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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE/CROSS-APPELLANT AIM IMMUNOTECH INC., ET AL.'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

This case starts with a foiled plot to take over Defendant AIM ImmunoTech Inc.[1] Franz Tudor—a felon convicted of insider trading—was the ringleader. Tudor orchestrated the scheme for years, covertly building a "web of individuals"—including a felon convicted of wire fraud, a fired CEO who refused to leave his post, and Plaintiff Ted Kellner—to fund, nominate, and run in proxy contests to oust AIM's Board. Since 2022, AIM has weathered their three clandestine attempts to nominate director candidates. This appeal concerns the third attempt.

In the first attempt, Tudor drafted a nomination notice for AIM stockholder Walter Lautz. The notice nominated Daniel Ring and Robert Chioini but did not mention Tudor. It was rejected for noncompliance with federal securities laws. Lautz and Ring dropped out of the second attempt, so Tudor and Chioini recruited Michael Rice and Rice's surfing buddy Jonathan Jorgl to replace them. Jorgl purchased AIM stock so he could nominate Chioini and Rice. Chioini also recruited Michael Xirinachs—another felon—to fund the Jorgl takeover attempt. All the while, Kellner and another coconspirator, Todd Deutsch, were operating in the shadows. When AIM rejected Jorgl's notice for failing to disclose Tudor's and

[1] "AIM."

Xirinachs's involvement in the nomination effort, Jorgl sued. Jorgl's lawsuit exposed the conspiracy.

With two clandestine takeover attempts in the rearview, the Board resolved to update its advance notice bylaw provisions. The Board considered that Tudor and his coconspirators' actions made AIM a ripe target for activists seeking to nominate candidates while concealing material information from AIM's stockholders. So, in 2023, with the advice of Delaware counsel, the Board amended AIM's bylaws to include state-of-the-art provisions adopted by myriad public companies.

Also in 2023, Kellner became the face of the conspiracy's third attempt. Kellner submitted a notice nominating himself, Chioini, and Deutsch.[2] Already familiar with Kellner, Deutsch, and Chioini from the earlier attempts, AIM retained Delaware and national counsel to assist with evaluating the Kellner Notice for compliance with AIM's advance notice bylaws. Advised by counsel, the Board rejected the Kellner Notice because it was noncompliant in many ways. Kellner, Deutsch, and Chioini lied about adverse recommendations from proxy advisory firms on AIM's director and officer questionnaire. And Kellner omitted specific dates of first contact with Deutsch regarding the nominations and with Chioini regarding AIM. Worst of all, Kellner obscured, and outright omitted, agreements,

[2] The "Kellner Notice."

arrangements, and understandings ("AAUs") between Tudor, Xirinachs, Chioini, and others dating back to the Lautz and Jorgl nominations. The Board also determined that they could not accept the Kellner Notice without breaching their fiduciary duties. Giving Kellner a pass would itself harm AIM's stockholders by allowing Kellner and his coconspirators to mislead them.

Kellner filed this lawsuit, making three claims. Count I is styled as a facial challenge to AIM's bylaws, but it alleges that their adoption breached fiduciary duties. Count III is styled as an as-applied challenge to AIM's adoption of the bylaws. But like Count I, Count III alleges that the adoption breached fiduciary duties because it targeted Kellner and his coconspirators. Count III and part of Count II allege that AIM's application of the advance notice bylaws to reject Kellner's notice was inconsistent with the bylaws and a breach of fiduciary duty.

After an expedited trial, the Court of Chancery upheld two provisions of AIM's advance notice bylaws—the Questionnaire Provision and First Contact Provision. It further found that the Kellner Notice had not complied with those provisions. And although the Court of Chancery invalidated AIM's amended bylaw requiring disclosure of certain pertinent AAUs within 24 months, it followed settled Delaware law to invoke the original 2016 AAU Provision. Applying the 2016 AAU Provision, the Court of Chancery found that the Kellner Notice did not comply. It explained that Kellner's takeover attempt "was—in many ways—a continuation of

the 2022 attempt" and that the Kellner Notice concealed information and made false statements. Op.73.[3] It also found the Board's decision not to waive compliance equitable because Kellner and his coconspirators "—not the Board—'are the ones engaging in manipulative conduct.'" Op.85.

Kellner largely ignores both the overwhelming evidence of his "manipulative, misleading, and improper conduct" and the conclusive ruling against him. Op.26. With respect to the Questionnaire, First Contact, and 2016 AAU Provisions, the judgment below was fully supported by the evidence at trial and none of Kellner's attacks withstand scrutiny. But this Court's intervention is needed to rectify other aspects of the judgment—specifically, the Court of Chancery's so-called facial invalidation of four other provisions of AIM's advance notice bylaws.[4] *First*, the Court of Chancery misconstrued Count I as a facial challenge when it is really an as-applied challenge. Delaware law does not recognize facial challenges to corporate bylaws based on their adoption or use.

Second, even if Kellner did bring a proper facial challenge, the Court of Chancery used the wrong standard—enhanced scrutiny—to evaluate it. Enhanced

[3] Citations to "Op.___" are to the post-trial opinion below. Ex.A.

[4] The "2023 AAU Provision," "Consulting/Nominating Provision," "Ownership Provision," and "Known Supporter Provision"; together, the "Challenged Bylaws."

scrutiny implicates a context-specific review of the circumstances surrounding a bylaw's adoption, but a facial challenge asks whether a bylaw cannot operate validly under any circumstance. That initial error caused the Court of Chancery to misallocate the burden to prove facial invalidity from Kellner to AIM and obscured that Kellner offered no evidence to show the Challenged Bylaws cannot operate validly in any circumstance. Absent any actual evidence of facial invalidity, the Court of Chancery compounded those errors by resorting to hypothetical scenarios—some based on misreading—to invalidate the Challenged Bylaws. But because Kellner did not prove facial invalidity, he should not have been granted facial relief.

Third, even if enhanced scrutiny is the correct standard for a facial challenge, the Court of Chancery erroneously concluded that the Challenged Bylaws were disproportionate to the threat posed by clandestine takeover attempts like those already perpetuated by Kellner and his coconspirators. The Court of Chancery's proportionality analysis runs contrary to the Challenged Bylaws' express terms, precedent, and market practice.

The Court should reverse judgment on the Challenged Bylaws and affirm in all other respects.

SUMMARY OF ARGUMENT

1. The Court of Chancery misconstrued Kellner's adoption challenge as a facial challenge. Kellner did not allege that the Amended Bylaws were invalid under every set of circumstances. Instead, Kellner alleged that the Amended Bylaws were "facially invalid" because—under the case's circumstances—the Board's adoption and application of the Amended Bylaws was a breach of fiduciary duty. That is an as-applied challenge, and the Court of Chancery should have treated it as one.

2. The Court of Chancery misapplied the facial validity standard. In reviewing "facial validity," the Court of Chancery subjected AIM's Amended Bylaws to enhanced scrutiny. Enhanced scrutiny governs as-applied challenges. The trial court's error misallocated to the Board the burden to prove facial validity, violating the presumption of validity attached to all bylaws. The trial court's error caused it to grant facial relief to Kellner without any evidence of facial invalidity.

3. Even under enhanced scrutiny, the Court of Chancery erroneously invalidated four of AIM's Amended Bylaws. Adopted with the assistance of counsel, these bylaws protect AIM's information-gathering objective from clandestine takeovers. The bylaws are proportional to that threat because they use industry-standard language comprehensible to any ordinary nominator, and were designed to uncover facts that Kellner's coconspirators had previously concealed. The Court of Chancery's contrary reasoning rests on hypotheticals detached from

the facts, and ignores key evidence of reasonableness of the bylaws' language and the Board's judgment.

4. ***Denied***. The Court of Chancery properly reviewed each of the Amended Bylaws individually because they were not adopted in combination with other defense measures. Under that approach, it properly upheld the Questionnaire and First Contact Provisions because they serve a proper information-gathering objective and were reasonably tailored to protect against threats of manipulative conduct by Kellner and his coconspirators. Kellner's factual disagreements supply no basis for disturbing its judgment.

5. ***Denied***. The Court of Chancery properly found that the Kellner Notice did not comply with the Questionnaire or First-Contact Provisions because it violated their unambiguous terms. Kellner's contrary interpretation is unreasonable, and his factual disagreements hardly warrant reversal.

6. ***Denied***. The Court of Chancery properly invoked the 2016 AAU Provision because invalidation of a bylaw amendment restores the original bylaw. The Court of Chancery properly applied the 2016 AAU Provision because the Kellner Notice did not disclose required arrangements or understandings. Kellner's contrary arguments misconstrue the law and the record to distract from the fact that he neither challenges the adoption of the 2016 AAU Provision nor disputes the Court of Chancery's application of its plain terms.

COUNTERSTATEMENT OF FACTS

This Court "defers to the Court of Chancery's factual findings supported by the record," and "set[s] aside" those "factual findings only if 'they are clearly wrong and the doing of justice requires their overturn.'" *Coster v. UIP Cos.*, 300 A.3d 656, 663 (Del. 2023) ("*Coster.IV.*"). "When there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 663-64. Kellner's statement of facts ignores this standard and extensive evidence that the Board's adoption of the Amended Bylaws and their later application to the Kellner Notice was not unlawful or inequitable.

A. The Parties.

AIM is a publicly traded Delaware pharmaceutical company that develops treatments for immune system disorders, viral diseases, and cancers. Op.3. From 2016 to 2023, AIM's Board comprised three directors: Thomas Equels, Stewart Appelrouth, and Dr. William Mitchell. Op.4. In 2023, AIM added a fourth director, Nancy Bryan. Op.4.

Kellner is an AIM stockholder and retired portfolio manager. Op.9.

B. Kellner Invests In AIM And Joins The Lautz Takeover Attempt.

In early 2021, Kellner purchased AIM stock on the advice of Deutsch, another AIM investor. Op.9. By February 2021, Deutsch was sending Kellner information about AIM from Tudor—a felon convicted of insider trading. Op.9.

Also in 2021, Deutsch began coordinating with Tudor and others to take over AIM. Op.8. In late 2021, Tudor recruited Lautz, Ring, and Chioini for his plan to "oust" the Board. Op.8. Tudor and Deutsch kept in touch about their plan. Op.8 ("[m]y BMY guy [Ring] can be on the AIM [Board]"). Tudor also drafted a notice nominating Ring and Chioini, which Lautz—not Tudor—submitted on April 18, 2022. Op.9; B2; A103. The notice did not mention Tudor. Op.9; A103.

One day later, Deutsch forwarded Kellner an investment analysis about AIM from Tudor. Op.10; B3. Kellner took notes on a printout of that email: "What do we own? 15 to 18%[?]" Op.10; B3. "[W]e" meant Kellner, Tudor, and Deutsch. Op.10; A1623.

Lautz's notice hid Tudor's involvement in the nomination and also did not comply with federal law. Op.11. So, AIM rejected it. Op.11; B7. "It became apparent that a better prepared, advised, and funded effort would be needed." Op.11.

C. Kellner Joins The Jorgl Takeover Attempt.

By April 29, that effort was underway. Op.11; B24. Chioini enlisted Xirinachs—another felon—to fund a second proxy contest. Op.11.[5] Xirinachs has

[5] Xirinachs agreed to split BakerHostetler's fees with Chioini. Op.15. But Xirinachs never paid his share of BakerHostetler's $2 million bill. A1578. If elected, Kellner intended to pick up Xirinachs's and Chioini's tab using AIM funds. Op.80 n.392; A1578; B583-84.

never owned AIM stock. B111.[6] Baker & Hostetler LLP ("BakerHostetler") was engaged to advise on the proxy contest. Op.11. Throughout the spring and summer of 2022, Chioini, Tudor, Xirinachs, and Lautz worked together with BakerHostetler to pull off the nomination. Op.11-12, 14-15; A1684-85; B96-108; B111.

Kellner kept tabs on those efforts through Deutsch and Tudor. Op.11-13. In May, Deutsch forwarded Kellner another investment analysis from Tudor. Again, Kellner took notes on a printout of the email: "[r]place mgt?"; "[w]hy are we picking this fight!" Op.12; B47. In June, Tudor asked Deutsch to email Kellner that he "ha[d] 2 strong candidates to run and get control of the [Board]" and had "spoken with legal counsel." Op.12-13; B48. Also in June, Kellner texted Deutsch that he was "stunned to learn [Tudor] only owned 45,000 shares of [AIM] stock." Op.13-14; B107. Deutsch responded that Tudor remained "all in" on AIM, and "d[idn't] want to let [Kellner] and [Deutsch] down." Op.14; B107-08. Kellner assured Deutsch that they had nothing to worry about. Op.14; B108.

But Kellner, Deutsch, and Tudor did have something to worry about. Later in June, Lautz told Tudor that he was investigated by FINRA and "fired from Merrill for 'selling away.'" Op.14; B50. Fearing his termination would "not be a good look," Lautz dropped out as the nominator. Op.14, 16; B50; B56. Ring also dropped

[6] *Jorgl v. AIM ImmunoTech Inc.*, 2022 WL 16543834 (Del. Ch. 2022) was a joint trial exhibit and is included in AIM's appendix at B111-29.

out. Op.16. In their stead, Chioini recruited Rice as a nominee, and Rice recruited Jorgl to be "the face of the activist." Op.16-17; B56. Jorgl had never heard of AIM and was not an AIM stockholder, so Rice and Xirinachs helped him buy AIM shares and move them into record name. Op.17. And Chioini assured Jorgl that he would not be responsible for BakerHostetler's fees. Op.17; B65. All the while, Kellner kept tabs. *E.g.*, B57 (emailing Tudor and Deutsch to request call about "AIM situation"); B58 (scheduling call for June 29).

On July 8, Jorgl nominated Chioini and Rice to AIM's Board. Op.17. The notice did not mention Tudor or Xirinachs. B66. Xirinachs nevertheless called Jorgl's slate "our slate" in an email to Chioini. B81 ("The way I hope this all plays out is we get control of AIM.").[7] Two days earlier, Tudor had called Kellner directly about the nomination. Op.17. Kellner took notes: "Franz [Tudor]"—*not* Jorgl—"submitted 2 new directors" for election. Op.17; B79.

On July 19, AIM rejected Jorgl's notice because it did not comply with AIM's bylaws or applicable law. Op.18. On July 29, Jorgl sued in the Court of Chancery to challenge the rejection of his notice. Op.18; B116.

[7] Xirinachs's involvement was not publicly revealed until after AIM uncovered Xirinachs's role during discovery in *Jorgl*. B59 (Jorgl's BakerHostetler retention letter listing Xirinachs as subject of BakerHostetler's conflicts check); B714; B717.

While Jorgl's lawsuit unfolded, on August 23, Kellner drafted an update to "The Beta Fund Investment Club"—an investment fund comprised of his fraternity brothers. Op.19; A152. Kellner manages the Club's AIM stock holdings. Op.19. Kellner wrote: "[a]couple of weeks ago, Todd Deutsch, who is known to several of you, and a gentleman named Franz Tudor, commenced a proxy to replace all of the directors and ultimately management [of AIM]. ***I am now a party to that proxy fight.***" Op.19-20; A154.[8] Kellner also "coordinat[ed] a breakfast" with Tudor, Jorgl, Chioini, and Rice for AIM's upcoming director meeting. Op.20; B110.

The Court of Chancery found Jorgl's notice was "at best—misleading" because "[o]ther than describing a potential agreement for Chioini and Rice to reimburse certain costs, Jorgl did not mention any arrangements or understandings with Tudor or Xirinachs in his nomination notice." B111-12 ("[D]iscovery indicated that a web of individuals had worked together to bring Jorgl's nomination forward. The facts read like a game of telephone….").

In 2022, AIM's stockholders elected Equels, Mitchell, and Appelrouth.

[8] At trial, Kellner testified "that the 'proxy fight' referenced him voting his shares for the 'gold card slate' at the annual meeting." Op.20 n.116. But "[t]hat testimony is inconsistent with the record, as no gold card existed until September 15 when Jorgl filed his preliminary proxy statement." Op.20 n.116. After Jorgl lost his lawsuit, Kellner revised the draft to conceal Tudor's and Deutsch's involvement in the Jorgl nomination. Op.24; A162 ("Two other investors are joining me in a proxy battle to replace an inept management team. More on that as time progresses.").

Op.20; A143. "[F]rustrated and angry," Kellner texted Deutsch and Tudor to "get a sense as to what Jorgl and his team [wa]s up to" and discuss "next steps." Op.20-21; A145. Kellner "hop[ed] this thing w[ould] still move forward and Jorgl [wa]s fully committed." Op.21; A145. He requested a call with "the Jorgl team and [Kellner, Tudor, and Deutsch] to ascertain what the next steps are." Op.21; A145. The same day, Chioini told their proxy solicitor: "We do intend to contest next year and will submit our nomination well in advance of the deadline to avert any antics like this year." Op.21; A146.

D. Kellner And His Coconspirators Immediately Begin Planning A 2023 Proxy Contest.

On November 9, the Board announced its intent "to add two directors who bring diversity and additional biotechnology commercialization experience." Op.21-22; A148. In response, Chioini directed John Harrington of BakerHostetler to tell AIM that he and Rice were still interested in being directors. Op.22. So, on November 13, Harrington emailed the Board "on behalf of [his] clients." Op.22. Harrington "recommend[ed] that [AIM] appoint Mr. Chioini and Mr. Rice to the Board and appropriate committees promptly." Op.22; A150. Then, at Chioini's instruction, Harrington followed up. Op.23. On December 5, he called AIM's Delaware counsel, Michael Pittenger of Potter Anderson & Corroon LLP ("Potter"). Op.23. Harrington proffered that Chioini and Rice wanted to "avoid another proxy contest" and were open to placing "mutually agreeable directors" on the Board.

Op.23; A160. But, he warned, Chioini and Rice were "impatient" and "ready to come out guns blazing" and "better organized next year." Op.23; A160.

On December 14, Chioini texted Harrington that he "spoke with Kellner last week." Op.23; A160.2. Chioini confirmed that Kellner was "very interested in working with [them] to remove these guys" and "want[ed] to keep in touch." Op.23; A160.2.

In 2023, Kellner resolved to continue the "AIM game plan," texting Deutsch it was time to "get this ball rolling!![hands clapping emoji; smiley emoji]." Op.24; B131. On February 15, Kellner responded to an email from BakerHostetler regarding "AIM Immunotech—Question re Share Ownership." Op.24; A172. Kellner's response transmitted his family's AIM holdings as of February 14. Op.24.

E. The Board Amends AIM's Advance Notice Bylaws With The Help Of Counsel.

While Kellner plotted, the Board was considering amending AIM's bylaws. Op.25. The Board sought to update its bylaws for many reasons. For starters, AIM had experienced "significant activist activity during 2022," involving "efforts to conceal who was supporting and who was funding the nomination efforts and to conceal the group's plans for the Company." Op.25. AIM also needed "'to update and modernize certain aspects' of the bylaws" to cohere with the DGCL and the SEC's universal proxy rules. Op.25; A1708; A1785-86; A267. So, in January 2023, AIM asked Potter to prepare proposed amended bylaws. A1785.

Potter drafted proposed amended bylaws, which it shared with the Board on March 17. Potter also prepared a memorandum summarizing its proposed changes and the fiduciary duties implicated by the Board's decision to amend the bylaws. Op.25; B132; A1786. Each director read the memorandum and the draft amendments. B145; A269; A1786-87; A1710; A1779; A1766.

On March 20, the Board convened to discuss the draft amendments. Op.25; A266-69. During the meeting, the Board considered AIM's experience with the misleading tactics deployed during the Jorgl nomination. A1787. The Board asked questions and discussed changes to the draft. Op.26. Equels proposed two specific changes—*one*, specifying a 24-month lookback period for AAUs and, *two*, requiring the full legal names of individuals involved with a nomination. The Board concluded that amended bylaws could "better ensure that [all] stockholders seeking to propose business or make nominations cannot attempt to engage in the types of manipulative, misleading, and improper conduct" deployed in 2022. Op.25-26; A267; A1786-87.

Counsel implemented the requested changes and, on March 28, recirculated a revised draft. Op.26. The Board determined that the revisions "clarified and enhanced the rules and procedures for providing advance notice of stockholder proposals and nominations for regulating the conduct of stockholder meetings." Op.26. Having been instructed by Potter on its fiduciary duties, the Board further

determined that the draft bylaws "were not 'preclusive or unreasonably restrictive' of stockholders' ability to make proposals or nominations." Op.26. Thereafter, the Board unanimously adopted the amendments.

The amendments contain advance notice provisions. Each provision requires nominating stockholders to disclose specific information so that AIM's Board may "knowledg[e]ably make recommendations about nominees" and AIM's stockholders may "cast well-informed votes." Op.39 (quoting *Strategic Inv. Opportunities LLC v. Lee Enters., Inc.*, 2022 WL 453607, at *9 (Del. Ch. 2022)). This lawsuit concerns six of those provisions (the "Amended Bylaws"):

- ***Questionnaire Provision*:** The Questionnaire Provision requires each nominee to "tru[thfully] and correct[ly]" complete and sign AIM's director and officer questionnaire. A410-11 (§§1.4(c)(1)(L), 1.4(e)). It also requires AIM to provide the director and officer questionnaire within five days of a stockholder's request for the questionnaire. A410-11.

- ***First Contact Provision*:** The First Contact Provision requires each nominee to disclose the dates of their first contact with any stockholder or Stockholder Associated Person ("SAP") regarding AIM and nominations to the Board. A409 (§§1.4(c)(1)(H)).

- ***2023 AAU Provision*:** The 2023 AAU Provision requires disclosure of AAUs between the nominating stockholder, the nominees, or other stockholders or SAPs related to nominations to the Board, including AAUs concerning nomination funding, within the last 24 months. A409 (§1.4(c)(1)(D)).

- ***Consulting/Nomination Provision*:** The Consulting/Nomination Provision requires each nominee to identify potential conflicts of interest by disclosing their AAUs with the nominating stockholder or any SAP regarding consulting, investment advice, or a previous

nomination for a publicly traded company within the last ten years. A409 (§1.4(c)(1)(E)).

- ***Known Supporter Provision*:** The Known Supporter Provision requires the nominating stockholder and nominees to list all known supporters of the nomination, and, to the extent known, the supporters' beneficial or record ownership of AIM stock. A411 (§1.4(c)(4)).

- ***Ownership Provision***: The Ownership Provision requires the nominating stockholder to disclose their ownership in AIM stock, including beneficial, synthetic, derivative, and short positions and any direct or indirect interest in AIM's principal competitors. A411 (§1.4(c)(3)(B)).

In adopting each of these six Amended Bylaw Provisions, "AIM's Board had an objective of obtaining transparency from a stockholder seeking to nominate director candidates." Op.47. The Board also "sought to prevent 'the types of manipulative, misleading, and improper conduct' experienced in 2022 from happening again." Op.47-48.

Expert testimony at trial confirmed that the Amended Bylaws are "consistent with market practice." B655, B658-59 (reviewing "the advance notice bylaws of a select group of firms"; "show[ing] that those firms' bylaws are in line with the broader market"; and "compar[ing] AIM's advance notice bylaws to these general market patterns"); A1805.[9] Consistent therewith, the Court of Chancery found that

[9] Rock's empirical analysis was unrebutted by Kellner's expert, Andrew Freedman. At trial, Freedman admitted that he did not base his analysis of whether a bylaw was state-of-the-art or market on any objective evidence or framework, but rather on his subjective experience representing activist shareholders. A1824 ("it is not necessary…to rely on empirical surveys to conclude that AIM's advance notice

"[n]umerous public companies have amended their advance notice bylaws to account for [changes to SEC Rule 14a-19]." Op.41. When doing so, many of those companies also took "the opportunity to revisit and enhance other advance notice requirements." Op.41.

F. Kellner Fronts The Kellner Takeover Attempt.

In the spring of 2023, Kellner, Deutsch, and Chioini finalized their third proxy contest. Op.27. Kellner moved the ball forward by asking Deutsch to "[p]lease reach out [to Chioini] to hear what his plan and that of Teresa [Goody Guillén of BakerHostetler] is regarding AIM." Op.27; A524. Kellner implored: "Time is becoming critical in moving this ball forward. Let's please talk later today." Op.27-28. Shortly thereafter, Kellner alerted Chioini that "Todd will call you momentarily." Op.28; B269.

The "plan [of BakerHostetler]" was revealed on June 15. A524; B272. Goody Guillén emailed Kellner's personal lawyer a financial breakdown of what a proxy contest would cost and set out possible outcomes and next steps BakerHostetler could take on Kellner's behalf. Op.28; B272. Initially, BakerHostetler advised "not

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provisions are…neither commonplace or market"). Freedman, who only represents activists, "could not identify a single set of advance notice bylaws that [he] believe[s] to be nonobjectionable." A1823. And despite representing that he "conducted [his] own review," Freedman admitted he did not review any of the bylaws in Rock's set or actually write his report. A1824.

to have the shares transferred into [Kellner's] name until we have all our ducks in a row lined up." Op.28; B272. BakerHostetler also recommended Kellner shop for a sympathetic Vice Chancellor so that "[i]f [his] Notice is denied and it is litigated," Kellner's lawsuit would not be assigned to "Vice Chancellor [Will] who we had last year (who favors defendants, not us)." B273 (emphases omitted). "At the same time," BakerHostetler would "draft the [n]otice of intent to nominate directors at the annual meeting," which it advised "is very detailed and comprehensive." B273 (emphases omitted).

After learning BakerHostetler's plan, Kellner chartered a private jet to take him, Chioini, Deutsch, Rice, and his personal lawyer to a meeting at BakerHostetler's Washington, DC office. Op.28; B275. That meeting was held on July 11. Kellner, Chioini, Deutsch, and Kellner's counsel attended in person; Rice joined by video. Op.28-29; A1666-67; B275. The meeting went well. Three days later, on July 14, Kellner texted Deutsch and Chioini that "he was willing to risk more and 'commit more dollars proportionally to AIM going forward.'" Op.29; B278. Kellner promised to "commit [a] million dollars." Op.29. And he threw in a sweetener: if Deutsch and Chioini "committed $150,000," Kellner would "commit the next $200k up to $1.5 million of legal cost[s]." Op.29; B278.

Kellner, Deutsch, and Chioini signed a final engagement letter with BakerHostetler on July 17. Op.29. Then, they emerged from the shadows. On July

24, Harrington requested AIM's director and officer questionnaire. Op.29. AIM revised its director and officer questionnaire to cohere to the Amended Bylaws and sent it to Harrington on July 31. Op.30. In the meantime, on July 27, Kellner filed a Schedule 13D disclosure that he "intend[ed] to provide notice to [AIM] of his intent to nominate directors for election at the 2023 annual meeting of stockholders." Op.30.

G. The Board Validly Rejects The Kellner Notice.

On the eve of the nomination deadline (August 3, 2023), Kellner submitted the Kellner Notice. Op.30. The Kellner Notice purported to nominate Kellner, Chioini, and Deutsch as candidates to the Board. Op.30; B321; A683. The Board discussed the Kellner Notice at three separate meetings in August. Op.31. Counsel advised AIM at each meeting. A1047; B483; B577-78. The Board first met on August 8. Op.31; A1047. The Board discussed how "'protecting stockholders was paramount' in 'view of the troubling background'—namely the failed 2022 nomination, the 'guns blazing call' in December 2022, and overlapping persons"—including felons—"present in the current and prior efforts." Op.32; A1049. The Board also considered that "Kellner, Deutsch, and Chioini intended to seek 'reimbursement from AIM for their expenses relating to the 2023 Annual Meeting'" and expenses "related to the 2022 Attempt." Op.32. Ultimately, the Board decided

to retain Potter and national counsel, Kirkland & Ellis LLP ("Kirkland"), to assist its evaluation of the Kellner Notice. Op.32.

The Board met again on August 21 and August 22. Op.33-34. Lawyers from Potter and Kirkland were present. Op.33-34; B577. Counsel advised that the Kellner Notice contained numerous deficiencies. Op.33-34; B566-74; B578; A1793. Counsel also advised that the Board had a fiduciary duty to determine whether to accept or reject the Kellner Notice even if it did not comply with AIM's bylaws. A1793-94. The Board decided to take additional time to consider the Kellner Notice and counsel's presentations. Op.34-35. When the Board reconvened on August 22, it "unanimously approved resolutions rejecting the Kellner Notice." Op.34-35. The Board "observed that the notice was 'designed to omit and conceal information and to provide incomplete or misleading disclosures that destabilize the important disclosure function that [AIM's] Advance Notice Provisions were designed to serve.'" Op.34-35. To that end, the Board concluded that accepting the Kellner Notice, notwithstanding its deficiencies, would harm stockholders. Op.34; B578; B585-86.

The Board explained the basis for its rejection in an August 23 letter. Op.35; A1055. The 14-page letter detailed why the Kellner Notice did not comply with AIM's bylaws. Especially pertinent, the Board rejected the Kellner Notice for

noncompliance with the Questionnaire Provision, First Contact Provision, and 2023 AAU Provision:

- ***Questionnaire Provision*:** AIM's director and officer questionnaire asks whether nominees have received adverse recommendations from proxy advisory firms in connection with past director service. A1061. Nominees must answer "yes" or "no." A1061. Kellner, Deutsch, and Chioini each answered "no" even though they all have received withhold recommendations from proxy advisory firms. A1061-62.[10] The Board explained that "these blatantly false disclosures appear to be part of a pattern of false, misleading, or incomplete disclosures intended to mislead stockholders and raise the question of what other information furnished in the Notice may be false or otherwise misleading." A1062.

- ***First Contact Provision*:** The Kellner Notice did not disclose the specific dates of first contact between Kellner, Deutsch, and Chioini—on one hand—and stockholders or SAPs—on the other. A1064. For example, the Kellner Notice did not disclose the date Kellner and Deutsch were first in contact regarding nominations to the Board. A1064. Nor did the Kellner Notice disclose dates of first contact between Kellner and Tudor or Deutsch and Tudor. A1064. The Board explained that "[t]hrough text messages, emails and/or call records, many of the dates of first contact would have been easily discernable, and yet there is no responsive disclosure provided in respect to this requirement nor any effort to explain why specific dates of first contact could not be discerned with any certainty." A1064.

- ***2023 AAU Provision*:** The Kellner Notice did not disclose AAUs related to the Lautz, Jorgl, and Kellner nominations. A1057-61. For example, it did not disclose AAUs related to Tudor's or Xirinachs's role in the Jorgl nomination despite the Court of Chancery's finding that, "Tudor and Xirinachs were working with Chioini and others to devise legal strategies and formulate a plan for the proxy contest." A1057-59. As another example, the Kellner Notice misrepresented that

[10] When "a board uses a plurality voting standard, a 'withhold' recommendation is [an] adverse recommendation." Op.77 n.379.

> Kellner and Deutsch did not have AAUs with Chioini before July 2023 despite their counsels' December 2022 threat to "come out guns blazing." A1059-60. The Board explained that this failure "to provide truthful and full disclosure" of AAUs "appears designed to mislead AIM's stockholders and deprive them of information needed to make fully informed decisions should [Kellner, Deutsch, and Chioini] stand for election." A1061.

H. This Litigation.

On August 25, Kellner sued AIM and the Board in the Court of Chancery. Op.36. Kellner's Complaint advanced three counts. Count I is styled as a facial challenge to the Board's adoption of the Amended Bylaws. B630. It alleges that the Amended Bylaws "were amended for the improper purpose[s]" of "entrenching the Board," "preventing AIM stockholders from nominating candidates for the Board," and "targeting specific groups." B629. It alleges that "the Bylaw Amendments were designed to target[] Plaintiff and his nominees." B629-30. And it alleges that "[e]nhanced scrutiny is the appropriate standard of review to apply to the Defendants' conduct" and that enhanced scrutiny "requires a context-specific application of the directors' duties of loyalty, good faith, and care." B629. Count III also challenges the adoption of the Amended Bylaws. It alleges that the Board's adoption of the Amended Bylaws "breached [its] fiduciary duties" of "care, loyalty, and good faith" because the Amended Bylaws were adopted for the "inequitable purposes" of "targeting specific groups" and "further entrenching the Board's power." B634. Count II and part of Count III allege that AIM's application of the

Amended Bylaws to reject the Kellner Notice was illegal and inequitable. B632; B634.

Vice Chancellor Will held trial from October 30 to November 1, 2023. Op.36. Post-trial argument was heard on November 21, 2023. Op.36.

I. The Opinion And Post-Trial Proceedings.

The Court of Chancery's December 28, 2023 opinion construed the Complaint as "challeng[ing] both the Board's adoption and application of the Amended Bylaws." Op.37. Its analysis therefore proceeded in two steps.

First, it "assess[ed] whether the Amended Bylaws at issue are facially valid." Op.38. In doing so, the Court of Chancery selected "[e]nhanced scrutiny" to "guide[] [its] assessment of this claim." Op.43. Assessing the first prong of the enhanced scrutiny analysis—reasonableness—the Court of Chancery found that "[t]he Board made a reasonable assessment, in reliance on the advice of counsel" that its information-gathering "objective of obtaining transparency from a stockholder seeking to nominate director candidates" was threatened by Kellner and his coconspirators' prior "manipulative, misleading, and improper conduct." Op.47-48. Turning to the second prong—proportionality—the Court of Chancery explained that the Amended Bylaws were intended to protect that proper corporate objective. Op.50, 57, 59, 63, 65, 66. The Court of Chancery upheld the Questionnaire and First Contact Provisions as reasonably tailored to further AIM's

information-gathering objective. Op.64-66. But it facially invalidated the Challenged Bylaws. Op.50-64.

Second, the Court of Chancery "consider[ed] whether Kellner satisfied the relevant advance notice bylaws and whether the Board acted reasonably in rejecting the Kellner Notice." Op.38. It found that the Kellner Notice did not comply with the Questionnaire and First Contact Provisions. Op.76-84. Additionally, after invalidating the 2023 AAU Provision, the Court of Chancery invoked and applied the 2016 AAU Provision. Op.70-76. It found that the Kellner Notice did not comply with that provision either. Op.71-76. On the equities, the Court of Chancery explained that the Board did not breach its fiduciary duties by rejecting the Kellner Notice. Op.79-85. Rather, it found Kellner and his "group—not the Board—are 'the ones engaging in manipulative conduct.'" Op.85.

The Court of Chancery entered final judgment on January 4, 2023. Ex.B. Kellner's appeal followed.[11]

[11] Kellner unsuccessfully sought an injunction pending appeal in both the Court of Chancery and this Court. Dkt.12.

ARGUMENT

I. THE COURT OF CHANCERY MISCONSTRUED KELLNER'S AS-APPLIED CHALLENGE AS A FACIAL CHALLENGE.

A. Question Presented.

Whether the Court of Chancery misconstrued Count I as a facial challenge when Count I expressly alleges that the Challenged Bylaws were adopted and used to "target" Kellner and his nominees. This issue was preserved for appeal. *E.g.*, A2028-29.

B. Scope Of Review.

This Court "reviews *de novo* the trial court's formulation and application of legal principles." *Reddy v. MBKS Co.*, 945 A.2d 1080, 1085 (Del. 2008). This review encompasses whether "a trial court applied an incorrect legal standard." *Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005).

C. Merits Of Argument.

The Court of Chancery facially invalidated the Challenged Bylaws. Op.50-64. But Kellner did not actually raise—much less prove—a facial validity challenge. So, this Court should reverse the Court of Chancery's ruling.

The distinction between facial and as-applied challenges is "well-understood." *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 287 (Del. 2016). "A facial challenge alleges that [an act] is not valid" in every circumstance. *Del. Bd. of Med. Licensure & Discipline v. Grossinger*, 224 A.3d 939, 956 (Del. 2020). It does not

concern the "circumstances of [a particular] case." *Id.* As a result, a stockholder cannot bring a facial challenge based on a bylaw's "adoption" or "use." *Salzberg v. Sciabacucchi*, 227 A.3d 102, 135 (Del. 2020) (challenge to the "enforcement" of a corporate bylaw tacitly concedes that the bylaw is "otherwise facially valid"). Instead, adoption and use challenges are reserved for an "extant controversy in which…[the] bylaw is being *applied*." *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 949 (Del. Ch. 2013) (emphasis added). Such "as-applied challenge[s]" include "whether the directors' [adoption or] use of the bylaws is a breach of fiduciary duty." *Id.* at 959.

That is what Kellner alleged. Count I alleged that the Amended Bylaws were "facially invalid" because the Board improperly "adopted" them to "target" his Notice. B628-30. This theory allegedly called for a "context-specific application" of "enhanced scrutiny" to "the directors' duties of loyalty, good faith, and care." B629. And it conceded that a "justiciable controversy" existed over the "timing, nature, context, and manner of the [Amended Bylaws'] adoption" and the Board's use of them to "fend off" the Notice. B629-30. Kellner's "real-world dispute[]" over the Board's adoption and use of the Amended Bylaws was not a facial challenge. *Boilermakers*, 73 A.3d at 960-63; *see Salzberg*, 227 A.3d at 135.

Kellner knows that. In his "as-applied" claims, Kellner alleged that the Board: (1) improperly "applied" the Amended Bylaws to reject his notice, B631 (Count II);

and (2) breached its fiduciary duties by "adopting" them, B634 (Count III). Nowhere in Count I did Kellner allege that the Amended Bylaws were improper "subject matters of bylaws as defined by the DGCL," *Boilermakers*, 73 A.3d at 949, as any facial challenger invariably "must," *Salzberg*, 227 A.3d at 113. Nor did Count I allege that the Amended Bylaws "cannot operate lawfully or equitably *under any circumstances*." *Salzberg*, 227 A.3d at 113. Instead, Count I alleged that the Amended Bylaws cannot operate validly under *this case's* circumstances. *E.g.*, B630 (The Amended Bylaws "target[] Kellner and his nominees, [and] *on their face* prohibit an entire group of qualified candidates from being nominated and elected to the Board." (emphasis added)). The Court of Chancery should not have reached a "facial challenge" that did not exist.

To conclude otherwise, the Court of Chancery credited Kellner's characterization of Count I as a facial challenge. But "label[s]" do not control. *Burroughs v. State*, 304 A.3d 530, 540 n.39 (Del. 2023). Indeed, Count I is based on the Declaratory Judgment Act, which "merely offers a procedural means for securing judicial relief." *250 Exec., LLC v. Christina Sch. Dist.*, 2022 WL 588078, at *4 (Del. Ch. 2022); B628-34. The Court of Chancery therefore should have looked to the underlying "substance" of Count I, *Enzolytics, Inc. v. Empire Stock Transfer Inc.*, 2023 WL 2543952, at *3 n.4 (Del. Ch. 2023), and determined that it "really" was an as-applied challenge, *Candlewood Timber Gp., LLC v. Pan Am.*

Energy, LLC, 859 A.2d 989, 997 (Del. 2004) ("[T]he Court must look beyond the remedies nominally being sought, and focus upon…what the plaintiff really seeks to gain by bringing his [] claim.").

Facial invalidation "cast[s] a cloud" over the bylaws of public corporations and creates market-wide uncertainty. *Boilermakers*, 73 A.3d at 938. Kellner did not bring a facial relief claim, so the Court of Chancery should not have granted "blanket" facial relief "by judicial fiat." *Hazout*, 134 A.3d at 286-87 & nn.43-44.

II. THE COURT OF CHANCERY MISAPPLIED THE FACIAL VALIDITY STANDARD.

A. Question Presented.

Whether the Court of Chancery committed legal error by applying enhanced scrutiny to Kellner's "facial challenge," and in doing so, shifting the burden to prove facial validity to the Board and granting Kellner facial relief. This issue was preserved for appeal. *E.g.*, A2026.

B. Scope Of Review.

This Court reviews "[t]he construction or interpretation" of bylaws *de novo*. *BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund*, 224 A.3d 964, 975 (Del. 2020). Necessarily, then, facial challenges to bylaws are reviewed *de novo*. *Salzberg*, 227 A.3d at 112. "The proper allocation of the burden of proof" is likewise reviewed *de novo*, *State Farm Mut. Auto. Ins. Co. v. Spine Care Del., LLC*,

238 A.3d 850, 857 (Del. 2020), as are legal conclusions that are embedded in the lower court's grant of relief, *Saba*, 224 at 975.

C. Merits Of Argument.

Kellner did not raise a facial challenge. But even if he did, the Court of Chancery reviewed it using the wrong standard. The trial court used an *as-applied standard* to fashion *facial relief*. That conceptual mismatch violated the presumption of bylaw validity, misallocated the burden of proof, and granted Kellner facial relief without any evidence that the Challenged Bylaws are invalid under every circumstance. Those errors warrant reversal.

"The bylaws of a corporation are *presumed* to be valid." *Franz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985) (emphasis added). So, the burden is on the facial challenger—not the Board—to prove facial invalidity. *Boilermakers*, 73 A.3d at 948-49. Facial relief is unavailable for "some future hypothetical application of the bylaws that might be impermissible." *Id.* at 949. Rather, bylaws are facially invalid only if they "cannot operate [validly] *under any circumstances*." *Salzberg*, 227 A.3d at 113.

The Court of Chancery disregarded all these principles. It began by reviewing the Challenged Bylaws' "facial validity" under enhanced scrutiny. Op.43-68. But enhanced scrutiny involves a context-specific review of the circumstances surrounding a bylaw's adoption and use. *Coster.IV*, 300 A.3d at 671. A facial

challenge does not. *Salzberg*, 227 A.3d at 135 ("Given that we are addressing a facial challenge, we are not considering…contextual situations regarding the adoption or application of [the bylaws]. Such 'as-applied' challenges…are [not] implicated."). The analysis was wrong from the start.

This error led to another. The Court of Chancery put "the burden of proof" on the Board to demonstrate facial validity. Op.45. But again, corporate bylaws "are presumed to be valid." *Frantz Mfg.*, 501 A.2d at 407. The Court of Chancery faulted the Board for adducing "no evidence" of facial validity even though the Board had no duty to introduce that evidence in the first place. Op.55; *see Solak v. Sarowitz*, 153 A.3d 729, 739-40 & n.37 (Del. Ch. 2016) (rejecting effort by facial challenger to shift the burden of proof to the company).

Compounding these errors, the Court of Chancery impermissibly deployed "hypothetical and imagined" scenarios to facially invalidate the Challenged Bylaws. *Boilermakers*, 73 A.3d at 963; *Openwave Sys. v. Harbinger Cap. Partners Master Fund I*, 924 A.2d 228, 240 (Del. Ch. 2007) ("Delaware law does not permit [facial] challenges to bylaws based on hypothetical abuses."). Those hypotheticals included that:

- ***2023 AAU Provision*:** The provision might be violated by not disclosing that "the mother of an associate of a beneficial owner had an agreement with the estranged sister of a nominee to finance the nomination of a third-party nominee to the Board." Op.54-55.

- ***First Contact Provision*:** The provision might be violated by failing to disclose a nine-year-old understanding between the "spouse of an associate of a nominee" and nominator regarding the value of "Apple shares." Op.57.

- ***Ownership Provision*:** The provision might be violated by failing to disclose "the entitlement of [a nominator's] mother's second cousin" to performance-related fees. Op.63-64

- ***Known Supporter Provision*:** The provision might be violated by failing to disclose that an "associate's mother…learned that an AIM stockholder…attend[ed] her church [to] offer[] prayers for the proxy contest to succeed." Op.59.

That was error. Instead of "wad[ing]" into these "imagined situations involving multiple 'ifs,'" *Boilermakers*, 73 A.3d at 962, the Court of Chancery should have considered whether the Challenged Bylaws "address proper subject matters" of bylaws and "can never operate consistently with law," *Salzberg*, 227 A.3d at 113. Its failure to do so was additional error. *See ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014) ("That, under some circumstances, a bylaw might…operate unlawfully is not a ground for finding it facially invalid.").

With those errors corrected, the record reveals that Kellner was the one who did not meet his burden. He introduced "no evidence" of facial invalidity. Op.55. Kellner only sought to prove under *Unocal* that the Board acted unreasonably in adopting the Amended Bylaws. *See, e.g.*, A1946-50. As explained, though, reasonableness is not a facial validity standard. *Compare Salzberg*, 227 A.3d at 135 (facial challenge not cognizable if based on a claim that the corporate bylaw is

"unreasonable" or "overreaching"), *with* Op.59 (facially invalidating Known Supporter Provision because the Board "overreached"). Because Kellner did not bother to prove facial invalidity, the Court should not have granted him facial relief. *Hazout*, 134 A.3d at 286-87 ("[C]ourts are not authorized to strike provisions of a [corporate bylaw] simply because that will make it easier" to resolve a claim.). This Court should reverse and direct judgment against Kellner's "facial challenge."

III. THE COURT OF CHANCERY ERRED BY INVALIDATING THE CHALLENGED BYLAWS UNDER ENHANCED SCRUTINY.

A. Question Presented.

Whether the Court of Chancery erred by invalidating the Challenged Bylaws under enhanced scrutiny. This issue was preserved for appeal. A2028-33.

B. Scope Of Review.

"This Court reviews the Court of Chancery's legal conclusions *de novo*. *Coster.IV*, 300 A.3d at 663. And this Court "defers to…factual findings" unless they are clearly wrong" or "justice requires their overturn." *Id.*

C. Merits Of Argument.

The Court of Chancery improperly applied enhanced scrutiny to facially invalidate the Challenged Bylaws. But even if enhanced scrutiny applied to a facial challenge, the Challenged Bylaws would satisfy it. The Court of Chancery correctly concluded the Board adopted the Challenged Bylaws to "obtain[] transparency from [stockholders] seeking to nominate director candidates" after it "endured[ed] a proxy

contest where it seemed that the nominating stockholder was a façade concealing the identities of individuals responsible for the effort." Op.46-48. And the Challenged Bylaws are proportional because they reflect a logical approach, developed in good faith with counsel, "to prevent 'the types of manipulative, misleading, and improper conduct experienced in 2022 from happening again." Op.46-48.

Proportionality is "fundamentally" a question of "reasonableness." *Coster.IV*, 300 A.3d at 671. A response is reasonable if it reflects "a logical…approach [to] advancing a proper objective" under the circumstances. *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 598-99 (Del. Ch. 2010).

1. The 2023 AAU Provision Is Proportional.

The Court of Chancery found that the 2023 AAU Provision "protect[s] AIM and its stockholders against potentially abusive and deceptive practices by activists," and tied that finding to AIM's past "experience in the 2022 proxy contest where a nominating stockholder…evaded disclosure requirements." Op.51-52. The Court of Chancery also found that the Board reasonably relied on the advice of its counsel in adopting the 2023 AAU Provision. Op.47-48. The Board's good faith reliance on counsel, coupled with a legitimate objective, should have "materially enhanced" the validity of the 2023 AAU Provision. *Selectica, Inc. v. Versata Enters. Inc.*, 2010 WL 703062, at *12 (Del. Ch. 2010), *aff'd*, 5 A.3d 586 (Del. 2010). It also should have ended the analysis. *Dollar Thrifty*, 14 A.3d at 600 ("[W]hen the record reveals

no basis to question the board's good faith desire to attain the proper end, the court will be more likely to defer to the board's judgment about the means to get there."). Despite these findings, the Court of Chancery concluded that the 2023 AAU Provision went "off the rails" because its new terms "form[ed] an ill-defined web of disclosure requirements" that made the provision "overbroad, unworkable, and ripe for subjective interpretation." Op.54, 56. There are several problems with this conclusion.

To begin, the Court of Chancery did *not* find the 2023 AAU Provision to be ambiguous. Op.71; *see also Levitt Corp. v. Office Depot, Inc.*, 2008 WL 1724244, at *5 (Del. Ch. 2008) (breadth does not equate to ambiguity). That means the 2023 AAU Provision should have been "construed as it is written." *Hill Int'l, Inc. v. Opportunity P'rs L.P.*, 119 A.3d 30, 38 (Del. 2015). But the trial court's focus on extreme hypothetical scenarios caused it to misconstrue the provision to require disclosure of AAUs between persons unknown to the nominator or nominees. As written, the provision always anchors disclosure to the nominator or nominees, ensuring they are not required to disclose information they do not know or cannot obtain. Indeed, Kellner never argued that he found the 2023 AAU Provision "unworkable." *E.g.*, *Salzberg*, 227 A.3d at 135 (no basis to invalidate bylaw where it can be applied without confusion to real-world scenarios); *Openwave*, 924 A.2d at 240. To the contrary, he purported to disclose his AAUs. A687-92. The Board

rejected the Notice, with the advice of counsel, because it "omitted and misrepresented" AAUs, including AAUs regarding potential nominations prior to July 2023. Op.76; A1059-61; *see Paragon Techs., Inc. v. Cryan*, 2023 WL 8269200, at *14 (Del. Ch. 2023) ("A bylaw mandating the accuracy of a nomination notice bears a facial link to the goals of maintaining orderly elections and ensuring appropriate disclosure.").[12]

Finally, the Court of Chancery erred in finding that the provision improperly required disclosure of "multi-level relationships." Op.56. Delaware law expressly permits companies to tailor bylaws to address company-specific issues. *See Salzberg*, 227 A.3d at 116 ("the DGCL allows immense freedom for businesses to adopt the most appropriate terms for the organization, finance, and governance of their enterprise"). That is exactly what the Board did here: it tailored this provision to require additional disclosure of multi-level relationships because AIM had just experienced a takeover attempt where an activist used multi-level relationships to obscure and evade disclosure. Op.25-26. That is a "logical" approach in AIM's case. *Dollar Thrifty*, 14 A.3d at 598.

[12] The possibility of a hypothetical coming to pass in the future is precisely why adoption is not a basis for facial invalidation. *See Salzburg*, 227 A.3d at 135; *Boilermakers*, 73 A.3d at 963.

The 2023 AAU Provision was adopted on the advice of counsel and was proportional to the legitimate threat posed to AIM. The Board's adoption of the 2023 AAU Provision was reasonable.

2. The Consulting/Nomination Provision Is Proportional.

The Consulting/Nomination Provision "requires disclosure of AAUs between the nominating stockholder or an SAP, on one hand, and any stockholder nominee, on the other hand, regarding…a previous nomination for a publicly traded company within the last ten years." Op.56-57. Using an improper hypothetical involving "the *spouse* of an associate of a nominee" and "the nominating stockholder," the Court of Chancery found the provision disproportionate because it imposes "ambiguous requirements across a lengthy term," including by requiring disclosure of AAUs with stockholders at "other publicly traded companies." Op.57 (emphasis added). It unambiguously does not.

Read correctly, the provision only requires disclosure of AAUs the nominee has with the AIM stockholder or SAP. Op.56 n.302. So, as written, the answer to the Court of Chancery's hypothetical is "no" because the provision only covers AAUs involving the *nominee*. The purpose of the provision and its reference to other public companies is to uncover whether an AIM nominee has been serially nominated by a particular stockholder in elections to other public boards or has otherwise benefitted from arrangements to evaluate investments over the past

decade. Kellner has never explained how disclosing whether he previously supported his nominee's election to a different public board would preclude him from nominating that same candidate to AIM's board. "Such information would also be important to stockholders' consideration of a nominator or nominees' motivations" for endorsing each other now and in the past. Op.51.

3. The Ownership Provision Is Proportional.

The Ownership Provision is designed to "require[] the disclosure of not only beneficial ownership but also synthetic and derivative ownership, short interests, and hedging arrangements" as to AIM and its principal competitors. Op.63; A1790. The court found this "very common," "perfectly legitimate," and "a means to close loopholes in Section 13(d) involving synthetic equity." Op.63. For good reason: this provision allows companies to "manage risk" of "share price changes." B673-75. The analysis should have stopped here. Instead, the Court of Chancery speculated as to the provision's applicability to extreme hypothetical situations, rather than assessing whether the provision was reasonably designed to achieve admittedly proper corporate objectives in real world situations. Op.64. And again, the record contains no evidence that this disclosure requirement confused Kellner.

The Court of Chancery also suggested that the failure to define "principal competitor" created "ambiguity." Op.63. But "a term is not ambiguous simply because it is not defined." *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 468

n.86 (Del. Ch. 2008). The Court of Chancery frequently relies on dictionary definitions; it could have done so here. *In re Solera Ins. Coverage Appeals*, 240 A.3d 1121, 1132 (Del. 2020). Regardless, the Court of Chancery overlooked that ownership in a principal competitor is crucial information in the activist setting where there may be affiliations with competitors. Requiring a disclosure of investments in a principal competitor therefore reflects "a logical…approach" to preventing a takeover. *Dollar Thrifty*, 14 A.3d at 598.

4. The Known Supporter Provision Is Proportional.

The Known Supporter Provision gathers "vitally important" information. *Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140, at *19 (Del. Ch. 2021). And it is not new either. The Known Supporter Provision is indistinguishable from the provision validated in *CytoDyn* (identical language bolded; *CytoDyn* language struck):[13]

> **The names…and addresses of other stockholders (including beneficial owners) known by any** ~~of the Proposing Persons~~[14] Holder or Stockholder Associated Person **to support such** Stockholder Proposal or Stockholder Proposals (including without limitation any nominations ~~or other business proposal(s)~~, **and to the extent known, the class** or series **and number of all shares of the Corporation's**

[13] *Id.*, at *5.

[14] "Proposing Person" was defined as: "(i) the stockholder of record providing the notice of nominations or business proposed to be brought before a stockholders' meeting, and (ii) the beneficial owner(s), if different, on whose behalf the nominations or business proposed to be brought before a stockholders' meeting is made." *Id.* at *4 n.27.

capital stock owned beneficially or of record by each **such other stockholder~~(s)~~ or other beneficial owner~~(s)~~**.

The Court of Chancery cabined *CytoDyn* to "financial supporters." Op.58. But *CytoDyn* upheld a board's rejection of a nomination notice because it did not disclose known financial supporters. *CytoDyn*, 2021 WL 4775140, at *19. It did not hold that a known supporter provision is invalid unless it references financial supporters. Indeed, the term "financial supporters" did not appear in the *CytoDyn* provision at all. There was therefore no basis for finding the "widely adopted" Known Supporter Provision disproportionate. B677-78.

* * *

The Challenged Bylaws are proportional under enhanced scrutiny. The contrary rulings below should be reversed.

IV. THE COURT OF CHANCERY PROPERLY UPHELD THE QUESTIONNAIRE AND FIRST CONTACT PROVISIONS.

A. Question Presented.

Whether the Court of Chancery properly upheld the Questionnaire and First Contact Provisions under enhanced scrutiny when the evidence showed each Provision was tailored to protect AIM's proper information-gathering objective.

B. Scope Of Review.

"This Court reviews the Court of Chancery's legal conclusions *de novo*" and does not defer to factual findings that are "clearly wrong" or unjust. *Coster.IV*, 300 A.3d at 663.

C. Merits Of Argument.

In the advance notice bylaw context, enhanced scrutiny requires a court to—*first*—"review whether the board faced a threat 'to an important corporate interest or to the achievement of a significant corporate benefit,'"—and *second*—"review whether the board's response to the threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder franchise." *Coster.IV*, 300 A.3d at 672-73.

Under enhanced scrutiny, the Court of Chancery upheld the Board's adoption of the Questionnaire and First Contact provisions. Kellner curiously claims that the Court of Chancery "failed to address" his adoption challenge in Count III, Br.31,[15] but the Court's enhanced scrutiny analysis confirms Count I is duplicative of the adoption challenge in Count III. *Supra* I-II.

Kellner challenges the Court of Chancery's application of enhanced scrutiny to the Questionnaire and First Contact Provisions because the Court of Chancery took an "overly mechanical approach to enhanced scrutiny." Br.21. He then quibbles with the factual findings underlying the application of enhanced scrutiny to the Questionnaire and First Contact Provision. Neither tack works.

[15] Citations to "Br.___" are to Kellner's opening brief.

1. The Court's Enhanced Scrutiny Analysis Of The Amended Bylaws Was Sound.

Kellner argues that the Court of Chancery took an "overly mechanical approach to enhanced scrutiny." Br.21. Drawing primarily on *Unitrin*, Kellner says the Amended Bylaws are "inextricably related" and therefore should have been analyzed—and invalidated—as a "single package." Br.20-21 (quoting *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1387 (Del. 1995)). But *Unitrin* involved defensive measures that were, literally, inextricably related. This case does not. So, *Unitrin*'s reasoning does not apply.

In *Unitrin*, American General tried to acquire Unitrin through a cash-for-stock tender offer. Unitrin's board adopted two defensive measures in response to the offer: a "Repurchase Program" and a poison pill. The Repurchase Program allowed Unitrin to buy back up to ~20% of its outstanding stock. *Unitrin*, 651 A.2d at 1370-71. The pill prevented Unitrin from merging with American General unless the deal was approved by 75% of Unitrin stockholders (including 23% of votes held by Unitrin's directors). *Id.* at 1377. The measures were thus "inextricably related": the Repurchase Program reduced the number of votes available to overcome the pill. *Id.* at 1387. So, this Court reviewed both measures together. *Id.*

But that is *not* a universal rule. The form of review depends on whether a defensive measure is adopted "individually" or "in combination" with other defensive measures. *Id.* at 1388 n.38. When a board adopts a single defensive

measure—*e.g.*, "advance notice by-laws"—then this Court reviews the bylaws "individually," *i.e.*, as to "each contested" bylaw. *Id.* at 1387, 1388 n.38; *accord Stroud v. Grace*, 606 A.2d. 75, 92-96 (Del. 1992) (evaluating charter and bylaw amendments individually); *Beck v. Greim*, 2020 WL 6742708, at *8 (Del. Ch. 2020) (reviewing bylaws individually); *Capano v. Wilm. Country Club*, 2001 WL 1359254, at *5 (Del. Ch. 2001) (same).[16] By contrast, when an advance notice bylaw is *combined with* another defensive measure as a "unitary response," this Court reviews all the measures "collectively." *Unitrin*, 651 A.2d at 1387; *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1145 (Del. 1990) (applying collective review to a combination of measures "[s]ince all the [measures] here are so inextricably related").

Kellner's cases confirm that *Unitrin*'s analysis only applies to combined measures. *Williams Companies* involved a "combination" of poison pills and "advance notice" and "acting in concert" rights plan provisions. 2021 WL 754593, at *38-39 (Del. Ch. 2021); *see also Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 113 (Del. Ch. 2011) ("combination of a staggered board plus a poison pill"). Similarly, *In re Ebix, Inc.* considered a "Director Nomination Agreement" and

[16] Kellner misreads *Hollinger International v. Black* as "determining bylaw amendments together 'are inequitable and are of no force and effect.'" Br.22. To the contrary, the Court of Chancery conducted the same piece-by-piece analysis that Kellner urges this Court to denounce. 844 A.2d 1022, 1078-79 (Del. Ch. 2004).

advance notice bylaws "in the aggregate" because they combined to prevent stockholders from satisfying procedural steps needed to install new directors. 2016 WL 208402, at *18-19 (Del. Ch. 2016). None of these cases govern here because AIM adopted a single measure—the Amended Bylaws requiring disclosure of discrete pieces of information—not a combination of measures.

The Court of Chancery rightly criticized Kellner's position as a "blunt tactic" that "would yield extreme and unnecessary relief." Op.68. Consider a board that adopts three bylaws—one unquestionably valid bylaw and two that are invalid. Under Kellner's approach, the unquestionably valid bylaw becomes invalid solely by association with the two invalid bylaws. That cannot be correct. If it is, an unquestionably valid bylaw would remain valid for those companies that adopted it in isolation, but that otherwise valid bylaw would be invalid for those companies that adopted it along with just one invalid bylaw. The resulting patchwork of invalid and valid, but otherwise identical, bylaws is fundamentally inconsistent with Delaware's "policy of seeking to promote stability and predictability in [its] corporate laws." *Stream TV Networks Inc. v. SeeCubic, Inc.*, 279 A.3d 323, 355 (Del. 2022); *accord Salzberg*, 227 A.3d at 137 ("The policies underlying [Delaware

law] include certainty and predictability [and] uniformity…[in] corporate disputes.").[17]

2. The Questionnaire Provision Is Reasonable And Proportional.

The Court of Chancery properly upheld the Questionnaire Provision because it was reasonable and proportional. Kellner's contrary arguments reduce to disagreements with the Court of Chancery's factual findings. And they do not carry Kellner up the "steep hill" to clear error. *Coster.IV*, 300 A.3d at 676.

***Reasonableness*:** Enhanced scrutiny first requires the Board to identify a proper corporate objective. *See Lee*, 2022 WL 453607, at *15-16; *accord Coster.IV*, 300 A.3d at 671. AIM proved that "[t]he Board made a reasonable assessment, in reliance on the advice of counsel" that clandestine takeover attempts threatened its "objective of obtaining transparency from a stockholder seeking to nominate director candidates." Op.47.[18] Kellner says this objective was pretext "given that the trial court found four Bylaw Amendments were 'designed to thwart an approaching

[17] Notwithstanding that Kellner waived challenge to all but the six Amended Bylaw Provisions considered by the Court of Chancery, Op.49 n.280, his suggestion that the Court of Chancery should have analyzed the "entire package of Bylaw Amendments" is also wrong for the reasons discussed above. Br.24.

[18] Kellner puzzlingly suggests that the information-gathering objective is only proper when a bylaw is enacted on a clear day. But Delaware courts routinely endorse information-gathering as a reasonable corporate objective when applying enhanced scrutiny, which only applies on cloudy days. Op.46.

proxy contest, entrench incumbents, and remove any possibility of a contested election.'" Br.25.[19] But that just disagrees with the Court of Chancery's factual and credibility findings.

The Court of Chancery based its reasonableness finding on the fact that "AIM had just endured a proxy contest where it seemed that the nominating stockholder was a façade" and that "the Board had reason to believe that the group behind the prior proxy contest was 'threatening to revive [its] efforts' for the 2023 election." Op.47-48. Against this backdrop, the Board revised its advance notice bylaws to require nominees to submit AIM's director and officer questionnaire to "prevent 'the types of manipulative, misleading, and improper conduct' experienced in 2022 from happening again." Op.48.

Kellner next says that "[q]uestionnaire responses are not provided to shareholders, [] and thus do nothing to ensure stockholders are 'well-informed.'" *Id.* But, again, Kellner forgets that the information-gathering objective is served by "allowing boards of directors to knowledgeably make recommendations about

[19] Kellner also suggests that disclosure of adverse recommendations from proxy advisory firms "is simply not important enough to satisfy enhanced scrutiny." Br.25. That argument is dead on arrival. The governing standard applicable to action impacting director elections is reasonableness—not "importance." *Coster.IV*, 300 A.3d at 671-72. Indeed, if a nominee's history of adverse recommendations in other corporate elections is not "important" for ensuring an informed stockholder electorate, it is hard to imagine what is.

nominees." Op.39; *accord Sternlicht v. Hernandez*, 2023 WL 3991642, at *14 (Del. Ch. 2023) ("Advance notice bylaws require stockholders…to supply information about their…nominees," which "provid[es] fair warning to the corporation so that it can respond to stockholder nominations.").

Finally, Kellner complains that the "[q]uestionnaires demanded far more information from challengers than from incumbents," and therefore the questionnaires do not ensure an informed shareholder electorate. Br.30. Trial showed the opposite. Each of AIM's incumbent directors completed the same director and officer questionnaire required of Kellner and his nominees. Op.83 ("After the form was revised, AIM's incumbent directors likewise completed it."). Once Kellner's mischaracterizations are corrected, that argument falls away.

***Proportionality*:** Kellner argues that the Questionnaire Provision's five-day window to respond to requests for AIM's director and officer questionnaire is preclusive because it could be subjectively implemented by the Board. Br.30. As an example, Kellner gripes that the Board revised AIM's director and officer questionnaire after he requested it. Br.30. True, but inapposite.

Setting aside that Kellner is really complaining about the Questionnaire Provision's application, not its adoption, the Court of Chancery found no evidence of manipulation. Op.66, 83-84. Because AIM's prior bylaws did not require nominees to complete director and officer questionnaires, the new Questionnaire

Provision "necessitated a change to the Company's form so that it also applied to nominees." Op.83. Crucially, "[t]he revisions to the questionnaire are non-preclusive"; "it mostly consists of yes or no questions"; and "Kellner was able to answer a majority of the sections that required narrative explanations with internal references to other parts of the completed notice." Op.83-84. Plainly, the Questionnaire Provision is not "preclusive of a full and fair vote; if anything," it "enfranchised those stockholders" who otherwise would have been misled by Kellner's dishonest director slate. *In re MONY Gp. S'holder Litig.*, 853 A.2d 661, 678 (Del. Ch. 2004); *Lee*, 2022 WL 453607, at *18 ("Requiring that nominees submit responses to a questionnaire…furthers the information-gathering and disclosure functions of advance notice bylaws."). Kellner's disagreement with factual findings underlying the proportionality analysis is no basis for reversal.

3. The First Contact Provision Is Reasonable And Proportional.

The Court of Chancery also properly upheld the First Contact Provision because it was reasonable and proportional.

***Reasonableness*:** "The Board made a reasonable assessment, in reliance on the advice of counsel" that conduct like that of Kellner and his coconspirators threatened its "objective of obtaining transparency from a stockholder seeking to nominate director candidates." Op.47. Kellner's conspiracy threatened to "conceal who was supporting and who was funding the nomination efforts." A189; Op.65

("The Board would have been focused on securing this knowledge after its experience with the 2022 proxy contest. The First Contact Bylaw would help alert the Board and stockholders to similar maneuvering.").

Kellner's counter—that the Court of Chancery "never explained why anyone would need to know 'dates of first contact' to cast an informed vote"—ignores the Vice Chancellor's factual findings. Br.28. She found that Kellner was involved in earlier efforts to takeover AIM, despite his representations to the contrary in both his Notice and sworn testimony before the Vice Chancellor.[20] For example, in August 2022, Kellner told his fraternity brothers that he was "***now a party to***" Jorgl's "***proxy fight***," along with Deutsch and Tudor. Op.20; A154.[21] Those factual findings alone compel the Court of Chancery's conclusion that such a lack of candor would threaten AIM's information-gathering objective.

***Proportionality*:** Kellner's arguments that the First Contact Provision is preclusive and unreasonable also (unsuccessfully) flyspeck the Court of Chancery's factual findings. Kellner says the "clearest evidence of" disproportionality is that

[20] *E.g.*, A689; A693; Op.17 n.104 ("Kellner testified that he was mistaken in noting that Tudor submitted the nomination and meant to write Jorgl. But since Jorgl did not enter the picture until late June and Kellner was in regular contact with Tudor, it makes more sense that Kellner's notes reflect his belief that Tudor was driving the effort."); Op.20 n.116.

[21] *See also* B3.

the First Contact Provision is bespoke. Br.28. But the fact that a defensive measure is novel is not evidence that it is disproportionate. *See Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985) (upholding first poison pill).

Next, Kellner faults the First Contact Provision for containing the SAP definition. Kellner reasons that because the Court of Chancery found the SAP definition contributed to the 2023 AAU Provision's overbreadth, its operation in any other Amended Bylaw must be fatal. But the Court of Chancery analyzed the SAP definition "[i]n the context of the [2023] AAU Provision." Op.54. And the Court of Chancery conducted the same contextual analysis for the First Contact Provision. It concluded that the SAP definition did not pose the same problem for the First Contact Provision because it "calls for a more defined set of information that could be known or knowable with reasonable diligence." Op.64-65 n.322. That is, the First Contact Provision requires a notice to disclose the dates of first contact concerning AIM and any proposed nomination to the Board between a nominee and any shareholder or SAP. Op.64-65. Read in context of the First Contact Provision, the SAP definition does not raise the hypothetical concerns about "far-flung, multi-level relationships" that clouded the 2023 AAU Provision. Op.56.

Kellner tries to evade the Court of Chancery's contextual analysis by recasting it as an "SAP carve-out." Br.28. That does not work either. Kellner contends that this supposed flaw is evident from the Vice Chancellor's and the parties' failure to

"identify a precise date of first contact regarding the 2023 nomination efforts." Br.29. But the point of trial was not to divine dates of first contact; it was to determine whether Kellner complied with the provision's requirement to provide them.[22] Of course the Vice Chancellor could not identify precise dates of contact—Kellner refused to provide them in his Notice or at trial. Op.76-77. And in any event, trial showed that "Kellner only needed to check his record[s] to give specifics." Op.77.[23]

In last efforts to create error, Kellner says the Court of Chancery failed to consider that "first contact" is undefined. Br.29. But whether in a "passing statement" or "in-depth" discussion, first contact about AIM is just that: contact for the first time. Br.29. Kellner also says the *Jorgl* litigation demonstrates that the First Contact Provision was not necessary to counter a cognizable threat. But, again, the First Contact Provision is tailored to "'a proper objective' unique to AIM," namely preventing the "manipulative, misleading, and improper conduct" underlying the *Jorgl* litigation (and that Kellner participated in). Op.48, 65.

[22] Kellner's complaint that the Board could not identify a date of first contact with Bryan is a red herring. The First Contact Provision is designed to provide AIM with "information about nominating stockholders and their nominees so that the Board and stockholders can become informed." Op.83. It "is both non-controversial and logical that" tit-for-tat is not "how advance notice bylaws work." Op.82.

[23] *See also* A1557; A160.1; A1666; A1598-99; A523.

V. THE COURT OF CHANCERY PROPERLY APPLIED THE QUESTIONNAIRE AND FIRST CONTACT PROVISIONS TO THE KELLNER NOTICE.

A. Question Presented.

Whether the Court of Chancery properly applied the Questionnaire and First Contact Provisions to the Kellner Notice when the evidence showed: (1) Kellner, Chioini, and Deutsch each failed to disclose adverse recommendations from proxy advisory firms, instead certifying that they had "no" adverse recommendations; (2) Kellner failed to specify the date of his first contact concerning the 2023 proxy contest with Deutsch or Chioini; and (3) the Board, with guidance of Delaware and national counsel, reasonably concluded that those deficiencies threatened AIM's proper information-gathering objective when its perceived threat came to fruition. Op.76-85.

B. Scope Of Review.

This Court reviews "[t]he construction or interpretation" of bylaws *de novo*. *Saba*, 224 A.3d at 975. Underlying "findings of fact and the inferences drawn from those facts are given deference unless clearly erroneous." *Id.*

C. Merits Of Argument.

Kellner's challenge to the Court of Chancery's application of the Questionnaire and First Contact Provisions to reject his notice "pick[s] at the court's factual findings without success." *Coster.IV*, 300 A.3d at 676. "Because bylaws are part of a 'flexible contract between corporations and stockholders,' consideration of

an advance notice bylaw's application begins with a contractual analysis." *Lee*, 2022 WL 453607, at *9. "Clear and unambiguous advance notice bylaws," accordingly, act "as conditions precedent to companies being contractually obligated to take certain actions." *Id.* at *13 n.142. If a stockholder has not complied with unambiguous bylaws, and "circumstances require, the court will go on to consider whether the fiduciaries' actions were unreasonable or inequitable." *Id.* at *9.

In assessing the Board's rejection of the Kellner Notice, the Court of Chancery performed both contractual and equitable analyses. Op.76-84. Kellner does not, however, challenge the Court of Chancery's equitable analysis as it relates to the Board's application of the Questionnaire and First Contact Provisions. Br.43-45. Argument regarding the equities is therefore waived. *White v. State*, 2023 WL 3675801, at *2 (Del. 2023). The arguments that Kellner did make—that he somehow complied with the Questionnaire Provision and First Contact Provision—fail. *See* B118 (compliance was Kellner's burden).

1. Kellner Did Not Comply With The Questionnaire Provision.

The Court of Chancery properly determined that Kellner did not comply with the Questionnaire Provision. Kellner accuses the Vice Chancellor of "nitpicking" because she found that, even crediting Kellner, Chioini, and Deutsch's testimony that "they were unaware of any withhold recommendations," they answered the questionnaire falsely by "affirmatively check[ing] 'no.'" Op.78; *accord* Br.44. But

the Vice Chancellor's finding that "to the extent known," "no" withhold recommendations does not mean "unaware" of any withhold recommendations is well supported by the evidence. "Kellner, Deutsch, and Chioini each had prior 'withhold' recommendations that they neglected to disclose." Op.77. And although they each "maintain[ed] that they were unaware of any withhold recommendations," they were represented by "sophisticated counsel" and "could have gathered the data needed to respond." Op.78. Alternatively, "their questionnaires could have explained that they were unaware of any adverse recommendations or that they lacked knowledge." Op.78. But "[i]nstead, they each affirmatively checked 'no.'" Op.78. In view of that evidence, the Court of Chancery's finding that "those representations were untrue" is not nitpicking and certainly not clear error. Op.78.[24]

[24] Kellner observes in passing that the Board could have investigated and publicized the withhold recommendations and that "it should be up to stockholders whether a 'withhold' recommendation is material to them." Br.45. That is a misstatement of law and entirely misses the point. Questionnaire requirements are "standard in second generation advance notice bylaws" and further the well-accepted "information-gathering objective of advance notice bylaws." Op.66. Kellner may prefer a different approach for information-gathering, but his preferences are irrelevant to the reasonableness and proportionality of the Questionnaire Provision. That provision is designed to give stockholders the information they need to determine whether a "withhold" recommendation is material to their vote. Kellner and his nominees—not the Court of Chancery—impeded stockholders from making that determination.

2. Kellner Did Not Comply With The First Contact Provision.

The Court of Chancery also properly determined that Kellner did not comply with the First Contact Provision. Kellner says the Court of Chancery's finding that the Kellner Notice did not include a date of first contact between Kellner and Deutsch regarding the 2023 nomination was "wrong." Br.44. According to Kellner, the Court should have found that the Notice did disclose that date of first contact because: (1) "[t]he Notice disclosed Kellner and Deutsch's first contact about the Company in detail"; and (2) the Notice "described Kellner's communications with Chioini regarding the nomination in 'late 2022'"; so, (3) by implication, the Notice disclosed that the date of first contact between Kellner and Deutsch regarding the 2023 nomination occurred sometime between when Kellner and Deutsch first discussed AIM and when Kellner and Chioini first discussed the 2023 nomination in "late 2022." Br.44.

Kellner's interpretive arithmetic does not show the Court of Chancery was "clearly wrong." *Coster.IV*, 300 A.3d at 676. Quite the opposite. Trial showed that Kellner frequently corresponded with both Deutsch and Chioini about AIM. *E.g.*, Op.10, 14, 24, 28, 75. And, by August 23, 2022, Kellner had joined Jorgl's takeover attempt. Op.19-20. The upshot: Kellner's specific dates of first contact with Deutsch and Chioini were discernable. Op.77. Kellner, however, chose not to provide them. He cannot manufacture clear error from his own wrongdoing.

VI. THE COURT OF CHANCERY PROPERLY APPLIED THE 2016 AAU PROVISION TO THE KELLNER NOTICE.

A. Question Presented.

Whether, after invalidating the 2023 AAU Provision, the Court of Chancery properly invoked and applied the 2016 AAU Provision when the AAU clause of the 2023 AAU Provision is identical to the 2016 AAU Provision.

B. Scope Of Review.

This Court reviews "[t]he construction or interpretation" of bylaws *de novo*. *Saba*, 224 A.3d at 975. Underlying "findings of fact and the inferences drawn from those facts are given deference unless clearly erroneous." *Id.*

C. Merits Of Argument.

Kellner failed to comply with the Questionnaire and First Contact Provisions. *Supra* VI. That is enough to affirm. But the Board properly rejected the Kellner Notice for a third, independent reason: it did not comply with the 2016 AAU Provision. This Court should affirm for that reason too.

The Court of Chancery correctly found that the Notice failed to comply with the 2016 AAU Provision. That Provision required Kellner to disclose all the prior arrangements and understandings regarding his nomination. Kellner submitted "false" information instead. Op.73. Kellner does not contest that finding on appeal. Nor could he. Overwhelming evidence showed that Kellner "omitted and misrepresented meaningful AAUs." Op.76. Kellner instead argues that the 2016

AAU Provision is inapplicable because: (1) adopting the 2023 AAU Provision "completely eliminated" it; and (2) the Board "did not rely" on it. Br.12, 15.

Kellner is wrong. The Court of Chancery's invocation of the 2016 AAU Provision is consistent with an unbroken line of precedent holding that the original version of a bylaw controls if an amendment to it is deemed invalid. And the Board did rely on the 2016 Bylaws' AAU requirement because that requirement existed in both the 2016 *and* 2023 versions of the AAU Provision.

1. The Court Of Chancery Properly Invoked The 2016 AAU Provision.

Kellner argues that the Court of Chancery improperly "resurrected" the 2016 AAU Provision. Br.12, 15-17. But the 2016 AAU Provision was never buried. So, the Court of Chancery properly invoked it.

For almost a century, "the remedy for an invalid [bylaw] provision [has been] refusal to enforce it, not [to] set[] aside" all the corporation's bylaws. *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 334 (Del. 1993) (citing *State v. Penn-Beaver Oil Co.*, 143 A. 257, 259 (Del. 1926)). That is because "a prior [bylaw's] validity continues where there has been…an invalid amendment." *Clark v. State*, 287 A.2d 660, 664 (Del. 1972).[25] Consistent with this paradigm, the Court of Chancery

[25] Although *Clark* considered a statutory amendment, "the rules that govern the interpretation of statutes…apply to the interpretation of corporate charters and bylaws." *Strougo v. Hollander*, 111 A.3d 590, 597 (Del. Ch. 2015).

follows the original versions of invalidly amended corporate bylaws. *See, e.g.*, *Rainbow Mountain, Inc. v. Begeman*, 2017 WL 1097143, at *10 (Del. Ch. 2017); *In re Seminole Oil & Gas Corp.*, 155 A.2d 887, 891 (Del. Ch. 1959); *Friends of Village of Cinderberry v. Village of Cinderberry Prop. Owners Ass'n*, 2010 WL 1843706, at *8 (Del. Ch. 2010). After all, "one bylaw straying too far does not mean other legitimate bylaws should be invalidated." Op.68 n.331.

The Court of Chancery traveled this well-worn path. It determined that the SAP clause rendered the 2023 AAU Provision invalid, Op.54-56, and "refus[ed] to enforce it," *Tri-Star*, 634 A.2d at 334. So, the Court of Chancery looked to the original—the 2016 AAU Provision. Op.70-76. Kellner has never disputed that the Board "validly enacted" that provision. Op.52, 70-71. The Court of Chancery therefore properly invoked it.

The Vice Chancellor joined good company. In *Rainbow Mountain*, for example, then-Vice Chancellor Montgomery-Reeves declared the company's original bylaws to be the "operative bylaws" because less than a quorum of the board amended them. 2017 WL 1097143, at *10. Similarly, in *Seminole Oil*, Chancellor Seitz applied the company's original bylaws because the board amended them under a "questionable" scheme to prevent a proper vote. 155 A.2d at 889-90. And in *Cinderberry*, Chancellor Chandler restored a corporation's original bylaws because a controller inequitably "abuse[d] [its] power" to amend the bylaws. 2010 WL

1843706, at *8. These cases confirm that bylaw amendments do not "completely eliminate[]" the original bylaws. Br.15.

Kellner denigrates these precedents as a "Blue Pencil Approach," but cites no case erasing them. Br.15-17. Neither *Sunder Energy* nor *Cerberus* involved corporate bylaws. *Sunder Energy, LLC v. Jackson*, 305 A.3d 723 (Del. Ch. 2023) (LLC agreement); *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141 (Del. 2002) (merger agreement). And the Court of Chancery did not "reform" the 2023 AAU Provision; it invalidated it. *Waggoner v. Laster*, 581 A.2d 1127, 1135-36 (Del. 1990). To manufacture a new "rule," Kellner says a court cannot revert to an original bylaw unless the amendment is "procedurally or statutorily defective." Br.17. But he does not explain that distinction or offer any authority to support it. If anything, he concedes that "there was no deficiency in" the 2016 AAU Provision. Br.17.

In a last gasp, Kellner resorts to policy arguments about why precedent should not apply to him. Br.17. But policy points in the opposite direction. "Given the vital corporate considerations at risk if nominating stockholders conceal AAUs, it would risk further inequity to excuse [Kellner] from disclosing them when AIM had a validly enacted provision in place pre-amendment." Op.70-71. It would make no sense, as Kellner suggests, for AIM to have *no* advance notice bylaws simply because part of *one* bylaw provision has been deemed invalid. Such a result would frustrate the ordering purpose of advance notice bylaws and create market-wide

uncertainty. *See Saba*, 224 A.3d at 980; ("[A]dvance notice bylaws…are designed…to permit orderly meetings and election contests."); *Boilermakers*, 73 A.3d at 938 (blanket invalidation of bylaws "cast[s] a cloud" over companies' internal affairs). This Court should not endorse that outcome.

2. The Court Properly Applied The 2016 AAU Provision.

Kellner does not dispute the Court of Chancery's interpretation of the 2016 AAU Provision. Nor does he challenge its adoption. Kellner instead argues that the Court of Chancery erred in applying the 2016 AAU Provision because the Board did not rely on it to reject the Notice. Br.12-14. Not so.

An unambiguous bylaw must be "construed as it is written." *Hill*, 119 A.3d at 38. As written, the 2023 AAU Provision "fully" incorporated the "narrower" 2016 AAU Provision "within" its concededly valid "arrangements or understandings" clause. Op.70-71; *see also* Op.51-52 (observing that the 2023 AAU Provision simply "buil[t] on" the 2016 AAU Provision's "reasonable" disclosure requirements). In other words, both provisions required Kellner to disclose arrangements or understandings. Op.51, 71. The Board rejected the Notice because it did not satisfy that requirement. Op.80. So, whether titled "2016" or "2023," the result is the same: the Board did "rely" on the arrangements or understandings clause. Br.12.

To distract from this, Kellner accuses the Vice Chancellor of "supply[ing]" her own reasons to reject the Notice. Br.14-15 (insinuating that the Vice Chancellor joined in purported "manipulation" by the "incumbent board[]"). But, in support, Kellner merely cites cases standing for the general principle that a board cannot defend its takeover response using a "*post hoc* justification." Br.13-14. Again, that did not happen here. The Board never "repealed" the 2016 arrangements or understandings clause, so the Vice Chancellor did not "resurrect[]" it. Br.14-15.

Finally, Kellner contends that Cross-Appellants cannot rely on the 2016 AAU Provision because they only "casual[ly] mention[ed]" it below. Br.14. This halfhearted waiver argument fails.

Waiver is "a matter within [a] [c]ourt's discretion." *REJV5 AWH Orlando, LLC v. AWH Orlando Member, LLC*, 2018 WL 1109650, at *4 (Del. Ch. 2018). The Court of Chancery did not find a waiver here. And Kellner does not argue any abuse of discretion.

Regardless, there is no basis to find a waiver. Kellner addressed the merits of the 2016 AAU Provision. A1954. The parties preserved the issue in their pre-trial order. B738-39. And the Court of Chancery directed the parties to use their post-trial briefs to respond to the pre-trial briefs. A1826. So, even if "passing[ly] reference[d]" pre-trial, AIM's reliance on the 2016 AAU Provision was properly preserved post-trial. *Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr.*, 2019

WL 2208465, at *20 n.22 (Del. Ch. 2019) (determining that argument was not waived for failure to be reasserted in post-trial brief where all these conditions were met), *aff'd, sub nom*, *Marion #2 Seaport Tr. U/A/D June 21, 2022 v. Terramar Retail Ctrs., LLC*, 2019 WL 5681450, at *3 (Del. 2019) (finding "no error" in trial court's entire "analysis" of issue); *see also Sunder*, 2023 WL 8868407, at *5 (rejecting waiver argument and explaining that in highly "expedited litigation[] parties often raise arguments…that have not been fully spelled out").

And in any event, Kellner does not claim any prejudice, which is the "touchstone" of waiver. *Mack v. Rev Worldwide, Inc.*, 2020 WL 7774604, at *15 (Del. Ch. 2020). Nor could he. Kellner knew all about the 2016 AAU Provision; he participated in the 2022 Jorgl takeover attempt. Op.16-21. His belated attacks on it should be rejected. *See also New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 572 (Del. Ch. 2023) ("[B]ecause stockholders can amend [a bylaw] without board approval, the continued presence of the bylaw provides [an] indication of stockholder consent.").

CONCLUSION

The Court should reverse the Court of Chancery's judgment concerning the validity of the Challenged Bylaws and otherwise affirm.

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