in the briefing, based on Section 4.1. At oral argument, the Court correctly focused on the principle that contractual discretion must be exercised in good faith. *See* A146 at 10:4-7, A178 at 42:3-6.

On January 26, 2026, the Court of Chancery issued its opinion on the motion to dismiss.[1] The Court dismissed the Complaint in its entirety on the basis of Court of Chancery Rule 12(b)(6).

The Court found that the Complaint failed to state a claim for breach of contract because "the Board had the unambiguous authority to convert McKenzie from a VSP to an FSP . . . not only upon admission but also 'at any time thereafter'"

[1] The decision below is attached as Exhibit A, and its pages are cited as "Op. at ___."

under Section 2.1(b) of the Partnership Agreement. Op. at 10 (quoting A020 (Partnership Agreement § 2.1(b))). The Court found that "[t]his broad grant of authority is bolstered by Section 4.1, which provides that the Board 'shall' allocate variable and fixed units 'in such type and amounts *as it determines in its sole discretion*.'" Op. at 10-11 (quoting A030-A031 (Partnership Agreement § 4.1)) (emphasis added in Opinion).[2] Although discussed at length during oral argument, the Opinion does not address the principle that contractual discretion must be exercised in good faith.

The Court found that the Complaint failed to state a claim for breach of the implied covenant because "[t]he Partnership Agreement expressly addresses the Board's authority to reclassify partners. Section 2.1(b) empowers the Board to designate a partner's status 'at any time thereafter.' Section 4.1 further grants the Board 'sole discretion' to allocate variable and fixed units." Op. at 13 (footnotes omitted). The Court held that "[t]hese provisions comprehensively define the scope of the Board's authority, specifying who may act (the Board), what it may do (designate status), and when it may do it (at any time)." Op. at 13. The Court held that the Board divesting McKenzie was "a foreseeable consequence of the Board's

[2] Defendants raised the argument based on Section 4.1 for the very first time at oral argument. A178 at 42:17-20.

rights," and that McKenzie's allegations that "the Board acted in bad faith to retaliate against him and hide a liquidity event" did not matter "[b]ecause this conduct was authorized by the plain terms of the Partnership Agreement." Op. at 14-15. Hence, "McKenzie's allegation of a retaliatory motive cannot support a claim for breach of the implied covenant." Op. at 15.

The Court found that the Complaint failed to state a claim for breach of fiduciary duty because "the Board owed no cognizable fiduciary duty to McKenzie as an individual partner" and because the fiduciary duty count was "duplicative of the contract claims. Op. at 15. The Court held that "McKenzie's claim for breach of the duty of loyalty—whether framed as a bad faith or as a self-dealing claim—fails because he has not identified a duty that was breached." Op. at 16-17.

The Court also made findings of fact as to the materiality of the units that were redistributed. The Court found that the "reallocation of McKenzie's 631 VSP units" could not have been material to the individual defendants because "[e]ven assuming there were only a few hundred equity holders among BDO's 800 partners, the pro rata redistribution of 631 units would result in a de minimis accretion to any one individual." Op. at 18.

The Opinion did not address the allegation, discussed at oral argument, that the Board's desire to retaliate against McKenzie was a further self-dealing motive. *See*, *e.g.*, A153 at 17:8-19, A157-A158 at 21:23-22:9, A175 at 39:13-24.

ARGUMENT

I. The Complaint stated a claim for breach of contract

A. Question Presented

Whether the Court of Chancery erred by finding that Sections 2.1(b) and 4.1 of the Partnership Agreement give the Board absolute discretion to convert an equity partner to a non-equity partner for any reason, including bad faith reasons, and that the Board's discretion is not subject to a limitation that it must be exercised in good faith. This issue was preserved at A096-A100 and decided by the Court of Chancery. Op. at 2, 10-12.

B. Scope of Review

The Court reviews *de novo* the Court of Chancery's decision to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6). *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 167-68 (Del. 2006).

C. Merits of Argument

It is well-settled under Delaware law that even where a contract provides for complete discretion, that discretion must be exercised in good faith. *Miller v. HCP Trumpet Invs., LLC*, 194 A.3d 908, 2018 WL 4600818, at *1 (Del. 2018) ("the mere vesting of 'sole discretion' did not relieve the Board of its obligation to use that discretion consistently with the implied covenant of good faith and fair dealing").

To the contrary, the implied covenant "operates with special force when a contract confers discretion on a party." *Cygnus Opportunity Fund, LLC v. Washington Prime Grp., LLC*, 302 A.3d 430, 460 (Del. Ch. 2023) (cleaned up). "Terms that enhance the level of discretion, such as 'sole discretion,' do not eliminate the implied duty." *Id*. "When a party has sole discretion to make a decision, '[t]hat setting provides more reason for the implied covenant to apply, not less.'" *Id*. (quoting *In re P3 Health Grp. Holdings, LLC*, 2022 WL 16548567, at *26 (Del. Ch. Oct. 31, 2022)). The Partnership Act prohibits parties from eliminating the covenant of good faith and fair dealing in a partnership agreement. 6 *Del. C.* § 15-103(b)(3).

The Court of Chancery's decision turns these well-worn principles on their head, finding that McKenzie cannot state a claim for breach of contract because the Partnership Agreement gave the Board absolute discretion to reclassify equity partners to non-equity—at any time and for any reason, including in bad faith.

1. Even where a contract provides for absolute discretion, that discretion must be exercised in good faith

The Complaint alleges that the Board breached the Partnership Agreement by declining to follow the clear procedures for treatment of a departing equity partner set forth in Article 12 of the Partnership Agreement. A013 (Compl. ¶ 35). The Complaint alleges that the Board was not permitted to "re-allocate and convert units in response to a notice of withdrawal as it did with McKenzie" and that "[t]he Board's conduct was unauthorized by the Partnership Agreement and, thus, a breach of the Partnership Agreement." A013 (Compl. ¶ 35). The Complaint alleges specific facts giving rise to an inference that the Board de-equitized McKenzie in bad faith as a punishment for his whistleblowing activities, to deprive him of benefits including a planning liquidity event. A009-A012 (Compl. ¶¶ 23-31).

In their motion to dismiss, Defendants argued that the Board had absolute discretion to de-equitize McKenzie at any time and for any reason based on Section 2.1(b) of the Partnership Agreement. A069 (Opening Br. at 2). Section 2.1 provides, in relevant part, that:

> The Board of Directors, with input from the Chief Executive Officer and other appropriate members of executive management of the Partnership, shall also have responsibility for, and review of, the following matters to the extent not otherwise delegated to the Chief Executive Officer and/or other appropriate members of executive management of the Partnership…
>
> (b) Allocation of income to Partners, and designation of each Partner as a Fixed Share Partner or Variable Share Partner upon such Partner's admission and at any time thereafter[.]

A020 (Compl., Ex. A § 2.1). At oral argument, Defendants relied on a different provision, Section 4.1, for the very first time. A178 at 42:17-20. Section 4.1 provides, in relevant part, that:

> The Board of Directors shall determine the total number of variable and fixed units to be allocated among all the Partners and shall allocate variable units to Variable Share Partners and fixed units to Fixed Share Partners in such type and amounts as it determines in its sole discretion.

A030-A031 (Compl., Ex. A § 4.1).

As a preliminary matter, the discretion presented in Section 2.1 and 4.1 is not as sweeping as Defendants presented it to be, *see infra*. But that point is really secondary because even if the contract had given the Board absolute discretion, that discretion does not include the ability to act in bad faith—as the Complaint alleges the Board did.

Because contractual discretion must be exercised in good faith, a plaintiff can plead a claim for breach of contract where a party exercised its contractual discretion in bad faith. *See Sheehan v. AssuredPartners, Inc.*, 2020 WL 2838575, at *11 (Del. Ch. May 29, 2020). To survive a motion to dismiss, the plaintiff "only must allege that the [] decision was motivated by an improper purpose." *Id*.

The Court acknowledged these principles at oral argument. In response to Defendants' argument that they could divest McKenzie based on the "discretion" afforded by Sections 2.1 and 4.1, the Court repeatedly asked Defendants to explain why—even assuming the absolute discretion that Defendants had argued for—the Board was not prohibited from exercising that discretion in bad faith. *See*, *e.g.*, A146 at 10:4-7 ("If it's a discretionary issue, though, which is what you argued in your brief, wouldn't the implied covenant require that that discretion be exercised in good faith?"); A178 at 42:3-6 ("Doesn't the implied covenant also say, though, that you need to exercise your express rights in a manner that's not arbitrary or unreasonable or in bad faith?"). In response to the Court's questions, Defendant's counsel conceded, "True. That's fair." A178 at 42:7-8. Defendants' only response was to cite again the language of Sections 2.1 and 4.1 and argue that the alleged extreme discretion therein overrides the requirement that discretion be exercised in good faith. But that is simply not so.

The Complaint in this action contains robust allegations that the Board acted in bad faith. These include, without limitation, allegations about McKenzie's status as a whistleblower (A009-A010 (Compl. ¶¶ 23, 26)), the unusual reactions of McKenzie's superiors to his informing them of his intent to retire from BDO (A010-A011 (Compl. ¶¶ 24-28)), and BDO's Managing Partner lying to McKenzie when McKenzie when McKenzie asked about whether there would be a liquidity event (A011-A012 (Compl. ¶¶ 29-31)).

Notably, the Court of Chancery did not find that the allegations of bad faith were inadequate. Rather, the Court declined to consider the allegations of bad faith because the Court found that the discretion granted by the contract was sufficient to justify the Board's conduct regardless of whether it was in bad faith or not. *See* Op. at 14-15 ("McKenzie insists that the Board acted in bad faith to retaliate against him and hide a liquidity event. But under *Nemec* [*v. Schrader*, 991 A.2d 1120, 1127 (Del. 2010)], '[a] party does not act in bad faith by relying on contract provisions for which that party bargained where doing so simply limits advantages to another party.' The Board utilized its authority to reclassify McKenzie's status as a partner 'at any time.' Because this conduct was authorized by the plain terms of the Partnership Agreement, McKenzie's allegation of a retaliatory motive cannot support a claim for breach of the implied covenant.")

2. The contract does not unambiguously provide for the extreme form of absolute discretion that the Court inferred.

The Court of Chancery's decision was wrong and should be reversed on the grounds that even absolute discretion does not alleviate the Board's responsibility to act in good faith. However, it is also true that the contract provisions on which Defendants (and the Court) relied to find absolute discretion are not as clear as Defendants attempted to make them sound.

At best, the level of discretion afforded by these provisions is ambiguous, and hence the question of whether the Board's actions were permitted by these provisions could not have been decided on a motion to dismiss. *LGM Holdings, LLC v. Schurder*, 340 A.3d 1134, 1146 (Del. 2025) (holding that the trial court erred in dismissing a claim based on an ambiguous contract term); *Monier, Inc. v. Boral Lifetile, Inc.*, 2008 WL 2168334, at *5 (Del. Ch. May 13, 2008) ("Where there are two (or more) reasonable interpretations of a contract, however, it is ambiguous, and the Court may not, on a Rule 12(b)(6) motion to dismiss, choose between two differing reasonable interpretations of ambiguous provisions.") (cleaned up).

Throughout the briefing on the motion to dismiss, Defendants based their argument for absolute discretion only on Section 2.1(b) of the Partnership Agreement. At oral argument, Defendants added Section 4.1. But neither of these provisions unambiguously afford the extreme sort of discretion that Defendants argue. Certainly, neither of these provisions evince an intent to override the requirement that discretion cannot be exercised in bad faith.

Section 2.1 provides that the Board of Directors, "with input from the Chief Executive Officer and other appropriate members of executive management of the Partnership, shall also have responsibility for, and review of" certain enumerated matters "to the extent not otherwise delegated to the Chief Executive Officer and/or other appropriate members of executive management of the Partnership," including:

> (b) Allocation of income to Partners, and designation of each Partner as a Fixed Share Partner or Variable Share Partner upon such Partner's admission and at any time thereafter[.]

A020 (Compl., Ex. A §2.1(b)). Defendants argued that this contractual language entitles the Board of Directors to strip equity from a Variable Share Partner at any time and for any reason whatsoever—including, among other things, in retaliation or with the intent to deprive him of the benefits of a liquidity event.

Defendants' reading of Section 2.1(b) is not a reasonable—and certainly not the only reasonable—reading of the contract language. Section 2.1(b) discusses the general areas of authority of the Board of Directors. The provision does not appear in a section specifically addressing conditions for appointment, elevation, or demotion of Fixed or Variable Share Partners. Nor does the section address conditions or qualifications of Fixed or Variable Share Partners.

Furthermore, Section 2.1(b) must be considered in the broader context of the contract, including Section 2.1. Before setting forth the areas of board authority, Section 2.1 makes clear that—even within the enumerated areas—the Board's authority is highly qualified. The Board only has authority (i) "to the extent not otherwise delegated to the Chief Executive Officer and/or other appropriate members of executive management of the Partnership" and (ii) this authority is simply to "have responsibility for, and review of" the enumerated areas. The highly qualified language of Section 2.1 does not reasonably suggest an intent to create an absolute, unfettered, and wholly arbitrary right to strip equity. Read as a whole, the only reasonable interpretation of Section 2.1 is that the enumerated provisions are areas where the Board has authority to act in the absence of other constraints—not that the Board has absolute, unfettered authority to do whatever it pleases within these areas. Section 2.1 contains no "sole discretion" or "absolute discretion" language.

Section 4.1, which Defendants introduced as their new basis at oral argument, says: "The Board of Directors shall determine the total number of variable and fixed units to be allocated among all the Partners and shall allocate variable units to Variable Share Partners and fixed units to Fixed Share Partners in such type and amounts as it determines in its sole discretion." A030-A031 (Compl., Ex. A §4.1). While this section does use the words "sole discretion," the scope of that discretion does not extend to the actions that the Board took in this case. Section 4.1 only addresses the number of units allocated to VSPs and FSPs. It does not say that the Board can strip all of an equity partner's units at any time or for any reason. Nor does Section 4.1 address or permit converting an equity partner to a non-equity partner. And Section 4.1 most certainly does not say that the Board can strip equity for bad faith reasons.

At oral argument, Defendants argued that under Sections 2.1 and 4.1, "the board had every right to convert Mr. McKenzie from a variable share partner to a fixed share partner." A143 at 7:13-15. But neither Section 2.1 nor Section 4.1 says that. Instead, Defendants rely solely on an inference: that because Section 4.1 provides the Board with the authority to "allocate variable units to Variable Share Partners and fixed units to Fixed Share Partners in such type and amounts as it determines in its sole discretion," the Court must infer that the Board also had the authority to completely strip an equity partner of all of his equity units and reclassify him as a non-equity partner. A143 at 7:7-15. Further, the Court must infer that this authority included stripping an equity partner of his equity for bad faith reasons, including retaliation and to deprive him of the benefit of a liquidity event.

But Defendants' reading is not a reasonable reading of Section 4.1. And it is certainly not the only reasonable reading, which is what must be the case for the Court to rule in Defendants' favor on a motion to dismiss. *See LGM Holdings*, 340 A.3d at 1145-46; *Monier Inc.*, 2008 WL 2168334, at *5. Even though Section 4.1 provides the Board with discretion about the number of units, that is different than allowing that the Board could take away all of an equity partner's units or reclassify him entirely. But even more fundamentally, even if the provision did expressly allow the Board to entirely strip units or reclassify a partner in its "sole discretion," Delaware law is well-established that that discretion still must be exercised in good faith.

Neither provision that Defendants cite provides the Board with the authority to divest a partner for bad faith reasons. No rational party would agree to such a provision. And, at minimum, had the parties been in the very strange (and arguably irrational) position of wanting to override Delaware's requirement that discretion cannot be exercised in bad faith, they would have included express language saying so. That language would arguably be void as a matter of public policy (and under the Partnership Act), but at least it would indicate that the true intent of the parties was an unusually sweeping sort of discretion. *See Terrell v. Kiromic Biopharma, Inc.*, 297 A.3d 610, 620 n.37 (Del. 2023) (rejecting interpretation of grant of authority in contract that would allow directors to act in bad faith without being subject to judicial review, and explaining that "public policy mandates that we recognize an implied covenant of good faith and fair dealing in every contract governed by Delaware law"). In any event, there are no indications of such an extreme intent here.

II. The Complaint stated a claim for breach of the implied covenant

A. Question Presented

Whether the Court of Chancery erred by finding, as a matter of law, that the implied covenant did not prohibit the Board from acting "arbitrarily or unreasonably" or "in bad faith to retaliate against [McKenzie] and hide a liquidity event." This issue was preserved at A100-A101 and decided by the Court of Chancery. Op. at 14-15.

B. Scope of Review

The Court reviews *de novo* the Court of Chancery's decision to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6). *Hughes*, 897 A.2d at 167-68.

C. Merits of Argument

"The implied covenant of good faith and fair dealing inheres in every contract governed by Delaware law and 'requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain.'" *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 145-46 (Del. Ch. 2009) (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005)). The implied covenant "exists to fulfill the reasonable expectations of the parties" and steps in to prohibit conduct where the parties "'would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter.'" *Id*. (quoting *Katz v. Oak Indus., Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986)). Even where a contract confers discretion on one party, "the implied covenant requires that the discretion be used reasonably and in good faith." *Id.* at 146-47. Furthermore, the Partnership Act expressly prohibits parties from eliminating the implied covenant in a partnership agreement. *See* 6 *Del. C*. § 15-103(b)(3).

The Complaint pleads a breach of the implied covenant in the alternative. Because of the way that briefing on the motion to dismiss unfolded, the Court focused mainly on the implied covenant at oral argument. Defendants' only defense for the Board's failure to follow Article 12 in its treatment of McKenzie as a departing partner was the sweeping discretion that Defendants argued that the Board had under Section 2.1 (and later, under Section 4.1). In actuality, the discretion afforded to the Board under Sections 2.1 and 4.1 does not clearly encompass the discretion to divest an equity partner. *See* Argument, § I(C)(2), *supra*. But even if it did, Defendants cannot escape the implied covenant, which would fill the contractual gap to say that the Board certainly cannot divest an equity partner arbitrarily or in bad faith to retaliate against him.

The Complaint alleges that the Board did precisely that. The Complaint alleges that the Board breached the implied covenant in the Partnership Agreement by divesting McKenzie to retaliate against him and to hide a liquidity event. The Complaint alleges McKenzie's role as a whistleblower (A009-A011 (Compl. ¶¶ 23, 26)), the unusual reactions of McKenzie's superiors to his informing them of his intent to retire from BDO (A010-A011 (Compl. ¶¶ 24-28)), and BDO's Managing Partner lying to McKenzie when McKenzie when McKenzie asked about whether there would be a liquidity event (A011-A012 (Compl. ¶¶ 29-31)). The Court acknowledged the applicability of the implied covenant to these circumstances at oral argument—explaining that even if the contract is read as giving the Board an express right, that right still must be exercised in good faith. *See*, *e.g.*, A146 at 10:4-7; A178 at 42:3-6. And Defendants' counsel conceded that it is "[t]rue" that "the implied covenant also say[s] . . . that you need to exercise your express rights in a manner that's not arbitrary or unreasonable or in bad faith." A178 at 42:3-8.

III. The Court of Chancery erred in finding that a board of a partnership does not owe fiduciary duties

A. Question Presented

Whether the Court of Chancery erred in finding that when a partnership chooses to be governed by a board of directors, the members of the board do not owe fiduciary duties to equity holders in their capacity as directors because the only fiduciary duties in a partnership are those of the partners to the partnership and to one-another under DRUPA. This issue was preserved at A109-A110 and decided by the Court of Chancery. Op. at 17.

B. Scope of Review

The Court reviews *de novo* the Court of Chancery's decision to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6). *Hughes*, 897 A.2d at 167-68.

C. Merits of Argument

The Complaint pleads that the Board had—and breached—a fiduciary duty of loyalty to McKenzie. A012-A014 (Compl. ¶¶ 34, 37-38). The members of the Board breached their fiduciary duty of loyalty "by acting in their self-interest at the expense of McKenzie" when they stripped him of his equity to retaliate against him and to hide a liquidity event, and to benefit themselves by the redistribution of his equity among the other VSPs, who included a majority of the Board. A012-A014 (Compl. ¶¶ 34, 38).

In their motion to dismiss, Defendants argued that the Board had no fiduciary duties to McKenzie because the only fiduciary duties implicated in a partnership are a narrow set of fiduciary duties that individual partners—not the Board—owe to other partners under the Partnership Act, 6 *Del. C.* § 15-404(b). A073-A074 (Opening Br. at 6-7). But that argument ignores the fact that McKenzie's claim for breach of fiduciary duty was not merely against Defendants *as his partners* but against Defendants *as members of the Board of Directors*.

In this case, the Partnership Agreement expressly appoints the Board to a managerial function, imbuing the board members with the fiduciary duties of a board. In creating a board and imbuing it with certain duties of management and oversight, BDO clearly intended the Board to have powers and duties beyond that of ordinary partners. *See* A020 (Compl., Ex. A § 2.1) ("Unless, and to the extent not, delegated to the Chief Executive Officer of the Partnership (the 'Chief Executive Officer') and/or other appropriate members of executive management of the Partnership in accordance with this Agreement, the business and affairs of the Partnership shall be subject to the oversight of the Board of Directors."). The express language of the Partnership Agreement gives the Board a role that is akin to a corporate board of directors. This intent is reinforced by the eight subsequent pages of provisions that set forth the procedures and duties of the Board, as well as the requirements for election, removal, and service of board members. *See* A020-A026 (Compl., Ex. A §§ 2.1-2.17). In contrast, Section 15-404(a) of the Partnership Act sets forth only the "fiduciary duties *a partner* owes to the partnership and the other partners." 6 *Del. C.* § 15-404(a) (emphasis added).

It is well-settled that where alternative entities avail themselves of corporate law constructs, Delaware courts routinely look to corporate law by analogy. *See, e.g.*, *Inter-Mktg. Grp. USA, Inc. v. Armstrong*, 2019 WL 417849, at *3 (Del. Ch. Jan. 31, 2019) (looking to demand requirement in corporate law and applying it by analogy to limited partnership context); *Obeid v. Hogan*, 2016 WL 3356851, at *7 (Del. Ch. June 10, 2016) (applying corporate law principles regarding formation of a special litigation committee to LLC where the LLC agreement "substantially re-create[d] the governance structure of a Delaware corporation using language drawn from the corporate domain"); *Freeman Fam. LLC v. Park Ave. Landing LLC*, 2019 WL 1966808, at *7 (Del. Ch. Apr. 30, 2019) (applying corporate case law by analogy in advancement context, holding that "the parties intended to import corporate case law as indicated by their decision to use contractual language that mirrors [the corporate advancement statute].").

This principle has been expressly applied to the partnership context where the partnership delegated its business and affairs to a board-like body. *See In re Cellular Tel. P'ship Litig.*, 2021 WL 4438046, at *5 (Del. Ch. Sept. 28, 2021) (analyzing duties of executive committee where partnership agreement held that "except as otherwise provided in this Partnership Agreement, complete and exclusive power to conduct the business affairs of the Partnership is delegated to the Executive Committee"). As the *In re Cellular* Court explained, the members of the company's executive committee "would be obligated to comply with their fiduciary duties" in determining whether to exercise a remedy on the company's behalf. *Id*. at *76, n.60.

Similarly, even in the case of limited partnerships where—unlike in ordinary partnerships or LLPs—the default is that limited partners have <u>*no*</u> fiduciary duties, Delaware courts will impose fiduciary duties on limited partners who assume a managerial function. *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 662 (Del. Ch. 2012) (explaining that "[p]assive limited partners do not owe default fiduciary duties," but "can assume fiduciary duties if they take on an active role in the management of the entity"); *see also KE Prop. Mgmt., Inc. v. 275 Madison Mgmt.*, 1993 WL 285900, at *9 (Del. Ch. July 27, 1993) ("[T]o the extent that a partnership agreement empowers a limited partner discretion to take actions affecting the governance of the limited partnership, the limited partner may be subject to the obligations of a fiduciary, including the obligation to act in good faith as to the other partners."). Delaware courts will likewise enforce contractually-created fiduciary duties for limited partners. *See Cantor Fitzgerald, L.P. v. Cantor*, 2000 WL 307370, at *9 (Del. Ch. Mar. 13, 2000) (partnership agreement imposed fiduciary duty of loyalty on limited partners). In evaluating where fiduciary duties are owed, "Delaware corporate decisions consistently have looked to who wields control in substance and have imposed the risk of fiduciary liability on the actual controllers." *Feeley*, 62 A.3d at 668.

In this case, the Court of Chancery rejected Plaintiff's argument that where a partnership elects to be governed by a board of directors, those directors have fiduciary duties—just like corporate directors and just like the boards of other alternative entities, like LLCs. The Court said the analogy to corporate law was misplaced because "BDO was a partnership governed by a Partnership Agreement, not a corporation." Op. at 16. The Court concluded, "[t]he parties chose to organize under DRUPA, and corporate law analogies cannot be used to override the contractual and statutory framework they selected." *Id*. The Court's holding means that the board members did not have any fiduciary duties as board members. The only fiduciary duties were those held by board members who were also partners, and those duties were the same duties that ordinary partners owe to one-another. The fact that BDO was governed by a board is immaterial by the Court of Chancery's lights.

This would create odd results. In their capacities as individual partners, the members of the Board would have had no power and authority to direct the entity, but they would have some remnant of fiduciary duty when exercising their meager individual powers. Meanwhile, in their capacities as members of the Board, those people would have had wide-ranging power and authority collectively to direct the entity, but absolutely no fiduciary duty to the partners they governed to exercise their power fairly and in good faith. The Partnership Agreement does not express or imply this was the intended arrangement.

The Court of Chancery's holding also misconstrues McKenzie's argument. The analogy to corporate law is not an attempt to "override the contractual framework" the parties selected, but an attempt to fulfill it. The parties in the case chose to go beyond the starting point of the Partnership Act and created a board of directors with duties akin to boards in the corporate and alternative entity contexts. A020 (Compl., Ex. A § 2.1). The members of that governing body have fiduciary duties in that capacity, as the Court of Chancery held in cases like *In re Cellular*, 2021 WL 4438046, at *5, and *Obeid*, 2016 WL 3356851, at *6.

IV. The Complaint stated a direct claim for breach of fiduciary duty

A. Question Presented

Whether the Court of Chancery erred in finding that McKenzie's claim for breach of fiduciary duty alleged only harms to him *qua* individual (and not *qua* equity holder) and that the breach of fiduciary duty claim was also "impermissibly duplicative of the contract claims." This issue was preserved at A106, A118 and decided by the Court of Chancery. Op. at 15-18.

B. Scope of Review

The Court reviews *de novo* the Court of Chancery's decision to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6). *Hughes*, 897 A.2d at 167-68.

C. Merits of Argument

The Complaint pleads that the board members had, and breached, their duty of loyalty to McKenzie by stripping McKenzie of his equity for bad faith and self-dealing reasons. A012-A013, A014 (Compl. ¶¶ 34, 38).

The Court held that even if the Court were to find that the Board had fiduciary duties like other corporate or alternative entity boards, McKenzie still could not state a claim for breach of fiduciary duty because (i) the duty alleged to have been breached was not a duty to McKenzie as an equity holder, and (ii) the claim is duplicative of the breach of contract claims. Op. 16-17.

First, the Court found that McKenzie "has not identified a duty that was breached" because "[c]orporate directors owe duties to the entity and its stockholders as a whole, not to individuals." *Id.* While the Opinion does not elaborate on this point, the Court's concern was raised at oral argument. Plaintiff argued that the Board had a duty to McKenzie as an equity holder (and the Board has the same duty to all equity holders *qua* equity holders) not to arbitrarily strip them of their equity. *See* A167-A169 at 31:5-33:19. The Court expressed the view that this duty cannot be a duty to stockholders because it affected only one individual in the case: McKenzie. *See* A166-A167 at 30:24-31:4.

But the number of persons affected is not the test for whether a duty is a duty to a stockholder *qua* stockholder. Were that the case, there would be no fiduciary duties of a board to single stockholder, or—strikingly—of one joint venturer to the other. That is not Delaware law. A breach of fiduciary duty derives its character from the nature of the relationship between the fiduciary and the person(s) to whom the duty is owed, and is agnostic as to the number of persons who must be affected by the breach. That fact is demonstrated by the well-worn principle that 50-50 joint venturers owe fiduciary duties to one another. *See*, *e.g.*, *Universal Studios Inc.*

v. Viacom Inc., 705 A.2d 579, 593 (Del. Ch. 1997) (joint venturers owe fiduciary duties to one another); *Wagamon v. Dolan*, 2013 WL 1023884, at *2 (Del. Ch. Mar. 15, 2013) ("In an equal 50-50 joint venture, . . . each partner owes the other a fiduciary duty of utmost good faith, fairness and honesty with respect to their relationship to each other and to the enterprise.") (internal quotation and citation omitted).

Relatedly, the Court found the breach of fiduciary duty claim must fail as a duplicative, "bootstrap[ed]" claim. Op. at 17. The Court held that the fiduciary duty claim was duplicative because the Court found that the Board's obligations to McKenzie with respect to his equity were "expressly addressed by contract" (and the contract permitted the Board to divest an equity partner for any reason). Op. at 17 (quoting *Nemec*, 991 A.2d at 1129). The court held that "[t]here is no meaningful distinction between the fiduciary duty claim and the contract claim, and both seek the same remedy: damages for loss of the [equity units'] value." *Id*.

As a preliminary matter, Delaware courts permit pleading in the alternative and that alternative theories may be maintained past a motion to dismiss. *OTK Assocs., LLC v. Friedman*, 85 A.3d 696, 715 n.1 (Del. Ch. 2014); *see also Firmenich Inc. v. Nat. Flavors, Inc.*, 2020 WL 1816191, at *9 (Del. Super. Ct. Apr. 7, 2020) (declining to dismiss claims on grounds of "duplicative damages" where claims "would never co-exist at final judgment and are, therefore, not duplicative") (quoting *Ashland LLC v. Samuel J. Heyman 1981 Continuing Tr. for Heyman*, 2018 WL 3084975, at *15 (Del. Super. Ct. June 21, 2018)).

Furthermore, just because two causes of action arise from a common nucleus of fact, that does not erase the existence of separate duties that have been violated. The issue is not whether relief sought for each claim is different (*see*, *e.g.*, *Firmenich*, 2020 WL 1816191, at *9), but instead, whether the fiduciary claim would exist independent of the contract's terms. *See Grunstein v. Silva*, 2009 WL 4698541, at *6 (Del. Ch. Dec. 8, 2009) ("In determining whether a breach of fiduciary duty claim is duplicative of a corresponding breach of contract claim, the principal inquiry by Delaware courts is whether the fiduciary duty in the complaint arises from general fiduciary principles or from specific contractual obligations agreed upon by the parties."). As Plaintiff explained at oral argument, "even if the partnership agreement did not exist or had very different terms, the board could not choose to take a partner's equity for no purpose other than to benefit themselves or to retaliate against him or just because they feel like it." A163 at 27:7-18. In other words, the fiduciary duty not to arbitrarily divest equity holders is independent of the existence of any contract or any specific contractual terms.

Furthermore, also as pointed out at oral argument, the Complaint alleges not only that the Board decided to strip McKenzie's equity, but also that they effected the conversion at an unfair price, representing a further breach of duty to McKenzie *qua* equity holder. A163 at 27:19-22. It is not the contract that specifies that conversion must be at a fair price. Rather, that requirement stems from general fiduciary principles.

V. The Court of Chancery improperly relied on findings of fact

A. Question Presented

Whether the Court of Chancery erred when it determined that the reallocation of McKenzie's equity units would result only in a "de minimis" financial benefit that could not have been material to the directors' decision and when it declined to consider that allegation that the directors received the benefit of punishing McKenzie for his whistleblowing activities, which was material to the directors. This issue was preserved at A103-A106 and decided by the Court of Chancery. Op. at 18.

B. Scope of Review

The Court reviews *de novo* the Court of Chancery's decision to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6). *Hughes*, 897 A.2d at 167-68.

C. Merits of Argument

On a motion to dismiss, the Court of Chancery "should accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as 'well-pleaded' if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof." *Central Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).

The Complaint alleges that Defendants stripped McKenzie of his equity for the dual aims of enriching themselves while punishing McKenzie for his whistleblowing activities. Specifically, the Complaint pleads that the "defendants used a planned retirement as a pretense to deprive McKenzie of the value of his partnership units in anticipation of a reorganization of BDO from a Delaware limited liability partnership to a Delaware professional association and then a Virginia professional corporation." A007 (Compl. ¶ 4). The Complaint further pleads that "[e]ach of the Variable Share Partners who were members of the BDO Board stood to benefit from the redistribution of McKenzie's Variable Share Partner units among themselves and the other Variable Share Partners. The Board acted in their self-interest and breached their duty of loyalty to McKenzie when they stripped him of his Variable Share Partner units." A012-A013 (Compl. ¶ 34).

The decision below held that stripping McKenzie of his equity could not qualify as a breach of fiduciary duty on a self-dealing theory because there was no "material, non-ratable benefit" to the Defendants. Op. at 18. The Court held first that "[t]here is no allegation that the redistribution of these units was material to the individual defendants," hypothesizing that "[e]ven assuming there were only a few hundred equity holders among BDO's 800 partners, the pro rata redistribution of 631 units would result in a de minimis accretion to any one individual." Op. at 18. The Court further held that "because the units were to be redistributed among *all* VSPs, not just the defendants, the benefit was ratable." Op. at 18 (emphasis in original).

The Court's holding errs in at least four ways. *First*, the Court erred by engaging in a hypothetical about what amount of equity might or might not be material to the Defendants. That hypothetical is not supported by the Complaint, the briefing, or anything else in the record.

Second, the Court erred by failing to address in the Opinion the argument that Defendants also received a non-ratable benefit by retaliating against McKenzie for his whistleblowing—even though the point was discussed in the briefing and at oral argument. A087 (Opp. Br. at 2) ("But the Board's real intent was to punish McKenzie for raising concerns about the management of the Partnership, to avoid paying McKenzie amounts to which he was contractually entitled upon exit as an equity partner, and to redistribute McKenzie's equity for the benefit of themselves and other equityholders in advance of a planned liquidity event."); A169-A170 at 33:20-34:23 ("[T]here's also the benefit alleged that they did it to get back at him or because they were unhappy with him.").

Third, but relatedly, the Court erred by holding that nothing in the Complaint supported the materiality of the benefits the Defendants realized. While it is true that the Complaint does not use the word "material," the Complaint is clear that the two purposes are pled as the motivating factors for the Board's actions. *See River Valley Ingredients, LLC v. Am. Proteins, Inc.*, 2021 WL 598539, at *5 (Del. Super. Ct. Feb. 4, 2021) ("[A] court may look to any factual allegations of particular acts within the complaint as a whole" to evaluate whether a claim is properly pled) (internal quotation marks omitted); *Beach to Bay Real Est. Ctr. LLC v. Beach to Bay Realtors Inc.*, 2017 WL 2928033, at *8 (Del. Ch. July 11, 2017) (looking to "the Complaint as a whole" to determine if pleading is adequate). The relevant inquiry is whether the complaint pleads sufficient facts to put the defendants on notice of the claims against them. *See Intermec IP Corp. v. TransCore, LP*, 2021 WL 3620435, at *22 n. 205 (Del. Super. Ct. Aug. 16, 2021) (Delaware's notice pleading standard does not require "exacting detail or magic words."); *Bean v. JUUL Labs Inc.*, 2026 WL 839831, at *35 (Del. Super. Ct. Mar. 26, 2026) (magic words not required for pleading). The reasonable inference is that if retaliation motivated the Board, that motive was material to them (by virtue of having been important enough to motivate). By pleading that the Board's misconduct was motivated by the dual aims of redistributing McKenzie's equity and retaliating against him, the Complaint pleads that those aims were material to the Board.

Finally, the Court erred by holding that the benefit was ratable. While the benefit was shared with the other VSPs who were not being divested, it was not shared with McKenzie—who was an equity holder at the time of his divestment. It is not a requirement under Delaware law that self-dealing cannot incidentally benefit some other stakeholders. *See*, *e.g.*, *Nixon v. Blackwell*, 626 A.2d 1366, 1376-77 (Del. 1993) (finding non-ratable benefit and applying entire fairness standard to transactions that controlling stockholders used to generate liquidity for themselves and other company employees, benefitting employee stockholders at the expense of non-employee stockholders). It is classic self-dealing where a fiduciary benefits himself to the detriment of other stockholders—even where some stockholders benefit along with the disloyal fiduciary. Notably, while application of the entire fairness standard is not an automatic win for the plaintiff (because the Court may still find that the transaction was entirely fair), it will ordinarily preclude dismissal under Rule 12(b)(6). *See Roofers Loc. 149 Pension Fund v. Fid. Nat'l Fin., Inc.*, 2025 WL 1354973, at *7 (Del. Ch. May 9, 2025).

The Court of Chancery did not have the discretion to determine that, contrary to the Complaint's allegations, the benefits that the directors received from divesting

McKenzie—either the financial benefits or the retaliatory purpose—could not have been material to the directors. Further, the Court of Chancery erred as a matter of law in holding that the benefit was ratable because it benefitted persons beyond the wrongdoers themselves. Under the motion to dismiss standard, the Court was required to accept the truth of the Complaint's allegations and not make factual determinations that conflict with the Complaint. The Court's improper determination of facts at the motion to dismiss stage, coupled with a misapprehension on what makes a benefit non-ratable, is a further ground for dismissal.

CONCLUSION

For the reasons set forth above, this Court should reverse the Court of Chancery's decision dismissing the Complaint.

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Respectfully submitted,

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