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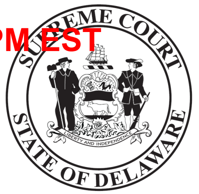

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TED D. KELLNER,	)	
	)	
Plaintiff Below, Appellant,	)	
	)	
v.	)	No. 3, 2024
	)	
AIM IMMUNOTECH INC., THOMAS EQUELS, WILLIAM MITCHELL, STEWART APPELROUTH, and NANCY K. BRYAN,	)	Court Below: Court of Chancery of the State of Delaware, C.A. No. 2023-0879-LWW
	)	
Defendants Below, Appellees.	)	

APPELLANT'S OPENING BRIEF

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Dated: January 25, 2024

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NATURE OF PROCEEDINGS

Plaintiff-Below/Appellant Ted D. Kellner ("Appellant") appeals from a Final Order and Judgment of the Court of Chancery upholding actions by the Board of Directors of AIM ImmunoTech Inc. ("AIM" or the "Company") that, according to the same court, had the primary purpose and effect of interfering with Appellant's right to nominate a competing slate of director candidates at the Company's 2023 annual meeting of stockholders ("Annual Meeting").

In March 2023, when "skies were overcast … with storm clouds of a proxy contest gathering on the horizon," Op. 43 (Ex. A), AIM's Board (together with AIM, "Appellees") adopted onerous and draconian advance-notice bylaw amendments ("Bylaw Amendments") to thwart the impending proxy contest.

On August 4, Appellant timely delivered his nomination notice ("Notice"), disclosing his intent to nominate himself, Todd Deutsch, and Robert L. Chioini for election to AIM's Board at the upcoming Annual Meeting.

On August 23, Appellees rejected the Notice based on alleged non-compliance with the Bylaw Amendments.

On August 25, Appellant filed this action seeking expedited declaratory relief that the Bylaw Amendments were facially invalid, the Notice complied with the Bylaw Amendments, the Board's rejection of the Notice was inequitable, and the director Appellees breached their fiduciary duties.

The trial court held a three-day trial beginning on October 30 and post-trial argument on November 21.

On December 28, the trial court issued a post-trial opinion entering judgment for Appellant in part and for AIM in part. Specifically, the trial court held that four of AIM's advance-notice bylaw provisions were facially invalid. The trial court nevertheless ratified the Board's rejection of the Notice. To reach that conclusion, the trial court incorrectly held—without supporting authority—that it could "revert" to a prior bylaw the Board eliminated and replaced, Op. 71, even though Appellees did not rely on it at any relevant time. The trial court then erroneously concluded that the Notice failed to comply with that repealed provision and two other provisions of the Bylaw Amendments that it erroneously deemed to survive enhanced scrutiny under a piecemeal test that isolated each bylaw provision and ignored their cumulative purpose and effect. The trial court also erroneously held that the same Board that adopted four facially invalid advance-notice bylaw provisions to prevent Appellant from nominating a competing slate of director candidates did not breach their fiduciary duties in rejecting the Notice.

This appeal followed.

SUMMARY OF ARGUMENT

1. After holding that certain Bylaw Amendments were invalid and void, the trial court incorrectly held that the Notice was deficient as a matter of law under a repealed 2016 advance-notice bylaw provision (the "2016 AAU Provision"). The court's reliance on the 2016 AAU Provision was erroneous for two independent reasons. First, under enhanced scrutiny, the court was required to evaluate the Board's stated reasons for rejecting the Notice—not litigation counsel's attempted *post hoc* justifications. The Board indisputably did not rely on the 2016 AAU Provision as a basis for rejecting the Notice. The first and only time Appellees' counsel suggested the court could revert to the 2016 AAU Provision was in a footnote in Appellees' pre-trial brief. Second, when the Board adopted the Bylaw Amendments, it repealed the 2016 AAU Provision, crossing out every word. By reverting to the repealed 2016 AAU Provision, the trial court impermissibly "blue-penciled" AIM's overreaching advance-notice bylaws. But only a board or the stockholders have the power to adopt, amend, or repeal bylaws, not a court. And the trial court cited no authority in support of its blue pencil approach.

2. The trial court incorrectly held that two Bylaw Amendments—the First Contact Provision and Questionnaire Provisions—withstood enhanced scrutiny, while simultaneously holding that other provisions in the same "package" of amendments were adopted with a disloyal motive and for an improper entrenchment

purpose. The trial court erred in multiple respects. First, where, as here, a board's defensive actions are "inextricably related," *Unitrin* and its progeny require Delaware courts to consider defensive measures in their totality. But the court erroneously and without supporting authority considered each of the Bylaw Amendments in isolation. Second, the trial court further erred because it did not assess whether the Bylaw Amendments were narrowly tailored, nor did it weigh the proportionate value of the Company's alleged interest in marginal disclosure by a nominating stockholder against Bylaw Amendments that, collectively, thwarted competitive elections. Third, even taken in isolation, the First Contact Provision and Questionnaire Provisions cannot withstand enhanced scrutiny.

3. The trial court incorrectly held that the Notice failed to comply with the bylaws.

a. The trial court incorrectly held that the Notice inaccurately disclosed when Appellant formed an arrangement, agreement, or understanding ("AAU") to pursue his nominations. The Notice disclosed that the nominees formed an AAU in July 2023, while the trial court held that it formed before that date by applying an unworkable standard based upon clearly erroneous factual findings. The trial court's standard for AAUs provides that mere "communications" cannot rise to an AAU, but an AAU may exist if a "measure" is taken in furtherance of the nominations. Reasoning that a "measure" may also include "communications," the trial court

ultimately held an AAU formed before July 2023 because Appellant had communications about starting a proxy contest. The standard used is so unworkable that the trial court could not identify when, exactly, the AAU in question was formed. The trial court further erred in how it applied enhanced scrutiny, because it failed to explain how this supposed discrepancy regarding the date of this AAU was sufficiently weighty to allow the Board to interfere with Appellant's sacrosanct right to make board nominations. And the trial court's factual findings about this AAU were clearly erroneous because most of the underlying "communications" did not concern Appellant's nominations.

b. The trial court likewise incorrectly held that the Notice failed to disclose the date of first contact between Appellant and Deutsch about the present nomination, but the Notice disclosed that information in detail. That, too, was clear error. The trial court further erred by holding that the questionnaires submitted with the Notice failed to disclose prior "withhold" recommendations Kellner, Deutsch and Chioini had received from proxy advisory firms, even though the questionnaires asked for disclosure of adverse recommendations "to the extent known" and all three indisputably were unaware of any withhold recommendations. Lastly, even if the trial court correctly held that the Notice failed to comply with the Bylaw Amendments, such non-compliance was immaterial and should be excused in equity.

STATEMENT OF FACTS

AIM is a publicly traded Delaware corporation focused primarily on the research and development of immuno-oncology treatments. Op. 3. AIM's flagship drug, Ampligen, emerged decades ago as a promising potential cancer treatment, A424, and, more recently, as a potential COVID-19 treatment. A99-100. AIM has never obtained FDA-approval for Ampligen for any purpose. Op. 3.

Until March 2023, AIM had a three-member Board consisting of Appellees Thomas Equels, William Mitchell, and Stewart Appelrouth. In March 2023, the Board appointed a fourth director, Appellee Nancy Bryan. Op. 4.

Under their tenure, AIM's stock price has fallen by 99%. Op. 3. "AIM's stockholder base is primarily composed of retail investors," Op. 4, who are dissatisfied with the Board's performance. Kellner first purchased AIM stock in early 2021 and now owns "a substantial stake," which has "lost most of [its] value." Op. 9-10. Deutsch, who owns "about 3.5% of the Company's outstanding shares," also experienced "significant losses." Op. 7.

Multiple stockholders have tried to nominate candidates to compete with the incumbents. In April 2022, Walter Lautz attempted to nominate two director candidates. Op. 8-9; A103. One of them, Chioini, co-founded a dialysis company and has substantial experience with pharmaceutical companies, directing clinical

trials, and obtaining FDA-approval. A1552. The Board rejected the Lautz notice. Op. 11.

In June 2022, Jonathan Jorgl noticed his intent to nominate Chioini and another individual for election to the Board at AIM's 2022 annual meeting. Op. 17. The Board rejected that notice as well, alleging it failed to disclose all AAUs related to the nomination as required by Section 1.4(c) of AIM's 2016 bylaws. Op. 18. Jorgl sued in the Court of Chancery seeking a preliminary injunction, Op. 18-19, which was denied, *Jorgl v. AIM ImmunoTech Inc.*, 2022 WL 16543834 (Del. Ch. Oct. 28, 2022).

At AIM's November 3, 2022 annual meeting, the incumbents faced no competition and were re-elected. Op. 20. Early returns showed Jorgl's slate would have won by a landslide, were it on the ballot. A122-141, 143.

On November 9, 2022, the Board announced "a process to add two directors." Op. 21-22 (quoting A148). Chioini saw this as "an opportunity to open dialogue" and directed his counsel, John Harrington, "to relay to AIM his … continued interest in being [a] director[]." Op. 22. In subsequent correspondence with AIM's Delaware counsel, Harrington communicated a proposal for "mutually agreeable directors" to join the Board, and observed that, without an agreement, another proxy contest might occur in 2023. Op. 23.

AIM's counsel never communicated Harrington's proposal to the Board. A1798. Instead, in March 2023, AIM responded by overhauling AIM's advance-notice bylaws. A409-412. The Board jettisoned the 2016 AAU Provision and replaced it with labyrinthine disclosure requirements that dwarfed the 2016 AAU Provision in length and scope. A277-78; A1228-29. AIM's counsel conceded that the Bylaw Amendments "respon[ded] to significant activist activity during 2022" and "likely would be subject to enhanced scrutiny judicial review." A189, A191.

The Bylaw Amendments include new rules requiring:

1. Disclosure of AAUs (even if unrelated to the nomination) going back two years, including those of any "Stockholder Associated Person" ("SAP"), sweepingly defined to include an "Associate" or "Affiliate," affiliates and associates of affiliates, persons "acting in concert" with any of them, and "immediate family" of the nominating stockholder and each beneficial owner on whose behalf the nomination is made ("2023 AAU Provision"), Op. 52-54;
2. Disclosure of AAUs between the nominating stockholder or an SAP and any nominee regarding consulting, investment advice, or a previous nomination for a publicly traded company, with a 10-year lookback period ("Consultation/Nomination Provision"), Op. 56;

3. Disclosure of all persons known to support the nomination, with the term "support" left sufficiently broad to include "any sort of support whatsoever, including that of other stockholders known by SAPs to support the nomination" ("Known Supporter Provision"), Op. 58;

4. Disclosure of AIM stock ownership in any form (including beneficial, synthetic, derivative, and short positions) as well as positions "in any [undefined] principal competitor" of AIM ("Ownership Provision"),[1] Op. 61-63;

5. Disclosure of dates when nominating stockholders and SAPs (as defined above) had contact with a nominee with respect to either AIM or any proposed nominations for election to AIM's Board ("First Contact Provision"), Op. 64;

6. Completion of a D&O questionnaire that did not exist in March 2023 and that would be provided to stockholders five business days after a nominating stockholder requested it, allowing the Board to revise the questionnaire *after* learning the identity of their challengers ("Questionnaire Provisions"), Op. 64-66.

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[1] The Ownership Provision is a 1,099-word run-on sentence. Op. 62.

The trial court found that these and other provisions targeted the "conduct in which Mr. Jorgl, his nominees, Mr. Tudor, and others acting in concert with them engaged in … in 2022." Op. 26 (quoting A270). Other amendments updated unrelated aspects of the bylaws. Op. 25.

In July 2023, after months of preliminary discussions, Kellner, Chioini, and Deutsch decided to mount a proxy contest and asked their counsel to request the D&O questionnaire. Op. 29-30. During the five-day period allowed by the Questionnaire Provisions, AIM added "14 pages" of new material, including three pages with nine disclosure prompts to "be completed only by stockholder nominees, rather than all nominees"; a required disclosure of any adverse recommendation by any proxy advisory firm; "[n]umerous new questions about the nominee using undefined concepts"; and a new phrase "preliminary or otherwise" in conjunction with AAU disclosures. Op. 30, 71.

On July 27, Kellner and Deutsch filed a Schedule 13D with the SEC, A546, disclosing their intent to work as a stockholder group and attaching a group agreement fully describing the group's plans for funding any proxy contest, A541. No one has questioned the accuracy of those disclosures.

On August 3, Kellner submitted the 162-page Notice to nominate himself, Chioini, and Deutsch ("Kellner Slate") as director candidates for AIM's Annual Meeting. Op. 30; A683-844.

On August 7—14 days before the Board met to reject the Notice—AIM's communications firm drafted a press release condemning the effort as a "hostile takeover." Op. 31. Although Appellees later referred to this as a "contingency" draft, *id.*, AIM never prepared a press release for the contingency that the Board would *accept* the Notice. A1758-60. Also on August 7, Appellees filed a pleading in a securities litigation in Florida ("Florida Action") claiming the Notice was deficient and violated federal securities laws. A853; A1758; Op. 32-33.

On August 22, the Board rejected the Notice ("Rejection"), based on as many grounds as counsel could concoct, including alleged violations of the six provisions described above. Op. 33-35; A1055.

On December 28, 2023, the trial court held that four of those Bylaw Amendment provisions were invalid as a matter of law, including the 2023 AAU Provision that was the primary basis for the Rejection. Op. 43-67. The trial court, however, resurrected the 2016 AAU Provision (which was not a basis for the Rejection) and held that the Notice was properly rejected under that provision, among other reasons.

On January 5, after the trial court approved the Rejection, AIM held its annual meeting. With no competition, the director Appellees retained their seats notwithstanding stockholders' strong support for the competing slate.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DETERMINED THE NOTICE WAS DEFICIENT UNDER INEFFECTIVE PRIOR BYLAWS

A. Question Presented

Whether the trial court committed legal error by applying the 2016 AAU Provision, even though the Board (i) repealed that provision in March 2023 and (ii) did not cite it as the basis for rejecting the Notice. Kellner raised this issue below (A1952-53), and the trial court adjudicated it (Op. 70-71).

B. Scope of Review

This Court reviews the trial court's interpretations of bylaws *de novo*. *Airgas, Inc. v. Air Prod. & Chemicals, Inc.*, 8 A.3d 1182, 1188 (Del. 2010).

C. Merits of Argument

The trial court erred in upholding the Rejection under the repealed 2016 AAU Provision. Op. 70-71. After invalidating the 2023 AAU Provision, the trial court resurrected the 2016 AAU Provision, stitched it together with the surviving 2023 Bylaw Amendments, and then "revert[ed] to assessing whether the [Notice] complied" with advance-notice bylaws that AIM's board never adopted ("Blue Pencil Approach") and had not relied upon. *Id.* at 71. That was legal error.

1. The Trial Court Incorrectly Approved Rejection of the Notice on Grounds the Board Did Not Supply

The trial court erred in relying on the 2016 AAU Provision because the Board did *not* rely on the 2016 AAU Provision as a basis for rejecting the Notice.

Delaware courts apply enhanced scrutiny to "board action that interferes with a corporate election or a stockholder's voting rights in contests for control." *Coster v. UIP Cos., Inc.*, 300 A.3d 656, 672 (Del. 2023) ("*Coster II*"). Under that standard, Delaware courts evaluate "the *board's* justification for each contested defensive measure and its concomitant results." *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1290 (Del. 1998) (emphasis added). The standard "require[s] the directors to articulate their justification for the defensive measure with specificity" and obligates the trial court to evaluate the board's "articulated purpose." *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 728 A.2d 25, 50–51 (Del. Ch. 1998); *see also Unitrin, Inc. v. Am. Gen. Corp*., 651 A.2d 1361, 1385 (Del. 1995). *Post hoc* justifications may not substitute for a board's actual reasons for contested actions. *See Air Prod. & Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48, 105 (Del. Ch. 2011) ("[T]he Airgas board discussed essentially none of these alleged 'threats' in its board meetings, or in its deliberations"); *Pell v. Kill*, 135 A.3d 764, 790 (Del. Ch. 2016) (rejecting justifications that "did not drive the Board Reduction Plan" but instead "were embellished for purposes of litigation"). That would be the rule even if enhanced scrutiny did not apply. *Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140, at *21 (Del. Ch. Oct. 13, 2021) ("The Board cannot base its decision to reject the Nomination Notice on after-discovered facts.").

The Board's 14-page, single-spaced rejection letter rested exclusively on the 2023 Bylaw Amendments. A1055. AIM's counsel advised the Board of "the Amended Bylaws' requirements," Op. 32, and the meeting minutes confirm the Board only discussed "the Bylaws, which were amended earlier in the year …." A1044; *see also* A1048 (same); A1052 (same). Despite its kitchen-sink approach, the Board never cited the 2016 AAU Provision as a basis for rejection.

Appellees did not even concoct the Blue Pencil Approach as a *post hoc* justification "for purposes of [this] litigation," *Pell*, 135 A.3d at 790. Appellees never properly raised this approach below. Appellees "casual[ly] mention[ed]" the Blue Pencil Approach in a footnote in their pre-trial brief (A1523), but that neither preserved the argument nor retroactively justified the Rejection. *Roca v. E.I. du Pont de Nemours & Co*., 842 A.2d 1238, 1242 (Del. 2004).

Application of enhanced scrutiny is supposed to "expos[e] pre-textual justifications," *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 807 (Del. Ch. 2007), not supply them. Instead, the trial court found the Blue Pencil Approach necessary to prevent "further inequity." Op. 70. But its "gimlet eye" should be trained on "inequitably motivated electoral manipulation" by incumbent *boards*, not challengers. *Coster II*, 300 A.3d at 668. Enhanced scrutiny is concerned with "inequitable purposes, contrary to established principles of corporate democracy," that mark abuse of power "by management." *Schnell v. Chris-Craft Indus., Inc.*, 285

A.2d 437, 439 (Del. 1971). It was not the trial court's role to find *post hoc* ways Appellees could achieve self-serving goals, especially considering that nominating stockholders did not think they needed to comply with this provision.

2. The 2016 AAU Provision Could Not Support the Rejection Because the Board Repealed It in March 2023

The trial court independently erred in relying on the 2016 AAU Provision because it was repealed. A405. The 2016 AAU provision is not in AIM's Bylaws. A408-19. The "comparison documents" the Board relied upon, A404-05, show that, by adopting the Bylaw Amendments, the Board completely eliminated the 2016 AAU Provision, *see* A277-78.

Only a corporation's board or stockholders have the power "to adopt, amend and repeal the bylaws," *CA, Inc. v. AFSCME Empls. Pension Plan*, 953 A.2d 227, 231 (Del. 2008), not a court. The trial court reasoned that the 2023 AAU Provision "is invalid" and proposed "[i]ts prior iteration in the 2016 Bylaws" could spring back into existence because it "does not suffer from the same flaws as the amended version" and its scope "is fully within and narrower than the 2023 AAU Provision." Op. 70. While that may mean the Board *could* have adopted or continued with the 2016 AAU Provision, it purposefully chose *not* to do so—crossing out every word, *see* A277-78.

Delaware courts strongly disfavor "blue-pencilling" contracts. In *Sunder Energy, LLC v. Jackson*, the Court of Chancery rejected "blue-penciling" in

analyzing the reasonableness of a restrictive covenant because it encourages overreaching by drafters where "the worst case is that the court will blue-pencil its scope so that it is acceptable" and where "[t]he logical result of such a system is sprawling restrictive covenants." 305 A.3d 723, 753-54 (Del. Ch. 2023).

For the same reason, Delaware courts should not blue-pencil overreaching advance-notice bylaws. After all, "[c]orporate charters and bylaws are contracts among a corporation's shareholders." *Airgas*, 8 A.3d at 1188.

Moreover, by reverting to text outside the Bylaw Amendments, the trial court impermissibly engaged in contract reformation without making *any* of the required findings. A party seeking reformation of a corporation's bylaws must prove by *clear and convincing evidence* that "(i) all present and past shareholders intended [the] provisions to be included within the … [bylaws], and (ii) there [is] not … any intervening third party interest." *Waggoner v. Laster*, 581 A.2d 1127, 1136 (Del. 1990). And the party seeking reformation must show there was a "mistake." *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1151 (Del. 2002). The trial court did not make any of those findings.[2]

No authority supports the trial court's Blue Pencil Approach. One case it cited, *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022 (Del. Ch. 2004), *aff'd*, 872 A.2d

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[2] AIM did not even plead a counterclaim for reformation.

559 (Del. 2005), Op. 71 n.343, found board action invalid under enhanced scrutiny and made no effort to create alternative paths for the board to achieve its goals. *Hollinger*, 844 A.2d at 1080-81. The trial court also cited *Rainbow Mountain, Inc. v. Begeman*, 2017 WL 1097143 (Del. Ch. Mar. 23, 2017); Op. 71 n.343. But that decision found a bylaw invalid merely because it was procedurally ineffective as it was not adopted by a proper quorum. *Rainbow Mountain*, 2017 WL 1097143, at *10. That is the rule where an attempted amendment is procedurally or statutorily defective. That does not describe *this* case, where there was no deficiency in adopting the Bylaw Amendments, and a quorum was present.

The court was also not positioned to apply the Blue Pencil Approach to prevent purported "inequity," Op. 70, as its lack of power to impose bylaws on AIM stockholders pretermitted any equitable discretion. A board that violates its fiduciary duties in adopting bylaw amendments should not benefit from the provisions it replaced. A contrary doctrine would give boards recourse to any number of bylaws, going back generations, to leverage against stockholders in battles for corporate power. It would subject stockholders and corporations to endless uncertainty as, at any moment, the governing bylaws may be a patchwork of current and former provisions the present enforceability of which can only be ascertained after costly litigation (like this).

II. THE TRIAL COURT INCORRECTLY HELD THAT CERTAIN BYLAW AMENDMENTS SATISFY ENHANCED SCRUTINY

A. Question Presented

Whether the trial court erred in holding that parts of the Bylaw Amendments satisfy enhanced scrutiny and the Board did not breach its fiduciary duties in adopting them, even as it found other parts of the same Bylaw Amendments fail enhanced scrutiny. Kellner raised this issue below (A1925, A1936-53, A2077-95), and the trial court considered it (Op. 70-71).

B. Scope of Review

This Court reviews the trial court's legal conclusions in applying enhanced scrutiny *de novo* and its factual determinations for clear error. *Coster II*, 300 A.3d at 663.

C. Merits of Argument

Even after the trial court correctly applied enhanced scrutiny and found that four Bylaw Amendments failed that test, the court still erroneously upheld other portions of the Bylaw Amendments.

Delaware law protects stockholders from manipulative conduct that adversely affects the electoral machinery. *See BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.*, 224 A.3d 964, 981 (Del. 2020) (citing *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1132 (Del. 2003)). Even if board action meets "all legal requirements" for validity, *Coster II*, 300 A.3d at 664, it is invalid if taken "for the

purpose of perpetuating [the incumbent directors] in office" and "obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management." *Schnell*, 285 A.2d at 439; *see also Coster II*, 300 A.3d at 664; *Liquid Audio*, 813 A.2d at 1132; *Chesapeake Corp. v. Shore*, 771 A.2d 293, 297 (Del. Ch. 2000). This is because "[t]he right of shareholders to participate in the voting process includes the right to nominate an opposing slate." *Linton v. Everett*, 1997 WL 441189, at *9 (Del. Ch. July 31, 1997).

The trial court correctly employed enhanced scrutiny review in assessing the Bylaw Amendments, given that "it was raining" when AIM's Board adopted them. *Coster II*, 300 A.3d at 664; Op. 43-44. Under that standard, "the board bears the burden of proof" to (1) identify "a threat to an important corporate interest or to the achievement of a significant corporate benefit" and (2) show that its response "was reasonable in relation to the threat posed." *Coster II*, 300 A.3dat 672-73. "The threat must be real and not pretextual," the "board's motivations must be proper and not selfish or disloyal," and the board must "tailor its response to only what is necessary to counter the threat." *Id.* The trial court erred in its application and determination that certain Bylaw Amendments passed muster under enhanced scrutiny.

1. The Trial Court Failed to Evaluate Inextricably Related Bylaws Together

The trial court correctly held that four Bylaw Amendment provisions failed enhanced scrutiny. It found that (1) the AAU Provision "goes off the rails" by

creating "a tripwire" that "suggests an intention to block the dissent's effort" to mount a proxy contest, Op. 54-56; (2) the Consultation/Nomination Provision "suffers the same problem[,]" "is draconian and would give the Board license to reject a notice based on a subjective interpretation of [its] imprecise terms," Op. 58; (3) the Known Supporter Provision "impedes the stockholder franchise while exceeding any reasonable approach to ensuring thorough disclosure," Op. 59; and (4) the Ownership Provision "is indecipherable," buries any "justifiable objectives" "under dozens of dense lawyers of text," and "seems designed to preclude a proxy contest for no good reason." Op. 64. Collectively, it found those provisions were "designed to thwart an approaching proxy contest, entrench incumbents, and remove any possibility of a contested election." Op. 67.

Despite that, the trial court found no breach of fiduciary duty and upheld two additional provisions (and others it ignored) adopted for the same purpose and as part of one package. Op. 64-68. That was error.

A court must consider how bylaws work together. *See Unitrin*, 651 A.2d at 1387. "Where all of the target board's defensive actions are inextricably related, the principles of *Unocal* require that such actions be scrutinized collectively as a unitary response to the perceived threat." *Id.*; *see Airgas*, 16 A.3d at 113. A board must prove it tailored "its response to only what is necessary to counter the threat" to a "legitimate" interest." *Coster II*, 300 A.3d at 673. Where a board meets an activist

threat with a unified response containing a "combination of features," the court must consider those features collectively, not in isolation. *Williams Cos. S'holder Litig.*, 2021 WL 754593, at *37 (Del. Ch. Feb. 26, 2021). That rule applies in full force where a board adopts "advance notice by-laws" "individually or … in combination." *Unitrin*, 651 A.2d at 1388 n.38. Otherwise, a board could hinder judicial scrutiny by breaking its response into discrete bylaw parts.

That occurred here. The six bylaw provisions the court reviewed were part of a single package; they differed only in labeling. The trial court found "that certain amendments were in response to significant activist activity" and that "[t]here were also changes to update and modernize certain aspects of the bylaws and bring the bylaws in line with" legal developments. Op. 25. Those findings naturally place the anti-activist bylaws together. The exhibits the trial court cited, *see* Op. 25-26, confirm the interrelation. The legal memorandum that "summarize[d] proposed amendments" understood one package of amendments "to better protect AIM and its stockholders against potentially abusive and deceptive practices," and distinguished that package from separate amendments that, "[i]n addition," "bring the Bylaws in line with recent amendments" to the DGCL and "update and modernize certain aspects of the Bylaws." A174; A267.

Applying an overly mechanical approach to enhanced scrutiny, the trial court considered six provisions individually. Op. 50–66. But it found no facts supporting

its review of each provision separately. It apparently viewed these and other provisions separately only because they were designated in separate subparts in the Bylaw Amendments.

The trial court's piecemeal approach is unworkable and unfounded. When the court determined that four Bylaw Amendments were improperly adopted for the purpose of disenfranchisement, the rabbit was out of the proverbial hat: the court made a "normative judgment" that the entire Board's action was "manipulative conduct requiring judicial intervention." *Strategic Inv. Opportunities LLC v. Lee Enters., Inc.*, 2022 WL 453607, at *14 (Del. Ch. Feb. 14, 2022). The court could not then selectively put the rabbit back in the hat for other provisions within the same package. Delaware precedent uniformly rejects this approach. *See Unitrin*, 651 A.2d at 1387; *In re Ebix, Inc. S'holder Litig.*, 2016 WL 208402, at *19 (Del. Ch. Jan. 15, 2016) (determining "in the aggregate" that bylaw amendments at issue were a "forward-looking prophylactic" against a perceived threat); *cf. Hollinger*, 844 A.2d at 1080-82 (determining bylaw amendments together "are inequitable and are of no force and effect," even while finding one part did not violate the DGCL).

The trial court's approach effectively rewards boards for grossly excessive responses to perceived threats. *Coster II*, 300 A.3d at 673. Under that approach, board incumbents could adopt 50 simultaneous bylaw amendments to thwart a contested election, issue a sweeping rejection notice citing most or all of them as a

basis to exclude the challenger, see 49 of them struck down under enhanced scrutiny, and yet stop the challenger based on the one amendment that squeezes by. That approach would invite endless litigation, as Delaware courts would be left to figure out what mix-and-match of provisions maintain force and whether they align with bases of notice rejections.

The trial court criticized Appellant's position as "an 'all or nothing' approach" and a "blunt tactic" that "would yield extreme and unnecessary relief." Op. 67-68. Not so. The point is not that "one bylaw straying too far" necessarily "mean[s] other legitimate bylaws should be invalidated." Op. 68 n.331. It means a court must "consider how bylaws work together," as the trial court acknowledged. *Id.* Again, Delaware law is clear that where "defensive actions are inextricably related, the principles of *Unocal* require that such actions be scrutinized collectively as a unitary response to the perceived threat." *Unitrin*, 651 A.2d at 1387. The trial court also suggested that Appellants' position would sweep away all the Bylaw Amendments, including those "to address [SEC] Rule 14a-19 and cohere with the DGCL." Op. 45. That is not true. The evidence supports distinguishing the restrictive advance-notice bylaws from distinct amendments that modernized AIM's bylaws and addressed changes in statutory law.

In addition, the trial court's overly restrictive view caused it to focus on six Bylaw Amendments and ignore the remainder. Op. 49-50. The trial court

acknowledged that Appellant cited "other provisions" but deemed his challenge to them forfeited because his post-trial briefing did not itemize his case against "every provision that changed between the 2016 Bylaws and Amended Bylaws." Op. 49 n.280. But Appellant framed his challenge to the entire package of Bylaw Amendments designed to restrict access to AIM's ballot. A1922-25, A1940-51. That is how the Board understood the amendments. The trial court erred in applying an artificially narrow scope of review.

2. Reversal Is Required

The correct standard requires reversal and a new meeting for election of directors. Even under an overly mechanical approach, the trial court found that four Bylaw Amendments failed enhanced scrutiny, and those determinations were correct insofar as failing enhanced scrutiny for the reasons stated, as well as additional reasons. Op. 54-64. Because none of these provisions *independently* is tailored to "only what is necessary," *Coster II*, 300 A.3d at 673, they cannot be tailored *together*. They certainly cannot be tailored as a package with other provisions (including the First Contact Provision and Questionnaire Provisions) in light of their collective effect.

The trial court erred in failing to weigh the proportionate value of AIM's general disclosure interest against the "nuclear" Bylaw Amendments that collectively had the effective of thwarting a competitive election. *Williams Cos.*,

2021 WL 754593, at *4; *Coster II*, 300 A.3d at 672. "[A] condition precedent to any judicial consideration of reasonableness and proportionality" is a sufficiently weighty "justification" for the board's action. *Liquid Audio*, 813 A.2d at 1132. Here, although the court recognized that its must have "sensitivity to the stockholder franchise," Op. 44, it only assessed whether "certain of the provisions are proportionate" to the Company's interest in "obtaining transparency from a stockholder seeking to nominate director candidates." Op. 46-47.

To begin, this interest must have been "pretextual," not "real," *Coster II*, 300 A.3d at 672, given that the trial court found four Bylaw Amendments were "designed to thwart an approaching proxy contest, entrench incumbents, and remove any possibility of a contested election." Op. 67. A Board cannot switch on and off its disloyal motive in fashioning interrelated bylaw amendments.

That aside, AIM's interest in the First Contact Provision disclosure, or prior "withhold' recommendations" from proxy advisory firms, is simply not important enough to satisfy enhanced scrutiny, particularly when the penalty for non-compliance is exclusion from the ballot and preclusion of a competitive election. The stockholder franchise is "an empty exercise" in the absence of competition, leaving corporations with "an aristocracy of directors and officers which can continue in office indefinitely, immune from the wishes of the shareholder-owners of the corporation." *Durkin v. Nat'l Bank of Olyphant*, 772 F.2d 55, 59 (3d Cir.

1985); *see also EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012). Although Delaware courts will uphold a disclosure interest when a bylaw is "validly enacted on a clear day," *see, e.g., Lee Enters.,* 2022 WL 453607, at *18; *Saba Cap.*, 224 A.3d at 980, neither the trial court nor Appellees have cited any case finding such a disclosure interest sufficiently important to satisfy enhanced scrutiny, and there appears to be none.

Further, Appellees' package of amendments was not tailored "to only what [was] necessary to counter" the purported "threat" of future non-disclosure. *Coster II*, 300 A.3d at 673. A board typically has a more tailored means to achieve its goals by "expending corporate funds to inform the electorate," *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 663 (Del. Ch. 1988), and Appellees did not prove those means ineffectual here. Incumbents always have steep, structural advantages. And Appellees' contention that the Jorgl nomination effort justified the entire panoply of Bylaw Amendments gets things backwards. Appellees *won* the *Jorgl* case and successfully excluded challengers from the ballot based on the 2016 Bylaws without amendment.

Even assuming stockholders would be marginally better off knowing information a board would demand from challengers, they will virtually always be better off with a choice between incumbents and challengers. Appellees' disclosure

interest should have yielded to the stockholders' voting interests, as they should "decide the path for AIM." *Jorgl*, 2022 WL 16543834, at *17.

The court's failure to view the Bylaw Amendments as a "unitary response" to a true corporate threat (assuming there was one)—and assess proportionality and equity accordingly—was legal error.

3. Regardless, the Isolated Provisions the Court Upheld Fail Enhanced Scrutiny

Even viewed in isolation, the First Contact Provision and the Questionnaire Provisions fail enhanced scrutiny.

a. The First Contact Provision

The First Contact Provision requires a nomination notice "to set out 'the dates of first contact between any Holder and/or Stockholder Associated Person, on the one hand, and the Stockholder nominee, on the other hand, with respect to (i) the Corporation and (ii) any proposed nomination or nominations … for election or re-election to the Board of Directors." Op. 64 n.320 (quoting Bylaws § 1.4(c)(1)(H) (A409)). The trial court understood this provision to "require[] disclosure of the dates of first contact among those involved in the nomination effort." Op. 64. It fails enhanced scrutiny at every step.

The provision serves no "important corporate interest." *Coster II*, 300 A.3d at 672. The court proposed it serves "the Board's desire to elicit sufficient information for the Board to make a recommendation about the nominations and

stockholders to cast informed votes." Op. 65. But it never explained why anyone would need to know "dates of first contact" to cast an informed vote. It is implausible that a shareholder would vote for a slate of candidates, unless that shareholder learned that nominees first discussed the corporation or campaign in May versus July (or any other date). And again, any marginal benefit of that information cannot compare to offset the harms of an uncontested election. *See Durkin*, 772 F.2d at 59; *EMAK Worldwide*, 50 A.3d at 433.

The First Contact Provision is also preclusive and unreasonable. *Coster II*, 300 A.3d at 673. The clearest evidence of this is that *none* of the bylaws in either expert's sample sets contained a First Contact Provision. A1819, A2084-89. Moreover, the First Contact Provision employs an expansive SAP definition that the trial court found improper when used in the 2023 AAU Provision, the Known Supporter Provisions, and the Ownership Provision. Op. 53-55, 58-59, 63-64. The trial court did not explain how the same SAP definition in the First Contract Provision can somehow be valid. If the SAP definition creates "vague requirements about far-flung, multi-level relationships" and "suggests an effort to block the dissident's efforts" in three provisions, Op. 56, it must do so in all provisions employing that term, including the First Contact Provision.

The court's SAP carve-out is also flawed in practice. The trial court proposed that the provision can easily be satisfied "[w]ith a few email or text message

searches." Op. 65. Not so. Case in point—after months of discovery and trial, neither the parties nor the court could identify a precise date of first contact regarding the 2023 nomination efforts. Op. 77; A409. Notably, Appellees also could not identify a date of "first contact" between the pre-existing Board and latest appointee (Nancy Bryan) either. *Compare* A1711 (Equels testifying he met Bryan in 2016) *with* A1307 (Bryan testifying she met Equels in 2019).

The trial court did not explain how stockholders can reasonably identify first contacts in all their potential forms across the "unending permutations" produced by the SAP definition. Op. 55. Nor did it consider that "first contact" is undefined—leaving it unclear whether it would be triggered, say, at an initial passing statement at happy hour that "we should discuss AIM soon" or only later at the in-depth follow-on discussion.

Finally, the trial court did not require Appellees to prove they tailored the First Contact Provision to only what was necessary to counter a cognizable threat. As shown, Appellees' reliance on the *Jorgl* litigation disproves that theory, as the 2016 Bylaws were adequate for the supposed purpose.

b. The Questionnaire Provisions

The Questionnaire Provisions also fail enhanced scrutiny because they improperly frustrate stockholder nominations by allowing the Board five business days to supply the questionnaire. Op. 65–66 & n.324.

First, while the trial court cited "information-gathering and disclosure functions," it did not explain the importance or materiality of *this* provision. Op. 66. Questionnaire responses are not provided to shareholders, *see* A1720, and thus do nothing to ensure stockholders are "well-informed." *Lee Enters.*, 2022 WL 453607, at *9. The trial court also did not consider the importance of the information requested. Questionnaires demanded far more information from challengers than from incumbents. *Compare* A714-844 (challenger questionnaires) *with* A375, A1069, A1114, A1158 (incumbent questionnaires). That inequality proves the information is not important and the purpose was "selfish." *Coster II*, 300 A.3d at 672.

Second, the Questionnaire Provisions are "preclusive," *id.* at 673, in that they are "ripe for subjective [implementation] by the Board." Op. 56. The five-business-day window to produce the questionnaire allowed the Board to revise the questionnaire *after* learning the identity of their challengers. Op. 83; A556. The Board used that opportunity to add 14 pages of new prompts. A597 (changes by AIM's counsel in late July). The trial court's view that Appellant's objection to that gamesmanship is "hair splitting," Op. 66, is the opposite of "a gimlet eye." *Coster II*, 300 A.3d at 668; *see Williams Cos.*, 2021 WL 754593, at *39 (rejecting board's request "not [to] presume the Board would misuse its power," as that argument "would excuse nearly any combination" of onerous bylaw provisions).

4. **The Board Breached Its Fiduciary Duties In Adopting the Bylaw Amendments**

Strangely, despite finding that four Bylaw Amendments "run afoul of Delaware law" and are "of no force and effect," Op. at 67, the court failed to address Count III alleging the directors' breach of fiduciary duties in adopting the voided Bylaw Amendments. *Id.* at 36.[3] Enhanced scrutiny involves a "context-specific application of the directors' duties of loyalty, good faith and care," *Lee Enters.*, 2022 WL 453607, at *16. So after having found the Board adopted the Bylaw Amendments for inequitable and entrenchment purposes, the trial court then should have held that the Board members "breached [their] fiduciary duties," *Coster II*, 300 A.3d at 669-70; *In re Rural Metro Corp.*, 88 A.3d 54, 85 (Del. Ch. 2014) ("A failure to satisfy the enhanced scrutiny standard … establishes the existence of a breach of duty"). Failure to do so was legal error requiring reversal.

[3] The court's only statement addressing breach of fiduciary duties pertained to the Board's later application of the Bylaw Amendments to reject the Notice. Op. 85. This is error for reasons explained in Argument §§ I, III.

III. THE TRIAL COURT ERRONEOUSLY UPHELD THE REJECTION

A. Question Presented

Whether in upholding the Rejection the Court of Chancery (i) misapplied the 2016 AAU Provision, (ii) misapplied the 2023 Questionnaire and First Contact Provisions, and (iii) committed clear error in holding that an undisclosed AAU existed before July 2023. Kellner raised these issues below (A1953-85), and the trial court considered them. Op. 69-84.

B. Scope of Review

In determining whether stockholder action contravenes corporate bylaws, this Court interprets bylaws *de novo* and reviews factual determinations related to compliance for clear error. *Hill Int'l, Inc. v. Opportunity P'rs L.P.*, 119 A.3d 30, 37–38 (Del. 2015). This Court reviews the trial court's legal conclusions in applying enhanced scrutiny *de novo* and its factual determinations for clear error. *Coster II*, 300 A.3d at 663.

C. Merits of Argument

The trial court erroneously upheld the Rejection under the crazy quilt of bylaw provisions it deemed operative. The inquiry governing these issues proceeds in two steps. Op. 68 & n.333.

First, the trial court must consider if the Notice complied with the operative bylaws, applying ordinary "rules of contract interpretation." *Hill Int'l*, 119 A.3d at

38. “If charter or bylaw provisions are unclear,” it must “resolve any doubt in favor of the stockholder’s electoral rights.” *Id.*

Second, even if a notice does not comply with the bylaws, “Delaware courts have reserved space for equity to address the inequitable *application* of even validly enacted advance notice bylaws.” *CytoDyn*, 2021 WL 4775140, at *15. Appellees’ “inherent conflicts of interest” again trigger “enhanced scrutiny,” *Lee Enters.*, 2022 WL 453607, at *15, as the court correctly acknowledged, Op. 78-79. Thus, “the board bears the burden of proof” to show “a threat to an important corporate interest” and that its “response to the threat was reasonable in relation to the threat posed and was not preclusive or coercive.” *Coster II*, 300 A.3d at 672-73.

The court misapplied this test at each step.

1. <u>The AAU Basis of Rejection</u>

The trial court’s first basis for upholding the Rejection was supposed non-compliance with the 2016 AAU Provision. Op. 70-76. Even assuming the 2016 AAU Provision properly applied (it does not), the Court’s analysis was wrong.

a. The Notice contained *six single-spaced pages* of AAU-related disclosures. A687-92. But the court did not consider any of them, or even cite them. *See* Op. 70-76 & nn.342-372. Nor did it make any findings of fact concerning the Notice’s lengthy AAU-related disclosures. *See* Op. 29-31 & n.187.

Instead, the trial court evaluated in isolation one sentence out of a section of the Notice that did not address or purport to disclose AAUs. The court focused on the statement that "no decision was made [for any of Kellner, Deutsch, or Chioini] to work together to advance potential nominations or otherwise take any action with respect to the Company." Op. 73. This quote from page 11 of the Notice, Op. 73 n.354, responded to the 2023 Date of First Contact Provision, *not any AAU provision*, A693. Even assuming the statement was "false," Op. 73, it was not material to the First Contact Provision, which addressed *first* contacts, not ultimate "decision[s]." More fundamentally, to evaluate whether the Notice disclosed AAUs, the court had to examine the AAU-related disclosures; it did not.

b. The trial court then applied an unworkable and flawed legal standard. The trial court looked to the 2016 AAU Provision's undefined terms "[a]rrangements" and "understandings" and found them "unambiguous," insofar as they embrace "a measure taken or plan made in advance of some occurrence" and "an agreement, especially of an implied or tacit nature." Op. 71. It then reasoned that "any advance plan, measure taken, or agreement" satisfies the standard, but "mere discussions or sharing of information is not alone sufficient." Op. 72.

But that distinction is untenable. Nominating stockholders have no practical way to differentiate "discussions" or "information sharing" from a "plan" or "measure taken," and the trial court's decision makes no effort to distinguish one

from the other. The standard will necessarily devolve into disputes about characterizations, not about what is (or is not) "false." Op. 73. This is a case in point. The five sentences in the Notice prior to the statement the trial court found false (and six prior pages) disclosed the material information the court cited in discrediting the statement. *Compare* A693 *with* Op. 73-76. The difference is that the trial court found a "tacit understanding" in what the Notice deemed discussions. Op. 76. Notably, the court ultimately recognized the statement it discredited is *not false*, as it acknowledged "[i]t is possible that no formal decision was reached before then," which was all the supposedly "false" statement asserted, *compare* Op. 76 (admitting no "decision" was reached) *with* Op. 73 (calling assertion of "no decision" "false"). The court's standard is one of nitpicking, not of real-world distinctions. *Cf. CCSB Fin. Corp. v. Totta*, 302 A.3d 387, 402-03 (Del. 2023) (affirming trial court's holding that, in the corporate law context, persons "act in concert when they have an agreement, arrangement, or understanding regarding the voting or disposition of shares"); Op. 72 & n.352 (interpreting AAU "consistent with discussion of AAUs in other corporate law contexts"). Moreover, the trial court never identified what statement would have been "true" or what AAU should have been disclosed. Instead, the trial court cited to various discussions (text exchanges, e-mails) and found that, at some undefined point, those discussions morphed into an

AAU. *Id.* The trial court's inability to apply its own AAU standard proves that the standard is, at best, confusing.

Because all "doubt" must be resolved "in favor of the stockholder's electoral rights," *Hill Int'l*, 119 A.3d at 38, the trial court should have demanded more concrete indicia of a solidified informal agreement or plans in ascertaining an AAU, and it should have treated Kellner's over-inclusive disclosure of discussions as satisfactory, regardless of characterization. After all, the Notice provides the reader all the information necessary to arrive at the arguable conclusion of an AAU, *see* A687-92, but falls short of referring to them as a "decision." Those types of disputes carry no legal significance.

c. Separately, the trial court erred in its application of enhanced scrutiny with respect to the 2016 AAU Provision. The Board identified no "threat to an important corporate interest," *Coster II*, 300 A.3d at 672-73, from a notice that thoroughly described the events (and even discussions) leading up to the 2023 nomination. The trial court again vaguely pointed to "the objective of preserving an informed stockholder vote," Op. 80, but did not identify any marginal difference between information disclosed and information allegedly not disclosed.

For a disclosure to be material to a voting stockholder, "there must be a substantial likelihood that the disclosure … would have … significantly altered the 'total mix' of information made available" to a reasonable investor. *TSC Indus., Inc.*

v. Northway, Inc., 426 U.S. 438, 449 (1976); *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (adopting *Northway* standard as law of Delaware). As explained, the Notice—which the trial court did not meaningfully evaluate—described at length the discussions leading up to the 2023 effort, those descriptions matched reality, and there is no reason to believe additional information would have made a difference to stockholders. The court agreed that the Notice disclosed AAUs but quibbled with the start date. But the First Contact Provision requires disclosure of dates of "contacts," not the first dates of formation of an AAU. The trial court did not find, and could not have found, that any supposed benefit of pinpointing the date that the Kellner Group first reached an agreement to run a proxy contest—when all material underlying information was otherwise disclosed—was sufficiently important to justify denying stockholders any electoral choice.

Again, there is no dispute that all relevant persons, financing arrangements, and strategic plans were disclosed. It is difficult to imagine that, if the Notice had asserted the AAU began in December 2022 or some other time, a single stockholder would change a voting choice. And the trial court itself made no finding of "the exact time" the AAU came into being. Op. 76. Immaterial information can hardly be deemed relevant to stockholders—let alone so important as to justify an "aristocracy" at AIM. *Durkin*, 772 F.2d at 59.

d. In addition, the trial court committed clear error in holding that an undisclosed AAU existed before July 2023. The court's determination hinged on flawed findings that mere discussions (most of which had nothing to do with the 2023 AIM nominations) indicated that undisclosed AAUs existed. But most of the items that it cited as evidencing an AAU had nothing to do with the 2023 proxy contest at issue.

First, the court inferred from a text message by Kellner that he requested "discuss[ing] next steps" for a nomination and proxy contest with the "Jorgl team" as early as November 2022. Op. 73-74 (citing A145). But such *discussions* are legally insufficient to form an AAU (Op. 72) and the context proves Kellner's lack of a plan ("I'm not sure what the next steps are gents") and his lack of involvement with the 2022 Jorgl effort ("I sure would like to get a sense as to what Jorgl and his team is up to and also next [] legal steps"). A145. Kellner provided unrebutted testimony that a call along the lines referenced never took place. A1664-65.

Second, the trial court found that, "[a]t the same time [in November 2022], Chioini expressed that he and another 2022 nominee intended to pursue nominations in 2023," and that, by December 2022, Kellner was "very interested." Op. 74. But

being "very interested" is not an AAU, and the documents the court cites do not mention Kellner. *Id.* (citing A146, A150, A158).[4]

The one communication that mentions (but does not include) Kellner simply shows Chioini stating to his lawyer that Kellner "wants to keep in touch," A160.1-160.2, which is not an AAU. In fact, Kellner declined to commit to any plan or concerted act in December 2022.[5] In all events, the December 2022 call between Kellner and Chioini was *fully disclosed* in the Notice (A693).

Third, the trial court's treatment of a December 2022 investment memorandum by Kellner to his fraternity brothers was also flawed. Op. 74. The document was not (as the trial court stated) drafted "after [Kellner] spoke to Chioini"; rather, Kellner first drafted the document months prior to his call with Chioini, in August 2022, when the Jorgl litigation and proxy contest, and Florida Action, was still ongoing. A161; A152 (August 2022 draft); A1612. This fact was not controverted by Appellees.

The court then stated that Kellner "could not recall at trial who the two other investors were" joining him "in a proxy battle," but that, because Kellner "had

[4] Chioini testified that he was not working with any AIM stockholder as of December 2022. A1557.

[5] A1607-08 (Kellner explaining that first conversation with Chioini was simply "data gathering" about the company); A1613 (by end of December, there was not "any discussion or any finalization of doing this year's proxy battle").

named Deutsch and Tudor [another AIM stockholder] in an earlier draft" (the August draft), the document refers to them. Op. 74. However, there is no evidence that Kellner "could not recall" the referenced investors—the transcript does not state this. *Cf.* A1665. Kellner was questioned on the earlier August draft and testified that he made a "sloppy" and "incorrect notation" about who was leading the 2022 proxy contest. A1612. And the trial court acknowledges that Tudor was not involved in the 2023 effort, *see* Op. 27, so it is hard to follow how it could discern a consummated AAU involving him.

Kellner also testified that he "was subpoenaed" in the *Jorgl* litigation, but denied any other involvement in the 2022 proxy contest. *Id.*; A118.[6] The trial court ignored this testimony in making its factual finding.

Fourth, the court erred when it found that two February 2023 emails from BakerHostetler to counsel for Kellner and Deutsch (among others) constituted a preparation in advance of the 2023 annual meeting. Op. 74-75 (citing A167, A171). These emails had nothing to do with Kellner's 2023 proxy efforts. They concerned federal litigation AIM brought in Florida in July 2022 against Kellner, Deutsch, and

[6] The same court held with respect to the 2022 nomination notice that it could not "resolve these questions of fact" "without the benefit of trial," *Jorgl*, 2022 WL 16543834, at *2. It cannot make those factual findings here without trial on the 2022 nomination notice, nor can it rely on the *Jorgl* preliminary findings. *See State of Wisc. Inv. Bd. v. Bartlett*, 2002 WL 568417 at *4 (Del. Ch. Apr. 9, 2002).

others, alleging violations of Schedule 13D in response to the Jorgl nomination. These emails, marked "common interest privilege," are between lawyers representing defendants in that case and *pro se* defendant (Tudor) regarding a potential motion to dismiss, and other documents (A164), which solely relate to that Florida action.[7] The documents themselves and trial testimony confirm this. A1612; A1599 ("… [T]his email had to do with the Florida litigation; correct? A: Apparently, yeah."), A1604.

Fifth, the court's finding that a series of calls (A420, A521, A523, A525) and a forwarded email link to the Bylaw Amendments (from Chioini to BakerHostetler, A421) prove a "tacit understanding" and constitute "multiple preparations" to submit a slate to AIM is wrong. Op. 75-76. The court's reliance on "preparations" proves the errors of its legal standard (or at least its application). And the court misread the documents.

A March 23, 2023 Teams meeting notice with Kellner, Deutsch and their Florida counsel, A420, had nothing to do with the 2023 proxy contest (and AIM failed to question any witness about this document at trial). The trial court's contrary

[7] Attorney Woodfield represents Kellner and Deutsch; attorney Stegawski (michael@cla-law.com) represents Lautz; attorney Keown of BakerHostetler's Florida office represents Jorgl, along with attorneys Goody Guillén and Molina; and Tudor is pro se. A2317-19.

assumption, Op. 75, was "not the product of an orderly and logical deductive reasoning process." *Nixon v. Blackwell*, 626 A.2d 1366, 1370 (Del. 1993).

An April 2023 text message from Kellner requests that Deutsch put together a call with their Florida counsel and Chioini. A521. But Deutsch testified that he did not recall if the call with Florida counsel ever took place, and further confirmed that he had never spoken with Chioini as of April 2023. A1599. This text, too, cannot reasonably substantiate a finding that Kellner, Deutsch and Chioini had an undisclosed arrangement in April 2023. Op. 75.

In May 2023, Deutsch confirmed in a text message to Kellner that he did not "talk" with Chioini. A523. The court wrongly referred to this correspondence as the "May 19" text (it is dated May 16) and interpreted Kellner's subsequent text – expressing his desire to "mov[e] th[e] ball forward" – to mean that Kellner and Deutsch intended to nominate Chioini. Op. 75. The trial court's interpretation is unsupported and a non-sequitur. *Id.* n.370. It is also belied by the text proposing to "see what [Chioini's] and [his counsel's] plans are," (indicating discussions, not an AAU) and Kellner's and Deutsch's testimony that they were still gathering information and did not have solidified plans. A1600, A1607-08.

Finally, the trial court blundered in stating that "[t]here is no evidence that any other potential nominees were considered for Kellner's nomination." Op. 75. The record is clear that, up until July 2023, Michael Rice (who was nominated by Jorgl

in 2022) was being considered, should Kellner move forward. A1558. Rice even attended a meeting with Kellner, Deutsch and Chioini on July 11, 2023 with counsel regarding the potential nomination. A1612.

At bottom, the trial court's conclusion that "there was undoubtedly a tacit understanding before" July 2023, Op. 76, was premised on misinterpreted evidence and mistaken assumptions. The court even admitted it could not identify when the alleged AAU began, and that "[i]t is possible that no formal decision was reached before then for Kellner, Deutsch, or Chioini to submit a slate to AIM." *Id*. The trial court thus committed clear error by mischaracterizing the above-referenced communications as indicia of AAUs, given that most of them had nothing to do with the proxy contest at issue here. And even if they did, the trial court never explains how these mere communications amount to a "measure" taken in furtherance of an AAU.

2. **<u>The Additional Grounds for Rejection</u>**

The trial court also rested its decision on two other supposed errors in the Notice. Op. 76-84.[8] Both holdings were erroneous.

[8] The trial court only addressed these two alleged errors, noting that any "other purported flaw" in the Notice was of "varying degrees of importance." Op. 76. Since the trial court did not make any specific finding about the propriety of other bases for rejection, Appellant will not address them here.

The Court criticized the Notice as not including "any date of first contact between Kellner and Deutsch about the present nomination" to satisfy the First Contact Provision. Op. 77. This was wrong. The Notice disclosed Kellner and Deutsch's first contact about the Company in detail, as the Court noted in a footnote. *Id.* at 77 n.374. The Notice then described Kellner's communications with Chioini regarding the nomination in "late 2022," which was not (by any accounts) false. *Id.* Yet the Court still found this approximation insufficient (calling it "fuzzy," *id.* at 77). That is no way to apply all doubts in favor of the stockholder franchise. Regardless, the difference between "late 2022" and some more precise date in late 2022 cannot be material.

The trial court then faulted the Notice for omitting from the "questionnaires" "prior 'withhold' recommendations" they received from proxy advisory firms. Op. 77. The court acknowledged that "[t]he three maintain that they were unaware of any withhold recommendations" and found no fault in those assertions. Op. 78. It still upheld the rejection because "their questionnaires could have explained that they were unaware of any adverse recommendations" and "each affirmatively checked 'no.'" *Id*. But the questionnaire asked for disclosure "to the extent known," A717, and the certification solicited in the questionnaire was "to the best of my knowledge, information and belief," A748. The trial court's standard, again, was nitpicking.

The difference between the two best-of-knowledge assertions of the questionnaire is immaterial. And the Board had a clearly less restrictive means of achieving its end: recommendations of proxy advisory firms can be purchased by anyone, so the Board could have spent corporate funds researching challengers and published findings to stockholders in their own reelection campaigns. Ultimately, it should be up to stockholders whether a "withhold" recommendation is material to them, and the lower court's usurpation of their voting choice is insupportable.

CONCLUSION

This Court should reverse the judgment below.

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