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RE: *ATG Capital Opportunities Fund LP v. Ryan Lane, et al.*,
C.A. No. 2026-0447-LWW

Dear Counsel,

The defendants ask that I certify a post-trial decision for interlocutory appeal. The decision held that Empery Digital, Inc.'s Board of Directors improperly rejected a stockholder nomination notice under the company's advance notice bylaws and, in doing so, breached its fiduciary duties. It presents no novel question of law, and interlocutory review would neither terminate the litigation nor serve considerations of justice. The application is refused.

I. BACKGROUND

ATG Capital Opportunities Fund LP submitted a notice to nominate a slate of director candidates at Empery's 2026 annual meeting (the "Nomination Notice"). Empery's Board rejected the nomination, prompting ATG to sue.

At trial, the defendants argued that the Nomination Notice was deficient because it failed to disclose another stockholder as a "participant" in ATG's proxy solicitation and omitted ATG's short position in a Bitcoin exchange-traded fund. In an August 28, 2026 post-trial decision (the "Opinion"), I held that the Nomination Notice complied with Empery's advance notice bylaws (the "Bylaws").[1] The defendants' justifications for the rejection were either unsupported by the Bylaws' plain text or were omitted from the letter rejecting the Nomination Notice (the "Rejection Letter") and raised for the first time at trial.[2] Because the Board lacked a contractual basis to reject the nomination, I also held that it acted inequitably.[3]

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[1] *See* Post-trial Mem. Op. (Dkt. 274) ("Mem. Op."); *see also* Suppl. Letter Op. (Dkt. 275).

[2] *See* Mem. Op. 33-34, 37-39.

[3] *See id.* at 44-45.

On September 4, 2026, the defendants filed an application for certification of an interlocutory appeal (the "Application").[4] ATG filed an expedited opposition on September 10.[5]

II. ANALYSIS

"Interlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources."[6] An interlocutory appeal "cannot be certified unless it clears two rigorous hurdles."[7] First, the interlocutory order must "decide[] a substantial issue of material importance that merits appellate review before a final judgment."[8] Second, "substantial benefits" must "outweigh the certain costs that accompany an interlocutory appeal."[9]

A. The Substantial Issue Requirement

"The 'substantial issue' requirement is met when an interlocutory order decides a main question of law which relates to the merits of the case, and not to

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[4] Defs.' Appl. for Certification of Interlocutory Appeal (Dkt. 280) ("Defs.' Appl.").

[5] Pl.'s Opp'n to Defs.' Appl. for Certification of Interlocutory Appeal (Dkt. 283).

[6] Supr. Ct. R. 42(b)(ii).

[7] *Elutions Cap. Ventures S.A.R.L. v. Betts*, 2022 WL 17075692, at *3 (Del. Ch. Nov. 18, 2022), *appeal refused*, 289 A.3d 1274 (Del. Jan. 12, 2023) (ORDER).

[8] Supr. Ct. R. 42(b)(i).

[9] Supr. Ct. R. 42(b)(ii).

collateral matters."[10] The Opinion meets this standard. It resolves a central legal question: whether ATG's Nomination Notice is valid and whether its nominees may stand for election to Empery's Board.

B. Multi-Factor Balancing

Because the substantial issue requirement is met, I next consider whether the benefits of interlocutory review outweigh its certain costs.[11] Rule 42(b)(iii) supplies eight factors for the trial court to balance in performing this analysis.[12] "If the balance is uncertain, the trial court should refuse to certify the interlocutory appeal."[13]

The defendants rely on three of the Rule 42(b)(iii) factors, arguing that the Opinion involves a legal question of first impression, that interlocutory review could terminate a portion of the litigation, and that considerations of justice favor immediate appellate review.[14] None of these factors supports the Application. The Opinion applied established contract law, multiple claims will remain pending regardless of interlocutory review, and allowing the vote to proceed is not unjust.

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[10] *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2861717, at *1 (Del. Ch. July 22, 2008), *appeal refused*, 956 A.2d 31 (Del. 2008) (TABLE).

[11] Supr. Ct. R. 42(b)(ii).

[12] Supr. Ct. R. 42(b)(iii)(A)-(H).

[13] Supr. Ct. R. 42(b)(iii).

[14] I therefore do not reach the remaining five.

1. Issue of First Impression

The defendants first invoke Rule 42(b)(iii)(A), which considers whether the interlocutory order "involves a question of law resolved for the first time in this State."[15] They argue that the Opinion broke new ground by adopting a novel interpretation of the term "participant" as used in Empery's Bylaws and by limiting the defendants to the reasons for rejection stated in their Rejection Letter.[16] Neither issue is one of first impression in Delaware, so this factor weighs against certification.

a. The Meaning of "Participant"

"As a general matter, issues of contract interpretation are not worthy of interlocutory appeal."[17] This case is no exception.

The Opinion construed the term "participant" under settled principles of contract interpretation.[18] The Bylaws incorporated the definition of "participant" in Schedule 14A, Item 4, Instruction 3(a)(ii)-(vi).[19] The Opinion reviewed the Bylaws'

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[15] Supr. Ct. R. 42(b)(iii)(A).

[16] Defs.' Appl. 9-10.

[17] *Realogy Hldgs. Corp. v. SIRVA Worldwide*, 2020 WL 4559519, at *10 (Del. Ch. Aug. 7, 2020) (collecting cases).

[18] *See* Mem. Op. 19-20, 26-28 (applying principles of contract interpretation to the term "participant").

[19] *Id.* at 24.

text, applied standard interpretive canons, and relied on persuasive federal precedent to discern the contractual meaning of "participant."[20]

The fact that "no other court (in Delaware or otherwise)" has "interpreted the term 'participant' as defined by Instruction 3(a)(v) to Item 4 of Schedule 14A" does not create a novel issue of law, as the defendants suggest.[21] Otherwise, every dispute over previously uninterpreted contract provisions would present a question of first impression, swallowing the narrow limits of Rule 42.[22] Nor did the Opinion resolve an unsettled question of federal securities law. It determined what Empery's Bylaws required as a matter of Delaware contract law. "The mere application of long-held precedent to new facts does not make an order worthy of appeal."[23]

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[20] *Id.* at 23-28. The Application attaches a United States Senate hearing transcript that was neither introduced at trial nor previously cited by the defendants. "[T]his new argument does not support certification. Arguments presented for the first time on appeal are deemed waived." *JB & Margaret Blaugrund Found. v. Guggenheim Funds Inv. Advisors, LLC*, 2023 WL 2562933, at *6 (Del. Ch. Mar. 17, 2023).

[21] Defs.' Appl. 9.

[22] *See XL Specialty Ins. Co. v. Cigna Gp.*, 360 A.3d 1259 (Del. 2026) (TABLE) (observing that if the construction of a policy term previously uninterpreted by a Delaware court were an "issue of first impression within the meaning of Rule 42(b)(iii)(A)," then "nearly every case involving contract interpretation would present an issue of first impression").

[23] *In re Carvana Co. S'holders Litig.*, 2022 WL 4661841, at *3 (Del. Ch. Oct. 3, 2022); *see also Riker v. Teucrium Trading, LLC*, 2023 WL 4411609, at *2 (Del. Ch. July 7, 2023) (explaining that an opinion does not present "an issue of first impression" merely because it "considered a factual situation that has some differences from applicable precedent").

b. Notice of Contractual Noncompliance

The defendants also assert that, by precluding them from raising new theories of contractual noncompliance that were not identified in the Rejection Letter, the Opinion "articulated a requirement that exceeds contractual notice and is without legal authority [under] Delaware law."[24] But Delaware courts have long held that a board's defensive action must "rise or fall on what the directors knew and considered" when it acted.[25] In the advance notice bylaw context, a board "cannot base its decision to reject [a] [n]omination [n]otice on after-discovered facts."[26]

The defendants' assertion that the Opinion "threatens to shift the burden of compliance with a company's bylaws onto its board" misconstrues contract law.[27] The Opinion confirmed that "ATG b[ore] the burden of proving its compliance with the Bylaws."[28] Because advance notice bylaws operate as conditions precedent to

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[24] Defs.' Appl. 9.

[25] *Atl. Rsch. Corp. v. Clabir Corp.*, 1987 WL 758584, at *1 (Del. Ch. Feb. 10, 1987).

[26] *Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140, at *21 (Del. Ch. Oct. 13, 2021); *see also Paragon Techs., Inc. v. Cryan*, 2023 WL 8269200, at *7 n.116 (Del. Ch. Nov. 30, 2023) (questioning a board's reliance on alleged nomination notice deficiencies that were "litigation constructs" raised after the rejection); *Politan Cap. Mgmt. LP v. Masimo Corp.*, C.A. No. 2022-0948-NAC, at 17 (Del. Ch. Dec. 20, 2022) (TRANSCRIPT) (observing that a board has "exclusive power to create the record" when adopting defensive measures and its "decision will rise or fall with that record").

[27] Defs.' Appl. 8.

[28] Mem. Op. 33.

recognition of a nomination, a board seeking to reject a nomination must identify the contractual deficiency on which it relies.[29] Applying that principle to reasons "fairly stated" in a contemporaneous rejection letter does not create a new legal standard.[30] Instead, it ensures that advance notice bylaws serve as mechanisms for orderly elections rather than as post-hoc litigation "tripwires."[31]

The defendants argue in the alternative that the Opinion conflicts with *Vejseli v. Duffy*, warranting certification under Rule 42(b)(iii)(B).[32] They misread *Vejseli*. In that case, the board rejected a nomination notice for failing to disclose an agreement. During litigation, the defendants cited a specific paragraph of the same agreement to support the disclosure deficiency the board had identified when it rejected the nomination notice. The court observed this was not a "new argument."[33] Here, the defendants attempted to raise an entirely new legal theory: a standalone Rule 14a-9 argument untethered from the "participant" justification given in the

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[29] *See id.* (citing *Strategic Inv. Opportunities LLC v. Lee Enters., Inc.*, 2022 WL 453607, at *13 n.142 (Del. Ch. Feb. 14, 2022)).

[30] *Id.*

[31] *Kellner v. AIM ImmunoTech Inc.*, 320 A.3d 239, 265 (Del. 2024) (warning against advance notice bylaws that function as a "tripwire").

[32] Defs.' Appl. 10 n.6; *see Vejseli v. Duffy*, 2025 WL 1452842 (Del. Ch. May 21, 2025).

[33] *Vejseli*, 2025 WL 1452842, at *15 n.126.

Rejection Letter.[34] Barring such a pivot is consistent with *Vejseli* and other precedent of this court.

2. Termination of the Litigation

The defendants next invoke Rule 42(b)(iii)(G), which considers whether "[r]eview of the interlocutory order may terminate the litigation."[35] They assert that the Opinion "resolved the Nomination Notice dispute" and that interlocutory review would address "every claim necessary to determine who stands for election at Empery Digital's annual meeting."[36] Yet multiple claims remain pending, including challenges to the Board's approval of a purportedly dilutive offering and other defensive measures that are unaffected by the requested appeal. Because interlocutory review would not terminate the litigation, this factor weighs against certification.[37]

The defendants insist that the "review need only 'terminate the litigation' as to the portion of the case the interlocutory order resolved, not the action in its

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[34] *See* Mem. Op. 31-34.

[35] Defs.' Appl. 10; *see* Supr. Ct. R. 42(b)(iii)(G).

[36] Defs.' Appl. 10-11.

[37] *See, e.g.*, *Elburn v. Albanese*, 2020 WL 4194865, at *5 (Del. Ch. July 21, 2020) (ORDER) (refusing an application for interlocutory appeal where the appeal would not resolve a separate, pending claim), *appeal refused*, 237 A.3d 820 (Del. 2020) (TABLE).

entirety."[38] For support, they cite the Superior Court's decision in *Green v. Geico General Insurance Co.*, which certified an interlocutory appeal that would "terminate the class portion" of a suit but not the "entire litigation."[39] But they omit that the Delaware Supreme Court refused the interlocutory appeal, noting that "review of the order w[ould] not terminate the litigation."[40] An appeal that leaves portions of the litigation unresolved does not advance Rule 42's purpose of avoiding piecemeal appellate review.[41]

3. Considerations of Justice

Finally, the defendants maintain that interlocutory review would "serve considerations of justice" under Rule 42(b)(iii)(H).[42] They contend that, without it, both the Board and Empery stockholders face "irreparable harm."[43] Empery's annual meeting will go forward on October 14 with ATG's nominees on the ballot,

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[38] Defs.' Appl. 11.

[39] *Id.* (quoting *Green v. Geico Gen. Ins. Co.*, 2019 WL 4643937, at *3 (Del. Super. Sept. 23, 2019)).

[40] *GEICO Gen. Ins. Co. v. Green*, 219 A.3d 996 (Del. 2019) (TABLE).

[41] *See* Supr. Ct. R. 42(b)(ii).

[42] Defs.' Appl. 11; *see* Supr. Ct. R. 42(b)(iii)(H).

[43] Defs.' Appl. 11.

and the defendants fear that a successful appeal after final judgment would come too late to reverse the election.[44]

This argument conflates a threat to incumbency with a threat to the stockholder franchise. Denying interlocutory review would not "thwart[] shareholders' voting rights."[45] Rather, permitting the October 14 election to proceed with a slate that this court has deemed valid leaves the choice to stockholders. The Opinion does not determine the outcome of the election. It merely holds that the Nomination Notice is valid and ATG's nominees may stand for election. Nor is any purported injury irreparable. The Delaware General Corporation Law provides a statutory remedy to resolve disputed elections after the fact.[46] Though unwinding an election post-judgment may be disruptive, it is contemplated by the statute.[47]

Beyond the upcoming election, the defendants warn that, absent prompt review, the Opinion will have broader consequences for other companies. They submit that bylaws requiring the "disclosure of 'participants' in a nomination" will

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[44] *Id.*

[45] *Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, at *5 (Del. Ch. Jan. 14, 1991).

[46] *See* 8 *Del. C.* § 225.

[47] *See SRG Glob. Inc. v. Robert Fam. Hldgs., Inc.*, 2011 WL 13491605, at *3 (Del. Ch. Mar. 4, 2011) (observing that an applicant faced no hardship where it "still would have recourse" absent interlocutory review).

be undermined, allowing stockholders to conceal agreements, arrangements, and understandings ("AAUs") concerning nominations.[48] But, as the Opinion explained, companies commonly adopt bylaws that expressly require the disclosure of AAUs.[49] Empery did not. Nothing in the Opinion prevents other companies from adopting such provisions. It enforced Empery's Bylaws as written and declined to read in requirements they lacked.[50]

III. CONCLUSION

Interlocutory appeals are meant to be exceptional. The imminent October 14 meeting demands certainty. Piecemeal appellate review of bylaw interpretation would cause delay and exhaust judicial resources. The costs decisively outweigh any benefits.[51] Accordingly, the Application is refused. IT IS SO ORDERED.

Sincerely yours,

/s/ Lori W. Will

Lori W. Will
Vice Chancellor

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[48] Defs.' Appl. 8.

[49] Mem. Op. 21-22.

[50] The same is true of commodities hedges. *See* Mem. Op. 37.

[51] *See* Supr. Ct. R. 42(b)(iii).