EFiled: Dec 19 2025 02:15PM EST
Filing ID 78044082
Case Number 381,2025

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 Case Below: Court of Chancery of the State of Delaware C.A. No. 2022-0807-MTZ **PUBLIC VERSION** **FILED: December 19, 2025**

APPELLEES' ANSWERING BRIEF ON APPEAL

AKIN GUMP STRAUSS HAUER & FELD LLP

Z.W. Julius Chen
Kristen E. Loveland
Haley S. Gorman
2001 K Street, N.W.
Washington, DC 20006
(202) 887-4000

Douglas A. Rappaport
Kaitlin D. Shapiro
One Bryant Park
Bank of America Tower
New York, NY 10036
(212) 872-1000

POTTER ANDERSON & CORROON LLP

Matthew F. Davis (No. 4696)
Adriane Kappauf (No. 7073)
1313 N. Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801
(302) 984-6000
mdavis@potteranderson.com
akappauf@potteranderson.com

Attorneys for Appellees/Defendants Below Armistice Capital, LLC and Armistice Capital Master Fund Ltd.

Dated: December 4, 2025

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

OTHER AUTHORITIES:

NATURE OF PROCEEDINGS

In seeking to resuscitate his stockholder derivative claims for breach of fiduciary duty under *Brophy v. Cities Service Co.*, 70 A.2d 5 (Del. Ch. 1949), and for unjust enrichment, Plaintiff Paul Witmer continues to search for a viable legal theory. Since 2021, Plaintiff has received over 47,000 pages of company documents that have given rise to three separate complaints. The latest of those complaints asserts a wide-ranging set of claims against nominal defendant Aytu BioScience, Inc. ("Aytu"); the members of Aytu's board; institutional investor Armistice Capital, LLC ("Armistice Capital") and Armistice Capital Master Fund Ltd. (together with Armistice Capital, "Armistice"); and Steven Boyd, Armistice Capital's Chief Investment Officer and Armistice's Aytu board designee. Yet after three years of litigation, Plaintiff voluntarily dismissed the board members, including Boyd, from his suit with prejudice. Thereafter, the Court of Chancery ("trial court") held that Plaintiff failed to plead a single claim against Armistice, the only remaining defendant.

On appeal, Plaintiff spends much of his opening brief rehashing his factual allegations. Ultimately, however, he challenges only a subset of the trial court's rulings, relating to Armistice's purported trading of Aytu stock based on material nonpublic information ("MNPI"). Whether framed under *Brophy* or as unjust enrichment, Plaintiff's arguments squarely conflict with settled Delaware law.

As the trial court explained at length, *Brophy* has no bearing here. Unlike Boyd, who owed fiduciary duties to Aytu as a director, Armistice was indisputably a non-controlling stockholder with no agency, employment, or similar relationship to the company. It therefore owed no fiduciary duties to Aytu at the time of the trades in question. And though Armistice is alleged to have received MNPI from Boyd, none of the cases that Plaintiff cited in the trial court supports the novel proposition that an investor becomes a fiduciary under Delaware law based *solely* on access to confidential information. In fact, Delaware cases hold the opposite.

Plaintiff's opening brief mainly reasserts his "mere access" rule and cites the same authorities, without addressing the distinctions raised by the trial court. That alone should doom Plaintiff's appeal. Plaintiff's remaining arguments, moreover, are waived and/or fail in their own right. In particular, Plaintiff now complains that the trial court should have considered additional facts beyond Armistice's alleged access to MNPI, but Plaintiff never relied on those facts below. At any rate, those facts remain focused on Boyd's alleged access to MNPI and reflect a veiled attempt to impute Boyd's fiduciary duties to Armistice.

Indeed, Plaintiff effectively seeks to make every stockholder with a director designee who has access to confidential information a fiduciary. While Plaintiff hopes for that result as a policy matter, Delaware courts and the General Assembly have consistently refused to expand fiduciary liability in ways that would impede or

discourage investors from designating directors. The facts of this case do not justify rewriting Delaware law, especially when Plaintiff voluntarily gave up his *Brophy* claim against Boyd. There is also no reason for this Court to consider Plaintiff's insider trading allegations, though the record clearly reflects that Armistice did not trade any stock until *after* Aytu (i) announced the supposed MNPI to the public, and (ii) confirmed that Armistice held no MNPI.

Finally, Plaintiff cannot save his suit by recasting the failed *Brophy* claim as an unjust enrichment claim. Both are rooted in precisely the same MNPI-access allegations, making the unjust enrichment claim subject to dismissal as duplicative under established precedent. On top of that independent ground for affirmance, Armistice's profit was neither unjust nor obtained at Aytu's expense. Again, Armistice's trades were not based on MNPI, as confirmed by Aytu prior to Armistice's trading. Furthermore, the upshot of Armistice's exercise of warrants and convertible stock rights resulted in Aytu *receiving* millions of dollars, as contemplated by the parties' agreements.

In sum, the trial court's dismissal of Plaintiff's *Brophy* and unjust enrichment claims was entirely sound. Accepting Plaintiff's contrary arguments, by contrast, would require a sea change in Delaware law and policy. This Court should affirm.

SUMMARY OF ARGUMENT

A. Denied. The trial court correctly held that Armistice did not owe fiduciary duties under *Brophy*.

1. Denied. The trial court correctly applied the *Brophy* standard, which imposes fiduciary duties only on a person in a "position of trust and confidence." As *Brophy* and its progeny make clear, to meet that standard an employee must gain access to confidential information in the course of his or her employment. Plaintiff's contention that the mere receipt of confidential information gives rise to *Brophy* duties finds no support in Delaware law. In addition, Plaintiff's new argument that the trial court should have conducted a "holistic analysis," which takes additional facts into account, is both waived and unavailing. The alleged MNPI was in the public domain prior to Armistice's trading, as confirmed by Aytu's Chief Executive Officer. But even assuming otherwise, the fact that Armistice received MNPI through Boyd at most permits a *Brophy* claim to be pursued against Boyd—who was a director at the time and, unlike Armistice, owed fiduciary duties. Plaintiff, however, voluntarily dismissed Boyd with prejudice from this case as part of a settlement with Aytu's officers and directors.

2. Denied. Public policy considerations do not support Plaintiff's expansive reconceptualization of *Brophy*. Delaware law has long refused to turn stockholders into fiduciaries by attribution through their director designees.

B. Denied. The trial court correctly dismissed Plaintiff's unjust enrichment claim as duplicative of his failed *Brophy* claim.

1. Denied. Just as Plaintiff could not prevail on a *Brophy* claim given that the alleged MNPI was publicly announced prior to Armistice's trading, Armistice cannot be said to have been unjustly enriched by its trading. Furthermore, Armistice's exercise of its warrants and convertible stock rights was done pursuant to contracts that netted Aytu the bargained-for price of $6 million.

2. Denied. Established law instructs that a court should dismiss an unjust enrichment claim that relies on the same theory as a fiduciary duty claim. That is plainly the case here.

COUNTERSTATEMENT OF FACTS

A. Factual Background[1]

Armistice Capital is an investment firm that focuses on the healthcare and consumer sectors. A621. It operates Armistice Capital Master Fund Ltd., a Cayman Island limited company and investment fund. *Id.* From 2017 to 2020, Armistice held equity in Aytu, a publicly traded pharmaceutical company incorporated in Delaware, in which Plaintiff is a stockholder. A620-A621. Boyd—Armistice Capital's founder, Chief Investment Officer, and Managing Partner—sat on Aytu's board as Armistice's director designee from April 2019 to August 2021. A621. During that period, no other member of Aytu's seven-member board was affiliated with Armistice. A186-A188.

Between 2017 and 2019, Armistice repeatedly provided necessary financing to Aytu, investing in several rounds of Aytu public offerings and private placements. *See* A109, A112. As relevant here, in November 2018, Armistice loaned Aytu $5 million at 8% interest for three years. A621. In January 2019, Armistice exchanged its promissory note for Aytu common stock and warrants to

[1] The following facts are drawn from Plaintiff's second amended complaint, documents incorporated by reference, and public filings. They are assumed to be true only for purposes of this appeal from a motion to dismiss. *See Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).

purchase additional common stock at a set "exercise" price. A621-A622; A127. As of April 2019, Armistice was alleged to have had a 41.1% stake in Aytu, and at no time owned 50% or more of Aytu's outstanding voting shares. A622.

In late 2019 and early 2020, Aytu acquired a number of medical and healthcare products. *See* A622-A628. On March 2, 2020, Aytu publicly disclosed in a Securities and Exchange Commission ("SEC") filing that it had a cash balance of just $2.4 million—"substantially less than [Aytu's] projected short-term cash requirements (including fixed costs and projected future costs)." A136; A282. Aytu further disclosed that to address its "short-term cash requirements," Aytu would need to "raise additional funds from sales of [its] equity or debt securities . . . or otherwise generate sufficient revenue to maintain [its] operations." A282. Aytu warned that failure to "obtain such funds would have a material adverse effect on the Company's financial condition and operations." *Id.* Just over a week later (on March 11 and 12, 2020), Aytu announced that it had entered into agreements with institutional investors for the purchase and sale of nearly 24,000,000 shares of Aytu common stock. A137-A138.

During the same period, Aytu was negotiating an exclusive distribution agreement for a point-of-care, rapid COVID-19 test. A135. On March 9, 2020, Aytu's Chief Executive Officer, Joshua Disbrow, advised the board of the

agreement. A451. The agreement was announced to the public at 8:05 a.m. EST the next morning, March 10, 2020, before markets opened. A135-A136.

Following that public announcement, Armistice sought preclearance from Disbrow to trade Aytu stock. A278. In an email exchange that included Aytu's outside counsel and Chief Financial Officer, Disbrow confirmed that Aytu was "NOT in a blackout" period for trading under the company's Insider Trading Policy "and that Armistice holds no material non public information." *Id.* Following Disbrow's email, Armistice sold Aytu stock over the course of the day. A137.

More than a month later, on April 27, 2020, Armistice emailed Disbrow for confirmation that Armistice was not in possession of MNPI. B4-B5. After Disbrow again confirmed that Armistice was not in possession of any MNPI, Armistice sold its remaining Aytu shares. A141; B4-B5.

B. Procedural History

In September 2021, pursuant to Section 220 of the Delaware General Corporation Law, Plaintiff asked Aytu to produce six categories of documents relating to the March and April 2020 trades. A195. Over a year later, Plaintiff made a further request for an additional 20 categories of documents. *Id.* In response, Aytu produced more than 47,000 pages of documents. *Id.* Meanwhile, Plaintiff filed both an initial and an amended complaint. *See* A26, A28. After Armistice moved to

dismiss the amended complaint, Plaintiff received permission to file his (operative) second amended complaint ("Complaint").

The Complaint alleged that Armistice and Boyd: (i) exercised control over Aytu by virtue of Armistice's holdings, and thus owed fiduciary duties to Aytu that they breached by causing Aytu to enter into transactions benefitting Armistice; (ii) breached fiduciary duties to Aytu by trading on MNPI in March and April 2020; (iii) were unjustly enriched by the transactions and trades; and (iv) aided and abetted a breach of fiduciary duty by Aytu's non-Armistice-affiliated directors in approving the transactions. *See* A156-A159, A162-A163. The Complaint also asserted claims against the non-Armistice-affiliated directors and officers for breach of fiduciary duty and aiding and abetting. *See* A159-A161.

Armistice moved to dismiss the Complaint. During briefing on Armistice's motion, Plaintiff entered into a stipulation to settle all claims against the non-Armistice-affiliated directors and officers and to dismiss Boyd from the action once the settlement received final approval. A632-A633. The trial court approved the settlement, at which point Plaintiff voluntarily dismissed his claims against Boyd and the other directors and officers with prejudice, leaving Armistice as the sole remaining defendant. A633.

After hearing oral argument on Armistice's motion, the trial court issued a 50-page memorandum opinion granting dismissal in full. The trial court first concluded

that Plaintiff failed to allege that Armistice was a controlling stockholder—either generally or with respect to any specific transaction—because it held only a minority stake in Aytu and did not otherwise exhibit any indicia of actual control. *See* A640-A651 (Armistice "did not control the board, dictate its decision making, or compel the challenged outcomes"). Consequently, Armistice did not owe—and could not have breached—any fiduciary duties to Aytu. *Id.* The trial court further rejected Plaintiff's novel theory that Armistice acquired fiduciary duties to Aytu under *Brophy* with respect to the March and April 2020 trades "because [it] had access to confidential information" through Boyd. A651-A657. The trial court then dismissed Plaintiff's aiding and abetting claim for failure to allege that Armistice actively participated in the challenged transactions. *See* A658-A665. And finally, the trial court dismissed Plaintiff's unjust enrichment claim as duplicative of the other failed claims. *See* A665-A667.

On appeal, Plaintiff challenges only the trial court's dismissal of the *Brophy* and unjust enrichment claims.

ARGUMENT

I. PLAINTIFF'S *BROPHY* CLAIM FAILS BECAUSE ARMISTICE DID NOT OWE FIDUCIARY DUTIES TO AYTU

A. Question Presented

Whether the trial court correctly held that Armistice did not owe *Brophy* fiduciary duties to Aytu merely because it was allegedly in receipt of MNPI? A651-A658.

B. Scope of Review

This Court reviews *de novo* the trial court's dismissal of a *Brophy* claim for failure to establish that Armistice was a corporate fiduciary. *See Kahn v. Kolberg Kravis Roberts & Co.*, 23 A.3d 831, 836 (Del. 2011).

C. Merits

In opposing dismissal of his *Brophy* claim below, Plaintiff argued only that Armistice's "access to MNPI," standing alone, created a fiduciary relationship. A411. The trial court correctly held that "no Delaware law support[s] his theory," which, if accepted, would "excavate[] the foundation of fiduciary duties altogether." A652, A654. Plaintiff's efforts to resuscitate his *Brophy* claim on appeal, including by making new legal and policy arguments, fare no better. This Court should affirm.

1. Armistice's (alleged) access to MNPI did not give rise to fiduciary duties.

To make out a *Brophy* claim, Plaintiff was required to "show that: 1) the corporate fiduciary possessed material, nonpublic company information; and 2) the corporate fiduciary used that information improperly by making trades because she was motivated, in whole or in part, by the substance of that information." *Kahn*, 23 A.3d at 838 (internal quotation marks omitted). As the trial court explained, Plaintiff's assertion that Armistice breached its fiduciary duties by allegedly trading on MNPI failed at the "threshold" because "Armistice did not owe fiduciary duties." A651. Notably, Plaintiff never disputed that "Boyd's fiduciary status [could] not [be] imputed onto Armistice" and that "[a]n investor does not become a fiduciary simply because it has a board designee." A656 n.193; *see* A411-A413. Plaintiff also did not—and could not—establish that Armistice was a "controller." A651 & n.173; *see* A411 (arguing in opposition brief that "whether or not Armistice was a controlling stockholder is beside the point for purposes of Defendants' fiduciary duties under *Brophy*, which . . . do not require any showing of control").

As such, Plaintiff was left to "argue[] a different pathway to fiduciary status": that "Armistice . . . possessed, through Boyd, Aytu's confidential information," and therefore "occupied a 'position of trust and confidence' that gives rise to fiduciary duties." A651-A652 & n.174, A654. But "Plaintiff point[ed] to no authority holding

that possessing confidential information alone creates fiduciary duties." A657. In fact, Delaware law holds that the mere receipt of confidential information from a corporate insider is insufficient to satisfy *Brophy*.

Take *Brophy* itself. In that case, a stockholder-plaintiff sued Thomas Kennedy, who "at all times material . . . was employed in an 'executive capacity' and as 'confidential secretary' to . . . a director and officer of Cities Service Company," and "in those capacities . . . had access to confidential information concerning Cities Service Company." 70 A.2d at 7 (internal quotation marks omitted). The stockholder-plaintiff alleged that, "[b]y reason of Kennedy's employment as an executive and as the confidential secretary," Kennedy "occupied a position of trust and confidence toward the corporation, with respect to the information so acquired, and the purchase of its stock for his own account was a breach of the duty he owed to Cities Service Company." *Id.* The court agreed, reasoning that Kennedy's position was "analogous in most respects to that of a fiduciary." *Id*.

Critically, however, Kennedy "did not owe fiduciary duties . . . merely because he had access to confidential information." A655. The *Brophy* court made clear the information would need to be acquired "in the course of . . . employment." 70 A.2d at 7. "Nor did [Kennedy] owe fiduciary duties merely because of his employment status." A655. As the *Brophy* court made equally clear, "[a] mere employee, not an

agent with respect to the matter under consideration, does not ordinarily occupy a position of trust and confidence toward his employer." 70 A.2d at 7. Rather, the fiduciary-like duties arose because of the "*combination* of [an employment] position within the company . . . and access to confidential information acquired in the course of that employment." A655 (emphasis added).

Consistent with that understanding, in *Zirn v. VLI Corp.*, the court held that a shareholder-defendant could *not* be liable under *Brophy* simply because, in making a tender offer, it "bec[ame] privy to certain confidential information that was not disclosed to [the company's] other shareholders." 1989 WL 79963, at *7 (Del. Ch. July 17, 1989). As a general rule, "[s]tock trading by one who possesses knowledge not available to the general public is not prohibited by a state statute in Delaware, . . . nor has it been generally considered to be a tort at common law unless coupled with a breach of a fiduciary duty." *Id.* Insofar as the plaintiff relied on *Brophy* to establish a fiduciary duty, the requisite "special relationship" could not be "extend[ed] . . . to just anyone in possession of confidential information." *Id.* at *8.

Applying Delaware law, the U.S. Court of Appeals for the Second Circuit similarly concluded that no *Brophy* claim could be made against Morgan Stanley for benefiting from confidential information it had received in its capacity as financial advisor to a potential acquirer. *See Walton v. Morgan Stanley & Co.*, 623 F.2d 796, 797-799 (2d Cir. 1980). Morgan Stanley and the company "had no relationship to

each other before or other than in the acquisition discussions." *Id.* at 798. And Morgan Stanley did not "bec[o]me a fiduciary [of the company] by virtue of the receipt of the confidential information." *Id.* at 799. Indeed, "the fact that the information was confidential did nothing, in and of itself, to change the relationship between" the two. *Id.*

This case is no different. Plaintiff does not allege that Armistice occupied *any* position at all within Aytu. Instead, Plaintiff relies solely on the fact "that Armistice was given access to Aytu's MNPI, *thereby* establishing the relationship of 'trust and confidence' contemplated by *Brophy*." Br. 22 (emphasis added). Or stated in legal terms, Plaintiff believes that "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"—full stop. *Id.* at 20. That is not, and has never been, the law. As the trial court correctly concluded, *Brophy* demands more.

2. Plaintiff's attempts to expand Brophy *find no support in precedent or policy.*

a. Plaintiff's cases do not support his novel rule.

In the trial court, "Plaintiff relie[d] on three cases as support for his theory" that "access to Aytu's MNPI" alone was sufficient to place Armistice in a "'position of trust and confidence' that gives rise to fiduciary duties." A654 (citing *Brophy*, 70 A.2d 5; *In re Fitbit, Inc. S'holder Deriv. Litig.*, 2018 WL 6587159 (Del. Ch. Dec.

14, 2018); *Triton Constr. Co. v. Eastern Shore Elec. Servs., Inc.*, 2009 WL 1387115 (Del. Ch. May 18, 2009)). The trial court readily distinguished all three. *See* A654-A657. On appeal, Plaintiff renews his reliance on *Brophy*, *Fitbit*, and *Triton*, but does not grapple with the trial court's reasoning at all. *See* Br. 21-22, 25. That conspicuous omission all but concedes the trial court's reasoning is sound and that the decision below should be affirmed. *Cf. Ploof v. State*, 75 A.3d 811, 823 (Del. 2013) ("[A]ppellate briefs must explain why the trial judge erred and cannot ignore the judge's reasoning.").

As discussed above, *Brophy* held that fiduciary "duties arose from the combination of [Kennedy's] position within the company" as an executive and confidential secretary "and access to confidential information acquired in the course of that employment," not "merely because he had access to confidential information" or "merely because of his employment status." A655. Here, Plaintiff does not contest the trial court's determination that "Armistice was not an Aytu employee." *Id.* It follows that "Armistice was not in a position of trust and confidence" solely because it had access to confidential information. *Id.* In arguing otherwise, Plaintiff ignores *Brophy*'s repeated emphasis that Kennedy had access to confidential information "by reason of" and "in the course of his employment." 70 A.2d at 7; *see* Br. 21 (reading *Brophy* to hold that Kennedy was a fiduciary "[i]n view of his access to the company's confidential information," without mentioning his employment).

Triton, which Plaintiff cites only in passing, misses the mark for essentially the same reason. There, the key fact giving rise to the fiduciary relationship was that the former employee entrusted with confidential information was acting as the company's agent. *See* 2009 WL 1387115, at *10-11 (explaining that "Kirk was an agent of Triton" and that where "an agent represents a principal in a matter where the agent is provided with confidential information to be used for the purposes of the principal, a fiduciary relationship may arise"). But as the trial court held, "[h]ere, Armistice was not Aytu's agent; Plaintiff [thus] fails to satisfy *Triton*'s foundational premise." A657. Again, Plaintiff does not disagree.

In re Fitbit is even further afield. In that case, the defendants were "directors, who of course already owed fiduciary duties" to the corporation. A657. Hence, the question before the court was whether the *director fiduciaries* could be held liable for trading on inside information through their respective funds. *See Fitbit*, 2018 WL 6587159, at *13-14 ("[T]he director[s] did not trade personally but rather passed the information to [funds] with which [they were] affiliated (and over which [they] exercised control) to do the trading."). That is the flipside of this case. To quote the trial court: "[T]he defendant here is the fund [*i.e.*, Armistice], not the director [*i.e.*, Boyd]," who was dismissed from this case and whose "fiduciary status [cannot be] imputed onto Armistice." A656 n.193, A657. Accordingly, *Fitbit* is hardly

"strikingly similar" to this case. *Contra* Br. 25. It is inapposite for the simple reason the trial court identified—and Plaintiff entirely ignores.

b. The trial court did not err in rejecting Plaintiff's arguments predicated on mere access to MNPI.

Unwilling (or unable) to defend his continued reliance on *Brophy*, *Triton*, and *Fitbit*, Plaintiff attacks a straw man. In his view, the trial court supposedly dismissed the *Brophy* claim on the ground that "*Brophy* duties . . . apply only to traditional corporate fiduciaries, such as directors, officers, and controlling stockholders." Br. 25-27. But even a cursory review of the trial court's opinion refutes that characterization.

The trial court's prefatory discussion of fiduciary duty concepts, with which Plaintiff takes issue, appropriately recognizes that "[t]he essential quality of a fiduciary is that she controls something she does not own." A652. Because of that dichotomy, fiduciary duties "will only be imposed where the relationship or trust can be characterized as 'special,'" *i.e.*, "where one party places a special trust in another and relies on that trust, or where a special duty exists for one party to protect the interests of another." *Id.* The trial court then explained that while "[t]raditional corporate fiduciaries like officers, directors, and controlling stockholders" obviously "owe fiduciary duties," there are also other "proper fiduciary relationships." A653.

It was through that lens that the trial court viewed Plaintiff's argument to "excavate[] the foundation of fiduciary duties altogether." A654. In criticizing Plaintiff for "asserting [that] Armistice need not exert any control over Aytu to owe [fiduciary duties]" and that mere "access to Aytu's MNPI" would suffice, the trial court simply called attention to Plaintiff's fundamental failure to allege a special relationship that justifies the imposition of fiduciary duties. *Id.* Indeed, the remainder of the trial court's opinion analyzes whether the special relationship recognized in *Brophy*—namely, a "position of trust and confidence"—was present in this case. A654-A658.

On that front, Plaintiff faults the trial court for not conducting a "holistic analysis of Armistice's relationship to Aytu." Br. 28. But Plaintiff never asked the trial court to do so. Aside from recounting *Brophy*, *Triton*, and *Fitbit*, Plaintiff's opposition to Armistice's motion to dismiss leaps repeatedly from the bare fact of access to MNPI to the conclusion that fiduciary duties attach:

> Here, [Armistice] indisputably had access to Aytu's MNPI through Boyd's position on the Board and role as Armistice's Chief Investment Officer responsible for making investment decisions. Accordingly, under *Brophy*, [Armistice] occupied a 'position of trust and confidence' that gives rise to fiduciary duties with respect to their trading of Aytu securities.

A412-A413 (citation omitted); *see* A411 (declaring that "fiduciary duties under *Brophy* . . . arise from access to MNPI"); A411-A412 (arguing that he did not need

to "plead an independent or pre-existing fiduciary duty" under *Brophy* "where access to MNPI has been plead"); A413 ("[T]he Armistice Defendants' trading activity is subject to *Brophy* fiduciary duties because of their access to MNPI[.]"). Plaintiff cannot argue for the first time on appeal that the trial court should have accounted for other facts beyond access to confidential information. *See, e.g.*, *Urdan v. WR Cap. Pr's, LLC*, 244 A.3d 668, 676 n.18 (Del. 2020) (citing Supr. Ct. R. 8).

In any event, Plaintiff's new argument is meritless. The only fact that relates directly to Armistice is that it allegedly "held approximately 40% of the Company's stock." Br. 28. Plaintiff's reliance on that statement is, at best, perplexing given his insistence that "whether or not Armistice was a controlling stockholder is beside the point." A411.

The remaining facts concern Boyd's alleged access to MNPI and his roles at Aytu and Armistice. *See* Br. 28-29; *see also id.* at 22-23. But as the trial court explained, and Plaintiff again ignores, "while Boyd is an Aytu fiduciary, and learned confidential information during his directorship, neither is true for Armistice," which "is the defendant, not Boyd." A655-A656 & n.193. Or put another way, Plaintiff cannot manufacture a "position of trust and confidence" for Armistice based on Boyd's special relationship with Aytu. *Cf.* A656 n.193 ("Boyd's fiduciary status is not imputed onto Armistice. An investor does not become a fiduciary simply because it has a board designee."). Especially in light of Plaintiff's dismissal of

Boyd, "*Brophy* does not support imposing fiduciary duties on Armistice that would restrict Armistice's right to sell." A656.

c. Plaintiff gets Delaware public policy backwards.

Turning to policy, Plaintiff argues that institutional investors "with a board seat and access to MNPI" necessarily hold positions of trust and confidence under *Brophy*. Br. 29-30. In reality, public policy points in the other direction. "Delaware courts have traditionally been reluctant to expand existing fiduciary duties." *North Am. Cath. Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 99 (Del. 2007). Currently, "a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation." *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113 (Del. 1994) (emphasis omitted). Just this year, the General Assembly enacted bipartisan legislation limiting fiduciary liability and expanding safe harbor protections for controlling stockholders. *See* SB 21, 153rd Gen. Assemb. (Del. 2025) (amending 8 *Del. C.* § 144).

Plaintiff's novel rule "would work an unprecedented, revolutionary change in [that] law." A656 n.193 (quoting *Emerson Radio Corp. v. International Jensen Inc.*, 1996 WL 483086, at *20 n.18 (Del. Ch. Aug. 20, 1996)). As the trial court warned, if "possessing confidential information alone creates fiduciary duties," then "every stockholder with a director designee would itself be a fiduciary for purposes of a *Brophy* claim." A657. The effect would be to make a stockholder "a fiduciary by

attribution" and give "investors in a corporation reason for second thoughts about seeking representation on the corporation's board of directors." A656 n.193 (quoting *Emerson*, 1996 WL 483086, at *20 n.18). It is no surprise, then, that Delaware courts have long rejected "attempt[s] to hold a non-fiduciary stockholder liable for the acts of its board designee." *Shafi v. Chien*, 2025 WL 671854, at *16 (Del. Ch. Mar. 3, 2025); *see also Firefighters' Pension Sys. of City of Kan. City, Mo. Tr. v. Presidio, Inc.*, 251 A.3d 212, 286 (Del. Ch. 2021) ("[T]his Court has rejected the use of agency principles like *respondeat superior* to impose liability on a stockholder for the acts of its director representative.").

That is not to say no party can potentially be held responsible if a stockholder does in fact trade on non-public information received from a director designee. Such a claim may be pursued against the director designee, who, contrary to Plaintiff's supposition, oftentimes own substantial stakes in designating funds. *See Fitbit*, 2018 WL 6587159, at *13-14. Although Plaintiff complains that indemnification agreements disincentivize companies from bringing *Brophy* claims against board members, companies may be just as reluctant to bring claims against major institutional investors that have provided, or may provide, significant financing. *See* Br. 31-32. Regardless, those concerns are answered by derivative actions, like the one Plaintiff initially brought against *both* Boyd and Armistice. Plaintiff's voluntary

dismissal of his claims against Boyd is no reason to rewrite Delaware fiduciary law in the dramatic way proposed.

In a similar vein, Plaintiff makes the bold claim that an intervening jury verdict in federal securities litigation exonerating Armistice from liability under Section 16(b) of the Securities Exchange Act of 1934 should compel this Court to broaden *Brophy*. *See* Br. 32-34. But *Brophy* is not, and has never been, a catchall mechanism for bringing insider trading claims that federal law exempts from liability. The "position of trust and confidence" test is bounded by the longstanding Delaware fiduciary duty principles discussed above and recognized by the trial court. *See Kahn*, 23 A.3d at 840 ("[W]e find no reasonable public policy ground" to align *Brophy* with "arguabl[e] parallel[s] . . . grounded in federal securities law").

For its part, while recognizing the interplay between federal and state laws, the SEC has acknowledged that an investor's designation of a director does not impose fiduciary duties under state law on that investor. Instead, it is "the deputized director who actually sits on the board [who] owes the company fiduciary duties" and accordingly "cannot allow the person who deputizes him to benefit at the expense of the company." SEC Amicus Brief at 25, *Roth ex rel. Beacon Power Corp. v. Perseus, L.L.C.*, 2007 WL 6370271 (2d Cir. Jan. 2007). Delaware law is fully aligned in that respect.

3. Plaintiff does not adequately allege Armistice traded based on MNPI.

Because Armistice owed no fiduciary duties to Aytu, the question of whether Plaintiff adequately alleged that Armistice possessed MNPI and used that information to make trades was not ruled upon below, and is not relevant to the "threshold" issue whether Armistice occupied a position of trust and confidence. A651. Nevertheless, Plaintiff spills considerable ink on the merits of his insider trading case. *See* Br. 8-18, 23-25. To the extent this Court broaches that issue, the Complaint makes clear that none of the trades at issue were based on MNPI. Plaintiff's *Brophy* claim therefore fails for that independent reason.

Plaintiff alleges that on March 10, 2020, Armistice sold Aytu stock based on Armistice's supposed inside knowledge that Aytu was set to sign an exclusive distribution agreement for the right to commercialize a clinically validated COVID-19 test. *See* Br. 9-10. Yet the Complaint acknowledges that Aytu publicly announced the distribution agreement on that day at 8:05 a.m. EST, *before* markets opened and Armistice began trading. *See* A135-A137. Armistice also did not make any trades until after Aytu's Chief Executive Officer (Disbrow) confirmed, in a post-announcement email exchange between Armistice and Aytu's officers and counsel, that Aytu was "NOT in a blackout and that Armistice holds no material non public

information." A278. On that record, Armistice did not possess MNPI, let alone improperly trade on it, as a matter of law.

Despite that record, Plaintiff maintains, without any factual support, that Armistice could not have conducted its trades absent advance knowledge of the distribution agreement. *See* Br. 24 (suggesting that Armistice would not have been "positioned" to execute significant trades in a single day absent access to MNPI). But the relevant question under *Brophy* is not what Armistice did in the lead-up to such trades, but whether Armistice *traded* based on information that was nonpublic. *See Kahn*, 23 A.3d at 838. Plaintiff's focus on the terms of Aytu's Insider Trading Policy is likewise inapt. *See, e.g.*, *NuVasive, Inc. v. Miles*, 2020 WL 5106554, at *13 (Del. Ch. Aug. 31, 2020) ("[P]leading a breach of an internal policy is not equivalent to pleading a breach of a common law fiduciary duty.").

Plaintiff also alleges that Armistice's March 10, 2020 trades were based on MNPI regarding Aytu's financing needs. Specifically, Plaintiff claims that Armistice "knew that the increase in the Company's stock price was likely to be temporary" because "Aytu was urgently in need of additional cash . . . and was in the process of negotiating financing arrangements that would substantially dilute existing shareholders and drive down the Company's stock price." A136. Like the information about the distribution agreement, however, Aytu's need for additional cash and intent to seek financing by issuing shares was previously disclosed to the

public. On March 2, 2020, Aytu revealed in an SEC filing that its $2.4 million cash balance was "substantially less" than its "*short-term* cash requirements," and that Aytu would need to "raise additional funds from sales of [its] equity or debt securities . . . or otherwise generate sufficient revenue to maintain [its] operations." A282 (emphasis added). Accordingly, there was nothing nonpublic or otherwise improper about Armistice's trades.[2]

[2] Aside from a cursory reference, Plaintiff's appeal brief appears to abandon any argument that Armistice's April 27, 2020 sale of Aytu stock was based on MNPI. *See* Br. 23-25; *see also Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 n.12 (Del. 2004) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived[.]") (first alteration in original). For good reason: While Plaintiff alleges that those sales were allegedly made during a financial black-out period, Plaintiff does not allege that Armistice actually possessed any MNPI at the time it made the April trades. Disbrow again provided confirmation to the contrary. *See* B4-B5.

II. THE TRIAL COURT APPROPRIATELY DISMISSED PLAINTIFF'S UNJUST ENRICHMENT CLAIM

A. Question Presented

Whether the trial court correctly dismissed Plaintiff's unjust enrichment claim as duplicative of his *Brophy* claim? A665-A667.

B. Scope of Review

This Court reviews *de novo* the trial court's conclusion that Plaintiff failed to state a claim for unjust enrichment. *State ex rel. Jennings v. Monsanto Co.*, 299 A.3d 372, 381 (Del. 2023).

C. Merits

1. Plaintiff's unjust enrichment claim is duplicative of his deficient Brophy *claim.*

The trial court appropriately dismissed Plaintiff's unjust enrichment claim as duplicative of his failed *Brophy* claim. A666-A667. In the Complaint, Plaintiff alleges that Armistice "w[as] unjustly enriched as a result of the profits [it] received from selling shares of Aytu stock while in possession of MNPI and without complying with the Company's Insider Trading Policy." A158. That is no different from Plaintiff's *Brophy* claim. Both seek to impose liability on Armistice for trading on MNPI. Even on appeal, Plaintiff lays out his unjust enrichment claim in terms that just as easily speak to his *Brophy* claim. *See, e.g.*, Br. 36 (arguing that Armistice's profits should be disgorged "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").

"[E]stablished law" directs "that an unjust enrichment claim should be dismissed if it duplicates a breach of fiduciary duty claim." *Urdan*, 244 A.3d at 680. It is no answer that only the *Brophy* claim is "couched in fiduciary duty terms," while the unjust enrichment claim is not. *Frank v. Elgamal*, 2014 WL 957550, at *31 (Del. Ch. Mar. 10, 2014); *see* Br. 37-38. So long as the claims rely on the same theory of enrichment—here, trading on MNPI—"it is fair to say that the unjust enrichment claim depends *per force* on the breach of fiduciary duty claim." *Frank*, 2014 WL 957550, at *31; *see also Gamco Asset Mgmt. Inc. v. iHeartMedia Inc.*, 2016 WL 6892802, at *19 (Del. Ch. Nov. 23, 2016).

Plaintiff's cited cases are not to the contrary. In *Oberly v. Kirby*, this Court did not even address whether the plaintiffs had brought an unjust enrichment claim that was duplicative of a fiduciary duty claim. The court simply noted that the result of a *Brophy* claim was "one of unjust enrichment"—language that actually cuts against Plaintiff's effort to separate his claims. 592 A.2d 445, 463 (Del. 1991).

Voigt v. Metcalf is also unhelpful to Plaintiff. Unlike in this case, the court in *Voigt* allowed the plaintiff's unjust enrichment claim to move forward *alongside* its breach of fiduciary duty claims. 2020 WL 614999, at *28-29 (Del. Ch. Feb. 10,

2020); *see also Frank*, 2014 WL 957550, at *31 ("[W]here the Court does not dismiss a breach of fiduciary duty claim, it likely does not dismiss a duplicative unjust enrichment claim."). More fundamentally, the court accepted the rule, applied in the cases above, that an unjust enrichment claim could "become[] redundant and superfluous." *Voigt*, 2020 WL 614999, at *28. The only reason the court allowed the unjust enrichment claim to survive was that "factual circumstances [might exist] in which the proofs for a breach of fiduciary duty claim and an unjust enrichment claim are not identical." *Id.* at *29 (alteration in original). Here, Plaintiff's own articulation of his unjust enrichment claim, in exactly the same terms as his *Brophy* claim, forecloses that result.

2. Plaintiff's unjust enrichment claim fails on its own terms.

Even if Plaintiff's unjust enrichment claim were not duplicative of his *Brophy* claim, the unjust enrichment claim is meritless. To successfully plead unjust enrichment, Plaintiff must allege "(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." *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010).

At a minimum, Plaintiff cannot demonstrate impoverishment or the absence of justification—largely for the same reasons that Plaintiff fails to allege under *Brophy* that Armistice improperly traded on MNPI. *See* pp. 24-26, *supra*. Most

notably, Plaintiff never explains why Armistice lacked justification to make profitable trades following Aytu's public announcement of its exclusive COVID-19 test distribution agreement, particularly after receiving confirmation from Aytu that Armistice had no MNPI. "As a general rule, stockholders . . . are free to act in their self-interest." *In re Oracle Corp. Deriv. Litig.*, 339 A.3d 1, 19 (Del. 2025).

Moreover, any "dilut[ion]" of Aytu's equity resulting from Armistice's exercise of its warrants and convertible stock in March and April 2020 took place pursuant to Armistice's contractual rights in warrants and convertible stock. Br. 36. Plaintiff has never contended Armistice breached those contracts or that the market was unaware of the dilutive effect of the warrants and convertible stock. *Cf. Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 58 (Del. Ch. 2012) ("It is a well-settled principle of Delaware law that a party cannot recover under a theory of unjust enrichment if a contract governs the relationship between the contesting parties that gives rise to the unjust enrichment claim."). In the end, in exercising those rights, Armistice paid Aytu over $6 million—precisely the benefit for which Aytu bargained. *See* A127; A344.

CONCLUSION

Armistice respectfully requests that this Court affirm the trial court's dismissal of Plaintiff's *Brophy* and unjust enrichment claims against Armistice.

AKIN GUMP STRAUSS HAUER & FELD LLP

Z.W. Julius Chen
Kristen E. Loveland
Haley S. Gorman
2001 K Street, N.W.
Washington, DC 20006
(202) 887-4000

Douglas A. Rappaport
Kaitlin D. Shapiro
One Bryant Park
Bank of America Tower
New York, NY 10036
(212) 872-1000

POTTER ANDERSON & CORROON LLP

By: /s/ *Matthew F. Davis*
Matthew F. Davis (No. 4696)
Adriane Kappauf (No. 7073)
1313 N. Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801
(302) 984-6000
mdavis@potteranderson.com
akappauf@potteranderson.com

Attorneys for Appellees/Defendants Below Armistice Capital, LLC and Armistice Capital Master Fund Ltd.

Dated: December 4, 2025