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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 PHARMACEUTICALS, INC., a Delaware corporation Nominal Defendant-Below/Appellee.	**PUBLIC VERSION FILED OCTOBER 2, 2026** No. 257,2026 On appeal from the Court of Chancery of the State of Delaware, C.A. No.: 2024-0421-KSJM

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 4

I. THE AMENDED COMPLAINT PLEADS THAT SPIEGEL AND GOLDBERG EACH RECEIVED A MATERIAL PERSONAL BENEFIT UNDER *ZUCKERBERG*'S FIRST PRONG 4

A. Sidransky's "Skin in the Game" Admission Supports a Powerful, Let Alone Reasonable, Inference of a Material Personal Benefit to Spiegel and Goldberg 7

B. Ayala was a "Bet-the-Fund" Asset That was Significantly Underwater 10

C. Ayala's Own Disclosure Traps Director Defendants in a Paradox That Compels a Finding of Demand Futility 11

D. Director Defendants "401(k)" Strawman has no Application Here 13

E. Under *Zuckerberg*'s Subjective, Context-Specific Standard, the Amended Complaint Pleads that Spiegel and Goldberg Received a Material Personal Benefit 14

F. The Absence of a Section 220 Demand Does Not Alter the Applicable Pleading Standard or Binary Inferences Drawn from Ayala's Disclosures 16

G. Alternatively, Under Settled Delaware Precedent Preserved by *Zuckerberg*, Subjective Materiality is Inapplicable to this Classic Case of Self-Dealing 18

II. THE AMENDED COMPLAINT PLEADS THAT SPIEGEL AND GOLDBERG FACE A SUBSTANTIAL LIKELIHOOD OF LIABILITY UNDER *ZUCKERBERG*'S SECOND PRONG 23

A. It is Reasonably Inferable That Spiegel and Goldberg Approved the Note Transaction 23

B. Approving the Unfair Note Transaction Constitutes a Breach of the Duty of Loyalty 25

CONCLUSION 28

TABLE OF CITATIONS

Page(s)

Cases

Berteau v. Glazek,
2021 WL 2711678 (Del. Ch. June 30, 2021) 12, 13

Cambridge Ret. Sys. ex rel. Unilife Corp. v. Bosnjak,
2014 WL 2930869 (Del. Ch. June 26, 2014) 19, 20

Cede & Co. v. Technicolor, Inc.,
634 A.2d 345 (Del. 1993).....19

Chester Cty. Emps.' Ret. Fund v. New Residential Inv. Corp.,
2017 WL 4461131 (Del. Ch. Oct. 6, 2017).....20

CIBC Bank USA v. Barker,
2026 WL 1507755 (Del. Ch. May 29, 2026) 24

Cinerama, Inc. v. Technicolor, Inc.,
663 A.2d 1156 (Del. 1995).....19

Frank v. Elgamal,
2012 WL 1096090 (Del. Ch. Mar. 30, 2012).....8

In re Cornerstone Therapeutics Inc., S'holder Litig.,
115 A.3d 1173 (Del. 2015).....26

In re Dell Techs. Inc. Class V Stockholders Litig.,
2020 WL 3096748 (Del. Ch. June 11, 2020) 11, 12

In re PNB Hldg. Co. S'holders Litig.,
2006 WL 2403999 (Del. Ch. Aug. 18, 2006)..... 8

In re ProAssurance Corp. S'holder Deriv. Litig.,
2023 WL 6426294 (Del. Ch. Oct. 2, 2023).....24

Leo Invs. Hong Kong Ltd. v. Tomales Bay Cap. Anduril III, L.P.,
342 A.3d 1166 (Del. Ch. 2025) 8

Maffei v. Palkon,
339 A.3d 705 (Del. 2025) 21

Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera,
119 A.3d 44 (Del. Ch. 2015) 24, 25

United Food & Com. Workers Union v. Zuckerberg,
262 A.3d 1034 (Del. 2021) ..... *passim*

Woods Tr. of Avery L. Woods Tr. v. Sahara Enters., Inc.,
238 A.3d 879 (Del. Ch. 2020) 16

Rules

Court of Chancery Rule 23.1 7

PRELIMINARY STATEMENT

This appeal involves an extraordinary and profoundly disturbing transaction. In November 2023, while Ayala was actively engaged in strategic acquisition discussions, its Board abruptly abandoned a viable, market-standard third-party financing in favor of an unvetted insider deal with its venture backers.[1] Approved in a single day, without an independent committee, without a financial advisor, without a fairness opinion, and without a minority stockholder vote, the Note Transaction conferred upon IBF and ABV convertible notes and warrants at an effective aggregate discount exceeding 80%. Just five weeks later, Ayala agreed to sell substantially all of its assets. By exercising their freshly-minted conversion rights, the Funds' equity ownership leapt from 36% to over 80%, diverting between $22,000,000 and $38,500,000 from Ayala's minority stockholders to the Funds' partners, which included a majority (five) of Ayala's nine directors.

Director Defendants do not contest demand as to three Fund managers and Ayala directors (David Sidransky, Yuval Cabilly, and Pini Orbach). The sole question is whether two IBF limited partners and Venture Advisors, Robert Spiegel and Murray Goldberg, also were incapable of impartially considering a demand. The Amended Complaint alleges that Spiegel, Goldberg, and each of the other Director

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in Appellant's Opening Brief ("Appellant's Br.").

Defendants approved the Note Transaction. The Amended Complaint also alleges facts supporting a reasonable inference that Spiegel and Goldberg received a material personal benefit through their IBF capital investments, which in Sidransky's own words gave them "skin in the game"—a phrase Delaware courts construe as aligning Spiegel and Goldberg with IBF's investors, not Ayala's minority stockholders. Accordingly, demand is excused under *United Food & Com. Workers Union v. Zuckerberg*, 262 A.3d 1034, 1047-49 (Del. 2021).

Director Defendants tried to refute the allegation that Spiegel and Goldberg voted to approve the Note Transaction based on Ayala's November 2023 Form 10-Q's opaque disclosure that directors "associated with" the Funds did not participate in deliberations and that the deal was approved by the "disinterested members of the Board." Director Defendants vigorously dispute that Spiegel's and Goldberg's investments rendered them interested.

Drawing all reasonable inferences in Marstrand's favor from the Amended Complaint's allegations, and the November 2023 Form 10-Q incorporated by reference therein, two mutually-exclusive, binary, and reasonable conclusions emerge—each of which independently excuses demand under Delaware law:

Either Director Defendants are correct that only three directors—the Fund managers—were deemed "associated with" the Funds, in which case Spiegel and

Goldberg were necessarily among the putative "disinterested" directors who reviewed and approved the Note Transaction.

Or Spiegel and Goldberg abstained, in which case it is reasonable to infer that their recusal—particularly in tandem with Sidransky, Cabilly, and Orbach—resulted from a disqualifying conflict due to their Fund ownership interests.

Approval of the Note Transaction subjects Spiegel and Goldberg to a substantial likelihood of liability under *Zuckerberg*'s second prong. A material conflict arising from their IBF ownership renders them interested and disabled under *Zuckerberg*'s first prong.

A plaintiff need not eliminate every conceivable defense-friendly inference to avoid dismissal, so long as the inferences drawn in its favor are reasonable. Here, unlike a "clear day" governance decision addressing hypothetical future liability, the Note Transaction was a concrete, zero-sum wealth transfer executed in direct contemplation of an imminent acquisition. The Amended Complaint alleges particularized facts compelling the reversal of the Dismissal Order below.

ARGUMENT

I. THE AMENDED COMPLAINT PLEADS THAT SPIEGEL AND GOLDBERG EACH RECEIVED A MATERIAL PERSONAL BENEFIT UNDER *ZUCKERBERG*'S FIRST PRONG.

The Amended Complaint read as a whole, including documents incorporated by reference, sets forth a powerful constellation of particularized facts from which it is reasonable to infer that, as IBF limited partners and Venture Advisors, Spiegel and Goldberg received a material personal benefit from the Note Transaction. Appellant's Br. at 18–29.

To recap, the Amended Complaint alleges:

- *Spiegel and Goldberg had "skin in the game" as IBF limited partners and Venture Advisors*. Spiegel and Goldberg at all relevant times were limited partners in, and "Venture Advisors" to, IBF, the primary counterparty to the Note Transaction. IBF's Co-Founder and Managing Partner, Sidranksy, who simultaneously presided as Chairman of Ayala's Board, publicly stated in May 2019—within a year of having led Ayala's Series A round and contemporaneously with IBF's participation in Ayala's Series B round—that IBF's Venture Advisors "[a]s investors in the IBF . . . 'have skin in the game'" and provide "'crucial'" services "'so that

we can manage and help the portfolio company[.]'" A043–44 (Am. Compl. ¶ 34).

- *IBF's continued identification of Venture Advisors as "key" and "crucial" to its success*. IBF promoted its Venture Advisors as a "key asset" who play a "crucial" role evaluating potential investment opportunities and serving as directors of portfolio companies. A046 (Am. Compl. ¶ 37).

- [redacted]

- *IBF and Ayala agreed to the Note Transaction while Ayala was engaged in strategic transaction discussions and only five weeks before Ayala agreed to sell substantially all of its assets to Immunome*. While in the midst of strategic transaction discussions, including with an Ayala Board member, Ayala's Board abandoned a viable third-party PIPE financing at a market-standard 20%

discount in favor of an insider Note Transaction featuring an effective aggregate discount exceeding 80% and an uncompensated 7.5 million-share warrant giveaway, enabling IBF to inflate its Ayala ownership from 29% to 71.63% and, together with ABV, extract $22,000,000 to $38,500,000 from public stockholders upon the Immunome sale. A071–77, A085–87 (Am. Compl. ¶¶ 100–01, 107–10, 128, 130–31); A514–30 (IBF Schedule 13-D, February 5, 2024).

In addition, the Amended Complaint references Ayala's November 20, 2023 Form 10-Q. A077–78 (Am. Compl. ¶ 112). Ayala disclosed in the Form 10-Q that "[t]hose members of the Company's Board of Directors who are 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).

Construing these facts holistically, as Delaware law requires, compels the finding that the Amended Complaint pleads demand futility under *Zuckerberg*'s first prong.

A. Sidransky's "Skin in the Game" Admission Supports a Powerful, Let Alone Reasonable, Inference of a Material Personal Benefit to Spiegel and Goldberg.

Director Defendants cannot escape the fact that IBF's Co-Founder and Managing Partner—while also Chairman of Ayala's Board of Directors—touted the significance of IBF's Venture Partners' investments *in IBF* and their status as fund limited partners. Specifically, Sidransky stated in a May 10, 2019 article: "As *investors in the IBF*, they [IBF's Venture Advisors] have *skin in the game* and they commit a tremendous amount of time . . . importantly, sitting on boards – which is crucial so that *we can manage* and help the portfolio company." A043–44 (Am. Compl. ¶ 34) (emphasis added).

Director Defendants try to reduce this statement to meaningless jargon by arguing it "establishes, at most, the existence of some economic interest in IBF as limited partners" and characterizing it as "stale" and "nonspecific." Appellees' Answering Brief ("Appellees' Br.") at 19, 21. Director Defendants ask the Court to adopt their preferred inference, not the reasonable one that must be drawn in Marstrand's favor under Rule 23.1. Director Defendants disregard the speaker, the timing of the statement, and statement's purpose—a purpose consistent with how Delaware courts have construed the statement's legal meaning.

First, the "skin in the game" statement was not made by a peripheral individual. It was made by IBF's leader who simultaneously served as Chairman of

Ayala—the very company IBF "founded" [redacted].

Second, the statement was made (i) only one year after IBF led Ayala's Series A round, (ii) contemporaneously with Ayala's $30 million Series B round (in which IBF contributed substantial capital), and (iii) directly prior to Ayala's May 2020 IPO registration statement. A043–44, A050–52 (Am. Compl. ¶¶ 34–35, 50–53).

Third, Director Defendants aim to neutralize any significance as to *why* Sidransky made this statement in the first place. He publicly emphasized Venture Advisors had "skin in the game" as investors to confirm the Fund's structural thesis: That IBF's Venture Advisors are financially aligned with its partners and serve as active guardians of the Fund's investments by using their director positions to "manage" and protect the Fund's investments.

Delaware courts construe the phrase "skin in the game" as meaning that a fiduciary has "interests that align with the best interests" of the entity where their capital resides and "'a personal interest in ensuring that the company is managed to maximize returns to the stockholders.'" *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)); *see also Frank v. Elgamal*, 2012 WL 1096090, at *10 n.75 (Del. Ch. Mar. 30, 2012)

(holding that where fiduciaries "have 'skin in the game,' it is reasonable to infer they are using their positions "to acquire a unique benefit for themselves at the expense of the minority stockholders."). Unable to substantively distinguish these authorities, Director Defendants dismiss them as "inapposite." Appellees' Br. at 23.

Here, Spiegel's and Goldberg's capital resided in the counterparty Fund, aligning their incentives directly with IBF's investors and against Ayala's minority stockholders with respect to the zero-sum Note Transaction. Appellant's Br. at 21–24. Thus, Sidransky was emphasizing the significance of IBF's Venture Advisors' investments in the Fund at the very time IBF was investing heavily in Ayala. There is nothing "stale" about the statement. What matters is the timing of when it was made relative to the investments, not the subsequent date of the Note Transaction.

Moreover, the Amended Complaint explicitly alleges that Spiegel and Goldberg disclosed their IBF I limited partnership interests in connection with Ayala's 2020 IPO and never sold, transferred, or divested those limited partnership interests. A035, A041, A044 (Am. Compl. ¶¶ 17–18, 31, 35). A vested equity interest in a closed-end venture fund does not evaporate with the passage of time. If Spiegel and Goldberg had "skin in the game" when IBF made its investments in Ayala, they continued to have "skin in the game" when Ayala agreed to the Note Transaction with IBF.

At bottom, Spiegel and Goldberg's "skin in the game" is a meaningful admission by Sidransky from which reasonable inferences of material interestedness can be drawn and should resolve in favor of Marstrand.

B. Ayala was a "Bet-the-Fund" Asset That was Significantly Underwater.

Spiegel's and Goldberg's "skin in the game" was amplified by their role as stewards of IBF's outsized, "bet-the-fund" investment in Ayala, [redacted]. A032–33, A053–54 (Am. Compl. ¶¶ 8, 57). [redacted].

In November 2023, IBF's concentrated investment, which Spiegel and Goldberg were tasked with protecting, was deeply underwater. Absent the Note Transaction, IBF would have received only a fraction of its capital back from the Immunome Transaction rather than the potential [redacted] returns the Note Transaction made possible. *See* Appellant's Br. at 25–26. By approving the Note Transaction with its 80% aggregate discount, the Board enabled IBF to increase its ownership to over 71%, transforming a catastrophic loss into a potential $22,000,000 to $38,500,000 payout upon the Immunome sale. A085–87 (Am. Compl. ¶¶ 128, 130–31). The Note Transaction by any reasonable measure, therefore, conferred a material personal benefit on Spiegel and Goldberg.

C. Ayala's Own Disclosure Traps Director Defendants in a Paradox That Compels a Finding of Demand Futility.

As Marstrand explained in its Opening Brief, Director Defendants' reliance on Ayala's November 2023 Form 10-Q to refute the Amended Complaint's allegation of board-wide approval creates an inescapable paradox. While the Court cannot accept the Form 10-Q for the truth of its contents over the Complaint's well-pleaded facts, because Appellees themselves have put the disclosure at issue, the Court must draw all reasonable inferences from its language in Marstrand's favor. *In re Dell Techs. Inc. Class V Stockholders Litig.*, 2020 WL 3096748, at *14 (Del. Ch. June 11, 2020). The November 2023 Form 10-Q's vague statement—that directors "associated with" the counterparty Funds abstained while the transaction was "approved by the disinterested members of the Board"—supports one of two reasonable, mutually-exclusive, plaintiff-friendly inferences:

Either Spiegel and Goldberg were among the "disinterested members" who approved the Note Transaction—a reading that aligns with Appellees' own litigation position—in which case they face a substantial likelihood of liability under *Zuckerberg*'s second prong for approving a patently unfair insider deal.

Or they were also deemed "associated with" the Funds and abstained alongside the Fund managers due to a material conflict. Because the November 2023 Form 10-Q uses the undefined and deliberately vague phrase "associated with," the

range of reasonable inferences necessarily includes the possibility that it encompasses Spiegel and Goldberg, who were admittedly Venture Advisors and limited partners.

Under Delaware law, if an incorporated document supports multiple reasonable interpretations, the Court must adopt the inference most favorable to the plaintiff on a motion to dismiss. *Dell*, 2020 WL 3096748, at *14 ("if a document supports more than one possible inference, and if the inference that the plaintiff seeks is reasonable, then the plaintiff receives the inference."). Here, either of the two reasonable inferences outlined above independently satisfies the demand futility test.

Director Defendants' only recourse is to ask the Court to adopt a third, defense-friendly inference: that Spiegel and Goldberg abstained for a reason other than a material conflict. Appellees' Br. at 25 n.9. Director Defendants' reliance on *Berteau v. Glazek*, 2021 WL 2711678 (Del. Ch. June 30, 2021) in support of its purported third-way is unavailing. In *Berteau*, the Court of Chancery declined to infer interestedness where a director recused himself from a special committee based on an ownership of 15,000 shares in a publicly traded entity for one dispositive reason: the plaintiff explicitly conceded on the record that the director's 15,000-share holding was "immaterial." *Berteau*, 2021 WL 2711678, at *21 ("In fact, Plaintiff concedes that Diao's ownership of shares in 15,000 SDI was 'immaterial.'"). The court did not conduct an independent materiality analysis; it

simply accepted the plaintiff's own binding concession. By contrast, Marstrand makes no such concession. And, in any event, the inference that Director Defendants seek to draw from Ayala's disclosure cannot override the reasonable material conflict inference that Marstrand has identified.

D. Director Defendants "401(k)" Strawman has no Application Here.

Director Defendants repeatedly characterize Spiegel's and Goldberg's IBF limited partnership interests as "incidental," "passive," and "immaterial." Appellees' Br. at 4–5, 27–30, 42. In an effort to create a doomsday scenario if a material personal benefit is found to have been alleged here, Director Defendants assert that every director of a Delaware corporation will be "conflicted on account of every trivial stockholding in their 401(k) or brokerage account." *Id*. at 5; *see also id*. at 29.

The issue in this case is Spiegel's and Goldberg's limited partnership interests in IBF—a private, closed-end venture fund that was a direct counterparty to the bespoke Note Transaction with Ayala, the company IBF founded [redacted].

Director Defendants ask the Court to evaluate Spiegel's and Goldberg's limited partnership interests in a complete vacuum, stripped of context. Here, the co-founder and manager of the Fund touted its Venture Advisors' Fund investments

to emphasize their financial alignment with the Funds' investors. *See* A041–44, A046 (Am. Compl. ¶¶ 33, 34, 37). [redacted]. Furthermore, Spiegel and Goldberg were tasked with "managing" and protecting that investment through their Ayala Board membership. This context—where directors rescued their fund's "bet-the-fund" investment via a non-ratable, multi-million-dollar wealth transfer—bears no resemblance to a trivial 401(k) holding. The analogy is a baseless strawman.

E. Under *Zuckerberg*'s Subjective, Context-Specific Standard, the Amended Complaint Pleads That Spiegel and Goldberg Received a Material Personal Benefit.

In their effort dismiss Spiegel's and Goldberg's admitted financial stake in IBF as "immaterial," Director Defendants ignore the subjective, context-specific standard for materiality that this Court applied in *Zuckerberg*. As Marstrand demonstrated in its Opening Brief, the materiality inquiry posits whether a conflict "could have" affected a director's impartiality." *Zuckerberg*, 262 A.3d at 1060; *see* Appellees' Br. at 5, 28–29. Director Defendants conspicuously avoid addressing this straightforward question.

The particularized facts alleged in the Amended Complaint are precisely the type of contextual allegations that satisfy this standard. Spiegel and Goldberg were

not passive retail investors who incidentally held stock in a counterparty. They were limited partners in IBF, financially aligned with the Fund's investors, and tasked with protecting the Fund's massive investment in Ayala. The Note Transaction was a sweetheart insider deal, executed just five weeks before a company sale, [redacted].

It defies logic and commercial reality to suggest that a multi-million-dollar transaction designed to avert a financial disaster for a private fund in which a director is personally invested could not have affected that director's impartiality. Director Defendants ask the Court to view Spiegel's and Goldberg's interest narrowly, applying a rigid mathematical calculation, rather than in the full context of the constellation of facts pleaded in the Amended Complaint. Under *Zuckerberg*, those facts are more than sufficient to create a powerful and reasonable inference that the benefit to Spiegel and Goldberg was material.

F. The Absence of a Section 220 Demand Does Not Alter the Applicable Pleading Standard or Binary Inferences Drawn from Ayala's Disclosures.

Director Defendants repeatedly fault Marstrand for not utilizing 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." Appellees' Br. at 2; *see also id*. at 4–5, 15, 24–25, 33–34. Under Delaware law, a books and records inspection request is not a prerequisite to the filing of a derivative complaint. Nor does the absence of such a request alter the applicable pleading standard. Where, as here, a derivative complaint pleads particularized facts establishing that a majority of directors could not impartially consider a demand under *Zuckerberg*, demand is excused.

First, as Marstrand explained in its Opening Brief, information regarding a corporate director's ownership interests in a third-party investment fund generally would not be accessible through a Section 220 demand to the corporation. Appellant's Br. at 24. Director Defendants overstate *Woods Tr. of Avery L. Woods Tr. v. Sahara Enters., Inc.*, 238 A.3d 879 (Del. Ch. 2020). In *Woods*, the court held that a stockholder could inspect the corporation's own records regarding compensation paid by the company and related-party contracts entered into by the company, even if those records were housed in a commonly controlled sister entity. *Id*. at 900, 903-04. *Woods* provides no support for the proposition that Section 220

can be used to access the internal, private information of an outside venture fund like IBF.

Second, Ayala's own disclosures and Director Defendants' litigation position yields the inferences required to excuse demand. Again, if Ayala deemed Spiegel and Goldberg—together with Sidransky, Cabilly, and Orbach—as "associated with" IBF, then this disclosure supports a reasonable inference that their IBF interests created a material conflict, rendering a majority of Ayala's directors incapable of impartially considering a demand under *Zuckerberg*'s first prong. If, on the other hand, no such conflict determination was made and Spiegel and Goldberg were not deemed "associated with" the Funds, the most reasonable inference is that they were "disinterested members of the Board" who voted to approve the grossly dilutive Note Transaction without any procedural protections and subject to a substantial likelihood of liability under *Zuckerberg*'s second prong.

This paradox arises from the very public and vague disclosure upon which Director Defendants affirmatively relied, not from missing facts. The logical binary inferences that Marstrand has identified from Ayala's November 2023 Form 10-Q disclosure exist because the disclosure, by its own terms, either includes or excludes Spiegel and Goldberg from the set of conflicted directors. *Supra* at 11–12. Each alternative independently supports demand futility. A Section 220 demand would

not have altered the paradox Marstrand identified; at most it would have resolved which *Zuckerberg* prong excuses demand.

G. Alternatively, Under Settled Delaware Precedent Preserved by *Zuckerberg*, Subjective Materiality is Inapplicable to this Classic Case of Self-Dealing.

Even if materiality were required, Marstrand satisfies it; but alternatively, Delaware courts have not required a separate materiality showing for self-dealing transactions. Director Defendants assert at the very end of their Answering Brief that the Amended Complaint does not "describe a 'self-dealing' claim against only conflicted directors." Appellees' Br. at 41. That argument should be given short shrift. The Amended Complaint uses the term "self-interested" 85 times. It also frequently refers to Spiegel's and Goldberg's "limited partner" stakes in IBF. *See* A035, A041, A092–94 (Am. Compl. ¶¶ 17–18, 31, 143–44). There is no requirement to incant magic words that Director Defendants were "self-dealing" or "standing on both sides." The Amended Complaint's well-pleaded allegations are sufficient. The fact that the Amended Complaint also alleges controlling stockholder claims against IBF and ABV does not change this.

In addition, and notwithstanding clear language to the contrary, Director Defendants argue that Spiegel's and Goldberg's limited partnership interests did not render the Note Transaction a classic self-dealing transaction as to them. Appellees' Br. at 25–30. This Court has unambiguously held that self-dealing occurs when a

director "has a stake in or is an officer or director of a firm that deals with the corporation." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1169 (Del. 1995). The test is disjunctive. As admitted limited partners in IBF, Spiegel and Goldberg hold a direct proprietary "stake in" the entity dealing with Ayala, placing them squarely within this definition of a self-dealing fiduciary. In *Cede & Co. v. Technicolor, Inc.*, this Court affirmed that a subjective materiality analysis is required "[a]bsent evidence of self-dealing." 634 A.2d 345, 362 (Del. 1993). Director Defendants' narrow characterization of self-dealing as requiring allegations that Spiegel and Goldberg served as IBF officers or principals or dictated the terms of the Note Transaction is directly at odds with *Cinerama* and subsequent decisions. Appellees' Br. at 5, 30.

Director Defendants' attempt to distinguish numerous decisions holding that separate materiality allegations are not required for self-dealing transactions as "address[ing] director interestedness in the context of determining the applicable standard of review" or as post-trial dispositions falls flat. Appellees' Br. at 27. The substantive legal definition of what constitutes self-dealing does not change with the procedural posture of the case. These decisions articulate substantive rules of law that govern at the pleading stage.

Equally unavailing is Director Defendants' attempt to distinguish *Cambridge Ret. Sys. v. Bosnjak*, 2014 WL 2930869 (Del. Ch. June 26, 2014) as involving

director compensation. Appellees' Br. at 28. The existence in this case of one type of self-dealing transaction does not limit its application to other types of self-dealing transactions. The Court of Chancery unambiguously found that "substantial precedent" compels the "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." *Cambridge Ret. Sys.*, 2014 WL 2930869, at *4.

Director Defendants also overstate the similarity of the facts alleged in the Amended Complaint to those in *Chester Cty. Emps.' Ret. Fund v. New Residential Inv. Corp.*, 2017 WL 4461131 (Del. Ch. Oct. 6, 2017). In *Chester County*, the director at issue held 18,000 shares of the target company and received the same per-share merger consideration as every other target stockholder—a quintessentially ratable benefit. 2017 WL 4461131, at *7. The Court of Chancery found that this ratable benefit, combined with only vague additional allegations, did not raise a reasonable doubt regarding the director's ability to consider demand. *Id.*

The facts here are a far cry from the ratable benefit in *Chester County*. Spiegel and Goldberg held a direct ownership interest in the counterparty, IBF, which received the benefit of an 80% discount and a massive warrant package [redacted]. Unlike in *Chester County*, this non-ratable

benefit flowed only to IBF and its investors—not to Ayala's public stockholders. This is classic self-dealing.

Finally, Director Defendants' reliance on *Maffei v. Palkon*, 339 A.3d 705 (Del. 2025), is misplaced and, when correctly applied, undercuts their position. Appellees' Br. at 24, 26. *Maffei* did not involve classic director self-dealing. Rather, this Court found that the plaintiff failed to allege facts establishing that a corporate redomestication from Delaware to Nevada "will provide non-ratable benefits in the form of reduced liability exposure to Defendants" subject to entire fairness review. *Maffei*, 339 A.3d at 710–11.

Although it did so in the context of litigation exposure, the Court "conclude[d] that temporality weighs heavily in determining materiality here and, ultimately, whether a non-ratable benefit exists that triggers entire fairness review." *Id*. at 733. The Court found, however, that the alleged benefit—reduced future litigation exposure from a reincorporation—was too speculative to be material precisely because it was approved on a "clear day," with no "allegations that any particular litigation claims will be impaired or that any particular [corporate] transaction will be consummated post-conversion[.]" *Id*.

The facts here present the exact opposite scenario. The Note Transaction was a concrete, zero-sum wealth transfer executed just five weeks before a sale of the company, while Ayala was engaged in active strategic sales negotiations. The

benefit to Spiegel and Goldberg was neither hypothetical nor contingent; it was an immediate and non-ratable financial windfall designed to rescue IBF's investment from a significant loss in the context of a specific, impending corporate transaction. By transforming that loss into a potential multi-million-dollar gain, the Note Transaction conferred a benefit that was directly tied to the imminent Immunome sale.

II. THE AMENDED COMPLAINT PLEADS THAT SPIEGEL AND GOLDBERG FACE A SUBSTANTIAL LIKELIHOOD OF LIABILITY UNDER *ZUCKERBERG*'S SECOND PRONG.

A. It is Reasonably Inferable That Spiegel and Goldberg Approved the Note Transaction.

Under *Zuckerberg's* second prong, demand is excused if a director faces a substantial likelihood of personal liability. That standard is satisfied here. The Amended Complaint pleads particularized facts supporting a powerful and reasonable inference that Spiegel and Goldberg approved a patently unfair, self-dealing transaction, thereby breaching their duty of loyalty and facing a substantial likelihood of liability.

Director Defendants argue that the Amended Complaint's allegations concerning Spiegel's and Goldberg's approval of the Note Transaction is based on impermissible "group pleading." Appellees' Br. at 33–34. The Amended Complaint does not rely on generalized allegations of collective knowledge or bad faith; it alleges a specific, collective corporate action—Board approval. Each Ayala director is explicitly named and included in the definition of the "Director Defendants" alleged to have approved the Note Transaction. Appellant's Br. at 36–37. If Director Defendants insist that Spiegel and Goldberg were "disinterested members of the Board," then Ayala's disclosure supports a strong inference they voted to approve

the Note Transaction, and the "group pleading" objection collapses on this basis alone.

Moreover, the two cases Director Defendants cite are inapposite because they involved impermissible attempts to plead scienter by alleging a board's collective awareness of mismanagement or financial issues. *See CIBC Bank USA v. Barker*, 2026 WL 1507755, at *11, 14 (Del. Ch. May 29, 2026) (rejecting "general allegation that 'BERA's directors . . . believed Terminus's $7 million offer provided them with an insufficient return" and speculation "that the directors must have known about Barker's actions based on their 'attendance at Board meetings and participation in the management of the Company.'"); *In re ProAssurance Corp. S'holder Deriv. Litig.*, 2023 WL 6426294, at *18 (Del. Ch. Oct. 2, 2023) (rejecting "group pleading that all Demand Board members 'knew by at least the second quarter of 2018 that ProAssurance's loss reserves for the TeamHealth account were massively understated.'"). Pleading that a board, through its defined members, voted to approve a transaction is a fundamentally different and permissible allegation of a corporate act.

Director Defendants misleadingly cite *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44 (Del. Ch. 2015), as holding that an inference of full board approval is inappropriate in the absence of a Section 220 demand. Appellees' Br. at 33–34. Director Defendants omit to state in that case the company's Audit

Committee charter explicitly "placed the responsibility for review and approval of the New Agreement, as a Related Party Transaction, in the hands of the Audit Committee" and the complaint omitted "any well-pled facts suggesting that the [c]ompany deviated from this policy[.]" *Baiera*, 119 A.3d at 57.

Moreover, as Marstrand has explained, Director Defendants are trapped in a paradox of their own making. *Supra* at 11–12. They affirmatively relied on Ayala's November 2023 Form 10-Q, which states that while directors "associated with" the Funds abstained, the Note Transaction was "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)). Director Defendants concede that three Fund managers (Sidransky, Cabilly, and Orbach) were conflicted but vigorously contend that Spiegel and Goldberg were not. The inescapable, logical inference from this disclosure and Director Defendants' litigation position is that Spiegel and Goldberg were among the "disinterested members of the Board" who voted to approve the Note Transaction. Drawing this plaintiff-friendly inference is required.

B. Approving the Unfair Note Transaction Constitutes a Breach of the Duty of Loyalty.

Because it is reasonably conceivable that Spiegel and Goldberg approved the Note Transaction, they face a substantial likelihood of liability for breaching their

duty of loyalty. A director faces such liability where the complaint alleges 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). That requirement is satisfied by the Amended Complaint's allegations that Spiegel and Goldberg held a direct ownership interest in IBF—the counterparty to the Note Transaction—and obtained a non-ratable benefit from that transaction. Again, materiality is not an element of this substantive claim, even though Marstrand alleges it exists here.

The gross unfairness of the Note Transaction is not seriously in dispute. It was a one-sided insider deal, consummated without any procedural protections while Ayala was in active strategic discussions. It funneled tens-of-millions of dollars from Ayala's public stockholders to IBF and its partners—including Spiegel and Goldberg—by granting an effective 80% discount and a massive warrant package just five weeks before the company's sale was announced.

As fiduciaries holding a direct ownership stake in the counterparty, Spiegel and Goldberg obtained a non-ratable benefit from a transaction that rescued their Fund's deeply underwater investment. Approving such a lopsided deal, which so clearly prioritized their personal financial interests and those of their partners at IBF

over Ayala's public stockholders, constitutes a clear breach of the duty of loyalty and is more than sufficient to establish a substantial likelihood of liability. For this reason, demand is futile under *Zuckerberg's* second prong.

CONCLUSION

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

Dated: September 24, 2026

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