**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| PAUL S. BUDDENHAGEN, Individually and on Behalf of All Others Similarly Situated, and Derivatively on Behalf of MARITIME EXPLORATIONS, INC., | No. 228, 2025 |
| Plaintiffs-Below, Appellants, | Case Below: |
| v. | Court of Chancery of the State of Delaware, C.A. No. 2019-0258-NAC |
| BARRY L. CLIFFORD and THE ESTATE OF ROBERT T. LAZIER, | |
| Defendants-Below, Appellees. | |

**APPELLANT'S OPENING BRIEF**

Dated: July 8, 2025

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## NATURE OF PROCEEDINGS

Plaintiff Paul S. Buddenhagen, individually and on behalf of all others similarly situated, and derivatively on behalf of Maritime Explorations, Inc. ("Plaintiff") proved at trial that, from 1995 onward, Defendants Barry L. Clifford ("Clifford") and Robert T. Lazier ("Lazier"),[1] who at all relevant times served as the directors of Maritime Explorations, Inc. ("MEI"), engaged in literal corporate piracy, converting to their personal gain virtually the entire profits of MEI's business exploring and commercializing the treasure of the *Whydah Gally* shipwreck (the "*Whydah*").

The trial court found that Plaintiff proved this long-running campaign of self-interested conduct culminated in an unfair, self-dealing merger in 2018 (the "Defective Merger") which had no semblance of process, an unfair price, and was undertaken with a subjective belief by Defendants that the transaction unfairly benefitted themselves over the corporation and its hundreds of stockholders. As a result, the trial court ordered the extraordinary remedy of rescinding the Defective Merger.

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[1] Lazier passed away during the pendency of this action and his estate was substituted in as a defendant (the "Estate" and together with Clifford, the "Defendants").

However, while the decades-long acts of fiduciary misconduct factored into the trial court's evaluation of the Defective Merger and the trial court's decision to rescind the same, the trial court barred separate relief for pre-merger misconduct on laches grounds, and otherwise left MEI as it was prior to the Defective Merger: at the mercy of its disloyal, self-enriching majority stockholder, Barry Clifford.

This decision committed legal error in two critical respects.

First, the trial court erroneously gave legal dignity to large blocks of shares Defendants purported to issue to themselves via intentionally falsified corporate records to place themselves in solid control. Those issuances were void and not susceptible to a laches defense at all.

Second, the trial court erred by failing to declare terminated a pair of contractual relationships—a Joint Venture Agreement (the "JVA") and Operating Agreement (the "OA")—which benefitted a side-entity separately owned by Defendants at the expense of MEI. The evidence at trial, and as found by the trial court, established that those contracts expired by their terms at the end of 2017, an ultimate ruling, however, that the trial court failed to make in its Post-Trial Opinion (the "Opinion" or "Op."). The Defendants argued that they had extended both agreements (which would have expired by their terms on December 31, 2017) three times, and that they remained in force. The issue was tried, and the trial court rejected all three purported extensions as invalid. Despite those findings, however, the trial court declined to make a legal determination either way as to whether the agreements remained in effect. Because it also left Clifford in control of MEI's board and its voting stock, the Court's non-decision allows Clifford to continue exerting economic rights of long-expired contracts for his own personal benefit at the expense of MEI.

The trial court's decision to remain silent on the vitality of the JVA and OA as a matter of law—despite finding all the predicate facts that show those agreements expired in 2017—was legal error for two reasons: (1) its rescission remedy required a determination of what the pre-Defective Merger status of MEI was, and (2) the 'extensions' were self-dealing conduct which was timely under the trial court's laches analysis. Either way, with the dispute briefed, argued, and tried before it, the trial court should have rendered a judgment.

## SUMMARY OF ARGUMENT

1. The trial court erred in finding, by a preponderance of evidence, that stock issuances to Defendants were not void, but rather valid, and therefore that the Defendants held a majority of MEI's outstanding shares of stock both at the time of the Defective Merger and presently. (Op. at 65–87, 88–93.)

2. The trial court erred in assuming for valuation purposes that the JVA and OA survived until the Defective Merger, while declining to rule on whether it expired, when its findings of fact show it had already expired and not been extended and that issue was presented by the parties for decision. (Op. at 57–58, 104 n.391.)

## STATEMENT OF FACTS

### A. The Discovery of the *Whydah* and Founding of MEI

In 1717, the *Whydah*, flagship of the infamous pirate captain "Black" Sam Bellamy, sank in a nor'easter of the coast of Cape Cod, bearing an unknown portion of the booty from Bellamy's prodigious raiding of merchant shipping. (Op. at 4.) The wreck remained unrecovered until 1982, when MEI's founder, Clifford, found debris which he believed localized the wreck site. (*Id.*)

Clifford thereafter formed MEI to recover the *Whydah*, and investors poured in over $1 million from 1983 through 1986 in exchange for stock. (*Id*. at 5.) Investor funds covered not only the exploration of and recovery of artifacts and treasure from the *Whydah* itself, but also the legal proceedings to secure title. (*Id.*) Further stock issuances went to individuals who gave services to MEI's operations. (*Id.*)

These recovery operations have netted thousands of coins, cannons, guns, and, critically, the *Whydah*'s deck bell, proving the ship's identity. (*Id*. at 6.) As a result, MEI owns the only authenticated pirate treasure. (*Id.*)

### B. The Joint Venture

On the strength of the legal and archaeological achievements MEI had already made, MEI in 1987 obtained new financing from the Whydah Partners Limited Partnership ("WPLP"), through two contracts, the JVA and OA, collectively this contractual relationship is called the Whydah Joint Venture ("WJV"). (*Id*. at 6–7.)

Pursuant to the JVA and OA, MEI assigned its rights to the *Whydah* to a subsidiary, Maritime Financing Co., Inc. ("MFC"), which assigned certain rights to manage the deployment or disposition of the salvaged assets, to the WJV. (*Id*. at 7.) The JVA provided that decisions on deploying those assets would be made by a governing board appointed by MEI and WPLP, in which WPLP controlled a tiebreaking majority. (*Id.* at 7–8.) The JVA provided for the distribution of proceeds from the "sale or other disposition" of *Whydah* artifacts and the WJV's "share of revenues from the exploitation of Ancillary Rights," which are run through a "Sliding Scale." (*Id*. at 7–8.) That Sliding Scale apportions the WJV's proceeds between WPLP and MFC and MEI in accordance with a tiered formula operating on $6 million increments. (*Id*. at 8.) Each increment ratchets the formula to be successively more favorable to MEI/MFC, starting with an 80/20 split between WPLP and MEI at the first tier, a 70/30 split between WPLP and MFC at the second tier, up to a 20/80 split between WPLP and MFC at the top tier for marginal proceeds over $54 million. (*Id.* at 8–9.)

"Ancillary Rights" include revenues from museums. (*Id*. at 8 n.8 (citing JX0045 at 16–18 (A0100–A0102).) Notably, the WJV's "share of revenues" from ancillary rights is distinctly more favorable to MEI—60% of those net proceeds go to MEI off the top, with the remaining 40% allocated to the Joint Venture and thus run through the Sliding Scale in which MEI/MFC receive a proportion. (JX0045 at 16–18 (A0100–A0102).)

Further, the JVA and OA were time-limited, with the JVA expiring on December 31, 2017, unless sooner terminated. (Op. at 9.) The OA terminated with the JVA. (A0134 (JX0046 at 16)). Amendments had to be approved in writing by WPLP and MFC. (Op. at 10.)

**C. The JV Buyout**

MEI, powered by the WJV, uncovered substantial amounts of treasure and artifacts. (*Id*. at 15.) Unfortunately, WPLP, based in part on a disappointing appraisal by Sotheby's in 1992, did not believe that a sale of the treasure was likely to recoup substantial funds. (*Id*.) Instead, WPLP sought to direct the WJV into museum operations, with the idea of telling the story of the pirate vessel, its history, and adventures. (*Id*. at 15–16.)

Unfortunately, these early museum efforts ran aground on a different problem—opposition to such a museum due to the *Whydah*'s pre-pirate history in the transatlantic transportation of the enslaved. (*Id*. at 16–17.) The WPLP sought an exit from the Joint Venture, and specifically sought to have its interest bought out. (*Id*. at 17.)

In December 1995, WPLP sold its WJV stake to a new entity, Whydah International, Inc. ("International")—owned by Lazier, Clifford, and Phillip

Crane—for $500,000 and 681 coins from the *Whydah* ("WPLP Buyout"). (*Id*. at 18 n.70 (citing JX0273 (A0138)).) The 681 coins were in turn intended as consolation prizes to WPLP's own investors, since the WJV investment had not been lucrative. (*Id*. at 101–02 n.388.) In accordance with the terms of the JVA, MFC's consent to the WPLP Buyout transaction was required, and Clifford and Lazier caused MFC to grant such consent. (*Id*.)

### D. Defendants Intentionally Falsify Corporate Records to Put Themselves in Hard Control

At the time of the WPLP Buyout, Clifford and Lazier owned only 37.63% of MEI's outstanding stock. (*Id*. at 28.)

Starting in 1999, and over the next several years thereafter, Defendants, fabricated numerous sets of "minutes" of a meeting of the MEI Board of Directors ostensibly taking place on November 15, 1996. (*Id*. at 19–28.) More than a dozen different versions of these "minutes" were created between 1999 and 2008. (*Id*. at 20 (citing JX0286–303 (A0150–A0215).) The differences are substantial, with material conflicts between different versions. (*Id*. at 22–23.)

The trial court divided the drafts into two groups—the first having been created 1999–2004 ("Group 1"), and the second created in 2004–2008 ("Group 2"). (*Id*. at 23.) Most of the Group 1 minutes – the versions from the earlier period – suggest the board did not issue 2.1 million shares at the 1996 meeting at all. (*Id*.)

The earliest Group 2 drafts assert that the board of directors in 1996 voted issuances to Clifford of 2.1 million shares, Lazier of 1.4 million shares, and to each of Mickey Salloway ("Salloway") and Vince Murphy ("Murphy") of 350,000 shares of MEI stock. (*Id*. at 24.) Contemporaneously with the creation of this document, the Defendants created minutes for a supposed meeting on April 1, 2004, reciting a resolution to issue each of Clifford and Lazier an additional 2,000,000 shares. (*Id*. at 25.)

The earliest datable copy of the falsified minutes from the ostensible 1996 meeting is a version with fax markings from 1999. (*Id*. at 21–22.) Fax markings for the same date and time, down to the minute, also appear on a document purporting to be "minutes" of a 1997 meeting. (*Id*. at 22.) This supposed set of 1997 minutes recites that the Board of Directors approved and each director—on that document, Clifford Lazier, Salloway, and Murphy—signed the 1996 minutes. (*Id*. (citing JX0306 (A0217).) But, the 1997 minutes are themselves unsigned, and no version of the 1996 "minutes" signed by anyone other than Barry Clifford has ever been produced. (*Id*.)

Handwritten notes from Lazier from sometime in 2004 (approaching a decade after the meeting supposedly occurred)—made either by him or at his direction—instruct "Change minutes" and "Remove Mickey & Vince." (*Id*. at 26 (citing JX0394 (A0258).) Further handwritten notes indicate "may need to be more from

’96 to ’04 – B.C. & B.L. 250,000 per year minutes to reflect that.” (*Id*. at 27.) A draft version of the 1996 minutes strikes through Salloway’s and Murphy’s names in the section reciting to whom the Board supposedly voted to grant shares, and their names are absent from most subsequent Group 2 versions. (*Id*. at 26.)

The only version of the 1996 minutes which bears any signature is signed by Clifford only, with blanks for Lazier and Salloway. (*Id*. at 20 (citing JX0303 (A0206).) This version is written in the Calibri font. (*Id*.)

In sum, “the unrebutted evidence shows Defendants created over a dozen sets of falsified draft minutes in the decade that followed the 1996 Meeting.” (*Id*. at 89.) The trial court specifically found that the “Defendants actively falsified documents designed to rewrite history, at least as it relates to the draft minutes for the 1996 Meeting.” (*Id.* at 89–90.) The trial court concluded that there was no Board resolution in 1996 authorizing the issuance of shares to the Defendants. (*Id*. at 90.) Highlighting the self-interested nature of the Defendants conduct, they themselves concede they made no effort, at any time, to obtain any independent valuation of the shares they issued to themselves. (A0352 (JX1010).)

### E. Defendants Try to Revise the Past in Contemplation of a Merger

In early 2003—during the time when Defendants were working with a Minnesota law firm to create the Group 1 falsified documents—Defendants obtained an up-to-date stock ledger from a paralegal at the Minnesota firm. (*Id*. at 28.)

The ledger produced by the Minnesota firm reflected Defendants' holdings of 37.63% of outstanding stock. (*Id.*) In 2008, Ken Kinkor reviewed MEI's corporate records and concluded that no shares had yet been issued pursuant to the 1996 and 2004 resolutions, specifically citing to the purported 1996 minutes for the existence of such shares. (*Id.* at 30.) He confirmed that as of September 2008, still only 37.63% of outstanding MEI shares were controlled by Defendants. (*Id*. at 31.)

Notwithstanding the history of the falsified 1996 minutes and the absence of any validly dated and signed corporate documents reflecting the issuance of these shares at any point, the trial court nevertheless concluded that the Board voted to issue stock to Clifford "in 2004 or 2009." (*Id*. at 35.) In reaching this conclusion, the trial court pointed to language from purported board meetings in 2004 and 2009 in which the minutes reflect Board votes to "reaffirm[]" the purported 1996 issuances. (*Id.* at 32–33). The trial court also considered a certificate reflecting the issuance of 2.1 million shares to Clifford in November 1996. (*Id.* at 34 (citing JX1168 (A0216).) However, the trial court recognized that even this document was facially suspect, in that it is signed by a corporate secretary who was not elected until 2004, meaning that the certificate was at least "backdated." (*Id*. at 34.)

Based on the trial court's finding that Defendants must have, and therefore did—at some point in either 2004 or 2009—issue stock to themselves, the trial court held Defendants conclusively held control of MEI, with Clifford controlling 50.71%, and Lazier controlling 0.48%, the same level which they remained at in 2017. (*Id*. (citing JX0394 at 17 (A0257); and JX0573, (A0320)).).[2]

### F. Following the WPLP Buyout, Defendants Essentially Ignore the Joint Venture Structure For Their Sole Benefit

Over the course of operating the *Whydah* project, and all while serving as fiduciaries to MEI, the Defendants bypassed MEI, MFC, International, and the WJV for MEI's revenue-generating business operations, instead running those operations through a network of side-entities which the Defendants separately owned — Historic Shipwrecks, Inc. ("HS"), Maritime Heritage Research Labs, LLC ("MHRL"), Clifford Explorations, LLC ("CELLC"), and 16 MacMillan Wharf Realty Trust ("MWRT"). (*Id*. at 36.)

One such profitable venture was "Real Pirates," a traveling museum exhibition undertaken by Arts & Exhibitions International, LLC ("AEI"), which paid substantial royalties to license the use of the *Whydah* artifacts. (*Id*.) In 2006, AEI paid a $1 million advance, along with a portion of ticket and merchandizing sales. (*Id*. at 38.) But, rather than run those substantial revenues through the JVA, or through MEI/MFC itself, Clifford formed HS, jointly owned by himself and Lazier to the exclusion of MEI/MFC and the minority investors, specifically to take

[2] In 2009 to 2010, Lazier transferred his stock to Clifford in order to give Clifford a majority of MEI's outstanding stock. (Op. at 92.)

advantage of the Real Pirates opportunity. (*Id*. at 36.) This diversion kept the profits from the AEI deal away from with MEI and its minority investors—profits which would have accrued to MEI both through the Ancillary Rights provisions, and the Sliding Scale. (*Id*.)

Clifford represented to AEI that he (Clifford) and HS owned full right and title to the *Whydah* artifacts. (*Id*. at 37.) This is contrary to the JVA and OA, since "the OA provided that the Whydah Joint Venture—not HS and not Clifford—had 'sole discretion' to make 'any portion of the' *Whydah* artifacts 'available for exhibition in a museum." (*Id*.) [3]

The Real Pirates traveling exhibition continued for years, with the contract amended on multiple occasions through 2010. (*Id*. at 37.) And, the exhibit was successful. (*Id*. at 38.)

After having created HS in 2006 to absorb the Real Pirates profit, "[i]nstead of using MEI and International, Defendants opted to run the entire *Whydah* profit

[3] The WJV, as the trial court found, "consisted of two agreements, the Joint Venture Agreement and the Operations Agreement." (Op. at 7 (citing JX0045 (A0085) and JX0046 (A0119).) The WJV was thus a purely contractual relationship and so could never take up *title* to the *Whydah* artifacts. The capacity to own property is a characteristic only the state can provide. *New Ents. Assoc. 14 L.P. v. Rich*, 295 A.3d 520, 568 n.159 (Del. Ch. 2023). Rather, MEI, either directly or through its wholly owned subsidiary, has always had complete title to the *Whydah* and its artifacts. (*Accord* A1143–46 (T.T. 611:19–614:6 (Clifford)).)

operation through HS." (*Id*. at 38.) This "included taking possession of one of MEI's museums in Provincetown, Massachusetts." (*Id*. at 38–39.) With the start of the profitable Real Pirates exhibit, "Defendants appear to have halted the Whydah Joint Venture's operations." (*Id*.)

The trial court noted that this virtual sidelining of the true *Whydah* entities, and the evasion of the JVA, OA, and Sliding Scale, goes back to "at least 2006." (*Id.* at 100–01 n.386.) But, that the sidelining goes back even further as can be seen by the falsified 1996 minutes, which also proposed discarding the JVA and the Sliding Scale entirely, and replacing it with a fixed revenue split favoring International over MEI. (*Id*. at 23.) The earlier Group 1 drafts propose a 3:1 split, while the later Group 2 drafts propose a 2:1 split. (*Id*.; *see also* A0179 (JX0295) (draft 1996 minutes not mentioning a fixed revenue split at all).) The purpose of such a change would have been for the Defendants to capture for themselves the "upside" which would be due to MEI and its stockholders if the *Whydah* generated significant returns, a pattern which the trial court found was a consistent pattern with the Defendants' behavior. (*Id*. at 103.) Though such a change never happened (*see id*. (characterizing the fixed-revenue split changes as 'proposals' and that the Defendants "realized this would not work")), it was further evidence that, once International took the place of WPLP, the Defendants *never* abided by the WJV.

(*See also* A0351 (JX1010 at 11) (admitting MEI has never received any payments through the Sliding Scale)).

In 2011, Defendants assigned HS's rights under the AEI contract to the WJV, but thereafter still did not direct any income, whether from the Provincetown museum or the AEI contract itself, to the WJV. (*Id.*) Also in 2011, the Defendants obtained two valuations of MEI's artifacts. (*Id*. at 47.) One, by Durkin Valuation Consultants, reviewing a sampling of MEI's coins, estimated the salvaged treasure and artifacts to be worth \$2.5 million. (*Id.* at 47.) The other, by Daniel Sedwick ("Sedwick"), was for \$8.6 million. (*Id*. at 47–48.)

Also some time between 2004 and 2011, Defendants explored merging MEI and International, "hoping to lock MEI and the minority stockholders into a lower distribution, thereby taking the upside under the Sliding Scale for themselves through their complete ownership of International." (*Id*. at 103–04.)

The Real Pirates touring exhibit ended when AEI's parent company filed for bankruptcy. (*Id*. at 39–40.) As part of the bankruptcy liquidation, AEI transferred all the exhibited artifacts and exhibitry, which had been a part of the tour, to HS, including a scale model of the *Whydah*. (*Id*. at 40.) These exhibits, in turn, were placed in two *Whydah* museums—the Provincetown museum, and a new museum in Yarmouth, Massachusetts. (*Id.*) The Yarmouth museum is not operated by or through MEI—or even by the WJV for that matter, but by two other Defendant-owned LLCs. (*Id.*) HS, at some point ceased to operate the Provincetown Museum, and now leases the former museum space to a nonprofit. (*Id.*)

As the trial court recognized, "the record strongly suggests that, since 2006, Defendants diverted whatever profits were derived from the *Whydah* site and its artifacts to their pockets via a host of other entities only Defendants owned." (*Id.* at 101 n.386.)

### G. The Joint Venture Expires and the Defendants Decide to Merge MEI and International for their Own Benefit

In 2016, Clifford's personal attorney, Allan Tufankjian, Esquire, called Clifford's attention to the highly problematic use of HS, and urged him to retain corporate counsel to straighten out MEI's internal affairs. (*Id.* at 42.) Clifford retained Erik Bergman ("Bergman") in January 2017 to orchestrate a stock-for-stock merger between MEI and International ("Merger"). (*Id.*) This involved reviving the earlier plans for an MEI/International merger, "seeming upon one or more recent finds that led Defendants to believe they were on the cusp of uncovering significant treasure." (*Id.* at 104.)

While Bergman's retention was putatively for "corporate hygiene, to allow the company to set itself up with a cleaner basis for moving forward," the trial court found that "the record also suggests another, more self-serving purpose for the [Defective] Merger—to deprive MEI's stockholders of the benefits provided under the Sliding Scale." (*Id.* at 43.)

Defendants decided the Defective Merger should leave Clifford with 76% of MEI, as the surviving company, Lazier with 15%, and MEI's minority investors with 9% (where the minority stockholders previously held at least 48% of the equity). (*Id.*) The Defendants' plan furthermore gave themselves a $4 million liquidation and dividend preference over MEI's other stockholders. (*Id.* at 45.) Bergman eventually finalized the Defective Merger documents in accordance with Defendants' planned distribution of post-transaction ownership and rights. (*Id.* at 45.) That distribution had been "predetermined." (*Id.* at 96.) "Defendants even split International's stock on a 40,860.6-for-one basis shortly before the Defective Merger, so it would look better to the stockholders of MEI." (*Id.* at 96 (footnote omitted) (quotations omitted).)

The Defective Merger was not, however, finalized until June 26, 2018, around 18 months after Bergman's retention. (*Id.* at 45.)

In the intervening time, the JVA's original expiration date of December 31, 2017, had passed. But, International's expired rights under the JVA and OA had been the linchpin of the Defendants' justification for issuing themselves the new equity of the Defective Merger. (*Id.* at 104.) To try to defend their conduct, the Defendants pointed to three supposed contractual amendments changing the term of the JVA, and the WJV more generally, to claim that the International's rights under the JVA and OA survived until the Defective Merger. (*Id.* at 57.)

The first of these amendments purported to *shorten* the JVA's term to expire instead on December 31, 2016. (*Id*.) The second "purported amendment occurred during a supposed 'Whydah Joint Venture board meeting' on February 21, 2018–two months after the end of the JVA's original term." (*Id*. at 58 (footnotes omitted).) "The final purported extension took place in March 2016." (*Id*.) This third extension "seems to be the only potentially viable extension." (*Id*. at 58 n.243.) However, as the trial court found, "MFC did not sign this third extension, as required for amendments to the JVA." (*Id*. at 58.)

Because "it required an amendment of the JVA to extend its term," (*Id*. at 9) these findings necessarily lead to the conclusion that the JVA, OA, and WJV more generally all expired prior to the Defective Merger. But, Plaintiff's proof of the Defective Merger's unfairness (specifically, here, as to fair price) was so overwhelming that "even assuming the JVA continued, Defendants do not meet their burden of showing entire fairness." (*Id*. at 104.) As a result, even though the trial court expressed that "I have serious reservations about whether the JVA remained intact. . . I need not resolve that issue." (*Id*. at 104 n.391.)

Finally, on June 26, 2018, the Defendants unilaterally executed and approved the Defective Merger, using their ownership of International, control of MEI's board, and written consents in lieu of stockholder meetings. (*Id*. at 45.) "Against Bergman's advice, there was no special committee, no financial advisor, and no fairness opinion." (*Id*. at 96.) Nor was there any board of directors meeting to formally consider the Merger. (*Id*. at 96–97.) Two days after unilaterally imposing the Merger, the Defendants mailed out an Information Statement to all stockholders of record. (*Id*. at 45.) The Information Statement was the first time MEI's minority stockholders were informed of the Merger. (*Id*. at 46; *id*. at 97.) It was also the stockholders' first report from MEI in 23 years. (*Id*. at 80.)

### H. Defendants Obtain a Contemporaneous Valuation

In July 2018, less than a month after the Defendants unilaterally imposed the Merger, Sedwick appraised the coins a second time ("Contemporaneous Sedwick Appraisal"). (*Id*. at 49.) This second appraisal was informed by sales of *Whydah* pirate treasure coins at auction, which had sold for prices between $6,168.75 and $16,450 each. (*Id*.) The Contemporaneous Sedwick Appraisal estimated the salvaged coins at $150 million, and the total value of all recovered treasure at $200 million. (*Id*.) According to Clifford, this was a "very fair appraisal." (*Id*. at 49–50 n.209 (quoting JX0710 (A0337).) Moreover, the Defendants believed that 85% of the *Whydah* treasure remains unrecovered at the wreck site. (*Id*. at 52.) Both the Defendants believed this unrecovered *Whydah* treasure is valuable. (*Id*. at 53.) The final version of the Contemporaneous Sedwick Appraisal did not assign any value to the unrecovered treasure, but earlier drafts estimated that the unrecovered treasure could be worth in excess of $1 billion. (*Id*. at 53–54 (citing JX0701 (A0328) and JX0706 (A0334)).)

### I. This Litigation

On January 9, 2019, Buddenhagen made a books and records demand under Section 220 of the DGCL. (*Id*. at 59.) On April 4, 2019, Buddenhagen and another stockholder commenced the instant plenary derivative and class action. (*Id*.)

In May 2021, the parties reached a proposed settlement. (*Id*.) Before the motion to approve the settlement could be heard, Buddenhagen wrote a letter to the Court objecting to the settlement and proposing modifications. (*Id*. at 59–60.) The presiding Vice Chancellor, taking note of the seriousness of the alleged breaches of fiduciary duty and limited discovery to that point, rejected the settlement. (*Id*. at 60.)

Buddenhagen amended the Complaint in October 2021, and then again to the operative Second Amended and Verified Stockholder Class Action and Derivative Complaint on January 20, 2022. (*Id*.)

Trial occurred on February 6–8, 2023. (*Id*.) Post-trial argument occurred on October 2, 2023. (*Id*.) Defendants' counsel provided a supplemental letter after post-trial argument on October 24, 2023. (*Id*.)

The trial court issued the Opinion on May 10, 2024. Counsel for Buddenhagen moved for a fee award on July 31, 2024, which the Court granted in part in a telephonic ruling dated April 11, 2025. The final ordered issued on April 29, 2025. This appeal timely followed.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN FINDING THAT STOCK ISSUANCES TO DEFENDANTS WERE VALID.

#### A. Question Presented.

Did the trial court err when it found, by a preponderance of evidence, that certain stock issuances to Defendants were not void, but rather valid, and therefore the Defendants held a majority of MEI's outstanding shares of stock both at the time of the Merger and presently? (Op. at 65-87, 88-93.) (Preserved at A0357, A0410–415, A0445, A0446–48, A0484–88, A1034–1055, A1526, and A1527–A1532)

### B. Scope of Review.

This Court reviews application of the DGCL *de novo*. *In re Fox Corp./Snap Inc. Section 242 Litig.*, 312 A.3d 636, 642 (Del. 2024). "Once the historical facts are established, the issue becomes whether the trial court properly concluded that a rule of law is or is not violated." *Poliak v. Keyser*, 65 A.3d 617, 2013 WL 1897638, at *2 (Del. May 6, 2013) (table).

### C. Merits of Argument.

A central issue in the proceedings below was whether Defendants collectively possessed a majority of the stock of MEI. (A0357 (Pre-Trial Order at ¶ 28) ("Plaintiff will establish that from 1993 through the date of the Putative Merger, Defendants validly owned less than 40% of MEI's outstanding stock"); A0451 (Plf. Pre-Trial Br. at 58) (arguing that, at the time of the Defective Merger, Clifford "possessed only 15,840,615 valid shares out of almost 41 million, less than 39%, and well short of the 50% required" to approve the Defective Merger") (emphasis removed); A1526 (Plf. Post-Trial Ans. Br. at 32) ("Defendants held, at most 37.63% of the stock in MEI at the time of the Putative Merger").)

As the trial record reflects, Defendants' claim to own more than 50% of the stock of MEI stems from purported stock issuances beginning with a large issuance that Defendants claimed took place at a meeting in 1996. (Op. at 90.) Instead, as Plaintiff argued, Defendants' years-long spree of false and fabricated minutes for a board meeting that likely never occurred never actually validly caused MEI to issue the disputed shares to themselves, and instead, was just another aspect of the larger plan to falsify MEI's corporate records and take voting control of the company for themselves. (A0416–21 (Plf. Pre-Tr. Br. at 23–28 (arguing that, from 2006 to 2009, Defendants fabricated minutes of a supposed meeting in November 1996 in which Defendants purported to issue themselves stock sufficient to take them over 50%));

A1527–A1532 (Plf. Post-Trial Ans. Br. at 33-38) (arguing that "sometime around 2006" Defendants "became concerned that they were not majority owners and set out to rewrite history and make it seem as though they had been majority owners since 1996" through a scheme to fabricate meeting minutes from a supposed November 1996 meeting).) Because there was never a resolution of MEI's board of directors conforming to 8 *Del. C.* § 152(a) authorizing the issuance of the Defendants' post-1996 shares, those shares were void, and the Defendants lack majority control of MEI's authentic stock. (A0451 (Plf. Pre-Tr. Br. at 58.)).

The issue of whether Defendants properly held a majority of the outstanding stock of MEI was critical for two reasons: (a) going into the Merger, did the Defendants possess voting shares sufficient to act alone and approve the Merger by written consent, and (b) if Plaintiff's challenge to the Merger was successful, was MEI subject—going forward—to the power the Defendants could wield as majority stockholders of MEI?

Plaintiff argued below that these purported stock issuances were void on their face because they were not issued in accordance the statutory requirements of the DGCL. (*See, e.g.*, A0357–58 (Pre-Trial Order at ¶ 29 (asserting that Plaintiff intended to prove at trial that "[t]he failure to follow corporate formalities [made] these issuance void under the [DGCL]")); A0452–0454 (Plfs. Pre-Trial Br. at 59–61 (arguing that the purported stock issuances were void)); A1530–32 (Plfs. Post-Trial

Ans. Br. at 36–38 (arguing that any purported stock issuances contemplated in the fabricated 1996 minutes were void *ab initio*")).)

The trial court held, however, that despite found instances of repeated efforts at falsifying the corporate records upon which the challenged shares issuances rested, those shares were ultimately validly issued to the Defendants. (Op. at 92 ("over the course of a decade or more, Defendants both acted to fabricate draft minutes of the 1996 Meeting and also later voted to issue, and then issued, themselves the disputed shares of stock").)

The trial court also ruled that Plaintiff's claims relating to these stock issuances were barred by laches. *See, e.g.*, Op. at 69 (finding that Plaintiff's claims relating to the stock issuances accrued "sometime between 2004 and 2009"), *id*. at 70–71 (finding that Plaintiff's "challenge to the stock issuances" would "be presumptively barred if brought after January 2012 (assuming Defendants did not issue themselves any shares until 2009)"); *id.* at 82–83 ("Laches … presumptively bares all non-Merger claims derived from Defendants' discrete acts," which included Plaintiff's claims related to the stock issuances, "and those claims find no sanctuary in the doctrine of equitable tolling."). As a result, the trial court reasoned that the shares were valid, irrespective of whether the issuances were fair, because laches as an equitable defense validated them. (Op. at 92 n.362.)

The trial court erred in finding that Plaintiff's claims relating to these stock issuances were valid and not void. As a result, this Court should reverse the trial court's finding and rule that the challenged stock issuances to the Defendants were void and of no current effect on the capital structure of MEI.

#### ***1. The Purported Stock Issuances Granting Defendants a Majority of the Stock of MEI Were Void.***

"Stock is not validly issued 'unless the board of directors exercises its power [to issue stock] in conformity with statutory requirements.'" *Boris v. Schaheen*, 2013 WL 6331287, at *13 (Del. Ch. Dec. 2, 2013) ("*Numoda I*") (quoting *Liebermann v. Frangiosa*, 844 A.2d 992, 1004 (Del. Ch. 2002)). Pursuant to Section 151(a) of the DGCL, "stock is valid only if it is issued pursuant to a written instrument evidencing board approval of the stock issue." *Id.*; *see also* 8 *Del. C.* § 151(a). "It is a well-established principle of current Delaware law that '[s]tock issued without authority of law is void and a nullity' and this includes stock that is not issued pursuant to a written instrument evidencing board approval." *Numoda I*, 2013 WL 6331287, at *14 (quoting *STAAR Surgial Co. v. Waggoner*, 588 A.2d 1130, 1137 (Del. 1991), *abrogated by statute on other grounds* (codified at 8 *Del. C.* § 204, 8 *Del. C.* § 205)). In assessing whether a writing is sufficient to establish that stock was validly issued, stock certificates or stock ledgers may be used as evidence of stock ownership, but do not on their own establish that the stock was validly issued. *See, e.g.*, *Pogue v. Hybrid Energy, Inc.*, 2016 WL 415423, at *1 (Del. Ch. Aug. 5, 2016) ("[The plaintiff] was … represented on [the defendant company's] stock ledger," but "[t]he evidence in the record … demonstrates that the 2011 'stock issuance' was void and that [the plaintiff's] stock certificate is a nullity.").

Here, the evidence in the record does not support a finding that the stock issuances at issue were the subject of a legitimate written instrument evidencing board approval. Therefore, the stock issuances were void.

*a. Defendants Relied on Fabricated 1996 Minutes to Establish their Stock Ownership.*

Because the underlying dispute about stock ownership centered around Defendants' ownership percentage, Defendants bore "the burden to establish [their] percentage based on the stock ledger, stock certificates, or other extrinsic evidence," which Plaintiff could then rebut. *Numoda I*, 2013 WL 6331287, at *13. To satisfy that burden, Defendants relied entirely "on documents suggesting that, at a November 15, 1996, Board meeting …, the Board voted to issue Clifford 300,000 shares of stock for each of his prior seven years of services." Op. at 19. However, based on the evidence in the record, the trial court found that "over the decade following the 1996 Meeting, Defendants manipulated the corporate records by writing, rewriting, and backdating many drafts of the minutes to suggest the Board voted to issue Clifford the 2.1 million shares in 1996." *Id.* at 19-20.

In so finding, the trial court noted that there were "17 different sets … of draft minutes from the 1996 Meeting," which all "show a demonstrable lack of contemporaneity to the 1996 Meeting." *Id.* at 20, 21. The trial court similarly found that "many of the draft minutes are inconsistent with each other," with "material conflicts between two groups of the minutes[.]" *Id.* at 22. As a result, the trial court found that "[t]he preponderance of the evidence in this case suggests Defendants drafted minutes in [a] font that did not exist until over a decade after the 1996 Meeting took place and manufactured over a dozen, ever-evolving drafts of the 1996 Meeting minutes long after the meeting occurred[,]" which suggested that "Defendants saw drafting the 1996 Meeting minutes as little more than a creative writing exercise." *Id*. at 27–28. In other words, the trial court found that "Defendants created over a dozen sets of falsified draft minutes in the decade that followed the 1996 Meeting," such that "Defendants actively falsified documents designed to rewrite history[.]" *Id.* at 89-90. Based on those findings, the trial court concluded that "it seems likely if not nearly certain, that the Board did not vote to issue Clifford 2.1 million shares in 1996." *Id.* at 90. Thus, the various sets of minutes from the purported 1996 minutes—which were the sole documents upon which Defendants relied to establish their stock ownership from the 1996 issuance (*id.* at 19)—were not legitimate and could not be used to establish a valid stock issuance.

##### *b. The Court Erred in Relying on Minutes and Stock Certificates from 2004 and 2009.*

Despite making the extraordinary finding that Defendants—acting at all times as fiduciaries of a Delaware corporation—spent a decade fabricating and falsifying corporate meeting minutes, which precluded a finding that Defendants validly issued stock to themselves in 1996, the trial court nevertheless went on to conclude that Defendants may still have acted at some later date to validly issue themselves the exact stock at issue in the 1996 minutes. *See, e.g.*, Op. at 92 ("[I]t is entirely possible—and indeed more likely than not—that, over the course of a decade or more, Defendants both acted to fabricate draft minutes of the 1996 Meeting and also later voted to issue, and then issued, themselves the disputed shares of stock."). But the trial court was not even able to say with any certainty when these supposed stock issuances took place and, therefore, did not determine what document (if any) constituted the requisite written instrument evidencing board approval necessary to have a valid stock issuance. *See, e.g.* Op. at 69 (finding that "the stock Defendants issued themselves … occurred sometime between 2004 and 2009."). Instead, the trial court pointed to certain Board meeting minutes from 2004 and 2009, as well as a stock certificate ("Certificate 1370"), none of which satisfy the statutory requirements for a valid stock issuance.[4] *See* Op. at 90–91.

The trial court first relied on purported meeting minutes from a Board meeting in April 2004. However, the April 2004 minutes exist only in draft form, without any indicia of formal approval by the Board. (*See* Op. at 29 (referring to the "draft set of minutes for a Board meeting on April 1, 2004"); *see also* A0220 (JX0327 at 2).) As the trial court notes, there are *two* materially different sets of unsigned 2004 Draft Minutes. (Op. at 25 n.89 (citing JX0327 (A0219) and JX0328 (A0221) with a "*but see*" signal).) Neither draft identifies who is on the board, or even how many members the board has – a fact not clarified by the signature blocks, which anticipate execution by MEI's *officers*. (A0220 (JX0327) and A0221 (JX0328)); *but see*

[4] The trial court criticized Plaintiff for not "wrestling" with the 2004 and 2009 meeting minutes or Certificate 1370 in post-trial briefing. Op. at 91. However, as discussed above, Defendants bore the burden of establishing their stock ownership, and Defendants relied solely on the fabricated and falsified 1996 meeting minutes. Op. at 19. Pre-trial, Plaintiff specifically addressed the 2009 minutes, and the post-1996 stock certificates, in the context of Plaintiff's reconstruction of Defendants' document falsifications. (A0490–94 (Plf. Pre-Trial Br. at 23–27).) At trial, Plaintiff spent considerable time examining Clifford to support that reconstruction. (A1034–1055, T.T. 502:4–523:23 (Clifford)). Defendants' attempted rehabilitation did not include presenting either of the 2004 Draft Minutes, the 2009 minutes, or Certificate 1370 at trial, even after the trial court directly asked Clifford, on the witness stand, whether he had participated in falsifying the 1996 minutes. (A1128–1130, T.T. 596:2–598:2 (Clifford).) Post-trial, Defendants had raised no argument based on the validity of the 2004 or 2009 minutes, or Certificate 1370. Plaintiff, who had the Answering Brief, had nothing to wrestle *with*.

*Grimes v. Alteon, Inc.*, 804 A.2d 256, 261 ("[I]t is well established in the case law that directors must approve a sale of stock. This duty is considered so important that the directors cannot delegate it to the corporation's officers.").

The 2004 Draft Minutes do not identify the *membership* of the board supposedly meeting, they are not signed by any attendee, and the warring drafts disagree about whether the board resolved to issue 7.5 million shares to the Defendants, or 4 million to the defendants and 350,000 to Salloway. (*Compare* A0219 (JX0327) *with* A221 (JX0328).) Moreover, the trial court recognized that these purported meeting minutes were undertaken at the same time, and in connection with, Defendants' scheme to falsify the purported 1996 minutes. *See* Op. at 24-27 (considering "Lazier's handwritten notes describing specific changes he wanted to make to the 1996 draft minutes in or after 2004"); *id.* at 25 (finding that "[a]round this same time"—meaning, around the time that Defendants were falsifying the 1996 minutes—"Defendants created a set of minutes for a Board meeting on April 1, 2004"). Given these findings, and without formal execution, the 2004 Draft Minutes do not satisfy the writing requirements for a valid stock issuance under the DGCL. Simply, put, the 2004 Draft Minutes do not even rise to the level of "official minutes" which could potentially be "evidence of a bona fide effort bearing resemblance to a corporate act but for some defect that made it void or voidable." *In re Numoda Corp. Shareholders Litig.*, 2015 WL 402265, at *10 (Del.

Ch. Jan. 30, 2015) ("*Numoda II*"), *aff'd* 128 A.3d 991 (Del. 2015). As a result, the 2004 Draft Minutes would not even be an acceptable basis for validating shares in a Section 205 action, let alone validation in equity. *Holifield v. XRI Invest. Holdings LLC*, 304 A.3d 896, 931 (Del. 2023) (noting that Sections 204 and 205 provide mechanisms to validate corporate acts which are otherwise incurable).

Recognizing simply that the April 2004 minutes were not signed, the trial court also pointed to meeting minutes from January 2009 to support the finding that Defendants, at some point, must have, validly issued shares to themselves. *See* Op. at 32-33. In these minutes, the Board purported to "reaffirm[]" the 1996 vote to issue Defendants shares, which, as set forth above, the trial court found to have never taken place. *Id*. at 32; *see also* A0223 (JX0340). The 2009 minutes similarly purported to "reaffirm[]" the April 2004 vote to issue Defendants shares, which, as set forth above, was never formally executed and which occurred during (and as part of) Defendants' scheme to falsify the 1996 minutes. Op. at 33; *see also* A0223 (JX0340). However, to the extent that the Board was intending to ratify these purported stock issuances in 1996 and 2004,[5] it could not ratify "an act that was

[5] Plaintiff notes that Defendants did not argue, and the trial court did not consider or decide, whether the 2009 minutes reflected an effort to ratify the purported 1996 or 2004 stock issuances under 8 *Del. C.* §§ 204, 205. Plaintiff further notes that the 2009 minutes do not use the term "ratify" and do not appear to satisfy the statutory requirements for ratification, including, for example, the "nature of the failure of

never taken but that the corporation now wishes had occurred, or … 'backdate' an act that did occur but that the corporation wishes had occurred as of an earlier date." *Numoda II*, 2015 WL 402265, at *9 (quoting C. Stephen Bigler & John Mark Zeberkiewicz, *Restoring Equity: Delaware's Legislative Cure for Defects in Stock Issuances and Other Corporate Acts*, 69 Bus. Law. 393, 403 (2014)). In other words, "[t]he Court cannot determine the validity of a defective corporate act without an underlying corporate act to analyze." *Id*.

In addition to the April 2004 and January 2009 minutes, the trial court also considered Certificate 1370 in connection with its conclusion that the Board issued the stock "sometime between 2004 and 2009." *See* Op. at 34-35, 69, 90-91. Certificate 1370 purports to reflect the issuance of 2.1 million shares to Clifford in November 1996. *Id.* at 34; *see also* A0216 (JX1168). However, despite being dated in 1996, Certificate 1370 purports to be signed by a corporate secretary who was not appointed until the 2004 Draft Minutes, meaning that "Certificate 1370 is backdated." *Id.* The trial court was not able to determine when, exactly, Certificate 1370 was issued, stating that the signature was "consistent with the draft April 2004 minutes," while also suggesting that Certificate 1370 was "consistent with the notion

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authorization" with respect to those purported stock issuances. 8 *Del. C.* § 204(b)(1)(D).

that" the Board voted to issue the shares "in 2004 or 2009." *Id.* at 34-35.[6] However, as set forth above, the April 2004 and January 2009 minutes do not satisfy the statutory requirements for a valid stock issuance. Therefore, Certificate 1370—which the trial court found to relate to either of those sets of minutes—is also not evidence of a valid stock issuance. *See, e.g.*, *Pogue*, 2016 WL 415423, at *1 (finding that a stock certificate or a stock ledger is a nullity where the evidence in the record demonstrates that the stock issuance was void).

In relying on the April 2004 Draft Minutes, the January 2009 minutes, and Certificate 1370, the trial court stated that, with respect to the purported stock issuances, the "Board's intention from 2004 onward was demonstrably clear." Op. at 90. However, the Board's intent—and even informal attempts to take action on that intent—is immaterial to the determination of whether or not the Board satisfied the requisite corporate formalities under the DGCL. *See, e.g.*, *Numoda I*, 2013 WL 6331287, at *16 ("The Numoda Corp. board may well have informally decided to issue stock, and the directors and purported stockholders may have conducted themselves as if the stock had been issued. But, even a shared understanding of what

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[6] As the trial court noted, MEI's internal records indicated that as of late 2008, MEI's outstanding share certificates still had the Defendants at 37.63%. (Op. at 31 (citing JX1029 (A0225) and JX1030 (A0230)).) The shares from the purported 1996 and 2004 issuances were, at that time, logged as "not yet issued." *Id.*

was intended is insufficient to satisfy the DGCL's strict requirement of a written instrument."). In the absence of any legitimately executed writing evidencing Board approval to issue shares, the purported stock issuances were void.

### *2. Laches Cannot Save Void Acts.*

Despite Plaintiff presenting evidence and arguing below that the purported stock issuances to Defendants were void, it is not clear whether the trial court also believed that all challenges to the issuance of MEI shares to Defendants—whether because they were void altogether, or were not entirely fair to MEI, fell into the bucket of "non-Merger claims" to which the trial court categorically applied laches. *See* Op. at 83 ("Laches, then, presumptively bars all non-Merger claims derived from Defendants' discrete acts, and those claims find no sanctuary in the doctrine of equitable tolling."). To the extent it did so, the trial court committed legal error because equitable defenses, including laches, cannot validate void acts. *See, e.g.*, *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 310 A.3d 985, 994 (Del. Ch. 2024) ("Equitable defenses, including laches, cannot validate void acts.")[7]; *id.*

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[7] Notably, the court in *W. Palm Beach* distinguished a prior case from the Court of Chancery that suggested that a claim related void stock issuance could be time-barred by the application of laches. *See, e.g.*, *Kraft v. Wisdom Tree Invest., Inc.*, 145 A.3d 969, 988 (Del. Ch. 2016). Specifically, the court in *W. Palm Beach* explained that although considering a void act, the court in *Kraft* relied on cases involving voidable acts, which led to the incorrect application of an equitable defense. *W. Palm Beach*, 310 A.3d at 998–99. It is also worth noting that, since *Kraft*, this Court

at 994 ("[L]aches is not an available defense" to "a claim of statutory invalidity[.]"); *see also Holifield v. XRI Invest. Hldgs. LLC*, 304 A.3d 896 (Del. 2023) (recognizing that equitable defenses cannot validate void acts); *Klaassen v. Allegro Development Corp.*, 106 A.3d 1035, 1046 (Del. 2014) (recognizing the well-established principle that "only voidable acts are susceptible to … equitable defenses") (internal citation omitted).

Thus, any application by the trial court of the doctrine laches to Plaintiff's claims relating to Defendants' self-interested stock issuances, which did not satisfy the requisite statutory formalities, was legal error. As a result, this Court should reverse.

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has since reaffirmed that equitable defenses do not apply to void acts. *Holifield*, 304 A.3d at 921–22.

## II. THE TRIAL COURT ERRED WHEN IT ASSUMED FOR VALUATION PURPOSES WITHOUT DECIDING THAT MEI'S OWNERSHIP OF THE *WHYDAH* REMAINS ENSNARED WITH THE JOINT VENTURE AGREEMENT AND OPERATIONS AGREEMENT

### A. Question Presented.

Did the trial court err in assuming for valuation purposes that the JVA and OA survived until the Defective Merger, while declining to rule on whether it had expired, when its findings of fact were that it had already expired and not been extended and that issue was presented to the trial court for decision? (Op. at 57–58, 104 n.391.) (Preserved at A0362, A0395–96, A0430–31, A0442–43, A0898–932, A1135–1140, and A1530–1536)

### B. Scope of Review

Questions of contract interpretation are reviewed *de novo*. *Sunline Comm. Carriers, Inc. v. CITGO Petrol. Corp.*, 206 A.3d 836, 845 (Del. 2019). The trial judge's factual determinations are reviewed for clear error. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

### C. Merits of Argument

MEI's *Whydah* treasure is, by Defendants' own reckoning, worth hundreds of millions of dollars. (Op. at 112.) The WJV's two contracts, the JVA and OA, gave International control of the deployment of that treasure and a claim on a significant portion of its revenues and profits (or proceeds upon a sale). (Op. at 8–9.) But, the JVA and OA, and through them the conceptual WJV, would expire by their terms, absent an extension, on December 31, 2017.[8] (Op. at 9.)

The legal validity of the WJV would become a critical issue in this matter for two reasons. First, nearly the entirety of the Defendants' arguments and presentations at trial depended on their belief that the WJV was in force and effect at the time of the Defective Merger, and therefore made up a material portion of the consideration that MEI was to receive in the Defective Merger. Op. at 57 ("Dr. Margolin's opinion relies heavily on the survival of the JVA"); *id*. at 104 (noting that even if "the JVA survived until the [Defective] Merger, Defendants still do not meet their burden of showing the price was within the range of fairness.") (footnote

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[8] This issue was presented to the trial court and preserved: (a) in the Pretrial Order, at ¶ 49 (A0362); (b) in Plaintiff's Pretrial Brief, at 8–9, 27,43–44, and 55–56 (A0395–96, A0430–31, A0442–43); (c) through cross-examination of Defendant Clifford at trial, at TT 372:4-406:15 (A0898–932) (citing JX1031, A0233; JX0045 (A0085); JX0357 (A0236); JX0359 (A0239); JX0631 (A0324); JX0448 (A0318)) and upon questions to Mr. Clifford by the Court, at TT 609:16–614:7 (A1135–1140); and (d) in Plaintiff's Answering Post-Trial Brief at 42–48 (A1530–1536).

omitted). Second, the minority stockholders of MEI need to know whether, going forward, any deployment of MEI's assets, including the *Whydah* treasure, were subject to the direction of persons or entities other than the MEI board of directors, and whether any revenues, profits, or sale proceeds, would first need to run through the WJV's financial provisions.

Recognizing that expiration of the WJV would have eroded International's (and thus their own) separate control and economic rights on the *Whydah* treasure, the Defendants argued in this proceeding that WJV, the JVA, and OA had been extended past the date of the Defective Merger. The issue was joined in the Pre-Trial Order. (A0362.) In the Pre-Trial Briefs, the Defendants argued for the validity of extensions in 2016 and 2018 (A0475 (citing JX0448 (A0319), and JX0634 (A0323))), while the Plaintiff attacked the proffered extensions as documents bearing numerous hallmarks of falsification—they never occurred, and even if they had, they were patently unfair, self-dealing corporate waste. (A0442–44.) The documents were the subject of extensive trial examination. (T.T. 391–408 (Clifford) (A0923–0940).) As Plaintiff argued in Post-Trial Briefing, trial showed the purported JVA extensions all failed. (A1536–42.)

The trial court's factual findings agreed with the Plaintiff's position: none of the extensions had occurred. (Op. at 57–58.) Indeed, if one reads the trial court's findings of fact on this matter the only thing missing from the cited paragraph would be the natural, legal conclusion of some version of: "And therefore, the court finds that the WJV expired by its terms on December 31, 2017."

In its Legal Analysis, however, the trial court makes clear that it had not taken the final step of finding that the WJV had expired, but rather, noted it had "serious reservations about whether the JVA remained intact" and further held that it "need not resolve that issue" as it analyzed whether the WJV provided a component of the "fair price" analysis of the Defective Merger. (*Id.* at 104.) The trial court made this declaration on the basis of the fact that *even assuming* the WJV had remained intact, and thus MEI's economic claims on the *Whydah* assets and income was encumbered by the JVA's terms, the Defective Merger was *still* at an unfair price. (*Id*.) The trial court went on to complete its analysis of the entire fairness of the Defective Merger—particularly as to the fair price prong—assuming the WJV and its Sliding Scale provisions would apply to MEI going forward.

This failure to ultimately rule whether the WJV remains in place was error and leaves MEI and its stockholders with material levels of uncertainty and potentially subject to contractual relationships to which, for years, no party had ever enforced against the other. Op. at 36 ("By 2016, Defendants ran most of the Whydah Joint Venture's business through a new company, Historic Shipwrecks, Inc."); *id.* at 38 ("Defendants put themselves in complete control over the disposition of this income, which should have predominantly been subject to distribution under the

Sliding Scale. . . After creating HS, Defendants appear to have halted the Whydah Joint Venture's operations."); *id.* at 40 (noting that the Yarmouth museum "is not run through HS, MEI, International, or the Whydah Joint Venture" but instead through yet further Defendant-owned side-entities); *id*. at 100–01 n.386 ("Defendants have done little actual work through MEI or the Whydah Joint Venture since at least 2006); T.T. 406:16–416:6 (Clifford) (trial examination showing complete lack of adherence to the JVA and OA in either form or substance) (A0930–0940); JX1010, A0351 (admitting MEI has never received any payments through the Sliding Scale).

The trial court's remedy for the unfairness of the Defective Merger was rescission, to "place all parties in the positions they were in before the [Defective] Merger." (*Id*. at 120.) The continued survival of the JVA and OA is a question of paramount importance to *what those positions were*.

Post-trial, final judgments "shall grant the relief to which the party in whose favor it is rendered is entitled." Del. Ch. 54(c). "Shall" is "mandatory language." *Sjunde AP-fonden v. Activision Blizzard, Inc.*, 2024 WL 863290, at *4 (Del. Ch. Feb. 29, 2024) (explaining that "shall" is mandatory language); *see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("the mandatory "shall" . . . normally creates an obligation impervious to judicial discretion"). The issue having been raised, joined and tried, and the predicate facts essentially found in Plaintiff's favor, it was legal error for the trial court to decline to "resolve" the issue. MEI was entitled to a judgment on this matter, and this Court should remand with the instruction that the trial court rule whether the WJV was properly extended before it had extinguished by its terms.

While the trial court did not find that Plaintiff's challenges to the purported extensions of the JVA were barred by laches, the trial court's overarching laches ruling does not change the analysis. The Court set Plaintiff's books-and-records demand as the lookback date for laches. (Op. at 83.) That demand was January 9, 2019. (*Id*. at 59.) Both of the putative extensions were dated within the three-year lookback window. (Op. at 57–58.)[9]

From International's perspective, the WJV is its key asset, its *raison d'être*. From MEI's perspective, the WJV is its key encumbrance. The Defendants, owning 100% of International, have a personal interest adverse to MEI, wanting to maximize International's claims on the *Whydah* assets and income.

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[9] A third document supposedly changing the term, dating from 2011, would have *shortened* the JVA and OA's duration by a year. (Op. at 57.) The trial court also gave weight to Plaintiff's evidence and argument that the March 2016 date on the earlier of these putative extensions, which it described as the "only potentially viable extension," is not authentic. (*Id.* at 58 n.243.) Further, it noted that this putative extension was not executed by MFC, which was a requirement for amendments under the JVA. *Id*. at 58.

Having ordered the parties to return to their pre-merger positions, but left the Defendants as controlling stockholders of MEI, establishing that MEI's ownership of the *Whydah* treasure and artifacts is free from the WJV's encumbrance is of paramount importance, lest Defendants *continue* to abuse and exploit MEI's minority stockholders and divert the profits and revenues to their own pockets. The issue was tried, and Plaintiff prevailed under the facts as found by the trial court. The trial court should have issued a ruling accordingly.

## CONCLUSION

Plaintiff respectfully requests that the Court reverse the trial court's decision on the two matters raised in this appeal and find that (1) the challenged share issuances were void that any shares of MEI stock issued to defendants in 1996 and thereafter are subject to cancellation, and (2) declare that the Joint Venture Agreement and Operations Agreement expired and terminated by their terms on December 31, 2017.

Dated: July 8, 2025

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