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

APPELLANT'S REPLY BRIEF

CHRISTENSEN LAW LLC

Joseph L. Christensen (#5146)
Anne M. Steadman (#6221)
1201 North Market Street
Suite 1404
Wilmington, DE 19801
(302) 212-4330
joe@christensenlawde.com
asteadman@christensenlawde.com

Attorneys for Plaintiff/Appellant Jason McKenzie

Dated: May 28, 2026

TABLE OF CONTENTS

<u>**TABLE OF CITATIONS**</u>

Page(s)

Cases

Statutes and Rules

PRELIMINARY STATEMENT

BDO's Board chose to de-equitize McKenzie in retaliation for his whistleblowing activities rather than complying with Article 12 of the Partnership Agreement, which specified how a retiring equity partner must be treated.

The Board's decision breached Article 12 of the Partnership Agreement, as well as the implied covenant of good faith and fair dealing. The Board's decision also breached its fiduciary duties to McKenzie as an equityholder.

Defendants moved to dismiss this action, arguing that the Partnership Agreement provides the Board absolute discretion, which allows the Board to strip a partner's equity for any reason whatsoever—including in bad faith and retaliation. Defendants further argued that boards of partnerships owe no fiduciary duties. The Court of Chancery dismissed this case in accordance with Defendants' arguments—holding that the bad faith and improper motives pled in the Complaint did not matter and the discretion in the Partnership Agreement allowed the Board to divest an equity partner at any time, for any reason—including bad faith. The Court of Chancery further 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.

In the Opening Brief, Plaintiff explained why the Court of Chancery's holdings are inconsistent with Delaware precedent and should be reversed. In the

Answering Brief, Defendants provide no real argument to the contrary. Instead, Defendants: (i) incorrectly assert that Plaintiff waived his breach of contract argument; (ii) deny that an exercise of contractual discretion must be in good faith (even through Defendants' counsel conceded that point at oral argument); (iii) adopt the dangerous principle that a board of directors has no fiduciary duties when the company is organized as a partnership; and (iv) argue that the Board's actions cannot be self-dealing because the Board incidentally benefitted persons other than themselves.

None of these principles are grounded in Delaware law. In fact, they do violence to well-worn principles of contract and fiduciary duty. Among other things (and as Defendants conceded), even when a contract grants absolute discretion (which is more than the contract at issue did here), that discretion must be exercised in good faith. Similarly, where a company delegates its managerial authority to a board of directors, that board (at minimum) is subject to the duty to act in good faith—whether the company is a corporation, an LLC, an LP, or a partnership (LLP). Finally, a board's actions can be conflicted and improperly self-interested even where the board incidentally benefits persons other than themselves.

The Supreme Court should uphold these vital principles of Delaware law by reversing the Court of Chancery's holding in the case below.

I. The Complaint states a claim for breach of contract.

A. Defendants' claim of waiver misquotes and misunderstands the breach of contract argument.

The Complaint alleges that Defendants breached the Partnership Agreement by failing to following the procedures set forth in Article 12 specifying the financial treatment of a departing equity partner. A013 (Compl. ¶ 35) ("The Board breached its obligations under Article 12 of the Partnership Agreement by converting McKenzie's variable share units to fixed, thus depriving him of the benefit of those payment mechanics.").

In the briefing on the motion to dismiss, Defendants never challenged (and hence conceded) the principle that Defendant's failure to follow the procedures in Article 12 for a departing equity partner would be a breach of the Partnership Agreement. *See* A077-78 (MTD Opening Br. at 10-11). Instead, Defendants' sole defense to the breach of Article 12 was their assertion that they did not need to follow the procedures in Article 12 because they properly de-equitized McKenzie under Section 2.1 (and Section 4.1, which they added for the first time at oral argument). A069 (Opening Br. at 2); A178 at 42:17-20. Because Defendants effectively conceded that their actions would be a breach of Article 12 but-for their alleged authority to convert McKenzie prior to his departure, the focus of the remaining briefing (and oral argument) was on whether Defendants could identify a part of the contract granting them the authority to de-equitize McKenzie in bad faith.

In this context, the Vice Chancellor questioned Plaintiff's counsel whether—putting aside the allegation that Defendants breached by failing to pay McKenzie in accordance with Article 12 *at the time of his departure*—whether there is a specific provision in the contract that Defendants breached *at the time of his conversion to non-equity*. The following colloquy resulted:

> 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… 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.

A156 at 20:1-16.

In the Answering Brief, Defendants misleadingly quote this colloquy to argue that Plaintiff's counsel "conceded" and thereby "waived" Plaintiff's argument that Defendants breached a specific provision of the Partnership Agreement. *See* Ans. Br. at 8-9. That is a misrepresentation of what was said.

To summarize: Plaintiff's argument is that Defendants breached because they failed to pay him in accordance with Article 12 at the time he left the company. Defendants' only defense is that they were justified in not following Article 12 because they de-equitized Plaintiff prior to his departure. Plaintiff's response is that the implied covenant precludes the Board from de-equitizing a partner in bad faith—including to circumvent the requirements of Article 12. It is true that the contract contains no express provision "that says the board cannot divest a partner just because it feels like it." A157 at 21:16-22. But there does not need to be. To hold that a board can divest an equity partner in bad faith (or that a contract must expressly state that the parties will not act in bad faith) would turn existing law on its head. *See infra* §§ I.C. & II.

B. Sections 2.1 and 4.1 are not unambiguous grants of absolute discretion.

In the Answering Brief, Defendants continue to pound the table and assert that Section 2.1(b) and Section 4.1 grant the Board discretion that overrides even the obligation to exercise discretion in good faith.

As a preliminary matter, neither of these sections states that the Board may de-equitize a partner. While these provisions provide some degree of discretion regarding the designation of partners (Section 2.1) and the number of units assigned to partners (Section 4.1), neither of these provisions directly authorizes de-equitizing partners.

Section 2.1 provides the Board with only limited "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 ask the Court to interpret this language as an express grant of authority to the Board to de-equitize an equity partner at any time and for any reason whatsoever (including bad faith reasons). But Section 2.1 does not say that.

Section 4.1 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). Read literally, Section 4.1 only addresses the number of units that may be allocated to equity and non-equity partners. 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 definitely does not say that the Board can strip equity for bad faith reasons.

Defendants' argument relies not on the plain language of Section 4.1, but rather on as series of inferential jumps. Defendants ask the Court to infer 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. *See* A143 at 7:7-15. Further, Defendants argue, the Court must infer that this authority includes stripping an equity partner of his equity for bad faith reasons. But these are all broad conceptual jumps. They are not grounded in the language itself. And they are certainly not unambiguous readings of the language. On a practical level, no reasonable contract party would agree his equity could simply be stolen from him at any time, including for bad faith and retaliatory reasons.

The point stands: Defendant's readings of Sections 2.1 and 4.1 are not reasonable readings. And they are certainly not the only reasonable readings—which is what must be the case for Defendants to win at the motion to dismiss. *See LGM Holdings, LLC v. Schurder*, 340 A.3d 1134, 1145-46 (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).

C. Even if Sections 2.1 and 4.1 did grant absolute discretion, it is beyond dispute that discretion must be exercised in good faith.

But if even Sections 2.1 and 4.1 did say what Defendants claim, that would not remove the obligation that contractual discretion—even absolute discretion—must be exercised in good faith.

Defendants describe Plaintiff's insistence that even absolute discretion must be exercised in good faith as a mere "quibble." Ans. Br. at 10. But far from being a mere quibble, the obligation to exercise contractual discretion in good faith is a bedrock principle of Delaware contract law. *See Sheehan v. AssuredPartners, Inc.*, 2020 WL 2838575, at *11 (Del. Ch. May 29, 2020); *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 145-46 (Del. Ch. 2009). This bedrock principle was recognized by the Court of Chancery at oral argument. *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?"). And Defendants' counsel conceded: "True. That's fair." A178 at 42:7.

The Supreme Court should not overturn this principle. It protects contract parties' reasonable expectation that their counterparties will act in good faith.

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

Despite acknowledging that even absolute contractual discretion must be exercised in good faith (*see* A178 at 42:3-7), Defendants' Answering Brief seeks to elide that point by focusing on general statements of the limitations of the implied covenant. *See* Ans. Br. at 15-16.

None of the general principles that Defendants cite refute the well-established principle that contractual discretion—even absolute discretion—must be exercised in good faith. *Airborne*, 984 A.2d at 146-47 (even where a contract confers absolute discretion "the implied covenant requires that the discretion be used reasonably and in good faith") (collecting cases). 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, 'that 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)).

Defendants' reliance on *Nemec v. Shrader*, 991 A.2d 1120 (Del. 2010), is misplaced. Defendant's quote *Nemec*'s holding that: "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." Ans. Br. at 15-16 (quoting *Nemec*, 991 A.2d at 1128). But that principle does not apply to (or conflict with) Plaintiff's argument in this case. Unlike *Nemec*, the Complaint in this action contains independent allegations of a bad faith motive. Nor are these simple statements of bad faith. Rather, the Complaint presents a detailed narrative of how and why the Board acted in bad faith to retaliate against McKenzie for his whistleblowing activities and deprive him of a liquidity event as punishment. *See*, *e.g.*, A009-A010 (Compl. ¶¶ 23, 26) (McKenzie's status as a whistleblower); A010-A011 (Compl. ¶¶ 24-28) (the unusual reactions of McKenzie's superiors to his informing them of his intent to retire from BDO); A011-A012 (Compl. ¶¶ 29-31) (BDO's Managing Partner lying to McKenzie when McKenzie asked about whether there would be a liquidity event).

It is consistent with *Nemec* to find that: (i) the mere fact that a transaction happens to deprive someone of a benefit does not constitute bad faith, but (ii) there is bad faith where a transaction is orchestrated for the purpose of depriving an equityholder of a benefit—including to retaliate against him as a whistleblower. In this case, neither Defendants nor the Court of Chancery engaged with the independent allegations of bad faith.

Defendant's reliance on *Johnson & Johnson v. Fortis Advisors LLC*, 352 A.3d 229, 253 (Del. 2026), is similarly misplaced. Defendants' quote *Johnson*

& Johnson's analysis of *Nemec*, holding that the implied covenant applies only to "developments that could not be anticipated, not developments that the parties simply failed to consider." Ans. Br. at 17 (quoting *Johnson & Johnson*, 352 A.3d at 253). While Defendants fail to connect the dots into an argument, the point appears to be that the implied covenant does not apply because McKenzie should have anticipated that the Board would try to de-equitize him in retaliation (and should have hence insisted on an express provision prohibiting that wrongful action).

That argument fails for two reasons. *First*, it flat out contradicts the bedrock principle that even where a contract gives a party absolute discretion, that party must exercise its discretion in good faith. The onus is not on the counterparty to insist on a contract term expressly prohibiting bad faith conduct.[1] *Second*, to the extent Defendants are arguing that McKenzie should have anticipated that the Board would act in bad faith, that only reinforces the credibility of the Complaint's allegations of the Board's improper motives.

[1] Insisting that McKenzie should have negotiated for a provision prohibiting the Board from acting in bad faith makes even less sense here where McKenzie became subject to the Partnership Agreement in connection with BDO's acquisition of his prior accounting firm. *See* A006, A009 (Compl. ¶¶ 1, 20).

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

As set forth in the Opening Brief, where an alternative entity—including a partnership—chooses to delegate its management to a board of directors, that board of directors has fiduciary duties. Nor is this merely theoretical. The Court of Chancery already applies fiduciary duties to boards of partnerships. *See In re Cellular Tel. P'ship Litig.*, 2021 WL 4438046, at *45, *76, n.60 (Del. Ch. Sept. 28, 2021) (an executive committee with power to "conduct the business affairs of the Partnership" is "obligated to comply with their fiduciary duties" and would have to exercise discretion in good faith). Defendants only counter to *In re Cellular* is to argue that this case was ultimately decided on breach of contract grounds. *See* Ans. Br. at 21.

Defendants assert that because there are specific duties that individual partners owe one-another under DRUPA, that implies that boards of partnerships (unlike boards of all other business entities) have absolutely no fiduciary duties. *See* Ans. Br. at 21-23 (arguing that governing bodies of partnerships, unlike those of LLC and LPs, cannot have fiduciary duties: "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.").

In support, Defendants cite only a limited partnership (LP) case: *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 362 (Del. 2013). Ans. Br. at 23. That case is distinguishable because it involved a limited partnership (LP), rather than a partnership—which is a different business entity. In any event, *Norton* was not a case holding that a general partner lacks any fiduciary duties. Rather, it was a case in which the parties replaced default common law fiduciary duties with contractual fiduciary duties. *See Norton*, 67 A.3d at 362. And there was no attempt by the parties in *Norton* to eliminate the duty of good faith—in fact, the Court interpreted the contractual fiduciary duties as another way of articulating that the general partner must act in good faith. *Id*.

Defendants' citing *Norton* for the principle that alternative entities may provide investors with fewer protections than corporations is a red herring. *See* Ans. Br. at 23. It is well-known that, given the contractual nature of alternative entities, they can modify or eliminate many of the corporate law defaults. But neither corporations nor alternative entities can eliminate the duty to act in good faith. Alternative entities are creatures of contract, and the implied covenant attaches to every contract. *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441–42 (Del. 2005); *see also* 6 *Del. C.* § 18-1101(c) (LLC agreement cannot eliminate duty of good faith); 6 *Del. C.* § 17-1101(d) (limited partnership agreement cannot eliminate duty of good faith); 6 *Del. C.* § 15-103(b)(3) (partnership agreement cannot eliminate duty of good faith).

Further, it is worth noting that while it is true that there are ordinarily no fiduciary duties of limited partners in a limited partnership, Delaware courts will impose fiduciary duties on limited partners who assume a managerial function. *See Feeley v. NHAOCG, LLC*, 62 A.3d 649, 662 (Del. Ch. 2012); *KE Prop. Mgmt., Inc. v. 275 Madison Mgmt.*, 1993 WL 285900, at *9 (Del. Ch. July 27, 1993). In evaluating whether 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.

Contrary to these well-settled principles, on Defendants' proffered view, boards of partnerships have no fiduciary duties. Individual members of the boards may or may not have fiduciary duties—depending on whether the individual directors are also partners. But if a director is not a partner, then he has no fiduciary duties.[2] And if all the directors are not partners, then no one on the board has any fiduciary duties. Further, even where directors are also partners (and have the DRUPA-defined fiduciary duties that Defendants say they have), these duties arguably only apply to their actions *qua* partners. In other words, these director-partners still have no fiduciary duties in their director capacity. That is not the

[2] In fact, the Partnership Agreement expressly contemplates that directors need not be current partners. A021 (Compl., Ex. A §§ 2.2(b), 2.3).

current state of Delaware law, and it would constitute a paradigm shift were this Court to rule in Defendants' favor.

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

As explained in the Opening Brief (at 35-36), the Court of Chancery further erred by holding that even if the Board had fiduciary duties, McKenzie still could not state a claim for breach because: (i) the duty alleged to have been breached was not a duty to McKenzie as an equityholder; and (ii) the claim is duplicative of the breach of contract claims. Op. 16-17.

On the first point, the Court of Chancery focused on the fact that only one individual (McKenzie) was affected by the Board's decision, and on those grounds, concluded that the duty cannot be a fiduciary duty to equityholders. *See* A166-A167 at 30:24-31:4. As set forth in the Opening Brief (at 36), the number of affected persons is not the test for whether or not there is a breach of fiduciary duty. Among other things, were that the case, there would be no fiduciary duties of a board to a single equityholder, or—strikingly—of one joint venturer to the other. That is not Delaware law. Instead, 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.

The Answering Brief offers essentially no counterargument on this point—except to assert without support that the loss of the equity units "is inescapably a harm personal only to McKenzie." Ans. Br. at 23. Defendants are wrong. Harms to equityholders *qua* equityholders are breaches of fiduciary duty. McKenzie's right to not have his equity arbitrarily (or worse, in bad faith) confiscated by the Board is a right McKenzie has as an equityholder. Arguably, it is the most fundamental right of all equityholders—and it is what undergirds the entire institution of equity ownership separate from control. Were there not a general right of equityholders not to have their equity taken arbitrarily or in bad faith, no one would invest.

On the second point, duplicativeness, the Court of Chancery erred because its holding was based on the fact that the breach of contract claim and the fiduciary duty claim arise from the same facts and "both seek the same remedy: damages for the loss of the [equity units'] value. Op. at 17. As explained in the Opening Brief (at 38), that is not the test. The test is not whether two causes of action arise from a common nucleus of fact or whether the relief sought is different, 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's counsel 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 equityholders is independent of the existence of any contract or any specific contractual terms.

Furthermore, even if the contract and fiduciary duty claims "would never co-exist at final judgment," Delaware courts permit pleading in the alternative, and alternative theories may be maintained past a motion to dismiss. *Firmenich Inc. v. Nat. Flavors, Inc.*, 2020 WL 1816191, at *9 (Del. Super. Ct. Apr. 7, 2020) (citation omitted); *OTK Assocs., LLC v. Friedman*, 85 A.3d 696, 715 n.1 (Del. Ch. 2014).

Defendants' Answering Brief fails to engage with these arguments, only repeating its assertion that the claim must be dismissed as duplicative because "it rests on no additional facts and offers no remedy beyond those available under McKenzie's contract claim." Ans. Br. at 24.

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

Finally, the Court of Chancery rejected Plaintiff's argument that the directors engaged in self-dealing because the Court of Chancery found no "material, non-ratable benefit" to the directors. Op. at 18. The Court erred in making findings of fact that the reallocation of McKenzie's equity units could not have been "material" to the directors and by failing to consider the allegation that the directors received the benefit of punishing McKenzie for his whistleblowing activities. Further, the Court of Chancery erred by holding that the benefit of redistribution was "ratable" because the directors shared the spoils equally with the other partners who remained after divesting McKenzie.

As explained in the Opening Brief, the Court wrongly substituted its own conclusions about materiality for what was pled in the Complaint. The Complaint pled that the Board's decision was motivated by its dual purposes of redistributing McKenzie's equity amongst other partners (including themselves) and punishing McKenzie for his whistleblowing activities. A011, A012 (Compl. ¶¶ 28, 34). While it is true that the Complaint does not use the word "material," the Complaint is clear that these two purposes are pled as *the motivating factors* for the Board's actions. Delaware courts "look to the Complaint as a whole" and "any factual allegations of particular acts within" to determine if pleading is adequate, and do not rely on the presence or absence of specific "magic words." *Beach to Bay Real Est. Ctr. LLC* *v. Beach to Bay Realtors Inc.*, 2017 WL 2928033, at *8 (Del. Ch. July 11, 2017); *River Valley Ingredients, LLC v. Am. Proteins, Inc.*, 2021 WL 598539, at *5 (Del. Super. Ct. Feb. 4, 2021); *Bean v. JUUL Labs Inc.*, 2026 WL 839831, at *35 (Del. Super. Ct. Mar. 26, 2026).

Defendants provide only the thinnest of responses in their Answering Brief, focusing on the fact that the word "material" does not appear in the Complaint and arguing that the Complaint pleads only that the Board "stood to benefit" from the reallocation—which Defendants say is "of course, too little." Ans. Br. at 29. But Defendants' characterization omits the most important fact pled in the Complaint: that the Board was *motivated by* its desire to punish McKenzie and enrich themselves by redistributing his equity. Taking the factual allegations of the Complaint as a whole, Plaintiff has stated the claim that the redistribution was material to the directors—because, logically, someone cannot be motivated by something unless it is material to them.

Defendants also argue (without citing any authority) that the fulfillment of their desire to retaliate against McKenzie could not have been a material benefit to the directors—presumably because it is not economic in nature. Ans. Br. at 28. But Delaware law has long held that the motives for disloyal conduct are myriad—and not limited to financial benefit. *In re RJR Nabisco, Inc. S'holders Litig.*, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989) ("Greed is not the only human emotion that can pull one from the path of propriety; so might hatred, lust, envy, revenge, or, as is here alleged, shame or pride.")

Defendants' response on ratability fares no better. Defendants make only two poorly developed points. First, Defendants focus on Plaintiff's citation to *Nixon v. Blackwell*, 626 A.2d 1366, 1376–77 (Del. 1993), and argue that it is inapplicable because that case involved two classes of stockholders. Ans. Br. at 29. But Defendants ignore the point that Plaintiff cited *Nixon* for. In the Opening Brief, Plaintiff cited *Nixon* for the principle that action by a board can still be self-dealing even if it incidentally benefits persons other than the wrongdoers—triggering "entire fairness" scrutiny. *See* Opening Br. at 44; *Nixon*, 626 A.2d at 1375-76 (agreeing with the trial court that entire fairness standard applies "since the defendants benefited . . . beyond that which benefited other stockholders generally" and hence "defendants are on both sides of the transaction"). In that specific case, the Supreme Court ultimately ruled that the trial court erred in holding that the transaction failed entire fairness simply because it resulted in disparate treatment for a separate class of stockholders. *Id*. at 1377. But that part of the holding had nothing to do with the principle that directors cannot escape enhanced scrutiny merely by the fact that they also benefitted some other equityholders along with themselves. In other words, the BDO Board cannot cleanse its disloyal actions (and avoid entire fairness scrutiny) merely by arguing that their confiscation of McKenzie's equity benefitted persons other than themselves.

Defendants' second point is simply to assert (with no explanation or argument) that "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." Ans. Br. at 30. The argument here, such as it is, is too vague to be credited. But the general principle that Defendants ask the Supreme Court to embrace is that it is entirely okay for directors (who are also equityholders) to take equity from one equityholder in order to redistribute it amongst the remaining equityholders including themselves. That is not how Delaware law—until now—has construed ratability. Even in *Nixon*, where the Supreme Court ultimately found the action entirely fair because of the different rights of the class A versus class B stockholders—the transaction was still subjected to enhanced scrutiny because it favored the directors (and some stockholders along with them) over other stockholders.

Other Delaware authority supports this interpretation of ratability. For example, the Court in *Maffei v. Palkon*, 339 A.3d 705, 731 (Del. 2025), defined a non-ratable benefit as one "that is not equally shared by the stockholders." *See also Firefighters' Pension Sys. of City of Kan. City, Mo. Tr. v. Presidio, Inc.*, 251 A.3d 212, 254 (Del. Ch. 2021) (defining a conflicted transaction subject to the entire fairness standard as where the controller receives "consideration for itself or another non-ratable benefit not shared by other stockholders"). While many of these definitions (frustratingly) omit the word "all," we submit that—these definitions read together with the application of entire fairness scrutiny in *Nixon v. Blackwell* imply that whenever directors receive a benefit that is not shared by all other equityholders, entire fairness scrutiny applies—even if the decision also incidentally benefits some additional equityholders (other than the directors).

Further, Delaware courts will apply entire fairness even where the consideration is nominally the same as that received by the other equityholders but nonetheless confers a special benefit on the conflicted party. *See IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964, at *9 (Del. Ch. Dec. 11, 2017) (applying entire fairness review where transaction ensured that controller would retain voting control and observing that entire fairness is the proper framework when a controller "extracts something uniquely valuable to the controller, even if the controller nominally receives the same consideration as all other stockholders.") (cleaned up). Application of the entire fairness standard ordinarily precludes 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).

In sum, there is no law (and Defendants do not cite any) that says it is generally acceptable to take from one equityholder to enrich the others—*i.e.*, that as long as the spoils of a wrongful confiscation of equity are equally divided amongst the remaining equityholders, stealing from one to enrich the others is acceptable. There may be narrow circumstances (like those in *Nixon*) where benefitting one class of stockholders at the expense of a separate class is acceptable. But those circumstances were not present here. In this case, the directors chose to divest one equityholder to enrich themselves (with the side effect of also enriching other members of the same equity class). The principle advocated by Defendants is not the current state of the law, and adopting this principle would undercut the institution of equity ownership separate from control.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Opening Brief, this Court should reverse the Court of Chancery's decision dismissing the Complaint.

Dated: May 28, 2026

Respectfully submitted,

CHRISTENSEN LAW LLC

/s/ Anne M. Steadman

Joseph L. Christensen (#5146)
Anne M. Steadman (#6221)
1201 North Market Street, Suite 1404
Wilmington, DE 19801
(302) 212-4330
joe@christensenlawde.com
asteadman@christensenlawde.com

Attorneys for Plaintiff/Appellant Jason McKenzie