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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARSTRAND PARTNERS, L.P., derivatively on behalf of AYALA PHARMACEUTICALS, INC., a Delaware corporation, Plaintiff-Below /Appellant, v. ISRAEL BIOTECH FUND I, L.P., ISRAEL BIOTECH FUND II, L.P., ARKIN BIO VENTURES L.P., DAVID SIDRANSKY, M.D., PINI ORBACH Phd., YUVAL CABILLY, Phd., ROBERT SPIEGEL, M.D., MURRAY GOLDBERG, RONI APPEL, KENNETH BERLIN, VERED BISKER-LIEB, and BRIDGET MARTEL, M.A., M.D., Defendants-Below /Appellees, and AYALA PHARMACEUTICAL, INC., a Delaware corporation Nominal Defendant-Below/Appellee.	**PUBLIC VERSION FILED AUGUST 24, 2026** No. 257,2026 On appeal from the Court of Chancery of the State of Delaware, C.A. No.: 2024-0421-KSJM

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal from the Court of Chancery's grant of motions to dismiss filed by Defendants-Below/Appellees David Sidransky, M.D., Pini Orbach, Ph.D., Yuval Cabilly, Ph.D., Robert Spiegel, M.D., Murray Goldberg, Roni Appel, Kenneth Berlin, Vered Bisker-Lieb, and Bridget Martel, M.A., M.D. (collectively, "Director Defendants"), Israel Biotech Fund I, L.P. ("IBF I"), Israel Biotech Fund II, L.P. ("IBF II" and together with IBF I, "IBF"), Arkin Bio Ventures L.P. ("ABV" and collectively with IBF, the "Funds" and each a "Fund"), and Nominal Defendant-Below/Appellee Ayala Pharmaceuticals, Inc. ("Ayala").

Plaintiff-Below/Appellant Marstrand Partners, L.P. ("Marstrand") alleges in its Verified Amended Complaint (the "Amended Complaint" or "Am. Compl.") that the Director Defendants breached their fiduciary duties by approving a convertible note and warrant transaction in November 2023 (the "Note Transaction") that unfairly and improperly benefited a majority of the Director Defendants and the Funds at the expense of Ayala and its minority stockholders. In other words, those directors that benefited from the Note Transaction through their Fund ownership interests engaged in classic self-dealing in violation of long-standing Delaware law principles intended to ensure the "fairness" of those transactions.

The Director Defendants and Nominal Defendant Ayala moved to dismiss the Amended Complaint pursuant to Court of Chancery Rules 12(b)(6) and 23.1 and the

Funds moved to dismiss under Rules 12(b)(2), 12(b)(6), and 23.1. Following briefing and oral argument, the trial court entered an Order on May 27, 2026 granting Defendants' motions to dismiss (the "Dismissal Order") solely under Rule 23.1, expressly declining to consider the Rule 12(b)(6) and 12(b)(2) arguments, including the argument concerning the Funds' status as controlling stockholders and their resultant liability.[1] The trial court's ruling turned on its finding that the Amended Complaint failed to plead particularized facts supporting a reasonable inference that two pivotal Ayala directors—Robert Spiegel, M.D. ("Spiegel") and Murray Goldberg ("Goldberg")—were incapable of impartially considering a demand under *United Food & Com. Workers Union v. Zuckerberg*, 262 A.3d 1034 (Del. 2021).[2]

Marstrand timely filed this appeal, which seeks reversal of the Dismissal Order.

[1] The Dismissal Order is attached hereto as Exhibit A.

[2] Because the trial court confined its analysis to Rule 23.1 and did not reach the Funds' personal jurisdiction or Rule 12(b)(6) dismissal arguments, this appeal is similarly confined to the trial court's Rule 23.1 ruling. Furthermore, Marstrand focuses this appeal exclusively on the trial court's errors under *Zuckerberg*'s first and second prongs—either of which compels reversal—and does not press its third prong (independence) arguments here.

SUMMARY OF ARGUMENT

1. The trial court erred as a matter of law by overlooking or misreading the Amended Complaint's well-pleaded allegations concerning the challenged Note Transaction and failing to draw all reasonable inferences from those allegations in the derivative plaintiff's favor. Five of Ayala's nine directors were direct stakeholders—managers or limited partners—of the Funds that boosted their collective ownership of Ayala through the entirely unfair Note Transaction from 36% to over 80% just one month before Ayala agreed to sell substantially all of its assets. The trial court incorrectly concluded that the Amended Complaint failed to allege with particularity facts supporting a reasonable inference under Court of Chancery Rule 23.1 and *Zuckerberg* that a demand on Ayala's Board would have been futile as to a majority of Ayala's nine directors, including the five Fund investors.

2. The trial court erred as a matter of law by concluding that the Amended Complaint failed to allege particularized facts supporting a reasonable inference that two Ayala directors—Spiegel and Goldberg—received a "material personal benefit" under *Zuckerberg*'s first prong. This finding was outcome-determinative because the Director Defendants did not contest that demand was excused as to three of Ayala's nine directors: David Sidransky, M.D. ("Sidransky"), Yuval Cabilly, Ph.D.

("Cabilly"), and Pini Orbach, Ph.D. ("Orbach"). The trial court's error was threefold:

- *First*, the trial court misread an explicit, well-pleaded admission by IBF's Co-Founder and Managing Partner, and Ayala's Chairman, Sidransky, that IBF Venture Advisors, such as Spiegel and Goldberg, had "*skin in the game*" as "*investors in the IBF*"—a statement that consistent with Delaware precedent signified a close financial alignment with the Fund's investors, *not* Ayala's public stockholders.
- *Second*, the trial court failed to consider the totality of the circumstances and the inescapable inferences they create. IBF's exposure in Ayala was not static; it was a massive bet-the-fund concentration, swelling to nearly a quarter or more of IBF's entire $70 million fund by the time of the challenged 2023 Note Transaction. IBF also had represented to existing and prospective investors that it expected a 10-to-20-fold return on that investment, which was deeply underwater prior to the Note Transaction. Furthermore, the Defendant Directors' own reliance on Ayala's SEC disclosures regarding conflicted directors "associated with" the Funds purportedly abstaining from decisions regarding the Note Transaction creates an inescapable dilemma for them: either Spiegel and Goldberg were conflicted (making a majority of the Board interested), or they

"approved" as "disinterested members of the Board" a patently unfair deal (exposing them to a substantial likelihood of liability). Under either scenario, demand is futile.

- *Third*, compounding the aforementioned factual errors, the trial court applied an unduly narrow, quantitative standard rather than the subjective "could have affected" materiality standard applied in *Zuckerberg*. By demanding that Marstrand plead the precise dollar value or unit count of Spiegel's and Goldberg's interests in IBF—information concerning a third-party investment vehicle that is simply not accessible through any pre-suit mechanism—the trial court applied a standard that, as a practical matter, fully insulates directors who benefit from transactions between the corporation and investment funds.

3. Alternatively, the trial court erred as a matter of law by failing to address the extensive body of Delaware case law, expressly preserved in *Zuckerberg*, establishing that the subjective materiality standard is inapplicable to classic self-dealing transactions. Because Spiegel and Goldberg held limited partner interests in IBF—a direct counterparty to the Note Transaction—they stood on both sides of a self-dealing transaction and therefore, are deemed "interested" as a matter of law, requiring no separate showing of materiality.

4. The trial court also erred as a matter of law by concluding that the Amended Complaint failed to plead particularized facts supporting a reasonable inference that Spiegel and Goldberg faced a substantial likelihood of liability under *Zuckerberg*'s second prong. The trial court's finding that the Amended Complaint did not allege that Spiegel and Goldberg approved the Note Transaction is a textually untenable reading of the record that ignores the pleading's clear definitions and repeated allegations of board-wide approval. Furthermore, the Director Defendants' own litigation positions and public disclosures trap them in the dilemma previewed above: either Spiegel and Goldberg abstained due to a disabling conflict, or they voted for the Note Transaction as purportedly disinterested directors. If they voted, their approval of a highly dilutive insider transaction that transferred tens of millions of dollars to IBF—a fund in which they were investors (*i.e.*, "skin in the game")—without any independent procedural protections triggers entire fairness review. Given the Note Transaction's patent unfairness, including its one-day, accelerated process, lack of a special committee, fairness opinion, or a majority-of-the-minority vote, and an effective aggregate discount of over 80% upon the exercise of rights, Spiegel and Goldberg face a substantial likelihood of liability for a breach of the duty of loyalty. Under either scenario, demand is excused as futile.

STATEMENT OF FACTS

A. The Parties.

Nominal Defendant Ayala is a Delaware corporation in which Marstrand has been a continuous stockholder at all relevant times. A034, A040 A055, A088 (Am. Compl. ¶¶ 11, 30, 55, 135). Defendants IBF and ABV are venture funds. A041–46, A047 (Am. Compl. ¶¶ 31–37, 41–42).

The nine Director Defendants were members of Ayala's Board when the challenged Note Transaction was presented and approved and when Marstrand's initial and amended pleadings in this action were filed. A035–36, A074–76, A088 (Am. Compl. ¶¶ 14–22, 107–08, 137). "Director Defendants" was a term Marstrand specifically defined at the very outset of the Amended Complaint to include each individual Ayala director at the time of the challenged Note Transaction and as of the filing of its initial and amended pleading. A028 (Am. Compl. [Preamble]). That defined term specifically includes Spiegel and Goldberg. *Id*.

B. IBF's Promotion of its Venture Advisors as Investors in, and Financially Aligned with, the Fund.

As a 2021 investor presentation illustrates, IBF touts the unique position it occupies in the Israeli biotechnology ecosystem as providing [redacted] A041–43 (Am. Compl. ¶ 33); A276 (IBF's 2021 Investor Deck, Slide 15). A key component of IBF's strategy is its use of expert "Venture Advisors" or "VAs" who evaluate potential investment

opportunities and serve as directors of portfolio companies. A041–43, A046 (Am. Compl. ¶¶ 33, 37). As of the filing of the Amended Complaint in November 2024, IBF's website continued to emphasize the "crucial" role its Venture Advisors play, referring to them as a "key asset." A046 (Am. Compl. ¶ 37).

IBF Co-Founder and Managing Partner Sidransky has stressed that IBF's Venture Advisors are investors in the Fund and financially aligned with its investors. Specifically, Sidransky is quoted in a May 10, 2019 Citeline article titled "*Israel Looks to Nurture New Leaders for Burgeoning Biotech Sector*" as stating: "As *investors in the IBF*, they [IBF's Venture Advisors] have *skin in the game* and they commit a tremendous amount of time . . . sitting on boards – which is crucial so that we can manage and help the portfolio company." A043–44 (Am. Compl. ¶ 34) (emphasis added). At the time of this statement, Sidransky also was the Chairman of Ayala's Board, which was in the process of completing a $30 million Series B financing round in May 2019. A050–52 (Am. Compl. ¶¶ 50, 53).

During the period relevant to this case, Spiegel and Goldberg were IBF Venture Advisors and limited partners. A035 (Am. Compl. ¶¶ 17–18). Consistent with Sidransky's "skin in the game" statement, at all relevant times, they have been IBF investors/limited partners. A041 (Am. Compl. ¶ 31). For example, as Ayala disclosed in its May 2020 IPO registration statement, Spiegel and Goldberg possess

a *"pecuniary interest . . . as limited partners of IBF I . . . ."* A044 (Am. Compl. ¶ 35) (emphasis added).

C. Ayala's Formation and Iteration.

In December 2017, IBF founded Ayala. A050–51, A053–54 (Am. Compl. ¶¶ 50, 57).[3] Specifically, IBF's 2021 Investor Deck states that [redacted] A050–51 (Am. Compl. ¶ 50); A279 (IBF's 2021 Investor Deck, Slide 18). Just one month later, in January 2018, [redacted] A051–52 (Am. Compl. ¶¶ 51–52); A279 (IBF's 2021 Investor Deck, Slide 18). [redacted]

In July 2021, Advaxis, [redacted] entered into a merger agreement with Biosight, a company in which IBF and ABV had significant investments. A048–50, A055, A061 (Am. Compl. ¶¶ 44–47, 60, 76). ABV manager Orbach served as Chairman of Biosight's Board, which

[3] For clarity and ease of reading, this brief refers to the nominal defendant and its predecessor entities collectively as "Ayala." The Amended Complaint details the company's corporate evolution, distinguishing the entity founded in 2017 as "Old Ayala" prior to its subsequent mergers with Advaxis, Inc. ("Advaxis") and Biosight Ltd. ("Biosight"). A032–33, A050–55, A061–69 (Am. Compl. ¶¶ 8 n.1, 50–59, 78–97.).

also included an IBF designee. A049–50 (Am. Compl. ¶ 47). The merger fell through due to the failure to obtain the stockholder votes required to effect a significant reverse stock split. A060–61 (Am. Compl. ¶¶ 75, 77).

In January 2023, Advaxis and Ayala merged. A067 (Am. Compl. ¶ 92). Six of the Director Defendants—Sidransky, Spiegel, Goldberg, Vered Bisker-Leib ("Bisker-Lieb"), Kenneth Berlin, and Roni Appel—were appointed to the Board of the combined company (Ayala). A065–66 (Am. Compl. ¶ 88).

On October 19, 2023, Ayala merged with Biosight. A069 (Am. Coml. ¶ 96). The same six Director Defendants—including Spiegel and Goldberg—continued on the resulting company's (Ayala's) Board. A068 (Am. Compl. ¶ 94). They were joined by two new directors, IBF Co-Founder and Manager Partner Cabilly and ABV manager Orbach. *Id.*

Upon consummation of this merger, IBF and ABV owned 29% and 7.14% of the combined company (Ayala), respectively. A069 (Am. Compl. ¶ 97). [redacted] A052 (Am. Compl. ¶ 54). The stakes associated with this investment were particularly high. Not only was it highly concentrated—[redacted] A032–33, A052–54 (Am. Compl. ¶¶ 8, 54, 57).

D. Ayala's Active Strategic Transaction and Financing Discussions.

In September 2023, before the Ayala-Biosight merger even closed, Orbach, the Chairman of Biosight's Board and an ABV manager, introduced Ayala to two potential strategic partners. A070 (Am. Compl. ¶ 98). Separately, around the same time period, Sidransky, and later, Cabilly, engaged in discussions with one of Ayala's directors, Bisker-Lieb, regarding a potential strategic transaction between Ayala and Compass Therapeutics, the company for which Bisker-Lieb then served as Chief Operating Officer. A072 (Am. Compl. ¶ 103). Ayala provided Compass Therapeutics with access to its data room on October 12, 2023. A072–73 (Am. Compl. ¶ 104).

Between mid-October and mid-November 2023, Ayala was engaged in ongoing strategic transaction discussions with at least *four* parties, including Compass Therapeutics. A073 (Am. Compl. ¶ 105). From these discussions, Ayala's directors—including Spiegel and Goldberg—and the Funds knew or reasonably expected that Ayala was about to reach agreement with one of its suitors. A070–71; A079 (Am. Compl. ¶¶ 99, 114).

E. The Board Abandons a Significantly More Favorable Financing Alternative and Approves the Note Transaction in a Rushed, One-Day Process.

While Ayala's Board was engaged in strategic transaction discussions with multiple parties, Ayala's investment bank actively solicited interest in a private

investment in public equity ("PIPE") financing. A071 (Am. Compl. ¶ 100). The proposed PIPE terms included convertible notes and warrants at a 20% discount to Ayala's market price. A071 (Am. Compl. ¶ 101). In response, Ayala received indications of interest from new investors and a non-binding commitment from certain existing investors for approximately $15,000,000 in funding on these terms. *Id.*

On November 16, 2023, Ayala's Board met and, *for the first time*, was presented with a proposal jointly structured by the Funds for the Note Transaction, which was reviewed and approved *that same day* without a special committee, fairness opinion, or majority-of-the minority vote. A029, A031, A073–74, A077–78 (Am. Compl. ¶¶ 3, 6, 106, 111–12). The Board immediately abandoned the far more favorable third-party PIPE financing alternative without further consideration and without making any effort to obtain equivalent, arms'-length bridge financing. A073–74, A077 (Am. Compl. ¶¶ 106, 111).

Under the Note Transaction, in exchange for a commitment to lend Ayala up to $4 million, Ayala issued to the Funds convertible notes with a conversion price equal to a 50% discount to Ayala's stock price. A074–75 (Am. Compl. ¶ 107). In addition, Ayala issued warrants to purchase up to 15 million shares of Ayala common stock at a 50% discount. *Id.* To sweeten the deal even more, the Board gifted IBF a warrant for 7.5 million additional shares for no new consideration,

resulting in an effective aggregate transaction discount—over the notes and series of warrants—of over 80%. A075–77 (Am. Compl. ¶¶ 108, 110). On November 17, 2023—*the very next day* after Ayala's Board first considered the Note Transaction—Ayala issued the notes and warrants. A077–79 (Am. Compl. ¶¶ 112, 115). Finally, if all of this were not enough, the Board granted the Funds the right, but not the obligation, to lend Ayala up to an additional $5.48 million under convertible promissory notes with the same 50% discounted conversion and additional warrant coverage with the same low exercise price at 50% of market. A076 (Am. Compl. ¶ 109).

F. The Funds Cash-In on the Note Transaction Almost Instantaneously.

Only five weeks after the Note Transaction, Ayala agreed to sell substantially all of its assets. This enabled the Funds and the Ayala directors who held stakes in them—a majority of the Board—to realize a massive windfall.

The challenge here is not one born of hindsight. Ayala was engaged in strategic discussions with multiple parties when it issued the Notes to the Funds. Ayala never disclosed that it was within weeks of bankruptcy or required emergency funding to complete a sales transaction. Moreover, the Amended Complaint details that Ayala had viable market alternatives, having successfully solicited indications

of interest and non-binding commitments for $15,000,000 in third-party PIPE funding at a standard 20% discount to market. A071 (Am. Compl. ¶¶ 100–01).

Opting for outside funding on anything close to market-standard terms, however, would have reduced the Funds' ownership percentage substantially, nearly wiping out their already deeply underwater investment. A077, A079 (Am. Compl. ¶¶ 111, 114). Drawing all reasonable inferences in Marstrand's favor, as Rule 23.1 requires, if uninformed third parties were willing to commit $15,000,000 at a 20% discount, Ayala easily could have secured the mere $4,000,000-to-$6,000,000 actually provided by the Funds on terms vastly more favorable to the company than the effective 80% discount the insiders extracted. Instead of pursuing these favorable market alternatives, the Funds weaponized their asymmetrical insider knowledge of discussions regarding an imminent, lucrative strategic transaction to seize a massively discounted equity stake for themselves, intentionally shutting out the public stockholders just weeks before agreeing to an asset sale.

The comparison between the rushed one-day Note Transaction and the sales process Ayala's Board conducted once the Funds received the notes is striking. The latter bore no resemblance to the former. Ayala's Board aggressively negotiated with interested parties regarding a sale, including extracting four proposals from Compass Therapeutics, Bisker-Leib's company. A081 (Am. Compl. ¶ 120). Ayala ultimately passed on those offers. *See* A082–83 (Am. Compl. ¶ 123). Just one

month after the Board approved the Note Transaction, on December 22, 2023, Ayala entered into a term sheet to sell substantially all of its assets to Immunome, Inc. ("Immunome") for up to $87.5 million. A082–83, A086 (Am. Compl. ¶¶ 122–23, 130).

On February 5, 2024, Ayala and Immunome executed an asset purchase agreement (the "Immunome Transaction"). A083 (Am. Compl. ¶ 124). The Asset Purchase Agreement provided for a closing payment of $20 million and stock valued at $30 million. *Id.* It also provided for three contingent milestone payments of up to $37.5 million based on the achievement of certain development and commercial milestone events set forth in the Asset Purchase Agreement. *Id.*

The Immunome Transaction was publicly announced on February 6, 2024. A083 (Am. Compl. ¶ 124). Two days later, on February 8, 2024, IBF and ABV exercised their conversion and warrant rights under the Note Transaction, instantly increasing their combined ownership of Ayala from approximately 36% to approximately 78%, allowing them to provide a stockholder consent needed to approve the Immunome Transaction without a vote of Ayala's other stockholders. A083 (Am. Compl. ¶ 125). After a final exercise of rights, the Funds' ownership exceeded 80%. A085–86 (Am. Compl. ¶ 128). IBF reaped the lion's share of the benefit from the Note Transaction, as its ownership percentage alone increased from 29% to 71.63%. A514–30 (IBF Schedule 13-D, February 5, 2024).

In summary, the following timeline highlights the strategic and financing transactions in which Ayala's Board was engaged shortly before, during, and after the Note Transaction:



A580.[4]

In the absence of the Note Transaction, IBF and ABV would have obtained from the Immunome Transaction's upfront $50 million payment only approximately $18,000,000—an amount well below their combined investments of $25,000,000-to-$30,000,000 in Ayala and Biosight. A086–87 (Am. Compl. ¶¶ 130–31). After an investment of $4-to-$6 million in the Note Transaction, IBF and ABV, within weeks of that investment, reaped $40 million from the upfront Immunome

[4] "Self-Interested Dilutive Financing" and "SIDF" refer to the Note Transaction.

Transaction payment—*i.e.*, an additional $22 million. *Id*. In addition, as opposed to only receiving $13.5 million if the full milestones payments are made, IBF and ABV will receive over $30 million—an increase of $16.5 million. *Id*.

To recap, the Amended Complaint sets forth allegations that the Note Transaction successfully transferred to IBF and ABV between $22,000,000 and $38,500,000 in value that otherwise would have flowed to Ayala's minority stockholders from the Immunome Transaction. A086–87 (Am. Compl. ¶¶ 130–31). If the full milestones payments are received, IBF and ABV will realize a return of between 2x and 3x of their investment—converting what would have been a catastrophic loss into a profitable return. *Id*.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DISMISSED THE AMENDED COMPLAINT FOR FAILURE TO SATISFY *ZUCKERBERG*'S FIRST PRONG.

A. Question Presented.

Did the trial court err by concluding that the Amended Complaint fails to allege particularized facts from which it can be reasonably inferred that a majority of Ayala's Board personally benefited from a self-dealing, zero-sum transaction warranting dismissal of the Amended Complaint under Court of Chancery Rule 23.1? Dismissal Order ¶¶ 31–35.

B. Scope of Review.

This Court's review of the trial court's dismissal under Court of Chancery Rule 23.1 is *de novo* and plenary. *Zuckerberg*, 262 A.3d at 1047.

C. Merits of the Argument.

1. The Trial Court Erred When it Found the Amended Complaint Did Not Allege Particularized Facts to Support a Reasonable Inference that Spiegel and Goldberg Received a Material Personal Benefit from the Note Transaction.

In *Zuckerberg*, this Court reiterated that "[w]hen considering a motion to dismiss a complaint for failing to comply with Rule 23.1, the Court does not weigh the evidence, must accept as true all of the complaint's particularized and well-pleaded allegations, and must draw all reasonable inferences in the plaintiff's favor." *Zuckerberg*, 262 A.3d at 1049. Trial courts must "consider all the particularized

facts pled by the plaintiffs about the relationships between the director and the interested party in their totality and not in isolation from each other, and draw all reasonable inferences from the totality of those facts in favor of the plaintiffs." *Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1019 (Del. 2015). The test at the pleading stage "is whether the complaint alleges a constellation of particularized facts which, when viewed holistically, support a reasonably conceivable inference" in the plaintiff's favor; "[t]he court must sample the concoction and if the pleading-stage favor is foul, then the complaint survives dismissal, and the case proceeds to discovery." *IBEW Local Union 481 Defined Contribution Plan and Trust on Behalf of GoDaddy, Inc. v. Winborne*, 301 A.3d 596, at 623 (Del. Ch. 2023).

Here, the Director Defendants did not contest the absence of a demand with respect to Fund managers Sidransky, Cabilly, and Orbach. A250–51 (Director Defendants' and Nominal Defendant Ayala Pharmaceuticals Inc.'s Opening Brief in Support of Motion to Dismiss Verified Amended Complaint ["OB"] at 49–50). Accordingly, to survive dismissal under Rule 23.1, the Amended Complaint therefore must allege particularized facts supporting a reasonable inference that demand also was excused as futile with respect to two other Ayala directors. It did so with respect to Spiegel and Goldberg.

a. Sidransky's "Skin in the Game" Admission Signified Spiegel's and Goldberg's Close Financial Alignment with IBF Investors.

The trial court read the Amended Complaint as "focus[ing] on a single factual allegation: Spiegel and Goldberg are 'Venture Advisors' of Israel Biotech." Dismissal Order ¶ 29. Relatedly, the trial court also concluded "Plaintiff relies solely on at [*sic*] statement by Sidransky from a 2019 news article that Venture Advisors have 'skin in the game' as investors in Israel Biotech." *Id*. ¶ 30. Those characterizations are incorrect and fail to both properly construe the statement itself and the Amended Complaint in its entirety.

The Amended Complaint alleges that Sidransky, IBF's Co-Founder/Manager and Ayala's Chairman, stated in a May 10, 2019 Citeline article titled "*Israel Looks to Nurture New Leaders for Burgeoning Biotech Sector*" the following: "As *investors in the IBF*, they [IBF's Venture Advisors] have *skin in the game* and they commit a tremendous amount of time . . . sitting on boards – which is crucial so that we can manage and help the portfolio company." A043–44 (Am. Compl. ¶ 34) (emphasis modified from Amended Complaint). This allegation is well-pleaded: the date, publication, title, speaker, and statement all are identified.

The trial court, however, found that "[i]t is unclear from the quote whether that 'skin' comprises interests in Israel Biotech or the portfolio companies." Dismissal Order ¶ 30. That construction cannot be reconciled with the statement's

plain text, which states "[a]s investors *in the IBF*, they have skin in the game . . . ." A043–44 (Am. Compl. ¶ 34) (emphasis modified from Amended Complaint). Sidransky's statement on its face referred to the Venture Advisors as "investors in the IBF" and having "skin in the game" as such. Even when referring to the Venture Advisors' board service, Sidransky spoke from the perspective of IBF, stating that this enables the Fund to "manage and help the portfolio company." *Id.*

To the extent any question exists, the Amended Complaint identifies a specific Ayala SEC filing disclosing Spiegel's and Goldberg's "*pecuniary interest . . . as limited partners of IBF I . . . .*" A044 (Am. Compl. ¶ 35) (emphasis added). It also alleges that they maintained that interest at all relevant times. A035, A041 (Am. Compl. ¶¶ 17–18, 31).

These facts are particularized. The question then is what are the inferences that can be reasonably drawn in Marstrand's favor from them. The first such inference is that consistent with the text of the statement itself, the reference to "skin in the game" referred to Spiegel's and Goldberg's direct investment interests in IBF, as Venture Advisors, not in IBF's portfolio companies.

The second reasonable inference concerns the statement's meaning and significance. When making the statement in his capacity as an IBF Managing Partner, Sidransky also was the Chairman of Ayala's Board. IBF founded and was heavily invested in Ayala, which at the time was in the process of completing a $30

million Series B financing round. A050, A052 (Am. Compl. ¶¶ 50, 53). During oral argument, Marstrand asserted:

> Skin in the game is not a phrase that connotes a trivial or an incidental financial interest. It connotes meaningful financial alignment. IBF chose that phrase deliberately to reassure existing and prospective investors that its venture advisors were positioned just like them, just like other investors in the fund, and incentivized to protect the fund's investments, precisely because, like those other investors, they also had something significant to lose if the fund's investments failed.

A575–76 (Hrg. Tr. 46:21–47:6).

This inference is not only reasonable, it is the one that Delaware courts have drawn from the same phrase in the context of corporate director stock ownership:

> *Delaware decisions presume that a director who is also a stockholder is more likely to have interests that align with the best interests of the stockholders as a whole*. As then-Vice Chancellor Strine wrote: '[I]t is useful to have directors with, as Ross Perot was wont [*sic*] to say, *skin in the game*. *Such directors have a personal interest in ensuring that the company is managed to maximize returns to the stockholders*.' The same is true of general partners and those who control them.

Leo Invs. Hong Kong Ltd. v. Tomales Bay Cap. Anduril III, L.P., 342 A.3d 1166, 1198 (Del. Ch. 2025) (quoting *In re PNB Hldg. Co. S'holders Litig.*, 2006 WL 2403999, at *10 (Del. Ch. Aug. 18, 2006)) (emphasis added). Applying the same reasoning here, Spiegel and Goldberg's IBF limited partnership interests would have aligned them with the "best interests" of investors in the Fund "as a whole" and incentivized them to "maximize returns" to those investors. *See id*.

In the context of a zero-sum capital raise such as the Note Transaction, that alignment was legally fatal. Benefiting Ayala's minority stockholders by pursuing the market-rate, third-party PIPE would have directly harmed IBF's investors, including Spiegel and Goldberg. Conversely, rescuing IBF's underwater Ayala investment required approving the dilutive insider deal at the direct expense of Ayala's public stockholders other than IBF and ABV. This non-ratable benefit—rescuing their own private fund investment—is a classic, disabling conflict. *See Frank v. Elgamal*, 2012 WL 1096090, at *10 n.75 (Del. Ch. Mar. 30, 2012) ("[W]hen the managers who are being given an on-going interest in the company are also members of the company's control group, it is reasonable for the Court to infer not only that the purchaser wants the managers to have 'skin in the game,' but that the managers/control group members are using their control to acquire a unique benefit for themselves at the expense of the minority stockholders.").

The fundamental purpose of any requirement that a plaintiff plead particularized facts indicative of a "material personal benefit" is to establish that the director possesses a meaningful interest that could have affected the director's impartiality. With respect to Spiegel and Goldberg, that is precisely what the statement by Sidransky, IBF's Co-Founder/Manager and Ayala's Chairman, signified. Marstrand logically should not be required at the pleading stage to allege additional facts to substantiate the underpinnings of what Sidransky publicly

communicated. Any such requirement would have significant implications well beyond this case. Requiring a derivative plaintiff in these unique circumstances armed with a public admission like Sidransky's at the pleading stage to specify the exact holdings that constitute the skin in the game in a third-party investment entity—information that generally would not be accessible through a Section 220 demand to the corporation—would, as a practical matter, insulate directors who benefit from transactions between the corporation and investment funds or other vehicles from legal challenge.

b. Ayala Was a "Bet the Fund" Investment That IBF Represented Would Yield Massive Returns.

The trial court compounded its error by failing to evaluate Sidransky's "skin in the game" statement and Spiegel and Goldberg's limited partnership interests as part of the "constellation" of particularized facts alleged in the Amended Complaint. Spiegel's and Goldberg's IBF interests were not held in a highly diversified, *de minimis* investment vehicle. Rather, their "skin in the game" represented a massive, escalating financial exposure for IBF that peaked at the exact moment of the challenged transaction. A048–49, A050–54 (Am. Compl. ¶¶ 44–46, 50–55, 57). When the statement was made in May 2019—contemporaneously with Ayala's Series B round—IBF had already poured over [redacted] into the company it founded and which it tasked Spiegel and Goldberg to help "manage." A043–44,

A051–52 (Am. Compl. ¶¶ 34, 52, 54). In May 2020, IBF injected an additional [redacted] into Ayala's IPO, driving its Ayala stake up to [redacted] *Id.*; A052–53 (Am. Compl. ¶ 55). That same year, [redacted] A049 (Am. Compl. ¶¶ 45–46). By the time of the 2023 Ayala-Biosight merger and the challenged Note Transaction, [redacted] A052–53 (Am. Compl. ¶¶ 54–55). [redacted] A052 (Am. Compl. ¶ 54). This was a major bet with actual and potential investors told: [redacted] A032–33, A053–54 (Am. Compl. ¶¶ 8, 57). Therefore, when Spiegel and Goldberg acted, they were not merely protecting casual "skin in the game"—they were protecting a bet-the-fund concentration that made their interests undeniably material.

In the Fall of 2023, Ayala was actively engaged in strategic discussions, and the Board expected a transaction to come to fruition—which it did just weeks later in December 2023 with Immunome. A082–83 (Am. Compl. ¶ 123). With this liquidity event on the horizon, IBF's heavily underwater investment faced a critical juncture. As evidenced by the Immunome Transaction's $50 million upfront payment, without the Note Transaction, IBF and ABV's combined 36% stake would have yielded only about $18,000,000—a substantial loss against their [redacted] cost basis. A086–87 (Am. Compl. ¶ 131). Furthermore, proceeding

with a standard, third-party PIPE (*e.g.*, raising $15,000,000 at a market-standard 20% discount) would have reduced the Funds' ownership percentage substantially, nearly wiping out their already deeply underwater investment. A071–72, A075–76, A086–87 (Am. Compl. ¶¶ 100–01, 108, 131).

To avoid these outcomes, the Director Defendants, including Spiegel and Goldberg, approved the insider Note Transaction, which featured a massive 50% discount and a 7.5-million-share uncompensated warrant giveaway. A075–76 (Am. Compl. ¶ 108). This insider-friendly structuring allowed IBF's and ABV's collective ownership to artificially surge from 36% to over 80% just in time to capitalize on the Immunome Transaction—with IBF's ownership alone exceeding 71%. A514–30 (IBF Schedule 13-D, February 5, 2024); A085–86 (Am. Compl. ¶ 128). Through this managed recapitalization, $22,000,000 to $38,500,000 of cash value was shifted directly from Ayala's public minority stockholders to IBF and ABV. This enabled IBF—the Fund in which Spiegel and Goldberg were invested and had served for several years—to transform a losing investment into a potential 2x to 3x return. A086–87 (Am. Compl. ¶ 131). From these collective facts, it can be reasonably inferred that Spiegel and Goldberg received a material benefit from this reversal of fortune.

Ironically, the Director Defendants' own litigation positions and Ayala's public disclosures support an inference of materiality. To defend the transaction

below, the Director Defendants relied on Ayala's November 20, 2023 Form 10-Q, which was referenced in the Amended Complaint. A077–78 (Am. Compl. ¶ 112); A214, A238 (OB at 13, 37). The Director Defendants cite Ayala's statement in the Form 10-Q that those board members "associated with" IBF and ABV "did not participate in any of the deliberations or decisions with respect to the [Note Transaction], all of which were reviewed and approved by *the disinterested members of the Board*." A323 (Ayala Form 10-Q, November 20, 2023, at 28) (emphasis added); A077–78 (Am. Compl. ¶ 112); A214, A238 (OB at 13, 37).

Marstrand believes that the most reasonable inference to be drawn from this statement—which as a statement not actually alleged in the complaint cannot be offered for its truth—is that Spiegel and Goldberg voted to approve the Note Transaction. But for purposes of demand futility, that does not matter because the Director Defendants are in a trap of their own making. Their reliance on the Form 10-Q statement creates an inescapable logical paradox.

If, as the Director Defendants conspicuously implied without actually stating, Spiegel and Goldberg abstained from approving the Note Transaction pursuant to this deliberately vague "associated with" disclosure, then a reasonable inference exists that their IBF interests created a material conflict. Any such determination would render a majority of Ayala's directors incapable of impartially considering a demand under *Zuckerberg*'s first prong—*i.e.*, Sidransky, Cabilly, Orbach, Spiegel,

and Goldberg. If, however, no such conflict determination was made, the most reasonable inference from the disclosure is that Spiegel and Goldberg approved the Note Transaction, which is addressed below in Section II.

The Director Defendants' own disclosure thus creates a dilemma from which they cannot escape. Either (i) Spiegel and Goldberg were deemed conflicted, making a majority of the board interested, or (ii) they were the "disinterested" directors who approved a patently unfair deal, exposing them to a substantial likelihood of liability. While the 10-Q is hopelessly ambiguous, under either scenario, demand is futile.

c. The Trial Court Failed to Apply the Proper Standard for Determining Materiality.

Finally, the trial court also erred by applying an unduly narrow and purely quantitative standard of "materiality." The correct standard, as this Court applied in *Zuckerberg*, is a subjective and context-specific inquiry focused on whether the particularized facts alleged support a reasonable inference that a director's impartiality "could have" been compromised. *Zuckerberg*, 262 A.3d at 1060.

Although *Zuckerberg* articulated this standard in the context of its third prong (independence), the exact same subjective standard logically governs the first prong's inquiry into a "material personal benefit." Particularly given the nature of the demand inquiry, no logical basis exists to apply a flexible, subjective standard

for a conflict based on a relationship (third prong) but a different, rigid numerical-only standard for assessing the materiality of a direct financial benefit (first prong). The relevant inquiry is not what exact dollar figure or equivalent a plaintiff can quantify without discovery—particularly with respect to the size of a director's ownership interest in an outside, private entity—but whether the alleged financial benefit was material in the sense that it "could have affected the impartiality of the individual director." *Id.* Because the trial court did not ask this question, it never addressed it. For the reasons explained previously, Spiegel's and Goldberg's ownership interests in Ayala most certainly could have affected their impartiality here.

2. Alternatively, Under Long-Standing Delaware Case Law Preserved by *Zuckerberg*, the Subjective Materiality Standard is Inapplicable to Classic Self-Dealing Transactions.

Even if this Court were to conclude that the Amended Complaint failed to satisfy the subjective materiality standard under *Zuckerberg*'s first prong, reversal is still required. The trial court erred by applying a materiality analysis to a classic self-dealing transaction.

In *Aronson v. Lewis*, this Court held that only "disinterested" directors may claim the protections of the business judgment rule, meaning that, "[f]rom the standpoint of interest . . . directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing,

as opposed to a benefit which devolves upon the corporation or all stockholders generally." 473 A.2d 805, 812 (Del. 1984). In *Cinerama, Inc. v. Technicolor, Inc.*, this Court characterized "self-dealing" as "when a director deals directly with the corporation, *or has a stake in* or is an officer or director *of a firm that deals with the corporation*." 663 A.2d 1156, 1169 (Del. 1995) (emphasis added). As IBF investors and limited partners, Spiegel and Goldberg held such a stake in the Note Transaction counterparty.

For purposes of pleading demand futility, Delaware courts historically have not required plaintiffs to allege particularized facts independently establishing "material self-dealing," reserving a subjective materiality standard for cases involving indirect, "incidental" personal benefits or relationship-based conflicts.

The distinction is deeply rooted in this Court's own precedent. In *Cede & Co. v. Technicolor, Inc.* ("*Cede II*"), this Court affirmed that "[a]bsent evidence of self-dealing," a personal or special benefit accruing to a director in an otherwise arm's-length transaction does not establish a disabling interest unless that interest is also found to be "material" to the individual director. 634 A.2d 345, 362–63 (Del. 1993).

In *HMG/Courtland Props., Inc. v. Gray*, the Court of Chancery construed *Cede II* in precisely this manner when it reviewed a transaction in which a director leading negotiations for the sale of corporate property secretly took a buy-side interest. 749 A.2d 94, 96, 108, 112–14 (Del. Ch. 1999). The court described that

circumstance as a "classic case of self-dealing" and held that proof of such an undisclosed conflict was, in itself, "sufficient to rebut the presumption of the business judgment rule and invoke entire fairness review." *Id.* at 114. The court explicitly contrasted the situation before it from one involving mere "incidental director interest," for which a separate showing of materiality is required. *Id.* at 113–14.

As the Court of Chancery explained in *HMG/Courtland Props., Inc.*, this well-established rule is entirely consistent with the statutory framework of Section 144 of the Delaware General Corporation Law (DGCL) that was in place at the time. 8 *Del. C.* § 144(a).[5] Section 144, which governs transactions between a corporation and other entities in which its directors "have a financial interest," provided no qualification or exception for "material" financial interests. *See HMG/Courtland Props., Inc.*, 749 A.2d at 114.

Thus, where a director stands on both sides of a challenged transaction as a counterparty, the conflict is inherent, and allegations of subjective materiality are

[5] Section 144 of the DGCL was subsequently amended by the General Assembly, effective March 25, 2025, to introduce certain language concerning the materiality of director or officer financial interests. However, because this action was filed prior to the effective date, the pre-amendment version of Section 144—which contains no materiality qualifier—governs this appeal. *Cf. CRI Liquidating Reit, Inc. v. A.F. Evans Co.*, 730 A.2d 1244, 1246 (Del. Ch. 1997) ("statutory amendments do not operate retroactively unless the General Assembly explicitly so provides.").

not required to establish that the director has a disabling interest. Relying upon "substantial precedent," the Court of Chancery emphasized in *Cambridge Ret. Sys. v. Bosnjak*:

> [D]efendants argue that a director's interest in his own compensation should not be considered "disabling" under *Aronson* unless it is alleged that the compensation is material to the particular director in question. Defendants have not identified any authority applying a materiality standard to a *self-dealing transaction* and I decline to do so. Substantial precedent supports the opposite conclusion: where self-dealing is present, a plaintiff need not plead that a director's interest in a challenged transaction is material to him to establish that the director has a disabling interest.

2014 WL 2930869, at *4 (Del. Ch. June 26, 2014) (emphasis in original); *see also Orman v. Cullman*, 794 A.2d 5, 25 n.50 (Del. Ch. 2002) ("[W]henever a director stands on both sides of the challenged transaction he is deemed interested and allegations of materiality have not been required.").

The Court of Chancery unequivocally reiterated:

> Under the first prong of *Aronson*, a director is interested if he or she appears "*on both sides of a transaction*" or expects to derive any personal financial benefit from it *in the sense of self-dealing* as opposed to a benefit which devolves upon the corporation or all stockholders generally.

Chester Cty. Emps. Ret. Fund v. New Residential Inv. Corp., 2017 WL 4461131, at *6 (Del. Ch. Oct. 6, 2017) (emphasis added). In other circumstances, however, "in the absence of self-dealing, it is not enough to establish the interest of a director by alleging that he received *any* benefit not equally shared by the stockholders. Such

benefit must be alleged to be *material* to that director." *Orman v. Cullman*, 794 A.2d at 23 (emphasis in original).

Significantly, director interestedness under *Aronson's* first prong was not at issue in *Zuckerberg*. That case involved a challenge to a stock reclassification designed to enable Facebook's founder and controller, Mark Zuckerberg, to sell his company stock while maintaining voting control. *Zuckerberg*, 262 A.3d at 1039–40. There was no allegation that any other Facebook director on the nine-member demand board obtained a personal financial or other direct benefit from the challenged reclassification. *Id.* at 1060. This Court's focus in *Zuckerberg* therefore was on whether the directors who approved the reclassification faced a substantial likelihood of liability or lacked independence from Mark Zuckerberg—who allegedly received a material personal benefit from the reclassification. *Id*. at 1049–64.

Given these issues, this Court considered how the second prong of *Aronson* applied to a care-based claim when directors are protected by an exculpatory charter provision adopted pursuant to Section 102(b)(7) of the DGCL. *See Zuckerberg*, 262 A.3d at 1049–54 (citing *passim* 8 *Del. C.* § 102(b)(7)). The Court agreed with the Court of Chancery that *Aronson's* standard-of-review-based second prong was no longer adequate to address a demand board protected by exculpation, where the directors faced no personal liability for a breach of the duty

of care. *Id*. at 1040-41, 1054. Once this question was resolved, the Court turned to whether the remaining directors lacked independence from Mark Zuckerberg. *Id*. at 1060-64.

A finding that *Zuckerberg* overruled Delaware's well-established body of case law concerning self-dealing transactions—an issue that was not before this Court—is inconsistent with the Court's express statement that "because the three-part test is consistent with and enhances *Aronson*, [*Rales v. Blasband*, 634 A.2d 927 (Del. 1993)], and their progeny, the Court need not overrule *Aronson* to adopt this refined test, and cases properly construing *Aronson*, *Rales*, and their progeny remain good law." *Zuckerberg*, 262 A.3d at 1059; *see also id*. at 1058 & n.169. Accordingly, under the long line of Delaware authority that *Zuckerberg* did not overturn, because Spiegel and Goldberg stood on both sides of a classic self-dealing transaction, their interest was disabling as a matter of law.

II. THE TRIAL COURT ERRED WHEN IT DISMISSED THE AMENDED COMPLAINT FOR FAILURE TO SATISFY *ZUCKERBERG*'S SECOND PRONG.

A. Question Presented.

Did the trial court err by concluding that the Amended Complaint fails to allege particularized facts from which it can be reasonably inferred that Spiegel and Goldberg face a substantial likelihood of liability for approving a self-dealing transaction without any procedural protections, warranting dismissal under Court of Chancery Rule 23.1? Dismissal Order ¶ 36.

B. Scope of Review.

This Court's review of the trial court's dismissal under Court of Chancery Rule 23.1 is *de novo* and plenary. *Zuckerberg*, 262 A.3d at 1047.

C. Merits of the Argument.

The Court of Chancery's analysis under *Zuckerberg*'s second prong was driven by a single, textually unsupportable error: its conclusion that the Amended Complaint "does not even state whether Spiegel or Goldberg voted on the transaction, much less voted to approve it." Dismissal Order ¶ 36. This finding is flatly contradicted by the plain text of the Amended Complaint and the reasonable inferences that must be drawn from it.

1. The Amended Complaint Alleges Particularized Facts Explicitly Pleading Spiegel's And Goldberg's Approval of the Note Transaction.

a. The Amended Complaint Alleges that the "Director Defendants"—a Defined Term that Includes Spiegel and Goldberg—Approved the Note Transaction.

The trial court's dismissal under *Zuckerberg*'s second prong rests on a single, textually untenable factual finding: that the Amended Complaint "does not even state whether Spiegel or Goldberg voted on the transaction, much less voted to approve it," leading to a purported "dearth of allegations concerning them specifically." Dismissal Order ¶ 36. This conclusion represents a fundamental misapplication of Rule 23.1 pleading standards and constitutes reversible error.

In this case, there was complete overlap in composition between Ayala's Board at the time of the Note Transaction and when Marstrand's complaints were filed. The Amended Complaint, therefore, established a clear master definition in the Preamble, explicitly defining the term "Director Defendants" to include Robert Spiegel, M.D., and Murray Goldberg by name along with the other Ayala directors. A028 (Am. Compl. [Preamble]). Using this unambiguous definition, the Amended Complaint repeatedly and specifically alleges that the Director Defendants—defined to include Spiegel, Goldberg, and each and every other Ayala director—approved the Note Transaction.

Specifically, the Amended Complaint alleges that on November 16, 2023, "the *Director Defendants approved* the Note Transaction and abandoned the potential PIPE financing." A074–75 (Am. Compl. ¶ 107). It further alleges that the "*Director Defendants approved*" the Note Transaction with an unjustified, uncompensated 7.5-million-share warrant giveaway to IBF "for nothing." A075–76 (Am. Compl. ¶ 108)*; see also* A031–32 (Am. Compl. ¶ 6) ("[T]he Director Defendants did not appoint an independent committee to evaluate the transactions that it approved."). The most logical, textually accurate reading of "the Director Defendants approved" is that each and every individual within that defined term—including Spiegel and Goldberg—approved the Note Transaction. These allegations were not qualified in any respect and no basis exists to read these allegations as excluding Spiegel and Goldberg. Moreover, the Amended Complaint elsewhere repeatedly alleges that Ayala's Board, which includes every one of the Director Defendants, approved the Note Transaction. A029–32, A077–80, A098–99 (Am. Compl. ¶¶ 3–6, 111–12, 114–16, 155).

b. The Ambiguous Form 10-Q Statement Cannot be Considered for the Truth of its Contents and All Reasonable Inferences from the Disclosure Must be Resolved in Marstrand's Favor.

To refute the Amended Complaint's allegations that Spiegel and Goldberg approved the Note Transaction, the Director Defendants relied on Ayala's Form

10-Q dated November 20, 2023. They implied the following statement—which Marstrand did not allege in the Amended Complaint—established that Spiegel and Goldberg had recused themselves from approving the Note Transaction:

> Those members of the Company's Board of Directors who are associated with Israel Biotech Fund I, L.P., Israel Biotech Fund II, L.P. and Arkin Bio Ventures L.P. *did not participate in any of the deliberations or decisions with respect to the [the Note Transaction], all of which were reviewed and approved by the disinterested members of the Board.*

A214–15, A238 (OB at 13–14, 37) (quoting A323 (Ayala Form 10-Q, November 20, 2023, at 28)) (emphasis added in OB).

Although the trial court correctly noted that a document, such as Ayala's Form 10-Q, which is referenced in paragraph 112 of the Amended Complaint,[6] is "incorporated by reference[,]" it failed to address the strict limitations on the court's review of such documents at the pleading stage or the purpose for which that SEC filing was considered in this case. Dismissal Order at n.1. Apart from determining the contents of a public filing itself—i.e., what the document says or does not say—a trial court may not consider the filing at the pleading stage for the truth of the matters asserted. In *In re Santa Fe Pacific Corp. S'holders Litig.*, this Court observed that "[f]ederal courts consider documents outside the pleadings when the documents are the very documents that are alleged to contain the various

[6] *See* A077–78 (Am. Compl. ¶ 112).

misrepresentations or omissions and are relevant not to prove the truth of their contents but *only* to determine what the documents stated." 669 A.2d 59, 70 (Del. 1995) (emphasis in original) (citation modified). Incorporated documents cannot be used to establish the truth of statements not alleged in a complaint. *Id*.

Nevertheless, even if the Form 10-Q statement were considered for its truth or only for the purpose of what Ayala disclosed, the defendants are trapped in an inescapable dilemma. As this Court confirmed in *Vanderbilt Income and Growth Associates, L.L.C. v. Arvida/JMB Managers, Inc.*, when an extrinsic document is considered, a trial court "cannot choose between two differing reasonable interpretations" and must draw the inference most favorable to the plaintiff. 691 A.2d 609, 613 (Del. 1996).

Here, the Form 10-Q disclosure that directors "associated with" the Funds abstained is vague. There is no disclosure as to whether Ayala used "associated with" solely to refer to the Funds' managers and employees or more expansively to also include advisors, such as IBF's Venture Advisors, and consultants. It certainly is reasonable to infer the more narrow construction.

Ayala's opaque Form 10-Q statement provides no basis for rejecting the Amended Complaint's allegations that Spiegel and Goldberg approved the Note Transaction. But in any event, this disclosure alone compels a binary, plaintiff-friendly inference. Although the Director Defendants did not contest the

interestedness of Sidransky, Cabilly, and Orbach, they made no such concession below for Spiegel and Goldberg. A214–15, A221, A234–35, A238 (OB at 13–14, 20, 33–34 37); A540–41, A554–55, A561–66 (Director Defendants' and Nominal Defendant Ayala Pharmaceuticals Inc.'s Reply Brief in Support of Motion to Dismiss Verified Amended Complaint, at 1–2, 15–16, 22–27). This silence strongly supports the inference that Spiegel and Goldberg were not deemed to be "associated with" the Funds, meaning they acted as the "disinterested members of the Board" who voted to approve the Note Transaction. Alternatively, they were deemed "associated with" the Funds and abstained due to a disabling conflict (excusing demand under *Zuckerberg*'s first prong). The Director Defendants cannot have it both ways; under either branch of this binary inference, demand is excused. By approving the Note Transaction—as explicitly alleged in the Amended Complaint and reasonably inferred from the Form 10-Q disclosure—Spiegel and Goldberg face a substantial likelihood of liability for a breach of the duty of loyalty.

To state a loyalty claim, a complaint must allege that "the director harbored a self-interest adverse to the stockholders' interests, acted to advance the self-interest of an interested party from whom they could not be presumed to act independently, or acted in bad faith." *In re Cornerstone Therapeutics Inc., S'holder Litig.*, 115 A.3d 1173, 1179–1180 (Del. 2015). As demonstrated, Spiegel and Goldberg held a direct ownership interest in IBF—the counterparty to the Note Transaction—and obtained

an equally direct benefit from that transaction that was not shared by Ayala's stockholders at large. A breach of the duty of loyalty does not require that the fruits of the breach be material to a director who does the picking, although it was in this case in any event. In such circumstances, to avoid liability, the underlying transaction must withstand review under Delaware's exacting entire fairness standard. *See, e.g.*, *In re Primedia, Inc.*, 67 A.3d 455, 489 (Del. Ch. 2013) ("Self-dealing fiduciaries are liable because they breached their duty of loyalty if the transaction was unfair . . ."); *HMG/Courtland Props., Inc.*, 749 A.2d at 115 ("It is a well-settled principle of Delaware law that where directors stand on both sides of a transaction they have the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.") (citation modified).

The Amended Complaint alleges particularized facts that make it highly unlikely the Director Defendants could meet this burden. Both the timing and terms of the Note Transaction are fundamentally inconsistent with fair dealing, fair process, and fair price. *See id*. at 116 (finding that the seller's director who took a position on the buyer's side "lacked the pure seller-side incentive that should have been applied on behalf of [the seller]"). As alleged, Spiegel and Goldberg voted to abandon a viable, market-rate PIPE financing and instead approved an insider deal. The Note Transaction was structured with multiple layers of self-dealing, starting with convertible notes and warrants that each carried a steep 50% discount to

Ayala's market price. A074–75 (Am. Compl. ¶ 107). To further sweeten the deal for the insiders, the Board also gifted IBF an additional 7.5-million-share warrant for no consideration, resulting in an effective aggregate transaction discount of over 80%. A075–77 (Am. Compl. ¶¶ 108, 110). They did so in a rushed, one-day process, completely bypassing the formation of a special committee, the procurement of a fairness opinion, independent legal or banking advice, or a majority-of-the-minority vote. A077–79 (Am. Compl. ¶¶ 112, 115). Consciously approving this transfer of tens of millions of dollars to a counterparty in which a majority of Ayala's directors owned an interest—including Spiegel and Goldberg—under these circumstances constitutes classic self-dealing and a breach of the duty of loyalty for which Spiegel and Goldberg face a substantial likelihood of liability. The trial court's decision to the contrary should be reversed.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court reverse the Court of Chancery's May 27, 2026 Dismissal Order and remand for further proceedings consistent therewith.

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