EFiled: May 13 2026 04:35PM EDT
Filing ID 79457797
Case Number 82,2026

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

<u>APPELLEES' ANSWERING BRIEF</u>

MCDERMOTT WILL & SCHULTE LLP

Kevin M. Regan (#6512)
The Brandywine Building
1000 N. West Street, Suite 1400
Wilmington, DE 19801
(302) 485-3906
kregan@mcdermottlaw.com

Attorneys for Defendants

OF COUNSEL:

Michael J. Sheehan
Aaron P. Sayers (#6373)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-2388
michael.sheehan@dechert.com
aaron.sayers@dechert.com

Dated: May 13, 2026

TABLE OF CONTENTS

TABLE OF CITATIONS iii
NATURE OF PROCEEDINGS 1
SUMMARY OF ARGUMENT 2
SUMMARY OF FACTUAL ALLEGATIONS 5
I. Factual Background 5
II. Procedural Background 6
ARGUMENT 8
I. The Vice Chancellor Correctly Dismissed McKenzie's Contract Claim 8
A. Question Presented 8
B. Scope of Review 8
C. Merits of Argument 8
1. McKenzie Waived His Breach of Contract Claim 8
2. McKenzie's Partnership Agreement Authorizes Converting His Status At Any Time 10
a. Sections 2.1(b) And 4.1 Are Unambiguous 10
b. Section 12.2 Imposes No Limits On Conversion 12
II. The Vice Chancellor Correctly Dismissed McKenzie's Implied Covenant Claim 14
A. Question Presented 14
B. Scope of Review 14
C. Merits of Argument 14
III. The Vice Chancellor Correctly Dismissed McKenzie's Fiduciary Duty Claim 19
A. Question Presented 19
B. Scope of Review 19
C. Merits of Argument 19

1. This Claim Fails For Lack Of Any Fiduciary Duty 19
2. This Claim Is Duplicative of McKenzie's Contract Claims 24
IV. The Vice Chancellor Made No Findings of Fact 26
A. Question Presented 26
B. Scope of Review 26
C. Merits of Argument..26
CONCLUSION 31

TABLE OF CITATIONS

Page(s)

Cases

Airborne Health, Inc. v. Squid Soap, LP,
984 A.2d 126 (Del. Ch. 2009) 16

Brinckerhoff v. Enbridge Energy Company, Inc.,
159 A.3d 242 (2017) 10

In re Cellular Tel. P'ship Litig.,
2021 WL 4438046 (Del. Ch. Sept. 28, 2021) 21

Cygnus Opportunity Fund, LLC v. Washington Prime Grp., LLC,
302 A.3d 430 (Del. Ch. 2023) 16

Firmenich Inc. v. Nat. Flavors, Inc.,
2020 WL 1816191 (Del. Super. Ct. Apr. 7, 2020) 25

Fortis Advisors LLC v. Dialog Semiconductor PLC,
2015 WL 401371 (Del. Ch. Jan. 30, 2015) 14

Freeman Fam. LLC v. Park Ave. Landing LLC,
2019 WL 1966808 (Del. Ch. Apr. 30, 2019) 22

Gilbert v. El Paso Corp.,
1988 WL 124325 (Del. Ch. Nov. 21, 1988) 23

Grunstein v. Silva,
2009 WL 4698541 (Del. Ch. Dec. 8, 2009) 25

Intel Corp. v. Am. Guarantee & Liab. Ins. Co.,
51 A.3d 442 (Del. 2012) 12, 13

Inter-Mktg. Grp. USA, Inc. v. Armstrong,
2019 WL 417849 (Del. Ch. Jan. 31, 2019) 21

Johnson & Johnson v. Fortis Advisors LLC,
352 A.3d 229 (Del. 2026) 2, 14, 17

Klaassen v. Allegro Dev. Corp.,
2013 WL 5967028 (Del. Ch. Nov. 7, 2013) 3, 23

Madison Realty Partners 7, LLC v. Ag ISA, LLC,
2001 WL 406268 (Del. Ch. Apr. 17, 2001) 25

Maffei v. Palkon,
339 A.3d 705 (Del. 2025) 4, 27, 29

Miller v. HCP Trumpet Invs., LLC,
194 A.3d 908, 2018 WL 4600818 (Del. 2018) 16

Nixon v. Blackwell,
626 A.2d 1366 (Del. 1993) 29

Norton v. K-Sea Transp. Partners L.P.,
67 A.3d 354 (Del. 2013) 2, 3, 23

Obeid v. Hogan,
2016 WL 3356851 (Del. Ch. June 10, 2016) 21

OTK Assocs., LLC v. Friedman,
85 A.3d 696 (Del. Ch. 2014) 25

P-5 GRA, LLC v. Ivankovich,
2025 WL 1483625 (Del. Ch. May 23, 2025) 3, 24

Price v. E.I. DuPont de Nemours & Co.,
26 A.3d 162 (Del. 2011) 27

Sheehan v. Assured Partners, Inc.,
2020 WL 2838575 (Del. Ch. May 29, 2020) 10, 17

Thompson St. Cap. Partners IV, L.P. v. Sonova United States Hearing Instruments, LLC, 340 A.3d 1151 (Del. 2025) .... *passim*

Universal Studios Inc. v. Viacom Inc.,
705 A.2d 579 (Del. Ch. 1997) 22

Wagamon v. Dolan,
2013 WL 1023884 (Del. Ch. Mar. 15, 2013) 22

Statutes

6 *Del. C.* § 15-404(b) 20

8 *Del. C.* § 145(a) and (b) 22

70 Bus. Law. 33, 49 (2014)....24

Other Authorities

Court of Chancery Rule 12(b)(6)....*passim*

J. Travis Laster & John Mark Zeberkiewicz, *The Rights and Duties of Blockholder Directors*....23

NATURE OF PROCEEDINGS

Jason McKenzie ("McKenzie") was a partner at BDO USA, LLP ("BDO"), which was organized under a partnership agreement governed by Delaware law. Pursuant to its terms, BDO's Board of Directors converted McKenzie from a Variable Share Partner ("VSP") to a Fixed Share Partner ("FSP").

McKenzie filed a Complaint challenging that conversion in three claims: breach of fiduciary duty (Count I); breach of contract (Count II); and breach of the implied covenant of good faith and fair dealing (Count III). The Vice Chancellor granted BDO's motion to dismiss, holding that "[n]one of his claims have merit." Mem. Op. at 2.

McKenzie has now appealed that dismissal. His Opening Brief asserts (at pp. 15-25) that the Vice Chancellor erred in dismissing his contract claim; asserts (at pp. 26-28) that the Vice Chancellor erred in dismissing his implied covenant claim; asserts (at pp. 29-39) that the Vice Chancellor erred in dismissing his fiduciary duty claim; and asserts (at pp. 40-45) the the Vice Chancellor made findings of fact in its alternative holding for dismissing his fiduciary duty claim.

None of those contentions are meritorious.

SUMMARY OF ARGUMENT

1. Denied. Contrary to McKenzie's contention, McKenzie's breach of contract claim fails for two reasons. *First*, McKenzie's counsel admitted at oral argument that none of the terms of the Amended and Restated Partnership Agreement (the "Partnership Agreement") had been breached. *Second*, wholly apart from that admission, the Partnership Agreement unambiguously authorizes BDO's Board of Directors to convert McKenzie's status from a VSP to an FSP "at any time" after his admission to the partnership.

2. Denied. Contrary to McKenzie's contention, his implied covenant claim fails. Here, conversion from a VSP to an FSP was expressly authorized by the Partnership Agreement so there was no contractual gap for the implied covenant to fill. *Johnson & Johnson v. Fortis Advisors LLC*, 352 A.3d 229, 253 (Del. 2026) ("We have repeatedly emphasized that this gap-filling power is a "limited and extraordinary remedy"; a "cautious enterprise" that applies only where there is a true contractual gap about how to handle an unforeseen event.").

3. Denied. Contrary to McKenzie's contention, his fiduciary duty claim fails as a matter of law for three separate reasons.

First, as the Vice Chancellor explained, "[t]he parties chose to organize under DRUPA, and corporate law analogies cannot be used to override the contractual and statutory framework they selected." Mem. Op. at 16; *see also Norton v. K-Sea*

Transp. Partners L.P., 67 A.3d 354, 362 (Del. 2013) (affirming dismissal of fiduciary duty claims; "Norton willingly invested in a limited partnership that provided fewer protections to limited partners than those provided under corporate fiduciary duty principles. He is bound by his investment decision").

Second, even if this arose in a corporate setting rather than a partnership setting controlled by DRUPA, corporate boards owe fiduciary duties only to the company as an entity and to its stockholders as a whole, not to individuals. *Klaassen v. Allegro Dev. Corp.*, 2013 WL 5967028, at *11 (Del. Ch. Nov. 7, 2013) ("[C]orporate directors do not owe fiduciary duties to individual stockholders; they owe fiduciary duties to the entity and to the stockholders as a whole.").

Finally, McKenzie's fiduciary duty claim impermissibly duplicates his contract claim: "any fiduciary claims arising out of the same facts that underlie the contract obligations are foreclosed as superfluous." *P-5 GRA, LLC v. Ivankovich*, 2025 WL 1483625, at *5 (Del. Ch. May 23, 2025) (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1129 (Del. 2010)).

4. Denied. McKenzie's Opening Brief (and his Summary of Argument) artificially bifurcates the dismissal of his fiduciary duty claim into separate arguments. Because that artificial bifurcation adds confusion rather than clarity, BDO's brief treats both (McKenzie's No. 3 and No. 4) together in a single section of

this brief; so, its response to No. 3, *supra*, incorporates its response to both Nos. 3 and 4 in McKenzie's Summary of Argument.

5. Denied. The Vice Chancellor addressed self-dealing only as an alternative justification for dismissing McKenzie's fiduciary duty claim. So, unless this Court rejects both of the Vice Chancellor's other grounds for dismissal of that claim, there is no need to decide this point. If this Court does reach this issue, McKenzie's contention is wrong: The Vice Chancellor made no factual findings and merely held McKenzie accountable for his own pleading shortfalls in failing to allege either a material benefit or a non-ratable benefit. *Maffei v. Palkon*, 339 A.3d 705, 744 (Del. 2025) (reversing failure to dismiss "where there are no well-pled allegations of a material, non-ratable benefit flowing to the director or controllers").

SUMMARY OF FACTUAL ALLEGATIONS

I. Factual Background

McKenzie became a partner in BDO USA, LLP in 2016. (A006, ¶¶ 1, 20.)[1]

Upon joining BDO, McKenzie signed the Partnership Agreement that was governed by Delaware law. (A019.) The Partnership Agreement charged a board of directors (the "Board") with managing BDO. (A008, ¶ 7.)

The Partnership Agreement created two tiers of partners: Variable Share Partners ("VSPs") and Fixed Share Partners ("FSPs"). (A009, ¶ 21; A31, § 5.1; A020, § 2.1(a)-(b).) McKenzie was initially a VSP. (A009, ¶ 21.)

A partner's position as a VSP or an FSP was not static. The Partnership Agreement authorized the Board to convert partners from a VSP to an FSP (or vice versa) "at any time" after his or her admission to the partnership. (A020, § 2.1(a)-(b).) Plus, the Partnership Agreement provides that the Board "shall" allocate variable and fixed units "in such type and amounts as it determines in its sole discretion." (A030, § 4.1.)

---

[1] BDO USA, LLP was at all material times a Delaware limited liability partnership. Subsequent to the events in question in this case, BDO converted to a Delaware professional association called BDO USA P.A. in June 2023 and thereafter became a Virginia professional corporation, BDO USA, P.C., in August 2023. (A007, A012, ¶¶ 4, 7, 31.)

The Partnership Agreement also set forth procedures for partner withdrawal. Under formulas set in the Partnership Agreement, a withdrawing partner would receive an allocable share of BDO's profits (net of any losses) for the last fiscal year in which the partner was associated with the partnership, based on the "type of units allocated to such [p]artner"—that is, whether they were a VSP or an FSP:

> [I]f termination of a Partner occurs for any reason other than death or permanent disability pursuant to Articles IX and VIII, respectively, then such Partner's allocable share, based on the type of units allocated to such Partner, shall be such Partner's allocable share of the profits or losses of the Partnership for the period ("short period") from the end of the last fiscal year of the Partnership until the date of termination.

(A044-A045, §§ 12.1(a), 12.2.)

In March 2023, McKenzie announced his intent to resign at the end of the upcoming fiscal year: *i.e.*, April 2024. (A009-A010, ¶ 23.) BDO's Board thereafter converted McKenzie from a VSP to an FSP. (A011, ¶ 28.) On April 27, 2023 BDO sent McKenzie a revised "unit allocation memo" memorializing the conversion of his 631 VSP units into 669 FSP units. (A012, ¶ 32.)

McKenzie remained a partner until April 2024 when he resigned as planned.

II. Procedural Background

McKenzie filed his Verified Complaint on March 3, 2025, raising three claims: breach of fiduciary duty (Count I); breach of the Partnership Agreement (Count II); and breach of the implied covenant of good faith and fair dealing (Count III). Appellees moved to dismiss all claims in the Verified Complaint.

After full briefing and oral argument, the Vice Chancellor granted that motion on January 26, 2026, dismissing all claims with prejudice. The Vice Chancellor's nineteen-page Memorandum Opinion detailed the controlling law supporting its holding that "[t]he Complaint fails to state any claim on which relief can be granted." Mem. Op. at 19.

ARGUMENT

I. The Vice Chancellor Correctly Dismissed McKenzie's Contract Claim

A. Question Presented

Whether the Vice Chancellor correctly held that Section 2.1(b) and Section 4.1 of BDO's Partnership Agreement afforded the Board authority to convert McKenzie from a VSP to an FSP at any time?

B. Scope of Review

This Court reviews *de novo* decisions to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6). *Thompson St. Cap. Partners IV, L.P. v. Sonova United States Hearing Instruments, LLC*, 340 A.3d 1151, 1165 (Del. 2025). Nonetheless, *de novo* review does not disturb a dismissal that is plainly correct on the face of the contract. *Id.* And, here, the text of the Partnership Agreement—incorporated by reference into the Verified Complaint—forecloses disturbing that dismissal.

C. Merits of Argument

1. McKenzie Waived His Breach of Contract Claim

The threshold question in every breach of contract claim is whether the plaintiff's complaint has pleaded a breach of a specific contractual obligation. McKenzie's Verified Complaint, as well as his briefing below, fails to identify what contractual provision was breached by converting him from a VSP to an FSP.

When the Vice Chancellor pressed this point at oral argument, McKenzie's counsel admitted that BDO did not breach any provision of the Partnership Agreement and that McKenzie actually is standing only on his implied covenant claim:

> THE COURT: What provision are you alleging was breached due to the conversion? You're saying that was the breach.
>
> ATTORNEY STEADMAN: Due to -- well, I guess what they breached in doing was not paying him as an equity partner under Article XII.
>
> THE COURT: But what specific term of the contract was breached?
>
> ATTORNEY STEADMAN: Well, I think what you're asking is at the time they converted him was there a specific provision that was breached.
>
> THE COURT: Right.
>
> ATTORNEY STEADMAN: And I think at that point we would rely on the implied covenant that they have to convert him for at least a good faith reason.
>
> ***
>
> THE COURT: It's not an explicit breach of the term of the partnership agreement itself? You're looking to the implied covenant?
>
> ATTORNEY STEADMAN: Yes, that's correct, Your Honor. There's not something that says the board cannot divest a partner just because it feels like it.

(A156-157.)

Having explicitly abandoned any breach of contract claim in open court before the Vice Chancellor, there is no permissible basis to assert such a breach on appeal.

Brinckerhoff v. Enbridge Energy Company, Inc., 159 A.3d 242, 257 (2017) (holding that appellant "waived the argument that EEP GP breached Section 5.2(c) of the LPA" because he "conceded below that Section 5.2(c) does not apply to the Alberta Clipper transaction").

2. McKenzie's Partnership Agreement Authorizes Converting His Status At Any Time

Even if McKenzie had not waived his breach of contract claim, the Vice Chancellor properly dismissed that claim. Neither of the contentions in his appellate brief warrant questioning the correctness of the Vice Chancellor's decision to dismiss McKenzie's breach of contract claim.

a. Sections 2.1(b) And 4.1 Are Unambiguous

McKenzie acknowledges that Section 2.1(b) and Section 4.1 grant the Board discretion but quibbles that the level of discretion afforded by these provisions is ambiguous and hence should not have been decided on a motion to dismiss. That quibble is wholly without substance.[2]

[2] Nor is it even grounded in the law. McKenzie's brief cites only cases discussing the implied covenant, which are irrelevant to his breach of contract claim. For example, McKenzie references *Sheehan v. Assured Partners, Inc.* for the proposition that "a plaintiff can plead a claim for breach of contract where a party exercised its contractual discretion in bad faith." 2020 WL 2838575, at *11 (Del. Ch. May 29, 2020). *Sheehan* says nothing of the sort, and the cited section only addresses an implied covenant claim.

Section 2.1(b) charges BDO's Board with the "designation of each Partner as a[n FSP] or [a VSP]" not only upon admission but also "at any time thereafter." (A020, § 2.1(a)-(b).)

And, as the Vice Chancellor correctly held, "[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.'" Mem. Op. at 10-11 (citing A030, § 4.1) (emphasis added).

Each of these provisions define with precision "who may act (the Board), what it may do (designate partner status), and when it may do so (at any time)." *Id.* at 13. And, where, as here, that explicit grant is stated twice-over, there is no room for quibbling over its scope for two compelling reasons.

First, wishing for ambiguity does not make ambiguity. *Thompson St. Cap. Partners*, 340 A.3d at 1166 ("The parties' steadfast disagreement over interpretation will not, alone, render the contract ambiguous" (internal citation omitted)).

Second, the legal standard requires more than just quibbles: "Language from a contract need not be perfectly clear for an interpretation of it to be deemed as the only reasonable one." *Id*. (internal citation omitted)

b. Section 12.2 Imposes No Limits On Conversion

McKenzie asserts that the Board should have followed the payout procedures for departing VSPs in Section 12.2 of the Partnership Agreement before converting his status from VSP to FSP. This is more wishful thinking and purposefully misreads Section 12.2.

Section 12.2(b) provides a formula to calculate a partner's allocable share for their last fiscal year with the partnership, based on "the type of units allocated to such [p]artner." (A044-A045, §§ 12.1(a), 12.2.) It governs the calculation of a departing partner's share based on whatever status (VSP or FSP) that the departing partner holds at the time of termination. (*Id.*)

McKenzie resigned effective April 30, 2024. The Board converted him to an FSP effective April 2023 **before** his final fiscal year began. So, for the relevant period under Section 12.2, McKenzie held only FSP units. This is why the Vice Chancellor correctly held that Section 12.2 does "not lock[] in a partner's status upon resignation or prohibiting a status change before the final fiscal year." (Mem. Op. at 10.)

Beyond that, McKenzie's proposed interpretation not only misreads that section but would impermissibly edit out the "at any time" and "sole discretion" language in Sections 2.1(b) and 4.1. Proffered contract interpretation that requires nullifying express grants of authority are unsustainable. *Intel Corp. v. Am. Guarantee*

& Liab. Ins. Co., 51 A.3d 442, 451 (Del. 2012) (noting that "Intel's interpretation would read out Paragraph C, violating the basic rule of construction that no part of an agreement should be rendered superfluous").

***

Net-net, there was no error in dismissing McKenzie's contract claim.

II. The Vice Chancellor Correctly Dismissed McKenzie's Implied Covenant Claim

A. Question Presented

Whether the Vice Chancellor correctly dismissed McKenzie's claim for breach of the implied covenant of good faith and fair dealing because the conduct was expressly authorized by the plain terms of the Partnership Agreement?

B. Scope of Review

This Court reviews *de novo* decisions to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6). *Thompson St. Cap. Partners*, 340 A.3d at 1165. Nonetheless, *de novo* review does not disturb a dismissal that is plainly correct on the face of the contract. *Id.* And, here, the text of the Partnership Agreement—incorporated by reference into the Complaint—forecloses disturbing that dismissal.

C. Merits of Argument

In Delaware, the implied covenant is a "narrow gap-filling tool of last resort." *Johnson & Johnson v. Fortis Advisors LLC*, 352 A.3d 229, 253 (Del. 2026) (citation omitted). So, it "only applies where a contract lacks specific language governing an issue. . . ." *Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *3 (Del. Ch. Jan. 30, 2015) (citation omitted).

McKenzie's suggestion that his implied covenant claim "would fill the contractual gap to say that the Board certainly cannot divest an equity partner" by converting his status from VSP to FSP assumes a non-existent gap. (Opening Br. at 27.) Here, there is no gap to fill.

Section 2.1(b) of the Partnership Agreement charges BDO's Board with the "designation of each Partner as a[n FSP] or [a VSP]" not only upon admission but also "**at any time** thereafter." Section 4.1 separately confirms that the Board 'shall' allocate variable and fixed units 'in such *type* and amounts as it determines **in its sole discretion**."

As the Vice Chancellor explained, these provisions leave no gap:

> McKenzie accepted the risk that his VSP status could be revoked "at any time" and in the Board's "sole discretion." The risk that the Board might exercise this right strategically—such as before a resignation or liquidity event—was a foreseeable consequence of the Board's rights. By exercising the discretion provided for in the Partnership Agreement, the Board comported with the parties' reasonable expectation embodied in the contract's text.

Mem. Op. at 14 (citations omitted).

Nemec v. Shrader, 991 A.2d 1120 (Del. 2010) is on point. There, this Court rejected an implied covenant claim where a company had a contractual right to redeem retired officers' shares **"at any time"** and exercised that right just before a valuable merger:

> 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.

Id. at 1128.[3]

Here, as there, exercising contractual options to convert a VSP to an FSP "at any time" violates no implied covenant. *Id.* at 1122–28. That result is ordained because of the inherently limited scope of the implied covenant: it is just "not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract." *Id.* at 1128.

McKenzie's litany of cases only buttresses the Vice Chancellor's dismissal of this claim. *Miller v. HCP Trumpet Invs., LLC*, 194 A.3d 908, 2018 WL 4600818, at *1 (Del. 2018) and *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126 (Del. Ch. 2009) both rejected the application of the implied covenant. And, McKenzie's cases that permitted implied covenant claims are patently distinguishable. *Cygnus Opportunity Fund, LLC v. Washington Prime Grp., LLC*, 302 A.3d 430, 460 (Del.

---

[3] Contrary to McKenzie's contention (Mem. Op. at 19), BDO's counsel never conceded otherwise at oral argument before the Vice Chancellor. Rather, BDO's counsel recognized the Vice Chancellor raised a "fair" question and then explained how that question is necessarily answered:

> Section 4.1 also speaks to that as well. . . . [T]he board had the sole discretion to determine the type and amount of shares for each partner and shall inform the partners at least annually of that decision. So consistent with 2.1(b), the board had every right annually, as it did here, at the end of the fiscal year to lean on its express authority to convert him from a variable share partner to a fixed share partner.

(A177-A178.)

Ch. 2023) explicitly embraced *Nemec* but held that there "the context is different," while *Sheehan v. AssuredPartners, Inc.*, 2020 WL 2838575, at *11 (Del. Ch. May 29, 2020) permitted an implied covenant claim to proceed because there, unlike here, "[t]he Amended Complaint identifies a possible gap, specifically that a termination will not be done in "bad faith."

McKenzie's assertion that the implied covenant cannot be contractually banned is a *non sequitur*. *See* Opening Br. at 27 (citing the Partnership Act) and at 25 (citing *Terrell v. Kiromic Biopharma, Inc.*, 297 A.3d 610, 620 n.37 (Del. 2023)). There is no such ban; this is merely a case where there is no gap to fill. And, that is the critical point that dooms this appeal just as it did in *Johnson & Johnson*, 352 A.3d at 253:

> We have repeatedly emphasized that this gap-filling power is a "limited and extraordinary remedy"; a "cautious enterprise" that applies only where there is a true contractual gap about how to handle an unforeseen event. **In *Nemec v. Shrader*, we held that the implied covenant only applied to "developments that could not be anticipated, not developments that the parties simply failed to consider."** In *Nemec*, retired executives argued that the implied covenant should be invoked to prevent the corporation from redeeming the retirees' shares immediately before a lucrative sale, depriving the retirees of the substantially higher merger consideration. We rejected the retirees' claims. Though harsh in hindsight, the stock plan under which the shares were issued authorized the corporation to redeem the shares at book value "at any time," and a later sale of the company fell within the gamut of events that "could have been anticipated" when the stock plan was enacted. The implied covenant, we held, is "not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract." **As *Nemec* teaches, hindsight cannot correct oversight**.

So too, here.

***

Net-net, there was no error in dismissing this implied covenant claim.

III. The Vice Chancellor Correctly Dismissed McKenzie's Fiduciary Duty Claim[4]

A. Question Presented

Whether the Vice Chancellor correctly held that McKenzie's fiduciary duty claim was foreclosed because (a) McKenzie was owed no fiduciary duty and (b) McKenzie's fiduciary duty allegations impermissibly duplicate his contract claim?

B. Scope of Review

This Court reviews *de novo* decisions to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6). *Thompson St. Cap.* Partners, 340 A.3d at 1165.

C. Merits of Argument

1. This Claim Fails For Lack Of Any Fiduciary Duty

McKenzie claims that the individual defendants below (who were members of BDO's Board) breached a fiduciary duty to McKenzie by converting his VSP units to FSP units in bad faith and for their own enrichment. That claim is a non-starter because Board members owe no fiduciary duties to McKenzie as an individual partner.

---

[4] McKenzie's Opening Brief artificially separates the dismissal of his fiduciary duty claim into separate arguments: the first at pp. 29-34 and the second at pp. 35-39. Because that artificial bifurcation adds confusion rather than clarity, BDO's brief treats both of those arguments together in this single section.

The Delaware Revised Uniform Partnership Act ("DRUPA") confirms that "[a] partner does not violate a duty or obligation under this chapter or under the partnership agreement solely because the partner's conduct furthers the partner's own interest." 6 *Del. C.* § 15-404(b). DRUPA also limits "a partner's duty of loyalty to the partnership and the other partners" to the following three situations:

> (1) To account to the partnership and hold as trustee for it any property, profit or benefit derived by the partner in the conduct or winding up of the partnership business or affairs or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;
>
> (2) To refrain from dealing with the partnership in the conduct or winding up of the partnership business or affairs as or on behalf of a party having an interest adverse to the partnership; and
>
> (3) To refrain from competing with the partnership in the conduct of the partnership business or affairs before the dissolution of the partnership.

Id. § 15-404(b).

McKenzie makes no claim for applying any of those exceptions and mentions DRUPA only in passing. Instead, McKenzie's Opening Brief just ignores the fact that BDO was a partnership at the time of the events at issue and asserts that his fiduciary duty claim should be assessed as if BDO were a corporation. Opening Br. at 30-34.

That assertion is unavailing for two separate reasons.

First, McKenzie's comparison to corporate law is misplaced. There is zero authority for ignoring DRUPA and instead treating partnership boards the same as corporate boards. His litany of cases decided by other Vice Chancellors are neither controlling nor apposite.

Despite McKenzie's suggestions to the contrary, *In re Cellular Tel. P'ship Litig.*, 2021 WL 4438046 (Del. Ch. Sept. 28, 2021) decided no issues concerning fiduciary duty: "This post-trial decision addresses the claims for breach of the partnership agreement. It does not address the claim for breach of fiduciary duty." *Id*. at 2. Neither did *Inter-Mktg. Grp. USA, Inc. v. Armstrong*, 2019 WL 417849, at *3 (Del. Ch. Jan. 31, 2019) (derivative action by unit holder in a publicly traded LLC; "issues in determining *demand futility* for partnership law appear identical to those in corporate law").

McKenzie fares no better advancing cases where an LLC's operating agreement directly imposed the corporate-style obligation (although in neither case was that obligation an issue of fiduciary duty):

- *Obeid v. Hogan*, 2016 WL 3356851, at *6 (Del. Ch. June 10, 2016), *judgment entered*, (Del. Ch. 2016) (citation omitted) (where the LLC *agreement directly incorporated language* from the Delaware General Corporation Law on delegation of authority to committees, "corporate law analogies should guide whether the Corporate Board can empower a special litigation committee comprising a single non-director" (emphasis added));

- *Freeman Fam. LLC v. Park Ave. Landing LLC*, 2019 WL 1966808, at *1–7 (Del. Ch. Apr. 30, 2019) (advancement action against LLC; applying 8 Del. C. § 145(a) and (b) because the parties "intended to import corporate case law as indicated by their *decision to use contractual language [on indemnity] on that mirrors" Delaware General Corporation Law on indemnity*) (emphasis added)).

BDO's Partnership Agreement nowhere adopts Delaware corporate law on fiduciary duty, nor has McKenzie raised any such argument.

As the Vice Chancellor explained, "[t]he parties chose to organize under DRUPA, and corporate law analogies cannot be used to override the contractual and statutory framework they selected." Mem. Op. at 16. That is why McKenzie's proffered cites to *Wagamon v. Dolan*, 2013 WL 1023884, at *2 (Del. Ch. Mar. 15, 2013) and *Universal Studios Inc. v. Viacom Inc.*, 705 A.2d 579, 593 (Del. Ch. 1997) are equally irrelevant; both involve joint ventures rather than partnerships.[5]

---

[5] McKenzie's remaining authority confirms that partners who assume managerial functions have fiduciary duties but only to the *partnership*. *See* Opening Br. at 32–33 (citing *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 659-662 (Del. Ch. 2012), *KE Prop. Mgmt., Inc. v. 275 Madison Mgmt.*, 1993 WL 285900, at *9 (Del. Ch. July 27, 1993), *Cantor Fitzgerald, L.P. v. Cantor*, 2000 WL 307370, at *9 (Del. Ch. Mar. 13, 2000)). As discussed *infra*, that is a separate reason why McKenzie's claim fails: he

When it comes to partnerships, the case law is clear: beyond DRUPA and beyond what the parties choose to add in their partnership agreement, there is no generic fiduciary duty. *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 362 (Del. 2013) (affirming dismissal of fiduciary duty claims; "Norton willingly invested in a limited partnership that provided fewer protections to limited partners than those provided under corporate fiduciary duty principles. He is bound by his investment decision.").

Second, even if this arose in a corporate setting that imposed a fiduciary duty, corporate boards owe such duties only to the company as an entity and to its stockholders as a whole, not to individuals. *Klaassen v. Allegro Dev. Corp.*, 2013 WL 5967028, at *11 (Del. Ch. Nov. 7, 2013) ("[C]orporate directors do not owe fiduciary duties to individual stockholders; they owe fiduciary duties to the entity and to the stockholders as a whole."); *Gilbert v. El Paso Corp.*, 1988 WL 124325, at *9 (Del. Ch. Nov. 21, 1988) (same).

There is no allegation of disloyalty to the partnership as a whole. Indeed, the harm alleged by McKenzie—the loss of the value differential between his VSP and FSP units—is inescapably a harm personal only to McKenzie, which falls outside the ambit of any fiduciary duty BDO's Board owed to their partners collectively. J.

---

is impermissibly seeking to impose a fiduciary duty running not to the partnership but to himself.

Travis Laster & John Mark Zeberkiewicz, *The Rights and Duties of Blockholder Directors*, 70 Bus. Law. 33, 49 (2014) ("The reference [to fiduciary duties running] to 'stockholders' means all of the corporation's stockholders as a collective. It means the stockholders as a whole . . . , which is what academics refer to as the 'single owner standard.'").

2. This Claim Is Duplicative of McKenzie's Contract Claims

There is no daylight between McKenzie's fiduciary duty claim and his contract claim. Both relate exclusively to BDO's decision to convert McKenzie from a Variable Share Partner to a Fixed Share Partner. *See* Compl. ¶¶ 38, 41 (alleging the same conduct with respect to both claims).

McKenzie pleads that this conversion was a breach of the Partnership Agreement, which is the same allegation that forms the entire basis of his fiduciary duty claim. That alone is fatal: "any fiduciary claims arising out of the same facts that underlie the contract obligations are foreclosed as superfluous." *P-5 GRA, LLC v. Ivankovich*, 2025 WL 1483625, at *5 (Del. Ch. May 23, 2025) (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1129 (Del. 2010)).

McKenzie puffs that his fiduciary duty claim is an independent and alternative theory. Opening Br. at 37-38. Not so; it rests on no additional facts and offers no remedy beyond those available under McKenzie's contract claim. Because the fiduciary duty claim relates to "obligations expressly treated . . . by contract [, it] will be governed by contract principles." *Madison Realty Partners 7, LLC v. Ag ISA, LLC*, 2001 WL 406268, at *6 (Del. Ch. Apr. 17, 2001). [6]

***

Net-net, there was no error in dismissing McKenzie's fiduciary duty claim.

---

[6] McKenzie's Opening Brief proffers case law that reconfirms that dismissal for duplication was correct. *Grunstein v. Silva*, 2009 WL 4698541, at *6–7 (Del. Ch. Dec. 8, 2009) dismissed a fiduciary duty claim as duplicative of a contract claim where the claims were "substantially identical" or involved "remedies that were likely to be equivalent"—precisely the situation here. And, his remaining authorities are inapposite; neither involved the duplication of a contract claim and a fiduciary duty claim seeking identical damages. *Firmenich Inc. v. Nat. Flavors, Inc.*, 2020 WL 1816191, at *10 (Del. Super. Ct. Apr. 7, 2020) (permitting fraudulent inducement claim and contract claim to proceed where the damages were *distinct*); *OTK Assocs., LLC v. Friedman*, 85 A.3d 696, 715 n.1 (Del. Ch. 2014) (permitting two types of *fiduciary duty* claims to be pled in the alternative).

IV. The Vice Chancellor Made No Findings of Fact

A. Question Presented

Whether the Vice Chancellor improperly made findings of fact as a basis for its alternative justification for dismissing McKenzie's breach of fiduciary duty claim?

B. Scope of Review

This Court reviews *de novo* decisions to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6). *Thompson St. Cap. Partners*, 340 A.3d at 1165.

C. Merits of Argument

The Vice Chancellor addressed self-dealing only "[t]o the extent the fiduciary duty claim relies on a self-dealing theory." (Mem. Op. at 18.) That framing is dispositive. The self-dealing analysis was an alternative rationale, offered only after the Vice Chancellor had independently dismissed McKenzie's fiduciary duty claim on other grounds: (1) BDO's Board owed no cognizable fiduciary duty to McKenzie as an individual partner and (2) McKenzie's claim was impermissibly duplicative of the contract claims.

If either is correct, this point in McKenzie's appeal is moot. Simply stated, unless this Court rejects both of those grounds, there is no need to decide the hypothetical alternative that the Vice Chancellor considered and rejected on self-dealing. If McKenize's fiduciary duty claim overlaps with his contract claim, that overlap dooms any self-dealing too; if McKenzie's assertion of fiduciary duty by superimposing corporate law despite DRUPA fails, then so too does any self-dealing.

But, even if not moot, McKenzie's foundational premise is wrong. The Vice Chancellor made no independent factual determination; its Memorandum Opinion merely examined the Verified Complaint, identified what it did not say, and held McKenzie accountable for pleading deficiencies.

That is precisely the function of Rule 12(b)(6). Courts need not accept "conclusory allegations unsupported by specific facts." *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011). The Vice Chancellor's observations about materiality and ratability were proper applications of that principle. Every "error" McKenzie identifies in Section V of his Opening Brief traces to his own pleading deficiencies.

So, McKenzie's assertion that the Vice Chancellor's "holding errs in at least four ways" (Op. Br. at 42) is unsustainable. It is McKenzie's four assertions that are error-ridden.

1. A self-dealing claim requires well-pled allegations of a material benefit. *Maffei v. Palkon*, 339 A.3d 705, 744 (Del. 2025) (reversing failure to dismiss "where there are no well-pled allegations of a material, non-ratable benefit flowing to the director or controllers"). And, McKenzie's Verified Complaint failed to plead materiality.

McKenzie's suggestion that the Vice Chancellor "err[ed] by engaging in a hypothetical about what amount of equity might or might not be **material** to the Defendants" is off the mark. The Vice Chancellor faulted McKenzie because there was "no allegation that the redistribution of these units was material to the individual defendants," and then observed in passing 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." (Mem. Op. at 18.)

There was no factual finding but only recognition of the shortfall in McKenzie's pleading mistake.

2. McKenzie suggests that the Vice Chancellor 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." That cheap shot fails on two independent grounds.

- McKenzie cites no law for the proposition that Delaware recognizes that a fiduciary's subjective satisfaction—alleged psychic gratification from retaliation—constitutes a "material, non-ratable benefit."
- This is also a pleading failure. McKenzie's Complaint 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." But, it omitted the critical allegation: the Complaint failed to allege that the directors received any **non-ratable** benefit from the act of retaliation itself.

3. McKenzie suggests that his Verified Complaint "need not use the word 'material'" and, indeed, that word never appears in his Complaint. Instead, McKenzie pleaded only that the Board "stood to benefit" from the reallocation of McKenzie's units. That, of course, is too little.

That passing reference is far short of what is required. Here, as in *Maffei*, 339 A.3d at 744, "there are no well-pled allegations of a material, non-ratable benefit flowing to the director or controllers furthers this important policy." Plus, the Verified Complaint's own numbers (approximately 800 BDO partners and 631 redistributed VSP units) eliminate **materiality**. McKenzie impermissibly blames the Vice Chancellor for McKenzie's own failure to plead what *Maffei* requires.

4. McKenzie suggests that *Nixon v. Blackwell*, 626 A.2d 1366, 1376–77 (Del. 1993) undercuts the Vice Chancellor's holding that any benefit was ratable. But, *Nixon* is unavailing. There, the non-ratable character of the benefit arose from a structural distinction between classes of shareholders: controlling stockholders generated liquidity for themselves and employee stockholders through mechanisms categorically unavailable to non-employee stockholders. That has no parallel here.

As the Vice Chancellor noted, "[a]mong the class of VSPs, of which the individual defendants were members, the benefit was shared equally." Every VSP received the same pro-rata share—that is a ratable benefit by definition. So, "[t]o the extent McKenzie argues that the benefit was non-ratable because he was excluded, it circles back to the contract dispute over his conversion." (Mem. Op. 18, n.88.) McKenzie cannot transform a ratable benefit into a non-ratable one simply by characterizing himself as the excluded party; that self-serving logic impermissibly eliminates the distinction between ratable and non-ratable.

***

Net-net, there was no error in the Vice Chancellor's alternative holding.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that the Court affirm the Vice Chancellor's ruling below in its entirety.

MCDERMOTT WILL & SCHULTE LLP

/s/ *Kevin M. Regan*
Kevin M. Regan (#6512)
The Brandywine Building
1000 N. West Street, Suite 1400
Wilmington, DE 19801
(302) 485-3900
kregan@mwe.com

Attorneys for Defendants Below/Appellees

OF COUNSEL:

Michael J. Sheehan
Aaron P. Sayers (#6373)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-2388
Michael.sheehan@dechert.com
aaron.sayers@dechert.com

Dated: May 13, 2026