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
	:	

APPELLEES ROBERT A. MAGINN, JR. AND NEW MEDIA INVESTORS II-C, LLC'S ANSWERING BRIEF

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Dated: June 10, 2026

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NATURE OF PROCEEDINGS

Appellants/Plaintiffs-below Felicia Gross, Sheila Nassberg, and Paul Fireman ("Plaintiffs") appeal the Court of Chancery's January 27, 2026, memorandum opinion (the "Opinion") and February 16, 2026, orders granting Appellees/Defendants-below Robert A. Maginn, Jr.'s and New Media Investors II-C, LLC's ("II-C"), D. Quinn Mills' and Olga Perera San Miguel's, Ling Chai's, and Jenzabar, Inc.'s (collectively, "Defendants") motions to dismiss Plaintiffs' Second Amended Consolidated Verified Complaint (the "Complaint").

Gross commenced an action (C.A. No. 2024-0413-LWW) on April 22, 2024 (which Nassberg later joined), and on December 31, 2024, Fireman commenced a similar action (C.A. No. 2024-1357-LWW). The two actions were consolidated, and Plaintiffs filed the Complaint. Plaintiffs' core theory is breach of fiduciary duty via usurpation of a corporate opportunity belonging to New Media Investors II, LLC ("New Media II"). Plaintiffs seek relief on behalf of New Media II notwithstanding that they relinquished their membership interests and released any claims over ten years prior to filing the action and notwithstanding that New Media II was cancelled in 2017 when a certificate of cancellation was filed with the Secretary of State (the "Cancellation").

Defendants moved to dismiss the Complaint. Following argument, the Court of Chancery issued the Opinion and granted Defendants' motions, holding: Plaintiffs' claims were derivative because New Media II, not the individual

Plaintiffs, suffered the alleged harm and thus the recovery would flow to the entity, and Plaintiffs lacked standing to bring claims on behalf of the entity that "ceased to exist long before this action commenced."[1] Therefore, the Court lacked subject matter jurisdiction. After filing the Compliant, Plaintiffs filed a motion to nullify New Media II's Cancellation. In the Opinion, the Court held that because it lacked subject matter jurisdiction at the outset, it could not address the motion to nullify filed by Plaintiffs after the Complaint.

Plaintiffs now appeal. This is Maginn and New Media II-C's answering brief. As set forth herein, the Court of Chancery's rulings should be affirmed.

[1] Opinion, Opening Brief Exhibit A (hereafter "Opinion"), at 1.

SUMMARY OF ARGUMENT

1. Denied. Count IX, seeking only a declaration that New Media II was never wound up, dissolved, or cancelled, despite the fact that New Media II indeed was cancelled in 2017, is not a well-pled petition for nullification. Without a proper claim for nullification, Plaintiffs do not have standing to pursue derivative claims on behalf of New Media II.

2. Denied. Counts I, III, and V are exclusively derivative. Plaintiffs allege a diversion of warrants and misappropriation of New Media II assets, which purportedly reduced New Media II's value and ultimately flowed down to the members *pro rata*. Any harm would have been to the company, and the company would receive any benefit of any recovery or other remedy, hallmarks of purely derivative claims.

3. Denied. Plaintiffs lack equitable standing. Plaintiffs slept on their rights by failing to plead an adequate remedy when they initiated the underlying action, such as seeking to appoint a receiver to nullify the cancellation of New Media II, which they attempted to do belatedly in February of this year.

STATEMENT OF FACTS[2]

I. NEW MEDIA II'S CANCELLATION

Jenzabar is a privately held Delaware corporation that provides Enterprise Resourcing Planning software-as-a-service, primarily in the higher education market.[3] Maginn was the chairman of Jenzabar's board of directors and at times was its CEO.[4]

New Media II was a Delaware company formed by Maginn in 1999 as a vehicle to hold securities in Jenzabar.[5] Maginn served as New Media II's managing member.[6] Plaintiffs were New Media II members,[7] until 2012 (Nassberg) and 2013 (Gross and Fireman).[8]

In December of 2013, Maginn sent letters and enclosed an NDA, final checks, and a "Payment Acknowledgment and Release" to New Media II's members.[9] The

[2] Except as otherwise stated, allegations in the Complaint are accepted as true for the purposes of this Court's review of the Opinion.

[3] A0234, ¶ 31.

[4] A0230, ¶ 15; A0234-235, ¶ 32.

[5] A0228, ¶ 4; A0234, ¶ 31.

[6] A0231, ¶ 23; A0234, ¶ 32.

[7] A0228, ¶ 4.

[8] Nassberg, Gross, and Fireman cashed final checks in exchange for their New Media II membership interests. *See* A0558; A0567; A0580-582.

[9] A0259, ¶ 96.

letter explained that: (i) the members' investments were "concluded," (ii) members were being provided a "final check" for their membership units; (iii) Maginn formed a new entity, II-C; (iv) Maginn was offering members, including Plaintiffs, the opportunity to invest in "another Jenzabar opportunity" through II-C; and (v) members could learn more information by signing the NDA.[10] Importantly, the letter explained that by cashing the check, the member agreed to the enclosed Release, the terms of which explained, *inter alia*, that the final check constituted payment to repurchase the member's units.[11]

The Release provided, among other things:

> INTERESTS. The Recipient hereby sells, assigns and transfers … title and interest in and to all the Recipient's Interests that are being redeemed hereby. The Recipient hereby releases, cancels and terminates any and all right, title and interest in New Media, and renounces now and forever any and all right, title and interest in New

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[10] *Id.*; A0572. On a motion challenging the Court's subject matter jurisdiction per Rule 12(b)(1), the Court of Chancery may consider materials outside the pleadings without converting the motion into a motion for summary judgment. *Acierno v. New Castle Cty. Dep't of Land Use*, 2006 WL 1668370, at *1 n.8, 3 (Del. Ch. June 8, 2006). "The 'plaintiff bears the burden of establishing this Court's jurisdiction, and where the plaintiff's jurisdictional allegations are challenged through the introduction of material extrinsic to the pleadings, he must support those allegations with competent proof.'" *Continental Automotive Systems, Inc. v. Nokia Corporation*, 2023 WL 1370523, at *6 (Del. Ch. Jan. 31, 2023) (quoting *Spiro v. Vions Tech. Inc.*, 2014 WL 1245032, at *7 (Del. Ch. Mar. 24, 2014)). Because Plaintiffs' standing under Rule 12(b)(1) is challenged, materials outside of the pleadings may be considered.

[11] A0259, ¶ 96.

> Media. The Recipient understands that by cashing the Redemption Payment, the Recipient will no longer be a member of New Media.[12]

Consistent with this text, Plaintiffs affirmatively allege that the Release reflected that a member accepting and cashing their distribution check "would effect a repurchase of the Members' ownership interest and terminate their membership in New Media II."[13]

Although Plaintiffs state that "[o]n 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,"[14] and that "[b]efore New Media II's wrongful cancellation, the parties' relationship was that of an LLC manager and members[,]"[15] that is false. Plaintiffs Gross and Fireman both received and cashed their final redemption checks, as reflected by New Media II's contemporaneous bank account statement showing images of the cashed checks.[16] Gross cashed her check (dated December 19, 2013, the same day as the letter) on January 7, 2014.[17] Fireman cashed

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[12] *Id.*; A0573.

[13] A0259, ¶ 96.

[14] Appellants' Opening Brief (hereinafter "OB") at 12 (citing A0259, ¶ 95; A0260, ¶ 98).

[15] OB at 46.

[16] A0558; A0567.

[17] A0558.

his check (also dated December 19, 2013) on January 10, 2014.[18] Nassberg relinquished her membership units prior to the letter being sent – New Media II sent her a letter on June 14, 2012, captioned “Repurchase of Remaining Member Interests in New Media II,” enclosing: “a check and release, which check represents full payment for your remaining membership interests in New Media II. By cashing the enclosed check, you will be deemed to have agreed to the release and will no longer be a member of New Media II.”[19] Nassberg’s check contained a note about “Repurchase of Remaining Interests in NMII” and was cashed on June 20, 2012.[20]

Plaintiffs’ termination of their membership interests, and the dissolution and winding up of New Media II, was also reflected in Plaintiffs’ tax returns.[21] In 2014, New Media II delivered to each of Fireman and Gross the last Form K-1 they would receive from New Media II, which reflected that as of year-end 2013, their shares of New Media II’s capital was 0% and a zeroing out of their capital accounts.[22]

Four years later, in December 2017, Maginn filed the Cancellation, and New Media II’s registration was revoked and nullified.[23]

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[18] A0567.

[19] A0582.

[20] A0580.

[21] A0585-593 (Gross); A0596-604 (Fireman); A0607-614 (Nassberg).

[22] A0586-593 (Gross); A0597-604 (Fireman).

[23] Opinion at 5; *see also* A0212-213, ¶ 213; A1162 at 14-17.

II. PLAINTIFFS FILE THIS ACTION

Plaintiffs filed this underlying action following the conclusion of *Deane v. Maginn* (the "*Deane* Action"), where the Court of Chancery issued a post-trial opinion and awarded damages exceeding $25.4 million.[24] On January 31, 2025, this Court affirmed.[25] Plaintiffs here "rely heavily on the findings in *Deane* to support their claims regarding the usurpation of the same warrants, which they allege also belonged to New Media II."[26] In the *Deane* Action, members of New Media Investors II-B, LLC ("II-B"), a sister entity to New Media II, sued Maginn alleging that he breached his fiduciary duties by usurping an opportunity to acquire warrants belonging to II-B.[27] But there are critical, dispositive differences between the *Deane* Action and this case, including that the plaintiffs there actually were members of the underlying entity.[28]

Plaintiffs specifically allege that they brought this action to "seek redress for the exact same breach of fiduciary duty."[29] The Complaint alleges that between 2004 and 2011, Defendants undertook "churning transactions" that dissipated the value of

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[24] 2022 WL 16557974, at *19, 23, 28-29 (Del. Ch. Nov. 1, 2022).

[25] *Maginn v. Deane*, 338 A.3d 1292 (Del. 2025) (TABLE).

[26] Opinion at 6.

[27] *Deane*, 2022 WL 16557974, at *1, 2.

[28] *Id.*

[29] A0047; A0156; A0226-27; *see also* A0107 (similar).

New Media II's assets.[30] According to Plaintiffs, Maginn caused New Media II to trade its "free-and-clear" Jenzabar common stock for warrants that carried restrictive conditions, which allegedly lacked a genuine business purpose and served only to siphon value from New Media II to Maginn.[31] Plaintiffs allege that in 2011, Maginn and Jenzabar's board allegedly manipulated valuations to prevent New Media II from exercising its remaining warrants, rendering them worthless and stripping New Media II of substantial value.[32] Plaintiffs allege that in 2012 and 2013, Maginn usurped a corporate opportunity belonging to New Media II.[33] According to Plaintiffs, Jenzabar issued new warrants intended to New Media II, but Maginn diverted them to Defendant II-C, a separate entity that he controlled and thereby stripped New Media II of an asset with substantial value.[34]

Based on the foregoing purported misconduct, Plaintiffs brought claims of declaratory judgment (Counts I, II, and IX), breach of fiduciary duty (Count III), misappropriation (Count V), waste (Count IV), aiding and abetting (Count VI), indemnification (Count VII), and tortious interference (Count VIII).[35]

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[30] Opinion at 3.

[31] *Id*.

[32] *Id*. at 3-4.

[33] *Id*. at 4.

[34] *Id*.

[35] A0270-285.

III. THE COURT OF CHANCERY'S DISMISSAL

The Court of Chancery dismissed the Complaint, holding that all of Plaintiffs' claims are derivative.[36] Plaintiffs' core allegation is that Maginn breached his fiduciary duty with respect to certain warrants and usurped corporate opportunities, and because the warrants were assets of New Media II and not its members, and a claim that a fiduciary usurped opportunities is derivative and there was no separate harm alleged as to the members, the Court concluded it is derivative.[37] It further held the waste claim is a classic derivative claim, and the misappropriation and tortious interference claims concerned an opportunity to be gained by New Media II, not by its members.[38] Moreover, although in the *Deane* Action damages were distributed to the members of II-B, the claims in that case also were derivative, but the Court awarded direct recovery via its equitable powers, *pro rata* in proportion with the members' ownership.[39]

The Court next held that because New Media II was cancelled in 2017 and not revived before the lawsuit was filed, Plaintiffs lacked standing to pursue claims on New Media II's behalf.[40] The Court explained that Plaintiffs could not

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[36] Opinion at 15.

[37] *Id*. at 11-12.

[38] *Id*. at 12-13.

[39] *Id*. at 13-14.

[40] *Id*. at 15.

simultaneously seek nullification and press derivative claims because they did not claim nullification in their pleadings, Plaintiffs' filing of a certification of correction nearly a year after the lawsuit cannot retroactively cure the lack of standing at the lawsuit's outset and presently the Cancellation has not been nullified, and Plaintiffs' plea for equitable standing failed because other avenues for relief existed.[41]

The Court concluded that because the Plaintiffs' claims are derivative and they do not have standing to assert them, it lacked subject matter jurisdiction over the dispute.[42]

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[41] *Id*. at 15-20.

[42] *Id*. at 20-21.

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ARGUMENT

I. PLAINTIFFS' CLAIMS ARE DERIVATIVE

A. Question Presented

Did the Court of Chancery correctly hold that all of Plaintiffs' claims, including, as specifically challenged here, Counts I, III, and V against Maginn, are derivative? Maginn preserved this issue below at A0509–A0512 and A1060–A1062.

B. Scope of Review

"The Delaware Supreme Court reviews questions relating to standing under the *de novo* standard of review."[43]

C. Merits of Argument

The Court of Chancery correctly held that the claims asserted against Maginn are exclusively derivative. On appeal, Plaintiffs attempt to revive Counts I, III, and V on the ground that they are "cognizable as direct claims against Maginn."[44] However, in apparent recognition of the flaws with the arguments they made below, Plaintiffs now pivot and assert a new theory absent from the underlying motions to dismiss briefing and Complaint.

Plaintiffs' new theory expressly acknowledges that "Maginn's actions predating New Media II's wind-up, including usurpation of the New Media II-C

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[43] *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1262 (Del. 2021).

[44] OB at 38.

warrant opportunity, harmed New Media II itself," and contend (for the first time) that Counts I, III, and V are distinct because they focus on "Maginn's diversion of assets during New Media II's putative wind-up," which "deprived members of distributions," thus stating "a direct injury in both its nature and remedy under *Tooley*."[45] This novel recharacterization is absent from the briefing below, rendering it waived on appeal. Moreover, Plaintiffs' argument is not supported by the Complaint's allegations, despite Plaintiffs' acknowledgment that the Court must assess whether claims are derivative or direct under *Tooley* based on the body of the complaint and the nature of the wrong alleged and the relief requested therein.

Notwithstanding the proprietary of Plaintiffs' arguments on appeal, the claims are derivative. Plaintiffs do not assert a breach of contract claim alleging damages unique to them, as opposed to the entity or all the members as a whole. Instead, Plaintiffs argue a diversion of warrants and misappropriation of New Media II assets, which purportedly reduced New Media II's value and ultimately flowed down to the members *pro rata*. New Media II would have suffered the alleged harm, and any damages would not be unique to Plaintiffs.

1. Plaintiffs' New "Wind-Up" Theory Was Not Preserved and Is Waived.

In an effort to escape the Court of Chancery's sound finding that their claims against Maginn—all of which are premised on the same core allegation that Maginn

[45] OB at 38-42 (emphasis added).

breached his fiduciary duties to New Media II by usurping corporate opportunities—are derivative, Plaintiffs advance a new theory of the harm. Specifically, they contend that Counts I, III, and V are distinct from their other claims because they arise from Maginn's alleged failure to "monetize and distribute New Media II's residual assets" to its members during "the period between New Media II's improper dissolution and wrongful cancellation."[46] They argue that this conduct during the wind-up "directly harmed Plaintiffs," while Maginn's conduct "pre-dating the wind-up" "harmed New Media II itself."[47] The Court should categorically reject this new theory, as it is being raised for the first time on appeal.

Delaware law is clear that arguments not raised in the trial court are waived on appeal.[48] In opposition to Maginn's motion to dismiss, Plaintiffs asserted that all of their claims against Maginn were direct, but they did not base that conclusion on the same theory as they do now—*i.e.*, that the claims allege wrongdoing during New Media II's winding up that supposedly harmed New Media II's members directly.[49]

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[46] OB at 40-41.

[47] *Id.*

[48] *See, e.g.*, *Ravindran v. GLAS Tr. Co. LLC*, 327 A.3d 1061, 1078 (Del. 2024) (finding argument not "fairly presented to the trial court for consideration" was waived on appeal under Delaware Supreme Court Rule 8); *Brookfield Asset Mgmt.*, 261 A.3d at 1281 n.160 (rejecting new theory raised for the first time on appeal).

[49] *See* A0821-A0823 (Opp. to Maginn MTD); *see also* A0894-A0986 (Opp. to Jenzabar MTD). Notably, other than a one-sentence footnote stating that Counts III and V "seek similar recovery" as Count I, Plaintiffs did not specifically analyze those claims in their opposition to Maginn's motion to dismiss below, thus waiving any argument on appeal that those claims should have been considered direct under

Rather, Plaintiffs acknowledged below that their claims focus on alleged diversion of New Media II's corporate opportunities and misappropriation of New Media II's assets[50]—"conventionally derivative" harms—and relied on the remedy awarded in *Deane*, where damages were distributed *pro rata* to II-B's members, as the basis for the Court of Chancery to treat the claims as direct here.[51] It was not until the Court of Chancery rejected Plaintiffs' reliance on the remedy awarded in *Deane*[52] that they pivoted to their new theory: that Maginn's actions during New Media II's winding up created independent, distribution-based injuries directly to New Media II's members. Because this new theory was not raised below, it has been waived.

2. Plaintiffs' Recharacterization of Counts I, III, and V as Arising from Alleged "Wind-Up" Conduct Is Not Supported by the Complaint.

Plaintiffs' new "wind-up" theory of harm also is not supported by the allegations in the Complaint and thus constitutes an impermissible attempt to amend

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Tooley. *See* A0822; *Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief."), *aff'd,* 840 A.2d 641 (Del. 2003).

[50] A0821-A0823; *see also* A0859-A0861, A0865-A0866 (characterizing the claims asserted in Counts I, III, and V in terms of harm to <u>New Media II</u> resulting from alleged breaches of fiduciary duty to <u>New Media II</u> and misappropriation of <u>New Media II's</u> corporate opportunities and assets).

[51] A0821.

[52] *See* Opinion at 13-14 (finding Plaintiffs' argument regarding *Deane* improperly "conflate[d] the nature of the claim with the form of the remedy" because, in *Deane*, the claims were derivative and the Court of Chancery simply ordered a direct recovery based on its equitable discretion, which is "distinct from the *Tooley* inquiry into the nature of the right being asserted").

a pleading on appeal. Claims are evaluated based on the allegations pled to support them, not *post-hoc* theories advanced for the first time after an adverse ruling.[53]

Plaintiffs' allegations in the Complaint and arguments below make clear that Counts I, III, and V (as well as the other, redundant causes of action arising from the same core harms) are predicated on Maginn's alleged diversion of the II-C warrants and misappropriation of New Media II's assets, which purportedly reduced New Media II's value and ultimately flowed down to the members on a *pro rata* basis proportional to their ownership interests.[54] These are quintessential derivative allegations. There are no allegations, factual or otherwise, establishing any distribution-based harm directly to members that is independent of harm allegedly inflicted on New Media II.[55] Indeed, Count I makes no mention of any direct harm to New Media II's members, only a general failure to disclose the corporate opportunity belonging to New Media II, which is a classic derivative harm.[56] Likewise, Counts III and V specifically allege harm to and seek recovery for New

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[53] *See Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004); *Dieterich v. Harrer*, 857 A.2d 1017, 1027 (Del. Ch. 2004) (court determines nature of claim from complaint's substance).

[54] A0226–A0288.

[55] *Id.*

[56] A0270–A0271, ¶¶ 133–135.

Media II and then tack on conclusory allegations that "its Members" have also been harmed, without providing any factual basis to substantiate them.[57]

Moreover, in setting forth the alleged wrongdoing giving rise to Counts I, III, and V, the Complaint does not specifically identify any of the unique wind-up-related conduct that Plaintiffs now contend is at the heart of their claims. For instance, there is no discussion of Maginn's alleged "failure to monetize and distribute New Media II's residual assets as required," nor are any facts pled to demonstrate that Maginn failed to "marshal the LLC's assets (including claims or causes of action) and distribute its value to members."[58] Indeed, New Media II's dissolution and winding up are not even mentioned in the Complaint other than in the context of Plaintiffs' request in Count IX for a declaratory judgment regarding the Cancellation,[59] and they are certainly not pled as the factual predicate for any of Plaintiffs' substantive claims.

This Court should reject Plaintiffs' impermissible attempt to rewrite their pleading on appeal.

3. Under *Tooley*, Counts I, III, and V Are Derivative.

Plaintiffs' new "wind-up" theory also does not change the outcome under *Tooley* because it is merely a clever attempt to reframe classically derivative harm

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[57] A0274-275, ¶¶ 157–162; A0277-278, ¶¶ 176–179; *see* A0811.

[58] OB at 5, 41.

[59] *See generally* A0226-A0288; *see* A0282-285.

as direct. The *Tooley* test turns on two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or suing stockholders individually)."[60] In evaluating these questions, courts must "examine the body of the complaint and consider[] the nature of the wrong alleged and the relief requested."[61] A claim will only be deemed direct if the plaintiff "can prevail without showing an injury to the corporation."[62]

Here, Plaintiffs do not identify (much less plead) any direct, individualized harm distinct from the alleged harm to New Media II itself. Instead, they simply repackage the same core allegation that the Court of Chancery already found to be derivative—that Maginn improperly usurped corporate opportunities and diverted assets belonging to New Media II (*i.e.*, the II-C warrants)[63]—and assert that Maginn's alleged subsequent failure to fully distribute those assets during New Media II's winding up gives rise to a separate, cognizable direct injury.[64] But the Court of Chancery considered and properly rejected the general argument that Maginn's alleged conduct directly affected Plaintiffs by reducing the value of their stake in New Media II. It found, based on controlling Delaware case law, that such

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[60] *Tooley*, 845 A.2d at 1033, 1035.

[61] *Id.* at 1036; *see also Brookfield Asset Mgmt., Inc.*, 261 A.3d at 1263.

[62] *Tooley*, 845 A.2d at 1036.

[63] Opinion at 11-13. This finding is not expressly challenged on appeal.

[64] OB at 40-43.

an injury is "indirect," and "the hallmark of a derivative claim," resulting "'only because of [Plaintiffs'] ownership' in New Media II and harms otherwise inflicted upon it."[65]

The same analysis applies to Plaintiffs' alleged loss-of-distributions theory of harm argued in the Opening Brief: it is a paradigmatic indirect injury because it flows from the underlying derivative harm to New Media II through the alleged diversion of New Media II's property, which is shared collectively by all of New Media II's members solely because they are stakeholders in the company.[66] It does not arise from any independent, direct harm to Plaintiffs, individually.

While Plaintiffs contend that case law in the LLC liquidation context compels a different result, the authorities they cite are inapposite or otherwise fail to support their position.[67] For instance, Plaintiffs cite Vice Chancellor Glasscock's footnote in *Joseph Penar Family Trust v. Adams*,[68] in which he muses that a claim alleging conversion of assets in connection with the liquidation and distribution of an LLC's

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[65] Opinion at 11-12 (quoting *In re J.P. Morgan Chase & Co. S'Holder Litig.*, 906 A.2d 808, 819 (Del. Ch. 2005), *aff'd*, 906 A.2d 766 (Del. 2006)).

[66] *See El Paso Pipeline GP Co., L.L.C.*, 152 A.3d 1248,1264 (Del. 2016) ("Were [plaintiff] to recover directly for the alleged decrease in the value of the [entity's] assets, the damages would be proportionate to his ownership interest. The necessity of a *pro rata* recovery to remedy the alleged harm indicates that his claim is derivative.").

[67] *See* OB at 39 n.191, 41 n.197, 42 n.203.

[68] 2016 WL 1730765, at *6 n.56 (Del. Ch. Apr. 28, 2016), *aff'd.* 151 A.3d 896 (Del. 2016).

liquidating trust may state a direct claim against the managers of the LLC.[69] But the commentary in that footnote is pure *dicta* because, as the Vice Chancellor explicitly stated in the immediately preceding sentence, he "[did] not reach the direct/derivative question" in light of alternative grounds warranting dismissal.[70] Thus, *Joseph Penar* does not substantiate Plaintiffs' contention that "Delaware law supports" treating Counts I, III, and V as direct based on their new theory of harm.

Moreover, the finding in *In re Cencom Cable Income Partners, L.P.*,[71] that a <u>breach of contract</u> claim based on the defendant's alleged failure to make certain distributions contractually owed to limited partners is direct rather than derivative, does not help Plaintiffs. In *Cencom*, the plaintiffs alleged that the general partner breached the partnership agreement by improperly terminating the limited partners' priority cash distributions.[72] The court held that this claim was direct, reasoning that any injury arising from the alleged breach affected "only the limited partners as a <u>distinct class</u> within the partnership[,]" and "any relief <u>would not benefit the entire partnership</u>."[73]

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[69] OB at 41-42.

[70] *Joseph Penar*, 2016 WL 1730765, at *6.

[71] 2000 WL 130629, at *3-4 (Del. Ch. Jan. 27, 2000).

[72] *Id.* at *3.

[73] *Id.* (emphases added).

Here, by contrast, Plaintiffs do not assert a breach of their contractual rights, and as the *Deane* court found, *Cencom*, while potentially "relevant for the distribution of damages[,] do[es] not support disregarding the derivative nature of [the LLC members'] claims entirely[,]" as any recovery would be *pro rata* rather than individual.[74] Indeed, Vice Chancellor Will noted in *Deane* that the members were not entitled to a personal recovery, as their duty of loyalty claim—like Plaintiffs' claims here—centered on the alleged diversion of the warrant to New Media II-C, and "the II-C Warrant was never intended to issue to New Media II-B members individually but to an entity."[75] The law is clear that *Cencom* is "limited to its own unique set of facts," and in cases where "all of the stockholders (or in this case, LLC members) are harmed and would recover *pro rata* in proportion with their ownership of the [company] solely because they are [interest holders], then the claim is derivative in nature."[76] *Cencom* is materially distinguishable.[77]

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[74] *Deane*, 2022 WL 16557974, at *13.

[75] *Id.* at *12.

[76] *Agostino v. Hicks*, 845 A.2d 1110, 1125 (Del. Ch. 2004); *CMS Inv. Hldgs., LLC v. Castle*, 2015 WL 3894021, at *7 (Del. Ch. June 23, 2015)).

[77] The two federal cases Plaintiffs cite—*Baghdadi v. Gen. Mediterranean Holding, S.A., Spf*, 2023 WL 1779773, at *11 (N.D. Ill. Feb. 6, 2023); and *Blystra v. Fiber Tech Group, Inc.*, 407 F. Supp. 2d 636, 646 (D.N.J. 2005)—fare no better. As an initial matter, these decisions from courts in the Northern District of Illinois and the District of New Jersey have no precedential value to this Court. *Baghdadi* is further inapposite because the purportedly relevant holding was decided under Illinois law. 2023 WL 1779773, at *8-11. And while *Blystra* applied Delaware law to determine the direct vs. derivative question, the case, like *Cencom*, involved the application of

For these reasons (and those set forth in the Opinion), the Court of Chancery properly found the "core allegation" underlying Plaintiffs' claims to be derivative in nature[78]—a finding Plaintiffs do not specifically challenge on appeal. As this Court held in *Brookfield Asset Management*, if the core of a claim is derivative as pled, it must be treated as such and cannot be considered "dual-natured" simply because Plaintiffs affix that label to it.[79] Accordingly, Plaintiffs' assertion, based solely on their newly manufactured "wind-up" theory, that Counts I, III, and V are "cognizable as direct claims" and that the Court of Chancery erred in treating them as "purely derivative," should be rejected. The Court of Chancery's holding that all of Plaintiffs' claims are derivative should be affirmed.

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that law to the unique context of a limited partnership, not an LLC. 407 F. Supp. 2d at 646–47.

[78] Opinion at 11.

[79] 261 A.3d at 1277-78.

II. PLAINTIFFS LACK STANDING TO PURSUE THEIR DERIVATIVE CLAIMS, DEPRIVING THE COURT OF SUBJECT MATTER JURISDICTION

A. Question Presented

Did the Court of Chancery correctly hold that Plaintiffs lacked standing when they filed this derivative action despite the purported "nullification allegations" in Count IX of the Complaint? Maginn preserved this issue below at A0512–A0523 and A1067–A1075.

B. Scope of Review

"Whether a party has standing is a question of law that is subject to *de novo* review."[80]

C. Merits of Argument

Under well-settled Delaware law, standing to sue is a threshold jurisdictional requirement that courts must address before they can adjudicate the merits of the claims asserted.[81] Absent standing, "the court lacks the power to adjudicate the matter," rendering any decision within the action a legal nullity.[82] The plaintiff bears

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[80] *El Paso*, 152 A.3d at 1256.

[81] *Id.* ("[A] party must have standing to sue in order to invoke the jurisdiction of a Delaware court."); *see also re Fitbit, Inc. S'holder Deriv. Litig.*, 2018 WL 6587159, at *2 n.4 (Del. Ch. Dec. 14, 2018) ("[S]tanding is a predicate to the [c]ourt's exercise of subject matter jurisdiction[.]"); *Hall v. Coupe*, 2016 WL 3094406, at *2 (Del. Ch. May 25, 2016) ("[T]he Court's first task, when appropriate, is to assess whether the fundamental predicates to subject matter jurisdiction exist, including the plaintiff's standing to pursue the claims.").

[82] *El Paso*, 152 A.3d at 1256; *see also Hall v. Coupe*, 2016 WL 3094406, at *2 (Del. Ch. May 25, 2016) ("[T]he Court's first task, when appropriate, is to assess whether the fundamental predicates to subject matter jurisdiction exist, including the

the burden to establish her standing, and it is evaluated as of the time the lawsuit is filed.[83]

In the derivative context, Court of Chancery Rule 23.1(c)(1)(A)(i) confirms that one who does not have "standing to sue derivatively" cannot "serve as a derivative plaintiff."[84] A plaintiff who is not a shareholder in a company lacks standing to sue derivatively on behalf that company.[85] As one can only hold interests in a company that actually exists, "[w]here a party advances derivative claims, standing depends on the continued existence of the entity on whose behalf the suit is brought."[86]

The Court of Chancery properly found that Plaintiffs lacked standing when they filed this derivative action in 2024 on behalf of the long-since cancelled New Media II and properly dismissed the Complaint for lack of subject matter jurisdiction. Count IX, seeking a declaration that New Media II was never wound

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plaintiff's standing to pursue the claims"); *Thompson v. Lynch*, 990 A.2d 432, 434 (Del. 2010) ("If a court lacks subject matter jurisdiction, its decision is a nullity."); *In re Coinmint, LLC*, 261 A.3d 867, 904 (Del. Ch. 2021) (similar).

[83] *Albence v. Mennella*, 320 A.3d 212, 220 (Del. 2024); *Doberstein v. G-P Indus., Inc.*, 2015 WL 6606484, at *6 (Del. Ch. Oct. 30, 2015).

[84] Ct. Ch. R. 23.1(c)(1)(A)(i).

[85] *El Paso*, 152 A.3d at 1256.

[86] Opinion at 15.

up, dissolved, or cancelled—despite "the fact that New Media was cancelled in 2017"—is not a well-pled petition for nullification.[87]

1. Plaintiffs Have Not Been Members of New Media II Since At Least 2014 and Thus Lack Standing to Pursue Derivative Claims.

Although the Court of Chancery did not address this argument in the Opinion, because Plaintiffs ceased being members of New Media II over ten years prior to filing their complaints, they do not have standing to bring claims on its behalf. "A plaintiff who ceases to be a shareholder, whether by reason of a merger or for any other reason, loses standing to continue a derivative suit."[88] Plaintiffs Gross and Fireman relinquished their membership interests in New Media II when they cashed their "final checks" in 2014, and Plaintiff Nassberg ceased to be a member when she sold her membership interests back to New Media II in 2012.[89]

By cashing their "final checks" and signing the Release in or about January 2014, Fireman and Gross agreed, *inter alia*, that New Media II was repurchasing and redeeming their interests.[90] They agreed that cashing the checks "releases, cancels and terminates any and all right, title and interest in New Media [II], and renounces

[87] A0212, ¶ 218.

[88] *El Paso*, 152 A.3d at 1256 (quoting *Lewis v. Anderson*, 477 A.2d 1040, 1049 (Del. 1984)).

[89] A0558; A0567; A0580.

[90] A0259, ¶¶ 95-96.

now and forever any and all right, title and interest in New Media [II]."[91] They further agreed that they "understand that by cashing the Redemption Payment, [they] will no longer be a member of New Media [II]."[92]

Likewise, Nassberg sold her interests in New Media II in 2012, when she cashed the check enclosed with a letter captioned "Repurchase of Remaining Member Interests in New Media II."[93] The check expressly stated that it was for the "Repurchase of Remaining Interests in NMII," and the letter explained that the check "represents full payment for your remaining membership interests in New Media II. By cashing the enclosed check, you will be deemed to have agreed to the release and will no longer be a member of New Media II."[94]

Plaintiffs' termination of their membership interests in New Media II is further reflected in their 2013 tax returns and in the Form K-1s delivered to Fireman and Gross in 2014.[95]

Accordingly, Plaintiffs are not members of New Media II, nor have they been since at least 2014, and they therefore lack standing to bring their derivative claims on New Media II's behalf.

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[91] A0572-573.

[92] A0573.

[93] A0582.

[94] *Id.*; A0580.

[95] A0585-593 (Gross); A0596-604 (Fireman); A0607-614 (Nassberg).

2. New Media II's Cancellation in 2017 Extinguished its Existence and, Consequently, Plaintiffs' Derivative Standing.

When a certificate of cancellation is filed for an LLC, the entity "cease[s] to exist as a body corporate" or legal person and loses the capacity to sue or be sued.[96] In other words, its "legal existence ends."[97] By extension, a cancelled LLC ceases to have any members who could bring a derivative action on its behalf.[98]

New Media II ceased to exist as of December 2017, when the Cancellation was filed. At that time, Plaintiffs' status as members of New Media II necessarily terminated—to the extent that had not already occurred.[99] This lawsuit was filed more than six years later.[100] As Plaintiffs cannot bring claims on behalf of an entity

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[96] *See In re Krafft-Murphy Co.*, 82 A.3d 696, 710 (Del. 2013) (internal citations omitted); *In re Reinz Wis. Gasket, LLC*, 2023 WL 3300042, at *2 (Del. Ch. May 8, 2023).

[97] *Reinz*, 2023 WL 3300042, at *2; *see also Capone v. LDH Mgmt. Holdings LLC*, 2018 WL 1956282, at *7 n.106 (Del. Ch. Apr. 25, 2018 ("Section 18-803(b) of the LLC Act provides that suit generally may be brought by or against a limited liability company only until the certificate of cancellation is filed.").

[98] *Hale v. China Online, Inc.*, 2009 WL 2601357, at *2 (N.D. Ill. Aug. 21, 2009) ("[D]issolution of a corporation terminates an individual's status as a shareholder of the corporation and therefore bars the individual from bringing a derivative action on behalf of the dissolved corporation."), *aff'd sub nom. Hale v. Victor Chu*, 614 F.3d 741 (7th Cir. 2010); *Giordano v. Marta*, 1998 WL 227888, at *4 (Del. Ch. April 28, 1998) (holding that the plaintiff was no longer a stockholder of a dissolved corporation and thus lacked standing to sue derivatively on behalf of the dissolved corporation).

[99] *Hale*, 2009 WL 2601357, at *2.

[100] *See* A0001.

that does not exist and of which they are not members, the Court of Chancery correctly held that Plaintiffs lacked derivative standing when they filed this action.

3. Plaintiffs' Attempt to Nullify the Cancellation within this Action Does Cure Their Lack of Standing and Is Not Well-Pled.

Plaintiffs contend that they have somehow rectified their lack of derivative standing by including in their Complaint a declaratory judgment count, expressly pled under 10 *Del. C.* §§ 6501, *et seq*.[101] As the Court of Chancery correctly held, this "concurrent nullification" theory fails for several reasons.[102]

a. Because Derivative Standing Is a Prerequisite to Subject Matter Jurisdiction, Plaintiffs' Purported Nullification Claim Is Itself a Legal Nullity.

As discussed, all of Plaintiffs' claims are derivative and New Media II was cancelled in December 2017. Plaintiffs therefore lack standing to pursue their derivative claims on behalf of New Media II—and the Court of Chancery lacks subject matter jurisdiction over them—unless and until Plaintiffs succeed in nullifying the Cancellation and reviving the entity. When a court lacks subject matter jurisdiction, as a matter of law, any decisions within the legal proceeding are themselves a nullity.[103]

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[101] A0282-85, ¶¶ 204-220.

[102] Opinion at ¶¶ 17-18.

[103] *See Thompson*, 990 A.2d at 434 ("If a court lacks subject matter jurisdiction, its decision is a nullity."); *In re Coinmint*, 261 A.3d at 904 ("[I]n the absence of subject matter jurisdiction, a decision in this proceeding would be a nullity. This Court must

Plaintiffs rely on *Matthew v. Laudamiel* for the proposition that they "have standing to bring a nullification claim in conjunction with a derivative claim, regardless of whether the [Complaint] also states a direct claim."[104] But that is not what *Matthew* says. Rather, *Matthew* provides that a nullification claim "may be brought in the name of the LLC using the process set forth in § 18-805, or as direct claims of the LLC or derivative claims of its members . . . in conjunction with a <u>successful action</u> seeking the nullification of the LLC's certificate of cancellation."[105] This nuance, which Plaintiffs ignore, is critical because it further substantiates Maginn's position that Plaintiffs must succeed in nullifying the Cancellation and reviving the entity before they can have standing to bring derivative claims on the entity's behalf—a process that is absent from Count IX. Accordingly, the Court of Chancery correctly observed that Plaintiffs "stretch[] *Matthew* too far" and held that *Matthew* "d[oes] not endorse the procedure attempted here."[106]

Metro Communications Corp. BVI v. Advanced Mobilecomm Technologies also does not support Plaintiffs' position.[107] As the Court of Chancery correctly

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decide the jurisdictional question.") (quoting *Bruno v. W. Pac. R. Co.*, 498 A.2d 171, 172 (Del. Ch. 1985), *aff'd*, 508 A.2d 72 (Del. 1986).

[104] OB at 34 (discussing 2012 WL 605589, at *22-23 (Del. Ch. Feb. 21, 2012)).

[105] 2012 WL 605589, at *22 (emphasis added).

[106] Opinion at 17.

[107] 854 A.2d 121 (Del. Ch. 2004).

noted, *Metro* is distinguishable because the plaintiff there asserted both derivative claims on behalf of the cancelled entity and <u>direct</u> claims <u>against</u> the cancelled entity.[108] Thus, the plaintiff in *Metro* had an independent basis for standing that allowed it to "maintain the suit while seeking nullification."[109] Here, by contrast, Plaintiffs assert only derivative claims on behalf of a canceled entity and thus, no such independent basis for standing exists.[110] While Plaintiffs appear to argue that the Court of Chancery's analysis of *Metro* is contrary to Delaware law, they tellingly cite no authority directly supporting that contention, and the cases they do rely on are inapposite.[111] *Thor Merritt Square, LLC v. Bayview Malls LLC*, merely stands for the uncontroversial proposition that a "dissolved entity certainly had the 'capacity to be sued'" in connection with a solitary claim to nullify its cancellation.[112] It does not hold that derivative claims may be brought on behalf of

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[108] Opinion at 17 (citing *Metro*, 854 A.2d at 138, 143).

[109] *Id.*

[110] *See* Section I, *supra*.

[111] OB at 34-37.

[112] 2010 WL 972776, at *5 (Del. Ch. Mar. 5, 2010).

a dissolved entity—as Plaintiffs seek to do here—without first successfully reviving it.[113] *Matthew* confirms that Plaintiffs' position is not the law.[114]

b. Count IX Is Time-Barred.

Plaintiffs are time-barred from challenging the 2017 Cancellation, and thus, any nullification claim is subject to dismissal as a matter of law. Plaintiffs purport to bring their nullification claim pursuant to 6 *Del. C.* § 18-203, which "requires that a limited liability company dissolve or complete winding up before filing a certificate of cancellation,"[115] and they purport to support the claim by alleging violations of 6 *Del. C.* §§ 18-801–806 in connection with New Media II's dissolution and winding up. Claims based on the DLLCA are, by analogy, subject to the three-year statute of limitations set forth in 10 *Del. C.* § 8106, which provides that "no

[113] Likewise, *Schwaber v. Margalit*, 2022 WL 2719952, at *1-2 (Del. Ch. July 13, 2022), did not address the court's subject matter jurisdiction in the context of a nullification claim pled simultaneously with derivative claims on behalf of a defunct entity. Unlike here, *Schwaber* involved a "single-count" complaint, specifically "seeking to nullify the certificates of cancellation." *Id.* at *2.

[114] *Matthew*, 2012 WL 605589, at *21 ("[T]he Court concludes that the dissolution and cancellation of [an LLC] does not transform derivative claims into direct claims held proportionately by the LLC's members, . . . instead, after the filing of the certificate of cancellation, such claims must be brought in the name of the LLC by a trustee or receiver . . . or directly by the LLC or derivatively by its members <u>after reviving the LLC by obtaining revocation of its certificate of cancellation</u>." (emphasis added)).

[115] OB at 24-25 (citing *Techmer Accel Holdings, LLC v. Amer*, 2010 WL 5564043, at *10 (Del. Ch. Dec. 29, 2010)).

action based on statute . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action."[116]

Here, Plaintiffs' bases for seeking nullification accrued in either 2013 or 2014.[117] Thus, Plaintiffs' meager attempt to revive New Media II nearly seven years later through Count IX is untimely under the three-year statute of limitations "[u]nless timely filing is excused by a recognized tolling doctrine."[118] Plaintiffs bear the burden to demonstrate that a tolling doctrine applies to extend the limitations period,[119] and they have failed to carry that burden here.

Specifically, the Complaint lacks any non-conclusory allegations demonstrating that the statute of limitations was tolled under any legally cognizable

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[116] 10 *Del. C.* § 8106; *see also PXP Producing Co. v. MitEnergy Upstream LLC*, 2025 WL 1779457, at *2 (Del. Ch. June 26, 2025) (recognizing that a claim to revive an LLC is subject to a three-year statute of limitations by analogy); *Thor*, 2010 WL 972776, at *3 n.6 (finding the analogous statute of limitation for a nullification claim is three years under 10 *Del. C.* § 8106); *see also Metro*, 854 A.2d at 165 n.108 ("[A] three-year statute of limitations applies to actions under § 18-804.").

[117] A cause of action accrues "at the moment of the wrongful act" (here, the allegedly improper conduct in 2013), not "when the harmful effects of the act are felt" (here, the filing of the cancellation in 2017), which is "merely the manifestation of the [wrongful act]." *In re Sirius XM S'Holder Litig.*, 2013 WL 5411268, at *5 (Del. Ch. Sept. 27, 2013) (quoting *In re Coca–Cola Enterprises, Inc., S'holders Litig.*, 2007 W L 3122370, at * 5 (Del. Ch. Oct. 17, 2007)); *see Tilden v. Cunningham*, 2018 WL 5307706, at *14 (Del. Ch. Oct. 26, 2018).

[118] *Largo Legacy Grp., LLC v. Charles*, 2021 WL 2692426, at *9 (Del. Ch. June 30, 2021) ("The statute of limitations begins to run at the time the cause of action accrues, which is generally when there has been a harmful act by a defendant. This is true even if the plaintiff is unaware of the cause of action or the harm.").

[119] *ETC Ne. Field Servs., LLC v. Muse*, 2024 WL 2797337, at *5 (Del. Ch. May 31, 2024).

tolling doctrine.[120] At best, Plaintiffs allege an unidentified "pattern of secretive misconduct" that "supports inherent unknowability" as to New Media II's members, and demonstrates the applicability of "equitable tolling and fraudulent concealment" as to New Media II itself.[121] But these allegations are vague, unsubstantiated by any specific facts, and fail to explain how any specific tolling doctrine actually applies in the context of Plaintiffs' purported claim for nullification. This does not suffice to satisfy Plaintiffs' burden.[122]

Moreover, any tolling theories Plaintiffs could conceivably assert would fail because Plaintiffs were on inquiry notice of a nullification claim in 2013/2014 when the claim accrued upon New Media II's allegedly improper dissolution and winding up. Such notice is demonstrated by: (1) the December 2013 letter Maginn sent to members (including Plaintiffs) "concluding" their investments and enclosing a "final check," and (2) the final K-1s received by members (including Plaintiffs) in 2014, which itemized deductions for costs associated with "***WIND UP***" and "***DISSOLUTION***".[123] Indeed, these facts are dispositive even if the Court finds that

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[120] A0518–A0519.

[121] *Id.* (quoting A0269, ¶ 124).

[122] *Orman v. Cullman*, 794 A.2d 5, 5 (Del. Ch. 2002) (conclusory allegations unsupported by facts will not be accepted as true on a motion to dismiss); *First State Towing, LLC v. Div. of State Police*, 2016 WL 2621137, at *4 (Del. Ch. May 5, 2016) ("Plaintiffs bear the burden of pleading facts demonstrating that a tolling doctrine applies."

[123] A0553–A0570; A0572–A0575; A0584–A0614. Notably, Plaintiffs concede that these New Media II members who received Maginn's letter and check in December

the nullification claim did not accrue until 2017 when the Cancellation was filed. Notice of the alleged improper dissolution in 2013/2014 obligated Plaintiffs to conduct reasonable due diligence into subsequent events that may give rise to claims.[124] At the very least, Plaintiffs should be held to have been on notice of their claim in 2017—six years before they brought this action—by virtue of the filing of the Cancellation with the Delaware Secretary of State, which is public record.[125]

Plaintiffs' attempt to nullify the Cancellation based on alleged wrongs that occurred in 2013 and 2014 is untimely and cannot be salvaged by any tolling doctrine.

c. Count IX Fails to State a Claim for Nullification.

Plaintiffs contend that they have overcome these fundamental standing and timing defects by pleading their purported "nullification claim" in Count IX, alongside their substantive derivative claims.[126] This argument is unavailing. The

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2013 would have had an "inkling that Maginn was 'concluding' [their] investment in New Media[.]" A0269, ¶ 100.

[124] *Buddenhagen v. Clifford*, 2024 WL 2106606, at *27 (Del. Ch. May 10, 2024) (as a matter of law, "[w]hatever is notice calling for inquiry is notice of everything to which such inquiry might have led"); *Gallagher Indus., LLC v. Addy*, 2020 WL 2789702, at *14 n.209 (Del. Ch. May 29, 2020) ("Our case law does not require . . . that the red flag relate precisely to the claim ultimately litigated, if the claim arose from the incident serving as the red flag.").

[125] A0680, ¶ 32; A0371 (Jenzabar MTD Br.).

[126] OB at 19-33.

Court of Chancery correctly held that the Complaint does not plead nullification.[127] On its face, Count IX does not constitute an application to nullify the Cancellation under the Delaware Limited Liability Company Act (the "DLLCA"), 6 *Del. C.* § 18-804. At best, Count IX asserts a declaratory judgment claim, pled pursuant to 10 *Del. C.* §§ 6501, *et seq.*, seeking certain judicial declarations regarding the Cancellation, yet ignoring the fact of the Cancellation.

Plaintiffs baldly assert Count IX is a "nullification claim" without setting forth the elements of a such a claim.[128] Yet the authority relied on either denied standing altogether or involved claims involving explicit applications to the court to nullify a certificate of cancellation, not, as in Count IX, a vague declaratory judgment claim.[129] If bringing a declaratory judgment claim sufficed to plead nullification and allow standing, Plaintiffs would not have filed on February 16, 2026 a "Verified Petition for Nullification of Certificate of Cancellation and Appointment of a Receiver Pursuant to 6 *Del. C.* §18-805" for New Media II (the "Nullification Petition").[130]

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[127] Opinion at 17-18.

[128] *See* OB at 3, 15, 19, 23-25, 34.

[129] *See* OB at 34 (discussing *Metro*, 854 A.2d at 139 n.27; *Matthew*, 2012 WL 605589, at *22).

[130] *See* C.A. No. 2026-0226-LWW, Trans. ID 78477133; *accord Matthew*, 2012 WL 605589, at *21 (discussing appropriate action under 6 *Del. C.* § 18-805 after a certificate of cancellation has been filed). "This statutory analysis indicates that the undistributed claims of a cancelled LLC may not, on the authority of the statute

Moreover, the allegations that Plaintiffs actually assert in Count IX fail to state a nullification claim. According to Plaintiffs, their "nullification claim rests on their allegations that Maginn caused New Media II to dissolve and wind up in contravention of the DLLCA,"[131] without a proper vote, by failing to distribute residual assets upon winding up, and making of unlawful distributions during winding up.[132] Plaintiffs acknowledge, however, some theories (*i.e.*, failure to distribute assets and unlawful distribution) were not specifically identified in the Complaint,[133] and certainly not in Count IX, therefore the focus must be on the allegations actually set forth in the Complaint, which plainly fail to state a claim.

As an initial matter, Plaintiffs lack individual standing to assert these theories because they ceased being members of New Media II in 2014 when they accepted their final checks.[134] Likewise, Plaintiffs' argument that the Cancellation was improper because Maginn did not conduct a vote of the members fails because by cashing their checks and agreeing to the release they effectively agreed to dissolve

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alone, be asserted directly by some of the LLC's former members. Such claims may be brought in the name of the LLC using the process set forth in § 18–805, or as direct claims of the LLC or derivative claims of its members after or in conjunction with a successful action seeking the nullification of the LLC's certificate of cancellation." *Matthew*, 2012 WL 605589, at *22.

[131] OB at 24.

[132] OB at 27-31.

[133] OB at 27 n.135, 30 n.149.

[134] A0522–A0523; A1075–A1078.

New Media II.[135] Plaintiffs also claim that the winding up was improper because Maginn purportedly "failed to make a reasonable provision for the liability arising from his [alleged] diversion of the new warrants from New Media II to New Media II-C, in violation of 6 *Del C.* § 18-804(b)."[136] But this misapplies Section 18-804(b), which generally requires a company to make "reasonable provision" for payment of its own claims and obligations, including contingent liabilities.[137] Here, Plaintiffs neither identify any contingent liabilities <u>of</u> New Media II nor assert any claims <u>against</u> New Media II. Rather, they purport to assert claims against <u>Maginn</u> <u>on behalf</u> of New Media II.[138]

Put simply, Plaintiffs' attempt to combine nullification and derivative claims in a single action to manufacture derivative standing on behalf of a non-existent entity would turn the concept of standing as a threshold jurisdictional requirement on its head. In the absence of standing, the Court of Chancery lacks any jurisdiction to adjudicate the merits of any of Plaintiffs' derivative claims, including any claim seeking to nullify the Cancellation. That is precisely why Delaware law requires

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[135] *See also* A0522; A1075.

[136] A0283, ¶ 213.

[137] *Capone v. LDH Management Holdings, LLC*, 2018 WL 1956282, at *8 (Del. Ch. Apr. 25, 2018); *see also* Robert L. Symonds, Jr. & Matthew J. O'Toole, *Symonds & O'Toole on Delaware Limited Liability Companies* § 16.06[E][2][b][ii] (2d ed. 2016) (noting that Section 18-804(b) is meant to address claims <u>against</u> the LLC as a means of protecting its creditors).

[138] A1074-075.

plaintiffs to seek nullification and revive a defunct entity before filing an exclusively derivative action.[139] Thus, irrespective of any contemporaneously pled nullification claim, the Court of Chancery's dismissal of the Complaint based on Plaintiffs' failure to establish standing (and, thus, subject matter jurisdiction) was proper and should be affirmed.

[139] *See Matthew*, 2012 WL 605589, at *21 ("[A]fter the filing of the certificate of cancellation, such claims must be brought…derivatively by its members after reviving the LLC by obtaining revocation of its certificate of cancellation.").

III. PLAINTIFFS ARE NOT ENTITLED TO EQUITABLE STANDING

A. Question Presented

Did the Court of Chancery correctly decline to grant equitable standing to Plaintiffs under the circumstances? Maginn preserved this issue below at A1077–1078.

B. Scope of Review

As the Court of Chancery's decision declining to extend equitable standing to Plaintiffs "implicates rulings of law," it is subject to *de novo* review.[140]

C. Merits of Argument

Delaware courts may only grant equitable standing if: (1) access to judicial machinery is necessary "'to prevent a complete failure of justice on behalf of the corporation;'" and (2) no "other avenues for invoking judicial machinery exist," even theoretical ones.[141] Courts may not grant equitable standing for mere convenience of the plaintiffs.[142] But that is precisely what Plaintiffs seek here: a convenient means of sidestepping the consequences of their own inaction.

Equitable standing should be denied where alternate relief is even theoretically available. In *SDF Funding*, this Court explained: "where other avenues

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

[141] *SDF Funding LLC v. Fry*, 2022 WL 1511594, at *7, *9 (Del. Ch. May 13, 2022) (quoting *Schoon*, 953 A.2d at 208) (emphasis omitted).

[142] *Id*. at *9 ("[T]he court eschewed the notion that equitable standing will be invoked for convenience as opposed to necessity.") (discussing *Schoon*, 953 A.2d at 208).

for relief exist for the corporation, even if only theoretical, extending the doctrine of equitable standing is unnecessary."[143] There, the Court declined to grant equitable standing because other shareholders had standing to enforce corporate rights, thus it would not be "a complete failure of justice on behalf of the corporation" to deny plaintiff standing, even if other shareholders never brought suit.[144] Likewise, in *Schoon*, the Court determined that a director should not receive equitable standing to sue derivatively, despite being "in a better position to know" of board misconduct and able to more efficiently bring suit, because shareholders had standing to bring suit.[145]

Moreover, in the rare instances Delaware courts grant equitable standing, no alternate relief existed. *In re Carlisle Etcetera LLC*, the only case Plaintiffs cite where the court granted equitable standing, is distinguishable.[146] *Carlisle* dealt with a two-member LLC, one of which transferred its interest to a subsidiary, but the parties continued to acknowledge and treat each other as members.[147] There, the Court gave the transferee equitable standing because the "real relations" of the

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[143] *SDF Funding*, 2022 WL 1511594, at *9.

[144] *Id.* at *9 ("[A]ny ostensible injustice in declining Feldman standing would be to Feldman only.").

[145] 953 A.2d at 208-209.

[146] 114 A.3d 592 (Del. Ch. 2015); OB at 45-46.

[147] *Id.* at *599-601.

parties point to a scenario warranting dissolution that was not otherwise available at law.[148]

Here, Plaintiffs had ample opportunities to establish standing before filing suit; Plaintiffs simply chose to delay. Nothing prevented Plaintiffs from filing the Nullification Petition earlier.[149] They simply chose not to. And nothing prevented Plaintiffs from filing a certificate of correction <u>before</u> filing the underlying suit.[150] Instead, they chose to ignore the issue until <u>after</u> initiating this action—when they filed only filed motions "to nullify the purported cancellation of New Media II's Delaware Registration."[151] Plaintiffs' subsequent actions tacitly confirm the Complaint's failure to plead nullification. Yet, Plaintiffs now ask this Court to protect them from the consequences of their own delay. In other words, Plaintiffs "neglected to exercise diligence to safeguard their rights" and now "rely on equity to cure their lack of standing."[152] Because Plaintiffs' lack of standing is an issue of their own making that could have been addressed outside the scope of this case, the Opinion should be affirmed.

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[148] *Id.* at *607.

[149] *See* 6 *Del. C.* § 18-805; *Matthew*, 2012 WL 605589, at *21 (explaining that derivative claims on behalf of a cancelled LLC must be brought either by a trustee or receiver, after revocation of the LLC's certificate of cancellation).

[150] Opinion at 7 (citing A0314 (Certificate of Correction)).

[151] *See* A0129-142 (filed June 25, 2024); A0289-302 (filed July 9, 2025).

[152] Opinion at 20.

Delaware recognizes two specific exceptions to the general rule that former members generally may not bring suit "by or against an LLC" once a certificate of cancellation has been filed.[153] As the Court of Chancery explained in *Matthew*, for a derivative claim to be brought after cancellation, it "must be brought in the name of the LLC by a trustee or receiver . . . or directly by the LLC or derivatively by its members after reviving the LLC by obtaining revocation of its certificate of cancellation."[154] Plaintiffs did neither, despite having over six pre-suit years to do so.

Plaintiffs provide only a cursory justification for their delay, arguing that, in *Deane*, the Court of Chancery held that tolling applied because members were entitled to rely on Maginn's "competence and good faith."[155] But *Deane* holds no such thing. *Deane* held that tolling applied to the plaintiffs' business opportunity claim because the plaintiffs proved at trial that they did not learn the grounds for their business opportunity claim until just before pleading because the letter sent by Maginn did not disclose that a new warrant had been issued to II-C.[156] Plaintiffs have neither pled nor proven similar facts. Instead, Plaintiffs merely state that they

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[153] *Matthew*, 2012 WL 605589, at *21 (citing *Metro*, 854 A.2d at 138); *Moelis & Co. v. W. Palm Beach Firefighters' Pension Fund*, 2026 WL 184868, at *16 (Del. Jan. 20, 2026) (applying the "maxim that equity aids the vigilant, not those who slumber on their rights") (internal quotations omitted).

[154] *Id.*, at *21 (emphasis added).

[155] OB at 47 (quoting *Deane*, 2022 WL 16557974, at *10).

[156] *Id.* at *11.

sought nullification "[o]nce the cancellation was discovered."[157] But, as the Court of Chancery recognized, the Cancellation was a matter of public record since 2017.[158] Without at least an explanation for their delay, Plaintiffs cannot avail themselves of the *Deane* court's tolling determination.

Plaintiffs also argue that, despite waiting seven years to address the cancellation, they at least "sought nullification of New Media II's certificate of cancellation in each complaint filed."[159] But Plaintiffs provide no legal basis for the sufficiency of a contemporaneous request for nullification. Instead, Plaintiffs merely rely on *dicta* from *Matthew*, which cites the inapposite *Metro* case.[160] Notably, however, the *Matthew* court ultimately declined to find standing and confirmed that derivative claims on behalf of cancelled LLCs can only be brought by its members "after reviving the LLC by obtaining revocation of its certificate of cancellation."[161] This order of operations preserves judicial efficiency by ensuring the Court does not expend resources litigating the merits of a case over which the Court later determines

[157] OB at 47. The cited requests for nullification, to the extent they exist, are sparse and lack a sufficient factual basis.

[158] Opinion at 20.

[159] OB at 47.

[160] *Id*. at 48 (quoting *Matthew*, 2012 WL 605589, at *22 n.150).

[161] *Matthew*, 2012 WL 605589, at *21 (emphasis added).

plaintiffs have no standing. While it may be less efficient for Plaintiffs,[162] equitable standing is designed to address necessity, not litigants' convenience.[163]

Equitable standing is not available here. Plaintiffs waited too long, well after the initiation of the underlying action to attempt seek nullification of the certificate properly (*e.g.*, via the Nullification Petition), and they now suffer the consequences of their own inaction. Equitable standing exists as a remedy for those with no other legal recourse in order to prevent "a complete failure of justice."[164] It does not exist as a backup plan for those who "neglected to exercise diligence to safeguard their rights" by availing themselves of alternate forms of relief.[165]

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[162] *See* OB at 48.

[163] *SDF Funding*, 2022 WL 1511594, at *9 ("[T]he court eschewed the notion that equitable standing will be invoked for convenience as opposed to necessity.") (discussing *Schoon*, 953 A.2d at 208).

[164] *Schoon*, 953 A.2d at 202.

[165] Opinion at 20.

CONCLUSION

The Court of Chancery correctly held that Plaintiffs lack standing to pursue their exclusively derivative claims and, as a result, the Court of Chancery lacked jurisdiction. The Opinion should be affirmed in full.

COLE SCHOTZ P.C.

/s/ James S. Green, Jr.

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