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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 REPLY BRIEF

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INTRODUCTION

Plaintiffs Martin Siegel and George Assad—AES[1] and OC stockholders, respectively—filed suit to challenge Improper Bylaws that harm all AES and OC stockholders by chilling stockholder engagement, deterring nominations, and imperiling corporate democracy. Plaintiffs are fighting to protect their voting rights, which are meaningless without a choice of who and what to vote for.

The issue in this consolidated appeal is whether Plaintiffs sufficiently allege a ripe controversy. Plaintiffs contend that Defendants—fearing that the Universal Proxy Rule ("UPR") would make it easier for activists to gain Board seats—adopted pernicious, unreasonable bylaws to defend against activism by making proxy contests riskier and more expensive to undertake.

In reviewing Plaintiffs' well-pled allegations, the court below improperly applied the more onerous Rule 12(b)(1) standard. Applying the proper deferential Rule 12(b)(6) standard, Plaintiffs' claims are undisputedly ripe: Defendants took actions to improperly insulate themselves from contested elections more than two years ago; the Improper Bylaws are in effect and govern director nominations for all AES/OC stockholders; and the Complaints plead how these tripwire bylaws presently deter stockholder engagement and nominations.

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[1] All capitalized terms not defined herein have the same meaning as in Plaintiffs-Below/Appellants' Amended Opening Brief (the "Opening Brief" or "OB").

This Court noted in *Williams* that "the main lever at an activist's disposal [is] a proxy fight. In this way stockholder activism is intertwined with the stockholder franchise."[2] Activism impacts all stockholders—not just the nominating stockholder—by offering a choice of candidates. In finding on a motion to dismiss that stockholder-plaintiffs who do not intend to nominate are not "real plaintiffs" and face only "hypothetical" harm, the court below disrupted the balance Delaware law strikes between assiduously protecting the stockholder franchise and respecting business judgment. A well-pled *Unocal* claim should not be dismissed without considering the evidence.

Further, declining to adjudicate whether newfangled rules governing director elections are enforceable unless and until an active electoral dispute commences does not work. It would be like telling a skydiver to jump from the plane without first being instructed which straps release the parachute. No sane person would jump.

Kellner, *Carroll*, and *Better Home* all confirm that the Improper Bylaws may be facially valid.[3] But even if valid, these provisions still must be reviewed in equity

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[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); *Carroll v. Burstein*, 2025 WL 2446891 (Del. Ch. Aug. 25, 2025); *Wright v. Farello*, 2025 WL 3012956 (Del. Ch. Oct. 27, 2025) ("*Better Home*").

to assess whether they address a legitimate threat and unreasonably burden stockholder nominations. The Boards' claim—that the business judgment rule protects their adoption of pernicious bylaws designed to deter all stockholder activism because the bylaws were specifically scheduled to be adopted when the Company does not face a *specific* activist—conflicts with established Delaware precedent. A generalized fear of activism is not "a cognizable threat under the first prong of *Unocal*."[4] Where, as here, a "board adopted 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 bylaw inequitable and unenforceable."[5]

These cases present as-applied challenges to bylaw provisions that *have been* adopted to interfere with stockholder nominations. The Improper Bylaws must be subject to judicial review under *Unocal* and declared unenforceable.

[4] *Williams*, 2021 WL 754593, at *30.

[5] *Kellner*, 320 A.3d at 260.

ARGUMENT

I. PLAINTIFFS ASSERT RIPE, EQUITABLE CHALLENGES TO THE IMPROPER BYLAWS

Defendants' ripeness arguments are based on two fundamentally flawed contentions: (i) Plaintiffs' claims are hypothetical because they involve potential events, including how the Improper Bylaws may be enforced in the future, and (ii) because Plaintiffs do not presently seek to nominate, they have not been injured and have only speculated about the deterrent effects of the Improper Bylaws. Both arguments readily fail.

A. PLAINTIFFS' CLAIMS ARE RIPE BECAUSE THE MATERIAL FACTS REGARDING DEFENDANTS' ADOPTION OF THE IMPROPER BYLAWS ARE HISTORICAL AND STATIC

Defendants assert that Plaintiffs' claims are "hypothetical"[6] and that equitable review of the Improper Bylaws should wait "until the question arises in a 'more concrete and final form.'"[7] But, as discussed in Plaintiffs' Opening Brief, the material facts here are static. The Boards adopted the Improper Bylaws in 2023, the intent behind their adoption is fixed, and the Improper Bylaws presently define the parties' rights. Plaintiffs' claims thus relate *solely* to conduct that has *already*

[6] Defendants assert more than *sixty* times in the Answering Brief ("AB") that Plaintiffs' claims are "hypothetical." But saying it over and over again does not make it true.

[7] AB-33.

occurred and the *present harms* the Improper Bylaws cause. Hypothetical future acts do not impact Plaintiffs' fiduciary duty claims, which are governed by what Defendants knew and did when they adopted the Improper Bylaws, not by facts that may unfold in the future.[8]

Defendants further contend that Plaintiffs' adoption claims require assessing how the Improper Bylaws may be enforced in the future.[9] Defendants are wrong. As this Court stated in *Stroud v. Milliken*, "the first step in th[e] [ripeness] evaluation is the identification of the legal questions in the case."[10] Here, Plaintiffs' adoption claims focus exclusively on whether the Boards breached their duty of loyalty by adopting the Improper Bylaws for the purpose of entrenching themselves—conduct that has already occurred. No "future" facts, actions, or conduct need to occur before

[8] *See, e.g., Chen v. Howard-Anderson*, 87 A.3d 648, 665 (Del. Ch. 2014) (the court evaluates directors' decisions "based on what they knew and did at the time"); *Firefighters' Pension Sys. of Kansas City, Mo. Tr. v. Presidio, Inc.*, 251 A.3d 212, 250 (Del. 2021) ("the information on which the directors based their decision" and "the reasonableness of the directors' action" is evaluated "in light of the circumstances then existing").

[9] AB-22. Defendants cite only *In re COVID-Related Restrictions on Religious Services*, 326 A.3d 626 (Del. 2024) ("*COVID II*") for this baseless assertion. AB-22. The *COVID II* footnote Defendants rely on for this proposition merely cited a federal practice treatise broadly describing the justiciability categories.

[10] *Stroud v. Milliken Enters. Inc.*, 552 A.2d 476, 480 (Del. 1989) ("*Stroud I*").

Plaintiffs' claims may be considered. Indeed, Delaware courts consistently find challenges to the precautionary adoption of defensive devices ripe.[11]

For this reason, Defendants' attempt to minimize the serious laches implications of "kicking the can" on Plaintiffs' adoption claims rings hollow. Defendants claim that accepting Plaintiffs' "risk of laches" argument could prevent any unripe claim from being dismissed, as every claim is subject to a limitations period.[12] But claims that are dismissed as unripe do not generally have a limitations period running, because such claims have not yet accrued.[13] By contrast, Plaintiffs' adoption claims accrued in June and August 2023, respectively, when the Boards adopted the Improper Bylaws; this, in turn, started the clock on the limitations period on Plaintiffs' adoption claims, which expire in 2026.[14] Delaware courts recognize

[11] *In re Gaylord Container Corp. S'holder Litig.*, 1996 WL 752356, at *2 (Del. Ch. Dec. 19, 1996); *see also* OB-43 (citing *Williams*, 2021 WL 754593).

[12] AB-31.

[13] *See, e.g.*, *ISN Software v. Richards, Layton & Finger, P.A.*, 226 A.3d 727, 733 (Del. 2020) ("[a] cause of action in tort accrues at the moment when 'an injury, although slight, is sustained in consequence of the wrongful act of another'") (internal citation omitted); *Himbrick v. Dover Hosp. Grp., LLC*, 2012 WL 2044343, at *2 (Del. Super. Ct. May 1, 2012) (a claim was "not ripe for determination" when it had not yet "accrue[d]").

[14] *Lebanon Cnty. Emps.' Ret. Fund v. Collis*, 287 A.3d 1160, 1195, 1196 (Del. Ch. 2022) ("the statute of limitations begins to run" at the accrual of a claim; a "claim for breach of fiduciary duty accrues at the time of the wrongful act").

that claim accrual and ripeness are "closely related."[15] Because a plaintiff must get "the full benefit of the statute of limitations period," where a claim has accrued, "it also ripened."[16]

Defendants' near-exclusive reliance on cases that Plaintiffs *already* distinguished in their Opening Brief—which Defendants fail to even attempt to rebut—reveals the hollowness of their argument.[17]

The two cases Defendants cite—*Stroud I* and *COVID II*[18]—fare no better. In *Stroud I*, the dispute was unripe because defendants had withdrawn the contested charter and bylaw amendments, and the parties were actively negotiating the required contents of the meeting notice.[19] The dispute thus was not in "concrete and final form."[20] In *COVID II*, the court found that plaintiffs' claim for injunctive relief to prevent potential COVID restrictions from being enacted in the future was

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[15] *Shareholder Rep. Servs. LLC v. Alexion Pharms., Inc.*, 2021 WL 3925937, at *5 (Del. Ch. Sept. 1, 2021).

[16] *Id.* at *5-6 & n.48 (a claim not only "accrues at the time" the wrongful act occurred, "it also ripened"); *see also Garfield v. Allen*, 277 A.3d 296, 318 (Del. Ch. 2022) ("the fact that the statute of limitations has started to run provides strong evidence that a claim is ripe").

[17] *Compare* AB-18-24 *with* OB-32-34 (distinguishing, *e.g.*, *Bebchuk v. CA, Inc.*, 902 A.2d 737 (Del. Ch. 2006), a facial challenge to proposed bylaws not yet adopted).

[18] *COVID II*, 326 A.3d 626.

[19] *Stroud I*, 552 A.2d at 480.

[20] *Id.*

unripe.[21] Neither *Stroud I* nor *COVID II* involved challenges to active, live defensive measures.

B. THE PRESENT, DETERRENT EFFECT OF THE IMPROPER BYLAWS ON ALL AES/OC STOCKHOLDERS CREATES A RIPE *UNOCAL* DISPUTE

Drawing on language from the court below, Defendants contend that because Plaintiffs do not presently seek to nominate anyone for the Boards, "**these Plaintiffs**" have not been injured and "**they**" have no interest in immediate relief that would support a finding of ripeness.[22] Again, this is a red herring.

To state ripe adoption claims, Plaintiffs do not need to seek to nominate directors, nor do they need to identify a specific stockholder who has been chilled or deterred. As Plaintiffs' Opening Brief explains, *all* AES and OC stockholders are harmed by having nominations disincentivized by draconian advance notice bylaws; this harm is *wholly independent* of whether plaintiffs themselves seek to nominate.[23]

Plaintiffs' Opening Brief cites extensive authority involving representative actions brought by stockholders who themselves do not seek to trigger a defensive measure but are injured nonetheless by the defensive measure's present depressing

[21] *COVID II*, 326 A.3d at 646.

[22] AB-24.

[23] OB-38-49.

and deterrent effect on all stockholders.[24] Defendants (and the court below) dismiss these cases out of hand because they involved "rights plans, dead hand proxy puts, and fee-shifting bylaws," rather than advance-notice bylaws. Defendants contend all of those cases impose "catastrophic negative consequences on stockholders who trigger them," whereas the Improper Bylaws, they argue, *merely* result in the rejection of a stockholders' nominee.[25]

But the Complaints readily plead that the deterrent effects of the "onerous," "aggressive," and "extreme" Improper Bylaws are current and real. The Complaints set forth in detail how the Improper Bylaws' two pernicious provisions—(i) the Acting-in-Concert definitions with "wolfpack" and "daisy-chain" elements, and (ii) the expansive "ownership" disclosure requirements—chill pre-contest stockholder communications, create compliance uncertainty that functions as a tripwire,[26] and require the disclosure of sensitive information (including performance-fee terms), imposing significant burdens that go "wildly beyond" what is necessary.[27] In *Moran v. Household International, Inc.*, the court observed that

[24] OB-43-49 (citing, *e.g.*, *Williams*, *Lerman*, *Moran*, *Solak*, *Browne v. Layfield*, and *Pontiac*).

[25] AB-27 (citing AES Op. 19).

[26]A164-A168; A274-278.

[27] A145-A150; A167-A168; A255-A261; A278-A279; OB-41.

the rights plan at issue was "complicated" and that "its very complexity [was] designed to create uncertainty on the part of a potential acquiror."[28] Here, too, the Improper Bylaws' broad, rambling provisions chill stockholder engagement by creating uncertainty; their complexity is a feature, not a bug.

The Complaints connect the bylaw provisions to present effects, setting forth the concrete effects the Improper Bylaws have on stockholder nominations and proposals. The Complaints allege that the provisions increase the costs, uncertainty, and reputational risks of stockholder engagement; chill stockholder communications; and deter economically rational actors from investing in or pursuing campaigns at these issuers.[29] These chilling effects exist *now, well before a live contest is underway*. That the challenged provisions mirror features already condemned as extreme, disproportionate, or indecipherable in recent decisions further bolsters the reasonable inference of present, substantial deterrence.[30]

As with the fee-shifting bylaw at issue in *Solak*, the "practical reality is that, so long as [these Improper Bylaws] remain[] in place, it is highly unlikely that any rational stockholder of [AES or OC would submit a nomination notice] because of

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[28] 490 A.2d 1059, 1066 (Del. Ch. 1985).

[29] A148-A151; A162-A169; A258-A261; A272-A279.

[30] OB-41-42; A150-A151; A167-A168; A260-A261; A277-A279; A459; A463-A466; A516-A517; A520; A523.

the significant [financial] risk" the Improper Bylaws present.[31] This harms all AES and OC stockholders, by depriving them of choice.

As the Chancellor recently recognized with respect to the bylaws in *Better Home*,[32] the Improper Bylaws set forth the exclusive means by which a stockholder may make director nominations: "only persons who are nominated in accordance with the [Improper Bylaws] shall be eligible for election as directors."[33] A "mandatory rule" that requires stockholder nominations of directors to be reviewed *only* after a nomination has been submitted would "leav[e] uncured wholly inoperable rules governing director elections"—that would be "extreme."[34]

Further, affirming the trial court's finding requiring a proxy contest for a *Unocal* claim to ripen creates perverse incentives for companies to adopt draconian defensive devices anticipatorily—indeed, Defendants here specifically claim they sought to adopt the bylaws on a supposed "clear day" to minimize litigation risk. Such an incentive would allow boards to claim that the entrenching transactions are

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[31] *Solak v. Sarowitz*, 153 A.3d 729, 738 (Del. Ch. 2016). While activists do not face personal liability in the same manner as stockholders facing fee-shifting bylaws, they still encounter significant financial risk, including the risk to their investment in the company, and the financial risks of activist campaigns (in terms of money and manpower, the risk of costly litigation, and the reputational risk of failed campaigns).

[32] *Better Home*, 2025 WL 3012956, at *3.

[33] A196.

[34] *Better Home*, 2025 WL 3012956, at *3.

insulated from judicial review. As the Opening Brief explains, such a rule ignores Delaware jurisprudence and is contrary to the Court of Chancery's equitable roots.[35]

[35] *See, e.g.*, *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 299 A.3d 393, 409 (Del. Ch. 2023) ("[E]quity will not suffer a wrong without a remedy."), *rev'd on other grounds*, 342 A.3d 324 (Del. 2025).

II. THE TRIAL COURT USED THE WRONG STANDARD TO ASSESS RIPENESS

A. RULE 12(B)(6) GOVERNS DEFENDANTS' JUSTICIABILITY MOTION

Defendants assert that all ripeness motions are "jurisdictional," and thus are governed by the onerous Rule 12(b)(1) review standard.[36] Unsurprisingly, Defendants cite no authority for their assertion, as it is wrong.

As explained in the Opening Brief, Delaware courts considering ripeness and other justiciability motions routinely use the deferential Rule 12(b)(6) standard, which requires the court to "take the allegations in the complaint as true and construe all reasonable inferences in the non-movant's favor."[37] Indeed, in *de Adler v. Upper New York Inc.*, cited in both the AES and OC decisions,[38] the court stated: where a party moves to dismiss under Rule 12(b)(1), "the Court should accept the material

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[36] AB-36; AB-41-42.

[37] OB-54-55 (citing *Christiana Care Health Servs. v. Carney*, 2025 WL 1541638, at *4 (Del. Ch. May 30, 2025); *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487 (Del. 1982); and *Klein v. ECG Topco Hldg., LLC*, 2022 WL 2659096 (Del. Ch. July 8, 2022), each applying the plaintiff-friendly, deferential standard of review to defendants' 12(b)(1) ripeness motions); *see also, e.g.*, *In re Doehler Dry Ingredient Sols., LLC*, 2022 WL 4281841, at *3 (Del. Ch. Sept. 15, 2022) *aff'd*, 294 A.3d 64 (Del. 2023) (on motion to dismiss under Rule 12(b)(1), the court "must take all well-pleaded allegations as true and construe reasonable inferences in the non-movant's favor"); *S'holder Rep. Servs. LLC*, 2021 WL 3925937, at *4 (when assessing ripeness, the court "accept[s] the material factual allegations in the complaint as true, and all inferences therefrom should be construed in the non-moving party's favor").

[38] AES Op. at 12; OC Op. at 7.

factual allegations in the complaint as true, and 'all inferences therefrom [should be] construed in [the non-moving party's] favor.'"[39]

Appriva and *COVID I* explain the circumstances in which the deferential Rule 12(b)(6) standard applies to jurisdictional motions, i.e., when the justiciability motion addresses whether "the plaintiff has failed to plead a necessary element of a claim," "the motion is more properly decided under Rule 12(b)(6)."[40] Additionally, "where the jurisdictional facts are intertwined with the facts central to the merits of the dispute, ... the entire factual dispute is appropriately resolved only by a proceeding on the merits."[41] This is such a case.

Defendants assert that *Appriva* and *COVID I* are inapplicable because they addressed standing, not ripeness.[42] But the reasoning in these cases is not so limited. Defendants acknowledge that the *Appriva* court could not assess whether plaintiff was injured (i.e., had standing) without also "determining the merits" of plaintiffs'

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[39] *de Adler v. Upper N.Y. Inc.*, 2013 WL 5874645, at *7 (Del. Ch. Oct. 31, 2013) (quoting *Harman*, 442 A.2d at 489).

[40] *Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1285 (Del. 2007).

[41] *Id.*; *see* OB-53 (citing *In re COVID-Related Restrictions on Religious Servs.*, 302 A.3d 464, 478 (Del. 2023) ("*COVID I*")); *see also Hartig Drug Co. v. Senju Pharma. Co.*, 836 F.3d 261, 272-73 (3d Cir. 2016) (recognizing that "procedural and substantive protections" that the Rule 12(b)(6) standard provides during "early testing" of a plaintiff's claims means challenges on prudential jurisdictional grounds should be assessed with the plaintiff-friendly standard).

[42] AB-42.

breach-of-contract claims, which required application of the 12(b)(6) standard.[43] Here, too, a court cannot determine whether Plaintiffs' claims are ripe without assessing whether Plaintiffs have pled *present* deterrent effects of the Improper Bylaws, an integral part of the merits of their claims.

Defendants' assertion that ripeness is always subject to a more onerous standard of review rests solely on a single footnote in *COVID II*, which merely cites a federal treatise describing the various categories of justiciability. *COVID II* did not analyze ripeness or standing, let alone the standard of review for such motions.[44] But *COVID II* did expressly recognize that ripeness and standing are "tied closely together," thus further supporting that *Appriva*'s and *COVID I*'s reasoning applies here, and that the lower court erred in using the more onerous standard of review.[45]

B. PLAINTIFFS PRESERVED THE ISSUE BELOW—SPECIFICALLY ASSERTING THAT RULE 12(B)(6) IS THE PROPER STANDARD OF REVIEW

Defendants contend that Plaintiffs waived their argument that Rule 12(b)(6) provides the proper standard of review by purportedly "never object[ing] to the

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[43] AB-42 (citing *Appriva*, 937 A.2d at 1285).

[44] In *COVID II*, this Court, *inter alia*, affirmed the Superior Court's finding that plaintiffs' declaratory claims were not justiciable because "a declaratory judgment would not redress Plaintiffs' alleged injuries" where the challenged conduct ceased before litigation. 326 A.3d at 644. That holding is irrelevant here.

[45] *Id.* at 642 n.117.

application of the Rule 12(b)(1) standard for ripeness" and "conced[ing]" the applicability of the more onerous Rule 12(b)(1) standard.[46]

Defendants' waiver argument fails because: (i) Plaintiffs preserved their argument that Rule 12(b)(6) governs the analysis of the entirety of Defendants' motions to dismiss; (ii) Plaintiffs' Opening Brief permissibly makes additional arguments in support of their position that the plaintiff-friendly standard applies; and (iii) Plaintiffs' appellate arguments directly respond to the trial court's flawed use of the wrong Rule 12(b)(1) standard.

1. Plaintiffs Preserved Their Argument That The Rule 12(b)(6) Standard Applies

It is well settled that the "mere raising of [an] issue [in the trial court] is sufficient to preserve it for appeal."[47] Presenting an issue "broad[ly]" in a party's briefs or at oral argument suffices to raise—and thus preserve—that issue.[48] Further, arguments are permitted on appeal where they are "sufficiently related" to the issues raised below, especially where an appellate contention is a further articulation of an existing argument.[49]

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[46] AB-37-38.

[47] *Watkins v. Beatrice Cos.*, 560 A.2d 1016, 1020 (Del. 1989).

[48] *See North River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 383 (Del. 2014), *as revised* (Nov. 10, 2014) (statement at oral argument was sufficient to preserve the "broader issue" argued below); *Watkins*, 560 A.2d at 1020.

[49] *Wit Cap. Grp., Inc. v. Benning*, 897 A.2d 172, 184 n.48 (Del. 2006).

Here, Plaintiffs' Answering Briefs in Opposition to Defendants' Motions to Dismiss consistently referred to the Rule 12(b)(6) standard as the only standard applicable to Defendants' motions.[50] Indeed, Defendants conceded that Rule 12(b)(6) applied to their motion for failure to state a claim—so Plaintiffs' argument about the standard of review was clearly targeted to assert that the more lenient Rule 12(b)(6) standard also applies to the ripeness question.[51]

Plaintiffs consistently rejected the more onerous 12(b)(1) standard. Plaintiffs contended that Defendants' attempt to argue the evidence and invite defense-friendly inferences on their motions to dismiss was procedurally improper,[52] and asserted at oral argument that the more onerous 12(b)(1) standard *does not apply* at this stage of litigation, explaining that it is "different than the [Rule] 12(b)(6) context, where all inferences go to my side[.]"[53]

2. Delaware Law Expressly Permits Appellants To Offer Additional Reasoning To Support Arguments Made Below

Defendants assert that the additional arguments and authority in Plaintiffs' Opening Brief regarding *why* Rule 12(b)(6) is the proper standard of review are

[50] A439; A445; A459-460; A495; A514-A515.

[51] A303; A367; AB-15-16; AB-3; AB-29.

[52] A517.

[53] A587; *see also* A557 ("Today, stockholders are being chilled from communicating with each other through the application of these bylaws, and that is enough to state a ripe case and to survive a 12(b)(6) challenge.").

improper "new arguments."[54] But the arguments of which Defendants complain merely, and permissibly, offer additional doctrinal grounds for *why* the Rule 12(b)(6) standard applies to all questions presented.[55]

It is black-letter law that appellate arguments that supply an "additional reason in support of a proposition urged below" are expressly allowed; only an "entirely new theory of [the] case" is barred.[56] The seminal authority is *Kerbs v. California Eastern Airways.*[57] There, this Court noted that plaintiffs had argued the "illegality" of a board action below, but had not argued that it was illegal for the "precise reason" that it violated Section 9 of the DGCL.[58] The *Kerbs* Court accepted plaintiffs' appellate argument regarding DGCL Section 9 because it constituted an "additional reason" in support of a proposition—illegality—advanced below.[59] Following *Kerbs*, this Court has consistently found that where an argument in an appellant's

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[54] AB-39-40.

[55] As noted above, Defendants misconstrue Plaintiffs' argument regarding jurisdiction—i.e., that ripeness, like standing, is a prudential doctrine that addresses whether the Court should exercise jurisdiction, not whether the Court *has* jurisdiction. This is consistent with Plaintiffs' arguments below that Rule 12(b)(6) is the proper standard of review.

[56] *Kerbs v. Cal. E. Airways*, 90 A.2d 652, 659 (Del. 1952).

[57] *Id.*

[58] *Id*.

[59] *Id.*

submission is "an additional reason in support of a proposition urged" below,[60] the Court may properly consider it.[61]

As explained above, Plaintiffs preserved the issue of the proper standard of review, both in briefing and during oral argument, consistently arguing that the plaintiff-friendly Rule 12(b)(6) standard, *not* the more onerous Rule 12(b)(1) standard, applies to the entirety of Defendants' motions. Plaintiffs' citations on appeal to *Appriva* and related authorities[62] advance additional reasons for these arguments; they merely refine the rationale as to *why* the plaintiff-friendly Rule 12(b)(6) standard governs.

Defendants rely on three cases to support their contention of "waiver."[63] Each of these cases is readily distinguishable, as each involved a party raising an *entirely new theory* for the first time on appeal. In *Shawe*, the Court rejected a novel

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[60] *Id.*

[61] *Origis USA LLC v. Great Am. Ins. Co.*, 2025 WL 2055767, at *14 n.78 (Del. July 23, 2025) (court may consider an argument on appeal that "is merely an additional reason in support of" the position asserted in the trial court (quoting *Mundy v. Holden*, 204 A.2d 83, 85 (Del. 1964)); *Mundy*, 204 A.2d at 85 (appellant's argument was "simply [] an additional reason in support of the theory argued [below]"); *LGM Hldgs., LLC v. Schurder*, 340 A.3d 1134, 1145 n.52 (Del. 2025) (reaffirming that a refined appellate argument is preserved where it advances an "additional reason" for the same underlying proposition advanced below and "does not raise a new argument or theory").

[62] OB-51-55.

[63] AB-38-39.

constitutional challenge neither raised nor developed below.[64] In *Protech*, the appellant introduced a new statutory theory—a spendthrift-trust bar—unsupported by the record.[65] And, in *Equitable Trust*, the party pivoted to a wholly different theory after argument.[66]

In contrast, here, Plaintiffs consistently argued to the trial court that the plaintiff-friendly Rule 12(b)(6) standard applies to the entire motions to dismiss.[67] This is neither a new theory nor a new issue being raised by Plaintiffs.[68]

3. The Court of Chancery's Flawed Reasoning Necessitated Clarification

The Court of Chancery's analysis further necessitated appellate clarification. *First*, the court justified its "ripeness" dismissal by making factual determinations that directly contradict the Complaints' well-pled allegations: e.g., *when and how* advance-notice bylaws produce an effect[69] and whether Defendants had improper

[64] *Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017).

[65] *Protech Mins., Inc. v. Dugout Team, LLC*, 284 A.3d 369, 378 (Del. 2022).

[66] *Equitable Tr. Co. v. Gallagher*, 77 A.2d 548, 549-50 (Del. 1950) (appellant "departed sharply from its theory of recovery in the Court below").

[67] A439; A445; A459-460; A495; A515.

[68] *See, e.g.*, *North River*, 105 A.3d at 383 n.58 (appellant raised the "broader issue" during oral argument, thus preserving the issue on appeal).

[69] AES Op. 11, 17-18; OC Op. 13.

intentions in adopting the Improper Bylaws.[70] In doing so, the trial court exceeded its mandate, requiring Plaintiffs to elucidate on appeal why and how the facts the court attributed to its ripeness decision overlap with the facts Plaintiffs alleged in support of their *Unocal* claim—and thus why Rule 12(b)(6) supplies the proper standard of review.

Second, though the court below based its rulings on ripeness grounds, the court's opinions rely heavily on considerations associated with standing—e.g., whether Plaintiffs themselves plan to nominate.[71] Indeed, the court specifically held that Plaintiffs' claims would be justiciable if brought by "a stockholder saying she is chilled from making a nomination,"[72] which is an issue of standing, not ripeness. Plaintiffs' explication of the appropriate standard of review as informed by cases addressing standing thus became necessary after the trial court issued its decisions.[73] Plaintiffs' appellate elaboration responds directly to the reasoning in the decisions being appealed; it does not raise a new issue.

[70] AES Op. 15-16; OC Op. 11-12.

[71] AES Op. 14-16; OC Op. 8-10.

[72] OC Op. 4-5, 11.

[73] OB-2; OB-23; OB-56-62.

III. PLAINTIFFS READILY STATE COLORABLE BREACH OF FIDUCIARY DUTY CLAIMS THAT IMPLICATE AND FAIL *UNOCAL*[74]

Applying the proper 12(b)(6) standard of review, accepting all well-pled facts as true, and taking all inferences in Plaintiffs' favor, the Complaints undisputedly state ripe and actionable *Unocal* claims.[75]

A. THE BOARD'S DEFENSIVE ACTS IN RESPONSE TO A PERCEIVED THREAT AND THE BYLAWS' ENTRENCHING EFFECT IMPLICATE *UNOCAL*

The stockholder franchise is "the ideological underpinning upon which the legitimacy of directorial power rests."[76] Accordingly, Delaware courts apply enhanced scrutiny to directors' attempts to infringe upon stockholder franchise rights.[77] Enhanced scrutiny is necessary because of the "inherent conflicts of interest

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[74] The court below did not address the merits of Plaintiffs' claims, i.e., whether Plaintiffs stated claims under Rule 12(b)(6). Plaintiffs address the merits here to respond to Defendants' arguments.

[75] Defendants inexplicably argue that the Complaints assert deficient facial challenges. AB-46-50. But the Complaints explicitly state: "Plaintiff[s] do[] not challenge the facial validity of the [Improper] Bylaws." A145; A255. Other Delaware courts have recognized that these cases "d[o] not involve a facial challenge." *Better Home*, 2025 WL 3012956, at *1 n.6; *Carroll*, 2025 WL 2446891, at *4 n.39.

[76] *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988).

[77] *See, e.g.*, *Bennett v. Propp*, 187 A.2d 405, 409 (Del. Ch. 1962) (directors are conflicted when using corporate funds to remove threat to control); *Canada S. Oils, Ltd. v. Manabi Expl. Co.*, 96 A.2d 810, 813–14 (Del. Ch. 1953).

that arise when shareholders are not permitted free exercise of their franchise."[78] *Unocal* enhanced scrutiny is triggered "where the board acts within its legal power, but is motivated for selfish reasons to interfere with the stockholder franchise."[79]

Defendants concede, as they must, that enhanced scrutiny is required where there are "'[i]nherent'" "structural and situational conflicts that do not rise to a level sufficient to trigger entire fairness review, but also do not comfortably permit expansive judicial deference."[80] Defendants further concede that such conflicts exist in the context of advance-notice-bylaws and can implicate enhanced scrutiny.[81] But Defendants contend that conflicts relating to advance-notice bylaws *only* exist once there is a live proxy contest. They assert that because the Boards were not acting in

[78] *Coster v. UIP Cos.*, 300 A.3d 656, 668, 672–73 (Del. 2023).

[79] *Id.* at 667 (equitable review appropriate); *Ryan v. Armstrong*, 2017 WL 2062902, at *7 (Del. Ch. May 15, 2017) ("Because an entrenchment motive is potentially implicated by defensive measures, enhanced scrutiny is justified."); *MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1129 (Del. 2003) (a board that "acts to prevent shareholders from effectively exercising their right to vote" faces "inherent conflicts of interest" that warrant enhanced scrutiny).

[80] AB-53 (quoting *Pell v. Kill*, 135 A.3d 764, 785 (Del. Ch. 2016)); *see also In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 598 (Del. Ch. 2010) ("In a situation where heightened scrutiny applies, the predicate question of what the board's true motivation comes into play.").

[81] AB-53.

response to a *specific* stockholder threat, they adopted the Improper Bylaws on a "clear day" and their actions are thus entitled to business judgment deference.[82]

Defendants are wrong.

First, the Improper Bylaws were *not* adopted on a clear day. The Complaints allege in detail—based on, *inter alia*, Defendants' own corporate records—that after the SEC passed the UPR to enhance board accountability to the public markets, the Boards adopted the Improper Bylaws to prevent activists from surfacing. By their own words, they did so to be able to "*mount a more effective defense*" against activists because they believed the UPR would "*make it easier for activists to gain seats on boards*[.]"[83] Thus, the Complaints allege that Defendants adopted the Improper Bylaws to defend against dissident stockholders unseating incumbent directors—i.e., to entrench themselves.

Second, Delaware law has routinely held that challenges to a board's precautionary adoption of a defensive measure triggers enhanced scrutiny even

[82] AB-51-54. Defendants contend that "Plaintiffs concede that the [Improper Bylaws] were adopted on a clear day." AB-1-2. This is, of course, false. Rather, the Complaints reference the self-serving (and false) statement in Defendants' board materials that the Improper Bylaws were scheduled to be adopted on a clear day, to seek to insulate the Boards from litigation risk. A149.

[83] A149; A158; A259; A268.

without an activist or bidder surfacing *ex ante*.[84] Thus, as this Court stated in *In re Gaylord Container*, it is "settled that a board's precautionary adoption of a defensive device is subject to enhanced scrutiny."[85] In *Gaylord Container*, the company implemented a number of defensive actions, including adopting a poison pill and enacting charter and bylaw amendments, on a "precautionary" basis where the board felt it was vulnerable to stockholder action. The Court stated:

> Although the Gaylord board was not responding to a specific takeover threat, it was responding to its loss of voting control and consequent vulnerability to hostile takeover. The inference that the board's primary purpose was entrenchment cannot be ruled out until the board satisfies the burden of justifying its defensive actions.[86]

Here, too, the AES and OC Boards acted on a precautionary basis because they believed they were vulnerable to stockholder action. They believed the UPR

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[84] *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 absent "an actual or potential hostile takeover threat"); *Stroud v. Grace*, 606 A.2d 75, 82 (Del. 1992) ("*Stroud II*") ("*Unocal* [scrutiny] is not limited to the adoption of a defensive measure during a hostile contest for control."); *Moran*, 490 A.2d at 1074 (precautionary shareholder rights plan subject to enhanced scrutiny review).

[85] *Gaylord Container*, 1996 WL 752356, at *2 ("the reason for subjecting a defensive device to enhanced scrutiny is that a board will inevitably have a conflict of interest when responding to a threat to control," including when the "board [is] not responding to a specific takeover threat").

[86] *Id.*

would make it easier for dissidents to displace incumbent directors on the Board. Defendants cite *In re Ebix* to support their contention that enhanced scrutiny does not apply here; but, in *Ebix*, the court held, in assessing the standard of review applicable to challenges to the adoption of advance-notice bylaws, that enhanced scrutiny applies where the board acts to prevent a "future threat."[87] As *Ebix* stated, "'*Unocal* applies [] whenever the record reflects that a board of directors took defensive measures in response to a perceived threat [] which touches on issues of control.'"[88]

The Boards here acted to defend against the "future threat" of activism. Their own Board materials state plainly that the Improper Bylaws' purpose was to defend against future activism. The Complaints further describe the Boards' battles with stockholder activists in the years preceding their adoption of the Improper Bylaws, and how the Companies' stock price depreciation and long-tenured boards made them vulnerable to activism.[89] Defendants devote pages in their Answering Brief

[87] *In re Ebix, Inc. S'holder Litig.*, 2018 WL 3545046, at *7 (Del. Ch. July 17, 2018).
[88] *Id.* (quoting *Gantler v. Stephens*, 965 A.2d 695, 705 (Del. 2009)).
[89] A154-A156; A264-A265.

purporting to explain away these inconvenient allegations, but their arguments about the merits of Plaintiffs' factual claims are inappropriate on a motion to dismiss.[90]

Recognizing their arguments' numerous flaws, Defendants point to purported "clear day" bylaw cases that they contend support that enhanced scrutiny does not apply here.[91] But *none* of Defendants' cases involved allegations of a defensive intent accompanying the adoption of the challenged bylaws. 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."[92] *Carroll* involved a facial invalidity challenge; the sole issue was whether the advance-notice bylaws can operate lawfully—which, of course, does not address the boards' intentions in adopting such bylaws.[93] *Rosenbaum*, *Lee*, *Saba*, *AB Value*, *Goggin*, and *Accipiter* all involved application challenges, which focused on the boards'

[90] *Firefighters' Pension Sys. of Kansas City v. Found. Bldg. Materials*, 318 A.3d 1105, 1135 (Del. Ch. May 31, 2024) ("When considering [a 12(b)(6)] motion, the court (i) accepts as true all well-pled factual allegations in the complaint, (ii) credits vague allegations if they give the opposing party notice of the claim, and (iii) draws all reasonable inferences in favor of the plaintiff. Dismissal is inappropriate 'unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.'").

[91] AB-53-54.

[92] *Stroud II*, 606 A.2d at 83.

[93] *Carroll*, 2025 WL 2446891, at *6.

conduct in rejecting stockholders' nominations, not the boards' intentions in adopting the bylaws in the first place.[94]

Defendants further argue that because the threat that the Boards acted against was not legitimate, *Unocal* does not apply.[95] But that is not the applicable standard.[96] The question is whether a board acted "with a subjective motivation of defending against a perceived threat."[97] Here, the Boards unquestionably did.

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[94] *See Strategic Inv. Opportunities LLC v. Lee Enters., Inc.*, 2022 WL 453607, at *16 (Del. Ch. Feb. 14, 2022) (sole issue at trial was the company's rejection of plaintiff's nomination); *Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140, at *2, *17 (Del. Ch. Oct. 13, 2021) (post-trial decision in application challenge; court declined to apply *Blasius* review because "no one dispute[d]" the absence of defensive intent at time bylaws were adopted); *BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.*, 224 A.3d 964, 980 (Del. 2020) (post-trial decision in application challenge; contract analysis applied); *AB Value P'rs, LP v. Kreisler Mfg. Corp.*, 2014 WL 7150465, at *3 (Del. Ch. Dec. 16, 2014) (addressing merits of application challenge). Defendants also cite *Maffei v. Palkon*, 339 A.3d 705 (Del. 2025), but that case concerned reincorporation and had nothing to do with assessing whether bylaws were adopted on a clear or cloudy day.

[95] AB-54. Defendants purport to rely on *Kahn ex rel. DeKalb Genetics Corp. v. Roberts*, 679 A.2d 460, 466 (Del. 1996) for this assertion. But that decision acknowledged that enhanced scrutiny is warranted where a board acts "substantially [] for the purpose of entrenchment," as the Defendants did here.

[96] *Williams*, 2021 WL 754593, at *22.

[97] *In re Edgio, Inc. S'holders Litig.*, 2023 WL 3167648, at *14 (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.").

Defendants contend that advance-notice bylaws are commonplace and serve "to ensure orderly meetings and elections."[98] For certain advance-notice bylaw provisions, that is true. But as Defendants concede, "whether enhanced scrutiny applies depends on the external circumstances in which the challenged corporate action was taken."[99] Plaintiffs amply allege that the Improper Bylaws were not adopted to "ensure orderly meetings and elections." The Board adopted those "*Enhanced Disclosure Requirements*" on the eve of the UPR taking effect with the *specific goal* of making compliance with the nomination procedures more difficult, because if a nominating stockholder fails to comply with the Companies' advance-notice-bylaw requirements, the Boards "may disregard [the] stockholder['s] nomination."[100]

Defendants' Board materials noted the litigation risk associated with the Improper Bylaws and stated that the amendments are therefore "scheduled to be adopted on a clear day" to minimize that risk.[101] Scheduling pernicious defensive bylaws to be adopted against a looming threat of the "universal proxy rule [which]

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[98] AB-51.

[99] AB-55 (citing *Ryan*, 2017 WL 2062902, at *7 ("*Unocal* attaches when the Complaint alleges 'threatened external action from which it could reasonably be inferred that the defendants acted defensively.'")).

[100] A159; A427.

[101] A159.

is expected to make it easier for activists to gain seats on boards"[102] does not make them "clear day" bylaws; they defend against activism, which is self-evidently "cloudy day" activity. The Boards felt threatened by the UPR's ability to allow dissidents to "get at least one board seat."[103] This was a threat; they responded with defensive measures. This unequivocally implicates *Unocal*.

B. THE COMPLAINTS READILY STATE COLORABLE *UNOCAL* CLAIMS

Under *Unocal,* courts assess whether the "board[s] faced a threat to an important corporate interest or to the achievement of a significant corporate benefit,"[104] and if the threat is legitimate, whether defensive measures taken in response to that threat are reasonable and not preclusive.[105] Where—as here—a complaint contains "well-pleaded allegations" to show it was reasonably conceivable that board action was taken in response to a perceived threat to its control, the complaint "will usually survive a motion to dismiss."[106]

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[102] A158.

[103] A157.

[104] *Kellner*, 320 A.3d at 260.

[105] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

[106] *Gaylord Container*, 1996 WL 752356, at *2; *see also In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995) (when a complaint contains "well-pleaded allegations on the *Unocal* claim . . . boards can expect to be required to justify their decisionmaking").

1. The Boards Acted For Improper Purposes—The Improper Bylaws Thus Fail *Unocal* Prong 1

Defendants contend that Plaintiffs have not alleged that the Improper Bylaws were adopted for an improper purpose. This is false. Plaintiffs' Complaints allege that Defendants acted "to thwart activists and entrench its sitting directors" and to erect "intentional barriers to stockholder activism" because they feared that the UPR would make it easier for activists to gain board seats.[107] The Boards' "general concern about stockholder activism" does not constitute a "legitimate" threat justifying defensive action under *Unocal*.[108] Thus, the Boards' efforts to insulate themselves from potential activist engagement is not a cognizable "threat" under *Unocal* Prong 1.

The sprawling language of the Improper Bylaws themselves, which seeks information on a "potentially limitless class of third parties," further "suggest[s] an intention to block" activist efforts.[109]

Defendants assert that the trial court "suggested" that directors have a duty to review other companies' bylaws and "adopt amendments in step with other

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[107] *See* A071; A148; A157-A161; A169; A258; A267-A271; A280.

[108] *Williams*, 2021 WL 754593, at *32; *see id.* at *22 (under *Unocal*, the "board must show that it sought to … respond[] to a legitimate threat. If the threat is not legitimate, then a reasonable investigation into the illegitimate threat, or a good faith belief that the threat warranted a response, will not [suffice]").

[109] *Kellner*, 320 A.3d at 265.

companies."[110] The court's observation that boards should remain *aware* of practices at other companies cannot equate to an instruction that boards *should adopt* inequitable bylaws to align with market trends. As Delaware courts have repeatedly recognized, an action does not become equitable because it is commonplace.[111]

Finally, Defendants' reliance on the lower court's characterization of the corporate documents as "generic" and "vanilla"[112]—aside from being improper on a motion to dismiss—entirely misses the point. These documents support Plaintiffs' allegations that the Boards acted defensively in response to a generalized, non-cognizable fear of shareholder activism—which support that the Improper Bylaws thus fail *Unocal* Prong 1.

2. The Improper Bylaws Are Unreasonable And Preclusive And Thus Fail *Unocal* Prong 2

Plaintiffs also readily alleged that the Improper Bylaws are unreasonable and preclusive and cannot satisfy *Unocal* Prong 2.

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[110] AB-59 (citing A158, A270-71, A584-85, A588, B058, B254).

[111] *See Lebanon Cnty. Emps.' Ret. Fund v. AmerisourceBergen Corp.*, 2020 WL 132752, at *10 (Del. Ch. Jan. 13, 2020) (the "argument that 'everyone else is doing it' is rarely a persuasive response") (quoting *In re Massey Energy Co.*, 2011 WL 217649, at *20-21 (Del. Ch. May 31, 2011)).

[112] AB-60 (citing AES Op. 16; OC Op. 11).

Defendants half-heartedly contend that Plaintiffs did not allege that the Improper Bylaws were preclusive.[113] But the Complaints more than adequately alleged that the Improper Bylaws unreasonably inhibit the stockholder franchise, including by disincenting nominations and proposals, "impos[ing] ambiguous [disclosure] requirements across a lengthy term,"[114] and enabling the Boards to invalidate nominations based on subjective readings of imprecise terms or minor technical defects. [115]

With respect to the Acting-in-Concert provisions, Defendants argue that *Kellner* did not find acting-in-concert provisions "*per se* unreasonable."[116] But Plaintiffs never argued that *all* acting-in-concert provisions are automatically unreasonable; rather, Plaintiffs alleged that the Acting-in-Concert provisions here fail *Unocal* because the Wolfpack and Daisy Chain components—not present in *Kellner*—make the definitions unreasonable.

Defendants accuse Plaintiffs of "omit[ting]" the word "knowingly" from their description of the Acting-in-Concert provisions.[117] But the Complaints plainly

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[113] AB-63.

[114] *Kellner*, 320 A.3d at 266.

[115] A150; A162-69; A260; A272-A280.

[116] AB-64.

[117] AB-10.

allege that the Acting-in-Concert provisions apply when a person "knowingly acts" towards a common goal with others in the Wolfpack Provision.[118] Defendants themselves omit that the word "knowingly" does not extend to the Daisy-Chain provision. Thus, knowingly acting in a "wolfpack" with one person could trigger unknowingly "acting-in-concert" with another in a daisy chain. For this reason, the Delaware courts invalidated substantively *identical* Acting-in-Concert provisions as "extreme" and overbroad in *Williams* and *Versum*.[119]

The Wolfpack component is also vague and overbroad, as it "do[es] not clearly specify what activities would result in aggregation,"[120] using "hard to apply" terms such as "in parallel" and "relating to," and includes acts such as "exchanging information" and "attending meetings,"[121] which courts have found "quite broad."[122] Indeed, if two stockholders merely have a coffee to discuss one of the Companies, the bylaws require them to share a "description of any proxy, contract, agreement,

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[118] A163; A274.

[119] *See Williams*, 2021 WL 754593, at *11, 40; *In re Versum Materials, Inc. S'holder Litig.*, C.A. No. 2019-0206-JTL (Del. Ch. July 16, 2020), (TRANSCRIPT) at 53–54, submitted as Tab 2 of Compendium of Authorities cited in Plaintiffs-Below/Appellants' Opening Brief.

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

[121] A182-A183; A231.

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

arrangement, understanding or relationship" before submitting a nomination.[123] The overbreadth and lack of clarity invite a board to reject notices based on "a subjective interpretation" by a board.[124]

The Limited Partner Disclosure and Daisy Chain components of the Acting-in-Concert provisions are also unreasonably restrictive and chilling. The Limited Partner Disclosure would require a fund that wants to tell its limited partners about a potential nomination strategy to disclose information about that partner to the Board—an impossibility for many, as the limited partners' identities are often protected by strict confidentiality agreements.[125]

Defendants argue that the Improper Bylaws' requirements to disclose performance-based fees are not inequitable.[126] But the Complaints allege that the Improper Bylaws disincentivize stockholders from submitting proposals and

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[123] A167.

[124] *Kellner*, 320 A.2d at 266 (addressing concerns about similar bylaw provisions).

[125] *See* Motion of Non-Party Managed Funds Association for Leave to Appear and File Brief as *Amicus Curiae* (Trans. ID 69057833), Exhibit A to Motion (Proposed Brief as *Amicus Curiae*) (Trans. ID 69057833), *Politan Cap. Mgmt, LP v. Kiani*, No. 2022-0948-NAC, at 9, 12 (Del. Ch. Feb. 2, 2023) (the "MFA Br.") (Tabs 1-2 of the Compendium of Authorities Cited in Plaintiffs' Below/Appellants' Reply Brief). Three days after the Managed Funds Association ("MFA") filed the MFA Br. as an attachment to its motion, the company amended its bylaws to remove the challenged provisions. MFA thereafter withdrew its request to file the MFA Br.

[126] AB-63.

nominations by making stockholders divulge commercially sensitive information.[127] As the Managed Funds Association explained in its amicus briefing in *Politan Capital Management v. Kiani*, information about an investor's future plans in other companies is "proprietary, highly confidential, and commercially sensitive,"[128] and forcing disclosure risks "caus[ing] a decline in stockholder engagement that would . . . increase the risk of entrenchment and diminish management accountability."[129] Defendants respond that stockholders have a right to know of their fiduciaries' self-interests.[130] But that is a red herring: nothing in the bylaws requires the board to provide this information to public stockholders—either about a Nominating Person or about any other nominee for the board.[131]

In *Better Home*, the Court of Chancery reviewed advance-notice bylaws with acting-in-concert definitions targeting "wolf pack" activity and "conscious

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[127] A167-169; A277-A280.

[128] MFA Br. at 16-17.

[129] *Id.* at 17.

[130] AB-63-64. Defendants cite *Paragon Technologies, Inc. v. Cryan*, 2023 WL 8269200, at *13 n.168 (Del. Ch. Nov. 30, 2023), but the quote is actually from *van der Fluit v. Yates*, 2017 WL 5953514, at *8 (Del. Ch. Nov. 30, 2017), a case about whether stockholders were entitled to know who was leading M&A deal negotiations.

[131] *Cf. In re Dell Tech., Inc. Class V S'holders Litig.*, 326 A.3d 686, 705 (Del. 2024) (noting that subjecting stockholders' "business practices" to scrutiny could deter stockholders from making meritorious objections to fee applications).

parallelism" similar to the Improper Bylaws. The Court of Chancery found the provisions "confusing," "broad," "cover[ing] an expansive set of conduct," "onerous," and potentially "burdensome to the point of unreasonable."[132] But, because the *Better Home* stockholder brought a facial challenge, the court could not consider the bylaw's reasonableness,[133] including the fit between means and end and whether the actions are "sufficiently tailored to the threat at hand[.]"[134] By contrast, Plaintiffs' *Unocal* claims require the Court to decide whether the Improper Bylaws are reasonably tailored—and they are not.

[132] *Better Home*, 2025 WL 3012956, at *7-8, *10.

[133] *Id.* at *10.

[134] *Kellner*, 320 A.3d at 261; *see Better Home*, 2025 WL 3012956, at *10 (noting court could not consider "'the reasonableness of the end that the directors chose to pursue, the path that they took to get there, and the fit between the means and the end'") (quoting *Obeid v. Hogan*, 2016 WL 3356851, at *13 (Del. Ch. June 10, 2016)).

CONCLUSION

For the foregoing reasons, and the reasons stated in Appellants' Opening Brief, the decisions of the Court of Chancery should be reversed.

Dated: December 12, 2025

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