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**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.,<br><br>Plaintiffs-Below, Appellants,<br><br>v.<br><br>BARRY L. CLIFFORD and THE ESTATE OF ROBERT T. LAZIER,<br><br>Defendants-Below, Appellees. | No. 228, 2025<br><br>Case Below:<br><br>Court of Chancery of the State of Delaware, C.A. No. 2019-0258-NAC |

# APPELLANT'S CORRECTED REPLY BRIEF

Dated: August 25, 2025

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## INTRODUCTION

This appeal concerns two questions of law as applied to the facts found by the trial court in its 122-page post-trial Opinion. Rather than meet the substance of those issues, the Defendants raise meritless procedural challenges to their consideration, while attempting to persuade this Court to accept factual predicates contrary to the trial court's unappealed fact-finding. This Court should reject both gambits.

First, because the facts found by the trial court establish that the Defendants' self-interested share issuances to place themselves in majority control of MEI's voting stock failed to conform to the DGCL, it was an error of law to leave those issuances intact. Second, because the trial court found that Defendants failed to prove their allegation that the JVA and OA contracts were extended, it should have formally acknowledged those agreements' termination occurred in 2017, before the Defective Merger.

As to the statutory invalidity of the share issuances, Defendants fail to meet the merits, and simply argue that the issue was waived. This is not so. Plaintiff raised the invalidity of the issuances in the pleadings, made specific factual inquiries in pretrial discovery, raised statutory invalidity under the DGCL in the pretrial order, briefed it pre-trial, and tried the issue. Defendants, who had the opening and reply briefs post-trial, defended *only* the supposed 1996 issuance. Plaintiff joined the issue, and as the trial court found, proved that 1996 vote never happened.

As to the survival of the JVA and OA, Defendants again fail to contest the merits, and argue the issue was raised too late in the case, or should have joined other parties. But the issue was raised in the pre-trial order by the *Defendants*. Plaintiff consented to try the issue, and prevailed on the facts. Defendants procedural attack on their own issue, in addition to being meritless, amounts to a request for a do-over. Delaware law neither requires nor permits such a post-trial mulligan.

This Court should reverse on the two narrow issues presented, and rule that MEI can move forward unencumbered by either the void control bloc the Defendants issued to themselves to abolish MEI's corporate democracy, or the long-expired contracts which Defendants have used as a pretext to divert all of MEI's profits to their own pockets.

## COUNTER-STATEMENT OF FACTS

For a recitation of the facts pertinent to this appeal, all of which are grounded in the trial court's findings of fact, Plaintiff respectfully refers to and incorporates by reference the Statement of Facts contained on the Opening Brief. (OB at 5–21).

Plaintiff includes this Counter-Statement of Facts specifically to draw to the Court's attention the factual allegations Defendants make in their Answering Brief which are contrary to the unappealed factual findings in the Opinion.

Section F, especially, consists almost exclusively of citations to Defendants' trial briefing. (AB at 11–13.) Defendants assert that "MEI never earned any 'profits.'" (AB at 13.) But the trial court repeatedly found otherwise. (*E.g.* Op. at 38, 39, and 101 n.386.) Defendants assert Plaintiff "mistakenly suggests" that Defendants took possession of one MEI's Provincetown museum, and deny the museum was ever MEI's. (AB at 12 n.6.) But, Plaintiff's language was not a suggestion—it was taken directly from the trial court's findings. (Op. at 38–39.)

Most glaringly, the Defendants write:

> 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)).

(AB at 11–12 (alterations, citations, footnote, and quotations in the original).) Page 39 of the Opinion holds no such thing. The quotation is from Defendants' post-trial

briefing. The argument that MEI owed "arrears" was Defendants invention, not adopted by the trial court.

Plaintiff has grounded his argument in the unappealed post-trial factfinding from the trial court. Defendants have not. Plaintiff will not take Defendants' invitation to get bogged down in evidentiary disputes which are not a proper topic of this appeal.

## ARGUMENT

### I. Appellant preserved the statutory invalidity of the stock issuances, and the trial court's findings establish the predicates to the shares' voidness as a matter of law.

A long line of cases in Delaware distinguish *void* and *voidable* stock. "Stock issued in violation of 8 *Del. C.* § 151 is void and not merely voidable." *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1137 (Del. 1991) (citing *Triplex Shoe Co. v. Rice & Hutchins*, 152 A. 342, 347 (Del. 1930)). The difference is fundamental. Void stock is subject to cancellation *per se*, while the remedy for voidable stock is subject to equitable discretion. *Id*. (citing *Diamond State Brewery, Inc. v. De La Rigaudiere,* 17 A.2d 313, 318 (Del. Ch. 1941)).

Defendants do not contest the *STAAR Surgical* rule, and concede in their brief that statutory invalidity defeats equitable defenses like laches. (AB at 28.) Instead, Defendants insist the statutory invalidity issue was not preserved, or that the DGCL was satisfied. (AB at 29–30.) Neither assertion is correct.

Statutory invalidity was preserved and tried below, both expressly and by consent. As a result, the issue before this Court is a purely legal one: were the post-1996 share issuances compliant with the DGCL under the facts found in the Opinion? As explained in the Opening Brief, the answer is a firm *no*.

#### A. Statutory Invalidity Was Pled and Tried

"The court is not bound to analyze the case solely through the counts presented in the pleadings." *Bamford v. Penfold, L.P.*, 2022 WL 2278867, at *25

(Del. Ch. June 24, 2022). "The notion that a complaint must plead the specific legal theories on which the plaintiff can proceed is a throwback to the 'theory of the pleadings.'" *Id*. Under that doctrine, abolished in Delaware, "a plaintiff had to pick a legal theory at the outset of the case and stick with it to the end." *Id*.

"Delaware has adopted the system of notice pleading that the Federal Rules of Civil Procedure ushered in, which rejected the antiquated doctrine of the 'theory of the pleadings'—*i.e.*, the requirement that a plaintiff must plead a particular legal theory." *HOMF II Invest. Corp. v. Altenberg*, 2020 WL 2529806, at *26 (Del. Ch. May 19, 2020). Delaware, following the federal rules, does not require the particular theory of recovery to be set forth at the pleading stage. *Trifecta Multimedia Holdings Inc. v. WCG Clinical Services LLC*, 318 A.3d 450, 469 (Del. Ch. 2024) (citing 5 Wright & Miller *Federal Practice and Procedure* § 1219 (4th ed.) and Hon. Daniel L. Herrmann, *The New Rules of Procedure in Delaware*, 18 F.R.D. 327, 327 (1956)). Rather, "if issues not raised by the pleadings are tried without objection, they are treated as though raised in the pleadings." *HOMF II*, 2020 WL 2529806, at *36.

The Pre-Trial Order is the quintessential manner of formulating the issues to be tried. *In re Mindbody, Inc., S'holder Litig.*, 332 A.3d 349 , 410 (Del. 2024); *In re Rural/Metro Corp. S'holder Litig.*, 102 A.3d 205, 217 (Del. 2014). The pre-trial order contains "a statement of the issues of fact and of law which any party

contends remain to be litigated." Ct. Ch. R. 16(c)(3). Likewise, the pre-trial order also notes "[a]ny amendments of the pleadings desired by any party, with a statement as to whether it is unopposed or objected to, and if objected to, the grounds therefor." Ct. Ch. R. 16(c)(5).

Unobjected inclusion in the pre-trial order is dispositive:

> When an issue not raised by the pleadings is tried with the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform to the evidence and to raise an unpled issue. But **failure to amend does not affect the result of the trial of that issue.**

Ct. Ch. R. 15(b)(2) (emphasis added).

Here, Plaintiff went above and beyond the minimum for preserving his challenge to the validity of Defendants' putative majority stock ownership. Plaintiff placed Defendants on notice of the challenge to the stock's validity in the pleadings. Plaintiff developed the statutory invalidity theory in discovery. The parties stipulated to trial on the statutory validity issue in the Pre-Trial Order. Defendants did not object to the introduction of evidence of statutory invalidity, and in their appellate brief concede that they themselves tried the issue. Plaintiff further pressed the issue in post-trial briefing, and in this appeal relies solely on the facts as found by the trial court after trial in arguing that he successfully proved the stock's invalidity. Defendants' claim of waiver is meritless.

i. Plaintiff Pled the Invalidity of Defendants' Stock

Delaware does not require a complaint to identify a specific legal theory of recovery in order to preserve that theory. *HOMF II* 2020 WL 2529806 (Del. Ch. May 19, 2020). Nor is a plaintiff confined to legal theories expressly identified in the complaint. "Under the theory of the pleadings, which was a feature of pleading at common law and of code pleading in some jurisdictions, a complaint had to 'proceed upon some definite theory, and on that theory the plaintiff must succeed, or not succeed at all.'" *Trifecta Multimedia Holdings Inc. v. WCG Clinical Services LLC*, 318 A.3d 450, 469 (Del. Ch. 2024). That is not the law in Delaware. Here, so long as the complaint identifies *any* legal theory upon which recovery can be made, the case may proceed. *inVentiv Health Clinical, LLC v. Odonate Therapeutics, Inc.*, 2021 WL 252823, at *4-6 (Del. Super. Ct. Jan. 26, 2021) ("[A]t the pleading stage of a case, a trial judge is not a robed gardener employing Rule 12(b)(6) as a judicial shear to prune individual theories from an otherwise healthily pled claim or counterclaim.").

Here, Plaintiff more than satisfied these requirements. He specifically asserted that Defendants' "almost complete disregard for corporate formalities" made it impossible for Plaintiff to know the *true* ownership stakes of Defendants on the one hand, and MEI's minority stockholders on the other. (B0005–06; B0013.) Plaintiff alleged instead that the Defendants "*claim* to have held a

majority of shares prior to the Merger transaction," again making clear from the outset that the Defendants' *bona fide* control of MEI was in doubt. (B0020 (emphasis added).) And, Plaintiff put Defendants on notice that, while their "failure to maintain a stock ledger makes it impossible for Plaintiffs to know their precise ownership interest," Plaintiff was seeking "the cancellation of sufficient shares of stock issued to Defendants Clifford and Lazier to return control over MEI to the disaggregated minority stockholders." (B0026–27.)

ii. Plaintiff Developed the Statutory Invalidity Theory in Discovery

Following the pleading stage, a plaintiff must simply give a defendant "fair notice" of a legal theory to try that issue. *HOMF II*, 2020 WL 2529806, at *37. Fair notice is satisfied when a plaintiff proceeds to "identify and frame the issues for decision through discovery, motions for summary judgment, and 'the use of pretrial conferences and pretrial orders under Rule 16.'" *Id*. Here, Plaintiff did so.

Defendants blithely declare that Plaintiff raised his challenge to Defendants' lack of *bona fide* majority stock ownership for the "first time" in the Pre-Trial Order and Pre-Trial Brief. (AB at 1, 19.) This uncited declaration is simply not true. On June 27, 2022, after Defendants had finally started to produce documents, and more than six months before trial, Plaintiff served new written discovery requests (A0038) which specifically addressed the absence of signed minutes of the critical supposed board meetings. (A0348.) The requests also addressed the

falsification of the critical stock certificates. (A0352.) Thus, Plaintiff developed the issue in discovery, giving Defendants notice.

iii. The Parties Agreed to Try the Issue

Chancery Rule 16 governs trial formulation, and here the parties *stipulated* to a Pre-Trial Order. (A0385.)

In that stipulation, the parties expressly agreed to try Plaintiff's challenge to the shares on both fiduciary *and* statutory grounds:

> Plaintiff will establish that from 1997 through to 2010, Defendants conspired to use their powers as directors to issue large blocks of MEI shares to themselves (and in one case to a close associate). These issuances were for no (or inadequate) consideration, and utterly lack adequate corporate formalities. As issuances to insiders transferring majority control to them from the disaggregated stockholders, these transfers lacked fair process, lacked fair price, and were for an inequitable purpose, and so fail every arm of the 'twice-tested' standard of fiduciary conduct under the circumstances. The failure to follow corporate formalities furthermore makes these issuances void under the Delaware General Corporate Law, as well. Plaintiff will further prove that Defendants back-dated and falsified documents to conceal their wrongful conduct.

(A0363–64.) Defendants reciprocally put forth intent to prove the validity of their supposed stockholdings. (A0367.)

Furthermore, the parties in the Pre-Trial Order stipulated that their legal and factual theories would be spelled out more fully in the pre-trial briefs. (A0356, A0361–62.) Plaintiff's pre-trial brief put forward a painstakingly detailed narrative, which he intended to prove at trial, detailing

Defendants' extensive actions to falsify documents and self-issue large numbers of shares with no adherence to required DGCL formalities and no showing of fairness at all, from 1997 through 2009, upon which Defendants' ostensible control was based. (A0412–14, A0416–19.) And, as the Pre-Trial Brief specifically explained, those facts meant that the new shares dated after 1996 contained in certificates 1369–79 "were nullities by statute." (A0451.) Plaintiff thus *specifically* pointed to a failure of DGCL authorization as being a separate and independent grounds for cancelling the shares, beyond their unfair self-dealing character. *Accord HOMF II*, 2020 WL 2529806, at *37 (pre-trial brief can put a defendant on notice of an intent to try a specific legal theory not previous identified).

iv. The Parties *Did* Try the Issue

"[W]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and Delaware courts have held that failure to amend the pleadings does not affect the result of the trial of these issues." *Roberts v. Moffa Constr. Co. LLC*, 2024 WL 5181400, at *7 (Del. Super. Dec. 20, 2024). Trial by consent is found when, for example, the issue is raised in discovery, appears in pre-trial briefing, and is addressed by trial testimony. *S'holder Rep. Servs. LLC v. Alexion Pharmaceuticals, Inc.*, 2025 WL 1089166, at *3 n.42 (Del. Ch. Apr. 11, 2025).

Thus, even if the parties had *not* specifically joined the issue in the pre-trial order and briefing, and thus expressly stipulated to trial on the issue, it would be of no moment. Defendants on appeal directly admit that they *actually tried* the statutory invalidity issue, pointing to direct examination they made of Defendant Clifford to try to defend their case. (AB at 16 n.9, 23–24 (citing A0769–72).) Both parties devoted extensive trial time to examining competing versions of documents ostensibly authorizing the stock issuances to address whether the underlying events occurred as described, and whether they adhered to the required DGCL formalities – during which the trial judge himself questioned the witness on the topic, highlighting its importance. (*E.g.* A1030–55 (T.T. 498:12–523:23) (Clifford cross-examination); A1120–30 (T.T. 588:14–598:3) (Clifford re-direct)).)

Defendants belatedly assert that they "strenuously objected" to Plaintiffs' issue formulation in the Pre-Trial Brief. But, this uncited mere narrative declaration identifies no such objection in the record. Defendants point to no motion *in limine* or other basis by which they preserved an objection to trial on the statutory challenge to the validity of their shares. *See HOMF II*, 2020 WL 2529806, at *27 (party preserved objection to evidence of an unpleaded claim not raised in the pre-trial order by objecting to the introduction of evidence).

### B. Under the Facts Found by the Trial Court the Shares are Incurably Void

The facts proved at trial establish that the shares Defendants caused MEI to issue to themselves were legal nullities, lacking the characteristics of true capital stock. Thus, Defendants were not at the time of the Defective Merger, and are not today, majority stockholders of MEI.

i. Post-Trial, the Parties Briefed Statutory Invalidity

As Defendants concede, having been duly placed on notice (through the pleadings, written discovery, the Pre-Trial Order and pre-trial briefing) that the statutory validity of the post-1996 share issuances was a matter being tried, they actually tried the issue. (AB at 16 n.9, 23–24, 30.) After trial, *Defendants* had the burden of proof, and so Defendants, not Plaintiff, had the opening post-trial brief. (A1406.)

Post-trial, Defendants' defense of the statutory validity of the share issuances was very limited. (A1435–39.) The only act Defendants argued post-trial reflected an actual share issuance was the "November 1996" meeting, which Defendants claimed reflected a true resolution of the board of directors at that time. (A1436.) Other than that, Defendants pointed only to Ken Kinkor's handwritten notes in 2008 and 2009, and Bergman's retrospective review of MEI's records in 2017, not to any actual corporate acts undertaken by the board. (A1436–37.) Defendants did not argue post-trial for the validity of the other minutes which had

been addressed at trial – such as the unsigned "1997" minutes, which had been undercut in questioning by the trial judge himself. (A1126–28 (T.T. 594:1–596:1).)

With Defendants having confined themselves to defending only the "November 1996" meeting, Plaintiff met the argument in the Answering Brief, and gave extensive argument supporting the proposition that the "minutes" purporting to document the ostensible 1996 board action to issue shares were intentionally falsified. (A1525–32.) Defendants, in their post-trial reply brief, mocked this evidence as mere "conspiracy theories." (A1591.)

Defendants did not argue that Certificate 1370 was evidence of a DGCL-compliant resolution issuing themselves shares. Nor did Defendants argue that the 2004 or 2009 minutes satisfied the DGCL, or somehow showed later ratification of the earlier, 1996 acts.

As noted in Section I(A)(iii), *supra*, Plaintiff *did* specifically address Certificate 1370, the unsigned (and mutually irreconcilable) 2004 minutes, and the 2009 minutes in the pre-trial briefing, and contextualized them as evidence of Defendants' years-long campaign of intentional document falsification. Post-trial, Plaintiff had only a single, *answering* brief post-trial. Because Defendants, after a devastating cross-examination on the issue of the falsification of corporate records, did not defend or rely upon those other documents, there was no argument for Plaintiff to meet. Instead, Plaintiff used his one and only post-trial answering brief

to meet the post-trial argument Defendant, who bore the burden of proof, actually made: that the November 1996 issuance was real, valid, and actually occurred at a November 1996 board meeting. And on that issue, the trial court found that Plaintiff proved his case convincingly, with the Court finding that it was "likely, if not nearly certain, that the Board did not vote to issue Clifford 2.1 million shares in 1996." (Op. at 90.)

ii. The Facts Found by the Trial Court Confirm the Shares Were Not Issued in Compliance with the DGCL

Defendants argue that the trial court's finding that the post-1996 shares were valid is subject to deferential review. (AB at 24.) This is not the case. Statutory interpretation of the DGCL is reviewed *de novo*. *In re Fox Corp./Snap Inc. Section 242 Litig.*, 312 A.3d 636, 642 (Del. 2024). While the factual findings of the trial court are entitled to deference, their legal significance is not. *See N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 380–81 (Del. 2014) ("we do not defer to the trial court on embedded legal conclusions and review them *de novo*.").

This Court has explained what a board of directors must do to issue stock under the DGCL – the "statutory scheme consistently requires board approval and a writing." *Grimes v. Alteon, Inc.*, 804 A.2d 256, 260 (Del. 2002). This Court has been emphatic that "the requirement of board approval for the issuance of stock is not limited to the act of transferring the shares of stock to the would-be stockholder, but includes an antecedent transaction that purports to bind the

corporation to do so." *Id*. at 261. "This duty is considered so important that the directors cannot delegate it to the corporation's officers." *Id*.

A board's "intention" is not a corporate act, and mere intention to issue shares is not susceptible to validation even in a statutory cure proceeding. *In re Numoda Corp. S'holders Litig.*, 2015 WL 402265, at *9 (Del. Ch. Jan. 30, 2015) ("*Numoda II*"), *aff'd*, 128 A.3d 991, 2015 WL 6437252 (Del. Oct. 22, 2015). "Corporate acts are driven by board meetings, at which directors make formal decisions." *Id.* at *9.

The facts found by the trial court do not satisfy the DGCL's requirements. Defendants emphasize the trial court's finding:

> [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 vote*s by the Board to issue Clifford the disputed stock.

(AB at 29 (quoting Op. at 90) (bold and italics added by Defendants).)

As in *Numoda II*, the 'intention' of the Board is not a corporate act. 2015 WL 402265, at *9. The trial court recognized the "April 2004 meeting" as having been documented by mutually irreconcilable draft minutes (*Id.* at 25 (citing JX0327 (A0219) and JX0328 (A0220) with a *but see* signal) created in connection with Defendant Lazier's specific directive to "alter the record of key corporate actions and MEI's equity ownership." (Op. at 27.)

That is, the only board-level formal corporate act that the trial court credited is the 2009 meeting, documented by finalized minutes. (Op. at 90.) Those minutes document only an issuance of stock. (A0223–24.) The "board" consisting of only the Defendants themselves (Op. at 92 n.362) merely voted to award shares to themselves. (A0224.) Rather than a board-approved writing, like an executive equity compensation plan, this self-issued grant was founded merely on "corporate practice as reflected by past Board votes." (*Id*.) *Grimes* requires a written instrument formall adopted by the Board, not 'past practice' and 'past board votes.' But, worse, the 1996 vote in question *never happened*, and was a later fabrication created with the intent to falsify MEI's corporate records. (Op. at 89–90.) The minutes do not even identify what consideration MEI received for the shares, instead insisting that the board (again, the Defendants) intends to award Clifford yet further compensation for "operational and other services to the Company." (A0224); *see* 8 *Del. C.* § 152(a) (requiring the board of directors to set forth the consideration being exchanged for shares of stock in a formal resolution).

Later actions by individuals like Ken Kinkor or Erik Bergman do not affect this analysis. A void issuance remains invalid, and its ostensible shares a nullity, even if the company issues a share certificate and enters the void issuance on a stock ledger. *Pogue v. Hybrid Energy, Inc.*, 2016 WL 4154253, at *2–3 (Del. Ch. Aug. 5, 2016).

iii. Defendants Concede Statutory Invalidity Cannot be Cured by Laches

"The oft-noted fact that corporate actions are 'twice-tested'—first in light of compliance with the DGCL, second for compliance with fiduciary duties—is neatly illustrated by directors' actions to set their own compensation." *Knight v. Miller*, 2022 WL 1233370, at *1 (Del. Ch. Apr. 27, 2022). Equitable defenses like laches can rectify fiduciary breaches in the second step, but not violations of the DGCL in the first step. The law is clear:

> It is a well-established principle of current Delaware law that "stock 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. That the stock is void means that it cannot be remedied by equity; "a court cannot imbue void stock with the attributes of valid shares." This Court must "refuse to overlook the statutory invalidity of stock even in situations when that might generate an inequitable result." Put simply, for changes to the corporation's capital structure, "law trumps equity."

*Boris v. Schaheen*, 2013 WL 6331287, at *13 (Del. Ch. Dec. 2, 2013) ("*Numoda I*") (quoting *STAAR Surgical*, 588 A.2d at 1136–37, *Liebermann v. Frangiosa*, 844 A.2d 992, 1004 (Del. Ch. 2002), and *Blades v. Wisehart*, 2010 WL 4638603 (Del. Ch. Nov. 17, 2010)).

Defendants do not deny this venerable rule. As Defendants concede, a defense of laches is unavailable when the challenge asserts statutory invalidity. (AB at 27–28.) Indeed, they *acknowledge* that the path for curing void shares is

limited to Sections 204 or 205 of the DGCL. (AB at 28 n.14 (citing *Holifield v. XRI Inv. Hldgs. LLC*, 304 A.3d 897 (Del. 2023)).

Because the Defendants issued themselves the contested shares without complying with the DGCL, the shares are void and the trial court's laches ruling cannot save them. Any other result would lead to the "untenable conclusion that the proper capitalization of a company could differ depending on the person who asks the question." *Numoda I*, 2013 WL 6331287, at *15. Nor could a meeting in 2004 or 2009 rectify this problem, because, just as other equitable defenses cannot remedy void stock, "[n]either can a board ratify void stock." *Id*. (citing *Waggoner v. Laster*, 581 A.2d 1127, 1137 (Del. 1990)); *see also Genger v. TR Investors, LLC*, 26 A.3d 180, 195 (Del. 2011) ("Ratification is an equitable defense") (citing *Frank v. Wilson & Co.*, 32 A.2d 277, 283 (Del. 1943)).

## II. It was the Appellees who injected the issue of the ongoing validity of the Joint Venture Agreement in the Pre-Trial Order, the issue was tried, and it was error for the trial court not to come to a conclusion of law on the issue.

The JVA and OA expired by their own terms in 2017, before the Defective Merger. (Op. at 9.) Defendants' defense of the Defective Merger "relied heavily on the survival of the JVA." (Op. at 57; 104.) To square this circle, Defendants – not Plaintiff – introduced to this case the contention that the Defendants had extended the JVA and OA by adding it to the Pre-Trial Order. (A0368.) As discussed in the Opening Brief, the parties tried the issue, and Plaintiff prevailed on the facts.

Unable to dispute the merits, of the issue, Defendants insist Plaintiff should have pled the non-extension as an affirmative count, and joined other entities Defendants control as co-defendants. Those grievances are both waived and meritless: extension was the *Defendants'* issue, raised by them, and tried by consent with all necessary parties present. Plaintiff prevailed.

### A. Defendants Raised the Extension Theory

An action for declaratory judgment will be dismissed if it is simply a restatement of an adverse claim. *Quantlab Group GP, LLC v. Eames*, 2019 WL 1285037, at *4 (Del. Ch. Mar. 19, 2019); *In re RJR Nabisco, Inc. S'holder Litig.*, 1990 WL 80466, at *1 (Del. Ch. June 12, 1990). A Delaware court will not separately address coextensive counts. *CSH Theaters, LLC v. Nederlander of San Francisco Assocs.*, 2015 WL 1839684, at *5 n.23 (Del. Ch. Apr. 21, 2015).

The JVA and OA by their terms expired no later than December 31, 2017. (Op. at 9.) The Second Amended Complaint had no need of a declaratory judgment count, because there was no ripe controversy: the JVA and OA were expired and had ceased to govern the parties' legal relations.

*Defendants,* not Plaintiff, requested that the trial court grant it a trial on the validity of the purported JVA extensions by placing that as an issue to be tried in the stipulated proposed Pre-Trial Order. (A0368.) When the trial court granted the order, Plaintiff got its way, and cannot now object to the trial granting it trial on an issue it requested. *See Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008) (Judicial estoppel "prevents a litigant from advancing an argument that contradicts a position previously taken that the court was persuaded to accept as the basis for its ruling."). Defendants having raised the issue, it would have been not merely unnecessary but *improper* for Plaintiff to plead a reciprocal count which merely denied Defendants' entitlement to relief. *E.g. Quantlab*, 2019 WL 1285037 ("I am satisfied Counts I and II of Defendants' Counterclaims should be summarily dismissed as duplicative of Plaintiffs' Count II").

### B. The Extension Theory Was Tried in Furtherance of the Entire Fairness Analysis of the Merger

Examination of the validity of the purported extension of the JVA and OA was necessary because the continued vitality of those agreements was the linchpin of Defendants' defense of the Defective Merger (Op. at 57), which hinged on the

transaction being "cleansed by fair value." (Op. at 98 (quoting Defs' Post-Tr. OB at 40 (A1452)).)

That gambit failed on both facts and law. The entire fairness test is unitary, and cannot be 'cleansed' by fair price–both prongs must be examined. *Jacobs v. Akademos, Inc.*, 2025 WL 1924348, at *1 (Del. July 14, 2025); *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 717–18 (Del. 2023). Here, the trial court found that the Defective Merger was not merely unfair but *intentionally* unfair as to *both* process and price. (*See* Op. at 97 ("it is frankly difficult to think of even a single act Defendants took that might suggest they intended anything other than for the process here to be manifestly unfair); *id*. at 117–18 (finding the price was subjectively unfair).)

The issue was fully joined, tried by the parties consent, addressing a central issue of the case–the Defective Merger's entire fairness. Court of Chancery Rule 54(c) requires a trial court to enter judgment on all issues tried and proved. That is particularly appropriate here, where the remedy restoring the pre-Defective Merger *status quo ante* necessarily requires a determination of what that status quo was.

### C. Plaintiff Proved No Extension Occurred

The trial court's factual findings are clear that none of the purported extensions occurred. (Op. at 57–58.) Defendants do not challenge that finding on appeal, and so cannot contest that Plaintiff proved the factual predicates showing

that the JVA and OA are long-expired. *See Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

Instead, Defendants argue that they themselves never should have been allowed to raise their claim that the JVA and OA for failure to join necessary parties– the WJV, MFC, and International. (AB at 36.)

In the first place, Defendants are barred from challenging the propriety of trial on the extension issue, since that issue was tried at their own request. Judicial estoppel bars Defendants from a later challenge to a ruling in their favor. *Motorola*, 958 A.2d at 859. But, even if the issue was not barred, it is without merit.

Rule 19(a) only addresses joinder of "[a] person who is subject to service of process." Ct. Ch. R. 19(a)(1). Artificial personhood, and the capacity to sue and be sued, can be granted only by the state. *New Ents. Assoc. 14 L.P. v. Rich*, 295 A.3d 520, 568 n.159 (Del. Ch. 2023).

The WJV was never a "person" with separate legal existence. A joint venture is a relation *between* persons, not a separate legal person itself. *See Gramcery Equities Corp. v. Dumont*, 531 N.E.2d 629, 632, 72 N.Y.2d 560, 565 (N.Y. 1988).

International, too, lacked legal existence throughout this litigation, because it had been merged into MEI. While it had once been a person, it was not "subject to service of process" as required by Rule 19.

MFC, as a wholly-owned subsidiary, was not a necessary party. Its parent company and the parent's entire board of directors were joined as parties, and thus able to defend MFC's interests, and compel its obedience. *See Dick v. Reves*, 206 A.2d 671, 673 (Del. 1965) (parties before the court can be ordered to dispose of property outside the court's jurisdiction because "Equity acts in personam"). Defendants point to no "practical" impairment, or risk of conflicting judgments. They give no suggestion that MFC has any directors, officers, evidence, employees, or any other possible resource which might affect the litigation. Simply put, they did not seek to join MFC when they raised the issue, and there was no need to.

## CONCLUSION

For the forgoing reasons, Plaintiff respectfully requests that the Court reverse the trial court's decision on the two matters raised in this appeal and grant Plaintiff relief as requested in the Opening Brief.

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