IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: NEW MEDIA INVESTORS II, LLC	No. 71, 2026 Court Below: Court of Chancery of the State of Delaware Consolidated C.A. Nos. 2024-0413-LWW and 2024-1357-LWW

JOINT OPENING BRIEF OF APPELLANTS

OF COUNSEL:

Colin R. Hagan*
David J. Shlansky*
Shlansky Law Group, LLP
1 Winnisimmet Street
Chelsea, MA 02150
(617) 497-7200
Colin.Hagan@slglawfirm.com
David.Shlansky@slglawfirm.com
**pro hac vice* forthcoming

MELUNEY ALLEMAN & SPENCE, LLC
Sean A. Meluney (#5514)
Matthew D. Beebe (#5980)
Joshua G. Wilson (#7694)
1143 Savannah Rd., Suite 3-A
Lewes, DE 19958
(302) 551-6740
sean.meluney@maslawde.com
matt.beebe@maslawde.com
josh.wilson@maslawde.com

SHLANSKY LAW GROUP, LLP
David H. Holloway (No. 5762)
Shlansky Law Group, LLP
1504 N. Broom St., Suite 1
Wilmington, DE 19806
Phone: (302) 357-9323
Fax: (302) 351-7216
David.Holloway@slglawfirm.com

Attorneys for Plaintiffs Below – Appellants Felicia Gross and Sheila Nassberg

KLEHR HARRISON
HARVEY BRANZBURG LLP

Richard M. Beck (No. 3370)
Sally E. Veghte (No. 4762)
919 N. Market Street, Suite 1000
Wilmington, Delaware 19801
(302) 552-5508
rbeck@klehr.com
sveghte@klehr.com

-and-

BARCLAY DAMON LLP
Brian E. Whiteley*
Henry T. Gaylord*
160 Federal Street, Suite 1001
Boston, Massachusetts 02110
(617) 274-2903
bwhiteley@barclaydamon.com
hgaylord@barclaydamon.com
* *pro hac vice* forthcoming

Attorneys for Plaintiff Below – Appellant Paul Fireman

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NATURE OF PROCEEDINGS

This appeal asks whether a Delaware fiduciary can misappropriate company assets, cancel the company in violation of the Delaware Limited Liability Company Act (the "DLLCA"), and evade accountability by claiming the company no longer exists. Delaware law does not permit that result.

Plaintiffs below and Appellants Felicia Gross ("Gross"), Sheila Nassberg ("Nassberg"), and Paul Fireman ("Fireman," and together with Gross and Nassberg, "Plaintiffs") were members of New Media Investors II, LLC ("New Media II"), a Delaware limited liability company formed in 1999 and managed by Robert A. Maginn, Jr. ("Maginn"). In 2000, Maginn formed a related entity, non-party New Media Investors II-B, LLC ("New Media II-B"). Both were "pass-the-hat" vehicles for investing in Jenzabar, Inc. ("Jenzabar") and held the same classes of Jenzabar securities in different amounts. At most relevant times, Maginn—then Jenzabar's chief executive officer—controlled New Media II, New Media II-B, and Jenzabar.

In litigation New Media II-B's members brought, the Court of Chancery held that Maginn breached his duty of loyalty by diverting warrants for 6,500,000 shares of Jenzabar stock meant for New Media II's and New Media II-B's members (the "*Deane* Action").[1] Maginn used funds from New Media II and New Media II-B to

[1] *See Deane v. Maginn*, 2022 WL 16557974, at *19 (Del. Ch. Nov. 1, 2022) ("*Deane*"), *aff'd*, 338 A.3d 1292 (Del. 2025) ("*Deane II*").

purchase the warrants, but he caused the warrants to be issued to New Media Investors II-C, LLC ("New Media II-C"), an entity he and his then-wife, Ling Chai ("Chai"), wholly owned. Maginn improperly realized $80,697,500 from that misconduct. The Court of Chancery awarded New Media II-B's members $25,451,992 in damages, recognizing that New Media II had an expectation in the remaining $55,245,508.

Plaintiffs bring this action on behalf of New Media II arising from the same misconduct for which Maginn has already been found liable, in large part based on that $55.2 million loss. Gross and Nassberg further allege that Jenzabar participated in the misconduct, along with its then-directors Chai, D. Quinn Mills ("Mills"), and Joseph Girard San Miguel ("San Miguel"),[2] and its then-general counsel, Jamison Barr ("Barr") (together with Jenzabar, Chai, Mills, and San Miguel, the "Jenzabar Defendants").

While the *Deane* Action was pending, Maginn filed a certificate of cancellation for New Media II without notice to its members. The cancellation violated the DLLCA because Maginn had not lawfully dissolved the company, distributed its residual assets, or made reasonable provision for known or foreseeable claims. Rather, Maginn intended to cut off claims belonging to New Media II and

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[2] San Miguel is deceased; his estate, administered by Olga Perera San Miguel, has appeared in this action.

its members. The operative pleading, Plaintiffs' Second Amended Complaint (the "SAC"), seeks a declaratory judgment nullifying New Media II's cancellation based on these statutory violations. It also asserts claims against Maginn and the Jenzabar Defendants for misconduct causing millions of dollars of harm to New Media II and its members.

On January 27, 2026, the Court of Chancery dismissed the action without prejudice.[3] The court held that Plaintiffs' claims were purely derivative, that New Media II was defunct when suit was filed, that Plaintiffs lacked standing because they had not pleaded nullification in conjunction with their derivative claims, and that equitable standing was unavailable.

That ruling should be reversed for three independent reasons. First, contrary to the court's holding, the SAC expressly pleads nullification at Count IX. It alleges that New Media II's members never consented to dissolution and that Maginn: (a) usurped a corporate opportunity belonging to New Media II and kept the proceeds for himself; (b) failed to distribute the value of that opportunity, including by failing to pursue and distribute the proceeds of the resulting cause of action; and (c) otherwise failed to make reasonable provision for the claims arising from his conduct. Second, Counts I, III, and V plead direct claims arising from Maginn's

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[3] *See In re New Media Inv'rs II, LLC*, 2026 WL 208698 (Del. Ch. Jan. 27, 2026) (the "Memorandum Opinion," attached as "Exhibit A").

failure, during dissolution and wind-up, to distribute residual assets owed to New Media II's members. Third, equity should confer standing because any standing defect was the product of Maginn's own bad-faith misconduct.

SUMMARY OF ARGUMENT

1. Delaware law permits the Court of Chancery to nullify a certificate of cancellation and revive an LLC dissolved or wound up in violation of the DLLCA. The SAC alleges such violations and seeks that relief in Count IX. The Court of Chancery overlooked those allegations and incorrectly held that Plaintiffs lacked standing because they did not plead nullification in conjunction with their derivative claims. The court erred in dismissing for lack of standing.

2. Counts I, III, and V are cognizable as direct claims. Properly dissolving and winding up an LLC requires the manager to marshal the LLC's assets (including claims or causes of action) and distribute their value to members. Misappropriating or withholding assets during wind-up injures members directly. The SAC alleges that harm: Maginn usurped New Media II's opportunity to obtain the II-C Warrants, achieving and retaining a personal windfall, and failed to monetize and distribute the proceeds of that opportunity, or the resulting claims or causes of action arising from his misconduct, to the company's members. Because Plaintiffs suffered this injury and recovery would flow to them, the Court of Chancery erred in treating Counts I, III, and V as purely derivative.

3. Equitable standing is available to Plaintiffs because Maginn's misconduct eliminated the very vehicle through which Plaintiffs' claims could be brought. Equity intervenes when rigid adherence to formal standing rules would

allow misconduct to defeat otherwise viable claims. The SAC alleges that Maginn breached his fiduciary duties, diverted New Media II's assets, concealed his diversion, and then silently canceled the company to foreclose relief. Equity should not permit him to rely on the consequences of his own misconduct to defeat Plaintiffs' claims, particularly where Plaintiffs made diligent, good-faith efforts to revive New Media II by seeking nullification in the same action.

STATEMENT OF FACTS

I. Maginn Breaches His Duty of Loyalty.

Maginn formed New Media II in 1999 as a Delaware LLC to hold Jenzabar securities[4] and served as its Managing Member.[5] At most relevant times, he also served as Jenzabar's chief executive officer and board chairman.[6] Plaintiffs were members of New Media II.[7]

Maginn later formed New Media II-B, another Jenzabar investment vehicle.[8]

A. Maginn and the Jenzabar Defendants Defeat New Media II's Exercise of the 2004 Warrants.

By 2004, New Media II held about 1.6 million shares of Jenzabar's Series A Convertible Preferred Stock ("Series A Stock").[9] That year, as part of a recapitalization to settle investor litigation,[10] Maginn caused New Media II to exchange its Series A Stock for about 2.18 million shares of Jenzabar Junior Preferred Stock and warrants authorizing New Media II to purchase up to around 2.4

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4 A0228, ¶ 4.

5 A0231, ¶ 23.

6 A0234-235, ¶ 32.

7 A0228, ¶ 4.

8 *See Deane*, 2022 WL 16557974, at *2.

9 A0237, ¶ 40.

10 A0235-237, ¶¶ 34-39.

million shares of Jenzabar common stock (the "2004 Warrants").[11] The 2004 Warrants had a $0.89 exercise price[12] and a cashless exercise feature under which New Media II, at Jenzabar's discretion, could exercise the warrants by surrendering a portion of the shares otherwise issuable under the instrument.[13] That feature had value only if Jenzabar stock exceeded $0.89 per share.[14] The 2004 Warrants were set to expire in 2011.[15]

As that expiration approached, Maginn prevented New Media II from exercising the warrants by ensuring that Jenzabar valued its common stock below $0.89.[16] In 2011, Maginn and the Jenzabar Defendants commissioned a valuation that valued Jenzabar's common stock at $0.66 per share to create a false impression that New Media II's 2004 Warrants were out of the money.[17] However, at or around that same time, Maginn and the Jenzabar Defendants had been working to negotiate a February 2012 settlement between Jenzabar and an investor that impliedly valued

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11 A0237, ¶ 40.

12 *Id.*

13 A0245, ¶ 58.

14 *Id.*

15 A0235, ¶ 33.

16 A0242-243, ¶ 52.

17 A0246-247, ¶¶ 62-63; A0248-249, ¶ 68.

Jenzabar common stock at $2.85.[18] Jenzabar repurchased the stock from this investor at the $2.85 valuation.[19]

With Jenzabar common stock artificially valued below the $0.89 strike price, Maginn asked a special committee of Mills and San Miguel to extend New Media II's time to exercise the 2004 Warrants.[20] Masquerading as a champion of New Media II, Maginn created a new opportunity for the New Media entities that he took for himself.[21]

B. Maginn Diverts the Replacement II-C Warrants.

With the 2004 Warrants' expiration looming, Maginn persuaded Jenzabar to issue new warrants, purportedly for the benefit of New Media II's and New Media II-B's members.[22] On October 15, 2011, he explained to Jenzabar's then-general counsel, Barr, that "if we could get a new deal at a strike price...that's better than the 89 cents, then we'd form the new entity, II-C, and offer it to everybody."[23] But New Media II-C was not a "new entity"; Maginn had formed it in 2009, and it was wholly

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18 A0243-244, ¶¶ 53-57.

19 A0246, ¶ 62; A0248, ¶ 68.

20 A0247-249, ¶¶ 66-70; A0251-252, ¶ 77.

21 A0250-251, ¶¶ 75-76.

22 A0251-253, ¶¶ 77-82.

23 A0253, ¶ 83.

owned by him and Chai.[24] As the *Deane* court found regarding substantially the same transaction, Maginn's proposal "involved new warrants being issued to an investment vehicle that—like New Media II and New Media II-B—would serve as a 'pass-the-hat' opportunity," allowing members to "make 'individual decisions' about whether to invest."[25]

At the end of 2011, the 2004 Warrants expired, causing a loss to New Media II of about $23 million.[26] New Media II's members were not informed of the warrants' expiration.[27]

In 2012, Maginn urged Mills and San Miguel, acting as Jenzabar's special committee, to approve replacement warrants for the 2004 Warrants at a $0.47 strike price—derived from another engineered valuation of Jenzabar common stock.[28] This time, Maginn sought an artificially low valuation because he intended to exercise the warrants for himself and his family.[29] On June 21, 2012, the committee resolved to sell the new warrants to New Media II-C, characterizing it as a "successor

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24 *Id.*

25 *Deane*, 2022 WL 16557974, at *3.

26 A0242-243, ¶ 52.

27 A0249, ¶ 70; A0252, ¶ 78; A0253 ¶¶ 81-83.

28 A0253-254, ¶¶ 81-84.

29 A0253, ¶ 82.

entity" to New Media II and New Media II-B.[30] New Media II-C acquired the warrants for $65,000, allowing it to purchase up to 6,500,000 Jenzabar shares at $0.47 each (the "II-C Warrants").[31] Maginn paid for the II-C Warrants using funds belonging to New Media II and New Media II-B.[32] On June 28, 2012, Barr reported to Jenzabar's outside counsel that Jenzabar "had agreed to sell warrants to purchase up to 6.5 million shares to New Media [II] and New Media [II-B]."[33]

On June 29, 2013, Maginn paid $3,055,000 to exercise the II-C Warrants, using funds from a special purpose vehicle believed to be owned by him and Chai.[34] Jenzabar issued New Media II-C 6.5 million voting shares and 65 million non-voting shares of Jenzabar common stock.[35]

Defendants concealed the issuance of the II-C Warrants and their exercise from New Media II's and New Media II-B's members.[36] Maginn said nothing to New Media II's members for two years after the 2004 Warrants expired.[37] In May 2013, Maginn drafted a letter, supposedly to inform such members about the

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30 A0254, ¶ 84.

31 *Id.*

32 *Id.*; *see also* A0258, ¶ 91.

33 A0254-255, ¶ 86.

34 A0258, ¶ 94; *see also Deane*, 2022 WL 16557974, at *6.

35 A0258-259, ¶ 94; A0262, ¶ 104; *see also Deane*, 2022 WL 16557974, at *22.

36 A0255, ¶ 87; A0257-258, ¶ 91.

37 A0257, ¶ 91.

opportunity to participate in New Media II-C.[38] Barr reduced "the letter from two pages to five sentences."[39] On December 19, 2013, as New Media II's sole Managing Member, Maginn sent the revised letter to some New Media II members, but not to Plaintiffs.[40]

The letter informed recipients of the purported "conclusion of your New Media Investment," enclosed what purported to be a final check, and included a "Payment Acknowledgment and Release" form (the "Release").[41] The Release was designed to extinguish any claims held by the recipients and terminate the recipients' membership in New Media II or New Media II-B upon depositing the enclosed check.[42] The *Deane* court found this letter "vague"[43] and lacking disclosure of the corporate opportunity belonging to New Media II and New Media II-B for the benefit of their members.[44] The court also found Maginn's "silen[ce] about the II-C Warrant[s]" to be "furtive."[45]

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38 A0258, ¶ 92.

39 *Id.* (quoting *Deane*, 2022 WL 16557974, at *5).

40 A0259, ¶ 95; A0260, ¶ 98.

41 A0259, ¶¶ 95-96.

42 *Id.*, ¶ 96.

43 *Id.* (quoting *Deane*, 2022 WL 16557974, at *1).

44 *Deane*, 2022 WL 16557974, at *18-19; *see also* A0260, ¶ 99.

45 *Deane*, 2022 WL 16557974, at *19.

New Media II-C, which Maginn wholly owns, continues to hold the Jenzabar stock obtained from exercising the II-C Warrants, on information and belief.[46] This is a corporate opportunity belonging to New Media II and New Media II-B.[47]

C. New Media II-B Members Successfully Sue Maginn for Breach of Fiduciary Duty; Maginn Cancels New Media II.

On December 6, 2016, members of New Media II-B sued Maginn for breaching his fiduciary duty of loyalty.[48] On December 28, 2017, while the *Deane* Action was pending, Maginn filed a certificate of cancellation of New Media II.[49] The SAC alleges that Maginn lacked authority to cancel, dissolve, or wind up New Media II; failed to do so in compliance with the DLLCA in any event;[50] and that doing so was intended to prevent New Media II or its members from discovering or pursuing claims against him.[51]

In 2022, the *Deane* court held Maginn liable for breach of the duty of loyalty for diverting the II-C Warrants from New Media II and New Media II-B to his and Chai's personal investment vehicle.[52] The court found that Maginn's conduct

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46 A0262, ¶ 105.

47 *Id.*

48 *Deane*, 2022 WL 16557974, at *7.

49 A0283, ¶ 215.

50 A0282-285, ¶¶ 204-220.

51 A0282, ¶ 210.

52 *Deane*, 2022 WL 16557974, at *8, *31; *see also* A0226.

caused $80,697,500 in damages; New Media II bore about $55.25 million of those losses.[53] While New Media II-B recovered its share, New Media II did not because the plaintiffs in the *Deane* Action were not members of New Media II.[54] In 2025, this Court affirmed the *Deane* court's judgment.[55]

II. Plaintiffs Sue; the Court of Chancery Dismisses.

A. Plaintiffs File Suit and Move to Nullify New Media II's Certificate of Cancellation.

On April 22, 2024, Gross filed a Verified Complaint (the "Complaint").[56] The Complaint sought, in part, a judgment declaring that Maginn dissolved, wound up, and canceled New Media II in violation of the DLLCA[57] and that "[t]he cancellation of New Media II's registration is revoked or nullified."[58] Gross and Nassberg amended the Complaint on March 26, 2025 (the First Amended Verified Complaint, or "FAC"),[59] and again on June 25, 2025 (the SAC), consolidating with an action that Fireman filed on December 31, 2024 (the "Fireman Complaint").[60]

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53 *Deane*, 2022 WL 16557974, at *28-29; *see also* A0263, ¶ 110.

54 *Deane*, 2022 WL 16557974, at *29.

55 *See Deane II*, 338 A.3d 1292; *see also* A0227, ¶ 3.

56 *See* A0046-103 (Complaint).

57 A0100-101, ¶¶ 193-205.

58 A0101, ¶ 205.

59 *See* A0155-225 (FAC).

60 *See* A0104-128 (Fireman Complaint).

Like the Complaint,[61] the FAC,[62] and the Fireman Complaint,[63] Count IX of the SAC sought a declaratory judgment nullifying New Media II's cancellation.[64] The SAC alleges that Maginn violated §§ 18-801(a) and 18-804(b) of the DLLCA by dissolving New Media II without member consent[65] and by "fail[ing] to make a reasonable provision for the liability arising from his diversion of the new warrants."[66] The SAC thus requested a judicial declaration that "New Media II has not been canceled," that Maginn improperly filed the certificate of cancellation, and that the cancellation is revoked or nullified as of December 28, 2017.[67]

The SAC pleads all claims against Defendants as "Direct and Derivative."[68] Counts III, IV, and V allege that Maginn diverted the II-C Warrants to himself through New Media II-C, thereby breaching his duty of loyalty[69] and wasting and misappropriating New Media II's assets.[70] Count VI alleges that Chai, Mills, Barr,

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61 A0100-101, ¶¶ 193-205.

62 A0211-214, ¶¶ 202-218.

63 A0122-124, ¶¶ 79-89.

64 A0282-285, ¶¶ 204-220.

65 A0284, ¶¶ 217-18.

66 A0283, ¶ 213.

67 A0284-285, ¶ 220.

68 A0270-282.

69 A0273-275, ¶¶ 149-62.

70 A0275-278, ¶¶ 163-79.

and Jenzabar aided and abetted Maginn by "issuing the new warrants to New Media II-C" and "ratifying the diversion of the new warrants by failing to take any corrective action."[71] Count VIII alleges tortious interference with New Media II's "reasonable expectation in the II-C Warrants."[72] Counts I and II seek declaratory judgments,[73] while Count VII alleges liability against Jenzabar arising from its obligation to indemnify Maginn.[74]

On June 25, 2024, Gross filed a motion to nullify New Media II's purported cancellation,[75] which was renewed on July 9, 2025 (the "Renewed Nullification Motion").[76] The Renewed Nullification Motion developed the grounds for nullification articulated in the SAC[77] and further argued that Maginn had violated § 18-804(a)(3) of the DLLCA by failing to distribute New Media II's assets to its members[78] and § 18-804(c) by distributing the II-C Warrants to himself rather than New Media II's members.[79]

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[71] A0278-279, ¶ 184.

[72] A0281, ¶ 199.

[73] A0270-273, ¶¶ 130-48.

[74] A0280-281, ¶¶ 191-96.

[75] *See* A0129-142.

[76] *See* A0289-302 (Renewed Nullification Motion).

[77] A0296, A0298-299.

[78] *See* A0297-298.

[79] *Id.*

B. The Court Dismisses Plaintiffs' Suit.

On January 27, 2026, the Court of Chancery issued the Memorandum Opinion, dismissing Plaintiffs' claims.[80] First, the court ruled that the nine claims pleaded in the SAC were purely derivative.[81] Second, the court found that New Media II was "defunct," such that "plaintiffs lack standing to sue on behalf of nominal defendant New Media II."[82] Plaintiffs argued that "they may simultaneously pursue nullification of the cancellation and press derivative claims," but the court found that "plaintiffs...failed to seek nullification in their pleadings."[83] The court also denied Plaintiffs' request for equitable standing as "unavailable."[84] The court dismissed the action without prejudice, observing that Plaintiffs "may pursue a petition to nullify the certificate of cancellation,"[85] which Plaintiffs did in a separate action filed on February 16, 2026.[86]

Plaintiffs appeal and ask this Court to reverse the judgment below.

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80 *See New Media Inv'rs II*, 2026 WL 208698, at *10.

81 *Id.* at *4-6.

82 *Id.* at *7.

83 *Id.* at *8.

84 *Id.* at *9.

85 *Id.* at *10.

86 *See In re New Media Investors II, LLC*, C.A. No. 2026-0226-LWW (Del. Ch.).

ARGUMENT

I. Plaintiffs Had Standing at the Time of Bringing Suit.

A. Question Presented

Did the Court of Chancery err in holding that Plaintiffs lacked standing when they filed suit, even though Count IX pleaded nullification of New Media II's certificate of cancellation?[87] Preserved: A0282-285, ¶¶ 204-220; A0295-301; A0832-834; A0836-838; A0897-900; A0903-906; A0951-953; A1200-201, 51:12-52:7; A1202-204, 53:10-55:17; A1209, 60:3-20.

B. Scope of Review

"Whether a party has standing is a question of law that is subject to *de novo* review."[88]

C. Merits of Argument

The *Deane* court held that Maginn breached his duty of loyalty by diverting the II-C Warrants intended for New Media II and New Media II-B.[89] This appeal asks whether Maginn can escape liability for the injury to New Media II by canceling the entity. The Court of Chancery held that he could, concluding that the SAC does not plead a claim for nullification. Recognizing "that derivative claims might be

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87 *See New Media Inv'rs II*, 2026 WL 208698, at *8.

88 *El Paso Pipeline GP Co., LLC v. Brinckerhoff*, 152 A.3d 1248, 1256 (Del. 2016).

89 *Deane*, 2022 WL 16557974, at *8, *31.

brought 'in conjunction with' a nullification claim," the court nonetheless found that "the plaintiffs...failed to seek nullification in their pleadings" and therefore "lacked standing when they filed this suit."[90] That conclusion disregards the requirement that a complaint be reviewed "in its entirety," in the light most favorable to Plaintiffs; it is also inconsistent with the SAC's allegations.[91]

The SAC pleads nullification. To state a nullification claim, a plaintiff must allege a statutory violation of the DLLCA's dissolution and wind-up provisions.[92] Count IX of the SAC does so, and it also seeks a declaration nullifying New Media II's certificate of cancellation.[93] Plaintiffs had standing to sue derivatively, and the Court of Chancery erred in holding otherwise.

1. Plaintiffs Alleged a Statutory Violation of the DLLCA's Dissolution and Wind-Up Provisions.

Litigation on behalf of, or against, a defunct business organization raises "idiosyncrasies"[94] and, at times, "a metaphysical wonder."[95] Historically, the death

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90 *New Media Inv'rs II*, 2026 WL 208698, at *8 (quoting *Matthew v. Laudamiel*, 2012 WL 605589, at *21 (Del. Ch. Feb. 21, 2012)).

91 *Branson v. Exide Electronics Corp.*, 645 A.2d 568 (Table), 1994 WL 164084, at *2 (Del. 1994).

92 *See, e.g.*, *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 139 (Del. Ch. 2004).

93 *See* A0282-285, ¶¶ 204-20.

94 *In re VBR Agency, LLC*, 274 A.3d 1068, 1076 (Del. Ch. 2022).

95 *In re Reinz Wisconsin Gasket, LLC*, 2023 WL 3300042, at *1 n.1 (Del. Ch. May 8, 2023) ("*Reinz II*").

of a corporation at common law "abat[ed] all pending actions by and against it" and "terminat[ed] its capacity thereafter to sue or be sued."[96] Legislatures recognized that this rule "created substantial risks for creditors and claimants of dissolved corporations" and often produced "harsh results."[97] Delaware addressed this through 8 *Del. C.* §§ 278–279, providing for post-dissolution continuation of a corporation to wind up its affairs and the appointment of a trustee or receiver to settle unfinished business. When "LLCs came into existence...in 1992,"[98] the General Assembly provided similar protections.[99]

Delaware courts have recognized judicial nullification as a remedy for the improper cancellation of an LLC.[100] "A proceeding to nullify a filed certificate of cancellation may be brought on the ground that the dissolved entity's business and affairs were not properly wound up."[101] The leading authority is *Metro*, which held that a plaintiff who pleads facts supporting an inference that an LLC "was wound up

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96 *In re Citadel Indus., Inc.*, 423 A.2d 500, 503 (Del. Ch. 1980).

97 *In re Krafft-Murphy Co., Inc.*, 2011 WL 5420808, at *6 (Del. Ch. Nov. 9, 2011).

98 *CML V, LLC v. Bax*, 28 A.3d 1037, 1045 (Del. 2011).

99 *See, e.g.*, 6 *Del. C.* § 18-805 (providing for appointment of trustee or receiver for canceled LLC).

100 *See, e.g.*, *Metro*, 854 A.2d at 139.

101 Robert L. Symonds, Jr. & Matthew J. O'Toole, *Symonds & O'Toole on Delaware Limited Liability Companies* § 16.08[F], at 16-70 (2d ed. 2019) ("Symonds & O'Toole").

in contravention of the [DLLCA]" necessarily "pleads facts that support an application to nullify the...cancellation." [102] This holding allows direct and derivative claims involving the defunct LLC to proceed.

The Court of Chancery's authority to nullify an LLC's cancellation may derive from either § 18-203, authorizing the "nullifi[cation] [of] an erroneously executed certificate of cancellation,"[103] or "'the general equity powers of the court sitting as a court of chancery.'"[104] The DLLCA prescribes rules for dissolving and winding up an LLC[105] but does not provide a complete remedial framework. "[W]here the General Assembly has not defined a right, remedy, or obligation with respect to an LLC," this Court has found "that common law equity principles supplement the [DLLCA's] express provisions."[106] One of "the historic powers of the Chancellor [is] to grant such other relief as the facts of a particular case may dictate."[107] When a manager causes an LLC to improperly dissolve or wind up—

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102 *Metro*, 854 A.2d at 139-40.

103 6 *Del. C.* § 18-203(b). *Metro* relied on a case decided in the limited partnership context to support nullification of an LLC's certificate of cancellation. *See Metro*, 854 A.2d at 139 n.27 (citing *In re CC&F Fox Hill Associates Ltd. P'ship*, 1997 WL 349236, at *4 (Del. Ch. June 13, 1997)).

104 *Gandhi-Kapoor v. Hone Cap. LLC*, 305 A.3d 707, 720 (Del. Ch. 2023) (citation omitted); *see also* 6 *Del. C.* § 18-1104.

105 *See, e.g.*, 6 *Del. C.* §§ 18-203 & 18-801–18-804.

106 *Bax*, 28 A.3d at 1045.

107 *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983).

especially to extinguish colorable claims against him—courts may grant nullification to revive the entity.[108]

To plead a nullification claim, a plaintiff must allege facts supporting an inference that a canceled LLC dissolved or "wound up in contravention of the [DLLCA]."[109] Even a "single-count Verified Complaint...seeking to nullify... certificates of cancellation" vests the Court of Chancery with "subject matter jurisdiction over the nullification claim."[110]

A plaintiff may plead nullification as a standalone claim or bring "direct claims of the LLC or derivative claims of its members after or ***in conjunction with*** a successful action seeking...nullification."[111] In *Metro*, then-Vice Chancellor Strine declined to require a plaintiff "to bring a separate action seeking to nullify [an LLC's] certificate of cancellation *before* it could bring [its direct and derivative]

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108 *See, e.g.*, *In re Reinz Wisconsin Gasket, LLC*, 2023 WL 2568326, at *13 (Del. Ch. Mar. 20, 2023) ("*Reinz I*") (deferring decision to nullify cancellation of LLC pending receiver report and development of trial record); *Capone v. LDH Mgmt. Holdings LLC*, 2018 WL 1956282, at *14 (Del. Ch. Apr. 25, 2018), *judgment entered*, (Del. Ch. 2018) (holding "the LLCs were dissolved in violation of Section 18-804(b)(1), and the certificates of cancellation shall be nullified"); *Thor Merritt Square, LLC v. Bayview Malls LLC*, 2010 WL 972776, at *6 (Del. Ch. Mar. 5, 2010) (denying motion to dismiss plaintiffs' claims for nullification of defendant LLCs' certificates of cancellation).

109 *Metro*, 854 A.2d at 139; *accord Reinz I*, 2023 WL 2568326, at *13 ("Nullifying a certificate of cancellation requires a statutory violation.").

110 *Schwaber v. Margalit*, 2022 WL 2719952, at *2 (Del. Ch. July 13, 2022).

111 *Matthew*, 2012 WL 605589, at *22 (emphasis added).

action," finding no legal support and reasoning that a contrary decision would "make[] little sense as a matter of efficiency."[112] If the plaintiff proves "that an LLC's affairs were not wound up in compliance with the [DLLCA], [a court] may nullify the certificate of cancellation, which effectively revives the LLC and allows claims to be brought by and against it."[113]

2. The SAC Pleads a Nullification Claim.

The Complaint,[114] the FAC,[115] the Fireman Complaint,[116] and the SAC[117] each state a nullification claim. Notably, the Memorandum Opinion did not determine that the SAC failed to state a cognizable claim under Rule 12(b)(6).[118] Rather, the Vice Chancellor found that "the plaintiffs here failed to seek nullification in their pleadings."[119] But Plaintiffs *did* seek nullification in their pleadings—at

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[112] *Metro*, 854 A.2d at 139 n.27.

[113] *Matthew*, 2012 WL 605589, at *22 n.148.

[114] A0100-101, ¶¶ 193-205.

[115] A0211-214, ¶¶ 202-218.

[116] A0122-124, ¶¶ 79-89.

[117] A0282-285, ¶¶ 204-220.

[118] The Court of Chancery dismissed Plaintiffs' action "without prejudice." *New Media Inv'rs II*, 2026 WL 208698, at *10. Since "dismissal for failure to state a claim will typically be granted with prejudice to the dismissed claims," it appears the Vice Chancellor did not adjudicate the SAC on the merits. *TransPerfect Glob., Inc. v. Ross Aronstam & Moritz LLP*, 2022 WL 803484, at *7 (Del. Ch. Mar. 17, 2022), *aff'd*, 287 A.3d 1159 (Del. 2022).

[119] *New Media Inv'rs II*, 2026 WL 208698, at *8.

Count IX, seeking a judgment declaring that "New Media II has not been canceled," that "[t]he attempted cancellation of New Media II's existence was not properly filed," and that the cancellation is revoked or nullified.[120] Plaintiffs reiterated twice in pleadings-stage briefing that "the SAC asks the Court to nullify Maginn's certificate of cancellation and nullify any dissolution."[121] The Court of Chancery's contrary finding and the jurisdictional ruling built on it should be reversed.

Plaintiffs' nullification claim rests on their allegations that Maginn caused New Media II to dissolve and wind up in contravention of the DLLCA. Under "Delaware's liberal notice pleading rules," a complaint need only provide "'a short and plain statement of the claim showing that the pleader is entitled to relief,'" and "a plaintiff need not identify the precise law on which it relies."[122] Each of the four theories discussed below ultimately states a violation of § 18-203, which "requires that a limited liability company dissolve and complete winding up before filing a

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120 A0285, ¶ 220(c)-(e).

121 A0836 (citing SAC ¶¶ 205-20); A0903 (citing SAC ¶¶ 204-20); *see also* A0952 ("[T]here is no requirement that the Court must order nullification separately or before any plenary claims, which the SAC asks the Court to do. *See* SAC ¶¶ 205-220....").

122 *AlixPartners, LLP v. Benichou*, 250 A.3d 775, 784 (Del. Ch. 2019) (quoting Del. Ch. R. 8(a)(1)).

certificate of cancellation."[123] The facts alleged in the SAC support the nullification claim pleaded at Count IX.

a. Unlawful Dissolution.

The SAC alleges a violation of § 18-801(a), governing an LLC's dissolution.[124] The limited liability company agreement of New Media II, upon information and belief, is substantially similar to that of its sister company, New Media II-B, or no such agreement exists.[125] New Media II-B's limited liability company agreement "is silent as to voting requirements to dissolve."[126] The *Deane* court held that, under that agreement, "Maginn did not have the unilateral power to wind-up and dissolve New Media II-B."[127]

Where a limited liability company agreement specifies no time or event triggering dissolution and is silent as to voting requirements, as alleged here, the DLLCA requires "the vote or consent of members who own more than 2/3 of the then-current percentage...in the profits of the limited liability company."[128] The

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123 *Techmer Accel Holdings, LLC v. Amer*, 2010 WL 5564043, at *10 (Del. Ch. Dec. 29, 2010) (citing 6 *Del. C.* § 18-203).

124 A0284, ¶¶ 217-219.

125 *Id.*, ¶ 218.

126 *Id.*

127 *Deane*, 2022 WL 16557974, at *18 n.211. New Media II-B's LLC agreement provides that dissolution and winding up are only possible upon "the written determination of the Members" or judicial decree. *Id.*

128 6 *Del. C.* § 18-801(a)(3).

SAC alleges that, "[o]n information and belief, no such vote ever happened."[129] Accordingly, "the predicate requirement of dissolution has never happened as to New Media II,"[130] making it "reasonably conceivable" that Maginn caused New Media II to dissolve in contravention of § 18-801(a).[131] Wrongful dissolution warrants judicial nullification.[132]

Because Maginn violated the DLLCA in dissolving New Media II, he also lacked statutory authority to wind up the company.[133] The DLLCA provides that only "a manager who has not wrongfully dissolved a limited liability company...may wind up the limited liability company's affairs."[134] In other words, Maginn's unlawful dissolution did more than terminate New Media II prematurely—it stripped Maginn of authority to control the company's wind-up at all.

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129 A0284, ¶ 218.

130 *Id.*, ¶ 217.

131 *Cent. Mortgage Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

132 *See CC&F Fox Hill Associates*, 1997 WL 349236, at *3 (finding "that [a limited partnership's] certificate of cancellation was improperly filed because [the partnership] had not been dissolved," independently warranting nullification).

133 6 *Del. C.* § 18-803(a); *see also* A0833 (arguing same).

134 6 *Del. C.* § 18-803(a).

b. Failure to Distribute New Media II's Residual Assets.

Second, the SAC pleads facts showing that Maginn canceled New Media II in contravention of § 18-804(a), which provides for the distribution of an LLC's assets upon winding up.[135] That section requires "assets [to] be distributed" first to creditors, then to members owed outstanding distributions, then to all members based on their contributions and *pro rata* shares in distributions.[136]

Under Maginn's management, New Media II failed to distribute its assets as required by § 18-804(a). As in *Deane*, the SAC alleges that "Maginn took the opportunity presented by the II-C Warrant for himself rather than offering it to New Media II-B," New Media II, or their members.[137] The *Deane* court found that this ultimately harmed New Media II-B's members, in part, by causing "an absence of distributions."[138] The same logic applies here: Maginn usurped a corporate opportunity belonging to New Media II and was not entitled to retain his ill-gotten gains. That usurpation gave rise to a valid claim and cause of action owned by New Media II. Maginn either failed to distribute his ill-gotten gains or otherwise

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135 The SAC does not cite § 18-804(a), but Plaintiffs briefed this theory when opposing the Maginn Defendants' motion to dismiss. *See* A0833; A0951.

136 6 *Del. C.* § 18-804(a).

137 *Deane*, 2022 WL 16557974, at *10; *see also* A0274-275, ¶¶ 158-61.

138 *Id.* at *12.

monetize or make appropriate provision for the claim or cause of action that arose from his usurpation.

As of 2013, Maginn was serving as New Media II's liquidating trustee.[139] New Media II-C acquired the II-C Warrants in 2012.[140] Maginn exercised the warrants in June 2013[141] and six months later purported to have wound up New Media II and concluded its business.[142] During wind-up, Maginn was required to distribute New Media II's residual assets to its members.[143] Though he exercised control over the Jenzabar shares obtained through the II-C Warrants as of December 2013, Maginn kept those shares for himself. Section 18-804(a)(3) required Maginn to distribute the residual assets to New Media II's members, whether in the form of the ill-gotten proceeds that he retained from his usurpation or provision for the resulting cause of action.[144] Failure to do so violates the DLLCA. In pleading such

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139 *See* A0259, ¶¶ 95-96; 6 *Del. C.* § 18-101(11).

140 A0254, ¶ 84.

141 A0258, ¶ 94.

142 A0259, ¶ 95.

143 *See* 6 *Del. C.* §§ 18-803(b) & 18-804(a)(3).

144 *See Weekapaug Groove LLC v. Charles Gallanti, Inc.*, 2019 WL 1643945, at *2 (Del. Ch. Apr. 15, 2019) ("Avery is liable to the Company for $12,424.21.... This order addresses Avery's liability to the Company by directing the trustee to make an initial distribution of $2,420.24 to CGI, representing CGI's share...."); *see also id.* at *4-5 (analyzing distribution owed to member CGI under § 18-804(a)(3)).

a violation, the SAC states a second, independent ground supporting judicial nullification.

Alternatively, the violation of § 18-804(a)(3) lies in Maginn's failure to distribute the value of claims arising from Defendants' misconduct. "Like a fleet of trucks or a factory, a lawsuit is a [company] asset."[145] Before and after dissolving New Media II, Maginn alone knew of New Media II's claims and controlled whether to monetize and distribute their value to New Media II's members.[146] Delaware law expects fiduciaries to compensate equity holders for such assets, and the *Deane* Action established that Maginn's usurpation gave rise to a "viable" and "material" derivative claim.[147] Rather than monetize and distribute the value of the usurped

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145 *Diep on behalf of El Pollo Loco Holdings, Inc. v. Trimaran Pollo Partners, L.L.C.*, 280 A.3d 133, 149 (Del. 2022); *see also Sehoy Energy LP v. Haven Real Est. Grp., LLC,* 2017 WL 1380619, at *1 (Del. Ch. Apr. 17, 2017) ("***A cause of action brought on behalf of an entity is an asset of that entity***. Like any other asset of an entity entering bankruptcy, the cause of action passes to the bankruptcy trustee, to be deployed on behalf of the bankruptcy estate and its beneficiaries.") (emphasis added).

146 *See* 6 *Del. C.* §§ 18-1001 (imposing demand requirement on members seeking to bring LLC's derivative claims); *id.* at § 18-803(b) (providing that "the persons winding up the limited liability company's affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits").

147 *See, e.g.*, *In re Primedia, Inc. Shareholders Litig.*, 67 A.3d 455, 476-77 (Del. Ch. 2013) ("What has been less clear under Delaware law is the extent to which stockholders of the acquired corporation can...challenge the fairness of the merger by which their standing to sue was extinguished.... Conceptually, these claims 'embrace the holding of the Supreme Court's decision...[that] permits a plaintiff to attack a merger directly if the target board agreed to a

opportunity or New Media II's derivative claims, Maginn "sought to cancel New Media II, at least in part, to prevent New Media II or its Members from pursuing any claims against him" in violation of § 18-804(a)(3).[148] This pleads a basis for nullification.

c. Unlawful Distribution.

The SAC's allegations also support a reasonable inference that Maginn contravened § 18-804(c) when purporting to wind up New Media II.[149] The DLLCA provides that a member who knowingly receives a distribution made in violation of § 18-804(c) "shall be liable to the limited liability company for the amount of the distribution."[150] By diverting the II-C Warrants to an entity owned by him and Chai, exercising the II-C Warrants and retaining the resulting shares, and then canceling New Media II, Maginn misappropriated roughly $55 million that belonged to New Media II and should have been distributed to its members.[151]

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materially inadequate, and therefore unfair, price because the price did not reflect the value of certain assets—in this case, the Derivative Claims.'" (citation omitted).

148 A0282, ¶ 210.

149 Plaintiffs framed their nullification claim under § 18-804(c) when litigating the Renewed Nullification Motion. *See, e.g.*, A0297-298.

150 6 *Del. C.* § 18-804(c).

151 *See Deane*, 2022 WL 16557974, at *28-29.

These operative facts mirror those that led the *Deane* court to hold "that Maginn breached his fiduciary duty of loyalty by usurping from New Media II-B the opportunity to obtain the II-C Warrant."[152] Maginn knew at the time that his self-distribution was wrongful.[153] Although he purported to wind up New Media II in 2013, he delayed filing its certificate of cancellation until 2017—while the then-pending *Deane* Action threatened to expose his misconduct.[154] This supports a reasonable inference that the cancellation was calculated to conceal and extinguish New Media II's known claims rather than legitimately conclude its business. Indeed, the *Deane* court limited New Media II-B's damages because "New Media II also had an expectation in a substantial portion of the II-C Warrant."[155]

d. Failure to Make Reasonable Provision for Claims.

Finally, the SAC alleges that Maginn violated § 18-804(b) when purportedly winding up New Media II.[156] That provision requires a dissolved LLC to "pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional or unmatured contractual claims, known to the [LLC]."[157]

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152 *Id.* at *19.

153 *See* A0282-284, ¶¶ 209-12, 214, 217-18.

154 *See* A0282, ¶¶ 207-10.

155 *Deane*, 2022 WL 16557974, at *29.

156 A0283, ¶ 213.

157 6 *Del. C.* § 18-804(b)(1).

The LLC must also "make such provision as will be reasonably likely to be sufficient to provide compensation for claims" likely to arise "within 10 years after the date of dissolution."[158] The SAC alleges violations of these requirements.

The SAC alleges that "Maginn failed to make a reasonable provision for the liability arising from his diversion of the [II-C Warrants]."[159] That and related allegations support the reasonable inference that Maginn—and by extension New Media II[160]—knew or should have known that the company needed to make reasonable provision for liabilities arising from that failure, particularly given Maginn's knowledge of his own misconduct and the then-pending *Deane* Action.

Defendants argued below that § 18-804(b) requires a company to make a reasonable provision for its own liabilities, not its manager's.[161] But the statutory text does not support this cramped interpretation. Only § 18-804(b)(2) is limited to "any claim ***against the limited liability company***."[162] By contrast, § 18-804(b)(1) governs "all claims and obligations...known to the limited liability company," while § 18-804(b)(3) governs "claims...likely to arise or to become known to the limited

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158 6 *Del. C.* § 18-804(b)(3).

159 A0283, ¶ 213.

160 *See, e.g.*, *B.A.S.S. Grp., LLC v. Coastal Supply Co., Inc.*, 2009 WL 1743730, at *7 n.72 (Del. Ch. June 19, 2009) ("see[ing] no reason" not to impute knowledge of LLC's manager to LLC).

161 A0521.

162 6 *Del. C.* § 18-804(b)(2) (emphasis added).

liability company within 10 years after the date of dissolution," including affirmative claims belonging to the company.[163]

Consistent with that text, the *Schwaber* court declined to dismiss a nullification claim alleging a failure to make reasonable provision for claims or causes of action belonging to canceled entities themselves.[164] There, the inquiry was "not whether the defendants made reasonable provision for known…claims against the canceled entities...but whether the defendants should have distributed or made reasonable provision for legal claims belonging to the [canceled entities]."[165] The court viewed the latter as a cognizable claim under § 18-804(b).[166] Maginn's analogous violation of § 18-804(b) warrants nullification.[167]

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The Memorandum Opinion erroneously concludes that "the plaintiffs here failed to seek nullification in their pleadings."[168] The record shows otherwise. The SAC expressly sought nullification, alleging multiple DLLCA violations that render

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163 6 *Del. C.* § 18-804(b)(1)-(3).

164 *Schwaber*, 2022 WL 2719952, at *1, 3.

165 *Id.* at *3.

166 *Id.* at *4.

167 *See, e.g.*, *Capone*, 2018 WL 1956282, at *14 (nullifying LLC's certificate of cancellation upon finding violation of § 18-804(b)(1)).

168 *New Media Inv'rs II*, 2026 WL 208698, at *8.

New Media II's dissolution and wind-up unlawful. The Vice Chancellor's contrary finding requires reversal.

3. The Nullification Claim Gave Plaintiffs Standing.

Because Count IX states a nullification claim, Plaintiffs had standing to bring that claim and their derivative claims. The *Metro* court expressly rejected the suggestion that a former member of a canceled LLC "was required to bring a separate action seeking to nullify [the LLC's] certificate of cancellation *before* it could bring this [direct and derivative] action."[169] Following *Metro*, *Matthew* confirms that a former member may bring "derivative claims...after or ***in conjunction with*** a successful action seeking…nullification."[170] The court below distinguished *Metro* because, there, "the plaintiff brought direct claims against the canceled entity, giving it standing to maintain the suit while seeking nullification."[171] This Court should hold that Plaintiffs have standing to bring a nullification claim in conjunction with a derivative claim, regardless of whether the SAC also states a direct claim.

Plaintiffs in Delaware courts can and do bring standalone nullification claims, making clear that a plaintiff's standing in such circumstances derives from the

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[169] *Metro*, 854 A.2d at 139 n.27.

[170] *Matthew*, 2012 WL 605589, at *22 (emphasis added) (citing *Metro*, 854 A.2d at 140).

[171] *New Media Inv'rs II*, 2026 WL 208698, at *8.

nullification claim itself. This follows from Delaware law's conception of standing. "The term 'standing' refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or to redress a grievance."[172] When a plaintiff adequately pleads a nullification claim—even standing alone—the court has before it a controversy and subject matter jurisdiction to redress it by restoring the entity's legal existence.

In *Schwaber*, for example, even a "single-count Verified Complaint...seeking to nullify...certificates of cancellation" vested the Court of Chancery with "subject matter jurisdiction over [the] nullification claim."[173] As here, the *Schwaber* plaintiff was a former member of a canceled LLC seeking to revive the entity and sue on its behalf.[174] Likewise, in *Thor Merritt Square*, plaintiffs asserted claims against two canceled LLCs but withdrew all but one, "leaving only their claim for nullification."[175] In both cases, the court declined to dismiss the standalone nullification claims.[176] Together, these cases reflect that: (i) a former member of a canceled LLC has standing to bring a nullification claim; and (ii) such a claim, standing alone, suffices to invoke subject matter jurisdiction.

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172 *Dover Hist. Soc. v. City of Dover Plan. Comm'n*, 838 A.2d 1103, 1110 (Del. 2003).

173 *Schwaber*, 2022 WL 2719952, at *1-2.

174 *Id.*

175 *Thor Merritt Square*, 2010 WL 972776, at *1.

176 *Schwaber*, 2022 WL 2719952, at *4; *Thor Merritt Square*, 2010 WL 972776, at *6.

It follows that when a plaintiff brings both a nullification claim and other claims that depend on an entity's revival, the nullification claim itself establishes standing "at the time a lawsuit is filed."[177] Otherwise, no LLC member could ever plead nullification, because cancellation would eliminate the status needed to invoke the court's jurisdiction. That result would defeat judicial review of wrongful cancellation and render nullification illusory.

Metro confirms this. There, the plaintiff "state[d] a claim that [an LLC's] certificate of cancellation should be nullified so that [the plaintiff] c[ould] sue [the LLC] directly ***and*** bring derivative actions on [the LLC's] behalf."[178] The plaintiff's nullification claim supplied the mechanism by which both direct and derivative claims involving the canceled LLC became redressable, supporting their maintenance in the same action. Under the DLLCA, an entity is never dead beyond revival,[179] and "those who were members of a terminated Delaware limited liability

177 *New Media Inv'rs II*, 2026 WL 208698, at *7.

178 *Metro*, 854 A.2d at 164 (emphasis added); *cf. New Media Inv'rs II*, 2026 WL 208698, at *8 n.90.

179 *See, e.g.*, 6 *Del. C.* § 18-805 (authorizing "any creditor, member or manager" of canceled LLC to seek appointment of trustee or receiver "at any time" for "good cause"); *see also* Symonds & O'Toole § 16.09[A], at 16-72 ("Insofar as the company no longer exists..., presumably each reference in Section 18-805 to a member or manager refers to a person who had that status prior to the company's termination.").

company may still be regarded as possessing such status" for limited purposes.[180] *Metro* and its progeny recognize that one of those purposes is to bring a nullification claim. Delaware courts also recognize "the ability of [a canceled LLC's] 'members' to bring about assertion of [derivative] claims" by seeking nullification.[181] Plaintiffs pleaded nullification through a declaratory judgment and filed a discrete motion for nullification, presenting procedural mechanisms to address nullification at the threshold.

Plaintiffs therefore have standing to pursue a nullification claim and, in the same action, to assert derivative claims whose viability turns on that claim's success. Permitting former members to revive a canceled LLC and pursue claims derivatively promotes efficiency and fairness. A rule limiting members to direct remedies would allow a disloyal fiduciary to keep the *pro rata* share of any usurped or self-distributed asset owed to members who are unaware of the wrong or unable to file individual actions.

The Court should foreclose any contrary interpretation of Delaware law.

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180 Symonds & O'Toole § 5.04[C][2], at 5-57.

181 *Id.* at n.312 (citing *Matthew*, 2012 WL 605589).

II. Counts I, III, and V of the SAC Are Cognizable as Direct Claims against Maginn.

A. Question Presented

Did the Court of Chancery err in holding that all Plaintiffs' "claims are derivative"?[182] Preserved: A0270-285; A0821-823; A0894-896; A0946-947; A1206-209, 57:8-60:2.

B. Scope of Review

Whether a complaint states a direct or derivative claim is reviewed *de novo*.[183] "[T]he reviewing court must look to the body of the complaint and consider the nature of the wrong alleged and the relief requested."[184]

C. Merits of Argument

The SAC pleads its nine claims as "Direct and Derivative,"[185] but the Court of Chancery held that none could be brought directly.[186] Plaintiffs dispute that ruling as to Counts I, III, and V against Maginn. The SAC pleads reasonably conceivable claims that Maginn's diversion of assets during New Media II's putative wind-up

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182 *New Media Inv'rs II*, 2026 WL 208698, at *4.

183 *See El Paso Pipeline*, 152 A.3d at 1256.

184 *Culverhouse v. Paulson & Co. Inc.*, 133 A.3d 195, 198 (Del. 2016).

185 A0270-282.

186 *New Media Inv'rs II*, 2026 WL 208698, at *6.

deprived members of distributions[187]—a direct injury in both its nature and remedy under *Tooley*.[188]

"The distinction between the rights of an LLC and the individual rights of its members is often quite narrow."[189] That distinction fades further during dissolution and wind-up. When a liquidating trustee[190] fails to distribute residual assets during wind-up, the company suffers no injury—the members do.[191] The SAC alleges that Maginn misappropriated New Media II's assets during wind-up, depriving members of distributions owed to them. That this was a direct injury is underscored by Maginn's performative effort to legitimize his misconduct by offering New Media

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187 A0270-271, ¶¶ 130-35; A0273-275, ¶¶ 149-62; A0277-278, ¶¶ 174-79.

188 *See Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004).

189 *Kelly v. Blum*, 2010 WL 629850, at *9 (Del. Ch. Feb. 24, 2010).

190 "Any person...who carries out the winding up of a dissolved limited liability company is a 'liquidating trustee' within the meaning of the statute." Symonds & O'Toole § 16.06[F][1], at 16-60 (citing 6 *Del. C.* § 18-101(9), subsequently renumbered as § 18-101(11)).

191 *See Baghdadi v. Gen. Mediterranean Holding, S.A., Spf*, 2023 WL 1779773, at *11 (N.D. Ill. Feb. 6, 2023) ("[T]he plaintiffs' injury under this particular theory...is...that at the time of dissolution, [the LLC] had an asset—that is, the option to receive, with no further investment, a materially equivalent interest in South Loop II—that was not liquidated and the economic value of which was not distributed to them upon dissolution in accordance with the LLC Act or the...operating agreement. Their injury under this theory is therefore direct, *i.e.*, it does not flow through [the LLC]."); *see also Blystra v. Fiber Tech Grp., Inc.*, 407 F. Supp. 2d 636, 646 (D.N.J. 2005) (finding plaintiffs could bring direct claim where limited partnership was "essentially defunct").

II's members an opportunity to make "individual decisions" about whether to invest in New Media II-C.[192]

Tooley governs "whether a [member]'s claim is derivative or direct."[193] "That issue...turn[s] solely on the following questions: (1) who suffered the alleged harm (the [LLC] or the suing [members], individually); and (2) who would receive the benefit of any recovery or other remedy (the [LLC] or the [members], individually)?"[194] "In answering these questions, the Court looks to the nature of the wrong alleged, not merely at the form of words used in the complaint."[195] Under *Tooley*, the SAC pleads direct claims.

1. New Media II's Members Suffered the Alleged Harm.

Counts I, III, and V state direct claims against Maginn for disloyally diverting and misappropriating the II-C Warrants while purporting to wind up New Media II.[196] Maginn's actions predating New Media II's wind-up, including usurpation of the II-C Warrant opportunity, harmed New Media II itself. But the analysis is different for the period between New Media II's improper dissolution and wrongful

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192 *Deane*, 2022 WL 16557974, at *3.

193 *Tooley*, 845 A.2d at 1033.

194 *Id.*

195 *Kelly*, 2010 WL 629850, at *9 (applying *Tooley* in LLC context).

196 A0270-271, ¶¶ 130-35; A0273-275, ¶¶ 149-62; A0277-278, ¶¶ 174-79.

cancellation.[197] Because Maginn had a duty to monetize and distribute New Media II's residual assets to its members,[198] his failure to do so directly harmed Plaintiffs, supplying an independent basis for standing at the time this action was filed.

At some time in 2013, Maginn began purporting to serve as New Media II's liquidating trustee.[199] Maginn diverted the II-C Warrants to New Media II-C in 2012,[200] exercised them in June 2013,[201] and, six months later, purported to wind up New Media II.[202] Maginn usurped this opportunity and retained its resulting value, rather than monetize and distribute New Media II's residual assets as required. The final distributions also failed to account for the value of New Media II's claims or causes of action. This absence of distributions is the direct harm that Counts I, III, and V allege.

Delaware law supports this characterization. As Vice Chancellor Glasscock opined, "a conversion of assets in connection with the liquidation and distribution of

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197 *See, e.g.*, *In re Cencom Cable Income Partners, L.P.*, 2000 WL 130629, at *3 (Del. Ch. Jan. 27, 2000).

198 *See Comerica Bank v. Glob. Payments Direct, Inc.*, 2014 WL 3779025, at *14 (Del. Ch. Aug. 1, 2014) (noting that LLC manager's fiduciary duties "continue to encompass...an obligation to distribute the assets of the company promptly consistent with maximizing their value" during wind-up).

199 *See* A0259, ¶¶ 95-96; 6 *Del. C.* § 18-101(11).

200 A0254, ¶ 84.

201 A0258, ¶ 94.

202 A0259, ¶ 95.

what is the LLC equivalent of a liquidating trust states ***a direct claim*** against the managers of that LLC."[203] After all, once an entity dissolves, "its assets [are] held in trust for the benefit of both its creditors *and* its stockholders" or members.[204] The *Deane* court found that the plaintiffs pleaded derivative claims because New Media II-B was "not...dissolved" and "[a]ny direct harm to the individual members...would have come later, when making individual investment decisions and from an absence of distributions."[205] "New Media II was, however, dissolved," albeit improperly.[206] The "direct harm" that "would have come later" to New Media II-B's members *did* come to Plaintiffs—when Maginn failed to distribute the company's residual assets.

The court below observed that "loss—proportional to ownership—is the hallmark of a derivative claim."[207] But as this Court concluded in *Brookfield*, "the relevant factor [i]s not [whether] all stockholders could equally assert the claim," but whether the claim arises out of independent and direct harm to individual equity holders.[208] And while the claims in *Brookfield* were derivative, that case did not involve the narrow circumstances here—Maginn's misappropriation of company

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203 *Joseph Penar Fam. Tr. v. Adams*, 2016 WL 1730765, at *6 n.56 (Del. Ch. Apr. 28, 2016), *aff'd*, 151 A.3d 896 (Del. 2016) (emphasis added).

204 *Kidde Indus., Inc. v. Weaver Corp.*, 593 A.2d 563, 564 (Del. Ch. 1991).

205 *Deane*, 2022 WL 16557974, at *12.

206 *Id.* at *29.

207 *New Media Inv'rs II*, 2026 WL 208698, at *5.

208 *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1273 (Del. 2021).

assets, which he retained and failed to distribute during New Media II's wind-up, when its assets were held in trust for distribution to members.

2. New Media II's Members Would Receive Recovery.

Because each New Media II member suffered individualized harm when distributions were due but not made, any recovery would go to those members. Maginn purported to legitimize the transaction by offering New Media II's members the illusory opportunity to learn about and invest in New Media II-C. Each member would have faced an "'individual decision[]' about whether to invest,"[209] and any gain or loss would have accrued to that member alone. Denying that opportunity and withholding the resulting value inflicted harm—and thus entitles relief—on a member-by-member basis.

If this Court finds that Plaintiffs did not state a nullification claim, it should nonetheless reverse the judgment below as to Counts I, III, and V and permit Plaintiffs' direct claims to proceed. Alternatively, if the Court finds that Plaintiffs did plead a nullification claim, it should still find that Plaintiffs may pursue Counts I, III, and V directly in connection with New Media II's liquidation, and reverse.

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[209] *Deane*, 2022 WL 16557974, at *3.

III. The Court Should Extend Equitable Standing to Plaintiffs.

A. Question Presented

Did the Court of Chancery err in refusing equitable standing where Maginn's own misconduct eliminated the very entity through which Plaintiffs' claims could have been asserted? Preserved: A0840-843; A0954-955.

B. Scope of Review

The Court of Chancery's decision on equitable standing "implicates rulings of law," it is therefore subject to *de novo* review.[210]

C. Merits of Argument

If this Court rejects Plaintiffs' arguments above, it should extend equitable standing because Defendants created the standing issue they now weaponize. Having diverted New Media II's assets, concealed the wrongdoing, and canceled the company, Defendants cannot invoke the consequences of that misconduct to defeat suit. The Court of Chancery's contrary conclusion should be reversed.[211]

1. Equity Favors Extending Standing to Plaintiffs.

Delaware law has long recognized equitable standing to ensure that substantive rights are not defeated by artifice, invoking this power to prevent a

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[210] *Schoon v. Smith*, 953 A.2d 196, 200 (Del. 2008).

[211] *New Media Inv'rs II*, 2026 WL 208698, at *9.

"complete failure of justice."[212] Equitable standing may be "judicially extended to address new circumstances."[213] Although derivative standing in the LLC context is statutory,[214] the DLLCA does not address circumstances where a fiduciary facing liability for breaching his duty of loyalty exploits the statute's dissolution and wind-up provisions to conceal his misconduct and defeat standing amid litigation. Where the DLLCA is silent, "the rules of law ***and equity***...shall govern."[215]

True to this instruction, the Court of Chancery extended equitable standing to a former LLC member in *Carlisle*.[216] The member had assigned its interest in the LLC and so, under the DLLCA, could not seek statutory dissolution of the company.[217] Looking to the parties' substantive relationship, the court found that, "[i]n good conscience, [the assignor] should be regarded as a member with the power to seek dissolution."[218] That approach reflects settled equitable principles: "Equity always attempts to...enforce rights and duties which spring from the *real* relations of

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212 *Schoon*, 953 A.2d at 202.

213 *SDF Funding LLC v. Fry*, 2022 WL 1511594, at *8 (Del. Ch. May 13, 2022) (quoting *Schoon*, 953 A.2d at 214).

214 *See Bax*, 28 A.3d at 1044.

215 6 *Del. C.* § 18-1104 (emphasis added).

216 *In re Carlisle Etcetera LLC*, 114 A.3d 592 (Del. Ch. 2015).

217 *Id.* at 597-601.

218 *Id.* at 607.

parties."[219] "[E]quity regards substance rather than form."[220] And "[e]quity also 'regards that as done which in good conscience ought to be done.'"[221]

Those principles apply equally here. In *Carlisle*, equity looked through formal status to enforce the parties' substantive relationship, and it should do so here—where Maginn eliminated the entity to avoid accountability. He diverted the II-C Warrants, paid for them out of New Media II's treasury,[222] and then, while attempting to conceal his wrongdoing during the *Deane* Action, "cancel[led] New Media II...to prevent [it] or its Members from pursuing any claims against him."[223] Equity should not permit Maginn to compound that wrongdoing by canceling New Media II, thereby obtaining immunity for his fiduciary breach.

Before New Media II's wrongful cancellation, the parties' relationship was that of an LLC manager and members entitled to rely on him.[224] By canceling the company, Maginn altered those real relations, placing himself in control of assets that should have been marshaled and distributed to members. Where an entity's

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219 *Id.* (quoting 2 John Norton Pomeroy, *Equity Jurisprudence* § 378 (Spencer W. Symons ed., 5th ed. 1941)).

220 *Id.* (quoting *Monroe Park v. Metro. Life Ins. Co.*, 457 A.2d 734, 737 (Del. 1983)).

221 *Id.* (quoting *Monroe Park*, 457 A.2d at 737).

222 A0283, ¶ 211.

223 A0282, ¶ 210.

224 *Reinz II*, 2023 WL 3300042, at *2 (quoting *Krafft-Murphy*, 2011 WL 5420808, at *6).

business is complete, "imposing derivative requirements...would only set up a legal artifice that has no justification and, therefore, ... makes no sense."[225] If Plaintiffs failed to plead a nullification or direct claim, equity does not approve dismissal here.

2. Plaintiffs Made Good-Faith Efforts to Revive New Media II.

The Court of Chancery denied Plaintiffs equitable standing because that "relief is unavailable when 'other avenues for relief exist ..., even if only theoretical[.]'"[226] The court reasoned that Plaintiffs could have "sought to nullify the certificate of cancellation *before* filing this suit."[227] This fails to credit the logic of *Deane*, which held that tolling applied because "[t]he plaintiffs were entitled to rely on 'the competence and good faith' of Maginn, who was tasked with protecting their interests as New Media II-B's Managing Member."[228]

Once the cancellation was discovered, Plaintiffs sought nullification of New Media II's certificate of cancellation in each complaint filed below.[229] Plaintiffs did not bring a separate nullification claim beforehand in good-faith reliance on the

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225 *Cencom*, 2000 WL 130629, at *4.

226 *New Media Inv'rs II*, 2026 WL 208698, at *9 (alterations in original) (quoting *SDF Funding*, 2022 WL 1511594, at *9).

227 *Id.* at *9.

228 *Deane*, 2022 WL 16557974, at *10 (footnote omitted).

229 A0282-285, SAC ¶¶ 204-220; A0211-214, FAC ¶¶ 202-218; A0100-101, Complaint ¶¶ 193-205; A0122-124, Fireman Complaint ¶¶ 79-89.

proposition that "a litigant need not bring a separate action seeking nullification of a certificate of cancellation before filing a derivative suit on the LLC's behalf."[230] Given the time that had elapsed since Maginn's wrongdoing and New Media II's cancellation, Plaintiffs were also working against the clock, and "efficiency" recommended simultaneously bringing the nullification claim.[231]

If this Court affirms the decision below, Plaintiffs' pursuit of nullification in a separate action faces heightened risk of dismissal on procedural grounds rather than adjudication on the merits. Defendants insist that Plaintiffs' nullification claim is time-barred.[232] To the extent Plaintiffs erred in pleading that claim, equity values substance over form.

Plaintiffs have followed decades-old Delaware law in pleading a nullification claim here. Where a fiduciary cancels an entity in bad-faith contravention of the DLLCA, where those he's injured seek redress, and where that fiduciary then seeks to throw those seeking justice out of court by arguing that they are powerless to lawfully undo what he has unlawfully done, equity provides the remedy. In such circumstances, equity creates a place to stand.

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230 *Matthew*, 2012 WL 605589, at *22 n.150 (citing *Metro*, 854 A.2d at 140).

231 *Metro*, 854 A.2d at 140 n.27.

232 *See, e.g.*, A0369-372; A0460.

CONCLUSION

For these reasons, the Court of Chancery's judgment should be reversed.

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MELUNEY ALLEMAN & SPENCE, LLC
/s/ Sean A. Meluney
Sean A. Meluney (#5514)
Matthew D. Beebe (#5980)
Joshua G. Wilson (#7694)
1143 Savannah Rd., Suite 3-A
Lewes, DE 19958
(302) 551-6740
sean.meluney@maslawde.com
matt.beebe@maslawde.com
josh.wilson@maslawde.com

SHLANSKY LAW GROUP, LLP
David H. Holloway (No. 5762)
1504 N. Broom St., Suite 1
Wilmington, DE 19806
Phone: (302) 357-9323
Fax: (302) 351-7216
David.Holloway@slglawfirm.com

Colin R. Hagan*
David J. Shlansky*
1 Winnisimmet Street
Chelsea, MA 02150
(617) 497-7200
Colin.Hagan@slglawfirm.com
David.Shlansky@slglawfirm.com
*Of Counsel, *pro hac vice* forthcoming

Attorneys for Plaintiffs Below – Appellants
Felicia Gross and Sheila Nassberg

KLEHR HARRISON
HARVEY BRANZBURG LLP

/s/ *Richard M. Beck*
Richard M. Beck (No. 3370)
Sally E. Veghte (No. 4762)
919 N. Market Street, Suite 1000
Wilmington, Delaware 19801
(302) 552-5508
rbeck@klehr.com
sveghte@klehr.com

-and-

BARCLAY DAMON LLP
Brian E. Whiteley*
Henry T. Gaylord*
160 Federal Street, Suite 1001
Boston, Massachusetts 02110
(617) 274-2903
bwhiteley@barclaydamon.com
hgaylord@barclaydamon.com
* *pro hac vice* forthcoming

Attorneys for Plaintiff Below – Appellant
Paul Fireman