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Case Number 228,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PAUL S. BUDDENHAGEN, individually and on behalf of All other similarly situated, and derivatively on behalf of MARITIME EXPLORATIONS, INC.	:	
Plaintiffs-Below, Appellants,	:	
v.	:	C.A. NO.: 228,2025
BARRY L. CLIFFORD and THE ESTATE OF ROBERT T. LAZIER,	:	Case Below: Court of Chancery of the State of Delaware,
Defendants-Below, Appellees,	:	C.A. No. 2019-0258-NAC

(CORRECTED) ANSWERING BRIEF OF APPELLEES BARRY CLIFFORD AND THE ESTATE OF ROBERT T. LAZIER

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NATURE OF PROCEEDINGS

Through this appeal, Appellant/Plaintiff-below ("Buddenhagen") continues his pattern of overreach by effectively seeking two declaratory judgments that he never sought in the court below.

First, since this action was filed over six years ago, in April 2019, and through three verified complaints, Buddenhagen repeatedly and consistently alleged that Defendants, Barry L. Clifford ("Clifford") and the Estate of Robert T. Lazier ("Lazier," and together with Clifford, the "Defendants"), were Maritime Explorations, Inc.'s ("MEI" or the "Company") majority stockholders who must demonstrate the entire fairness of the Merger (defined below). Now, on appeal, Buddenhagen asks this Court to rule on an eleventh-hour theory that he raised for the first time in the Pre-Trial Order, that Defendants were not majority stockholders at all. Putting aside the procedural problems and prejudice that would have resulted if the Court of Chancery had adopted Buddenhagen's late breaking theory, the court below did not err in its factual findings that (1) Defendants were majority stockholders of MEI at the time of the Merger; (2) that Buddenhagen's own decades of delay in asserting these claims barred ***him*** from pursuing such claims; and (3) that Buddenhagen waived his right to challenge the April 2004 and January 2009 meeting minutes and MEI stock certificate 1370 which were the basis for the finding below.

Second, Buddenhagen contends that the court below erred by not issuing unrequested declaratory relief regarding the current status of a joint venture partnership that had been in place since 1987 in connection with its rescissory remedy. Buddenhagen did not pursue a declaratory judgment regarding the current status of the JVA (defined below) and the Court of Chancery was not mandated to resolve every contention that Buddenhagen raised in connection with issuing its remedy. Indeed, neither the Whydah Joint Venture (defined below), nor MEI's past or present partners in the joint venture, Maritime Finance Company ("MFC"), Whydah Partners, LP ("WPLP"), and Whydah International, Inc. ("Whydah International"), were parties to the underlying action.

While Buddenhagen may have preferred the leverage that invalidation of Defendants' shares or an outsized judgment would have afforded him in his ongoing personal vendetta against Clifford, the Court of Chancery did not err in granting the relatively simple and logical remedy of rescission of the Merger. The post-trial ruling of the Court of Chancery should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery did not err in its factual findings that (1) Defendants were the Company's majority stockholders, (2) that Buddenhagen's decades of delay barred him from challenging those stock issuances, and (3) that Buddenhagen waived his right to challenge the April 2004 and January 2009 meeting minutes and MEI stock certificate 1370 which were the basis for this finding below.

2. Denied. The Court of Chancery did not err in not issuing unrequested declaratory relief regarding the current status of the JVA in connection with its rescissory remedy.

STATEMENT OF FACTS[1]

A. The Parties

Defendant Clifford is MEI's founder and, at all times, has been a director and the Company's largest stockholder. (Op. at 3; A0357 ¶ 2). Following the death of Lazier during this litigation, he was MEI's only remaining director.

Defendant Lazier was also a stockholder of MEI who served as a director since the Company's founding until his death in April 2020. (Op. at 3). Mr. Lazier was a party to the action at the time of his death, and his Estate was substituted as a Defendant on July 2, 2020. (*Id.*; D.I. 49).

Plaintiff is the holder of 1,450,000 shares of MEI stock, which were issued to him in 1992, in lieu of $5,000 cash compensation that MEI was unable to pay pursuant a personal services agreement.[2] (Op. at 3; A0356-57 ¶ 1; A0591).

B. MEI's Was Perpetually Underwater

After laying under the ocean floor for more than 250 years, in 1982, Clifford, through his company, Maritime Underwater Surveys Inc. ("MUS"), discovered the wreck of the *Whydah* and won the exclusive rights to excavate the wreck site. (Op.

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[1] The Operative Complaint is appended to hereto and cited herein as B0001-0030. The Opinion is attached to Plaintiff's Opening Brief as Exhibit A and cited herein as "Op.". Plaintiff's Opening Brief on Appeal is cited herein as "OB".

[2] Plaintiff initially held 1,500,000 shares of MEI stock and in 1992, he sold 50,000 shares of his MEI stock to former plaintiff, Brent R. Dibner. (A0528).

at 4-5). "In May 1983, … Clifford formed MEI to facilitate his excavation of the *Whydah* wreckage." (*Id.* at 5). "After forming MEI, Clifford and MUS assigned their rights in the *Whydah* to MEI." (*Id*.).

As Buddenhagen acknowledged in the Operative Complaint, "[e]ven with 20th Century technology to assist, treasure hunting was and continues to ***be an expensive (and sophisticated) endeavor***." (B0005 (¶ 13) (emphasis added). (*See also* A1416 ("In 1987, Harvard Business School commissioned a study of MEI and concluded that it needed to raise between $25 million - $30 million for the project. MEI never came close to raising those amounts.") (citing B012-24; B0125-45; A0700-01; A0687)). Although "MEI raised over $1 million in financing through two private placements between 1983 and 1986[,]" all of those funds were rapidly depleted by 1987. (Op. at 5;*See also* A0689-90). Indeed, "financing from the private placements did not last long, and Clifford soon found himself, again, in need of funding to facilitate his dives on the *Whydah* site." (Op. at 6). Throughout MEI's history, it has resorted to "issu[ing] stock to compensate those involved in its excavation and business operations." (*Id.* at 5). This included stock issuances to Clifford and Lazier, as well as Buddenhagen. (*Id.* at 29, 33).

C. <u>The Transformative Whydah Joint Venture of 1987</u>

In February 1987, Clifford secured the largest infusion of capital yet for MEI through a partnership known as the Whydah Joint Venture, between WPLP, led by

Roland Betts and Tom Bernstein, and MFC.[3] (Op. at 6; A0085-118). The Whydah Joint Venture was governed by a Joint Venture Agreement (the "JVA") and an Operations Agreement, both under New York state law, whereby "MEI assigned its rights in the *Whydah* to MFC, and MFC assigned those rights to the Whydah Joint Venture." (*Id.* at 7; OB 6). The Operations Agreement stated that MEI "represents and warrants that it owes MUS, a corporation wholly owned and controlled by Barry Clifford, president of [MEI], $150,000 for the assignment to [MEI] in 1983 of its custodianship of the [*Whydah*] and the Property, along with the [] permit to explore and excavate the Permit Area." (A0087, A0120-21 § 1.3).

"[T]he Whydah Joint Venture made certain distributions to MEI to finance its continued excavation operations[,]" in increments totaling $6 million. (Op. at 7). Aside from the assignment of the rights to the *Whydah* site (for which MEI failed to ever pay Clifford or MUS), MEI made no independent financial contributions in connection with the Whydah Joint Venture. (*See, e.g.* A0086-87 (§ 2)). The JVA provided for a sliding scale comprised of $6 million increments, where "WPLP would receive 80% of the first $6 million in Net ***Proceeds*** from the sale or lease of *Whydah* artifacts and incrementally less of the marginal dollar at each rung of the ladder." (Op. at 8-9) (emphasis added). "Net Proceeds" are defined by the JVA as

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[3] The Whydah Joint Venture was not named as a party to this action, nor were WPLP or its successor, Whydah International, or MFC.

"[p]roceeds from the sale or lease of the Property, plus the Joint Venture's share of revenues from exploitation of Ancillary Rights (defined in Paragraph 8), ***net*** of obligations to any governmental agency and all third party sales fees, commissions and expenses (here referred to as 'Net Proceeds')[.]" (A0092-93 (§ 6.2) (emphasis added); *see also*, A0102 (§ 8.2) (describing net revenues)). The JVA also provides for a "term" through December 31, 2017, absent an amendment to extend its term in accordance with Section 15.1.3. of the JVA. (Op. at 9; A0103 (§ 9), A0109 (§ 15.1.3.)). The JVA includes detailed dissolution and liquidation provisions for the orderly winding up of the Whydah Joint Venture. (A0108-11 (§§ 15, 16)).

The Whydah Joint Venture was initially controlled by a six-member board, but "the three members WPLP appointed had veto power and thus final decision-making authority over the Whydah Joint Venture." (Op. at 8; A0096-100 §§ 7.1, 7.2, 8.1).

Upon the formation of the Whydah Joint Venture, MEI estimated that its operating expenses for June through December 1986 were $400,000 - $500,000. (A1417 (citing A0123-24 § 2.2)). That burn rate is supported by the fact that by 1990 (four years after executing the JVA), the Whydah Joint Venture could only afford to fund preservation (not excavation) activities. (A1417). "MEI once again faced financial difficulty and operated at a loss in 1990 and 1991." (Op. at 14 (citing B0234-39)).

D. Buddenhagen Wreaks Havoc on the Partnership with WPLP.

Buddenhagen had a short, but tumultuous tenure as a consultant to MEI from 1991-1993. (*See generally* A1418-22). Buddenhagen was hired as a consultant to help negotiate on behalf of MEI against the more sophisticated investors from WPLP. (A0543-44). Specifically, in connection with the first museum exhibit at Pilgrim's Monument, Buddenhagen advanced an argument similar to the one that he advanced at trial: that MEI was entitled to a portion of the revenues of the exhibit without first paying for the expenses of the exhibit. (A1419 (citing B0209-11; B0216-18; B0219-20; B0229; B0212-13; B0214-15; B0221-22; B0226-28; A0600-18)). WPLP strongly rejected this argument as inconsistent with the terms of the JVA. (A1419 (citing B0205-08)). (*See* A0092 (§ 6.2), A0102 (§ 8.2)). Buddenhagen then became more belligerent in his correspondence with MEI's investors and undermined the relationship with those investors at a crucial time for the project. (A1419-20 (citing B0223-25; B0229; B0170-92; B0193-94; B0195-97; B0198-202; B203-04; A0714-15)). Shortly thereafter, and following a vulgar incident at the Harvard Club (Op. at 12), WPLP called for Buddenhagen's termination (A1420-21 (citing (B0230-33)) and Clifford and Lazier terminated him. (A1421 (citing B0240-42); A0715, A0720-22).

E. The Whydah Joint Venture Buyout

In 1992, after operating at a loss for two consecutive years, WPLP obtained an appraisal of the treasure from Sotheby's Appraisal Company ("Sotheby's") valuing the artifacts at $220,000 to $350,000[,]" noting that if the artifacts were sold together, they could be valued higher; but Sotheby's determined such circumstances would make it "difficult to estimate the collection's potential." (Op. at 15) (quotations and citations omitted). With such a meager valuation of the artifacts, WPLP began to look for other options, including opening potential museums in Boston and Tampa, but both fell through on account of the *Whydah*'s history as a vessel built and initially used to transport people into slavery. (*Id.* at 15-16). After both museum endeavors fell through, WPLP began looking for an exit from their investment and the Whydah Joint Venture. (*Id.* at 17).

WPLP advised MEI that it was looking for an investor to buy its stake in the Whydah Joint Venture. (Op. at 17). At the time, Buddenhagen was aware of and discussed WPLP's desire to be bought out with John Begg, another MEI stockholder who later offered to buy WPLP's interest on his own; however, WPLP "focused on their negotiations with Lazier." (*Id.*).

In April 1995, Lazier paid for a $50,000 option for the purchase of WPLP's interest in MEI. (Op. at 17). "[D]espite calling 'a million people,' [Lazier] remained unable to find meaningful co-investors before the option expired." (*Id.* at 18)

(citation omitted). Lazier formed a new entity, Whydah International, and secured funds to purchase WPLP's interests. (*Id.*). On December 29, 1995, Whydah International purchased "100% of [WPLP's] interest in the Joint Venture (including recovered artifacts and ancillary rights owned by the Joint Venture) other than cash and certain coins[4] described on Exhibit A[]" for $500,000. (A0138 (¶ 2), A0139 (§§ 1, 2); Op. at 18). MFC also executed the Joint Venture Interest Acquisition Agreement, "as required under Section 10 of the JVA for transfers of Whydah Joint Venture interests." (Op. at 18).

Plaintiff argued that MEI had "many ways" it could have bought WPLP's interests in the Whydah Joint Venture in 1995, but there is no evidence whatsoever that MEI had the financial ability to exploit that opportunity. (A1547; A0701-05; B0097-99, B0110). The record overwhelmingly demonstrated that it could not have done so. (A0701-05). (*See also* A1423 (citing B0152; B0155-57; B0158-59; B0161-62; B0166-69; B0223-25; B0146-49; B0150-51; B0153-54; B0160; B0163-65; B0097-99, B110)).

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[4] In addition to the cash consideration, WPLP also retained certain coins as tokens or "trinkets" for their investors when WPLP sold to Whydah International. (B0113). The record is muddy as to the exact number of coins. (A1424). The Joint Venture Interest Acquisition Agreement suggest that it was 681 coins. (A0138). The Opinion notes that Whydah International provided WPLP with 381 coins. (Op. at 18 n. 70). Non-party witness Roland Betts made clear that the inclusion of the coins was his decision, that WPLP viewed them as "trinkets" worth $25-$30 "with the frame" and that far less than 681 coins were given to WPLP in the transaction. (B0113).

F. The Defendants' Decades of Beneficence

Defendants, through Whydah International, stepped into the shoes of WPLP after the buyout and continued to operate the Whydah Joint Venture, including controlling the decisions and its treatment of "Net Proceeds," under the JVA as net of expenses. (A0092 (§ 6.2) (emphasis added)).

Over many years, Clifford and Lazier breathed life back into MEI's sails and ensured that the complicated and expensive excavation and preservation of the *Whydah* was continued in order to protect MEI's interests in the artifacts and the wreck site under its permit. Clifford and Lazier leveraged the museum-based business model identified by WPLP and a popular exhibit at the Pilgrim's Monument, then slowly built upon it to (a) promote the *Whydah* project and history, and (b) offset some of MEI's massive preservation and excavation expenses. (A0726-28; B0063-64, B0092).

Without any other outside investments, MEI generated *de minimis* revenue from the operation of the museums (ticket and gift shop sales) while continuing to incur significant costs for its excavation and preservation of the *Whydah* and its artifacts, an admittedly "expensive (and sophisticated) endeavor." (B0005 (¶ 13)).

In 2006, a decade after Lazier bought out WPLP, Clifford secured a contract with National Geographic for a touring exhibition of the *Whydah* artifacts called *Real Pirates*. (Op. at 36). The *Real Pirates* exhibition ran through 2012 and

generated meaningful revenues but did not come close to satisfying the arrears from "a decade of operations, and massive conservation and preservation work associated with the project."[5] (Op. at 39; A1428 (citing A0772-77)).

Clifford and Lazier's decades of beneficence ensured that MEI could continue its mission by providing MEI with use of Cape Cod real estate, including 16 McMillan Wharf, the Brewster laboratory and the Yarmouth museum, a large research vessel and various tender boats, including those vessels' dockage, storage and maintenance, dive and excavation equipment, and archaeologists, to name a few.[6] (A1425-28). In return, Clifford and Lazier were compensated (poorly and partially) with equity in MEI due to the lack of cash flows and high expenses and hoped to recover something for their contributions if they were ever able to monetize the project. (A1427).

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[5] The $1 million advance from the 2006 *Real Pirates* exhibition that Buddenhagen refers to as "substantial revenues" is the largest revenue source that Buddenhagen can identify. (OB at 12). Of course, that exhibition followed ten years in which Lazier and Clifford were self-funding the operations, which in 1986 were estimated to be $1 million per year, and providing MEI with access to wharf-front real estate and expensive marine vessels and dive equipment without any meaningful monetary compensation, much less reimbursement. (A1417, A1425-28).

[6] Plaintiff mistakenly suggests that Defendants "took possession of one of MEI's museums in Provincetown." (OB at 14). But MEI never owned a museum. Mr. Lazier purchased 16 MacMillan Wharf in Provincetown and permitted MEI to use it for free because he knew that MEI did not have the funds to pay for it. (A0489; A1425-26) (citing A0740-46; B0243-50)). Mr. Clifford purchased the Yarmouth museum, funding that purchase, in part, with a mortgage on his home. (A0496; A1429-30).

Simply put, and contrary to Buddenhagen's mistaken counter-narrative, while there were some minimal revenues, MEI never earned any "***profits***." Its expensive operations and arrears were far beyond anything that its limited revenues could ever support. (A1448-50, n.25). Buddenhagen's continued suggestion that Clifford and Lazier were fleecing MEI is factually backwards and not supported by evidence or simple logic. A company that generates revenue from museum admission tickets and gift shop sales simply cannot afford the wealth of assets that Lazier (and Clifford) provided access to over the decades: waterfront real estate in Provincetown, a large laboratory in Brewster to house and conserve artifacts, a massive museum in Yarmouth on a seven acre parcel, a 70-foot research vessel, other vessels, dockage, an archaeologists, etc. (A1448-50). And that is putting aside Ken Kinkor's salary, compensation for divers and archaeologists, and the largely stock-based compensation of Clifford and Lazier in exchange for their decades of service and beneficence.

G. <u>The Use of Equity Based Compensation in Lieu of Cash.</u>

Lacking sufficient revenues and funding, MEI and the Whydah Joint Venture were operated on a shoestring budget by Defendants as the sole directors. (*See* Op. at 3-4, 92 n.362; A0503). MEI had a history of issuing stock-based compensation to "those involved in its excavation and business operations." (Op. at 5, 29, 33) (*see also* A0591).

In 2009, Ken Kinkor determined that Clifford and Lazier held a combined interest of 50.77% in MEI. (A1437). Lazier then transferred his stockholdings as of January 2009 to Clifford. (*Id.*). On September 9, 2010, outside counsel at Messerli & Kramer reviewed Mr. Kinkor's work. (A1437).

On May 8, 2017, Bergman prepared his analysis of MEI stockholdings and noted that the work previously done by Kinkor and Messerli & Kramer appeared to be "very thorough," and adopted the analysis of the stockholdings provided by Messerli & Kramer in September 2010. (A1437). Bergman advised Clifford that he held 26,640,615 shares and Lazier held 250,000, for a combined percentage interest of 51.19% at the time of the Merger.[7] (*Id.*). The Operative Complaint pled that "[b]y 2018, Lazier and Clifford combined for at least 51% ownership in MEI." (B0005(¶ 16)). (*See also* B0013 (¶ 40) ("Clifford and Lazier remained MEI's majority stockholders and the sole Directors of MEI's Board."), B0013 (¶ 43), B0014 (¶ 50)). The court below found that "Plaintiff ma[de] no effort to explore the factual predicate Bergman referenced." (Op. at 92).

The Court of Chancery also found that Defendants' intent during a November 15, 1996 board meeting to award Clifford 300,000 shares for each year of service to

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[7] Between 2009 and 2018, Defendants had only gained a 0.42% interest in MEI through stock compensation for services spanning nine years. In light of the 1,450,000 shares of stock issued to Plaintiff in lieu of $5,000 cash for services he provided under a services agreement, Clifford and Lazier were entitled to far greater stock-based compensation in lieu of actual cash compensation.

MEI for the preceding seven years was ineffective. (Op. at 19-20). If perfected, that issuance would have amounted to 2.1 million shares as of November 1996. There is a stock certificate number 1370 which purports to issue Clifford those 2.1 million shares on November 15, 1996 ("Certificate 1370"). (*Id.* at 34). Nonetheless, Defendants consistently and repeatedly took steps to ratify those share issuances, and the court below found that MEI did so on April 1, 2004. (*Id.* at 28-29, 35, 90). "Other evidence in the record also supports the notation that during the April 2004 Board meeting, the January 2009 meeting, or another Board meeting on December 29, 2009, the Boad voted to issue Clifford the 2.1 million shares and then MEI actually issued the contested 2.1 million shares to Clifford." (*Id.* at 33, 34 (citing B0254-61)). The court below noted that "Defendants were the sole members of the Board by the time of the January 2009 Board meeting[,]" and that "it would frankly be naïve to think that Defendants did not undertake whatever actions might have remained to vote to issue, and then issue, themselves the disputed shares." (*Id.* at 92 n.362). In reaching that determination, the court below examined the efforts undertaken by MEI's prior counsel, Messerli & Kramer, MEI's late bookkeeper Ken Kinkor, and Erik Bergman, Esq., who facilitated the Merger. (*Id.* at 35, 42).

Neither party subpoenaed Messerli & Kramer and neither Lazier nor Kinkor was available to testify on this issue because they were deceased.[8] (A1438-39).

[8] Mr. Kinkor passed away suddenly in 2013.

Clifford had limited involvement in stock issuances for MEI. (A1438). Indeed, the court below found that "Plaintiff ma[de] no effort in his post-trial papers to wrestle with the April 2004 Board meeting minutes, the signed and finalized January 2009 Board meeting minutes, or Certificate 1370. Nor does Plaintiff's post-trial briefing include a single reference to any of these exhibits."[9] (Op. at 91).

H. The 2018 Merger

On June 27, 2018, acting in their capacities as the sole directors of MEI and by written consent as majority stockholders of MEI, and relying on the advice of counsel, Defendants approved the Merger between MEI and Whydah International. Clifford testified at trial that his intent for the Merger was to do what was in the best interests of MEI and its minority stockholders. (A0794-802, A0952-54, A1081-84).[10]

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[9] Buddenhagen claims he had "nothing to wrestle *with*[,]" arguing that "Defendants relied solely on the fabricated and falsified November 1996 meeting minutes." (OB at 31 n.4) (emphasis in original). Not so. The record is clear that Defendants presented numerous documents which demonstrated, as the court below correctly found, that Defendants took several steps in the ensuing years to ratify the share issuances set forth in the draft November 1996 minutes as compensation for services rendered by Clifford and Lazier. (*See* Op. at 92 n.362). Buddenhagen had every opportunity to cross-examine Clifford on the April 2004 and January 2009 meeting minutes at trial, but he chose not to, instead focusing only on the November 1996 minutes. (*See* A0769-72 (Clifford testifying on direct examination about the April 2004 and January 2009 meeting minutes)).

[10] Defendants held 51% of MEI prior to the Merger. After contributing their interests in Whydah International, the Brewster Lab, and foregoing some of their arrears, their percentage interest in the new entity would logically need to be greater

I. Post-Merger

Shortly after the Merger, Clifford received a naively simplistic letter regarding the purported value of the *Whydah* coins from a Florida coin auctioneer, Daniel Sedwick. (Op. 47-49; A1613-17). While Clifford appreciated Mr. Sedwick's astronomical valuation (Op. 49), even putting aside many other obvious flaws in the Sedwick letter, it was a dramatic outlier from all prior appraisals and market evidence of valuation in the record, including the appraisal from Sotheby's. (Op. 47-49; A1613-19).

On September 6, 2018, Buddenhagen sent a demand for information related to the Merger to Lazier which was followed by a second letter on October 24, 2018, seeking appraisal of his shares in MEI. (B0262-63; B0264-65). After Buddenhagen received notice that his demands for appraisal were ineffective (and an attempt to extract a personal benefit from MEI and Defendants), Buddenhagen changed tact to pursue the representative claims in this litigation. (A1433).

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than 51%. Defendants recognized that the exact number was difficult to determine with any accuracy and would be difficult to prove given the application of the entire fairness standard in the underlying action.

J. The Proceedings Below

Buddenhagen initiated this action by filing the initial Complaint on April 4, 2019. (D.I. 1).[11] Defendants filed their Answer on May 31, 2019 (D.I. 14), as did nominal defendant MEI (D.I. 13).

In May 2021, the parties reached a proposed settlement. (D.I. 57). Under that agreement, Buddenhagen agreed to release all claims against Defendants in exchange for bespoke corporate governance changes and Defendants agreed to convert their 2,424,293 preferred shares in post-Merger MEI to 85,303 shares of common stock in that entity, "leaving Defendants with a slight majority of New-MEI's stock while significantly reducing the dilutive effect of the Merger on the minority stockholders." (Op. at 59). Just before the settlement hearing, however, Buddenhagen scuttled his own settlement by sending a letter of objection to the Court of Chancery. (*Id.*). Following Buddenhagen's objection and presentation at the settlement hearing, Vice Chancellor Laster rejected the proposed settlement on September 15, 2021. (D.I. 63).

Thereafter, Plaintiff filed a First Amended Verified Complaint on October 21, 2021. (D.I. 72). On December 17, 2021, the Defendants filed a motion to dismiss the First Amended Complaint. (D.I. 76).

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[11] At the time the initial Complaint was filed, Plaintiff was joined by a second plaintiff, Brent R. Dibner, who was dismissed from the lawsuit on August 11, 2022. (D.I. 142).

Plaintiff filed the operative Second Amended Verified Complaint on January 20, 2022 (the "Operative Complaint") (D.I. 80) (B0001-30), which Defendants answered on February 22, 2022 (D.I. 88).

Neither the Whydah Joint Venture, nor the past or present partners in the joint venture (MFC, WPLP, and Whydah International) were ever parties to the proceedings in the court below.

In the Pre-Trial Order, Buddenhagen raised, for the first time, a host of unprecedented proposed remedies, including vesting in Buddenhagen the power to vote proxies over other stockholders' shares, appointing a new board of directors, disgorging to MEI Defendants' interests in various assets and entities, and requesting Defendants "deliver up to MEI their equity in and past profits" under a theory of rescissory ***damages***. (A0370-31; A0530-31). Defendants strenuously objected to those belated and unprecedented requests in their Pre-Trial Brief, filed on January 20, 2023 (D.I. 180) (A0527), and during the Pre-Trial Conference on January 25, 2023 (D.I. 191, 194).

A three-day trial was held on February 6-8, 2023. (D.I. 198-200) (A0534-1405). The parties completed post-trial briefing on September 18, 2023, and post-trial oral argument was held on October 2, 2023. (D.I. 215).

K. <u>The Remedy of Rescission of the Merger</u>.

On May 10, 2024, the court below issued its Post-Trial Memorandum Opinion (the "Opinion"). (D.I. 219) (OB Ex. A). The court below explained:

> Here, cancelling the stock issued in the Merger and rescinding the Merger would place all parties in the positions they were in before the Merger. That is, Plaintiff and MEI's other pre-Merger minority stockholders would be returned to their pre-Merger cumulative holdings of roughly 45% of MEI. Likewise, Defendants would return to their roughly 51% holding in MEI and their complete ownership of [Whydah] International.

(Op. at 120).

Plaintiff filed his Amended Notice of Appeal on May 22, 2025. (D.I. 239). On July 8, 2025, Plaintiff filed his Opening Brief ("OB") in support of this appeal.

This is Defendants' Answering Brief in opposition to Plaintiff's appeal.

ARGUMENT

I. THE COURT OF CHANCERY DID NOT ERR IN ITS FACTUAL FINDINGS THAT DEFENDANTS WERE MAJORITY STOCKHOLDERS OF MEI.

A. Question Presented

Whether the Court of Chancery erred in its post-trial factual findings that (1) Defendants were the majority stockholders of MEI; (2) that Buddenhagen's decades of delay barred ***him*** from pursuing such claims; and (3) that Buddenhagen waived his right to challenge the April 2004 and January 2009 meeting minutes and Certificate 1370 which were the basis for the finding below.

Buddenhagen did not properly preserve this argument. (*See* Op. at 91-93).

B. Scope of Review and Legal Standard

The Court reviews the trial court's findings of fact under the "deferential 'clearly erroneous' standard[.]" *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015). "That deferential standard applies not only to historical facts that are based upon credibility determinations, but also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts." *Id.* (cleaned up) (citations omitted). *See also New Castle Cnty. v. Disabatino*, 781 A.2d 687, 690–91 (Del. 2001) ("This Court must accept the factual findings made by the trial judge if those findings are supported by the record and are the product of an orderly and logical deductive process. In the exercise of judicial restraint, the

applicable standard of appellate review requires this Court to defer to such factual findings, even though independently we might have reached different conclusions."). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *RBC Cap. Markets*, 129 A.3d at 849. "Factual findings are not clearly erroneous if they are sufficiently supported by the record and are the product of orderly and logical deductive process." *Bäcker v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 94-95 (Del. 2021) (quotations and citations omitted).

However, a party may be deemed to have waived an argument on appeal by "choos[ing] to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert[ing] error on appeal if the outcome in the trial court is unfavorable.'" *Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017) (quoting 5 Am. Jur. 2d *Appellate Review* § 618 (2016)). "If … [a] party has waived its argument for purposes of appeal, the argument can survive only if plain error occurred in the court of first instance." *Beebe Med. Ctr., Inc. v. Bailey*, 913 A.2d 543, 551 (Del. 2006), *as amended* (Nov. 15, 2006). Plain error "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process[,]" and is "limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which

clearly deprive an accused of a substantial right, or which clearly show manifest injustice." *Shawe*, 157 A.3d at 168 (quotations and citations omitted).

C. Merits of Argument

1. Defendants were the Majority Stockholders of MEI

Buddenhagen's new contention on appeal is inconsistent with the theory that he advanced through three verified complaints that Clifford and Lazier were the Company's "majority stockholders" and were required to demonstrate the entire fairness of the Merger. (*See, e.g.,* B0005 (¶ 16), B0013 (¶ 40)). Buddenhagen never amended his complaints to include a claim that the Defendants were not majority stockholders at the time of the Merger, nor that the prior share issuances to Defendants were invalid. (A1438-19).

It was not until the Pre-Trial Order and pre-trial briefing that Buddenhagen first raised his theory that Defendants lacked the requisite majority of shares to conduct the Merger. (A1435-36) (*See, e.g.,* OB at 24 (citing Plaintiff's section of Pre-Trial Order, pre- and post-trial briefing)).[12]

At trial, Buddenhagen failed to address the April 2004 and January 2009 meeting minutes despite Clifford testifying about those documents on direct

[12] Had Plaintiff properly pled this claim, the parties may have pursued additional discovery, including from a representative of Messerli & Kramer. While it is likely that the passage of time has deprived the parties of witnesses with meaningful factual knowledge, the law firm remains in business today.

examination.[13] (*See* A0769-72). Buddenhagen also ignored the evidence of those minutes in his post-trial briefing. (Op. at 91). Instead, Buddenhagen was (and still is) hyper-focused on the drafts of the November 1996 meeting minutes. (*See* A1026-55; A1527-32; OB at 25, 28-29). Indeed, the Defendants' shareholdings was never a "central issue" in the litigation. (OB at 24).

Moreover, the court below found that during the April 2004 and January 2009 Board meetings, as the sole directors of MEI, Defendants "voted to issue, and then issued, themselves the disputed shares of stock." (Op. at 92). Post-trial, the court below correctly concluded by a preponderance of the evidence that Defendants took steps to issue the disputed shares and therefore held a majority interest in MEI at the time of the Merger. (*Id.* at 92-93). Those factual findings are entitled to great deference and may only be overturned if this Court determines them to be clearly erroneous. *See RBC Cap. Markets*, 129 A.3d at 849. Since Defendants were the only two directors of MEI as of January 2009, they were well-within their power to issue the disputed shares, and the record reflects that they did so through both the January 2009 meeting minutes and Certificate 1370. (*See* Op. at 91-93). Buddenhagen presented no evidence below to contest those findings and only now argues that those minutes are defective. (OB at 31-35). His belated incantation of

[13] Buddenhagen also failed to seek discovery from Messerli & Kramer regarding the stock list. (A1438-39).

the Delaware General Corporation Law ("DGCL") cannot change the fact that Buddenhagen chose to remain silent in the court below on these issues.

Buddenhagen has not established that the factual finding below that the Defendants held a majority of the shares at the time of the Merger was plain error "which clearly deprive[d] [Buddenhagen] of a substantial right, or which clearly show[ed] manifest injustice." *Shawe*, 157 A.3d at 168. (*See* OB at 27-37 (no discussion of the clearly erroneous or plain error standards)). Indeed, Buddenhagen himself perpetuated the fact that Defendants were majority stockholders of MEI until the Pre-Trial Order and the eve of trial. (*See* B0005 (¶ 16), B0013 (¶ 40); A0365). The court below supported its findings that Defendants were majority stockholders of MEI by evidence in the record, including the April 2004 and January 2009 meeting minutes and Certificate 1370, which Buddenhagen "made no effort … to wrestle with" in his post-trial briefing. (Op. at 91-92) (*See also* A0216, A0219-20, A0221-22, A0223-24).

Post-trial findings of fact that are ***consistent*** with the allegations plead by Plaintiff in his Operative Complaint cannot constitute a clearly erroneous finding of fact by the Court of Chancery. There is no basis to overturn factual findings below that Defendants possessed the requisite majority of shares to execute the Merger as clearly erroneous.

2. Buddenhagen's Decades of Delay Barred Him from Pursuing Many of His Claims.

"'Laches is an affirmative defense that ***the plaintiff*** unreasonably delayed in bringing suit after learning of an infringement of his or her rights.' It consists of two elements: '(i) unreasonable delay in bringing a claim ***by a plaintiff with knowledge*** thereof, and (ii) resulting prejudice to the defendant.'" *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 310 A.3d 985, 993 (Del. Ch. 2024) (citations omitted) (emphasis added). Laches is an affirmative defense to equitable claims by a certain plaintiff due to his own dilatory conduct. It may not bar a claim *per se*, but it can bar a plaintiff from pursuing that claim where equity finds he has slumbered on his rights. (*See* Op. at 64).

The court below found that Buddenhagen's challenges to the disputed stock issuances in April 2004 and January 2009 were barred by laches and that Plaintiff failed to meet his burden to establish that these were part of a continuing wrong. (Op. at 70-71). Buddenhagen was a sophisticated investor who had exposure to the operations of MEI and knowledge of the "unconventional" management; therefore, he could not reasonably claim to have relied on Defendants in support of his tolling defense. (Op. at 75-78). Buddenhagen's delay was not a few months or years, but, in some instances, ***decades*** after the court below found he should have been placed on notice of his claims. (Op. at 82). As a result, Defendants faced significant prejudice in presenting evidence in their defense, including the death of two key

witnesses, Lazier and Kinkor, and the loss of documentary evidence due to floods and the passage of time. (Op. at 85-87). It was established at trial that Clifford had little involvement in keeping the stock list and rightly deferred to others who were better equipped at such tasks, like Mr. Kinkor and Messerli & Kramer. (Op. at 85; A1438). Despite this, Buddenhagen proceeded to cross-examine an empty chair instead of pursuing company records from Messerli & Kramer, or other evidence to support his version of events. The Court of Chancery properly applied the defense of laches to Buddenhagen's prejudicial delay in bringing his claims.

This case has always been about the fairness of the 2018 Merger. (*See generally* B0001-30; Op. at 1). Notably, Buddenhagen did not allege in any of his complaints, or his pre- and post-trial briefing that the April 2004 and January 2009 meeting minutes were ***statutorily*** invalid. (*See generally* B0001-30; A0450-55; A1526-32). Instead Buddenhagen myopically focused on the resolution used to pass the Merger and the various drafts of the November 1996 meeting minutes. (A1526-32).

To further his belated claims on appeal, Buddenhagen now invokes (incorrectly) a recent holding from *Moelis*, where the plaintiff challenged an advance notice bylaw under Section 141(a) of the DGCL, claiming it was ***statutorily*** invalid on its face. (OB at 36-37). *See Moelis*, 310 A.3d at 991. Defendant asserted laches as a defense. *See id.* The Court of Chancery held that "[w]hen a defendant invoked

laches to defeat a claim of ***statutory invalidity***, a trial court can properly strike it." *Id.* at 994 (emphasis added). In so holding, the Court noted: "Equitable defenses, including laches, cannot validate void acts."[14] *Id.* "[B]oard action taken in violation of equitable principles is voidable, not void, because '[o]nly voidable acts are susceptible to . . . equitable defenses.'" *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1046 (Del. 2014) (quoting *Boris v. Schaheen*, 2013 WL 6331287, at *15 (Del. Ch. Dec. 2, 2013)). The court in *Moelis* also noted, however, that "a breach of fiduciary duty claim is not a substitute for a statutory claim. … If a provision is invalid under the DGCL, the appropriate claim is a statutory one." *Moelis*, 310 A.3d at 998.

On appeal, Buddenhagen now seeks to argue that Certificate 1370 is statutorily void pursuant to 8 *Del. C.* § 151(a) because "the record does not support a finding that the stock issuances at issue were the subject of a legitimate written

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[14] The *Moelis* case relied heavily on recent precedent set forth in *Holifield v. XRI Inv. Holdings LLC*, 304 A.3d 896 (Del. 2023). The Court in *Holifield* explained "recent legislative efforts, [which] provid[ed] equitable solutions to otherwise incurable defects, … to ameliorate the harsh consequences of defective corporate acts." *Id.* at 931. Those efforts are codified in "Sections 204 and 205 of the DGCL. Those sections were designed to provide mechanisms for a corporation to unilaterally ratify defective corporate acts …. The new sections gave corporations multiple avenues to remedy certain transactions ***including stock and option issuances***, for example, that under prior case law, might otherwise have been void and incapable of ratification as a result of noncompliance with governing law or the corporation's own organizational documents." *Id.* (emphasis added). Buddenhagen raises no argument on appeal pursuant to Sections 204 and 205 of the DGCL.

instrument evidencing board approval." (OB at 28). The precedent set forth in *Moelis* does not support Buddenhagen's belated position. *First*, Buddenhagen never pled a ***claim*** that Certificate 1370 was ***statutorily*** invalid. (*See generally* B0023-29). Instead, Plaintiff pursued only equitable claims for derivative and direct breach of fiduciary duty. (*See* B0023-27). *Second*, Buddenhagen never pursued a ***statutory theory*** that Certificate 1370 was void under 8 *Del. C.* § 151(a). (*See* A0450-55 (pre-trial brief challenging the share issuances under 8 *Del. C.* § 152(a) and the resolution pursuant to 8 *Del. C.* § 251(b)(1) and (b)(5)); A1526-32 (post-trial brief challenging the share issuance pursuant to 8 *Del. C.* § 251(b), (c)). The lack of a developed record on the stock issuances reflects the reality that these claims were not part of the case that Plaintiff attempted to ambush Defendants with at the pretrial conference. *Finally*, the court below found that the record clearly supported a factual finding that the Board formally issued Certificate 1370:

> [T]he Board's intention from 2004 onwards was ***demonstrably clear***. And the preponderance of the evidence records specific formal acts the Board took to give effect to those intentions. It documents those efforts through draft ***and finalized*** Board meeting minutes that reflect the attendance of an attorney and ***clear and affirmative votes by the Board*** to issue Clifford the disputed stock.

(Op. at 90) (emphasis added).

Buddenhagen's reliance on the precedent in *Moelis* is misplaced because he never pled a statutory claim or theory. His belated attempt to conjure a claim (that

he never pled) under the DGCL that the April 2004 and January 2009 meeting minutes and Certificate 1370 are statutorily invalid for the first time on appeal cannot prevail. (OB at 30-31). Therefore, the Court of Chancery's factual finding of laches due to Buddenhagen's decades of delay in bringing his equitable claims was sound and should be affirmed.

3. Plaintiff Waived the Right to Challenge the Validity of the April 2004 and January 2009 Meeting Minutes and Certificate 1370.

"Plaintiff ma[de] no effort in his post-trial papers to wrestle with the April 2004 Board meeting minutes, the signed and finalized January 2009 Board meeting minutes, or Certificate 1370. Nor does Plaintiff's post-trial briefing include even a single reference to any of these exhibits." (Op. at 91). Buddenhagen also failed to address those minutes at trial even though Clifford testified about them on direct examination. (A0769-72). Defendants established that Kinkor and Messerli & Kramer conducted a "very thorough" review of the April 2004 and January 2009 meeting minutes and Certificate 1370 which were also used by Mr. Bergman in connection with the Merger. (Op. at 91-93). That evidence and the trial court's assessment and weighing of that evidence went uncontested by Buddenhagen, despite Plaintiff belatedly identifying Defendants' share ownership as an issue to be proven at trial. (A0363 (¶ 28), A0365 (¶ 35), A0367 (¶ 44)). By failing to address the evidence presented that Defendants held a majority of the shares at the time of

the Merger, Buddenhagen has waived his right to now appeal those findings of fact below. Buddenhagen does nothing to establish that the Court of Chancery's factual findings regarding the April 2004 and January 2009 meeting minutes and Certificate 1370 deprived him of a substantial right or resulted in manifest injustice.[15] Indeed, Buddenhagen chose to "remain silent in the trial court …, taking a chance on a favorable outcome," and cannot be permitted a second bite at the apple on appeal. *Shawe*, 157 A.3d at 169.

[15] Had Buddenhagen properly preserved his right to appeal these factual findings (he did not), and Defendants were ultimately found to lack the requisite majority of shares in MEI to effectuate the Merger, the results would have been the same. The Merger would have been rescinded and Plaintiff's equitable fiduciary duty claims would still be subject to laches.

II. THE COURT OF CHANCERY DID NOT ERR BY DECLINING TO ISSUE A DECLARATORY JUDGMENT THAT WAS NOT SOUGHT REGARDING THE CURRENT STATUS OF THE JVA.

A. Question Presented

Whether the Court of Chancery erred by not issuing a declaratory judgment regarding the current status of the JVA in connection with granting the remedy of rescission of the Merger.

Buddenhagen did not preserve this argument. He did not assert a claim for a declaratory judgment regarding the status of the JVA or assert a claim in any of his three complaints regarding the current status of the JVA. The earliest document Plaintiff identifies in which he contends this argument was preserved was in the Pre-Trial Order. (OB at 38 (citing A0362)).[16] Moreover, he could not have asserted such a claim because neither the Whydah Joint Venture, nor the partners thereto, MFC and Whydah International, were ever parties to this action.

B. Scope of Review and Legal Standard

This Court does not review arguments that a party fails to properly raise in the trial court. *See Ravindran v. GLAS Tr. Co. LLC*, 327 A.3d 1061, 1078 (Del. 2024) ("Under Supreme Court Rule 8 and general appellate practice, this Court may not consider questions on appeal unless they were first fairly presented to the trial court

[16] Buddenhagen's other citations are non-responsive to the issue that he claims to have preserved. (*See* OB at 38 (citing A0395-96, A0430-31, A0442-43, A0898-932, A1135-1140, A1530-1536)).

for consideration.") (quotation and citation omitted). "Rule 8 provides that 'only questions fairly presented to the trial court may be presented for review.' As a result, this Court does not consider issues that are not raised unless the interest of justice requires it." *Protech Mins., Inc. v. Dugout Team, LLC*, 284 A.3d 369, 377-78 (Del. 2022) (citation omitted).

This Court reviews the Court of Chancery's determination of remedies for abuse of discretion. *Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242, 262 (Del. 2017), *as revised* (Mar. 28, 2017) ("Once liability has been found, and the court's powers shift to the appropriate remedy, the Court of Chancery has broad discretion to craft a remedy to address the wrong."); *Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 439 (Del. 2000) (noting that the Delaware Supreme Court "defer[s] substantially to the discretion of the trial court in determining the proper remedy"); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983) (noting "the broad discretion of the Chancellor to fashion such relief as the facts of a given case may dictate"). Similarly, decisions by a trial court that do not involve discrete findings of fact or applications of pure law are reviewed for abuse of discretion. *Chavin v. Cope*, 243 A.2d 694, 695 (Del. 1968). Buddenhagen does not identify any cases in which a trial court has been reversed on appeal for not providing clarifying declaratory relief in connection with its remedy, much less when it was not requested by the parties in the proceeding below.

C. Merits of Argument

This Court "'adhere[s] to the well settled rule which precludes a party from attacking a judgment on a theory which was not advanced in the court below.'" *Riedel v. ICI Americas Inc.*, 968 A.2d 17, 25 (Del. 2009), *overruled on other grounds by Ramsey v. Georgia S. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255 (Del. 2018) (quoting *Danby v. Osteopathic Hosp. Ass'n of Del.*, 104 A.2d 903, 907–08 (Del.1954)). Where the plaintiff "failed to raise [an] issue in his complaint[,]" it has been held that the "party is precluded from attacking a judgment on a theory which was not advanced in a court below." *Saunders v. Laggner*, 593 A.2d 590 (Del. 1991) (TABLE) (citing *Danby*, 104 A.2d at 908). A party may also be deemed to have waived an argument on appeal by "choos[ing] to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert[ing] error on appeal if the outcome in the trial court is unfavorable.'" *Shawe*, 157 A.3d at 169 (citation omitted).

First, Buddenhagen is attacking a non-decision. The Court of Chancery determined that it "need not resolve [whether the JVA terminated] because, even assuming the JVA continued, Defendants do not meet their burden of showing entire fairness." (Op. at 104 n. 391). The court below specifically found that the remedy of rescission of the Merger was "reasonable and appropriate" and "clear[ly] adequate[e]." (Op. 121). That remedy was not an abuse of discretion. Indeed, and

as the Court of Chancery noted, rescission is the "preferrable" remedy when it can "restore the parties to the position they occupied prior to the challenged transaction." (Op. 119 (citing (*Tornetta v. Musk*, 310 A.3d 430, 448 (Del. Ch. 2024) (citing *Lynch v. Vickers Energy Corp.*, 429A.2d 497, 501 (Del. 1981))).

Second, Buddenhagen did not pursue a declaratory judgment regarding the parties' rights and obligations under the JVA in the event of rescission. Rather, he refused to pursue the most "reasonable and appropriate" remedy in favor of a fixation on an aggressive damages award that he hoped to wield as a cudgel. (A1552-67). While Buddenhagen attempts to demonstrate where this argument was preserved below, he fails to identify any of his three verified complaints and instead cites to the Pre-Trial Order and his own counsel's questions on cross-examination during trial. (OB 40 n.8). It may be accurate that "the continued survival of the JVA and OA" is important to determining what the current status of MEI's rights and obligations are following the rescission of the Merger. (*Id.* at 41). But that was not a question that was properly litigated by the parties nor presented to the court below. It was simply not a question that the Court of Chancery was obligated, or even asked, to answer based on the case that Buddenhagen pursued through three amended complaints. The Court of Chancery found that the relief to which Plaintiff was entitled was rescission of the challenged Merger and return of the "parties to the *status quo ante*, i.e., to the position they occupied before the challenged transaction."

(Op. 118-20) (emphasis in original). No further relief was appropriate given the "clear adequacy" of rescission of the Merger (*Id.* at 121), and the specific relief Buddenhagen now seeks on appeal was not even requested by him in the court below.[17] Buddenhagen waived this challenge for purposes of appeal.

Third, neither the Whydah Joint Venture, nor the partners in the Whydah Joint Venture – MFC and Whydah International – were parties to the proceedings in the court below. As Defendants argued in pre-trial briefing, had Buddenhagen requested such declaratory relief regarding the current status of the Whydah Joint Venture, the Whydah Joint Venture, MFC and Whydah International would have been indispensable parties under Court of Chancery Rule 19. (A0523-24). *See, e.g., Elster v. Am. Airlines, Inc.*, 106 A.2d 202, 204 (Del. Ch. 1954) ("all parties to a contract sought to be cancelled are indispensable parties to the suit for cancellation"); *Makita v. New Castle Cnty. Council*, 2011 WL 6880676, at *1, 4 (Del. Ch. Dec. 23, 2011) (dismissing action brought by homeowners regarding a

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[17] *Sjunde AP-fonden v. Activision Blizzard, Inc.*, 2024 WL863290 (Del. Ch. Feb. 29, 2024) and *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998), relied upon by Buddenhagen stand for the unremarkable proposition that "shall" is mandatory language under specific statutory contexts inapplicable here. These cases are inapposite: (a) they are not controlling on this Court, (b) they do not address the Rule 54(c) standard that Buddenhagen invokes, and (c) they do not address a request for a new declaratory judgment on appeal that was not sought in the court below, nor do those authorities compel a trial court to clarify the parties' rights and status following the award of an equitable remedy on the claims actually pled.

housing plan where one record owner of the parcel was not joined as a party to the action).

Fourth, an error is harmless when it is trivial, formal or merely academic and does not affect the final outcome of the case. *See Seeney v. State*, 211 A.2d 908, 909 (Del. 1965). The Court of Chancery's rescission remedy avoided the need to resolve Buddenhagen's late breaking contentions regarding the current status of the JVA and murky valuation matters. (Op. at 104).[18] Thus, to the extent that the Opinion's lack of a determination of the status of the JVA constitutes an "error" it was a harmless error in light of the awarded remedy of rescission of the Merger.

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[18] The Court of Chancery recently highlighted how difficult it can be to demonstrate non-speculative damages with reasonable certainty and that it can be a "nearly impossible task" with respect to unproven technology in connection with the court's responsibility to put in place a "balanced remedy that is equitable and reasonably tailored to the precise nature of the misconduct at issue." *Sorrento Therapeutics, Inc. v. Mack*, 2023 WL 567689, at *34 (Del. Ch. Sept. 1, 2023) (quoting *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *24 (Del. Ch. Feb. 18, 2010)). *See also Amaysing Techs. Corp. v. Cyberair Commc'ns, Inc.*, 2004 WL 1192602, at *5 (Del. Ch. May 28, 2004) ("the subject matter of the contract, a trademark, 'is a unique and valuable property interest' which the court will protect because of the 'often impossible task of measuring money damages arising therefrom.' Similarly, ATC is faced with the nearly impossible task of measuring money damages for an unproven technology. Because such damages are likely to be merely speculative, ATC has no adequate remedy at law and is entitled to pursue its equitable remedy in the Court of Chancery.") (citations omitted)). The incredibly unique assets at issue in this case, with potentially more to be found, complicated by the "Net Proceeds" flowing through a nearly four-decade old JVA with a complex course of dealing, at a dramatically underfunded entity kept afloat by decades of in-kind contributions of Clifford and Lazier, and the effect of Plaintiff's decades of slumber presented even more difficult issues of proof in this litigation – but rescission presented a "clearly adequate" remedy. (*See* Op. 47-58).

Finally, and ironically, Buddenhagen's misguided eleventh-hour argument that the JVA terminated would have resulted in a worse outcome for MEI and its stockholders. The "term" of the JVA in Section 9 is not equivalent to "termination" of the JVA. Rather, Section 15.1.3. of the JVA provides that upon the "expiration of the ***term*** set forth in paragraph 9 hereof [e.g., December 31, 2017]" (unless extended) triggers an event of dissolution of the Whydah Joint Venture. (A0109 (§ 15.1.3.)). Dissolution activates a winding up of the Whydah Joint Venture based on capital accounts and the liquidation provisions of Section 16 of the JVA. (A0109 (§ 15.2), A0110-11 (§ 16)). The liquidation provisions of the JVA require that the Whydah Joint Venture "liquidate the assets of the Joint Venture" and "distribute the proceeds thereof" in a specific "order of priority" starting with the Whydah Joint Venture debts and liabilities, followed by reserves for contingencies and unforeseen liabilities, followed by WPLP (now its successor Whydah International) and MFC (as the assignee of the MEI assets) in accordance with their respective Capital Account Balances, as defined in the JVA. (*Id.*). Only "after distribution of all of the assets of the [Whydah] Joint Venture" pursuant to Section 16 of the JVA, a process

that could take many years, can filings be made in the State of New York[19] to terminate the JVA and the Whydah Joint Venture. (A0109-10 (§ 15.3)).[20]

The only testimony in the record regarding what would happen to the assets of the Whydah Joint Venture if the JVA was terminated comes from Dr. Margolin's testimony where he explained that if the JVA lapsed, the assets would not revert to MEI, but instead would revert to the Whydah International or, alternatively, to MUS or Clifford because they were never actually paid the $150,000 for the assigned rights. (A1349-1351). Thus, if Buddenhagen's theory that the JVA expired was correct, upon the eventual dissolution, liquidation, and termination of the JVA and the Whydah Joint Venture (not the end date of the "term" of the JVA that simply commences the process of dissolution and liquidation), all of the rights to the *Whydah* that were assigned to MFC by MEI, would not simply revert to MEI as

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[19] In a footnote, Plaintiff cites to a lengthy footnote in *New Enter. Assoc. 14, L.P. v. Rich*, 295 A. 3d 520 (Del. Ch. 2023) regarding contractarianism to argue that the Whydah Joint Venture could not hold title to the *Whydah* artifacts. (OB 13 n. 3). There is no dispute that the JVA and Operations Agreement provides for the assignment of MFC's rights to the *Whydah* to the Whydah Joint Venture. (Op. 7; OB 6; A0087 (§ 3.1); A012 (§ 1.2). Joint ventures are authorized by New York State law and Dr. Margolin testified that such arrangements were common prior to the proliferation of alternative entities. *See Decker, Decker & Assocs., Inc. v. Ass'n of Nat. Advertisers, Inc.*, 839 N.Y.S.2d 432 (Sup. Ct. 2007). (*See* A1346-47).

[20] Plaintiff's counsel is now a creditor of MEI (*See* OB Ex. B (fee award to Plaintiff's counsel against MEI only)) and may be seeking to accelerate counsel's ability to exercise rights as a creditor of MEI in the hopes of attaching priceless historical *Whydah* artifacts.

Buddenhagen naively assumed, but would revert to Whydah International, MUS and/or Clifford. (*Id.*). Notably, the court below observed that Defendants (in stark contrast to the representative plaintiff) "argued very strongly" against this outcome. (Op. at 104).

CONCLUSION

The Court should affirm the Court of Chancery's post-trial ruling below.

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Dated: August 26, 2025

CERTIFICATE OF SERVICE

Samuel T. Hirzel, II, Esquire, hereby certifies that on August 26, 2025, copies of the foregoing *Answering Brief of Appellees Barry T. Clifford and the Estate of Robert T. Lazier* were served electronically on the following:

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