IN THE SUPREME COURT OF THE STATE OF DELAWARE

PAUL WITMER, Plaintiff Below/Appellant, v. ARMISTICE CAPITAL, LLC, and ARMISTICE CAPITAL MASTER FUND LTD., Defendants Below/Appellees.	No. 381, 2025 (Appeal from Court of Chancery C.A. No. 2022-0808-MTZ) PUBLIC VERSION DATED: November 12, 2025

OPENING BRIEF OF APPELLANT PAUL WITMER

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October 28, 2025

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NATURE OF PROCEEDINGS

This action, brought derivatively by Plaintiff Paul Witmer ("Plaintiff"), a stockholder of Nominal Defendant Aytu BioPharma, Inc. ("Aytu" or the "Company"), alleges that Defendants Armistice Capital, LLC and Armistice Capital Master Fund Ltd. (together, "Armistice" or "Defendants") unlawfully traded shares of Aytu stock based on material nonpublic information ("MNPI") Armistice received from its designee on Aytu's Board of Directors (the "Board").

In March 2020, Armistice owned over 40% of Aytu's outstanding stock, which it had acquired through a series of transactions that it orchestrated between Aytu and other portfolio companies substantially owned by Armistice. Armistice's Managing Partner and Chief Investment Officer, Steven Boyd, served on Aytu's Board, and through Boyd, Armistice had access to two pieces of MNPI that would have significant impacts on Aytu's stock price during the week of March 9, 2020. First, Armistice, through Boyd, learned from Aytu's CEO, Josh Disbrow, that the Company was set to announce an exclusive distribution agreement for COVID-19 tests just as the severity of the COVID pandemic was becoming clear. Second, Armistice was aware, through Boyd, that Aytu was entering into financing agreements, which would dilute existing shareholders and drive down the share price.

Armed with this MNPI, Armistice implemented a trading strategy to liquidate its Aytu holdings in the brief window between the announcement of the COVID test agreement, which caused the stock price to spike, and the announcement of the financing arrangements, which caused the stock price to decline rapidly. Armistice executed its plan to perfection. Despite needing to liquidate millions of shares—a task made even more complicated by the need to convert convertible securities into tradeable common stock while also navigating a series of blocker provisions—Armistice sold more than $30 million Aytu shares (representing half the Company's market capitalization) in a single trading day, March 10, 2020. Armistice's use of MNPI to implement this trading strategy yielded enormous financial benefits, as Armistice made its trades as Aytu's stock price surged by 400% on March 10, before giving back half of those gains following the announcement of the financing arrangements on March 11 and 12, 2020.

Plaintiff brought this Action alleging Defendants were liable for insider trading pursuant to *Brophy*, as well as unjust enrichment (in addition to other causes of action not at issue in this appeal). The Court of Chancery dismissed Plaintiff's claims in their entirety, ruling that Armistice did not owe fiduciary duties pursuant to *Brophy* and could not be found liable for unjust enrichment because there was no liability for breach of fiduciary duty. Plaintiff-below Appellant Witmer appeals from

the judgment of the Court of Chancery. For the reasons set forth below, this Court should reverse.

SUMMARY OF ARGUMENT

A. The Court of Chancery erred in ruling that Armistice did not owe fiduciary duties pursuant to *Brophy*.

1. *First*, the Court erred in its analysis of *Brophy* by ruling that the claim was contingent upon Plaintiff establishing that Armistice was a controlling stockholder. *Brophy* duties are based on a party's position of trust and confidence and access to MNPI, not allegations of control. A holistic analysis demonstrates that Armistice occupied a position of trust and confidence, had access to MNPI, and profited from that confidential relation.

2. *Second*, the Court contravened the public policy backing Delaware's insider trading law. Specifically, dismissal permits parties occupying that position of trust and confidence to abuse that relationship for profit. The result is inequitable and conflicts with longstanding Delaware law. Moreover, dismissal undermines the interplay of state and federal law, which relies on states imposing liability on insiders exploiting material nonpublic information for insider trading.

B. The Court of Chancery erred in dismissing Plaintiff's unjust enrichment claim as duplicative of the breach of fiduciary duty claim.

1. *First*, Plaintiff's allegations state a viable claim that Armistice was unjustly enriched. Armistice's trades resulted in a windfall of $61.2 million, in turn harming the Company and other stockholders, whose equity holdings were

massively diluted when Armistice flooded the market with new shares. These profits were unjust because they were obtained through abuse of MNPI that had been entrusted to Defendant Boyd in his capacity as a member of the Aytu Board and because Armistice's trades were made in plain violation of Aytu's Insider Trading Policy.

2. *Second,* the Court of Chancery erred in improperly imposing a fiduciary element on Plaintiff's claim for unjust enrichment. Rather than evaluating whether Plaintiff's factual allegations established the elements of an unjust enrichment claim, the Court of Chancery dismissed the claim because it purportedly is "duplicative of" and "depends *per force* on" Plaintiff's claims for breach of fiduciary duty. The Court of Chancery's holding improperly ignores that unjust enrichment is a separate cause of action that has different elements than Plaintiff's breach of fiduciary claims. In doing so, the Court of Chancery improperly inserted an element of fiduciary duty that is not required to establish a claim for unjust enrichment.

STATEMENT OF FACTS

A. Armistice Builds its Equity Stake in Aytu

Steven Boyd founded Armistice Capital LLC ("Armistice Capital") and Armistice Capital Master Fund Ltd. ("Armistice Fund") (together with Armistice Capital, "Armistice") in 2012. Armistice Capital is a hedge fund primarily focused on the health care and consumer sectors, and Armistice Fund functions as an investment fund offered and operated by Armistice Capital. Boyd serves as Armistice's Chief Investment Officer and Managing Partner.

Beginning in 2017, Armistice, led by Boyd, began to build a controlling stake in the Company through purchases of common stock, convertible preferred stock, and warrants acquired through private and public offerings. In November 2018, Aytu issued a $5 million promissory note to Armistice, and the Company announced that it would expand the size of its Board of Directors and elect Boyd to fill the new vacancy. A109-110.

In April 2019, Boyd joined Aytu's Board as Armistice's designee and representative. At that time, Armistice held 41.1% of the Company's outstanding shares, and the Board acknowledged that "Armistice will become an interested stockholder pursuant to Section 203 of the DGCL." The Company further stated in its 10-K for the fiscal year ended June 30, 2019, that because of Armistice's

ownership of "a significant percentage of [Aytu's] stock" and Boyd's position on the Board, Armistice "could be able to exert significant control over" Aytu. A113.

Later in 2019, Aytu began negotiations to acquire Innovus Pharmaceuticals Inc. ("Innovus"), an Armistice portfolio company. Armistice owned 10% of Innovus's equity, yet Aytu appointed Boyd to a two-person special review committee to review the proposed terms for purchasing acquisition Innovus. Boyd then concealed his conflict of interest from the Board of Directors, which subsequently voted to authorize Aytu management to negotiate the transaction. A114-16.

On September 10, 2019, the Board again met to consider the transaction and learned of Armistice's ownership stake in Innovus. A118-19. Stockholders, including Armistice, approved the acquisition of Innovus (the "Innovus Transaction") on February 13, 2020, and the deal closed the following day. A128. In exchange for their shares in Innovus, Armistice and other stockholders received equity in Aytu.

At the same time that negotiations were going on in the Innovus Transaction, Aytu was pursuing an asset purchase agreement (the "Cerecor Transaction") with Cerecor Inc. ("Cerecor"). At the time, Armistice owned over 60% of Cerecor's voting stock, and Boyd was a member of Cerecor's Board of Directors. On October 10, 2019, the Aytu Board approved the Cerecor Transaction, which closed on

November 1, 2019. In exchange for their shares in Cerecor, Armistice and other stockholders received equity in Aytu.

The Innovus Transaction closed in February 2020. A121-28. Through the Cerecor and Innovus transactions, Armistice's shares in the respective companies were exchanged for equity in Aytu, thereby increasing ownership stake.

B. Armistice Dumps All of Its Aytu Holdings and Violates the Company's Insider Trading Policy

Beginning in March 2020, just weeks after the Innovus transaction closed, Armistice liquidated its direct and indirect holdings of Aytu stock, generating approximately $61.2 million in proceeds, while flooding the market with Aytu shares. On March 10, 2020, Armistice sold more than $31.2 million in Aytu shares, including all common stock held prior to the Cerecor and Innovus Transactions and all shares of common stock it received as a former stockholder of Innovus. A136-37.

Armistice made these sales while Boyd was in possession of MNPI concerning the Company. On March 9, 2020, Aytu's CEO, Josh Disbrow, advised the Board, including Boyd, of what he described as [redacted] The Company was set to sign an exclusive distribution agreement with L.B. Resources, Ltd. for the right to commercialize a clinically validated and commercially used COVID-19 test. The Company would acquire the exclusive right to distribute the test—which was intended for professional use and

purportedly would deliver clinical results within 10 minutes at the point-of-care—in the United States for a period of three years, with an additional three-year autorenewal thereafter. Disbrow advised the Board (including Boyd) that announcement of the distribution agreement was "[redacted]" once it was announced to the market. A135-36.

A few hours later, after Board members expressed support for the COVID test distribution agreement, Disbrow sent the Board, including Boyd, a press release announcing the agreement, which he advised would "[redacted]." Thus, heading into March 10, 2020, Boyd and Armistice knew that Aytu would make an announcement that would cause an increase in the Company's stock price. A136.

Boyd and Armistice also knew that the increase in the Company's stock price was likely to be temporary. Aytu was urgently in need of additional cash (in part due to the cost of the Innovus and Cerecor Transactions) and was in the process of negotiating financing arrangements that would substantially dilute existing stockholders and drive down the Company's stock price through the issuance of a large volume of Aytu shares. Boyd was actively involved in negotiating the financing arrangements and consulting with Disbrow. A136-37.

Prior to the announcement on March 10, Boyd and Disbrow had negotiated a series of securities purchase agreements, which would dilute existing stockholders and drive down the Company's stock price by flooding the market with new shares representing more than 50% of outstanding shares immediately prior to the issuances (approximately 42.2 million shares). A137-38.

The COVID test distribution agreement and the Company's financing needs and anticipated share issuances fall squarely within the definition of MNPI in Aytu's Insider Trading Policy, which includes, among other things: [redacted] A447. As anticipated, the Company's March 10, 2020 announcement of the COVID test distribution agreement caused its stock price to spike by more than 400% by the end of the day. A137.

The Company's market capitalization increased from $10.2 million to more than $60 million in a single trading day. Over the course of the March 10, 2020 sales, Armistice sold more than $31.2 million of Aytu stock, representing more than half of the Company's total market capitalization. After Armistice completed its sales, the Company announced the securities purchase agreements on March 11 and March 12, 2020. The agreements with unnamed institutional investors for the purchase and

sale of nearly 24,000,000 newly issued shares of Aytu common stock were to close on March 13, 2020. A137-38.

Aytu's prospectus supplements filed in connection with the issuances acknowledged the risk of dilution, cautioning that "[p]urchasers of common shares in this offering will experience immediate and substantial dilution in the book value of their investment" and "[a] substantial number of common shares may be sold in the market following this offering, which may depress the market price for our common shares." A138.

As expected, the announcements created downward pressure on Aytu's stock price. By close of market on March 13, 2020, Aytu's stock price had fallen nearly 44% from the closing price on March 10, giving back more than half the gains that followed the announcement of the COVID test distribution arrangement. Thus, due to Boyd's access to MNPI about the Company, Armistice was able to perfectly time its sales to capture the increase in the Company's stock price due to the announcement of the COVID test distribution agreement before the market became aware of the Company's need for additional financing and highly dilutive stock issuances, and the stock price fell back to earth. None of Armistice's March 10, 2020 sales were made pursuant to a Rule 10b5-1 plan. A138-40.

The sales also violated the Company's Insider Trading Policy. The Insider Trading Policy contemplates that the Company will impose a special black-out

period prohibiting trading by Aytu insiders until the third day following disclosure of material developments impacting the Company, such as the COVID test distribution agreement. A special black-out period enables the market to assimilate the developments before insiders with prior knowledge of those developments are permitted to trade. Even where no formal special black-out period has been imposed, the policy states that insiders who have MNPI about the Company should not trade Aytu securities [redacted]" A445-446. In violation of these requirements, Armistice began selling its Aytu holdings immediately following announcement of the COVID test distribution agreement.

Armistice also failed to comply with the Insider Trading Policy's preclearance requirement, which prohibits Aytu directors, and entities over which a director exercises control, from trading Aytu securities:

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Although Armistice's Chief Compliance Officer Daniel Radden sent an email to Disbrow, David Green (then Aytu's Chief Financial Officer), and Aytu's outside counsel concerning the March 10, 2020 sales, the email does not comply with the policy. The email does not state the amount of the proposed trades, nor does it include the required certifications with respect to MNPI (a certification Boyd could not have provided in good faith in view of his possession of MNPI concerning the COVID test distribution agreement and the Company's need for additional financing and dilutive stock issuances) and compliance with the requirements of Rule 144 and Section 16 (the latter of which Armistice would later admit had been violated). Moreover, Mr. Green never responded to the email to authorize Armistice to trade. Despite not being authorized to approve trading pursuant to the Insider Trading Policy, Disbrow did respond to Mr. Radden's email and purported to confirm (incorrectly) that Armistice was not in possession of MNPI and was authorized to trade. A141.

Armistice sold again on April 27, 2020, when it liquidated its remaining holdings of Aytu stock, including Aytu equity received through the Innovus Transaction. Also on April 27, 2020, Armistice sold all rights to Aytu equity it received in the Cerecor Transaction. Following the April 27, 2020 sales, Armistice had no remaining direct or indirect holdings of Aytu common stock, preferred stock, or warrants. As with the March 10 sales, the April 27, 2020 sales were not made

pursuant to a Rule 10b5-1 plan, and Boyd and Armistice failed to comply with Aytu's Insider Trading Policy. A141.

The Aytu Insider Trading Policy imposes a [redacted] A445. The Insider Trading Policy explains that the mandatory prohibition on trading during the period between the end of the quarter and the release of quarterly financial results reflects that [redacted] *Id*. The April 27, 2020 sales were made during a Financial Information Black-Out Period because the third quarter of Aytu's 2020 fiscal year closed on March 31, 2020, and the Company did not release financial results for the quarter until May 14, 2020. Thus, the April 27, 2020 sales by Boyd and Armistice were strictly prohibited. A141-42.

Boyd and Armistice were aware a Financial Information Black-Out Period was in effect at the time of the April 27, 2020 trades and that no trading was permitted at that time. A143. Boyd and Mr. Radden (Armistice's CCO) were informed by email on March 19, 2020 that a black-out period began that day and would extend [redacted]

[redacted]. A454-56.

Defendant Disbrow received the same notice and was likewise aware that a Financial Information Black-Out Period was in effect at the time of the April 27, 2020 trades. As with the March 10 trades, Mr. Radden sent an email to Disbrow and Mr. Green (Aytu's CFO), concerning the April 27, 2020 trades; however, trading during a Financial Information Black-Out Period is not permitted even if a preclearance request is made. A143. Moreover, Mr. Radden's email again did not comply with the preclearance requirements of Aytu's Insider Trading Policy. The email does not state the amount of the proposed trades, and it does not include the required certifications with respect to MNPI and compliance with the securities laws. Like he did on March 10, Disbrow purported to authorize Armistice's trading on April 27, 2020, despite not having the authority to do so under Aytu's Insider Trading Policy, and despite that a Financial Information Black-Out Period was in effect. *Id*.

C. Armistice was Subject to Aytu's Insider Trading Policy

Boyd's role as a director of Aytu (as a result of which he frequently came into possession of MNPI about the Company) and his role as a principal of Armistice (which had a large investment in the Company and frequently transacted in the

Company's securities) provided a unique opportunity to profit from MNPI. Boyd was the principal decisionmaker for Armistice, and he had control over Armistice's investment policies with respect to Aytu while in possession of MNPI. A143.

Armistice's trading was subject to and violated Aytu's Insider Trading Policy, which seeks, among other objectives, to "[redacted]" *Id*.

Moreover, the policy provides that [redacted]" A444. The policy further provides that "[redacted]

[redacted]

[redacted]" A444-449.

D. This Litigation

Plaintiff served two demands for inspection of books and records pursuant to 8 *Del. C.* § 220, the first dated September 29, 2021, and the second dated March 23, 2022 (together, the "220 Demands"). Plaintiff filed the initial Complaint in this action on September 12, 2022. D.I. 1; *see* A148. In November 2022, the Company produced more than 44,600 additional pages of documents responsive to the 220 Demands. Plaintiff then filed its Verified First Amended Shareholder Derivative Complaint on April 5, 2023 after review of the Company's supplemental production. D.I. 13; *see* A101.

On August 14, 2023, Plaintiff advised the Court that he had reached an agreement to resolve this action with Aytu and the Director Defendants (D.I. 17; *see* A152), and the parties filed a fully executed Stipulation and Agreement of Settlement, Compromise, and Release (the "Settlement Agreement") on March 13, 2024. D.I. 27; A030-100. Pursuant to the Settlement Agreement, the Aytu Board agreed to implement significant corporate governance enhancements to address the Company's failures in oversight related to insider trading and other matters. *See* A067-72. The Company and the Director Defendants also agreed in the Settlement Agreement that they will maintain a position of neutrality with respect to the

remaining claims against the Armistice Defendants, and that the Company shall neither object to nor support the assertion of those claims on its behalf, thereby excusing demand. A038. Aytu insisted, however, that Plaintiff voluntarily dismiss the claims against Boyd because of the financial risks posed by his demands for advancement of legal fees. *See* A030-100.

In August 2025, the Court of Chancery granted Armistice's motion to dismiss. *Witmer v. Armistice Capital, LLC, et. al*, C.A. No. 2022-0808-MTZ (Del. Ch. Aug. 14, 2025); A618-67. The *Brophy* claim was dismissed "on the grounds that Armistice did not owe fiduciary duties." A651. The Court held that Plaintiff's theory for *Brophy* liability "excavates the foundation of fiduciary duties altogether" because it asserts that "Armistice need not exert any control over Aytu to owe" fiduciary obligations. A654. Further, the Court dismissed Plaintiff's claim for unjust enrichment, ruling that the unjust enrichment claim depended "*per force* on the breach of fiduciary duty claim." A666. On September 10, 2025, Plaintiff filed a Notice of Appeal. A702.

E. Federal Litigation

Armistice was also sued in the United States District Court for the District of Colorado for allegedly violating Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), and SEC regulations thereunder. *See Revive Investing, LLC, et. al v. Armistice Capital Master Fund, Ltd.*, C.A. 20-CV-2849-CMA-SKC

(D. Colo.). Section 16(b) provides for strict liability on the part of statutorily defined "insiders" for so-called "short swing" profits realized on purchases and sales of the same security within a six-month period. By regulation, however, the SEC has exempted transactions involving so-called "directors by deputization," which are investment funds with designated representatives serving on a corporation's board, from liability under the statute. *See* A668-99.

Armistice asserted that it qualifies as a "director by deputization" and is therefore not liable for any "short swing" profits. *See id*. To support that position, Armistice argued that the court cannot separate its analysis of Boyd and Armistice for purposes of evaluating their trades. *See* A683 ("Mr. Boyd was invited to—and joined—the Aytu Board to serve as [Armistice's] representative . . . Mr. Boyd received confidential information regarding Aytu. Mr. Boyd necessarily 'shared' such confidential information with Armistice—given his role as Chief Investment Officer of Armistice Capital, 'sharing' amounted to simply receiving the information. Mr. Boyd was also responsible for all voting and trading decisions regarding [Armistice's] Aytu securities . . . Information Mr. Boyd received as an Aytu director thus necessarily informed his decisions regarding Armistice's investment strategy in Aytu.") (internal citations omitted).

In January 2025, a federal jury ruled that the hedge fund was exempt from liability under Section 16(b). A700.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN RULING THAT ARMISTICE IS NOT SUBJECT TO *BROPHY* FIDUCIARY DUTIES

A. Question Presented

Did the Court of Chancery err in ruling that a hedge fund did not owe *Brophy* fiduciary duties when it designated a director to the company's board of directors, received MNPI through the director designees, and executed trades based on that MNPI? A651-52.

B. Standard of Review

The Court of Chancery's ruling that *Brophy* fiduciary duties do not apply is a legal conclusion that this Court reviews *de novo*. *Kahn v. Kolberg Kravis Roberts & Co.*, 23 A.3d 831, 836 (Del. 2011).

C. Merits of the Argument

1. Armistice Owed Fiduciary Duties Pursuant to *Brophy*

For more than seventy-five years, Delaware law has imposed a fiduciary duty with respect to trading in a corporation's securities where a party has access to the corporation's MNPI. *See Brophy v. Cities Serv. Co.*, 31 Del. Ch. 241, 246-47 (Del. Ch. 1949). A party who trades based on a corporation's MNPI in violation of the so-called *Brophy* duty must, as a matter of equity, disgorge the profits from such trading, irrespective of any loss to the corporation. *See id.*

The *Brophy* court grounded the duty to refrain from trading based on MNPI, and to account for the profits from any such trading, in long-standing principles of agency and trust law, recognizing that "[p]ublic policy will not permit [a party] occupying a position of trust and confidence . . . to abuse that relation to his own profit." *Id.*; *see also Kahn*, 3 A.3d at 838 ("[I]t is inequitable to permit the fiduciary to profit from using confidential corporate information"). Delaware's prohibition on insider trading "does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of [] confidence." *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939).

In *Brophy*, defendant Thomas Kennedy was a "confidential secretary" to a director and officer of the company. *Brophy*, 31 Del. Ch. at 243. Although Kennedy was a "mere employee" and had no responsibility for the shaping of corporate policy, the *Brophy* court ruled that fiduciary principles governed Kennedy's trading in company stock because his role as confidential secretary offered him "access to confidential information concerning [the company] and its operations." *Id.* 243-45. In view of his access to the company's confidential information, the court found that Kennedy occupied "a position of trust and confidence toward [the company],

analogous in most respects to that of a fiduciary," and fiduciary principles "must govern his actions accordingly." *Id.* at 244.

Delaware courts, including this Court, have consistently applied *Brophy* for more than seven decades, repeatedly reiterating the important policy of eliminating any incentive to abuse a position of trust and confidence for personal benefit. *See, e.g.*, *Kahn*, 23 A.3d at 837 ("Because [Kennedy] occupied a position of trust and confidence within the plaintiff corporation, the court found his relationship analogous to that of a fiduciary"); *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, *11 (Del. Ch. May 18, 2009) (ruling that an employee, who was not a director, breached his fiduciary duty to the company by trading on MNPI when he used the company's "confidential information for his own [] benefit without [the company's] consent.").[1]

The Complaint's allegations more than suffice to show that Armistice was given access to Aytu's MNPI, thereby establishing the relationship of "trust and confidence" contemplated by *Brophy* and requiring that Armistice account to the Company for any profits it realized by trading based on that MNPI. Boyd acted as

[1] Courts in other jurisdictions also have adopted *Brophy* duties, recognizing the important equitable considerations at stake where a party abuses its position of trust and confidence by trading based on MNPI. *See, e.g.*, *Diamond v. Oreamuno*, 24 N.Y.2d. 494, 501, 248 N.E.2d 910, 914 (N.Y. 1969) ("Sitting as we are in this case as a court of equity, we should not hesitate to permit an action to prevent any unjust enrichment realized by the defendants from their allegedly wrongful act [of trading based on MNPI].").

Armistice's designee on Aytu's Board, and in his role as Armistice's Chief Investment Officer, he was the primary decisionmaker for Armistice with respect to its investment in and trading of Aytu securities. *See* A107. Boyd had access to Aytu's MNPI as a Board member, and the Company and the Board expressly acknowledged in contemporaneous documents that Boyd "regularly shared confidential information about the Company with [] Armistice" and "routinely … influenced[d] Armistice's investment policy regarding the Company." *See* A144; *see also* A143, 154.[2]

The Complaint's allegations also establish that Armistice's trades in March and April 2020 were based on MNPI received through Boyd. After building an enormous position in Aytu securities over a period of months, Armistice abruptly sold down that position on March 10, 2020. Armistice's sales were perfectly timed to take advantage of a short-lived spike in the Company's stock price between the announcement of the COVID-19 test distribution agreement and the disclosure of dilutive financing arrangements. A135-39. Contemporaneous documents

[2] Armistice asserted the same in the related federal securities litigation. *See* A683 ("Mr. Boyd was invited to—and joined—the Aytu Board to serve as [Armistice's] representative . . . Mr. Boyd received confidential information regarding Aytu. Mr. Boyd necessarily 'shared' such confidential information with Armistice—given his role as Chief Investment Officer of Armistice Capital, 'sharing' amounted to simply receiving the information. Mr. Boyd was also responsible for all voting and trading decisions regarding [Armistice's] Aytu securities . . . Information Mr. Boyd received as an Aytu director thus necessarily informed his decisions regarding Armistice's investment strategy in Aytu.") (internal citations omitted).

demonstrate that Boyd (along with the other Board members) was informed of the COVID test agreement the day before Armistice's sales, with Defendant Disbrow specifically advising Boyd that the announcement planned for the morning of March 10 was "likely to generate significant interest in the [Company's] stock and increase volume." A135-36. Contemporaneous documents also demonstrate Boyd was actively involved in negotiation of the financing arrangements, which would cause [redacted]" A136-38; *see also* A451. Armed with this knowledge, Armistice was able to plan and implement a trading strategy—including not only selling common stock, but also converting preferred shares while sequencing transactions to navigate various blocker positions—to sell more than 23.5 million shares in a single day when the stock price spiked by 400%. A137. Shares sold by Armistice that day totaled more than $31.2 million, representing more than half of the Company's total market capitalization. *Id*.

Had Armistice not been positioned, based on Boyd's access to MNPI, to execute such significant trades in a single day, its profits would have been far less because the share price fell rapidly following disclosure of the dilutive financings on March 11 and 12, 2020. By the market close on March 13, 2020, Aytu's stock price had fallen nearly 44% from the closing price on March 10, giving back more

than half the gains that followed the announcement of the COVID test distribution agreement. A138.

The above allegations state a viable claim that the Armistice Defendants abused their position of trust and confidence to sell Aytu shares based on MNPI in violation of their *Brophy* fiduciary duties. Indeed, the allegations here are strikingly similar to—and if anything, more particularized than—those in *In re Fitbit, Inc. S'holder Derivative Litig.*, where board designees for investment funds had "voting and dispositive power over the Fitbit stock owned by their respective funds" and caused the funds to trade based on MNPI the designees received in their capacity as Fitbit directors. 2018 WL 6587159, at *13-14 (Del. Ch. Dec. 14, 2018). The *Fitbit* Court denied the defendants' motion to dismiss, holding that "to allow [] directors through controlled funds, to profit from inside information without recourse would be inconsistent with the policy of extinguishing all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation." *Id.* at *14 (cleaned up). Likewise, here, Plaintiff's allegations state a viable *Brophy* claim, and the Armistice Defendants' motion to dismiss should have been denied.

2. The Court of Chancery Erred by Holding that *Brophy* Does Not Apply to Armistice Because It Was Not a Controlling Stockholder

Despite the strength of Plaintiff's allegations that Armistice traded based on MNPI, the Court of Chancery held that Plaintiff failed to state a *Brophy* claim

because the allegations did not establish that Armistice was a controlling stockholder. The Court's holding was in error because *Brophy* fiduciary duties are independent of the duties owed by controlling stockholders and do not depend on allegations of control.

The Court of Chancery focuses its analysis on the foundation of "traditional" fiduciary duties in the "separation of ownership and control" (A652-53), but that is not the basis for the species of fiduciary duty recognized in *Brophy*. Instead, *Brophy* arises from the "position of trust and confidence" between a corporation and parties that have access to its MNPI. *See Brophy*, 31 Del. Ch. at 246.[3] Thus, far from "excavat[ing] the foundation of fiduciary duties altogether" (A654), Plaintiff's claims reflect that *Brophy* fiduciary duties are based on a different foundation.

The Court of Chancery's suggestion that *Brophy* duties are merely a subset of general corporate fiduciary duties and apply only to traditional corporate fiduciaries,

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[3] *See also Triton*, 2009 WL 1387115, at *11 (*Brophy* applies where defendant "acquires secret information" through "a position of trust and confidence"), *aff'd*, 988 A.2d 938 (Del. 2010); *Mitchell Lane Publ'rs, Inc. v. Rasemas*, 2014 WL 4925150, at *6 (Del. Ch. Sept. 30, 2014) (If a party obtains "secret information relating to [the company's] business, he occupies a position of trust and confidence toward it, and must govern his actions accordingly. The resulting relationship is analogous in most respects to that of a fiduciary") (internal quotations omitted); *Pfeiffer v. Toll*, 989 A.2d 683, 704 (Del. Ch. 2010) (*Brophy* claims depend "on the existence of a fiduciary relationship or similar relationship of trust and confidence") (abrogated on other grounds); *Zirn v. VLI Corp.*, 1989 WL 79963, at *8 (Del. Ch. July 17, 1989) (assessing whether defendant "occupied a special position of trust and confidence"); *Oberly v. Kirby*, 592 A.2d 445, 467 (Del. 1991) (analyzing whether a "confidential relationship" has been "betrayed").

such as directors, officers, and controlling stockholders, cannot be squared with *Brophy* itself. *Brophy* involved a corporate employee who was not alleged to be a director or officer or to exercise any control over the corporation and, therefore, would not be considered a traditional fiduciary. The *Brophy* court acknowledged that such a "mere employee . . . does not ordinarily occupy a position of trust and confidence toward his employer." *Brophy*, 31 Del. Ch. at 244. However, the *Brophy* court found that the employee's access to "secret information relating to his employer's business" materially changed the situation, creating a position of trust and confidence and requiring that the employee's use of that secret information be governed by fiduciary principles. *See id.* Thus, rather than requiring a traditional fiduciary relationship, *Brophy*, by its own terms, recognizes that access to MNPI gives rise to a relationship "*analogous* in most respects to that of a fiduciary" such that the party—even though not a traditional fiduciary—"must govern his actions accordingly." 31 Del. Ch. at 244 (emphasis added).

The Court of Chancery seemingly acknowledges that the defendant in *Brophy* was found to owe fiduciary duties with respect to his trading because of the combination of his non-fiduciary employment with the corporation and his access to

the corporation's MNPI. *See* A655.[4] Nevertheless, the Court refused to employ a similarly holistic analysis of Armistice's relationship to Aytu, holding that Plaintiff's claims necessarily failed because Armistice was not a controlling stockholder. *See* A655-56.

Taking all relevant facts into account, as required by *Brophy*:

(a) Armistice held approximately 40% of the Company's common stock. Although not establishing *de facto* control, these holdings created substantial opportunities for Armistice to profit from trading in the Company stock and substantial risk that its trading could detrimentally impact the Company's stock price.

(b) Boyd had access to the Company's MNPI through his position on the Company's Board.

(c) Because he was Armistice's representative on the Board and Armistice's primary investment decisionmaker, Boyd necessarily shared the MNPI he obtained with Armistice and used that information when making trading decisions on behalf of Armistice.

[4] The Court of Chancery's suggestion that the *Brophy* defendant's employment position "was a 'position of trust and confidence'" (A655) misreads *Brophy*, which clearly states that the defendant occupied a position of trust and confidence not because of his employment position, but because of his access to "secret information." *Brophy*, 31 Del. Ch. at 244.

(d) The Company and the Board were aware Boyd shared MNPI with Armistice and allowed him to serve as Armistice's representative on the Board, subject to compliance with the Company's Insider Trading Policy, which prohibits trading by Directors and their affiliates on the basis of MNPI.

In view of these facts, even if Armistice was not a controlling stockholder, it occupied a position of trust and confidence as to the Company because the Company entrusted Armistice with access to its MNPI through Boyd. Accordingly, applying the same rationale as in *Brophy*, Armistice is analogous to a fiduciary, and its use of Aytu's MNPI must be governed accordingly.

3. The Court's Ruling Undermines Delaware Public Policy

a. Dismissal Allows Profit Flowing From a Breach of Confidence and Undermines Enforcement of *Brophy*

Delaware public policy does not permit a party "occupying a position of trust and confidence … to abuse that relation to his own profit" by trading based on MNPI. *Brophy*, 31 Del. Ch. at 246; *see also Kahn*, 23 A.3d at 838 ("[I]t is inequitable to permit the fiduciary to profit from using confidential corporate information"). Delaware's insider trading law, as developed under *Brophy*, seeks to "'extinguish[] all possibility of profit'" from abuse of a party's access to MNPI. *Fitbit*, 2018 WL 6587159 at *14 (quoting *Guth*, 5 A.2d at 510). Delaware's public policy seeks to protect both "the corporation's interest in its confidential information" and "to

ensure that the information is not misused for private gain." *Pfeiffer*, 989 A.2d at 707.

The Court of Chancery's dismissal undermines these policy objectives by opening the door for hedge funds with concentrated ownership stakes and significant trading power to profit from their access to corporate MNPI through their board designees. In addition to abusing the position of confidence and trust established when a corporation entrusts a hedge fund with a board seat and access to MNPI, the profit opportunities created by the Court of Chancery's opinion will drive a wedge between hedge funds and other stockholders, encouraging hedge funds to focus on short-term profit opportunities that they can exploit through their privileged access to MNPI, rather than long-term value creation.

The Court of Chancery notes that, even if Armistice cannot be held liable under the court's narrowed application of *Brophy*, Boyd potentially could be liable because he is a director of Aytu and, therefore, is subject to traditional fiduciary duties. *See* A655-56. However, the fact that one party may be liable for wrongdoing does not justify immunizing other culpable parties. *See In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 778 (Del. Ch. 2009) ("the fact that [] Plaintiffs have pled that" other parties are liable "does not immunize [another defendant] from [] liability for his role"), *aff'd sub nom. Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011).

Furthermore, allowing a *Brophy* claim to be asserted directly against Armistice (which occupies a position of trust and confidence vis-à-vis the Company for all the reasons discussed above) will promote enforcement of *Brophy*'s fiduciary duties and further its underlying policy objectives. Armistice is the party that carried out and benefited from the trades based on MNPI in violation of *Brophy*. Therefore, to accomplish *Brophy*'s objective of requiring disgorgement of and accounting for profits realized from improper trading activity, relief must be obtained from Armistice. In contrast, limiting liability under *Brophy* to Boyd as Armistice's director designee frustrates disgorgement because Boyd is not personally in possession of the trading proceeds, nor is he likely to have personal assets sufficient to cover the more than $60 million in proceeds Armistice realized from its improper sales.

Limiting liability to director designees, rather applying it to their affiliated hedge funds, also risks disincentivizing companies from pursuing valid *Brophy* claims because directors will demand indemnification and advancement of legal expenses, just as Boyd did here. Given the risks inherent in litigation and the often-onerous terms of indemnification and advancement agreements, corporations may face significant financial risks if they pursue litigation against a director for causing an affiliated hedge fund to trade based on MNPI. Thus, corporations will frequently elect not to pursue such claims, even if they are meritorious. In contrast, allowing

for *Brophy* claims to be asserted directly against a hedge fund occupying a position of trust and confidence enables companies to pursue claims without similar financial risks, thereby encouraging enforcement in furtherance of Delaware's public policy to eliminate all possible profit from trading based on MNPI.[5]

b. Dismissal Undermines the Interplay of State and Federal Law

In addition to state law, federal law establishes obligations and potential liabilities with respect to insider trading in corporate securities. In developing federal law and related regulations, the SEC and other federal authorities have relied on the existence of state-law fiduciary duties, including *Brophy*, allowing for exemptions from federal regulation for matters more appropriately addressed through state law. The Court of Chancery's opinion threatens to disturb the balance reflected in federal law and regulations, creating a liability loophole that will enable hedge funds to trade based on MNPI with impunity.

Most directly relevant here is Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), and SEC regulations thereunder. Section 16(b) provides for strict liability on the part of statutorily defined "insiders" for so-called "short

[5] This Action illustrates these considerations. Aytu agreed to a position of neutrality with respect to claims against Armistice, thus excusing demand and enabling Plaintiff to proceed with this action on behalf of the Company, but it insisted that Plaintiff voluntarily dismiss the claims against Defendant Boyd because of the financial risks posed by his demands for advancement of legal fees. A030-100.

swing" profits realized on purchases and sales of the same security within a six-month period. By regulation, however, the SEC has exempted transactions involving corporate directors from Section 16(b) liability in certain circumstances, and it has extended that exemption to so-called "directors by deputization," which are investment funds with designated representatives serving on a corporation's board. *See* A668-99. As a result, investment funds with board designees benefit from exemptions from Section 16(b) liability to the same extent as if the funds were themselves directors.

The SEC has justified the Section 16(b) exemptions for corporate directors and directors by deputization based on the existence of state-law fiduciary duties with respect to trading based on MNPI: "The Commission believes that traditional state law fiduciary duties facilitate compliance with the underlying purposes of Section 16 by creating effective prophylactics against possible insider trading abuses." Ownership Reports and Trading by Officers, Directors and Principal Security Holders, 61 Fed. Reg 30,376, 30,381 (SEC June 14, 1996).[6]

[6] *See also* Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Exchange Act Rel. No. 37,260, 61 Fed. Reg. 30,376, 30,377 n.17 (SEC June 14, 1996) ("An insider's breach of fiduciary duty to profit from self-dealing transactions with the company is a concern of state corporate law. Generally, states have created potent deterrents to insider self-dealing and other breaches of fiduciary duty").

The Court of Chancery's opinion upsets the balance between state corporate law and the SEC's rulemaking by removing hedge funds from the scope of *Brophy*'s fiduciary duties. As a result, hedge funds will enjoy the exemption from Section 16(b) liability extended to directors by deputization, but they will not be bound by the obligations and "prophylactics" of state insider trading law.

This Action demonstrates how disturbing the interplay between state law and Section 16(b) liability creates a liability loophole for hedge funds such as Armistice. In the related federal action, Armistice successfully avoided liability under Section 16(b) for its trading of Aytu securities by arguing that it was a director by deputization and benefits from the exemptions of federal law as if Armistice itself was a director. A684. At the same time, Armistice successfully avoided liability in the Court of Chancery by arguing that Armistice itself was not a director and that any *Brophy* duties applied to Boyd alone. Reversing the Court of Chancery's decision will close this liability loophole and ensure that hedge funds that seek to enjoy the advantages of having a designee serve on the board of a Delaware corporation also will be subject to the associated duties and obligations of Delaware insider trading law.

II. THE COURT OF CHANCERY ERRED IN DISMISSING PLAINTIFF'S UNJUST ENRICHMENT CLAIM

A. Question Presented

Did the Court of Chancery err in ruling that Plaintiff's unjust enrichment claim was "duplicative" of the breach of fiduciary duty claims and should be dismissed for the same reasons, even though unjust enrichment is a separate cause of action, with different elements, and does not require a showing that defendant was a fiduciary? A666.

B. Standard of Review

The Court of Chancery's holding that Plaintiff failed to state a claim for unjust enrichment is a legal conclusion, which this Court reviews *de novo*. *Kahn*, 23 A.3d at 836.

C. Merits of the Argument

1. Plaintiff Adequately Pleads a Claim for Unjust Enrichment

Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988). The elements of a claim for unjust enrichment are: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law." *Garfield v. Allen*, 277 A.3d 296, 341 (Del. Ch. 2022).

"It is sufficient to plead … that the defendant received benefits that in equity and good conscience he ought not to keep, even though he may have received those benefits honestly in the first instance." *RCS Creditor Tr. v. Schorsch*, 2018 WL 1640169, at *8 (Del. Ch. Apr. 5, 2018) (internal citations omitted).

Plaintiff's allegations state a viable claim that Armistice was unjustly enriched through the "dump and dump" scheme. After building a massive position in Aytu securities over a short period of time, Armistice dumped its shareholding onto the market in two massive sales, using MNPI passed to it through Boyd to maximize its profits, resulting in a windfall of $61.2 million. A135-143. Armistice's sales harmed the Company and its other stockholders, whose equity holdings were massively diluted when Armistice flooded the market with new shares received through the exercise of convertible stock when the stock price popped following announcement of the COVID test distribution agreement, enabling Armistice to lock in enormous profits for itself while driving down the market price of the Company's shares. *See* A130-137.

Armistice's profits were unjust because they were obtained through abuse of MNPI that had been entrusted to Boyd in his capacity as a member of the Aytu Board and because Armistice's trades were made in plain violation of Aytu's Insider Trading Policy. *See* A442-49. Indeed, Armistice proceeded with the April 2020 sales during a Financial Information Black-Out Period, when trading was strictly

prohibited, as had been expressly communicated to Boyd just weeks earlier. A416. In these circumstances, it would be unjust and inequitable to permit Armistice to retain the profits from its trades. *See Oberly,* 592 A.2d at 463 (profiting from "the use of information secured in a confidential relationship" is "unjust enrichment which will not be countenanced by a Court of Equity").

2. The Court of Chancery Improperly Imposed a Fiduciary Element on Plaintiff's Claim for Unjust Enrichment

Rather than evaluating whether Plaintiff's factual allegations established the elements of an unjust enrichment claim, the Court of Chancery dismissed the claim because purportedly is "duplicative of" and "depends *per force* on" Plaintiff's claims for breach of fiduciary duty. A666 (quoting *Frank v. Elgamal*, 2014 WL 957550, at *31 (Del. Ch. Mar. 10, 2014)). The Court of Chancery's holding improperly ignores that unjust enrichment is a separate cause of action that has different elements than Plaintiff's breach of fiduciary claims. Thus, the question was not whether the unjust enrichment and breach of fiduciary duty claims are based on the same underlying wrongdoing, but whether that wrongdoing gives rise to a viable claim for unjust enrichment.

By shortcutting the analysis and dismissing the unjust enrichment claim simply because it had already determined to dismiss the fiduciary duty claims, the Court of Chancery improperly inserted an element of fiduciary duty that is not required to establish a claim for unjust enrichment. Indeed, the sole basis for the

Court's dismissal of Plaintiff's breach of fiduciary duty claims was its conclusion that the Armistice Defendants were not fiduciaries because they were not controlling stockholders. *See* A611-23. But unjust enrichment does not require a fiduciary relationship, and even non-fiduciaries can be liable where they are were unjustly enriched. *Voigt v. Metcalf*, 2020 WL 614999, at *28 (Del. Ch. Feb. 10, 2020) (even if plaintiffs "were not able to prove that [defendant] breached [] fiduciary duties," defendant "could have been unjustly enriched to the extent it received benefits"). Thus, even assuming Plaintiff failed to allege that the Armistice Defendants were fiduciaries (and Plaintiff's allegations *do* establish that they owed *Brophy* fiduciary duties, as discussed above), that would not preclude Plaintiff from pleading a viable claim for unjust enrichment.

Unjust enrichment is an independent claim that is adequately plead here based on factual allegations that Armistice abused MNPI that it obtained through Boyd to generate profits for itself to the detriment of the Company and its other stockholders. The Court of Chancery erred by failing to analyze whether Plaintiff's allegations establish the elements of an unjust enrichment claim and instead dismissing that claim based on the purported absence of a fiduciary relationship, which Plaintiff was not required to plead.

CONCLUSION

For the reasons above, the Opinion of the Court of Chancery should be reversed, and Plaintiff's *Brophy* and unjust enrichment claims should be reinstated.

Dated: October 28, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2025, I caused a true and correct copy of the Public Version of Opening Brief of Appellant Paul Witmer to be served on the following counsel in the manner indicated as follows:

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