EFiled: Sep 18 2026 09:53AM EDT
Filing ID 80675428
Case Number 257,2026

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-LEIB, and BRIDGET MARTEL, M.A., M.D., Defendants-Below/Appellees, and AYALA PHARMACEUTICALS, INC., a Delaware corporation, Nominal Defendant-Below/Appellee	No. 257, 2026 On appeal from the Court of Chancery of the State of Delaware, C.A. No. 2024-0421-KSJM **REDACTED PUBLIC VERSION FILED: September 18, 2026**

APPELLEES' ANSWERING BRIEF

OF COUNSEL:

Caroline H. Bullerjahn
Tucker DeVoe
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, Massachusetts 02210
(617) 570-1000
CBullerjahn@goodwinlaw.com
TDevoe@goodwinlaw.com

S. Toni Wormald (#7152)
GOODWIN PROCTER LLP
525 Market Street
San Francisco, California 94105
(415) 733-6000
TWormald@goodwinlaw.com

Rudolf Koch (#4947)
John M. O'Toole (#6448)
Nicole M. Henry (#6550)
Avery Benesch (#6753)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700
Koch@rlf.com
Otoole@rlf.com
Henry@rlf.com
Benesch@rlf.com

Attorneys for Defendants-Below/Appellees Israel Biotech Fund I, L.P., Israel Biotech Fund II, L.P., and Arkin Bio Ventures L.P.

OF COUNSEL:

Michael Blanchard
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, Massachusetts 02110
(617) 341-7700
michael.blanchard@morganlewis.com

Christopher M. Wasil
MORGAN, LEWIS & BOCKIUS LLP
One State Street
Hartford, Connecticut 06103
(860) 240-2700
christopher.wasil@morganlewis.com

Jody C. Barillare (#5107)
Brian Loughnane (#6853)
MORGAN, LEWIS & BOCKIUS LLP
1201 N. Market Street, Suite 2201
Wilmington, Delaware 19801
(302) 574-3000
jody.barillare@morganlewis.com
brian.loughnane@morganlewis.com

Attorneys for Defendants-Below/Appellees David Sidransky, M.D., Pini Orbach, Phd., Yuval Cabilly, Phd., Robert Spiegel, M.D., Murray Goldberg, Roni Appel, Kenneth Berlin, Vered Bisker-Leib, & Bridget Martel, M.A., M.D.; and Nominal Defendant-Below/Appellee Ayala Pharmaceuticals, Inc.

TABLE OF CONTENTS

Page

TABLE OF CITATIONS iii

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 4

STATEMENT OF FACTS 7

A. Formation of Ayala 7

B. Parties 8

1. Investor Defendants 8

2. Board of Directors Defendants 8

C. Ayala's Ongoing Efforts to Secure Financing 10

D. The Notes Transaction 11

E. The Immunome Transaction 13

F. Procedural History 14

ARGUMENT 18

I. THE COURT OF CHANCERY CORRECTLY APPLIED *ZUCKERBERG*'S FIRST PRONG TO DISMISS PLAINTIFF'S AMENDED COMPLAINT. 18

A. Question Presented 18

B. Scope of Review 18

C. Merits of Argument 18

1. The Amended Complaint fails to allege particularized facts supporting a reasonable inference that Spiegel and Goldberg received a material personal benefit. 19

2. Plaintiff cannot avoid the materiality requirement of *Zuckerberg* prong one by claiming Spiegel and Goldberg stood "on both sides" of the Notes Transaction. 25

II. THE COURT OF CHANCERY CORRECTLY APPLIED *ZUCKERBERG*'S SECOND PRONG TO DISMISS PLAINTIFF'S AMENDED COMPLAINT. 31

A. Question Presented 31

B. Scope of Review 31

C. Merits of Argument 31

1. The Court of Chancery correctly concluded the Amended Complaint fails to plead any particularized facts concerning Spiegel and Goldberg's potential liability. 31

2. Spiegel and Goldberg's non-particularized status as limited partners of IBF does not support a substantial likelihood of liability. 35

3. The Amended Complaint fails to plead a substantial likelihood of liability because it fails to plead a viable cause of action at all. 37

i. There is no well-pleaded claim of a controller-dominated transaction. 37

ii. The Amended Complaint pleads no other theory of liability. 40

CONCLUSION 43

TABLE OF CITATIONS

Page(s)

CASES

Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart,
833 A.2d 961 (Del. Ch. 2003), *aff'd*, 845 A.2d 1040 (Del. 2004) 41

Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart,
845 A.2d 1040 (Del. 2004).....24, 25

Berteau v. Glazek,
2021 WL 2711678 (Del. Ch. June 30, 2021) 21, 25, 35, 36

Brehm v. Eisner,
746 A.2d 244 (Del. 2000).....18

Cambridge Retirement System ex rel. Unilife Corp. v. Bosnjak,
2014 WL 2930869 (Del. Ch. June 26, 2014) 28

Cede & Co. v. Technicolor, Inc. ("Cede II"),
634 A.2d 345 (Del. 1993).....27, 29

Chester Cnty. Emps.' Ret. Fund v. New Residential Inv. Corp.,
2017 WL 4461131 (Del. Ch. Oct. 6, 2017).....21, 28, 29, 42

CIBC Bank USA v. Barker,
2026 WL 1507755 (Del. Ch. May 29, 2026) 33

Cinerama, Inc. v. Technicolor, Inc.,
663 A.2d 1156 (Del. 1995).....27, 29

City of Hialeah Emps.' Ret. Sys. ex rel. nCino, Inc. v. Insight Venture P'rs, LLC,
2023 WL 8948218 (Del. Ch. Dec. 28, 2023), *aff'd*, 326 A.3d 1201 (Del. 2024) (TABLE) 22, 38

In re Cornerstone Therapeutics Inc., S'holder Litig.,
115 A.3d 1173 (Del. 2015).....35

Elburn ex rel. Invs. Bancorp, Inc. v. Albanese,
2020 WL 1929169 (Del. Ch. Apr. 21, 2020).....20, 33

Frank v. Elgamal,
2012 WL 1096090 (Del. Ch. Mar. 30, 2012) 23

Gilbert v. El Paso Co.,
1988 WL 124325 (Del. Ch. Nov. 21, 1988), *aff'd*, 575 A.2d 1131 (Del. 1990).....30

Hanna v. Paradise,
2025 WL 1836642 (Del. Ch. July 3, 2025) 19, 21

HMG/Courtland Properties, Inc. v. Gray,
749 A.2d 94 (Del. Ch. 1999) 27

Hughes v. Xiaoming Hu,
2020 WL 1987029 (Del. Ch. Apr. 27, 2020).....20, 32

King v. VeriFone Hldgs., Inc.,
12 A.3d 1140 (Del. 2011).....24

In re KKR Fin. Holdings LLC S'holder Litig.,
101 A.3d 980 (Del. Ch. 2014), *aff'd sub nom. Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015) 39

L.A. City Emps.' Ret. Sys. ex rel. eXp World Hldgs., Inc. v. Sanford,
352 A.3d 276 (Del. Ch. 2026) 40

Leo Invs. Hong Kong Ltd. v. Tomales Bay Cap. Anduril III, L.P.,
342 A.3d 1166 (Del. Ch. 2025), *aff'd*, 2026 WL 1993637 (Del. July 10, 2026) 23

Maffei v. Palkon,
339 A.3d 705 (Del. 2025).....24, 26

MCG Cap. Corp. v. Maginn,
2010 WL 1782271 (Del. Ch. May 5, 2010) 41

Orman v. Cullman,
794 A.2d 5 (Del. Ch. 2002) 27

Patel v. Duncan,
2021 WL 4482157 (Del. Ch. Sep. 30, 2021).....38

In re Primedia Inc. Shareholders Litigation,
67 A.3d 455 (Del. Ch. 2013) 27

In re ProAssurance Corp. S'holder Deriv. Litig.,
2023 WL 6426294 (Del. Ch. Oct. 2, 2023) 33

Robotti & Co. v. Liddell,
2010 WL 157474 (Del. Ch. Jan. 14, 2010) 36

Rudd v. Brown,
2020 WL 5494526 (Del. Ch. Sep. 11, 2020) 36

Sciannella v. AstraZeneca UK Ltd.,
2024 WL 3327765 (Del. Ch. July 8, 2024), *aff'd*, 340 A.3d 544
(Del. 2025) (TABLE) 39, 40

Sheldon v. Pinto Tech. Ventures, L.P.,
220 A.3d 245 (Del. 2019) 38

Simons v. Brookfield Asset Mgmt. Inc.,
2022 WL 223464 (Del. Ch. Jan. 21, 2022) 21

Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera,
119 A.3d 44 (Del. Ch. 2015) 34

Thermopylae Cap. P'rs, L.P. v. Simbol, Inc.,
2016 WL 368170 (Del. Ch. Jan. 29, 2016) 33

In re Trados Inc. S'holder Litig.,
2009 WL 2225958 (Del. Ch. July 24, 2009) 29

In re Tri-Star Pictures, Inc. Litig.,
1995 WL 106520 (Del. Ch. Mar. 9, 1995) 34

Turnbull v. Klein,
2025 WL 353877 (Del. Ch. Jan. 31, 2025) 40

United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg,
250 A.3d 862 (Del. Ch. 2020), *aff'd*, 262 A.3d 1034 (Del. 2021) 20, 32

United Food & Commercial Workers Union & Participating Food Industry Employers Tri-State Pension Fund v. Zuckerberg,
262 A.3d 1034 (Del. 2021).....*passim*

Unitrin, Inc. v. Am. Gen. Corp.,
651 A.2d 1361 (Del. 1995).....18

Williamson v. New Castle Cnty.,
2002 WL 453926 (Del. Ch. Mar. 13, 2002).....41

Woods Tr. of Avery L. Woods Tr. v. Sahara Enters., Inc.,
238 A.3d 879 (Del. Ch. 2020).....24

NATURE OF PROCEEDINGS

This Court should affirm the Court of Chancery's unremarkable conclusion that a derivative complaint failed to plead demand futility where it failed to plead with particularity any material conflicting interest for a majority of the board of directors. While Plaintiff's argument wends its way among various legal theories, Plaintiff cannot avoid this core deficiency: the Amended Complaint contains zero factual allegations that a majority of Ayala's directors had a material interest in the counterparties to the bridge financing transaction that Plaintiff seeks to challenge. In those circumstances, demand is not excused, and dismissal under Rule 23.1, as the trial court ordered here, is appropriate.

In late 2023, Ayala, a small biotechnology company, was in dire financial straits. It had spent the last several years limping along, merging with other biotech companies and raising financing wherever it could. In November 2023, three Ayala investors agreed to provide further bridge financing to Ayala (the "Notes Transaction") to keep the Company on life support. That financing came in the form of convertible notes and warrants which could be converted into equity at any time. Subsequent to the Notes Transaction, a purchaser for Ayala's assets (Immunome) emerged. The three investors then exercised the equity rights they negotiated for in connection with the Notes Transaction and received a larger portion of the proceeds from the Immunome sale than they would have received had they never provided

the bridge financing (assuming Ayala managed to survive without that financing).

Plaintiff, an Ayala stockholder, purported to bring a derivative suit challenging the Notes Transaction but not the Immunome transaction. The Amended Complaint's theory is that two of the three investors in the Notes Transaction, ABV and IBF, formed a control group, thus subjecting the Notes Transaction to entire fairness review. Even together, ABV and IBF owned less than 40% of Ayala's stock at the time of the Notes Transaction, so Plaintiff pursued a theory that because ABV and IBF together dominated the nine-member board, a demand was futile. Plaintiff did not seek books and records under Section 220 of the Delaware General Corporation Law to investigate the process behind the Notes Transaction or the nature of any board conflicts before bringing these claims. That lack of investigation resulted in a lack of particularized pleading of any potential conflicts on Ayala's board throughout the Amended Complaint.

Plaintiff concedes at least three directors are fully independent. For two additional directors that would decide the majority (Spiegel and Goldberg), Plaintiff points only to the fact that they were designated to the Ayala board as "Venture Advisors" and limited partners of IBF. "Venture Advisors" are not alleged to have any formal role within IBF—they are not employees, officers, or agents; they have no managerial responsibilities; and no compensation is alleged. Instead, Venture Advisors are simply experienced pharmaceutical executives whom IBF appoints to

its various portfolio companies based on their wealth of industry experience. Moreover, the Amended Complaint contains no allegations that the limited partnership interest in IBF is material in any respect for Spiegel or Goldberg.

After Defendants moved to dismiss the action under both Rule 23.1 for failure to show demand futility and Rule 12(b)(6) for failure to state a claim, the Court of Chancery dismissed Plaintiff's Amended Complaint under Rule 23.1. Analyzing the three-prong test laid out by this Court in *United Food & Commercial Workers Union & Participating Food Industry Employers Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1058 (Del. 2021) ("*Zuckerberg*"), the court found Plaintiff failed to adequately plead a conflict for a majority of directors. As to the first *Zuckerberg* prong, principally, the court concluded the vague allegations that Spiegel and Goldberg may have *some* economic interest in IBF as Venture Advisors were "not sufficiently particularized to demonstrate that [they] had material interests," or had "hands-on involvement" in IBF. As to the second prong, the same "dearth of allegations" made it "difficult to understand what liability either director faces." The court therefore rejected that prong as well. Finally, and not challenged on appeal, the court concluded that the same thin allegations could not support that either director was "subject to" IBF's "dominion" or "beholden to" IBF.

Because the court's analysis properly applied the *Zuckerberg* test, its dismissal order should be affirmed.

SUMMARY OF ARGUMENT

1. **Denied.** The Court of Chancery correctly dismissed Plaintiff's claims under Rule 23.1 and *Zuckerberg* because Plaintiff failed to allege that a majority of the board was incapable of impartially considering a demand. The sum and substance of the facts alleged with particularity concerning the outcome-determinative directors (Spiegel and Goldberg) are (1) that their [redacted] and (2) that as limited partners of IBF, they have some unquantified economic interest, not alleged to be material, in the performance of IBF. Having failed to conduct any investigation under Section 220, Plaintiff failed to plead any additional facts. Plaintiff cites no case in which this Court or the Court of Chancery concluded that an immaterial economic interest in a counterparty renders a director incapable of impartially considering a demand. Plaintiff's position would entail a sudden and dramatic rewriting of longstanding Delaware law.

2. **Denied**. The Court of Chancery correctly applied *Zuckerberg*'s first prong and held that Plaintiff failed to allege that Spiegel or Goldberg received any "material personal benefit" in the Notes Transaction. Plaintiff misinterprets the court's holding. The court did not find (nor did it need to find) that the Notes Transaction was not material to IBF; rather, it found that the Amended Complaint had no allegations connecting a material benefit to IBF as a counterparty to the Notes Transaction with a "material personal benefit" to Spiegel and Goldberg as required

by *Zuckerberg*. Nor did the court require Plaintiff to "plead the precise dollar value" of the directors' alleged interest. The Amended Complaint contains no allegations whatsoever bearing on the materiality of Spiegel and Goldberg's interest in IBF. A plaintiff cannot meet the "stringent requirements of factual particularity" required by Rule 23.1 with zero allegations—quantitative or qualitative—concerning materiality. Plaintiff's gripe that information related to director conflicts may not appear within Section 220 materials falls flat given that Plaintiff did not even bother to try to seek such materials here.

3. **Denied**. Plaintiff's attempt to rewrite the clear holding of *Zuckerberg* should be rejected. To start, this argument rests on a false premise. Spiegel and Goldberg did not stand on both sides of the Notes Transaction. They are not officers, principals, or agents of IBF and had no role in (or influence on) IBF's decision to engage in the Notes Transaction. Their incidental economic interest in IBF is immaterial, not hidden from the board, and unconnected to the Notes Transaction in particular. Plaintiff's cases concerning conflicted self-dealing involve inapposite situations where a director was directly on both sides of the ledger, such as awarding director compensation to themselves. Moreover, the "material personal benefit" standard is appropriate and consistent with Delaware law. Plaintiff's proposed rule would make every director of every Delaware corporation conflicted on account of every trivial stockholding in their 401(k) or brokerage account.

4. **Denied**. The Court of Chancery correctly concluded that Plaintiff failed to allege with factual particularity that a majority of Ayala's board, including Spiegel and Goldberg, faced a substantial likelihood of liability under *Zuckerberg*'s second prong. Due to Plaintiff's own failure to use the "tools at hand" and investigate the Notes Transaction, the Amended Complaint fails to describe the board process approving the transaction in any detail. The Court of Chancery was right to find that the Amended Complaint's undifferentiated and nonspecific group pleading could not satisfy Rule 23.1's heightened pleading standards. In the alternative, Plaintiff also failed to plead a viable claim even under the Rule 12(b)(6) standard, including as to Spiegel and Goldberg. The theory of Plaintiff's Amended Complaint—that IBF and ABV constituted a control group, thereby subjecting the Notes Transaction to entire fairness review—was not plausibly alleged. Without a viable cause of action, Spiegel and Goldberg could not have faced a substantial likelihood of liability.

STATEMENT OF FACTS

A. Formation of Ayala

Ayala Pharmaceuticals, Inc. (the "Company" or "Ayala") was a publicly traded Delaware corporation focused on developing and commercializing cancer treatments. A050 ¶ 50. Ayala was formed in 2017 by Defendant IBF[1] and other investors. *Id.* In May 2020, Ayala completed an initial public offering and its common stock began trading on the Nasdaq Global Market. A052 ¶ 55. Thereafter, Ayala struggled financially, sustaining net losses in 2021 and 2022. A054 ¶ 58. Indeed, in December 2021, the Company's auditors expressed substantial doubts about the Company's ongoing financial viability. *Id.* In an effort to sustain the Company, Ayala merged with Advaxis Inc. in January 2023. A061-62, 67 ¶¶ 78-80, 92. The resulting company, however, "still fac[ed] substantial doubt as to its ability to continue as a going concern," leading it to a merger with Biosight Ltd. that closed in October 2023. A067 ¶ 93. Biosight had been formed several years earlier by Defendant Arkin Bio Ventures, L.P. ("ABV"), and had received subsequent investment from IBF and others. A048 ¶ 43; A049 ¶ 46. Following the Ayala/Biosight merger, IBF owned 29% of Ayala's stock and ABV owned 7.14%. A069 ¶ 97.

[1] Defined as Israel Biotech Fund I, L.P. ("IBF I") and Israel Biotech Fund II, L.P. ("IBF II," and collectively with IBF I, "IBF").

B. Parties

1. Investor Defendants

Defendant ABV is an investment fund specializing in the life sciences sector created by Arkin Holdings in 2016. A047 ¶ 41. ABV was an investor and stockholder in Biosight prior to the Ayala/Biosight merger and became a stockholder in Ayala after the merger. A048 ¶¶ 43-44; A069 ¶ 97.

Defendant IBF includes funds founded by Defendants David Sidransky and Yuval Cabilly to make investments in the Israeli biotechnology industry. A041 ¶ 31. IBF founded Ayala and [redacted]. A050-52 ¶¶ 50-54. IBF also [redacted]. A049 ¶ 46. Other than the fact that IBF and ABV had invested in some of the same companies, though not always at the same time, and both participated in the Notes Transaction (along with non-party Biotel Limited), the Amended Complaint contains no factual allegations supporting the proposition that ABV and IBF operated together as a stockholder group. *See* A048-69.

2. Board of Directors Defendants

At the time of the challenged transactions and at the time this action was filed, Ayala's Board of Directors (the "Board") consisted of nine members: Defendants David Sidransky, Pini Orbach, Yuval Cabilly, Robert Spiegel, Murray Goldberg, Roni Appel, Kenneth Berlin, Vered Bisker-Leib, and Bridget Martel. A068-69

¶¶ 94-96. Plaintiff advances no demand futility argument on appeal as to four directors: Appel, Bisker-Leib, Martel, and Berlin. *See* Appellant's Opening Brief ("Br.") at 19; *see also* Br. Ex. A, Dismissal Order ("Order") at 12 ¶ 27 (noting same on motion to dismiss). For purposes of appeal of the motion to dismiss, Defendants do not challenge the allegations that three directors would potentially be conflicted in reviewing a demand in this matter: Sidransky and Cabilly, who are both Co-Founders and Managing Partners of IBF, and Orbach, who is the majority owner and manager of ABV. A035 ¶¶ 14-16. That leaves Goldberg and Spiegel.

Spiegel is the former Chief Medical Officer at Schering-Plough and Goldberg is the former Chief Financial Officer at Regeneron. A041-43 ¶¶ 31, 34. Plaintiff alleges that both Spiegel and Goldberg are associated with IBF as "Venture Advisors" and limited partners in IBF funds. A041 ¶ 31. Sparsely described in the Amended Complaint, IBF referred to "Venture Advisors" as "industry experts" who "evaluate" potential investments and are appointed by IBF to boards of portfolio companies. *See* A041-43 ¶¶ 33-34. In 2019, four years before the events at issue in this case, Sidransky described that, as Venture Advisors are investors in the IBF funds, they "have skin in the game and [] commit a tremendous amount of time both evaluating companies, helping devise strategy, recruiting the right people, and, importantly, sitting on boards." A043 ¶ 34; *see also* A045 ¶ 36 (describing Venture Advisors similarly in July 2019). The Amended Complaint does not allege that any

compensation is associated with the "Venture Advisors" designation, nor does it allege that Venture Advisors have any contractual, fiduciary, agency, or other duties to IBF. The Amended Complaint also does not quantify (or otherwise describe) Spiegel or Goldberg's alleged investment amount as limited partners of IBF in any respect.

C. Ayala's Ongoing Efforts to Secure Financing

In late 2023, Ayala remained in dire financial straits. A067 ¶ 93. "[E]ven before the Ayala/Biosight merger closed," the directors and senior management of both companies were pursuing their next transaction to keep the newly combined company afloat. A070 ¶ 98.

In September and early October 2023, Ayala, advised by Alliance Global Partners ("AGP"), conducted outreach to existing and potential investors in connection with a potential private investment in public equity ("PIPE") financing. A071 ¶ 100. Ayala sought terms for PIPE financing whereby investors who agreed (if any investors were to agree) would receive convertible promissory notes with a conversion price equal to 80% of Ayala's stock price, and warrants giving those investors the right to buy an additional number of shares equal to the shares they would obtain via note conversion. A071 ¶ 101. Although investors allegedly "conducted due diligence and were provided access to the Ayala Data Room," the Amended Complaint does not allege that any formal offers were made or that a PIPE

financing was viable—*i.e.*, that there was an investor who would agree to participate. A071 ¶ 100; *see* A077 ¶ 111. Rather, the Company received only "verbal indications of interest" and "a non-binding commitment of certain of its existing investors" of around $15 million. A071 ¶ 100.

Also in October 2023, certain Board members had conversations with Bisker-Leib, an Ayala Director and then-executive of Compass Therapeutics ("Compass"), regarding a potential strategic transaction. A072-73 ¶¶ 103-04. Again, although Ayala allegedly "made formal management presentations, provided access to its Data Room, and respond [sic] to additional diligence requests," A073 ¶¶ 105-06, the Amended Complaint does not allege that Ayala and Compass discussed terms of a potential transaction, that either party made an offer, or that talks progressed beyond the alleged data room access. *See id.*[2]

D. The Notes Transaction

On November 16, 2023, the Board met to discuss the Company's financial status. A073 ¶ 106. Around the same time, the Board announced that without

---

[2] While Plaintiff's Opening Brief suggests Defendants "knew or reasonably expected Ayala was about to reach agreement with one of its suitors," the allegations of the Amended Complaint are more modest. Br. at 11 (citing A070-71, A079 ¶¶ 99, 114). As alleged, "IBF and ABV knew that there was a *high likelihood* of a further transaction that would provide *an opportunity* for them quickly to liquidate their positions," and the timing of these discussions "yield[ed] a *strong inference* that … [Defendants] knew, or had a reasonable expectation, that [ABV and IBF] would soon realize a return." A070, A079 ¶¶ 99, 114 (emphasis added).

additional funding, it would need to consider "bankruptcy and liquidation of the Company or an assignment for the benefit of creditors." A295 (SEC Form 10-Q, filed by Ayala on November 20, 2023) (identifying the Company's accumulated deficit of over $170 million at the end of September 2023, stating "[t]he Company ha[d] limited available cash resources and believe[d] that its current resources [would] not, without additional funding, be sufficient to meet its current obligations," and that "different strategies to obtain the required funding for future operations . . . [had] been unsuccessful").

Among the financing options discussed was the Notes Transaction, whereby IBF, ABV, and non-party Biotel would loan Ayala up to $4,000,000 through convertible promissory notes (with IBF and ABV providing about 95% of the financing); Ayala would issue warrants to IBF, ABV, and Biotel for the right to purchase up to 15,000,000 shares of Ayala common stock; IBF would amend and restate the terms of its prior convertible promissory notes to conform with the terms of the notes in the Notes Transaction; and Ayala would issue to IBF warrants to purchase up to 7,500,000 shares of Ayala on the same terms as the warrants in the Notes Transaction. A073-76 ¶¶ 106-09. Finally, pursuant to a side letter, IBF, ABV,

and Biotel would have the right to lend Ayala up to $5,480,000 in additional funding on the same terms as the Notes Transaction. *Id.*[3]

The Board approved the Notes Transaction at the November 16, 2023 Board meeting. A074-75 ¶ 107. While the Amended Complaint pleads a collective allegation that the Board approved the Notes Transaction "by a majority of self-interested and deeply conflicted directors," there are no specific allegations supporting that contention or any facts in the Amended Complaint establishing which directors voted for the Notes Transaction. A098 ¶ 155. Notably, Ayala's November 2023 Form 10-Q, cited in the Amended Complaint (A077-78 ¶ 112), states that "[t]hose members of [the Board] who are associated with [IBF and ABV] did not participate in any of the deliberations or decisions with respect to [the Notes Transaction], all of which were reviewed and approved by the disinterested members of the Board." A323.

E. The Immunome Transaction

The first contact with Immunome pleaded in the Amended Complaint took place on December 6, 2023, three weeks after the Notes Transaction, when "AGP

[3] IBF received additional warrants in connection with the Notes Transaction. *See* A075-76 ¶ 108. Although the Amended Complaint pejoratively describes this as a giveaway "for nothing" (*id.*), it does not dispute the Company's statement of why those warrants were granted: IBF had lent the Company money pursuant to convertible notes only four months earlier, and the additional warrants were granted "to conform to the terms" of the Notes Transaction. *See* A323.

discussed with Immunome a potential transaction with Ayala." A080 ¶ 118. Discussions progressed and, on December 22, 2023, the Board approved a term sheet for the Immunome Transaction. A082-83 ¶ 123. Ayala and Immunome negotiated an asset sale agreement, which they executed on February 5, 2024 (the "Immunome Transaction"). A083 ¶ 124. During the same period, Ayala declined to pursue several proposed transactions with Compass. A082-83 ¶ 123. The Amended Complaint does not allege that the terms of the proposed Compass transactions were superior to those of the Immunome Transaction.

After the Immunome Transaction was approved by the Board and publicly announced, on February 7, 2024, IBF and ABV exercised their rights under the Notes Transaction and converted their promissory notes into shares of Ayala common stock. A083-84 ¶ 125. Following the exercise of their rights, the Amended Complaint alleges that IBF and ABV collectively owned "approximately 78% of the Company's common stock." *Id.* Plaintiff "does not challenge" the Immunome Transaction. A457 n.2.

F. Procedural History

On April 22, 2024, less than a month after the closing of the Immunome Transaction, Plaintiff sued, alleging the director defendants had violated their duty of loyalty by approving the Notes Transaction and subsequently by approving the Immunome Transaction. A097-99 ¶¶ 150-59; A190. Plaintiff also alleged that IBF

and ABV (but not Biotel) had acted as a control group and had violated their fiduciary duties to minority stockholders by approving the Notes Transaction. A098 ¶ 155. At no point prior to or after filing its complaint did Plaintiff request access to Ayala's books and records under Section 220 of the Delaware General Corporation Law.

On January 17, 2025, Defendants moved to dismiss the Amended Complaint pursuant to Court of Chancery Rules 12(b)(6) and 23.1. A193-259.[4] Defendants argued Plaintiff had failed to allege demand futility under all three prongs of *Zuckerberg*. *See* A248-58. Defendants also argued in the alternative that the Amended Complaint failed to allege facts demonstrating that IBF and ABV acted as a control group or demonstrating any self-dealing on the part of Ayala's Board. *See* A219-43.

On May 27, 2026, the Court of Chancery granted Defendants' motion to dismiss the Amended Complaint. *See* Order. The court concluded that the Amended Complaint must be dismissed pursuant to Rule 23.1 because Plaintiff had not pled particularized facts creating a reason to doubt that five of the nine Board members were capable of impartially considering a demand. Order at 17 ¶ 39. For purposes

[4] IBF and ABV joined the Rule 12(b)(6) and 23.1 arguments made by the director defendants; IBF and ABV also filed a separate motion challenging the Court's exercise of personal jurisdiction, which is not at issue in this appeal. *See* Order at 6 ¶ 17.

of the motion, the parties did not contest that four members of the Board were capable of impartially considering the demand and that three members of the Board were alleged to lack independence. Order at 12 ¶ 27. The court's demand futility inquiry thus focused on the remaining two directors, Defendants Spiegel and Goldberg.

The court first considered whether Plaintiff had established that Spiegel and Goldberg were not impartial because they received a material personal benefit not shared with stockholders under the first prong of the analysis required by *Zuckerberg*. The court observed that Plaintiff's material personal benefit argument "focuse[d] on a single factual allegation: Spiegel and Goldberg are 'Venture Advisors' of [IBF]." Order at 12 ¶ 29. Although Plaintiff contended that as Venture Advisors, Spiegel and Goldberg were limited partners in IBF, Plaintiff did not plead the size of the alleged investment in IBF, but instead relied only on "a vague statement" that Venture Advisors generally had "skin in the game" as investors in IBF, and so the allegations failed under prong one. *Id.* at 12-13 ¶ 30. Moreover, the court noted, the statement that Venture Advisors had "skin in the game" did not clearly distinguish whether Spiegel and Goldberg had a financial stake in IBF or in its portfolio companies. *Id.*

Turning to *Zuckerberg*'s second prong, the court concluded that Plaintiff did not plead particularized factual allegations demonstrating that Spiegel or Goldberg

faced a substantial likelihood of liability for the Notes Transaction. The court reasoned that the Amended Complaint made no allegations particular to Spiegel and Goldberg that related to the Notes Transaction, and "d[id] not even state whether Spiegel or Goldberg voted on the transaction, much less voted to approve it." Order at 15 ¶ 36. Accordingly, the Amended Complaint did not establish that Spiegel or Goldberg would face a substantial likelihood of liability for the Notes Transaction. *Id.*

Finally, the trial court held that Plaintiff also failed to plead demand futility under Zuckerberg's third prong because the allegations in the Amended Complaint "boil[ed] down to the idea that Spiegel and Goldberg lack independence from [IBF] because [IBF] appointed them to the Board and might appoint them to other boards." Order at 16 ¶ 38. The court concluded that theory was insufficient to demonstrate demand futility under Delaware law. *Id.*

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY APPLIED *ZUCKERBERG*'S FIRST PRONG TO DISMISS PLAINTIFF'S AMENDED COMPLAINT.

A. Question Presented

Whether the Court of Chancery correctly concluded that the Amended Complaint failed to plead particularized allegations that Spiegel or Goldberg received a material personal benefit under *Zuckerberg*'s first prong.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's dismissal of a derivative complaint under Court of Chancery Rule 23.1. *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000). The Court "may affirm on the basis of a different rationale than that which was articulated by the trial court," and "may rule on an issue fairly presented to the trial court, even if it was not addressed by [that] court." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

C. Merits of Argument

In *Zuckerberg*, this Court held that to show a director could not impartially consider a demand under the first prong, a derivative plaintiff must plead "the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand." 262 A.3d at 1059. Plaintiff concedes four of Ayala's nine directors could impartially consider the demand. Plaintiff therefore must establish that both Spiegel and Goldberg were disabled. But the Amended

Complaint fails to demonstrate that either director received any *material* personal benefit from the Notes Transaction. Plaintiff's attempt to avoid the factual gap fails, and its secondary argument to rewrite *Zuckerberg* should be rejected.

1. The Amended Complaint fails to allege particularized facts supporting a reasonable inference that Spiegel and Goldberg received a material personal benefit.

The Court of Chancery's decision under *Zuckerberg* prong one is correct. The touchstone for *Zuckerberg*'s first prong is whether a director received a material personal benefit from a transaction such that he cannot impartially consider a litigation demand regarding that transaction. *Zuckerberg*, 262 A.3d at 1059. "Whether a benefit is material is a question of fact that takes into consideration the amount, the recipient's wealth, and the circumstances surrounding the benefit." *Hanna v. Paradise*, 2025 WL 1836642, at *6 (Del. Ch. July 3, 2025).

Here, Plaintiff's claim that Spiegel and Goldberg received a material personal benefit in the Notes Transaction is based solely on the allegation that they are limited partners of IBF. Specifically, Plaintiff relies on a May 2019 article (written four years before the events at issue) quoting Sidransky as stating that Venture Advisors "have skin in the game." A043-44 ¶ 34. Plaintiff's "skin in the game" theory establishes, at most, the existence of some economic interest in IBF as limited partners. Of what amount, Plaintiff does not begin to analyze: the Amended Complaint does not allege how much Spiegel and Goldberg invested in IBF; either

director's ownership percentage; the value of either director's interest; or other facts concerning either director's personal economic circumstances that would permit an inference of materiality. Despite the fact that Plaintiff's opening brief quotes the "skin in the game" comment *seventeen* times, the repetition does not cure the failure to plead.

Simply stating that a director might have some economic interest in the counterparty to the transaction without pleading particular facts indicating how that interest provided a material personal benefit to that director is insufficient under Court of Chancery Rule 23.1. "To comply with Rule 23.1, the plaintiff must meet 'stringent requirements of factual particularity that differ substantially from . . . permissive notice pleadings.'" *Zuckerberg*, 262 A.3d at 1048 (quoting *Brehm*, 746 A.2d at 254). "Particularity" means the pleading "must have some indicia of specificity." *Elburn ex rel. Invs. Bancorp, Inc. v. Albanese*, 2020 WL 1929169, at *7 (Del. Ch. Apr. 21, 2020).[5] Moreover, "[m]ateriality means that the alleged benefit was significant enough '*in the context of the director's economic*

[5] *See also United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 250 A.3d 862, 877 (Del. Ch. 2020) ("*Zuckerberg I*"), *aff'd*, 262 A.3d 1034 (Del. 2021); *Hughes v. Xiaoming Hu*, 2020 WL 1987029, at *10 (Del. Ch. Apr. 27, 2020) ("Under the heightened pleading requirements of Rule 23.1, 'conclusionary … allegations of fact or law not supported by the allegations of specific fact may not be taken as true.'") (quoting *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988)).

circumstances, as to have made it improbable that the director could perform her fiduciary duties to the . . . shareholders without being influenced by her overriding personal interest.'" *Chester Cnty. Emps.' Ret. Fund v. New Residential Inv. Corp.*, 2017 WL 4461131, at *6 (Del. Ch. Oct. 6, 2017) (citations omitted).

Against these standards, the Amended Complaint falls far short. As the Court of Chancery explained, "a vague statement quoted by the press in 2019 regarding Venture Advisors generally is not sufficiently particularized to demonstrate that Spiegel and Goldberg had material interests in the Notes Transaction." Order at 12-13 ¶ 30.[6] The stale, nonspecific "skin in the game" comment gives no indication that any "skin," such that it is, Spiegel and Goldberg might have in IBF is material in any way to either of them. Plaintiff thus cannot satisfy prong one of the *Zuckerberg* test for Spiegel or Goldberg. *See Berteau v. Glazek*, 2021 WL 2711678, at *21 (Del. Ch. June 30, 2021) (concluding allegations director possessed "15,000 shares" of majority stockholder and counterparty "do not demonstrate that [director] was not disinterested and independent"); *Hanna*, 2025 WL 1836642, at *7 ($360,000

[6] Plaintiff's brief on appeal also does not pursue a theory of disinterestedness based on Goldberg and Spiegel's customary director compensation, and for good reason. *Simons v. Brookfield Asset Mgmt. Inc.*, 2022 WL 223464, at *15 (Del. Ch. Jan. 21, 2022) ("[W]hen director fees are not excessive, mere allegations of payment of director fees are insufficient to create a reasonable doubt as to the director's independence.") (citing *In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 360 (Del. Ch. 1998)).

in avoided losses from selling stock before drop did not create inference of materiality to "exceedingly wealthy" director in light of his other assets); *City of Hialeah Emps.' Ret. Sys. ex rel. nCino, Inc. v. Insight Venture P'rs, LLC*, 2023 WL 8948218, at *10 (Del. Ch. Dec. 28, 2023) (dismissing complaint under Rule 23.1 where Plaintiff failed to plead that "director compensation is material at all or in light of his economic circumstances"), *aff'd*, 326 A.3d 1201 (Del. 2024) (TABLE).[7]

Instead of confronting the pleading deficiency, Plaintiff makes excuses, arguing it "logically should not be required at the pleading stage to allege additional facts to substantiate the underpinnings" of Sidransky's "skin in the game" comment. Br. at 23-24. Plaintiff cites no authority in support of this assertion because that argument is directly contrary to Rule 23.1 and the "stringent requirements of factual particularity" required of derivative plaintiffs. *Zuckerberg*, 262 A.3d at 1048. Nor did the trial court "apply[] an unduly narrow and purely quantitative standard of 'materiality.'" Br. at 28-29. The problem for Plaintiff is that it pleaded a single fact, that Spiegel and Goldberg held some interest of some kind in IBF. There is no indication, quantitative or qualitative, anywhere in the Amended Complaint

[7] Plaintiff (Br. at 20-21) also takes issue with the trial court's observation that "[i]t is unclear from the quote whether that 'skin' comprises interests in [IBF] or the portfolio companies." *See* Order at 12-13 ¶ 30. The trial court's order nevertheless analyzed the quote under the Plaintiff-friendly inference that the "skin" was an interest in IBF. *See id.*

suggesting that interest was material or impugned their independence. And Plaintiff's lone "vague statement quoted by the press in 2019 regarding Venture Advisors generally is not sufficiently particularized to demonstrate that Spiegel and Goldberg had material interests in the Notes Transaction." Order at 12-13 ¶ 30.

The inapposite cases cited by the Opening Brief that happen to use the colloquialism "skin in the game" do not support Plaintiff. *See* Br. at 22-23; *cf. Leo Invs. Hong Kong Ltd. v. Tomales Bay Cap. Anduril III, L.P.*, 342 A.3d 1166, 1198 (Del. Ch. 2025) (describing aligned interests between fund and general partner where general partner "earn[ed] a 2% management fee and 20% of the upside"), *aff'd*, 2026 WL 1993637 (Del. July 10, 2026); *Frank v. Elgamal*, 2012 WL 1096090, at *10 (Del. Ch. Mar. 30, 2012) (noting employees with equity in a company may have interests aligned with the company). Neither case stands for the proposition that the phrase "skin in the game," without more, connotes a material interest or even presents a conflict.[8]

Finally, Plaintiff pivots to arguing (Br. at 24-25) that Ayala was material *to IBF*. Even if true, whether or not IBF's stake in Ayala was a "bet-the-fund"

[8] *Leo Investments* concerned fiduciary duties in a limited partnership relating to a general partner forcing the withdrawal of another limited partner—whether the principal (an individual) controlled the general partner was never in doubt. 342 A.3d at 1191-94. *Frank* concerned a cash-out merger by a control group without procedural protections—it was a direct action, and Rule 23.1 was not at issue. 2012 WL 1096090, at *1.

investment does not answer the question of whether Spiegel or Goldberg's interests *in IBF* were material *to them personally*. *See Zuckerberg*, 262 A.3d at 1059; *Maffei v. Palkon*, 339 A.3d 705, 731 (Del. 2025) (materiality analysis requires consideration of "the context of the director's economic circumstances"). The Court cannot infer the missing materiality of Spiegel's or Goldberg's investment merely from the magnitude of IBF's investment in Ayala.

The complete absence of particularized facts in the Amended Complaint is inexcusable, particularly in light of Plaintiff's "failure to exhaust all reasonably available means of gathering facts" by making a Section 220 demand (as "this Court and the Court of Chancery have continually advised plaintiffs" to do). *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1057 (Del. 2004); *see also King v. VeriFone Hldgs., Inc.*, 12 A.3d 1140, 1145-46 (Del. 2011) (emphasizing that "[b]y first prosecuting a Section 220 action to inspect books and records, [a] stockholder-plaintiff may be able to uncover particularized facts that would establish demand excusal"). Although Plaintiff argues (Br. at 24) that it would not have been able to obtain information about the size of Spiegel and Goldberg's economic interest in IBF, "how directors and senior officers are compensated and whether they are the beneficiaries of any related-party transactions are basic facts that stockholders are entitled to know." *Woods Tr. of Avery L. Woods Tr. v. Sahara Enters., Inc.*, 238 A.3d 879, 900 (Del. Ch. 2020). In any event, because

Plaintiff "did not even attempt to use the fact-gathering tools available to [it] by seeking to review [Ayala's] books and records in support of [its] demand futility claim, we cannot know if such an effort would have been fruitless." *Beam*, 845 A.2d at 1057.[9]

2. Plaintiff cannot avoid the materiality requirement of *Zuckerberg* prong one by claiming Spiegel and Goldberg stood "on both sides" of the Notes Transaction.

Notwithstanding that *Zuckerberg* prong one specifically requires courts to consider whether a director "received a material personal benefit from the alleged misconduct," Plaintiff argues that the trial court erred by analyzing materiality. *Zuckerberg*, 262 A.3d at 1059. On Plaintiff's theory, the court should have ignored the materiality analysis required by *Zuckerberg* because Spiegel and Goldberg allegedly stood on both sides of the Notes Transaction. Br. at 29. That theory is wrong for at least two reasons.

---

[9] Plaintiff's supposed "logical paradox" (Br. at 26-27) concerning whether or not Spiegel and Goldberg actually voted on the Notes Transaction is more relevant to an analysis of their (lack of) likelihood of liability, discussed *infra* at pp. 35-42. In any event, if Spiegel and Goldberg had recused themselves from the vote on the Notes Transaction, there is no reason to believe that recusal concedes a *material* conflict, and Plaintiff cites no case suggesting that recusal from a Board vote—a fact not in the record due to Plaintiff's failure to make a books and records demand—leads to an inference of demand futility. *See Berteau*, 2021 WL 2711678, at *21 (rejecting inference that recusal indicated lack of independence).

First, Plaintiff ignores that the fundamental purpose of *Zuckerberg* is to determine whether a director is "able to bring [his] impartial business judgment to bear on a litigation demand." 262 A.3d at 1059. Considerations of materiality are essential in this context, as "non-ratable benefits and financial interests" will not "taint director interest" unless they are "sufficiently material." *Maffei*, 339 A.3d at 732 (citing *Zuckerberg*, 262 A.3d at 1059). In other words, a plaintiff cannot clear the hurdle of *Zuckerberg*'s first prong without showing that a director's ability to exercise his disinterested business judgment is compromised by some material interest in the challenged transaction. Plaintiff instead seeks to overturn *Zuckerberg*'s clear command that "*from this point forward*," demand futility requires assessing a "*material* personal benefit." 262 A.3d at 1059 (emphasis added); *see also Maffei*, 339 A.3d at 732 n.183 ("we highlight *the focus on materiality* in prongs one and three of the demand futility test set forth in [*Zuckerberg*]") (emphasis added). *Zuckerberg* meant what it said.

Plaintiff cites a handful of cases decided before *Zuckerberg* for the proposition that courts should forgo a materiality analysis if a plaintiff alleges that fiduciaries engaged in self-dealing. Most of these cases, however, do not address director interestedness in the context of a demand futility analysis with the overlay of the particularized pleading requirements of Rule 23.1, and none of them addresses a factually analogous scenario where the director possesses a non-material, passive

economic interest alone. There are no pre-*Zuckerberg* cases that "remain good law" that find demand futility is pleaded in the way Plaintiff advocates for here. *See Zuckerberg*, 262 A.3d at 1059.

Instead, Plaintiff's cases generally address director interestedness in the context of determining the applicable standard of review (and in some cases, after a full trial and with the benefit of a factual record). *Cede & Co. v. Technicolor, Inc. ("Cede II")*, 634 A.2d 345 (Del. 1993) and *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156 (Del. 1995) both addressed post-trial appeals that required the Supreme Court to opine on how courts should evaluate director interestedness in that exact context. Similarly, *HMG/Courtland Properties, Inc. v. Gray* is a post-trial decision that discussed a director's undisclosed interest in a counterparty in connection with addressing whether a majority of the board was disinterested or independent with respect to the transaction for purposes of determining whether entire fairness should be the applicable standard of review. 749 A.2d 94 (Del. Ch. 1999).[10] *In re Primedia, Inc. Shareholders Litigation* was a denial of a Rule 12(b)(6) motion to dismiss in the context of a post-closing direct claim by a class of stockholders against a company's controller. 67 A.3d 455, 489 (Del. Ch. 2013). Finally, *Orman v. Cullman* dealt with

[10] The trial court in *HMG/Courtland Properties* also ultimately concluded that the alleged ownership interest *was* material to the director. 749 A.2d at 114.

the same question regarding whether entire fairness should apply in a post-merger claim by shareholders against a controller. 794 A.2d 5, 20 (Del. Ch. 2002).

The cases Plaintiff cites that actually involve a demand futility analysis do not support Plaintiff's conclusion. *Cambridge Retirement System ex rel. Unilife Corp. v. Bosnjak* involved a claim that defendant directors breached their fiduciary duties by awarding themselves outsized compensation. 2014 WL 2930869, at *4 (Del. Ch. June 26, 2014). The court accurately described this "payment of compensation to themselves" by the directors as "classic forms of self-dealing." *Id.* at *5. But in director compensation cases, the directors themselves are counterparties opposite to the corporation—a dynamic meaningfully distinct from a director possessing an immaterial interest in a transactional counterparty as alleged here.

While Plaintiff cites *Chester County* (Br. at 32) for the proposition that materiality is not required to be alleged when a director stands on both sides of a transaction, that case is directly contrary to Plaintiff's argument. *Chester County* dealt with a claim that an alleged controller arguably secured significant benefits for itself in connection with causing a buyer to overpay when it acquired another company's assets. 2017 WL 4461131, at *1. The plaintiffs argued that one of the buyer's directors was interested in the transaction—and thereby unable to consider a demand under *Aronson*—because he owned 18,000 shares in the seller and would accordingly receive a portion of the merger consideration. *Id.* at *7. The court

rejected this argument and held that this allegation (along with the other vague allegations made) "do not raise a reasonable doubt that [the director] is disinterested and independent." *Id.*

Second, even if Plaintiff were correct and courts should not consider materiality in cases involving self-dealing (they should), the reed-thin allegations about Spiegel and Goldberg's ownership interest in IBF are not nearly sufficient to show that either engaged in the type of self-dealing that might excuse review for materiality. Plaintiff's entire theory on self-dealing is that Spiegel and Goldberg "stood on both sides" of the Notes Transaction because they each held passive limited partnership interests in IBF. Br. at 30, 34. But Plaintiff's cases do not characterize such a limited connection to a transaction as "self-dealing." *Cinerama* and *Cede II* distinguish a "situation when a corporate fiduciary is on both sides of a transaction" from the qualitatively distinct "incidental director interest." *Cinerama*, 663 A.2d at 1169 (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) and citing *Cede II*, 634 A.2d at 362-63). The latter is not disqualifying.

Plaintiff's logic would redefine even the lightest touch of economic interest—including a few shares of a public company in a brokerage account or 401(k)—as a form of "self-dealing," thereby causing the exception to swallow the rule. That is not the command from the cases. *See In re Trados Inc. S'holder Litig.*, 2009 WL 2225958, at *6 (Del. Ch. July 24, 2009) ("The receipt of any benefit is not sufficient

to cause a director to be interested in a transaction. Rather, the benefit received by the director and not shared with stockholders must be of a sufficiently material importance, in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties . . . without being influenced by her overriding personal interest[.]" (internal quotations omitted)). Spiegel and Goldberg had no alleged role in negotiating on behalf of IBF, did not dictate strategy or negotiating positions, and did not have any agency or other duty to IBF whatsoever; they did not stand on both sides of the transaction. *See Gilbert v. El Paso Co.*, 1988 WL 124325, at *8 (Del. Ch. Nov. 21, 1988), *aff'd*, 575 A.2d 1131 (Del. 1990) ("To engage in self-dealing, however, the directors must have stood on both sides of the transaction, dictated its terms, and derived a benefit to the exclusion of the shareholders.").

There are no well-pleaded facts—much less particularized facts sufficient to meet the heightened pleading standard under Rule 23.1—establishing that Spiegel and Goldberg's interests in IBF were anything but immaterial. And none of Plaintiff's cases suggest that the mere passive ownership of an immaterial equity position in a counterparty is sufficient to show the "substantial" interest that would qualify as self-dealing. Thus, even on Plaintiff's incorrect theory, the Amended Complaint is insufficient to satisfy *Zuckerberg*'s first prong.

II. THE COURT OF CHANCERY CORRECTLY APPLIED *ZUCKERBERG*'S SECOND PRONG TO DISMISS PLAINTIFF'S AMENDED COMPLAINT.

A. Question Presented

Whether the Court of Chancery correctly concluded that the Amended Complaint failed to plead particularized allegations that Spiegel or Goldberg face a substantial likelihood of liability for the Notes Transaction under *Zuckerberg*'s second prong.

B. Scope of Review

This Court's review is *de novo*. *See supra* Section I.B.

C. Merits of Argument

Plaintiff likewise failed to plead particularized facts demonstrating that Spiegel or Goldberg face a substantial likelihood of liability. Plaintiff's contrary argument conflates the standard of review applicable to the Notes Transaction with the distinct question of whether these two directors face personal, non-exculpated liability and relies on collective allegations that do not establish wrongdoing by either director individually.

1. The Court of Chancery correctly concluded the Amended Complaint fails to plead any particularized facts concerning Spiegel and Goldberg's potential liability.

Plaintiff's Opening Brief (Br. at 36-37) misreads and overreads Chancellor McCormick's holding concerning *Zuckerberg* prong two. Contrary to Plaintiff's

argument, the court did not make a "factual finding" about the Notes Transaction or misapply Rule 23.1.

Instead, the court correctly found that the Amended Complaint failed to plead with particularity *any facts* connecting Spiegel and Goldberg to the Notes Transaction. Order at 15 ¶ 36. As the court explained in its order, pleading demand futility requires a stockholder to allege "particularized factual statements that are essential to the claim." Order at 8-9 ¶ 22 (quoting *Brehm*, 746 A.2d at 254). "Particularity" means the pleading "must have some indicia of specificity." *Id.* (quoting *Elburn*, 2020 WL 1929169, at *7).[11] Having set forth the standard, the court found the Amended Complaint lacking.

To be sure, the Amended Complaint starts with a collective definition of "Director Defendants" that it then employs 36 separate times throughout the remainder of its text, including the generic use in paragraphs 107 and 108 stating "the Director Defendants approved the Note[s] Transaction." *See* Br. at 36-37 (referencing the "master definition"); A074-76 ¶¶ 107-08. But employing a group noun to describe a collective outcome does not show Spiegel and Goldberg's involvement in or approval of the Notes Transaction *with particularity*. "This group

[11] *See also Zuckerberg I*, 250 A.3d at 877. "Under the heightened pleading requirements of Rule 23.1, 'conclusionary allegations of fact or law not supported by the allegations of specific fact may not be taken as true.'" *Hughes*, 2020 WL 1987029, at *10 (quoting *Grobow*, 539 A.2d at 187).

pleading fails Rule 23.1's particularity requirement." *See CIBC Bank USA v. Barker*, 2026 WL 1507755, at *11 (Del. Ch. May 29, 2026); *In re ProAssurance Corp. S'holder Deriv. Litig.*, 2023 WL 6426294, at *18 (Del. Ch. Oct. 2, 2023) (holding that a "generalized allegation" of "group pleading" about "all" directors fell "well short of the particularity standard" of Rule 23.1); *see also Elburn*, 2020 WL 1929169, at *6 ("[The] stringent requirements of factual particularity [within Rule 23.1] . . . differ substantially from . . . permissive notice pleadings.").

The absence is particularly unsurprising here where Plaintiff failed to avail itself of the "tools at hand" of Section 220. *See Thermopylae Cap. P'rs, L.P. v. Simbol, Inc.*, 2016 WL 368170, at *1, *17 (Del. Ch. Jan. 29, 2016) (dismissing action where "[p]laintiff could have obtained pertinent facts through an action under Section 220, instead of suggesting that the Court speculate as to the existence of a claim"). Evidence concerning the Board's deliberations and considerations of the Notes Transaction, including at a minimum "whether Spiegel or Goldberg voted on the transaction, much less voted to approve it," could have been, but was not, obtained by Plaintiff prior to rushing to seek demand excusal. *See* Order at 15 ¶ 36. Plaintiff is not entitled to friendly inferences from pleading conclusions:

> Drawing an inference of full board approval would be particularly inappropriate here given Plaintiff's decision not to use 8 *Del. C.* § 220 to obtain documents relating to the review and approval of the New Agreement, despite repeated admonitions Delaware courts have made for

> representative plaintiffs to do so before launching derivative claims. Documents from such an inspection undoubtedly would have confirmed whether any factual basis exists for the assertion of full board approval that Plaintiff asks the Court to infer. There is no equity in asking the Court to speculate over a factual matter that was well within Plaintiff's control to determine through basic due diligence.

Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera, 119 A.3d 44, 58 (Del. Ch. 2015) (footnote omitted). In these circumstances, the Court of Chancery's conclusion that the Amended Complaint failed to plead with particularity that Goldberg and Spiegel faced substantial liability was the right one.

As noted above, Plaintiff also claims a "paradox" that somehow a "binary inference" requires demand excusal regardless of Spiegel or Goldberg's involvement in the Notes Transaction. Br. at 26-27, 39-40. To begin, the "paradox" is of Plaintiff's own making—it exists because Plaintiff failed to conduct an investigation and so failed to plead particularized facts about the Notes Transaction. Moreover, the "paradox" is easily resolved. Plaintiff does not appear to contest that if Spiegel or Goldberg did not participate in the approval of the Notes Transaction, they face no substantial risk of liability, and rightly so. *See, e.g.*, *In re Tri-Star Pictures, Inc. Litig.*, 1995 WL 106520, at *2 (Del. Ch. Mar. 9, 1995) ("Delaware law clearly prescribes that a director who plays no role in the process of deciding whether to approve a challenged transaction cannot be held liable on a claim that the board's

decision to approve that transaction was wrongful."). And on the other side, voluntary withdrawal from participation in the Notes Transaction is by no means a concession of a *material* personal benefit under *Zuckerberg*, much less a particularized pleading of one. *See Berteau*, 2021 WL 2711678, at *21 (finding "[i]t is not a reasonable inference that [a director's] recusal was a pretext" for lack of independence).

2. Spiegel and Goldberg's non-particularized status as limited partners of IBF does not support a substantial likelihood of liability.

Looking past Plaintiff's failure under Rule 23.1's pleading standard, Plaintiff also fails to connect a vote in favor of the Notes Transaction to a substantial risk of *personal* liability for Spiegel or Goldberg. "[E]ach director has a right to be considered individually" and "applying the entire fairness standard against interested parties does not relieve plaintiffs seeking damages of the obligation to plead non-exculpated claims against each of the defendant directors." *In re Cornerstone Therapeutics Inc., S'holder Litig.*, 115 A.3d 1173, 1181-82 (Del. 2015).[12] Simply alleging Spiegel and Goldberg possess some unquantified and not-alleged-to-be-material financial connection to IBF does not overcome that "directors are presumed to be motivated to do their duty with fidelity." *Id.* at 1182-83. A director's

[12] Ayala's Certificate of Incorporation, which includes an exculpation provision, can be found in Appellee's Appendix at B1-B3.

"economic interest" in a majority stockholder does "not support a claim that he breached his fiduciary duty of loyalty" where that interest is not alleged to be material. *Berteau*, 2021 WL 2711678, at *21 (dismissing entire fairness claim against director who possessed "15,000 shares" of majority stockholder and counterparty); *cf. Rudd v. Brown*, 2020 WL 5494526, at *11 (Del. Ch. Sep. 11, 2020) (director not conflicted where he secured financial benefits from sale of company including "acceleration of . . . stock options, change in control payments, and other benefits"). As explained *supra* pp. 25-30, directors having some unspecified financial interest in a counterparty they do not control or influence is not self-dealing. Because Plaintiff has not alleged that Spiegel or Goldberg possess any material economic interest in IBF that was affected by the Notes Transaction, they face no substantial risk of personal liability in connection with the claims at issue.[13]

[13] *See also Robotti & Co. v. Liddell*, 2010 WL 157474, at *14 (Del. Ch. Jan. 14, 2010) (rejecting allegation director was interested because options in the company personally held by the director increased from 20,000 to 40,000 due to transaction, where plaintiff "failed to allege how such a benefit could be material").

3. The Amended Complaint fails to plead a substantial likelihood of liability because it fails to plead a viable cause of action at all.

i. There is no well-pleaded claim of a controller-dominated transaction.

Of course, Spiegel and Goldberg could only be at substantial risk of liability if the Amended Complaint pleaded a viable underlying unexculpated claim in the first instance. The Amended Complaint proceeds from the theory that the Notes Transaction is subject to entire fairness review because it was a transaction between the Company and an alleged control group.[14] Plaintiff's brief, however, makes no effort to pursue on appeal its allegation that liability (and therefore Spiegel and Goldberg's substantial likelihood of liability) comes from any controller-dominated transaction.

The Amended Complaint fell woefully short in making out a claim for a controller transaction that was subject to entire fairness review. *See* A219-243. The allegations of control failed on every level.

---

[14] *See, e.g.*, A029 ¶ 2 ("Specifically, on November 16, 2023, the Controlling Stockholders [ABV and IBF], exercising their control over the Director Defendants, entered into [the Notes Transaction]."); A089 ¶ 138 ("Demand is excused as to all Director Defendants because each one of them . . . assist[ed] in the Controlling Stockholders' abuse of their control of Ayala. . . ."); A097 ¶ 152 ("At all relevant times, the Controlling Stockholders owed a fiduciary duty of loyalty to the minority stockholders and the Company, including the duty not to exercise control of the Company and its assets to the detriment of the Company and its minority common stockholders.").

First, the Amended Complaint failed to allege IBF and ABV formed a control group.[15] To allege a legally cognizable stockholder group, a plaintiff "must establish that [the alleged controlling stockholders] are 'connected in some legally significant way'—such as 'by contract, common ownership, agreement, or other arrangement,'" and not that there was a "mere concurrence of self-interest among certain stockholders." *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 251-52 (Del. 2019). A single prior co-investment—or even "a few" co-investments—fails to allege a "long history of cooperation and coordination" that might suggest the existence of a control group. *Patel v. Duncan*, 2021 WL 4482157, at *12 (Del. Ch. Sep. 30, 2021), *corrected* (Oct. 4, 2021), *aff'd*, 277 A.3d 1257 (Del. 2022) (TABLE). That is all the Amended Complaint alleged. Prior to the Notes Transaction, the only connection between IBF and ABV was that [redacted] (A048-49 ¶ 43, 46), and that [redacted] the Ayala-Biosight merger (A032-33 ¶ 8). These limited allegations of parallel activity come nowhere close to establishing a control group. *See Patel*, 2021 WL 4482157, at *2, *12 (control group not sufficiently alleged where founder

[15] There was no argument that either IBF or ABV controlled Ayala alone. Neither held nearly enough equity, and even Plaintiff would concede that neither could designate a majority of the Board. *See, e.g.*, A069 ¶ 97. The Amended Complaint also does not explain how or why, if IBF and ABV were a control group, they allowed non-controller Biotel to participate in the Notes Transaction.

of one firm moved to the other firm, the two firms appointed the majority of the board, and had a prior joint investment).

Second, even if ABV and IBF were a group, the Amended Complaint does not allege that they generally controlled the Board. ABV and IBF together owned only 36.14% of Ayala's outstanding stock, not enough for any presumption of control. A069 ¶ 97. Thus, the Amended Complaint needed to plead facts indicating a "reasonable inference of actual control." *Sciannella v. AstraZeneca UK Ltd.*, 2024 WL 3327765, at *17 (Del. Ch. July 8, 2024), *aff'd*, 340 A.3d 544 (Del. 2025) (TABLE). There were no serious allegations of control over Appel, Bisker-Leib, or Martel—leading the analysis back to Goldberg and Spiegel. And there again, the Amended Complaint comes nowhere close to showing that either Goldberg or Spiegel was controlled. "It is well-settled Delaware law that a director's independence is not compromised simply by virtue of being nominated to a board by an interested stockholder"; rather, it must be alleged that "the director is beholden to [the] controlling person or so under their influence that their discretion would be sterilized." *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 995-96 (Del. Ch. 2014) (internal quotation marks omitted), *aff'd sub nom. Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015). The Amended Complaint shows nothing of the sort.

Finally, the Amended Complaint also fails to plead transaction-specific control for the Notes Transaction. There is no fact alleged at all that ABV and IBF inserted themselves into the Board's deliberations, "let alone the type of 'overt or even subtle bullying' that this Court has found to support a reasonable inference of control." *Turnbull v. Klein*, 2025 WL 353877, at *14 (Del. Ch. Jan. 31, 2025) (finding complaint failed to allege transaction control) (citation omitted); *see also Sciannella*, 2024 WL 3327765, at *17 (transaction control can be shown through "pressure tactics that went beyond ordinary advocacy to encompass aggressive, threatening, disruptive, or punitive behavior"). Indeed, no particularized fact is alleged that Spiegel or Goldberg even voted on the Notes Transaction, further undermining the argument that ABV and IBF exercised transaction-specific control. S*upra* pp. 32-34.

ii. The Amended Complaint pleads no other theory of liability.

While Plaintiff argues that certain "directors that benefited from the Note[s] Transaction through their Fund ownership interests engaged in classic self-dealing," Br. at 1, that theory finds no support in the Amended Complaint. An entire fairness claim premised on majority board self-dealing could state a claim for breach of fiduciary duty against only conflicted directors, and IBF and ABV could not be parties to that claim. *See, e.g.*, *L.A. City Emps.' Ret. Sys. ex rel. eXp World Hldgs., Inc. v. Sanford*, 352 A.3d 276, 319-20 (Del. Ch. 2026) (observing that even

controlling stockholders' fiduciary duties are "restrict[ed]" in scope compared to the duties of directors). But the Amended Complaint does not describe a "self-dealing" claim against only conflicted directors. Instead, it squarely places its theory of liability on the premise that "*Controlling Stockholders* [*i.e.*, ABV and IBF] owed a fiduciary duty of loyalty to the *minority stockholders* and the Company." A097 ¶ 152 (emphasis added). Neither the phrase "both sides" nor "self-dealing" appears anywhere in relation to the Notes Transaction in the Amended Complaint. Plaintiff had an opportunity to amend its complaint and chose not to include this theory, raised for the first time in its briefing in opposition to Defendants' motions to dismiss. *See* A073-79; A458-59; A483-85. Plaintiff "cannot supplement the complaint through its brief." *MCG Cap. Corp. v. Maginn*, 2010 WL 1782271, at *5 (Del. Ch. May 5, 2010); *see also Williamson v. New Castle Cnty.*, 2002 WL 453926, at *3 (Del. Ch. Mar. 13, 2002) (argument amounting to "a new claim, not pled in the complaint, that appears for the first time in the plaintiffs' brief . . . will not be considered"); *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 833 A.2d 961, 969 n.9 (Del. Ch. 2003), *aff'd*, 845 A.2d 1040 (Del. 2004) (declining to consider argument made for the first time during oral argument where "[n]o allegations of this type [were] made in the amended complaint").

Even if this Court were to consider Plaintiff's self-dealing argument on the merits (it should not), the argument nonetheless fails for the reasons explained in

greater detail *supra* pp. 25-30, and thus cannot logically create a substantial likelihood of liability for Spiegel or Goldberg. Any minor, passive economic interest in IBF, nowhere alleged to be material, is simply insufficient on its own to form the foundation for a self-dealing claim. There are no allegations anywhere in the Amended Complaint to suggest Spiegel or Goldberg's limited partnership interest in IBF was material to them, as would be necessary to create a conflict under *Zuckerberg*. 262 A.3d at 1059; *see Chester Cnty.*, 2017 WL 4461131, at *7 (immaterial interest in counterparty "d[id] not raise a reasonable doubt that [director] [was] disinterested and independent"). Plaintiff's self-dealing theory therefore fails on the merits and Spiegel and Goldberg accordingly cannot face a substantial likelihood of liability on those grounds.

CONCLUSION

For all of the foregoing reasons, the judgment below should be affirmed.

/s/ Rudolf Koch

Rudolf Koch (#4947)
John M. O'Toole (#6448)
Nicole M. Henry (#6550)
Avery Benesch (#6753)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700
Koch@rlf.com
Otoole@rlf.com
Henry@rlf.com
Benesch@rlf.com

Attorneys for Defendants-Below/Appellees Israel Biotech Fund I, L.P., Israel Biotech Fund II, L.P., and Arkin Bio Ventures L.P.

OF COUNSEL:

Caroline H. Bullerjahn
Tucker DeVoe
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, Massachusetts 02210
(617) 570-1000
CBullerjahn@goodwinlaw.com
TDevoe@goodwinlaw.com

S. Toni Wormald (#7152)
GOODWIN PROCTER LLP
525 Market Street
San Francisco, California 94105
(415) 733-6000
TWormald@goodwinlaw.com

/s/ Jody C. Barillare

Jody C. Barillare (#5107)
Brian Loughnane (#6853)
MORGAN, LEWIS & BOCKIUS LLP
1201 N. Market Street, Suite 2201
Wilmington, Delaware 19801
(302) 574-3000
jody.barillare@morganlewis.com
brian.loughnane@morganlewis.com

Attorneys for Defendants-Below/Appellees David Sidransky, M.D., Pini Orbach, Phd., Yuval Cabilly, Phd., Robert Spiegel, M.D., Murray Goldberg, Roni Appel, Kenneth Berlin, Vered Bisker-Leib, & Bridget Martel, M.A., M.D.; and Nominal Defendant-Below/Appellee Ayala Pharmaceuticals, Inc.

OF COUNSEL:

Michael Blanchard
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, Massachusetts 02110
(617) 341-7700
michael.blanchard@morganlewis.com

Christopher M. Wasil
MORGAN, LEWIS & BOCKIUS LLP
One State Street
Hartford, Connecticut 06103
(860) 240-2700
christopher.wasil@morganlewis.com

Dated: September 9, 2026