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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: January 5, 2026

APPELLANT'S REPLY BRIEF ON APPEAL

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PRELIMINARY STATEMENT[1]

Far from "revolutionary," Plaintiff's claims stand on the bedrock principle of Delaware insider trading law that a party may not use MNPI obtained through a relationship of "trust and confidence" to trade in a company's stock. Repeating the errors of the Court of Chancery, Defendants' Answering Brief on Appeal ("Opp.") would erode that foundation by strictly interpreting the relationship of trust and confidence to include only traditional fiduciaries, employees, and agents, while exempting others where the risk of abuse of trust is as great, if not greater.

Here, Armistice did not fall into any of those narrow categories, but it did stand in a relationship of trust and confidence vis-à-vis Aytu because of its substantial share ownership, designation of a director to Aytu's Board, and resulting ability to influence the Company's strategy and operations. Through these relationships—which stand in stark contrast to the purely arm's-length relationships in the cases relied upon by Defendants—the Company shared MNPI with Armistice and its Board designee on the expectation that they would use the information to benefit the Company and its stockholders, and subject to an Insider Trading Policy prohibiting Armistice from trading based on that MNPI. Yet, Armistice did so anyway, selling millions of shares over the course of three trading days in March

[1] Unless otherwise defined herein, capitalized terms have the same meaning as in Plaintiff's Opening Brief on Appeal.

and April 2020, yielding tens of millions in profits for itself, while severely diluting the Company's other stockholders.

As these facts demonstrate, Defendants' restrictive interpretation of *Brophy* will undermine Delaware's policy of eliminating the possibility of profit from MNPI by exempting the very types of investors who are best positioned to extract those profits. It is no answer to say that Armistice's director designee instead may be liable because Armistice is the direct beneficiary of the trades, and the only way to ensure complete relief and deterrence effect is to allow a claim to be pursued directly against Armistice.

Defendants also echo the Court of Chancery in arguing that Plaintiff's unjust enrichment claim is duplicative of its *Brophy* claim. However, the two claims involve different elements, with the critical difference being that Plaintiff is not required to allege a fiduciary relationship for purposes of its unjust enrichment claim. Because it requires different proof, Plaintiff is entitled to plead its unjust enrichment claim in the alternative, and because it does not require any fiduciary relationship on the part of Armistice, the unjust enrichment claim survives even if the *Brophy* claim is dismissed (which it should not be).

Lastly, Defendants raise arguments regarding the sufficiency of Plaintiff's allegations as to other elements of their claims that were not considered or relied upon by the Court of Chancery. Even if this Court were to consider those arguments

for the first time on appeal, they do not support dismissal because they raise factual disputes and require inferences to be drawn in favor of Defendants, which is not permitted at this stage.

For all of these reasons, and as discussed further below, Plaintiff has plead reasonably conceivable claims for breach of *Brophy* duties and unjust enrichment. The Court of Chancery's Order dismissing those claims should be reversed and the claims reinstated.

ARGUMENT

I. ARMISTICE OWED *BROPHY* DUTIES

A. Plaintiff Seeks to Apply, Not Expand, Delaware Law

Plaintiff's claims against Armistice are not "novel," nor do they require the Court to "expand" or "reconceptualiz[e]" *Brophy*, much less work a "sea change in Delaware law and policy." Opp. at 2, 3, 10, 15, 21. Plaintiff seeks only to apply long-standing Delaware law recognizing that a party in a relationship of "trust and confidence" vis-à-vis a company may not abuse that relationship by trading based on the company's MNPI and, if it does so, it is liable to disgorge the resulting profits. *See Brophy v. Cities Serv. Co.*, 70 A.2d 5, 7-8 (Del. Ch. 1949).

Armistice cannot claim to be surprised by its duty not to trade based on Aytu's MNPI because *Brophy* has been established law for seventy-five years, and Delaware courts have found *Brophy* duties to apply where, as here, an investment fund trades based on MNPI acquired through its director designee on a company's board. *See In re Fitbit, Inc. S'holder Derivative Litig.*, 2018 WL 6587159, at *14 (Del. Ch. Dec. 14, 2018). Moreover, Armistice admittedly was subject to Aytu's Insider Trading Policy, which expressly prohibits trading based on MNPI and during specified Financial Information Black-Out Periods. [redacted]

[redacted]

Armistice's catastrophizing about the purported chilling effect Plaintiff's claims will have on director designation by investment funds is overblown. *See* Opp. at 2-3, 21-22. *Brophy* does not impose generalized fiduciary duties or create far-reaching secondary liability for a director designee's decision-making, as Defendants imagine. It only requires the subject parties to refrain from trading based on MNPI acquired through a relationship of trust and confidence. *See Brophy*, 70 A.2d at 8. Investment funds seeking to designate directors in good faith—and not to obtain an unfair trading advantage relative to the company's other stockholders—will not be dissuaded from doing so merely because they are required to comply with *Brophy*.

B. Plaintiff Alleges Armistice Held a Position of Trust and Confidence Vis-à-vis Aytu

Brophy and its progeny make clear that a party may stand in a "position of trust and confidence" with respect to a company even if the party is not a traditional corporate fiduciary. *See Zirn v. VLI Corp.*, 1989 WL 79963, at *7 (Del. Ch. July 17, 1989) (*Brophy* "extended liability for insider trading beyond the strict fiduciary context"). Armistice admits as much but contends that *Brophy* duties apply only where an employee has "access to confidential information *by reason of and in the course of his employment*." Opp. at 16 (emphasis added; quotations omitted).

Defendants' overly narrow reading of *Brophy* is contrary to the case law and would undermine the equitable purpose of *Brophy* duties.

Armistice cites various references in *Brophy* to the fact that the defendant's access to MNPI in that case came through his position as an employee. *See id*. However, those references merely reflect that *Brophy* arose in the employment context, and nothing in the decision suggests that the duty not to trade based on MNPI was limited to employees. To the contrary, *Brophy*'s reasoning and rationale focus on the fact that the defendant had been entrusted with MNPI pursuant to a relationship of trust and confidence such that it would be inequitable for him to use that information to trade for his own benefit. *Brophy*, 70 A.2d at 7-8. The court expressly acknowledged that "[a] mere employee . . . does not ordinarily occupy a position of trust and confidence toward his employer," and the defendant there did so only because he had "acquire[d] secret information relating to his employer's business." *Id.* at 7. Later courts have recognized that the same rationale applies any time there is a "special relationship"—not necessarily an employment relationship—between the company and a party with which it shares MNPI. *See Zirn*, 1989 WL 79963, at *8 (framing issue as whether a "special fiduciary-like relationship" exists between the parties).

Armistice's cramped interpretation of *Brophy* cannot be squared with the underlying policy objective of "extinguish[ing] all possibility of profit" from the

betrayal of the company's confidence. *See In re Fitbit*, 2018 WL 6587159, at *14 (alteration in original; quotations omitted). Defendants studiously ignore this policy objective, presumably because they cannot explain how it would be furthered by exempting institutional investors, such as Armistice, who have the financial resources and trading capacity to reap millions of dollars in profits in a single day, while applying *Brophy* duties strictly to mere employees with decidedly more modest means to profit from MNPI.

This is not to say that "just anyone" who receives MNPI is subject to *Brophy*, and contrary to the strawman Defendants construct, Plaintiff does not rely solely on Armistice's receipt of MNPI for the application of *Brophy* duties here. *See* Opp. at 14-15. Plaintiff alleges that Armistice not only had access to MNPI, but also designated Boyd to serve as its representative on Aytu's Board, and held more than 40% of the Company's outstanding shares, giving it significant influence, if not control, over the Company's operations. *See* A109-112, A127-131. As Armistice's designee, Boyd acted as a confidante and advisor to Aytu's CEO, assisted the Company in negotiating financing, and arranged strategic transactions. *See* A109-110, A136. Further, Plaintiff alleges that the Company entrusted MNPI to Boyd and Armistice subject to the strictures of the Company's Insider Trading Policy, which prohibited trading based on that information. *See* A443-445. These facts, taken

together and in context, support a pleadings-stage inference that Armistice stood in a relationship of trust and confidence vis-à-vis Aytu.[2]

C. Armistice Is an Insider, Not an Arm's-Length Negotiator

In stark contrast to the facts alleged here, the cases cited by Armistice where courts have refused to apply *Brophy* duties involve arm's-length dealings between potential counterparties in a transaction. In *Walton v. Morgan Stanley & Co.*, 623 F.2d 796 (2d Cir. 1980), Morgan Stanley represented a client that was considering a merger with another corporation. *See id.* at 797. To facilitate that potential transaction, the corporation provided confidential information to Morgan Stanley. At all times, however, Morgan Stanley's interests were adversarial to the corporation because it represented a counterparty in the potential transaction and it never purported to represent the interests of the target company. *See id* at 798. ("Morgan Stanley's client was [the potential acquiror], and its task was to obtain information

[2] Defendants' suggestion that Plaintiff "waived" any argument that the Court should consider these facts is unfounded. *See* Opp. at 2. All of the relevant facts were alleged in the Complaint and properly before the Court of Chancery, and Plaintiff argued both that Armistice was a controlling stockholder and that, even if not, Armistice stood in a position of trust and confidence vis-à-vis Aytu for purposes of *Brophy*. This Court may properly consider all of these allegations and arguments as part of its *de novo* review of the Court of Chancery's holding. This case is nothing like *Urdan v. WR Capital Partners, LLC*, 244 A.3d 668 (Del. 2020), where the plaintiffs argued for the first time on appeal that a settlement agreement was ambiguous and sought remand to allow the Court of Chancery to consider parol evidence of the parties' intent. *See id.* at 676 n.13.

with which to advise [the acquiror].") The court ruled that the mere sharing of confidential information did not transform the fundamentally adversarial relationship between Morgan Stanley and the target company into a relationship of trust and confidence. *See id.* at 799.

Similarly, in *Zirn*, the defendant made an "arms-length tender offer" to acquire all the outstanding stock of VLI Corporation, which ultimately was successful. 1989 WL 79963, at *1. In furtherance of the transaction, VLI provided the acquiring corporation access to confidential information. *See id.* at *7. As in *Walton*, the court held that the sharing of confidential information did not change the "underlying third-party relationship" between the parties, who remained "strident adversaries with clearly defined, independent interests." *Id*. at *8.

Defendant's insistence that *Walton* and *Zirn* are "no different" from this action (Opp. at 15) ignores the fundamental difference in the parties' relationships. Armistice obtained access to Aytu's MNPI not in furtherance of an arm's-length transaction, but because Armistice was Aytu's largest stockholder and designated a representative to serve on Aytu's Board. Far from standing in an adversarial position vis-à-vis Aytu, Armistice's shareholdings purportedly aligned its interests with other stockholders, and its Board designee was charged with representing the interests of all stockholders, not just Armistice. Thus, unlike in *Walton* and *Zirn*, Aytu shared MNPI with Armistice in furtherance of a perceived joint interest in increasing the

value of the Company, and not for purposes of an adversarial, arm's-length negotiation. Armistice's use of the Company's MNPI to obtain a trading advantage for its own private benefit betrayed the parties' relationship of trust and confidence.

D. That Boyd Also Breached His Fiduciary Duties Does Not Absolve Armistice of Liability for Its Own Acts

Plaintiff does not seek to "impute" Boyd's fiduciary status to Armistice or impose secondary liability for Boyd's acts. *See* Opp. at 2, 22. Armistice is the party that made the trades in question, and it is being held accountable only for its own acts.

The fact that Boyd also breached his fiduciary duties as an Aytu director and faced claims (resolved through settlement) for his role in Armistice's trading is beside the point. Armistice *also* is subject to *Brophy* duties because of its relationship of trust and confidence vis-à-vis Aytu, and Armistice is liable for trading based on MNPI. While Boyd's liability conceivably could entitle Armistice to an offset pursuant to 10 *Del. C.* § 6304, it does not entirely absolve Armistice of liability.

Because Armistice is the beneficiary of the unlawful trades, holding Armistice directly liable facilitates *Brophy*'s disgorgement remedy and furthers the policy objective of eliminating any profit from breach of a party's position of trust and confidence. *See In re Fitbit*, 2018 WL 6587159, at *14. Even assuming director designees "oftentimes own substantial stakes in designating funds," as Defendants contend (Opp. at 22), a "substantial stake" is not 100% ownership, and full

disgorgement of illicit profits can be achieved only by subjecting the Armistice to direct liability under *Brophy*.

E. Plaintiff's Allegations Establish a Reasonably Conceivable Claim That Armistice Traded Based on MNPI

Defendants' arguments that Plaintiff has not alleged that Armistice traded based on MNPI were not considered or relied upon by the Court of Chancery. In any event, Defendants' arguments misconstrue Plaintiff's allegations and raise questions of fact and require defense-friendly inferences that are not suitable for a motion to dismiss. *See Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings*, 27 A.3d 531, 536 (Del. 2011) (requiring courts to "accept all well-pleaded factual allegations in the Complaint as true, . . . draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof"); *In re Edgio Inc. S'holders Litig.*, 2023 WL 3167648, at *6 (Del. Ch. May 1, 2023) ("[T]he touchstone to survive a motion to dismiss is reasonable conceivability. The standard is minimal and plaintiff-friendly.").

Defendants' argument that the COVID test licensing deal was publicly disclosed before Armistice began to sell its Aytu holdings misunderstands Plaintiff's claims. *See* Opp. at 24. Plaintiff alleges that Armistice traded based on *two* pieces of MNPI—the COVID test licensing deal and the dilutive financings—the *combination* of which Armistice knew would cause a significant *and temporary* increase in

Aytu's stock price. Armed with this information, Armistice knew that it needed to complete its sell-off on March 10, 2020, after the stock price popped on the news of the COVID test deal, and before the stock price declined in response to disclosure of the financing arrangements. This knowledge enabled Armistice to execute an astounding volume of trades—representing half of the Company's outstanding shares—in a single day, reaping more than $31 million in profits. *See* A135-139. Defendants' suggestion that Armistice could have pulled off the required trades without advance knowledge of the COVID test licensing agreement—despite the volume of shares to be sold, and the need to convert preferred shares while navigating various blocker provisions—requires an impermissible defense-friendly inference.

Defendants' reliance on Aytu's general disclosures regarding financing needs also is a red herring. *See* Opp. at 25-26. The cited disclosures vaguely allude to a need to "raise additional funds," without providing specifics regarding the amount or timing of any potential financing. *See id.* at 26. In contrast, Armistice had undisclosed information regarding specific financing arrangements and, most importantly, that those arrangements would be publicly disclosed beginning on March 11, 2020, the day after the announcement of the COVID test deal. These particular facts—which were not publicly disclosed—gave Armistice the critical knowledge that the pop in Aytu's stock price would be exceedingly short-lived and

that it needed to complete all of its trading in a single day in order to maximize its profits. *See* A137-138.

Defendants' reliance on the approval of Armistice's preclearance requests by Aytu CEO Disbrow also is misplaced. Discovery is needed to determine why Disbrow purported to authorize Armistice's trading when: (a) he was not empowered to do so under the Company's Insider Trading Policy (*see* A140-141); (b) he had specifically acknowledged providing material, market-moving information to Boyd the day before Armistice's March 2020 trades (*see* A135-137); and (c) he knew a Financial Information Black-Out Period was in effect—meaning trading was strictly prohibited—at the time of the April 2020 trades (*see* A142-143).

Taking the allegations of the Complaint as true and drawing all reasonable inferences in Plaintiff's favor, Plaintiff has alleged a reasonably conceivable claim that Armistice traded based on MNPI received through its position of trust and confidence. That is all that is required at this stage, and Plaintiff's *Brophy* claims should be reinstated.

II. PLAINTIFF HAS STATED A CLAIM FOR UNJUST ENRICHMENT

A. Unjust Enrichment Is Not "Duplicative" of *Brophy* Claims

Armistice echoes the Court of Chancery's error in arguing that Plaintiff's unjust enrichment claim is "duplicative" of the *Brophy* claim, while ignoring the distinct elements of the two claims. *See* Opp. at 27-28. Plaintiff is *not* required to prove that Armistice was a controlling stockholder or otherwise owed fiduciary duties to Aytu in order to prevail on its unjust enrichment claim—a fact Armistice does not dispute. *See id.* Therefore, the absence of a fiduciary duty—the sole basis for the Court of Chancery's dismissal of the *Brophy* claim—does not provide a basis for dismissing Plaintiff's unjust enrichment claim.

Armistice argues that the claims are "duplicative" because they are based on overlapping factual allegations insofar as "[b]oth seek to impose liability on Armistice for trading on MNPI." *Id.* at 27. However, Plaintiff is entitled to plead claims in the alternative, and where different claims require proof of different elements, a Plaintiff may be able to prevail on one claim even if it cannot prevail on the other.

Voigt v. Metcalf, 2020 WL 614999 (Del. Ch. Feb. 10, 2020), is instructive. There, plaintiff alleged, among other things, that a private equity firm, CD&R, was a controlling stockholder of the company, NCI Building Systems, Inc. ("NCI"), due to its shareholdings, designation of board members, relationships with other board

members, and contractual rights under a stockholders agreement. *See id.* at *1. The plaintiff alleged that CD&R breached its fiduciary duties as a controlling stockholder in connection with an acquisition through which NCI acquired another company CD&R owned and controlled. *See id.* The plaintiff also alleged a claim for unjust enrichment, which it plead "in the alternative . . . in the event [the breach of fiduciary duty claim] falls short." *Id.* at *8.

The Court of Chancery allowed the unjust enrichment claim to proceed even though it was "likely duplicative" because the plaintiff could prevail on that claim even if it failed to prove that CD&R owed fiduciary duties as a controlling stockholder. *Id.* at *2, *28-29. The court focused on the differing elements of the two claims and, particularly, the absence of any requirement for the plaintiff to prove that CD&R was a fiduciary in order to prove unjust enrichment. *See id.* at *28-29; *see also, e.g.*, *Dubroff v. Wren Holdings, LLC*, 2011 WL 5137175, at *11 (Del. Ch. Oct. 28, 2011) (denying motion to dismiss potentially "duplicative" unjust enrichment claim against alleged controller where parties disputed allegations of control).

Defendants' attempts to distinguish *Voigt* are unavailing. The *Voigt* court "allowed the plaintiff's unjust enrichment claim to move forward *alongside* its breach of fiduciary duty claims" (Opp. at 28 (emphasis in original)) because it held the plaintiff's allegations were sufficient to establish a pleadings-stage inference that

CD&R owed fiduciary duties as a controller (as the Court of Chancery *should* have done here with respect to Plaintiff's *Brophy* claims). *See Voigt*, 2020 WL 614999, at *22. In view of the court's focus on the differing elements of the two claims, however, the court would have allowed the unjust enrichment claim to proceed, even if it had dismissed the breach of fiduciary duty claim. *See id.* at *28 (holding that "the unjust enrichment claim could provide a viable means of relief" against CD&R even if the plaintiff was "not able to prove that CD&R breached its fiduciary duties").

Defendants' cases are not to the contrary. *Gamco Asset Mgmt., Inc. v. iHeartMedia Inc.*, 2016 WL 6892802 (Del. Ch. Nov. 23, 2016), involved claims against admitted controllers who conceded they owed fiduciary duties to minority stockholders. *See id.* at *15 ("[I]t is not contested that the iHeart Defendants and the Private Equity Defendants owe fiduciary duties to the minority stockholders by virtue of their position as controllers of CCOH."). With fiduciary status conceded, the different elements of proof for unjust enrichment and breach of fiduciary duty were not relevant, and the unjust enrichment claim was properly dismissed as duplicative. *See id.* at *19.

Similarly, in *Frank v. Elgamal*, 2014 WL 957550 (Del. Ch. Mar. 10, 2014), the court held that plaintiff had adduced sufficient evidence of control to go to trial against alleged controllers on a fiduciary theory. *See id.* at *27 ("[T]he Court

identified a genuine issue of material fact as to whether the Rollover Group constituted a control group during the period surrounding the selection of the First Option."). Because the breach of fiduciary duty claim survived summary judgment, the Court dismissed the "unnecessary" and "redundant" unjust enrichment claim because "a plaintiff is entitled to only one recovery after trial." *Id.* at *32. Importantly, the court dismissed the unjust enrichment claim only at the summary judgment stage where the policy considerations supporting pleading in the alternative—*i.e.*, that "assuming there is a reasonably conceivable basis for both claims, the plaintiff is entitled to discovery on them"—are "not as strong . . . because discovery is generally, if not entirely, complete." *Id.* Here, in contrast, Plaintiff's claims remain at the pleadings stage where pleading in the alternative is generally allowed.[3]

B. Plaintiff's Unjust Enrichment Claim Is Reasonably Conceivable

Armistice's attacks on the actual elements of Plaintiff's unjust enrichment claim were not considered or relied upon by the Court of Chancery, and they are unavailing in any event. *See* Opp. at 29-30.

[3] *Urdan*, also cited by Defendants, has no application because the claims there were dismissed for lack of standing. 244 A.3d at 680 ("We need not wrestle with their nuanced pleading argument because . . . [j]ust as they gave up their ability to assert a direct claim for dilution when they sold their shares, they likewise gave up a parallel claim for unjust enrichment based on harm to their shares.") (alteration in original; quotations omitted).

Whatever its contractual rights, Armistice had no right to trade based on Aytu's MNPI or during a Financial Information Black-Out Period, both of which were expressly prohibited by the Company's Insider Trading Policy. *See* A443-445. Moreover, regardless of Armistice's own conduct, its enrichment from the trades was unjust because it arose from breaches of fiduciary duties by the other Defendants. Specifically, the Director Defendants failed to monitor and oversee the Company's Insider Trading Policy or establish reasonable policies to detect and prevent prohibited trading, and Defendant Disbrow recklessly approved Armistice's pre-clearance requests even though he lacked the authority to do so. *See* A140-147, A159-161. *See also Voigt*, 2020 WL 614999, at *28 (non-fiduciary subject to claim for unjust enrichment where "it received benefits from [transactions] that flowed from a breach of duty" by corporate directors).

Lastly, Defendants' argument that Aytu stockholders were not impoverished by the dilution of their shareholding because Armistice paid a nominal exercise price to convert certain of its preferred shares raises questions of fact and requires a defense-friendly inference that is improper at the pleadings stage. *See* Opp. at 30.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Opinion of the Court of Chancery be reversed and that Plaintiff's *Brophy* and unjust enrichment claims be reinstated.

Dated: December 19, 2025

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