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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE THE AES CORPORATION AND OWENS CORNING	CONSOLIDATED No. 218,2025 No. 257, 2025 Court Below: Court of Chancery of the State of Delaware C.A. No. 2024-0628-NAC C.A. No. 2024-0688-NAC

PLAINTIFFS-BELOW/APPELLANTS' AMENDED OPENING BRIEF

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NATURE OF PROCEEDINGS

Plaintiffs-Below/Appellants (hereinafter, "Plaintiffs") bring a consolidated appeal arising from the Court of Chancery's dismissal at the pleading stage of two stockholder class actions. The cases ("Cases") allege that the boards of AES Corporation ("AES") and Owens Corning ("OC") breached their fiduciary duties by adopting certain advance-notice-bylaw ("ANB") provisions (the "Improper Bylaws"). The lower court dismissed both cases on ripeness grounds.

Plaintiffs' amended complaints (the "Complaints")[1] assert that the AES and OC Boards adopted the Improper Bylaws for the explicit purpose of deterring or impeding future proxy contests, which triggers *Unocal*'s enhanced scrutiny. As reflected in Defendants' board materials, the Boards adopted the ANBs out of concern that the Universal Proxy Rule is expected to "*lower[] barriers to run a proxy contest and to get at least one board seat[.]*" The Boards thus amended their ANBs to "*mount a more effective defense*" to activism. This improper entrenching purpose is manifest in the onerous and preclusive ANBs they adopted, including Acting-in-Concert definitions with "Wolfpack" and "Daisy Chain" provisions similar to those invalidated in *Williams*[2] and *Kellner*[3] as "extreme," "tripwires," and

[1] A143-74; A253-85.

[2] *Williams Cos. S'holder Litig.*, 2021 WL 754593, at *21-22 (Del. Ch. Feb. 26, 2021), *aff'd*, *Williams Co. v. Wolosky*, 264 A.3d 641 (Del. 2021).

[3] *Kellner v. AIM Immunotech, Inc.* 320 A.3d 239 (Del. 2024).

"disproportionate." As set forth below, Defendants' adoption of the Improper Bylaws cannot be sustained under *Unocal.*

Following this Court's opinion in *Kellner v. AIM Immunotech, Inc.* ("*Kellner*"), the trial court stayed discovery to allow motion to dismiss briefing. Defendants moved to dismiss under Rule 12(b)(1) and 12(b)(6) grounds; Plaintiffs opposed. The trial court heard a coordinated argument on both motions on November 20, 2024.

The Court of Chancery granted Defendants' motions on Rule 12(b)(1) grounds. It held that it lacked subject-matter jurisdiction because the cases were unripe, reasoning that Plaintiffs are not nominating and therefore relevant facts may develop later.

The trial court erred. Plaintiffs' adoption claims challenge the adoption of the ANBs—a static, historical event. Ripeness does not require Plaintiffs to intend to nominate a candidate, as Delaware precedent recognizes that a defensive measure may chill stockholders generally. The court also applied the wrong standard of review, improperly construing allegations against Plaintiffs and making factual findings contrary to the pleadings, which is impermissible on a motion to dismiss.

The Improper Bylaws exert a present, substantial deterrent effect on stockholder activism that harms Plaintiffs and all AES and OC stockholders. The decisions below should be reversed and remanded.

SUMMARY OF ARGUMENT

1. The trial court erred in conflating Plaintiffs' adoption claims with bylaw application claims to find these Cases unripe. Adoption claims address whether a board breached its fiduciary duties in adopting a bylaw, focusing on intent and reasonableness under *Unocal*. Application claims, by contrast, concern a board's enforcement of a bylaw against a particular stockholder; the court's analysis begins with contract interpretation before moving to enhanced scrutiny.

2. The court wrongly held that the claims are unripe because "pertinent facts" may later develop. Adoption claims are based on historical facts that become fixed once the bylaws are adopted. Delaware law makes clear that *Unocal* scrutiny is not limited to live proxy contests.[4]

3. The court further erred in finding Plaintiffs' claims unripe because neither Plaintiff alleged a personal intent to nominate a director, nor identified a specific stockholder who had been chilled. Delaware precedent recognizes that deterrent effects on stockholder rights can render a claim ripe. Plaintiffs adequately pled those facts, including that the Improper Bylaws deter nominations and chill stockholder communications. The Improper Bylaws mirror defensive provisions universally regarded as extreme in *Politan,* and already found unenforceable in *Williams* and *Kellner* as "extreme" and "disproportionate," including "Wolfpack"

[4] *Stroud v. Grace*, 606 A.2d 75, 82 (Del. 1992) ("*Stroud II*").

and "Daisy-Chain" features of Acting-in-Concert Provisions, limited partner disclosure obligations, and indecipherable Ownership Provisions.

4. The trial court improperly applied the Rule 12(b)(1) standard of review, making premature factual findings on board intent and deterrent effect. Because the dismissal was based on determinations intertwined with facts central to the merits of Plaintiffs' claims, the proper standard of review here is Rule 12(b)(6), which requires accepting Plaintiffs' allegations as true, construing inferences in their favor, and limiting analysis to the pleadings. Under that standard, the Complaints plainly state *Unocal* claims.

5. Delaying review until a proxy contest emerges risks insulating fiduciary breaches from scrutiny. Because the ANBs deter stockholder activism, declining review risks ensuring they are never reviewed. Concerns about "floodgates" can be managed through case-management tools, rather than dismissal.

STATEMENT OF FACTS

I. THE AES AND OC BOARDS HAVE BOTH EXPERIENCED STOCKHOLDER ACTIVISM AND PERIODS OF POOR PERFORMANCE

Both AES and OC's boards had a history of engagement with activist stockholders, and both companies' financial performance had also recently struggled.

A. AES'S FINANCIAL STRUGGLES AND HISTORY OF ENGAGEMENT WITH STOCKHOLDER ACTIVISTS

AES Corporation ("AES") is a Delaware-incorporated energy company.[5] The AES Board has had years of experience navigating stockholder activism. In late 2017 and early 2018, several activists advanced stockholder proposals pushing for a board refreshment and environmental accountability, respectively.[6] AES mounted a defense, which resulted in a partial victory when the SEC issued no-action decisions.[7] Days after the SEC's no-action decisions, AES's board agreed to let well-known activist investor Jeffrey Ubben of ValueAct Capital join the AES board.[8] Neither Ubben nor ValueAct had emerged publicly prior to the announcement that Ubben was joining the AES board.[9]

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[5] A154.

[6] A423-425; A154-155.

[7] A423-425; A154-155.

[8] A155.

[9] A155.

In the six months preceding August 2023, when month after the AES Board adopted the Improper Bylaws, AES faced a period of extended stock price depreciation.[10] The Company's stock price had risen from late 2017 to a peak of $28.76 per share in December 2022.[11] But between December 2022 and June 2023, its stock price dropped more than 27%, to $20.73 per share.[12] In Ubben's own words, such stock price drops are "a catalyst for change" at the board level.[13]

AES's precipitous stock depreciation and the lengthy tenure of its incumbent directors made it ripe for activist engagement. Half of the ten-member board had served for at least six years, with four of them having served for more than ten years.[14] AES also continued to be sensitive to ESG-related activism. In May 2023—two months before AES adopted the Improper Bylaws at issue here—the AES board identified that its securities faced risks based on "controvers[ies] and criticisms by activist groups or other stakeholders[,]" in connection with a notes offering.[15]

[10] A155.

[11] A425.

[12] A155.

[13] A155.

[14] A156.

[15] A156.

B. OC's Financial Challenges and Engagement with Stockholder Activists

OC, a global building and construction materials company incorporated in Delaware, had also fielded stockholder activists for years.[16] In July 2019, in connection with a $450 million notes offering, OC expressed concern that the offering "may become controversial or criticized by activist groups or other stakeholders."[17] Its concerns were well-founded: in mid-2019, activist hedge fund HG Vora announced that it had taken a stake in OC and anticipated pushing OC to explore a sale or breakup.[18]

In 2021 and 2022, OC's stock price stagnated while the S&P 500 soared.[19] Those same years, dissatisfied stockholders cast nine times as many votes against long-tenured directors (Defendants Chambers, Lonergan, Mannen, Morris, Nimocks, and Williams) as they did against the other directors.[20] And like AES, its ten-member board has lengthy tenures. In 2023, half of OC's board had served for at least nine years and four had served at least a decade, making them ripe for activist engagement.[21]

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[16] A263-264.

[17] A264.

[18] A264.

[19] A265; A487.

[20] A265.

[21] A265.

II. THE ENACTMENT OF THE UNIVERSAL PROXY RULE

In November 2021, the SEC enacted Rule 14a-19, which established the use of a "universal proxy card" for contested director elections after August 31, 2022 (the "Universal Proxy Rule").[22] The Universal Proxy Rule was designed to ensure that proxy contests would present fair opportunities for stockholder nominees across U.S. public markets.[23] Accordingly, it requires companies to list all properly nominated candidates on their respective proxy cards. Critically, in December 2022, the SEC issued guidance ("Question 139.04") which clarified that a company may exclude a dissident stockholder's nominees from its proxy card if it determines, in accordance with state law, that "the dissident shareholder[] fail[s] to comply with [the Company's] advance notice bylaw requirements."[24]

III. THE BOARDS WEAPONIZE THE UNIVERSAL PROXY RULE AND ADOPT ONEROUS DISCLOSURE OBLIGATIONS TO DEFEND AGAINST ACTIVISTS AND ENTRENCH THEMSELVES

AES and OC's long-tenured directors and lackluster financial performance made them ripe for activist engagement.[25] The ability to exclude a dissident's nominees if they failed to comply with the company's ANBs provided a lifeline.

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[22] A156-157; A266

[23] A426; A266.

[24] A426; A266.

[25] A156-157; A266.

Faced with the prospect of activism, in the summer of 2023, both boards seized on what they perceived as opportunity arising out of Question 139.04 to protect their incumbency.[26]

A. AES'S BOARD ADOPTS THE IMPROPER BYLAWS

On July 31, 2023, AES's counsel presented it with bylaw amendment proposals (the "AES Amended Bylaws"), which include the advance-notice-bylaw provisions challenged herein (the "AES Improper Bylaws" or "Improper ANBs")).[27] Counsel's slide deck is labeled "*Rationale For Proposed By-Law Amendments*" and explicitly states what such rationale is: to address the New Universal Proxy Rule which will "*lower[] barriers [for dissidents] to run a proxy contest and get at least one board seat*" pursuant to the Universal Proxy Rule:[28]

[26] A266; A157 (emphasis added). AES and OC were advised by the same law firm, Jones Day, that has also defended them in litigation regarding this issue. Unsurprisingly, the presentations made to the boards of both AES and OC, as well as the bylaws each company ultimately adopted, bear significant similarities.

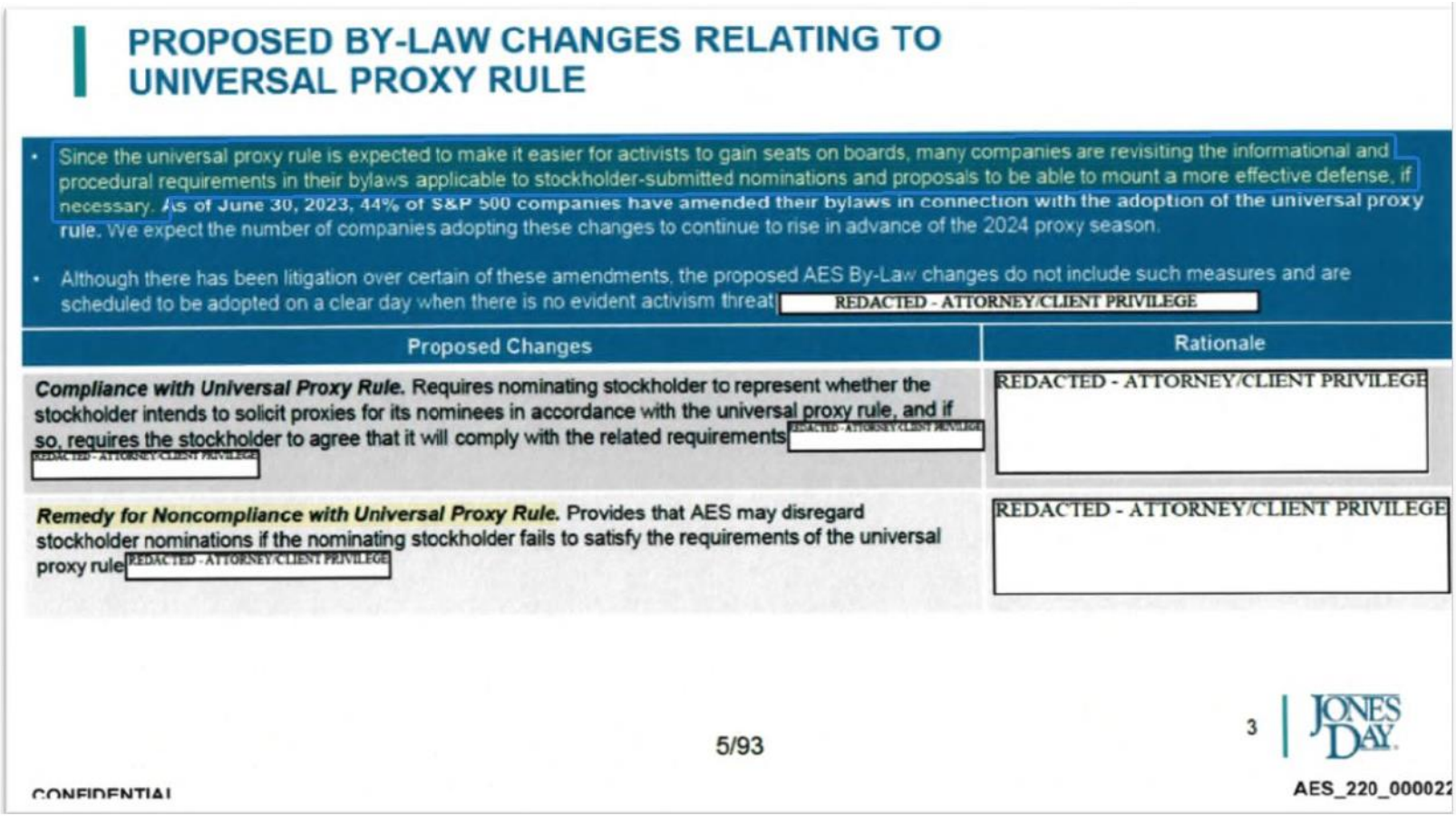
[27] A157.

[28] A157 (highlighting added).

Counsel further advised that "[s]*ince the universal proxy rule is expected to make it easier for activists to gain seats on boards, many companies are revisiting the informational and procedural requirements in their bylaws* applicable to stockholder-submitted nominations and proposals *to be able to mount a more effective defense*" against the activist's nomination. The presentation highlighted that the remedy for an activists' non-compliance is that "AES may disregard the stockholder nomination."[29] And it further noted the litigation risk associated with

[29] A158 (emphasis added).

bylaw amendments and that to minimize this risk, the proposed amendments "are scheduled to be adopted on a clear day":[30]



PROPOSED BY-LAW CHANGES RELATING TO UNIVERSAL PROXY RULE

- Since the universal proxy rule is expected to make it easier for activists to gain seats on boards, many companies are revisiting the informational and procedural requirements in their bylaws applicable to stockholder-submitted nominations and proposals to be able to mount a more effective defense, if necessary. **As of June 30, 2023, 44% of S&P 500 companies have amended their bylaws in connection with the adoption of the universal proxy rule.** We expect the number of companies adopting these changes to continue to rise in advance of the 2024 proxy season.
- Although there has been litigation over certain of these amendments, the proposed AES By-Law changes do not include such measures and are scheduled to be adopted on a clear day when there is no evident activism threat REDACTED - ATTORNEY/CLIENT PRIVILEGE

Proposed Changes	Rationale
Compliance with Universal Proxy Rule. Requires nominating stockholder to represent whether the stockholder intends to solicit proxies for its nominees in accordance with the universal proxy rule, and if so, requires the stockholder to agree that it will comply with the related requirements REDACTED - ATTORNEY/CLIENT PRIVILEGE REDACTED - ATTORNEY/CLIENT PRIVILEGE	REDACTED - ATTORNEY/CLIENT PRIVILEGE
Remedy for Noncompliance with Universal Proxy Rule. Provides that AES may disregard stockholder nominations if the nominating stockholder fails to satisfy the requirements of the universal proxy rule REDACTED - ATTORNEY/CLIENT PRIVILEGE	REDACTED - ATTORNEY/CLIENT PRIVILEGE

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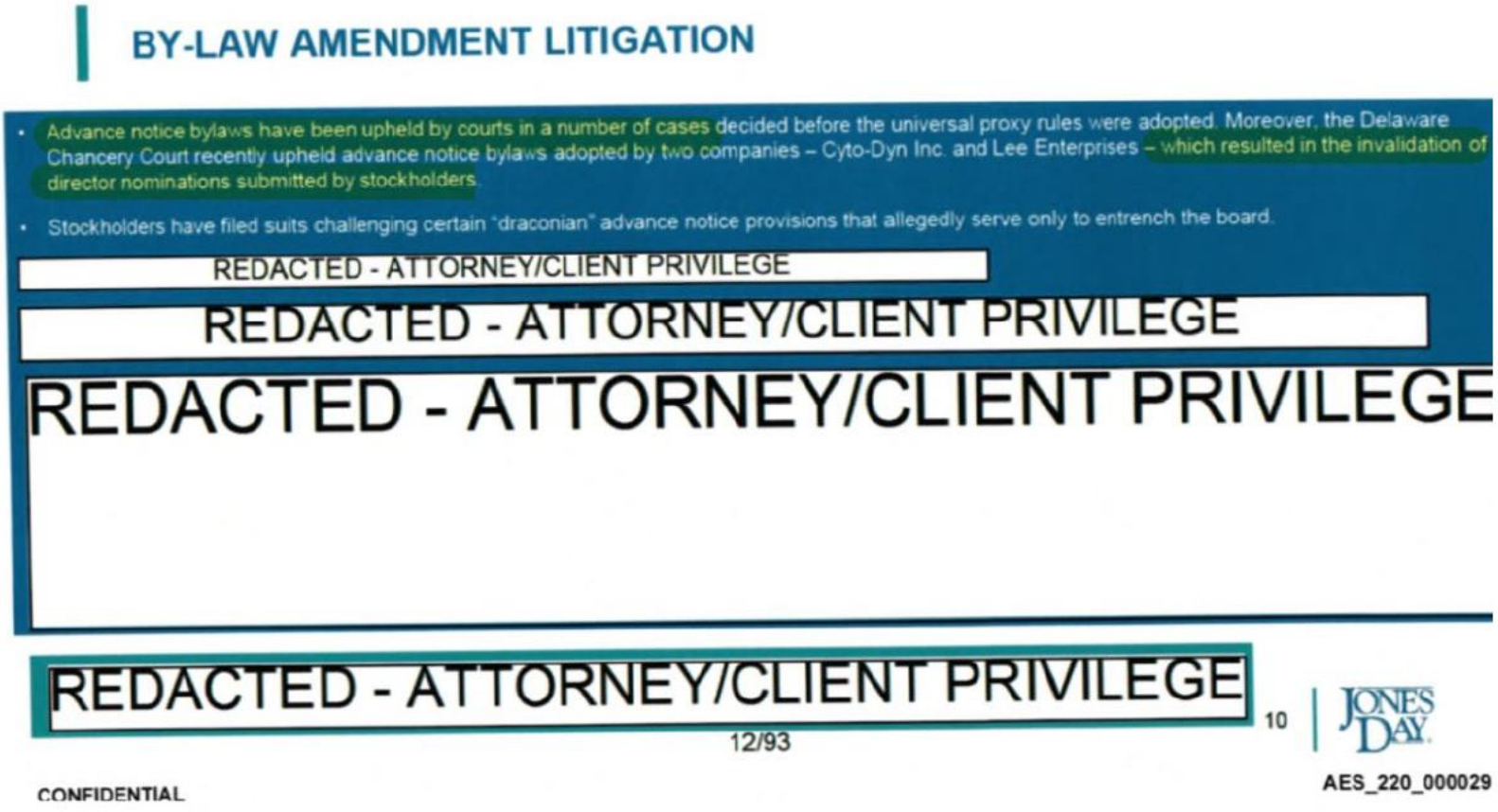
The presentation listed informational and procedural requirements that counsel recommended the Board adopt to further the goal of defending against activism. The Slide listed a series of "*Enhanced Disclosure Requirements*" designed to make compliance with the AES Improper Bylaw Provisions even more difficult.[31]

[30] A158 (highlighting added).

[31] A159-160 (highlighting added).

Outside counsel touted the fact that other corporations that had amended their advance notice bylaws had successfully "invalidat[ed] … director nominations submitted by stockholders":[32]



The AES Board formally adopted the AES Amended Bylaws on August 1, 2023.[33] The AES Amended Bylaws provide "the exclusive means for a stockholder

[32] A160-161

[33] A161.

to nominate persons for election to the Board of Directors before an annual meeting or special meeting of stockholders[.]"[34]

Rather than publicly disclose that the AES Board adopted its Improper Bylaws for defensive purposes, as their Board materials clearly reflect, AES's public filings instead took a misleadingly innocuous tone. In its Form 10Q filed on August 3, 2023, AES opaquely stated that the amended bylaws "address[] matters relating to Rule 14a-19[.]"[35] But AES's Improper Bylaws were not mere technical changes necessary to comply with the Universal Proxy Rule. The Universal Proxy Rule only required that a stockholder submit their nominee's name and a statement of intent to solicit 67% of the stockholders' approval.[36] Thus, the Board did not need to adopt the Improper Bylaws to comply with applicable federal regulations.

B. THE OC BOARD ALSO ADOPTS IMPROPER BYLAWS

On June 14, 2023, OC's General Counsel Gina Beredo gave a presentation to OC's Governance and Nominating Committee recommending that the Board revise OC's advance-notice provisions. Similar to AES, the presentation slide is labeled "Universal Proxy Rule Amendments" to guard against "*the possibility that dissidents will utilize a universal proxy card*."[37]

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[34] A161.

[35] A162.

[36] SEC Rule 14a-19(b)(1)–(2).

[37] A266-267 (emphasis added).

Beredo's presentation further recommended that the Committee enact "*Enhanced Advance Notice Provision Amendments*" to "*expand the required disclosure for submitting stockholders to obtain more detailed information* about the proposal's proponent, the proposal, other interested parties, and the ownership interest in the Corporation of the proponent." As with AES' board materials, Beredo's presentation also touted that the new "Enhanced" ANBs "*may enable the Corporation to mount a stronger defense against the proposal*."[38]

OWENS CORNING

GOVERNANCE AND NOMINATING COMMITTEE

APPROVAL OF AMENDED & RESTATED BYLAWS

Gina Beredo, Executive Vice President, General Counsel and Secretary

Enhanced Advance Notice Provision Amendments

It is recommended that the advance notice provisions also be amended to align with current market practice more closely by enhancing the procedures and disclosure requirements for director nominations made and business proposals submitted by stockholders (the "Enhanced Advance Notice Provision Amendments").

The Enhanced Advance Notice Provision Amendments should be adopted to expand the required disclosure for submitting stockholders to obtain more detailed information about the proposal's proponent, the proposal, other interested parties, and the ownership interest in the Corporation of the proponent (including an expansion of the derivative instruments held by the proponent). This detailed information may enable the Corporation to mount a stronger defense against the proposal.

The corresponding Governance and Nominating Committee meeting minutes note that Committee discussed "the number of the Corporation's proxy peers that

[38] A268 (emphasis added; highlighting added).

had adopted the proposed revisions" and the "*advantages*" of "greater disclosure" about nominating stockholders and their nominees."[39]

The full board met the following day. Minutes from the the OC Board meeting reflect that when the Board considered whether to adopt the bylaws, it too construed "the advantages of … greater disclosure about nominating stockholders and their nominees[]," which the Beredo memorandum had noted was to allow "the Corporation to mount a stronger defense against the proposal," underscoring the board's entrenchment motive.[40]

The Board so amended its bylaws on June 15, 2023 (the "OC Amended Bylaws"), which include the ANB provision challenged here (the "OC Improper Bylaws" or "Improper Bylaws." Under the OC Amended Bylaws, OC's advance-notice bylaw (the "OC Advance-Notice-Bylaw") is "the exclusive means for nominations," and "only the chair of the meeting shall have the power and duty to determine whether a nomination" was "made or proposed" "in accordance with" the OC Advance-Notice-Bylaw.[41] As with AES, despite the entrenching motives underlying the OC Amended Bylaws, the Board caused OC to disclose a more innocuous justification publicly, stating that the Improper Bylaws were adopted

[39] A269-270.

[40] A268.

[41] A268, 270-71.

merely to "address matters relating to Rule 14a-19, as amended (the 'Universal Proxy Rule')."

But, as with AES, as the OC Board materials show, the OC Improper Bylaws were not mere administrative or technical changes to comply with the Universal Proxy Rule. They were designed to deter stockholders from participating in the nomination process.

C. THE IMPROPER BYLAWS ARE ONEROUS AND PRECLUSIVE

The AES and OC Improper Bylaws each consist of two main components: (a) an "Acting in Concert" definition ("Acting-in-Concert" or "AIC") applicable to the disclosure requirements with improper features including "Wolfpack" provisions that extend to limited partner disclosures and "Daisy Chain" provisions, and (b) an overbroad "Ownership" disclosure requirement. Both sets of provisions, which are nearly identical because they were drafted by the same outside counsel, serve to interfere with a stockholder's ability to nominate a director.

1. The Acting-In-Concert Definitions

Under both the AES and OC ANBs, a stockholder that wishes to nominate a director slate (the "Nominating/Proposing Person") must identify all compensation or financial agreements, arrangements or understandings over the past three years

between the Nominating/Proposing Person and a slew of others, including persons "acting in concert" with the nominee, or any affiliate thereof.[42]

The Acting-in-Concert provision in both bylaws includes a "Wolfpack" or "Conscious Parallelism" Provision, whereby a person acts "in concert" with a Nominating/Proposing Person if they act:

> towards a common goal relating to the management, governance or control of the Corporation in parallel with, such other person where (i) each person is conscious of the other person's conduct or intent and this awareness is an element in their decision-making processes and (ii) at least one additional factor suggests that such persons intend to act in concert or in parallel, which such additional factors may include, without limitation, exchanging information (whether publicly or privately), attending meetings, conducting discussions or making or soliciting invitations to act in concert or in parallel[.][43]

The Acting-in-Concert provision implicitly requires disclosures regarding the identities of the limited partners of Nominating/Proposing Persons, when those limited partners are aware of or informed about the Nominating/Proposing Person's intent to wage a proxy contest.[44]

The Acting-in-Concert definitions for both Defendants also include an identical "Daisy Chain" provision, whereby Person A and Person B are deemed

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[42] A197-199 (§ 9.01(C)); A222-228 (§ 1.7(a)(2)(A)-(C)).

[43] A163-164; *see also* A182-183 (§2.15(B)); A231 (§1.7(c)(A)(3)).

[44] A165-166; A273-274.

"acting in concert" with one another if they each act towards a "common goal relating to the management, governance or control of the Corporation" with third party (Person C), even if Persons A and B do not know each other and have never spoken:

> A person deemed to be "acting in concert" with another person shall be deemed to be "acting in concert" with any third party who is also "acting in concert" with such other person[.][45]

2. The Ownership Provisions

In addition to the overly expansive Acting-in-Concert definition, the ANBs Defendants adopted in 2023 also included extreme Ownership Provision disclosure requirements that mirror the ANB provisions invalidated by this Court due to length, vagueness, and incomprehensibility.[46]

The Ownership Provisions for the two companies were substantively similar. First, they were both extremely lengthy and complex. At the time the actions were filed, the AES Ownership Provision had 13 parts and 1523-words, while the OC Ownership Provision has 11 parts, and exceeds 1200 words. The Ownership Provision required the disclosure of any "material relationship with" or any "direct or indirect material interest in any material contract or agreement" with either the Company or any "principal competitor," held not only by the nominating

[45] A163-164; A182-183 (§2.15(B)); A231 (§1.7(c)(3)).

[46] A165-166; A273-274.

stockholder but by those considered "Acting-in-Concert" therewith by operation of the "Daisy chain" or "Wolfpack" provision.[47]

Both provisions demanded the disclosure of any voting or economic interests in the Company (including via derivative, non-stock securities), as well as a host of additional economic information that often described with undefined terms.[48] These Ownership Provisions would apply not merely to the stockholder nominating the candidate but also to persons brought in by operation of the Acting-in-Concert Provisions.

Both Ownership Provisions further required disclosures of stock and derivative interests that are unbounded in temporal scope.[49] And, they also required that the Nominating/Proposing Persons (and those Acting-in-Concert) disclose commercially sensitive performance-related fees, should the value of their Company stock appreciate.[50]

The OC and AES Boards further amended portions of their Ownership Provisions following *Kellner*.[51] They did so on August 27, 2025 and October 3, 2025

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[47] A167.

[48] A278; A167-168.

[49] A279; A1637-168.

[50] A168; A279.

[51] A175-209. *See* AES Corporation, Current Report (Form 8-K) (Oct. 4, 2024); *see also id.*, Ex. 3.1 ("Oct. 3, 2024 Amended Bylaws").

respectively. The Ownership Provisions in both companies, however, remain problematic. For example, for AES, a nominating stockholder no longer needs to disclose "material relationship" or "material interest" provisions, but the other issues Plaintiffs identified with the Ownership Provision, such as their vagueness and incomprehensibility remain, as does their unbounded scope, and performance-related fees disclosures.

IV. PLAINTIFFS AND PROCEDURAL HISTORY

Plaintiff Siegel is an AES stockholder, and Plaintiff Assad is an OC stockholder. Both Plaintiffs filed putative class action complaints in these cases; neither has interests adverse to either putative Class.[52]

In the Spring of 2024, both Plaintiffs conducted Section 220 investigations seeking books and records regarding the respective Boards' adoption of the contested bylaws. Following their investigations, Siegel filed his Verified Stockholder Class Action Complaint on June 7, 2024, seeking declaratory and injunctive relief on the grounds that the AES Improper Bylaws have a deterrent, chilling effect on stockholder nominations and cannot survive scrutiny under *Unocal*.[53] Siegel's initial complaint asserted both facial invalidity and *Unocal* claims. After Siegel moved to expedite ("MTE"), AES Defendants moved to stay proceedings ("MTS").

[52] A170, A171; A263, A281.

[53] A432.

On June 26, 2024, the trial court heard argument on the MTE and MTS in AES. The trial court denied both motions.[54]

Assad filed his action on June 26, 2024.[55] His complaint also sought declaratory and injunctive relief on the grounds that the OC Improper Bylaws have a deterrent and chilling effect on stockholder nominations and cannot survive *Unocal* scrutiny,[56] and asserted both facial invalidity and Unocal claims. Given the close similarities of the Improper Bylaws at issue, that the same outside counsel represented both AES and OC, and the 220 investigations were conducted by overlapping plaintiffs' counsel, the parties agreed to coordinate briefing and hearing.

On July 11, 2024, this Court issued its ruling in *Kellner*, which clarified the law applicable to facial and as-applied breach of fiduciary duty claims.[57]

Following the *Kellner* decision, Defendants in both actions filed motions to stay discovery on July 17, 2025. On July 24, 2024, the court below granted both motions to stay, noting that "Plaintiff points to no pending or imminent proxy contest. Nor does Plaintiff identify a stockholder who is 'chilled.'" The trial court further commented that "[r]ather than suggesting a selfish or disloyal motive, the text [of the board slides] seems generic and likely found in many law firm

[54] A083-136.

[55] A054-A082.

[56] A078-A079.

[57] A437-438; A493-494; *Kellner v. AIM ImmunoTech Inc.,* 320 A.3d 239 (Del. 2024).

memoranda,"[58] improperly construing inferences against Plaintiffs before any motion to dismiss briefing had even been filed.

Defendants filed their initial motion to dismiss briefs on August 20, 2024. On September 4, 2024, Plaintiffs filed Amended Complaints (the "Complaints"), which were revised to conform with this Court's guidance in *Kellner*. The Complaints each assert a single claim: a *Unocal* claim brought because the bylaws were defensively motivated and are unreasonable. Plaintiff filed a corrected version of the OC Complaint on September 10, 2024, to fix a formatting issue.

Both sets of Defendants filed renewed Opening Briefs on September 23, 2024.[59] Defendants moved to dismiss under both Rule 12(b)(1) and 12(b)(6), contending the complaints must be dismissed as unripe and because Plaintiffs had not stated viable claims. Defendants also characterized these cases as part of a supposed "flood" of ANB litigation following the *Kellner* trial opinion, which is incorrect.[60] Unlike the other ANB cases Defendants referenced, Plaintiffs sued only after completing 220 investigations that revealed the respective Boards' improper

[58] A137-139; A140-142.

[59] *See generally* A286-A347; A348-A410.

[60] A293, A355; *see Kellner v. AIM ImmuntoTech, Inc.*, 307 A.3d 998, 1023 n.242 (Del. Ch. 2023 *overturned in part,* 320 A.3d 239 (Del. 2024) (hereinafter "*Kellner* Trial Opinion")

defensive motives.[61] Further and critically, Plaintiffs in these actions assert equitable challenges under *Unocal* – not facial invalidity claims.

The motions to dismiss were heard together on November 20, 2024.[62] On April 14, 2025, and June 2, 2025, respectively, the Court of Chancery granted AES and OC's motions to dismiss on 12(b)(1) grounds only, finding each Plaintiff's claims unripe.[63]

This consolidated appeal follows.

[61] A301-032; A365-366.

[62] A529-A642.

[63] AES Op. 14; OC Op. 8-10.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING THE ACTIONS BECAUSE PLAINTIFFS' ADOPTION CLAIMS ARE RIPE

A. QUESTION PRESENTED

Are fiduciary duty challenges to AES's and OC's adoption of the Improper Bylaws ripe, where Plaintiffs alleged that the Improper Bylaws were adopted for improper purposes and create current and ongoing deterrent effects on stockholder proposals and nominations, notwithstanding that Plaintiffs do not presently intend to nominate candidates to the board?

This issue was preserved.[64]

B. SCOPE OF REVIEW

The scope of review is de novo.[65]

C. MERITS OF ARGUMENT

The trial court erred in dismissing the Cases on ripeness grounds. Plaintiffs' Complaints challenge the adoption of the Improper Bylaws, not their application. These adoption challenges are ripe because the Improper Bylaws were adopted for improper defensive purposes and impose substantial and present deterrent effects on stockholders' exercise of the corporate franchise.

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[64] *See* A439-457.

[65] *See XL Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1216 (Del. 2014); *see also Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004).

1. Plaintiffs Assert Ripe Breach of Fiduciary Duty Claims Challenging the *Adoption* of the Improper Bylaws

In *Kellner v. AIM ImmunoTech Inc.*,[66] this Court distinguished between legal and "validity" challenges to a bylaw provision and equitable challenges to its "enforceability."[67] "Bylaws 'may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.'"[68] Thus, bylaws are presumed to be valid.[69]

Nonetheless, "even if facial validity is not at issue, bylaws are still subject to judicial review."[70] The Court of Chancery "reviews corporate acts not only for their legality but also for their equity."[71] As "[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests" and because

[66] 320 A.3d 239 (Del. 2024).

[67] *Id.* at 262.

[68] *Id.* at 257 (*citing* 8 Del. C. §109(b)).

[69] *Kellner*, 320 A.3d at 258 (*citing Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985)).

[70] *Kellner*, 320 A.3d at 258; *see Salzberg v. Sciabacucchi*, 227 A.3d 102, 135 (Del. 2020) ("[B]ylaw provisions that may otherwise be facially valid will not be enforced if adopted *or* used for an inequitable purpose) (emphasis added).

[71] *Kellner*, 320 A.3d at 258-59.

advance notice bylaws "can be misused to thwart stockholder choice and entrench the existing board of directors," ANBs must be twice-tested in equity.[72]

Equitable challenges—such as the fiduciary duty claims that Plaintiffs assert here—are most often reviewed under *Unocal*. *Unocal* applies when a Board acts defensively in response to a perceived threat to corporate policy, and that action is draconian, preclusive, or disproportionate to the Board's stated goals. Where, as here, a Board is alleged to have acted without a legitimate threat to corporate policy and effectiveness, and instead adopted a disproportionate "response" aimed at deterring stockholder activism, Plaintiffs have properly stated a claim.[73]

Unocal is a two-step analysis. First,

> the court should review whether the board faced a threat "to an important corporate interest or to the achievement of a significant corporate benefit." The threat must be real and not pretextual, and the board's motivations must be proper and not selfish or disloyal. [74]

Second, if the Board faced a legitimate threat to corporate policy, the court will consider "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."[75]

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[72] *Id*. at 259.

[73] *See id.* at 259-60; *Coster v. UIP Cos., Inc.*, 300 A.3d 656, 672 (Del. 2023); *Williams Cos. S'holder Litig.*, 2021 WL 754593, at *21-22 (Del. Ch. Feb. 26, 2021), *aff'd*, *Williams Co. v. Wolosky*, 264 A.3d 641 (Del. 2021).

[74] *Coster*, 300 A.3d at 642.

[75] *Id.*

The "[d]irectors' actual and articulated reason for taking action figures prominently in the *Unocal* analysis."[76] When a board adopts "advance notice bylaws for a selfish or disloyal motive – meaning for the primary purpose of precluding a challenge to its control – the remedy is to declare the advance notice bylaws inequitable and unenforceable."[77]

Here, Plaintiffs each allege a single claim: that Defendants breached their fiduciary duties in *adopting* the Improper Bylaws. Plaintiffs allege that Defendants adopted the Improper Bylaws with the specific intent to defend against activists. As with the poison pill challenged in *Williams*, the Improper Bylaws were not adopted to protect against "any specific activist threat." Rather, the Boards "act[ed] pre-emptively to interdict hypothetical future threats."[78]

The Complaints allege that the Improper Bylaws were not adopted in response to a legitimate threat and were not a proportional response to any reasonably

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[76] *Williams*, 2021 WL 754593, at *23.

[77] *Kellner*, 320 A.3d at 259; *see also Salzberg*, 227 A.3d at 135 (charter and bylaw provisions "might be invalidated on an 'as applied' basis (i) they will not be enforced if doing so would be 'unreasonable and unjust,' (ii) they would be invalid for reasons such as fraud or overreaching; or (iii) they could not be enforced if they 'contravene[d] a strong public policy of the forum where suit is brought'") (discussing both stockholder challenges to both charter and bylaw amendments).

[78] *Williams*, 2021 WL 754593, at *24; *see id.* at 26 (finding based on trial testimony of board members and contemporaneous documents that "the intent of the Plan was to deter stockholder activism").

perceived threat to the Corporation.[79] The Complaints further allege that the Improper Bylaws chill and impermissibly burden the free exercise of the stockholder franchise, and in doing so have the purpose and effect of inequitably entrenching Defendants.[80]

2. Plaintiffs' Adoption Claims Became Ripe for Consideration After the Board Acted to Adopt the Improper Bylaws

This Court in *Kellner* made clear that Delaware courts should only address challenges regarding the adoption, amendment, or application of bylaws that are "ripe for judicial review."[81] Ripeness addresses "the simple question of whether suit has been brought at the right time"—i.e., if the facts are fully developed such that court has the authority to make a judicial determination that is not an advisory or hypothetical opinion.[82] "A bylaw dispute is ripe when litigation is 'unavoidable' and the 'material facts are static.'"[83]

By their plain terms, adoption challenges differ from application challenges. An *adoption* challenge concerns the circumstances under which the new bylaw was

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[79] *See* A162; A272-273.

[80] *See* A172; A283.

[81] *Kellner*, 320 A.3d at 246.

[82] *Bebchuk v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006).

[83] *Kellner*, 320 A.3d at 258-59 n.139 (*citing Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 936 (Del. Ch. 2013)).

proposed and approved by the board of directors. The board need not have attempted to enforce the bylaw for an adoption claim to be valid.

By contrast, a challenge to the *application* of a bylaw focuses on whether the board enforced an existing bylaw fairly. The circumstances of the bylaw's adoption are not decisive, as even a fairly-adopted bylaw may be applied unfairly. In an application challenge, the court "begins with a contractual analysis[,] [and if] circumstances require, the court will go on to assess whether there is a 'basis in equity to excuse strict compliance with the bylaws.'"[84]

Here, the trial court mistakenly treated Plaintiffs' claims as though they were application claims rather than adoption claims. On that flawed basis, it held that Plaintiffs' claims were unripe and dismissed them under Rule 12(b)(1).[85]

In dismissing Plaintiffs' claims, the court reasoned that Plaintiffs "ask[] the Court to review the Advance Notice Bylaws now, even though no stockholder presently seeks to nominate a director for election to the … Board."[86] The court further observed that "[w]hether any stockholder will attempt to do so in the future is unknown, and the facts that might arise are not static."[87] It noted that Plaintiffs did

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[84] *Kellner* Trial Opinion, 307 A.3d at 1037 n.333.

[85] *See* Memorandum Opinion, dated April 14, 2025, at *6 (hereinafter "AES Op.") (attached hereto as Exhibit A); Memorandum Opinion, dated June 2, 2025, at **5-6 (hereinafter "OC Op.") (attached hereto as Exhibit C).

[86] *See* AES Op. 14-15.

[87] *Id.*

not "identify a stockholder who either intends to run a proxy contest, is considering running one, or, for that matter, says he, she or it is 'chilled.'" The trial court concluded that "in the absence of a proxy contest threat[,]" Plaintiffs' "challenge is a hypothetical one" and not ripe for "the machinery of equitable review."[88] It justified its dismissal of the claim by opining that hearing the case "'would prematurely resolve a highly contentious and important matter before the court knows what pertinent facts might develop in the future.'"[89]

The trial court plainly erred in this finding. In "adoption" claims, once the Board approves the bylaws, the facts become static and historical; there are no relevant "facts that might develop in the future." Only in "application" claims could there be relevant facts that might develop post-adoption.

Plaintiffs do not assert an application claim. Their claims challenge the Boards' improper defensive actions in adopting the Improper Bylaws. These actions are in the past, and no future facts will arise that bear on these adoption claims.

The trial court's conflation of adoption and application claims is reflected in its statement that "the remedy for an enforceability or as-applied challenge is to declare the bylaw unenforceable in some respect, and having a ripe dispute allows

[88] *See* AES Op. 12; OC Op. 5.

[89] AES Op. 13 (quoting *Bebchuk,* 902 A.2d at 744).

this Court to specify *against whom* the bylaw cannot be enforced."[90] But an adoption claim such as this, which has been brought on a class basis, asserts that the Improper Bylaws were enacted with an improper intent and have an improper effect on all stockholders.

The court takes issue with Plaintiffs' requested relief—that the Improper Bylaws be found inequitable for the class of all stockholders—reasoning that such class-wide relief means that Plaintiffs really assert a facial invalidity claim.[91] But the court's reasoning is flawed. By reducing all possible challenges to only a "facial" challenge or an "application" challenge, the court overlooked adoption or amendment challenges, which are neither a "facial" nor an "application" challenge.

A bylaw is facially invalid only if it is not permitted by the DGCL or cannot operate lawfully under any circumstances. By contrast, an adoption challenge asserts that the bylaw's adoption was *inequitable*.

The trial court criticized Plaintiffs for not citing precedent involving an ANB challenge outside of a live proxy contest. But, as the trial court acknowledged, "equity is eminently flexible."[92] Here, against a backdrop of boards putting into

[90] AES Op. 11 (emphasis added). *But see Kellner*, 320 A.3d at 267 (finding bylaw provisions "unenforceable," without limitation to a particular party).

[91] AES Op. 11 n.54.

[92] OC Op. 12.

place "progressively more onerous requirements,"[93] the court is presented with allegations of a board of directors adopting and defending onerous bylaw provisions that Delaware courts have invalidated. This requires judicial review. Of course, different claims can lead to effectively the same remedies, and Delaware courts have invalidated bylaws and other Board decisions to remedy in a variety of circumstances. For example, in *MM Cos.*, this Court invalidated the Board's efforts to adopt bylaws to expand the board s to diminish the influence of dissident nominees.[94] And in *Hollinger International Inc.*, the Court of Chancery found bylaw amendments "inequitable" and therefore "of no force and effect" as to all stockholders.[95] Thus, in a variety of circumstances, equitable challenges result in setting aside board conduct as to all stockholders.

None of the cases cited by the trial court support the court's conclusion that these adoption challenges are unripe. The lower court relied heavily on *Bebchuk v. CA, Inc.*[96] In *Bebchuk*, the Court of Chancery found a case unripe when a stockholder sought a declaratory judgment regarding the facial validity of a proposed bylaw that

[93] Bates, *Rewriting Rules*, at 638.

[94] *MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1132 (Del. 2003) (recognizing while the Board had the power to expand the Board, it could not do so for an improper purpose)

[95] *Hollinger Int'l Inc. v. Black*, 844 A.2d 1022, 1082 (Del. Ch. 2004).

[96] 902 A.2d 737 (Del. Ch. 2006).

had *not* been enacted and remained subject to a "challenging stockholder vote."[97] The *Bebchuk* court dismissed the action as unripe because "the key event necessary to vest jurisdiction in this court is the adoption of the proposed bylaw," which had not yet come to pass.[98] The court specifically noted that if the stockholders approved the bylaw and the board refused to adopt it, then the dispute would have been ripe.[99] *Bebchuk* thus supports that these Cases are ripe.

The remainder of the cases cited by the trial court are equally inapposite. *XL Specialty* is an indemnity case holding that an indemnity claim is not ripe until there is an underlying judgment and involves fundamentally different circumstances. In *XL Specialty*, the jurisdictional trigger—the denial of the indemnity claim—had not yet occurred.[100] Here, by contrast, the jurisdictional trigger—the adoption of the Improper Bylaws—*has* occurred.

Nor does *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*,[101] dictate a different result. In *Boilermakers*, the court upheld bylaws as facially valid, rejecting plaintiffs' arguments about how the bylaws might be

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[97] *Id.* at 741.

[98] *Id.*

[99] *Id.*

[100] *XL Specialty,* 93 A.3d at 1218-19.

[101] 73 A.3d 934.

applied in the future.[102] Here, by contrast, the Complaints do not allege facial invalidity[103] or speculate about future applications of the Improper Bylaws.

The other cases cited by the court below are likewise inapposite. *Openwave* is inapplicable, as it involved an application challenge.[104] Similarly, in *Stroud II*, the Court declined to apply heightened scrutiny because there was "no evidence that the board adopted the [challenged bylaw amendments] as defensive measures."[105]

The trial court also erroneously concluded that these Cases are not ripe because "at some point in the future," the facts may change. The court speculated that a stockholder might "in the future" seek to nominate board candidates, and the facts about such hypothetical nomination are unknown.[106] The court reasoned that a stockholder could later claim to be chilled from nominating a candidate.[107]

But the court's speculation about future events ignores the nature of Plaintiffs' claims: the Boards have already breached their fiduciary duties by adopting the bylaws. The issue is not how the Boards might act toward some hypothetical future

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[102] *Id.* at 945-46, 963.

[103] As described above, Plaintiffs amended their complaints in conformity with this Court's holding in *Kellner* to assert only a claim for breach of fiduciary duty challenging the enforceability of the Board's adoption of the improper bylaws.

[104] *Openwave Sys. Inc. v. Harbinger Cap. P'rs Master Fund I, Ltd*., 924 A.2d 228, 240 (Del. Ch. 2007).

[105] *Stroud II*, 606 A.2d at 96.

[106] AES Op. 13-14.

[107] OC Op. 9.

stockholder. If such circumstances were to arise, that stockholder would have an *application* claim. And if raised within three years of the bylaws' adoption such a stockholder could also assert an adoption claim.

Here, equitable review of the Boards' adoption of the Improper Bylaws—and whether such provisions withstand *Unocal* review—is ripe and would not amount to an advisory opinion. The material facts are static, and the bylaws impose substantial present deterrent effects, as discussed in Point I(4), *infra*.

3. The Boards' Defensive, Entrenching Purpose in Adopting The Improper Bylaws Implicates *Unocal* Review, Confirming that Plaintiffs' Adoption Claims are Ripe

Because the DGCL imposes very few limits on what companies can put in their bylaws, facial validity is a low bar.[108] The real check comes through equitable challenges to such bylaws' adoption and enforceability.

When a board adopts "advance notice bylaws for a selfish or disloyal motive – meaning for the primary purpose of precluding a challenge to its control – the remedy is to declare the advance notice bylaws inequitable and unenforceable."[109]

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[108] *Kellner*, 320 A.3d at 258; Benjamin Bates, *Rewriting the Rules for Corporate Elections*, 100 N.Y.U. L. REV. 635, 662 (2025) (hereinafter, "Bates, *Rewriting Rules*").

[109] *Kellner*, 320 A.3d at 259-60, *citing Coster (Unocal* review applies "when a board interferes with a corporate election or a stockholder's voting rights in contests for control.")

Enhanced scrutiny under *Unocal*, in turn, is triggered when a board acts for defensive purposes.[110] "The Court may consider all relevant circumstances to discern the directors' motivations."[111] A defensive measure can trigger enhanced scrutiny even without an activist or bidder surfacing *ex ante*.[112] This reflects recognition of the principle that a board that "acts to prevent shareholders from effectively exercising their right to vote" faces "inherent conflicts of interest" that warrant enhanced scrutiny.[113]

In *Kellner*, this Court found that the AIM ImmunoTech board adopted ANBs for an improper purpose: to thwart an approaching proxy contest, entrench the board, and foreclose the possibility of a contested election.[114] That was sufficient to fail

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[110] *See, e.g.*, *Coster*, 300 A.3d at 667 (equitable review appropriate "where the board acts within its legal power, but is motivated for selfish reasons to interfere with the stockholder franchise"); *In re Edgio, Inc. S'holders Litig.*, 2023 WL 3167648, at *15 (Del. Ch. May 1, 2023) ("[T]riggering *Unocal* enhanced scrutiny requires pleading the board acted with a subjective motivation of defending against a perceived threat."); *Ryan v. Armstrong*, 2017 WL 2062902, at *7 (Del. Ch. May 15, 2017) (entrenchment motive triggers *Unocal* review).

[111] *Edgio*, 2023 WL 3167648, at *15.

[112] *See, e.g.*, *Williams*, 2021 WL 754593, at *21 (applying *Unocal* to poison pill "designed to address stockholder activism" even where no activist had emerged); *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 599 (Del. 2010) (applying *Unocal* to NOL poison pill even in absence of "an actual or potential hostile takeover threat"); *Stroud II*, 606 A.2d at 82 ("The scrutiny of *Unocal* is not limited to the adoption of a defensive measure during a hostile contest for control.").

[113] *MM Cos.*, 813 A.2d at 1129.

[114] 320 A.3d at 253.

prong one of *Unocal*.[115] This Court nevertheless examined the ANBs and agreed that they were preclusive, functioned as "tripwires," and reflected an intent to block dissident shareholders.[116]

Here, the Complaints plead that Defendants' board materials show that AES and OC adopted the Improper Bylaws to "*mount a more effective defense*" against activists.[117] The Boards acted out of concern that the Universal Proxy Rule would "make it easier for activists to gain seats on boards[.]"[118] The Board slides evidence the same improper motive identified in *Kellner*—to entrench incumbents and minimize the likelihood of a contested election. The only difference is that in *Kellner*, the board acted to block specific stockholders, while here, the AES and OC Boards acted to block *all* stockholders.

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[115] *Id.* at 265.

[116] *Id.* at 264.

[117] *See* A266-267; A162.

[118] *See* A266-267; A158-159. The trial court did not address directly Plaintiffs' allegation that the Boards acted defensively; instead, the court minimized Board materials that plainly display the Boards' defensive intention by finding them "vanilla" and "generic." The trial court's treatment of these allegations, and its decision to accord them less weight than warranted, is addressed in Part II, *infra*.

4. The Present Deterrent Effects of the Improper Bylaws Create a Ripe Dispute

Stockholders have three fundamental rights: to vote, sell, and sue.[119] Stockholders' right to nominate candidates to run against incumbent directors is essential to ensuring that their voting rights are meaningful.[120]

A corporate action is ripe when it has a substantial and present deterrent effect on stockholders and the stockholder franchise.[121] Plaintiffs' claims are ripe because the Improper Bylaws are alleged to presently have such an effect.

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[119] *Williams*, 2021 WL 754593, at *20 (discussing "subsidiary rights," including the right to nominate directors, that "flow" from stockholders' fundamental rights "to vote, to sell, and to sue").

[120] Bates, *Rewriting Rules*, at 637; *Strategic Inv. Opp. LLC v. Lee Enters., Inc*., 2022 WL 453607, at *8 (Del. Ch. Feb. 14, 2022) (internal quotation omitted) (citing cases); *see also Williams*, 2021 WL 754593, at *30 ("stockholder activism is intertwined with the stockholder franchise"); *cf. MM Cos.*, 813 A.2d at 1126 ("the stockholder's power is the right to vote").

[121] *Solak v. Sarowitz*, 153 A.3d 729, 737 (Del. Ch. 2016) (disputes are ripe for review when stockholders challenge measures that have a substantial deterrent effect" on stockholder rights.) (collecting cases); Compendium Tab 1 (*Pontiac Gen. Emps. Ret. Sys.*) at 72-73 (proxy put challenge ripe even though untriggered because a "truly effective deterrent is never triggered"); *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1072 (Del. Ch. 1985), *aff'd*, 500 A.2d 1346 (Del. 1985) (poison pill challenge ripe when it "involves the alleged present depressing effect … on shareholder interests, regardless of whether the rights are in fact ever triggered").

(a) The Improper Bylaws Contain Acting-in-Concert Provisions With Wolfpack and Daisy-Chain Features that Mirror Disclosure Provisions Held by this Court to be Inequitable and Invalid

The Improper Bylaws are nearly identical to bylaw provisions that have been invalidated in other contexts: specifically, (i) Acting-in-Concert ("AIC") provisions with improper "Wolfpack" and "Daisy-Chain" features that were struck on *Unocal* grounds in *Williams*; (ii) the Stockholder-Associated-Person Provision found unenforceable in *Kellner*; and/or (iii) Ownership Provisions that mirror ownership provisions invalidated in *Kellner*.

(i) The Improper Acting-in-Concert Provisions

The AIC provisions of the Improper Bylaws use mechanisms that chill stockholder engagement and deter stockholder nominations: (i) the Wolfpack Provision limits stockholders' ability to engage with each other pre-nomination and may require Limited Partner ("LP") Disclosure; and (ii) the Daisy-Chain Provision requires stockholders to disclose the identity of third parties they may not even know exist.

First, the Wolfpack Provision improperly targets "conscious parallelism" by requiring a stockholder to disclose parties who *may* be acting towards similar or identical goals, even absent any agreement to act together.[122] Wolfpack provisions

[122] A164; A274-275.

have been included in anti-activist stockholder rights plans, and invalidated as "extreme" and unreasonable in relation to any legitimate corporate objective.[123] The *Williams* court found that wolfpack provisions improperly "make illicit parallel actions that are not the product of an agreement," in a manner that is "based on a fundamental misconception of how [stockholders] ought to act" and which "threaten[s] to chill the [] shareholder interaction."[124]

Second, the Wolfpack Provisions presently burdens potential nominations by threatening to expose the identities of limited partners, who generally have no authority, and whose identities are commercially sensitive and often subject to confidentiality agreements that prohibit disclosure.

Third, the AIC provisions contain "Daisy-Chain" features which deems two persons to be acting in concert if they independently coordinate with a common third party—even if they are unaware of each other's existence. Daisy-chain provisions leave stockholders "no way of knowing with any certainty with which other third parties they are aggregated"[125] which makes it nearly impossible for *any* nominating stockholder to comply with the ANB disclosure requirements.

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[123] *Williams*, 2021 WL 754593, at *37.

[124] *Id.* (quoting Marcel Kahan & Edward Rock, *Anti-Activist Poison Pills*, 99 B.U. L. REV. 915, 962-66 (2019); s*ee* Tab 2 at 53-54.

[125] *Williams*, 2021 WL 754593, at *37 n.383; *see also Kellner*, 320 A.3d at 265 (AAU provision requiring nominator to "gather information about agreements and

That Defendants specifically chose to implement—and now defend—ANB provisions the Court of Chancery has already invalidated as "extreme," "tripwires," "disproportionate" to any legitimate board goal,[63] "chill[ing] to a wide range of anodyne stockholder communications,"[64] and impossible to comply with, supports the well-pled inference that the Boards acted with improper entrenchment intent. These disclosure obligations are no less a tripwire because they were aimed broadly at all stockholder activism, rather than at a specific stockholder in connection with an active proxy contest.

(ii) The Challenged Ownership Provisions

The Ownership Provisions require a broad range of expansive ownership-related disclosures, many of which go "wildly beyond" what is necessary to obtain full and fair information about the nominating stockholder and nominating group. Similar to the "Ownership Provision" invalidated in *Kellner*, the Improper Bylaws include a multi-part, thousand-word run-on provision that not only demands the disclosure of any equity "interest" in the Company (including synthetic or derivative ownership interest, short interests, and hedging arrangements), as well as a litany of additional information over an unbounded time period.[126] For example, the

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understandings between any members of potentially limitless class of third parties and individuals unknown to the nominator" found unenforceable)

[126] As of the filing of the Complaints, the AES Ownership Provision demanded disclosure of any "material relationship with" or any "direct or indirect material interest in any

Ownership Provisions require the Nominating Person (and those Acting in Concert) to disclose its performance-related fees should the value of its Company stock appreciate.

No stockholder can reasonably be expected to comply with such requirements as written, which—as discussed below—create a chilling effect on stockholder nominations. Similar to the Ownership Provision in *Kellner*, AES's and OC's Ownership Provisions are so unworkable that they appear "designed to preclude a proxy contest for no good reason."[127] For example, by demanding disclosure of an investor's commercially sensitive information—such as performance-related fees—the provisions inflict real and current harm by deterring stockholders from making nominations in the first place.[128]

material contract or agreement" with either the Company or any "principal competitor," held not only by the nominating stockholder but by unknown third parties brought in by the Daisy-Chain provision, or third parties purportedly part of a "Wolfpack." In October, the AES Board amended the bylaws; however, other problems with the Ownership Provision persist.

[127] *Kellner*, 320 A.3d at 264.

[128] *Cf. In re Dell Tech., Inc. Class V. S'holders Litig.*, 326 A.3d 686, 705 (Del. 2024) (remarking that the court should not deter meritorious objections to fee applications by demanding that they disclose their business practices—i.e., their performance fees).

(b) The Improper Bylaws Have Present, Substantial Deterrent Effects

The trial court concluded that Plaintiffs' claims are hypothetical and not ripe because Plaintiffs themselves do not intend to nominate a candidate, nor do they identify a specific stockholder that has been chilled or deterred.[129]

The court's conclusion is contrary to long-standing Delaware precedent that a plaintiff does not have to directly use a bylaw to be injured by its operation, and that an individual stockholder need not come forward to say they are chilled for a defensive measure to have a deterring effect or a claim to be ripe. For example, in *Williams*, defendants asserted that the plaintiffs' alleged harm was speculative because plaintiffs did not intend to run a proxy contest or engage with other stockholders, and was "not aware of any Williams stockholders who have refrained from taking this action because of the Rights Plan."[130] The court quickly disposed of this argument, stating "it is not incumbent on a class representative to prove a negative. Given the Plan's features, the absence of stockholder activism could be a consequence of the Plan."[131] Similarly, in *Lerman v. Diagnostic Data, Inc.*, the court

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[129] AES Op. 13. As set forth in Point II, *infra*, this reasoning addresses the merits of Plaintiffs' claims, which required the court limit its inquiry to the pleadings, and construe all reasonable inferences in Plaintiffs' favor, which the court failed to do.

[130] *Williams*, 2021 WL 754593, at *20 n.233 (referring to trial testimony).

[131] *Id.*; *see also Giuricich v. Emtrol Corp.*, 449 A.2d 232, 239 (Del. 1982) ("[C]areful judicial scrutiny will be given [to] a situation in which the right to vote for the election of successor directors has been effectively frustrated and denied . . . ."); *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127 (Del. 2003) (Delaware Supreme Court "and the Court of

invalidated amended bylaws where they inhibited stockholder activists from mounting a proxy contest "*along with any other [company] shareholder who secretly might have been harboring similar intentions*").[132]

Incredibly, the trial court dismissed the Improper Bylaws as having only a "supposed deterrent effect"[133] seemingly without analyzing the Improper Bylaws themselves or considering how they operate to deter stockholder engagement. Instead, the court summarily discredited Plaintiffs' well-pled allegations regarding deterrence in favor of endorsing Defendants' unfounded—and incorrect—factual assertion that the Improper Bylaws have "no actual effect until a nomination is submitted and then only if the nomination is rejected for failure to comply."[134]

The trial court improperly disregarded the many ways in which the Improper Bylaws chill and deter stockholders well before any nomination or live proxy contest. The present deterrent effects of the Improper Bylaws are two-fold.

First, the Improper Bylaws erect significant barriers to potential activists, making it far more difficult to successfully submit stockholder proposals or challenge incumbents. They increase the costs, uncertainty and reputational risks of

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Chancery have remained assiduous in carefully reviewing any board actions designed to interfere with or impede the effective exercise of corporate democracy by shareholders, especially in an election of directors.").

[132] 421 A.2d 906, 912 (Del. Ch. 1980) (emphasis added).

[133] AES Op. 17.

[134] AES Op. 18 n.84.

pursuing stockholder engagement—whether through nominations or proposals—which in turn deters stockholders from exercising their fundamental stockholder franchise rights.[135] This deterrent effect is immediate and ongoing: it applies to every current or potential stockholder of AES or OC who *might* otherwise consider nominating or submitting a stockholder proposal. These chilling effects have existed since the Improper Bylaws were adopted and are in play well before any proxy contest begins.

Activist stockholders are presumed to be economically rational actors. Adding the enormous cost and burden of intrusive disclosure obligations and the uncertainty and reputational risks of expedited litigation to a proxy campaign's already substantial expense is a nuclear deterrent to activist. Stockholders know that to submit a valid nomination or proposal, they must strictly comply with unambiguous ANBs that have been adopted on a clear day.[136] When confronted with overbroad or ambiguous "trip-wire" ANBs, they must also anticipate the prospect of inequitable or defensive enforcement by the board—and the significant costs of challenging that enforcement.

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[135] A169; A279-280.

[136] *BlackRock Credit Allocation Income Trust v. Saba Capital Master Fund, Ltd.*, 224 A.3d 964, 978-79 (Del. 2020); *Strategic Inv. Opp. LLC*, 2022 WL 453607, at *9-10, *22; *Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140, at *5, *17 (Del. Ch. Oct. 13, 2021).

Activist stockholders are not in the business of spending money simply to right a company's wrongs—their objectives, and often their own fiduciary duties, are profit-driven. They must weigh the substantial risks and costs of a campaign, coupled with the prospect of costly litigation, against the expected benefit if the campaign succeeds. As the Court of Chancery has remarked, "few stockholders will rationally be able to accept the risk of exposure to millions of dollars in attorneys' fees to attempt to rectify a perceived corporate wrong, no matter how egregious."[137] Activists must further anticipate that the Court of Chancery may deny corporate-benefit fees even where they prevail in vindicating the stockholder franchise—on the basis that their interest in obtaining a board seat may disqualify them from creating a compensable corporate benefit.[138]

Thus, when confronted with Defendants' ambiguous, extreme, draconian, tripwire bylaws, an economically rational activist will have every incentive to deploy their capital elsewhere, investing instead in companies with less onerous ANBs.

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[137] *Solak*, 153 A.3d at 738.

[138] *See, e.g.*, Order, *Driver Opp. P'rs I LP v. Briggs*, C.A. No. 2023-0287-NAC (Del. Ch. May 22, 2025) (denying corporate benefit for activist who successfully challenged ANB amendments but lost the corporate election)); Tab 4 (*CAMAC Fund v. Wagner*) at 36 (no corporate benefit because "Camac is an activist investor. Activism is Camac's business model, and this settlement contemplates paying Camac for doing its job."); *ARC Global Invs. II LLC, v. Digital World Acquisition Corp.*, 2025 WL 1922011, at *4 (Del. Ch. July 14, 2025) (granting only a $75,000 fee as the court determined the plaintiff "set out primarily to benefit itself").

Second, the Improper Bylaws unreasonably chill stockholder communications for any stockholder considering a proposal or director nomination. As the *Williams* court noted, "[s]tockholders frequently 'take the temperature' of other stockholders in advance of launching a proxy contest in light of the risk of financial and reputational damage resulting from a failed contest."[139]

The Wolfpack Provisions in the Improper Bylaws restrict stockholder "activity leading up to a proxy contest" in ways similar to a poison pill, by "imped[ing] . . . private communications in advance of proxy contests."[140] As the *Williams* court recognized, the "stifling effects the Plan has on stockholder communications, a chilling effect that exists *whether the Board triggers the Plan or not.*"[141]

The trial court sought to distinguish *Williams* and the proxy put cases, asserting that the "supposed deterrent effect" of ANBs is unlike the "immediate and devastating financial consequences" of stockholder rights plans or dead hand proxy puts, which are "purportedly self-executing."[142] The trial court further reasoned that because ANBs do not trigger equity dilution or "potentially ruinous debt

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[139] *Williams*, 2021 WL 754593, at *38.

[140] *See id*.

[141] *Id.* at *39 n.401 (emphasis added); *see* Bates, *Rewriting Rules*, at 646 (citing material that in turn indicates that activist stockholders may communicate with other stockholders prior to determining whether to engage in an activist campaign).

[142] AES Op. 17-18 n.84.

acceleration" as proxy puts or poison pills, the line of Delaware precedent recognizing the chilling effects on stockholder activism is inapplicable.[143]

This distinction is divorced from reality. Deterrent effects have been found to arise not only from threatened dilution (poison pills) or debt acceleration (proxy puts), but also from financial and practical realities. Defensive measures need not reflect *immediate* financial consequences, so long as the consequences are *significant*. In *Solak*, for example, the court found on a motion to dismiss that claims challenging a fee-shifting bylaw were ripe because the "practical reality is that, so long as the Fee-Shifting Bylaw remains in place, it is highly unlikely that any rational stockholder of Paylocity would file an internal corporate claim outside of Delaware because of the significant risk of personal liability that triggering the [bylaw] presents."[144]

As Delaware courts have explained time and again, the lack of "any move against the company or proxy contest isn't dispositive" when challenging restrictions on the stockholder franchise, because "defensive measures like these acts as deterrents."[145] "The best deterrents never have to be used. The even better deterrents not only never have to be used, but *the threat you are attempting to deter never*

[143] AES Op. 19.

[144] *Solak*, 153 A.3d at 738.

[145] Tab 5 at 34:7-10.

manifests because the deterrent is successful."[146] ANBs are no exception, as they "can be misused to thwart stockholder choice and entrench the existing board of directors."[147]

The trial court concluded on a motion to dismiss that the deterrent effect of the Improper Bylaws was insufficient to establish a ripe claim. In doing so, it disregarded Plaintiffs' well-pled allegations and reached that conclusion without the benefit of any evidence. By contrast, in both *Williams* and *Kellner*, the Court of Chancery had expert reports and testimony addressing the impacts of the boards' defensive measures on stockholder nominations and stockholder activism, which informed the court's fiduciary-duty analyses.[148] Given the critical stockholder franchise rights at stake—rights that form "the ideological underpinning upon which the legitimacy of directorial power rests[,]"[149]—the trial court's decision to prejudge the merits of Plaintiffs' claims at the pleading stage cannot stand.

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[146] *Id*. at 34 (emphasis added); *see also* Tab 1 (*Pontiac Gen. Emps. Ret. Sys.*) at 73:1-5 ("A truly effective deterrent is never triggered. A really truly effective deterrent is one you don't even have to point the other side to because they know it's there. If the deterrent is actually used, it has failed its purpose.").

[147] *Kellner*, 320 A.3d at 259.

[148] *See Kellner* Trial Opinion, 307 A.3d at 1006 (noting expert reports); *Williams*, 2021 WL 754593, at *2 (same).

[149] *Blasius Inds., Inc. v. Atlas Corp.*, 564 A.2d 651, 658 (Del. Ch. 1988).

II. THE TRIAL COURT APPLIED AN INCORRECT STANDARD IN DISMISSING THE CLAIMS

A. QUESTION PRESENTED

Whether the trial court erred when it failed to apply the correct, plaintiff-friendly Rule 12(b)(6) standard of review where the court's ripeness analysis was intertwined with the facts central to Plaintiffs' *Unocal* claims.

This issue was preserved.[150]

B. SCOPE OF REVIEW

As discussed above, the scope of review is de novo.[151]

C. MERITS OF ARGUMENT

The trial court applied the wrong standard of review. It dismissed the Cases for lack of ripeness based on Plaintiffs' lack of intent to nominate, while acknowledging that the cases could be brought by a nominating stockholder. That reasoning sounds in standing, not subject-matter jurisdiction. Delaware precedent requires applying Rule 12(b)(6) when justiciability turns on facts intertwined with the merits. Instead of accepting Plaintiffs' allegations and inferences as true, and confining the analysis to the pleadings, the court improperly construed facts against

[150] A439; A495.

[151] *XL Specialty*, 93 A.3d at 1216; *see Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013), *as corrected* (Oct. 8, 2013).

Plaintiffs and ignored well-pled allegations of present deterrent effects. This was plain error.

1. The Standard of Review for Ripeness and Standing Depends on Whether the Justiciability Issues Closely Intersect with the Merits of Plaintiffs' claims

Rule 12(b)(1) is not limited to cases in which subject-matter jurisdiction is absent.[152] It is also invoked to resolve "adjacent" prudential questions—such as "abstention doctrines and justiciability issues" including "standing, ripeness, and mootness"[153]—that address whether a court should exercise the subject-matter jurisdiction it possesses. As the court explained in *Gandhi-Kapoor v. Hone Capital LLC*, "[c]lose attention is required" to a Rule 12(b)(1) opinion's reasoning, as it "does not follow that … any decision that rules on a 12(b)(1) motion and uses the language of subject matter jurisdiction necessarily establishes that a court lacks the power to hear that type of case."[154]

"[S]ubject matter jurisdiction refers to a court's 'authority to adjudicate the type of controversy involved in the action[,]' and "derives … from constitutional or

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[152] *Gandhi-Kapoor v. Hone Cap. LLC*, 307 A.3d 328, 333 (Del. Ch.), as corrected (Dec. 4, 2023), *aff'd sub nom. CSC Upshot Ventures I, L.P. v. Gandhi-Kapoor*, 326 A.3d 369 (Del. 2024).

[153] *Id*. at 341-42.

[154] *Id.* at 340.

statutory provisions that create or empower the court."[155] The legislature has "conferred jurisdiction on the Court of Chancery to decide all matters and causes in equity."[156] "When considering a motion to dismiss for lack of subject matter jurisdiction, the Court must address the nature of (1) the wrong alleged, and (2) the remedy sought, to determine whether a legal, as opposed to an equitable, remedy is available and adequate."[157]

By contrast, ripeness does not ask whether the court has authority to hear a claim, but whether it is the correct time to do so.[158] The inquiry balances the plaintiff's interest in immediate relief against the court's interest in postponing review.[159] References to ripeness as "the heart of whether a court has subject matter jurisdiction" are shorthand—as ripeness addresses whether the court *should* exercise the subject-matter jurisdiction it already has.[160] Similarly, disputes over standing

[155] *Id.* at 338; *see Kroll v. City of Wilmington*, 2023 WL 6012795, at *14 (Del. Ch. Sep. 15, 2023) ("Subject matter jurisdiction concerns this court's powers, not the parties' rights.").

[156] *CCSB Fin. Corp. v. Totta*, 302 A.3d 387, 397 (Del. 2023).

[157] *CLP Toxicology, Inc. v. Casla Bio Holdings LLC*, 2021 WL 2588905, at *9 (Del. Ch. June 14, 2021).

[167] *Bebchuk*, 902 A.2d at 740.

[159] *Gandhi-Kapoor*, 307 A.3d at 342.

[160] *See Bebchuk*, 902 A.2d at 740; *see also Gandhi-Kapoor*, 307 A.3d at 342 ("a ripeness determination does not involve a court determining whether it has subject matter jurisdiction"; ripeness is an abstention, not jurisdictional, doctrine)

concern *who* may bring a claim, *not* whether the court has jurisdiction over the claim.[161]

The standard on a Rule 12(b)(1) motion to dismiss for lack of standing or ripeness differs from that for subject-matter jurisdiction. For true jurisdictional defects, the nonmovant bears the burden and the court may consider facts outside the pleadings.[162] But for standing or ripeness, the court may proceed under either Rule 12(b)(1) or 12(b)(6), depending on the circumstances of the case. [163]

Where justiciability issues are intertwined with the facts central to the merits, the proper standard of review is Rule 12(b)(6), not the more rigorous Rule 12(b)(1) standard for jurisdictional defects. This Court addressed this issue squarely in *Appriva Shareholder Litigation Company v. EV3, Inc*., explaining that in motions to dismiss on justiciability grounds, when the facts on which dismissal hinges are "intertwined with" facts "central" to the Plaintiffs' claims, the more plaintiff-friendly standard of review applicable to Rule 12(b)(6) applies because what is at issue is

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[161] *Gandhi-Kapoor*, 307 A.3d at 342; *see Cont'l Auto. Sys., Inc. v. Nokia Corp.*, 2023 WL 1370523, at *6 (Del. Ch. Jan. 31, 2023) (*quoting Dover Hist. Soc'y v. Dover Plan. Comm'n*, 838 A.2d 1103, 1110 (Del. 2003)) ("The term 'standing' refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or redress a grievance."); *see Dover*, 838 A.2d at 1111 (standing is a "matter of self-restraint").

[162] *See Appriva S'holder Litig. Co. v. EV3, Inc.*, 937 A.2d 1275, 1285 n.14 (Del. 2007) (noting that Rule 12(b)(1) is "far more demanding" of a non-movant).

[163] *See In re COVID-Related Restrictions on Religious Servs.*, 302 A.3d 464, 478 (Del. 2023) ("The court may review motions to dismiss based on standing pursuant to Rule 12(b)(1) or 12(b)(6) depending on the circumstances of the case. Whether Rule 12(b)(1) or 12(b)(6) applies depends on whether "the issue of standing is related to the merits.")

whether "the plaintiff has failed to plead a necessary element of a cognizable claim."[164] The Court explained that in such circumstances, "the entire factual dispute is appropriately resolved only by a proceeding on the merits."[165]

Appriva's reasoning cohere with the rule that when a court relies on matters outside the pleadings, a dismissal motion is effectively converted to a summary judgment motion, requiring notice and a chance to present evidence. [166] Thus, prudential justiciability questions intertwined with the merits should be assessed under Rule 12(b)(6); otherwise, the court risks premature fact-finding that contradicts the pleadings.[167]

Appriva expressly concerns standing. Nonetheless, Delaware courts likewise recognize that the more plaintiff-friendly 12(b)(6) standard of review should govern 12(b)(1) motions made on ripeness grounds. For example, in *Christiana Care Health*

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[164] *Appriva*, 937 A.2d at 1284-85.

[165] *Id.* (providing examples of when a jurisdictional fact is "intertwined with facts central to the merits" of the underlying dispute); *In re COVID*, 302 A.3d at 478 (dismissal for failure to plead an element of a claim is decided under Rule 12(b)(6)).

[166] *Appriva*, 937 A.2d at 1286-87; *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1060 (Del. 1986); Ch. Ct. R. 12(b); *see also In re Allergan S'holder Litig.*, 2014 WL 5791350, at *9 (Del. Ch. 2014) (finding ANB claim unripe on summary judgment only after plaintiffs declined to seek discovery and admitted facts).

[167] *See Appriva*, 937 A.2d at 1286-89 (requiring notice unless parties "have presented all evidence related to dispositive issues"); *cf. Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007) (in Rule 12(b)(2) motion, without an evidentiary hearing, "the record is construed in the light most favorable to the plaintiff").

Servs., Inc. v. Carney, the court reviewed the ripeness of plaintiffs' claims on Rule 12(b)(1) motion to dismiss, and held that:

> the court must take the allegations in the complaint as true and construe all reasonable inferences in the non-movant's favor. Dismissal will be granted if 'it appears to a reasonable certainty that under no state of facts which could be proved would [the plaintiffs] be entitled to relief.'[168]

Likewise, in *Harmon v. Masoneilan International, Inc.*, this Court applied the same reasoning as in *Appriva* to reverse on laches grounds and faulted the trial court for going "outside the complaint to obtain facts … on which to base its ruling [granting dismissal of a rescission claim] on laches," where the facts plaintiff presented in its filings "raised, at the very least, a justiciable issue [of fact] … that precluded striking, in effect, before trial, plaintiff's claim …."[169]

In short, where facts relevant to laches, ripeness, or standing are "closely related" to and "intertwined with" the merits, the motion to dismiss must be reviewed under Rule 12(b)(6), rather than Rule 12(b)(1), thus confining the analysis to the pleadings and giving plaintiffs the benefit of all inferences.[170]

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[168] *Christiana Care Health Servs., Inc. v. Carney*, No. 2024-0802-LWW, 2025 WL 1541638, at *4 (Del. Ch. May 30, 2025); *See Klein v. ECG Topco Holding, LLC*, 2022 WL 2659096, at *2 (Del. Ch. July 8, 2022).

[169] 442 A.2d 487, 502 (Del. 1982).

[170] *Appriva*, 937 A.2d at 1280; *Harmon*, 442 A.2d at 489.

2. The Court Below Applied the Wrong Standard of Review

The trial court held that the standard for evaluating Defendants' Rule 12(b)(1) motion to dismiss is "far more demanding of the non-movant" than Rule 12(b)(6).[171] The court further stated further that "[d]ismissal under Rule 12(b)(1) is appropriate if the record, including evidence outside the pleadings, indicates that the court does not have subject matter jurisdiction."[172] The trial court was wrong.

First, the court need not have questioned its subject-matter jurisdiction; the Court of Chancery plainly has jurisdiction over equitable *Unocal* claims.[173]

Second, in deciding whether to decline its subject-matter jurisdiction, the court was required to assess whether the ripeness facts were "intertwined with the facts central to the merits," which determines the proper standard of review. It failed to do so.

Third, although framed as ripeness, the court's reasoning actually sounded in standing, focusing on Plaintiffs' lack of intent to nominate a candidate or whether Plaintiffs themselves were personally chilled by the Improper Bylaws; [174] these are issues of standing, not ripeness.

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[171] AES Op. 12.

[172] *Id.*

[173] *CCSB Fin. Corp.*, 302 A.3d at 397.

[174] AES Op. 2; OC Op. 8-9.

In *AES*, the court also noted that Plaintiff "does not even allege that any of the Advance Notice Bylaws' disclosure requirements that he challenges *would apply to him* if he were to submit a nomination[.]"[175] The AES Opinion states:

> Plaintiff objects to the Ownership Provision's requirement for disclosure of performance-related fees, or "carry," since "[d]emanding disclosure of such commercially sensitive information to the Company can deter stockholders from making nominations in the first place. But Plaintiff does not allege that *he* charges performance-related fees such that this disclosure requirement would apply to *him* if *he* were to make a nomination.[176]

The court's reasoning in OC similarly focuses on Plaintiff's standing.[177] But the court below acknowledged that an equitable challenge to the adoption of advance notice bylaws can be ripe in the absence of a proxy contest *if* brought by "a stockholder saying she is chilled from making a nomination."[178] The court thus recognized that the case would be justiciable if brought by a different stockholder who alleges that she is deterred or chilled by the Improper Bylaws.[179] Thus, the

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[175] AES Op. 14 (emphasis added).

[176] *Id.*

[177] OC Op. 8-9 (emphasis added) (noting that Plaintiff "acknowledges *he* will not, and has no interest in, running a proxy contest," that *he* does not allege that any of the challenged disclosure requirements would apply to *him* if he were to submit a nomination, and that *he* cannot identify an OC stockholder who is deterred or chilled).

[178] OC Op. 4-5, 11; AES Op. 16.

[179] OC Op. 11; AES Op. 16.

court's analysis, focusing on whether relief could be granted to these specific Plaintiffs, centers on standing, not ripeness.[180]

Plaintiffs allege present harm because the Improper Bylaws deter other stockholders from nominating. Whether passive investors like Plaintiffs have alleged sufficient injury for the "*court [to] grant relief to these particular plaintiffs*"[181] is central to the justiciability inquiry and is also intertwined with the merits of the case. Because the standing/ripeness issue is "so closely related to the merits," the court was required to apply Rule 12(b)(6), but failed to do so.

3. The Trial Court Improperly Relied on Facts Outside the Pleadings and Applied the Wrong Pleading Standard to Plaintiffs' *Unocal* Claims

Whether framed as standing or ripeness, Rule 12(b)(6) governs Defendants' motions. The court below erred by applying the wrong standard—considering evidence outside the pleadings, construing inferences against Plaintiffs, and making factual findings contrary to the Complaints. It disregarded Plaintiffs' allegations that the Improper Bylaws have a present deterrent effect, instead accepting Defendants' unsupported claim that ANBs matter only if a nomination is rejected,[182] and wrongly

[180] *Appriva*, 937 A.2d at 1285.

[181] *Id.*

[182] AES Op. 18 n.84 (quoting Defs.' Opening Br. ISO Motion to Dismiss) (emphasis added).

inferred from the absence of another stockholder that the Improper Bylaws have no deterrent effect.[183]

The court improperly relied on facts outside of the pleadings—such as whether other stockholders have been deterred—to rebut Plaintiffs' well-pled allegations.[184] The Complaints do not address Plaintiffs' own nomination plans or their knowledge of others' intentions, and the court improperly elicited information outside the pleadings on these questions at the Motion to Expedite hearing.[185] Under Rule 12(b)(6), inferences must be drawn in Plaintiffs' favor; here, the absence of nominations at AES or OC itself supports an inference of the bylaws' deterrent effect.[186]

Whether these deterrent effects exist or not requires a factual finding ill-suited for a motion to dismiss. As Professor Ann Lipton wrote after the AES decision issued:

> [The court's] ripeness argument seems to jump ahead to the merits to conclude that, in fact, there would not be much deterrent effect…[w]hich, to me, collapses the merits of the claim with the ripeness inquiry in a manner that is not only aesthetically displeasing, but also does not engage with how aggressive advance notice bylaws

[183] *Id.* at 14-16.

[184] AES Op. 18 n.84.

[185] A093-097.

[186] *Williams*, 2021 WL 754593, at *20 n.233 (noting lack of a proxy contest as a deterrent effect of challenged poison pill).

> deter activists by, implicitly, adding litigation to the list of gauntlets that must be run before a contest can conclude successfully.[187]

In multiple instances throughout both decisions, the court minimized the incriminating Board materials and improperly drew inferences in Defendants' favor. Specifically, the AES presentation—quoted in the Complaints—observed that corporations had adopted "Advance Notice Bylaws," which ultimately "resulted in the invalidation of director nominations submitted by stockholders," and that the amendments were made to enable the board to "mount a more effective defense, if necessary," to stockholder nominations and proposals.[188]

Similarly, the OC board materials included a presentation that that "Enhanced Advance Notice Provision Amendments" should be adopted to "expand the required disclosures" from nominating or proposing stockholders, to "enable the Corporation to mount a stronger defense against the proposal."[189]

The trial court brushed aside this evidence, dismissing the board materials as "vanilla presentation[s]" with mere "generic references to stockholder activism," and asserting that "rather than suggesting a selfish or disloyal motive the text seems

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[187] Ann Lipton, *When is a challenge to an advance notice bylaw ripe*? BUS. LAW. PROF. BLOG (April 19, 2025), *available https://www.businesslawprofessors.com/2025/04/when-is-a-challenge-to-an-advance-notice-bylaw-ripe/* (last accessed Aug. 25, 2025).

[188] A158-159.

[189] A268.

generic and likely found in many law firm memoranda."[190] The court further mused: "a few slides with "generic references to stockholder activism do not transform this dispute from an 'imagined' one to a 'real-world' one."[191] And then yet again: "If a couple of generic law firm slides demand equitable review here, …"[192]

The court signaled that it had prejudged Plaintiffs' claims even before any briefing on the Motions to Dismiss, noting in its order staying discovery that "rather than suggesting a selfish or disloyal motive the text seems generic and likely found in many law firm memoranda."[193]

This statement is further improper because the court looked outside the pleadings to muse as to what other companies' board materials might contain. The court's speculation about what may or may not be in other board materials at other companies fails to make reasonable inferences in Plaintiffs' favor.[194] Whether other boards adopt defensive measures to make stockholder nominations more difficult does not excuse the improper defensive conduct of the AES and OC Boards.[195]

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[190] AES Op. 1, 8; OC Op. 11.

[191] AES Op. 17 n.80.

[192] AES Op. 16, OC Op. 11.

[193] A139; AES Op. 8.

[194] AES Op. 17 n.80.

[195] *See* Tab 6, (*VAALCO Energy, Inc. S'holder Litig*.) at 58 (observing there were 190 dead hand poison pills when Toll Brothers was briefed, and that "you know, at the time of a riot, rioting is market").

Finally, the trial court also opined that the board slides are "not enough … to demonstrate that a genuine, extant controversy exists."[196] But, on a motion to dismiss, a plaintiff need not *demonstrate* the facts that support their claims, even when those facts go to ripeness; rather, on motion to dismiss the Court, the inquiry is whether a plaintiff has *pled* their claims, which the court then must accept as true and draw all reasonable inferences therefrom in the plaintiff's favor.[197]

When the proper standard of review is used to review Plaintiffs' allegations regarding the board materials, it is more than "reasonably conceivable" that the AES and OC Boards acted with defensive intent against stockholder nominations and proposals in amending their bylaws. This intent implicates the same concerns as seen in *Williams*: even without responding to a specific activist stockholder, the board acted defensively with respect to stockholder activism generally.[198]

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[196] AES Op. 15-16; OC Op. 11.

[197] *Appriva*, 937 A.2d at 1285; *see Harman*, 442 A.3d at 489; *id.* at 502 ("We conclude that the issue of laches was … improperly determined on its merits by the Court below… [which] has [improperly] gone outside the complaint to secure facts … on which to base its ruling on laches.").

[198] *Williams*, 2021 WL 754593, at **29-30 (noting post-trial that the Board's intent to "prevent stockholder activism during … market uncertainty" due to "concern that activists might pursue 'short-term' agendas" state "hypothetical threats" identified when "the Board was not aware of any specific activist plays," which were "not … cognizable threat[s]" under *Unocal*).

4. The Trial Court's Precedents Do Not Support Dismissal

None of the cases cited by the trial court support the proposition that a complaint may be dismissed on ripeness or standing grounds based on evidence outside the pleadings that contravenes the complaint's allegations. Several cases the lower court cites do not even concern ripeness or standing. For example, in *de Adler v. Upper New York Investment Company*, the Court of Chancery noted that the nonmoving party bears the burden of establishing "equitable jurisdiction"—i.e., Chancery's subject-matter jurisdiction.[199] In *CLP Toxicology, Inc. v. Casla Bio Holdings, LLC*, the court dismissed for lack of subject-matter jurisdiction because the parties had previously contracted to arbitrate the claims, and arbitration provided an adequate remedy at law.[200]

In *K&K Screw Productions, LLC v. Emerick Capital Investments, Inc.*—the only case the court cited that discusses ripeness—the defendant had cross-moved to dismiss on ripeness grounds *after* the plaintiff had first moved for summary judgment.[201] While the *K&K* court noted that the "plaintiff bears [the] burden of

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[199] *de Adler v. Upper New York Inv. Co.*, 2013 WL 5874645, at *7 & n.68 (Del. Ch. Oct. 31, 2013).

[200] *CLP Toxicology*, 2021 WL 2588905, at *16.

[201] *K&K Screw Prods., L.L.C. v. Emerick Cap. Invs., Inc.*, 2011 WL 3505354, at *1 (Del. Ch. Aug. 9, 2011) (also noting that the defendant moved to stay the action in favor of a co-pending arbitration or permit it leave to take discovery to respond to the buyer's motion for summary judgment).

establishing subject matter jurisdiction," it ultimately exercised jurisdiction because plaintiff had shown a live controversy between adverse parties that was ripe.[202]

The fact that the *K&K* motion arose as a cross-motion to a motion for summary judgment is critical; there, the *K&K* court relied on the record presented for summary judgment, and the applicable standard was different. The *K&K* court rejected the defendant's contention that the case was not ripe and its ask for more time to conduct discovery.[203] Instead, it found that the record supported that material facts "have occurred and w[ere] static," and the plaintiffs there forecasted that the only "contingent" fact would occur imminently.[204] The defendant in *K&K* had not countered plaintiffs' summary judgment by pointing to any material contrary facts, resting only jurisdictional arguments. The court finally noted that "the Court never stayed discovery in this action, nor did either party ever ask it to do so."[205]

This has no bearing on this case, where the court improperly dismissed the claims at the pleadings stage, prior to discovery.

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[202] *Id.* at *6 (quoting *Pitts v. City of Wilmington*, 2009 WL 1204492, at *5 (Del. Ch. 2009)).

[203] *Id.* at *9.

[204] *Id.* at *10.

[205] *Id.* at *18.

III. PLAINTIFFS' INTEREST IN IMMEDIATE RELIEF OUTWEIGH ANY POLICY CONCERNS SUPPORTING POSTPONING REVIEW

A. QUESTION PRESENTED

Whether the trial court erred when it decided to abstain from exercising jurisdiction to review Plaintiffs' claims. The issue was preserved.[206]

B. SCOPE OF REVIEW

The standard of review is de novo. [207]

C. MERITS OF ARGUMENT

The court's ripeness inquiry "requires a common sense assessment" as to whether the interests of the parties seeking immediate relief outweigh the concerns favoring postponement of review until the question arises in a more concrete and final form."[208] Here, Plaintiffs' need for relief outweighs any such concerns.

The Improper Bylaws are currently working harm to the rights of Plaintiffs and all other stockholders by chilling potential nominations of dissident board candidates. The lower court's rulings, if sustained, would permit Defendants' fiduciary breaches and Improper Bylaws to evade review. The court's rulings also encourage the adoption of ever more intrusive and inequitable bylaws.

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[206] A447-448; A504-505.

[207] *XL Specialty*, 93 A.3d at 1216.

[208] *League of Women Voters of Delaware, Inc. v. Dep't of Elections*, 250 A.3d 922 (Del. Ch. 2020).

1. The Improper Bylaws Will Evade Judicial Review

The trial court's ruling—that Plaintiffs' adoption claim must await either an active proxy contest or a stockholder claiming to be chilled—ensures that a *Unocal* challenge to the adoption of the Improper Bylaws will very likely never occur. The window to challenge the adoption of these problematic bylaws is narrow, while the scope of conduct they affect is broad. As-applied challenges typically are subject to a three-year statute of limitations. Thus, if no stockholder with both the financial means and inclination to run a contest and fund litigation emerges within three years of the bylaws' adoption, then even a defensively motivated and unreasonable ANB would escape judicial review.

Here, the AES Improper Bylaws were adopted on August 1, 2023 and the OC Improper Bylaws on June 15, 2023. If no activist AES stockholder files suit by August 1, 2026 (and no OC stockholder by June 15, 2026), any adoption claims would become time-barred. Subsequently, even if a deep-pocketed stockholder unfazed by the cost and risk of a proxy contest attempted to nominate a candidate, only an application challenge as to that specific stockholder could be asserted.

An application challenge cannot adequately redress the claims brought here. Application challenges seek relief only as to the nominating plaintiff(s) and no others; they would not address the ANBs' deterrent or preclusive effects for any other stockholder. Indeed, regardless of whether the defendant chooses to enforce the

Improper Bylaw against that stockholder, the Improper Bylaws would remain, primed to be enforced against any other stockholder.

As a result, even successful litigation of an application claim would likely leave the offending ANB in place—preserving its deterrent effects on shareholder nominations. Declining to exercise jurisdiction here would allow boards to adopt with impunity any bylaw, including ones substantively identical to bylaw provisions found illegal or unenforceable by the Court of Chancery in other contexts.[209]

2. Lack of Judicial Review Incents Boards to Pass Illegal Bylaws on "Clear" Days

In its ripeness analysis, the lower court speculated that the Boards might modify their bylaws later.[210] But both Boards have already amended their bylaws in a fashion that modified part of the original Ownership Provisions, but left the most egregious Improper Bylaws—and their deterrent effects—in place.

As the Court of Chancery acknowledged, left unchecked, corporate lawyers will aggressively expand market practices.[211] The AES and OC presentation slides

[209] A169-170.

[210] OC Op. 9 n.39; AES Op. 15.

[211] *See, e.g.*, Tab 5 (*Browne v. Layfield*) at 37 ("I do take seriously what plaintiff's counsel said about market practice expanding and becoming more aggressive over time absent some periodic checks on what practitioners out there in the world are doing.").

illustrate this point: the slides encouraged the OC Board to amend the disclosure obligations in the ANBs to follow current market practice.[212]

As noted by Professor Bates, corporations and their counsel typically know not to adopt onerous ANBs in response to specific activist campaigns. Thus "Delaware courts' skepticism of rainy-day ANB amendments" generally dissuades corporations from tactical bylaw amendments after an activist appears.[213] But "on a clear day, boards can adopt vague, sweeping, complicated, and invasive disclosure provisions that might chill activism with very little risk of being challenged."[214] As a result, boards will freely adopt "enhanced" ANBs with extreme provisions in reaction to perceived threats of stockholder activism. This has already "occurred on an industry-wide basis, with director questionnaires that resemble 'colonoscopies' becoming endemic."[215]

Endorsing the trial court's mistaken view—that *Unocal* ANB claims are ripe only in the context of a live proxy contest—creates perverse incentives. It invites boards to adopt defensive devices with strong deterrent effects anticipatorily,

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[212] A160-161; A268.

[213] Bates, *Rewriting Rules*, at 703; *id.* at 686 (boards generally "avoid adding disclosure requirements after they are targeted to avoid being sued"). In this regard, the circumstances presented in *Politan* and *Kellner*, where onerous ANBs were directed at a specific activist stockholder, are very unusual. *Id.*

[214] *Id.* at 702; *see id.* at 639 ("enhanced disclosure requirements" in ANBs are a defensive board maneuver in fights for corporate control, similar to poison pills, etc.).

[215] *See* Tab 7 at 19.

knowing that such entrenching measures will be largely insulted from judicial review. Limiting review to active contests effectively signals to corporate managers that they may enact any ANBs with impunity. Experience bears this out. Indeed, after *Kellner*, the OC Board amended their Ownership Provision, which resembled *Kellner*'s "indecipherable" bylaw, but left in place the remaining ANBs that mirrored those that *Kellner* found inequitable.[216]

3. The Court's Concerns About a Potential Deluge of ANB Litigation Can Be Managed Without Depriving Stockholders of Judicial Review

The trial court also expressed apprehension that, "[i]f a couple of generic law firm slides demand equitable review here, why not … in essentially every other bylaw case as well."[217] The lower court's reasoning reflects concern that a finding of ripeness would open the floodgates to review of bylaws adopted by myriad other companies that also adopted onerous ANBs.[218] But the Court of Chancery has a variety of methods by which it can manage its docket, which include consolidation, early summary judgment, and the like. Dismissal at the pleading stage is not the right answer. Finding these Cases unripe would allow the deterrent and chilling effects of

[216] Indeed, this was intentional, as defense counsel has taken the position that the Court's determination in *Kellner* that various bylaw provisions were inequitable and unenforceable applies only to Mr. Kellner—and not to all AIM Immunotech stockholders. A332-334.

[217] AES Op. 17 n.80.

[218] *See* A094-95.

the Improper Bylaws to continue to evade judicial review and deprive stockholders of the "important safety valve" the Court of Chancery provides to police defensive board conduct.[219]

[219] *See Kellner*, 320 A.3d at 259; *Salzberg*, 227 A.3d at 135 (as-applied challenges are "an important safety valve").

CONCLUSION

For the foregoing reasons, the decisions of the Court of Chancery should be reversed.

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