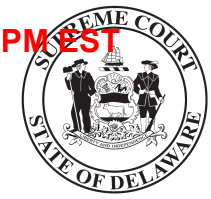

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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|---|---|---|
| ELDON KLAASSEN, | ) | |
| | ) | |
| *Plaintiff and Counterclaim-Defendant Below, Appellant,* | ) | |
| | ) | |
| v. | ) | No. 583, 2013 |
| | ) | |
| ALLEGRO DEVELOPMENT CORPORATION, RAYMOND HOOD, GEORGE PATRICH SIMPKINS, JR., MICHAEL PEHL, and ROBERT FORLENZA, | ) | Court Below<br>The Court of Chancery of<br>The State of Delaware<br>C.A. No. 8626-VCL |
| | ) | |
| *Defendants and Counterclaimants Below, Appellees.* | ) | |

**APPELLEES' CORRECTED ANSWERING BRIEF**

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## NATURE OF PROCEEDINGS

Seven months after being terminated as Allegro's CEO at a regularly scheduled meeting of Allegro's Board of Directors, Eldon Klaassen filed the underlying Section 225 proceeding. Ten months after such termination, and, following extensive discovery, the Chancery Court held a trial on the merits. During trial, Vice Chancellor Laster heard from seven live witnesses and considered dozens of exhibits. Only one of those witnesses testified in support of the Appellant, and that was Klaassen himself, who was presented with the opportunity to explain why he waited for seven months to file suit. After post-trial briefing, the court reconvened for 3 hours of oral argument.

In denying Klaassen's claims, the Vice Chancellor issued a 55-page memorandum opinion, half of which comprises extensive fact-findings. Contrary to Klaassen's assertions, the fact-findings fully address, among other things, alleged "notice, deception and fiduciary duty issues" raised by Klaassen's claims. *Compare* Appellant Br. 1; *with* Memorandum Opinion ("Opinion" or "Op.") (Ex. B to Appellant's Brief). The court concluded that Klaassen's challenge to his removal was barred by laches and acquiescence and thus found it unnecessary to decide the merits of his claims. Based on the conclusion that Klaassen was no longer Allegro's CEO, the court decided Klaassen's claims regarding the composition of Allegro's Board.

## SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly found that because Klaassen's claims sound in equity, they are subject to equitable defenses. Claims in equity are *always* subject to equitable defenses; no case has ever held otherwise. Put differently, an equitable challenge to board action may, at most, render that action "voidable," not "void." The cases on which Klaassen relies are consistent with other precedent on this point. In *dicta*, two of them reference actions as being "void," but acknowledge that equitable defenses nevertheless can apply. The bylaw provision for "special meetings" of the board of directors that Klaassen has cited does not apply to the regular board meeting at which he was removed as CEO. Klaassen's challenge to that meeting relies solely on equity.

Besides being rooted in equity, Klaassen's claim is subject to equitable defenses because he challenges the process used to remove him, not the Board's underlying right to do so. Procedural challenges are subject to equitable defenses even where, unlike here, a bylaw was violated.

Moreover, even if the cases urged by Klaassen established circumstances under which equitable defenses were barred, those circumstances are inapposite to the controlling facts of this appeal. Klaassen does not and cannot dispute that the Board had the power under the Bylaws and Delaware law to remove Allegro's CEO at any time for any or no reason, and that no ownership rights were affected

by his removal as CEO. Nor does he contest the court's fact-findings that (i) Allegro's Board terminated Klaassen due to his chronic failures as CEO and after he failed to respond to years of mentoring designed to improve his performance; (ii) Klaassen was warned repeatedly that his job was "in jeopardy" because of his poor performance; (iii) each of Allegro's four other directors, including those Klaassen designated, each independently concluded that the company could succeed only with Klaassen's removal; and (iv) the commonly-used process the Board followed to remove Klaassen was, in its business judgment, best for Allegro.

2. Denied. The record amply supports the Vice Chancellor's fact-findings as to the defenses of laches and acquiescence, and his application of settled legal elements to the facts should be affirmed. As the court found, Klaassen waited seven months before asserting that his removal was invalid. During that time, Klaassen communicated with words and actions that, although he was sometimes unhappy about being removed as CEO, he regarded his termination as legally effective. While Klaassen delayed, he knew that Allegro was completing a wholesale transition under new management, forming a new senior executive team with new key hires, investing in new strategic initiatives, and forming new partnerships and customer relationships. The court found that Klaassen's "overall conduct" made it "reasonable" for Allegro to believe he had accepted the validity of his removal, and that his return as CEO would cause "chaos" at Allegro.

## STATEMENT OF FACTS

Vice Chancellor Laster's thorough October 11, 2013 Memorandum Opinion resolved the parties' factual disputes based on an extensive evidentiary record. Klaassen's selective excerpts from the Opinion are misleading at best. Contrary to Klaassen's appellate brief, Vice Chancellor Laster did not "omit" the allegations which Klaassen represents are "fact." Appellant's Br. 3. Rather, he rejected those allegations after weighing the evidence and assessing the witnesses' credibility.

### A. In 2007, Klaassen sold control over Allegro and became subject to removal as CEO at any time for any reason.

Klaassen founded Allegro in 1984 and owned nearly 100% of its stock until 2007, when he sold a portion of his holdings to Series A Investors and personally received almost $40 million. Op. 2. As part of that transaction, Allegro amended and restated its certificate of incorporation (A65-A88) and bylaws (A89-A102)[1], and the parties entered into a Stockholders Agreement (A31-A64)[2]. Op. 2–3. As a result, Klaassen relinquished control over Allegro. *See* Op. 3.

Allegro's new Board of Directors would be comprised of seven members. Klaassen, in his capacity as majority common stockholder, was entitled to elect only *one* of these seven (the "Common Director"), while the Series A Investors, holding a majority of Series A Preferred Stock, could elect *three* (the "Series A

[1] Hereinafter referred to as the "Bylaws."
[2] Hereinafter referred to as the "Stockholders Agreement."

Directors"). Op. 3. One of the remaining seats would be occupied by whomever the Board elected as CEO (the "CEO Director"). The other two would be filled by outsiders or independents designated by that CEO and reasonably acceptable to the Series A Investors (the "Outside Directors"). Op. 3–4; Stockholders Agreement ¶ 9.2. The CEO may also have a role in the removal of the Outside Directors under some circumstances. Stockholders Agreement ¶ 9.4.

The Bylaws provide that the CEO is "subject to the control of the Board of Directors." Bylaws, Article III § 4. The CEO is an at-will employee; the Board can hire or fire the CEO at any time for any or no reason. *Id.*, §§ 1, 3. After the 2007 sale and restructuring, Allegro's new Board elected Klaassen CEO. B1-10. Klaassen admitted at trial that he had no contractual right to hold the CEO seat and "could be terminated as CEO for any reason or no reason at all at any time without notice." A2563; *see also, e.g.,* A2493-A2495.

In 2012, when the events giving rise to this litigation took place, Klaassen was CEO and occupied the CEO Director seat. Defendants Pehl and Forlenza occupied two of the Series A Director seats, and Defendants Hood and Simpkins—whom Klaassen designated to the Board with Series A acceptance—occupied the Outside Director seats (collectively, the "Non-Management Directors"). Op. 4. Klaassen never filled the Common Director seat, and the third Series A Director seat also sat vacant. *Id.*

### B. In five years as CEO, Klaassen proves unable to govern, build teams, or grow the newly-capitalized Allegro.

To attract the 2007 Series A investment, Klaassen projected substantial revenue growth for Allegro. Op. 7. Reality under Klaassen's leadership, however, "proved more sobering" than those projections, and year after year the company fell far short of the projections *and* of its reduced budget. *See id.* at 7–8. The Vice Chancellor found that the four Non-Management Directors' dissatisfaction with Klaassen was rooted in his consistently poor performance and failure to respond to mentoring and constructive criticism. *Id.* at 7–10, 13–14, 17–23. The dissatisfaction ripened at different times for each director, but it became increasingly clear to each that Klaassen's "management style" held Allegro back. *Id.* at 7–8. As the court found, Klaassen's core weaknesses impeded Allegro:

> To grow a business, a CEO must succeed across multiple dimensions, including assembling and retaining a talented executive team, empowering them to succeed, setting appropriate budgetary goals and implementing processes to achieve those goals, and communicating with the Board. ***Klaassen struggled in each of these areas.***

*Id.* at 7 (emphasis added).

Contrary to Klaassen's assertion that his termination was a "complete surprise," Appellant's Br. 3, the Vice Chancellor found (and the evidence established) that Klaassen long knew that he was performing poorly and jeopardizing his position. Beginning less than a year after the 2007 Series A

transaction, a "pattern" emerged of senior executives leaving the company because they "could not work with" Klaassen. Op. 7. The Board tried coaching Klaassen, but to no avail. Op. 8–9, 15, 20–21. After the two Outside Director seats had remained vacant for two years, the Series A Investors urged Klaassen to designate candidates for seats to "mentor him in his weaker areas." Op. 8. Klaassen designated Hood and Simpkins, whom the Series A Investors accepted. *Id.*

Hood and Simpkins "invested years in mentoring Klaassen." Op. 20. When the Series A Directors were first ready to consider a CEO change in 2010, Hood and Simpkins persuaded them to give Klaassen more time to respond to their mentoring. Op. 9. Hood warned Klaassen that his performance needed to improve and that Hood "had gotten him more time as CEO." *Id.*

Klaassen nonetheless capped disastrous consecutive fiscal quarters ending 2011 and beginning 2012 by firing Allegro's SVP of Sales just before the end of the second quarter of 2012 "with no plan for a replacement." *Id.* at 10, 13. This contravened the Non-Management Directors' request that Klaassen wait until forming a succession strategy and until after the quarter ended to avoid disrupting pending deals. *Id.* Hood and Simpkins—the Outside Directors whom Klaassen had designated—"were particularly troubled by how Klaassen handled the firing." *Id.* Simpkins felt Klaassen had completely missed his coaching, and Hood saw "a recurring pattern in which Klaassen could not work with new executives" and that

"'the company was going sideways.'" *Id.* at 14 (quoting Hood).

A few weeks later, during a customary executive session at the July 19, 2012 Board meeting, the Non-Management Directors discussed Klaassen's performance as CEO. "Forlenza sensed for the first time that the Outside Directors had become frustrated with Klaassen, and he began to think that terminating Klaassen might be a viable option." *Id.* at 15.

### C. Klaassen, after repeat warnings that his job is in "jeopardy," convinces the Board that removing him is best for Allegro.

After the July 19 Board meeting, the Outside Directors held a private discussion with Klaassen during which, the court found, "Hood told Klaassen that how he handled Friedman's termination seemed to be part of a recurring theme," and "pointed out that the Board could fire Klaassen." *Id.* Following this, a concerned and agitated Klaassen "barreled" into the office of Allegro's General Counsel, asking if the Board could remove him as CEO. *Id.* at 16. After being told that it could, Klaassen requested a second opinion from Gibson, Dunn & Crutcher. Gibson Dunn confirmed that there was no limitation on the Board's ability to terminate Klaassen as CEO. *Id.* at 16-17.

Two weeks later, Klaassen intensified concerns about his performance by giving a presentation to the Board that "detailed the Company's poor performance during the life of the Series A investment." *Id.* His strategy—to convince the Series A Investors to sell their shares to him at significantly less than their asking

price—"backfired." He succeeded only in highlighting his leadership failures. *Id.*

Contrary to Klaassen's conspiracy theory that the Series A Directors there hatched a plan to coerce Klaassen to buy them out at a higher price, the court found that Series A Director "Forlenza became convinced that the Company's value had dropped too far for a sale or recapitalization to be feasible," and believed "the only possible path was to increase the Company's value." *Id.* He and Pehl discussed how Klaassen as CEO was "a major impediment to the Company's growth." *Id.*

The Non-Management Directors spent August, September, and October of 2012 "considering whether to terminate Klaassen, who should replace him as CEO, and how to go about doing it." Op. 7. They "did not share a singular moment of clarity in which they collectively realized that Klaassen needed to go," but rather each person's view evolved over time. *Id.* "[V]arious subsets of the Non-Management Directors talked more frequently among themselves, but it is not possible to pin down all of the conversations." *Id.* at 18.

As is customary and considered a best practice of directors in the exercise of their duty of care, the Non-Management Directors deliberated about the CEO outside his presence. *See id.*; *infra* Arg. § I(C)(1)(b). But Klaassen did know that his position was under intense scrutiny. In September, a "worried" Klaassen scheduled separate meetings with Simpkins and Hood to discuss his job status. Op. 20. Klaassen's uncorroborated assertion that the directors "hid" their

intentions from him is directly contradicted by the trial court's express finding that they each communicated again that his job was "in jeopardy." *Id.* at 21.

By early October, Hood, Forlenza, and Pehl had each concluded that replacing Klaassen was best for Allegro. Simpkins reached his conclusion after hearing the reasons why yet another senior executive quit the company because of Klaassen's "leadership style." *Id.* at 22. For Simpkins, who had tried repeatedly to mentor Klaassen on this issue, this was the "last straw," and he concluded in October that "replacing Klaassen was the only way for Allegro to grow." *Id.* at 23.

The Vice Chancellor rejected Klaassen's theory that the CEO position was offered to Hood as a *bribe* to secure his vote to remove Klaassen. Op. 19-20. Hood was "an experienced, professional CEO with an established track record of creating value for investors." *Id.* His willingness to accept the position, once offered, solved the difficult problem of who would succeed Klaassen. *Id.* The trial court found Hood's testimony "credibl[e]" regarding the reasons he accepted the position and why it was best for the company. *Id.*

### D. On November 1, Klaassen is terminated at a Regular Meeting of the Board in compliance with Bylaws and without "deception."

Having agreed that terminating Klaassen was best for Allegro, the Non-Management Directors "decided to act at the next regularly scheduled Board meeting, set for November 1." Op. 23. Vice Chancellor Laster rejected Klaassen's theory that they moved the meeting to prepare an ambush. *Id.* The November 1

Board meeting was one of the six Regular Meetings fixed by Board resolution. Bylaws, Art II § 6; A2501. Though Allegro's Bylaws do not require notice of Regular Meetings, *id.*, notice of the meeting had been provided by Klaassen himself. B32. The Vice Chancellor found that no deception was used or needed to terminate Klaassen because it was "a regular meeting of the Board that Klaassen would have attended and led regardless." Op. 24.

In advance of the November 1 Regular Meeting, the Non-Management Directors held two teleconferences and sought advice of counsel. Op. 23. The Series A Investors' counsel asked whether Klaassen should be given advance notice of his termination, and the Non-Management Directors decided against it. *Id.* The court rejected Klaassen's claim that this decision was driven by a desire to "ambush" and deprive him of alleged opportunities to entrench himself. Instead, as the court found, the Non-Management Directors felt "it was important not to give Klaassen notice because they needed to make sure that they had control over the Company's bank accounts, intellectual property, and other key assets." *Id.*[3]

At the November 1 Regular Meeting, with Klaassen present, the Board passed a resolution to terminate him as CEO and replace him with Hood. Op. 24.

### E. After November 1, Klaassen communicates that his removal is legally effective and waits seven months to sue.

Following his removal, Klaassen sought the advice of counsel regarding his

[3] *See also* A3054-55, A3111-12, A3166-67, A3169-73; A1753-54, A1840; B19.

rights under the Charter, Bylaws, and Stockholders Agreement. Op. 16, 20, 40-41.[4] But he did not challenge his removal until June 5, 2013— *seven* months later.

Instead, shortly after his removal, Klaassen began helping Hood adjust to being the new CEO, while at the same time negotiating a consulting agreement with Allegro that would govern his new role. Op. 25, 42.[5] With legal counsel, Klaassen approved drafts referring to himself as an "executive consultant" to Allegro, "barr[ing] Klaassen from holding himself out as an Allegro employee," and "identif[ying] Hood as Allegro's 'President & CEO' and requiring Klaassen to 'report to and follow the lawful directives of Allegro's CEO.'" Op. 25, 42; A215-25; B83-91. Ultimately, discussions broke down over Klaassen's fee and the hours he would be required to work—not, as Klaassen claims on appeal, because he had placed "external conditions" on the agreement that went unfulfilled. *Compare* Op. 25 *with* Appellant Br. 12-13, 32; *see also* A3185-86; B81-82; B83-91.

The trial court found that "Klaassen never asserted during this time that the termination was invalid or that he remained CEO." Op. 25. Instead of asserting that he was CEO, Klaassen "insisted" that he would hold *Hood*, as CEO, "accountable" for Allegro's performance. *Id.* at 25, 42; B95-98. The court found that Klaassen never objected before filing suit that his removal was illegal, a

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[4] B33-72; B73; A243; A793-A809; A2591. *See also* B11-13; B20-24; B25; B26-31; A2561; A3210-11, A3215-29.

[5] *See also* B74; B75-76; B77; B78-80; A215-25; B81-82; B83-91; A3087, A3112-13, A3164, A3183-84.

finding supported by substantial evidence. Op. 25-26.[6]

In late November, Klaassen executed a Board resolution listing himself as a "Board Member" and Hood as "President and CEO" of "Allegro Development Corporation." B92-94. In early December 2012, Klaassen objected that Hood could not serve on the Audit Committee because the Bylaws did not permit the CEO to serve in that capacity. Op. 42; B99. Klaassen then drafted and circulated a signed written consent removing Hood from the Audit Committee—"because of Hood's status as an officer of Allegro"—and appointing himself to the Audit and Compensation Committees, neither of which he would have been eligible for as CEO. Op. 43.[7] As a member of the Compensation Committee, Klaassen interviewed (and sometimes approved) proposed additions to Hood's management team, and even provided comment on the terms of Hood's employment agreement as CEO. Op. 43.[8]

For seven months following Klaassen's removal, Hood managed the Company, assembled a new executive team, instituted new policies, and made commitments to employees and customers. *Id.* at 41; *see also* B124-29, B159-60. Klaassen's return after all this would "throw Allegro into chaos." Op. 41.[9]

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[6] *See, e.g.,* A3183-84, A3194-95; A2812-15; A3236-37; A3305-06; B92-160.
[7] *See also* A89-102, B99-119, B156-160.
[8] *See also* B120-160.
[9] *See also* A3104, A3194-96; A3237-38; A3310-11; A3340, A3345-46, A3349.

## ARGUMENT

### I. The Court of Chancery correctly concluded that Klaassen's challenge to his removal is subject to equitable defenses.

#### A. Question Presented.

Did the court correctly conclude that Klaassen's challenge to his removal is subject to equitable defenses?

#### B. Standard of Review.

Whether a claim is subject to equitable defenses is generally a question of law reviewed de novo. *See Waggoner v. Laster*, 581 A.2d 1127, 1136–37 (Del. 1990). To the extent the availability of equitable defenses depends on factual determinations, however, the trial court's fact-findings are subject to clearly erroneous review. *See id.* at 1136; s*ee also Poliak v. Keyser*, 65 A.3d 617 (TABLE), 2013 WL 1897638, at *2 (Del.); *Brody v. Zaucha,* 697 A.2d 749, 753 (Del. 1997). Additionally, when the record supports the reasons for the court's judgment, this Court will affirm even if the trial court did not rule on that basis. *See Windom v. William C. Ungerer, W.C.*, 903 A.2d 276, 281 & n.18 (Del. 2006).

#### C. Merits of the Argument.

The Court of Chancery correctly concluded that "because Klaassen seeks to invalidate the Board's actions by invoking principles of equity, his theories are

subject to equitable defenses." Op. at 31.[10] No Delaware court has ever held that equitable defenses cannot apply to an equitable claim, whether because the challenged action is "void" or for any other reason. The Vice Chancellor also posited that suits to redress bylaw, charter, or Delaware General Corporations Law (DGCL) violations may not be subject to equitable defenses because such violations render board actions "void," but he acknowledged the cases applying equitable defenses in those circumstances. Op. 38 n.10. To affirm the judgment, it is unnecessary to decide whether bylaw violations always render actions "void" rather than "voidable." Klaassen does not and cannot contend that his removal at a regular, duly-noticed board meeting violated a bylaw. If the Court does reach the question, however, Delaware law also holds that suits alleging process violations are subject to equitable defenses even when (unlike here) bylaws are violated.

### 1. Equitable defenses apply to all claims rooted in equity, including Klaassen's challenge to his removal.

#### (a) Claims in equity are always subject to equitable defenses.

"It is elementary that he who seeks equity must do equity." *Welshire, Inc. v. Harbison*, 91 A.2d 404, 408 (Del. 1952). Claims in equity are *necessarily* subject to equitable defenses because "any inequitable conduct of such a plaintiff

[10] Contrary to Klaassen's assertion, the court below did not "hold[] that the actions of the Allegro Board were voidable." Appellant Br. at 16. The court found it unnecessary to decide whether or not the actions were inequitable. Instead, the court assumed arguendo that Klaassen's claims were meritorious, but concluded they were barred by laches and acquiescence. Op. 30.

may justify the withholding or conditioning of equitable relief." *Welshire,* 91 A.2d at 408; *see also, e.g., Khanna v. McMinn,* 2006 WL 1388744, at *31 (Del. Ch.) (applying laches to reject equitable challenge to election because "this is not an instance in which the grant of equitable relief would comport with its general notions of equity"); *Nevins v. Bryan*, 885 A.2d 233, 248 (Del. Ch. 2005), *aff'd*, 884 A.2d 512 (Del. 2005) (applying equitable defenses to Section 225 claim).

The courts in this State have consistently applied equitable defenses where a plaintiff challenges board action by invoking equity—including where the plaintiff (like Klaassen) alleges improper notice or "trickery" in advance of a meeting. In *Dillon v. Berg*, for example, the plaintiff sought to invalidate a meeting to replace directors based on improper notice and trickery. The court rejected the claim because the complaining director acquiesced to the meeting. *Dillon v. Berg*, 326 F. Supp. 1214, 1221 (D. Del. 1971) (equitable challenge could not render meeting "invalid per se.").[11] No Delaware case has held otherwise. Whenever courts have refused to apply equitable defenses to claims in equity, they have always done so based on failure of proof, without questioning the premise that, if the defendant had proved the essential elements of the defense, it would apply.

Klaassen seeks to reverse decades of precedent based on cases that Vice

[11] *See also, e.g., Kates v. Beard Research, Inc.*, 2010 WL 1644176, at *6 (Del. Ch.); *Khanna v. McMinn*, 2006 WL 1388744 (Del. Ch.); *Pepsi-Cola Bottling Co. of Cincinnati v. Woodlawn Canners, Inc.*, 1983 WL 18017 *12–13, 15 (Del. Ch.).

Chancellor Laster analyzed thoroughly in his October 11, 2013 opinion and his subsequent November 7, 2013 opinion on the related partial stay pending appeal. *See* Opinion (Oct. 11, 2013); Mem. Op. in Supp. of Status Quo Order ("SQO") (Nov. 7, 2013) (B161-201). Some of these cases, in *dicta* and without analysis, reference board actions as being "void." Because the void-voidable distinction was not at issue, however, the terms were used interchangeably and imprecisely. *Compare Adlerstein v. Wertheimer*, 2002 WL 205684, at *10 (Del. Ch.) (relating *Koch* court's explanation that certain actions are "void," without considering equitable defenses), *with id*., at *9 n.28 (describing similar actions as "voidable"); *see also President & Fellows of Harvard Coll. v. Glancy*, 2003 WL 21026784, at *16-17 (Del. Ch.) (applying laches to claim that election was "void or voidable" without considering distinction).

The two cases on which Klaassen principally relies reference actions as being "void," but also *expressly acknowledge* that equitable defenses can apply to defeat challenges to those same actions. In *Koch v. Stearn*, the court observed:

> The validity of the board action taken on April 7th, whereby Stearn was removed from office and replaced by Ginsberg, depends upon whether Stearn was tricked or deceived into attending the meeting. If so, the general rule is that actions taken at such a meeting are **void**. ***Notwithstanding*** any deceit that may have been involved in calling a meeting, the actions taken ***will not be invalidated*** where the deceived director remains at the meeting and participates throughout or where that director suffers no disadvantage in his ability to participate meaningfully in the meeting.

1992 WL 181717, at *4 (Del. Ch.) (emphasis added; citations omitted). *Koch*, in turn, cites two decisions in which equitable defenses barred claims to invalidate meetings based on trickery and deceit. *Id*. (citing *Dillon*, 326 F. Supp. at 1221; *Pepsi-Cola*, 1983 WL 18017, at *12). Likewise, relying on *Koch*, *Fogel* recognizes that acquiescence to a meeting forecloses claims to invalidate the meeting based on trickery or deceit. *Fogel v. U.S. Energy Sys., Inc.*, 2007 WL 4438978, at *3 (Del. Ch.) (observing that meeting only invalid where complaining director "subsequently does not participate in that meeting").[12]

**(b) Klaassen's claim is equitable, notwithstanding his offhand citation to bylaws.**

Klaassen relied on equitable principles to challenge his removal. Equitable arguments include those not based on a bylaw, charter, or statutory violation. *See, e.g., Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1077–78 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005). Klaassen's trial court briefing and oral argument expressly invoked the Chancery Court's equitable powers, including "generally accepted notions of fairness." *See* A2246; A3425, A3428; A3488-89, A3493,

[12] In *Moore Business Forms, Inc. v. Cordant Holdings Corp.*, 1998 WL 71836 (Del. Ch.), the court described the challenged action as void but neither examined equitable defenses nor considered whether the actions might instead be voidable. The plaintiff's claim was premised on a bylaw violation; Klaassen mistakenly asserts that the opinion "contains no discussion of the company's bylaws." *Compare* Appellant's Br. 23 *with Moore*, 1998 WL 71836 at *7, *9 (relying on principle that a "special meeting held without due notice to all directors as required by the by-laws is not lawful"). In *VGS, Inc. v. Castiel*, 2000 WL 1277372 (Del. Ch.), the court did not use the words "void" or "voidable," or consider the applicability of equitable defenses, or apply corporate law. *See id.*; SQO 20-25.

A3530. On appeal, Klaassen invokes "fundamental precepts" arising from fiduciary duties owed in equity by directors. Appellant Br. 17.

Klaassen also now contends, in a single paragraph, that his removal is void "because Allegro's Bylaws were violated," but points only to a Bylaw provision concerning "Special Meetings" that has no application to the "Regular Meeting" at which the court held he was terminated on November 1. Appellant Br. 25; Op. 7, 23-24; Bylaws, Art. II §§ 6-7. Klaassen does not and cannot dispute that his termination was at a Regular Meeting that complied with the Bylaws. *Id.*; Op. 39.

Klaassen's argument, instead, turns the Bylaw notice provision for "Special Meetings" on its head. He complains that he should have been given formal notice of *pre-November 1* side conversations between and among some Non-Management Directors regarding his performance as CEO. At most, the absence of such notice confirms that those conversations did not qualify as "Special meetings of the Board of Directors" capable of binding the company to corporate action. *See* Bylaws, Art. II §§ 1, 7. Defendants have never contended that they did, and the trial court did not so hold. No party contended at trial that any Board action occurred during those side conversations that could be rendered "void." Most importantly, Klaassen was not terminated during those conversations. The court held that the termination which Klaassen challenges occurred *at the November 1 meeting*—not before. Op. 7. Klaassen relies solely on equity to attack that Board action.

Further, there is no requirement in the Bylaws that all directors participate in all conversations that occur outside Board meetings. As the Non-Management Directors testified, and as Klaassen's own conduct affirms (Op. 20-21), conversations outside board meetings among subsets of directors are common and accepted corporate practice.[13] In the Non-Management Directors' judgment, their conversations regarding Klaassen were necessary for full and frank discussion in the best interest of Allegro. A3286. This was consistent with the Non-Management Directors' fiduciary duty to protect the company's best interest by conferring candidly about management-directors outside their presence. *See, e.g., Yucaipa Am. Alliance Fund II, L.P. v. Riggio,* 1 A.3d 310, 326-27 (Del. Ch. 2010) (criticizing Board for ***not*** deliberating outside of founder-chairman's presence), *aff'd,* 15 A.3d 218 (Del. 2011). Even in formal board meetings, it is appropriate for non-management directors to exclude a CEO-director from discussions. *See, e.g.*, *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1147–48 (Del. 1989); *In re Walt Disney Co. Derivative Litig*., 906 A.2d 27, 44-45 (Del. 2006). Both the New York Stock Exchange and NASDAQ *mandate* that non-management directors for member companies hold "executive sessions without management," to "promote open discussion" and "empower non-management directors to serve as a more effective check on management." B202-38 at 18; B239-50 at 43.

[13] A3287-88; A2815-16; A3110-12, A3168-69.

Klaassen's complaint about pre-meeting discussions regarding his performance as CEO does not change the fact that he relies on equity, not a bylaw provision, to contest his termination at the November 1 Regular Meeting.

**2. Delaware courts apply equitable defenses to defective-process claims even when, unlike here, they are based on alleged bylaw violations.**

Were it necessary to address Vice Chancellor Laster's treatment of claims premised on alleged bylaw violations, a further refinement is warranted. A challenge to the *process* of removing an executive as opposed to challenges to the Board's underlying power to do so is subject to equitable defenses. *See Michelson v. Duncan*, 407 A.2d 211, 219 (Del. 1979); *CarrAmerica Realty Corp. v. Kaidanow*, 321 F.3d 165, 171 (D.C. Cir. 2003) (surveying Delaware law and concluding that "a void result occurs when a corporate board acts without authorization, while the result of an authorized act improperly accomplished may be merely voidable").

Klaassen's process-based challenge resembles those in many other cases where equitable defenses were applied, even when, unlike here, the challenge relied on alleged bylaw violations. *Cf.* Op. 38 n.10. For example, in a decision this Court affirmed, the Court of Chancery explicitly rejected a Section 225 claim that failure to provide proper notice under the bylaws rendered a special meeting "void" and not "voidable," and proceeded to apply various equitable defenses.

*Nevins,* 885 A.2d at 246–50. In another case, the court applied the equitable defense of waiver to a plaintiff's claim that a board meeting was improperly noticed. *Prizm Grp. v. Anderson,* 2010 WL 1850792, at *6 (Del. Ch.). And in still another, laches and acquiescence barred an election challenge alleging procedural violations of the bylaws. *Stengel v. Rotman*, 2001 WL 221512, at *7 (Del. Ch.), *aff'd sub nom.*, *Stengel v. Sales Online Direct, Inc.*, 783 A.2d 124 (Del. 2001).[14]

The Court's affirmance of such cases is consistent with its other precedent. For example, defective issuance of stock may be void "where the corporation lacks the inherent power" to issue it, *Waggoner*, 581 A.2d at 1137, but not all defective stock issuances are void—even when statutes or bylaws are violated. *See Kalageorgi v. Victor Kamkin, Inc.*, 748 A.2d 913 (TABLE), 2000 WL 313439 (Del.) (affirming decision that board could cure, by ratification, defectively issued stock in violation of statute and corporate charter). This has important implications not only for affirmative defenses, but also for the ability of boards to ratify legitimate corporate actions taken with procedural defects unrelated to stock issuing power. *See* C. Stephen Bigler & Seth B. Tillman, *Void or Voidable?—Curing Defects in Stock Issuances Under Delaware Law*, 63 Bus. Law. 1109, 1110 (2008).

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[14] *See also Hockessin Cmty. Ctr., Inc. v. Swift*, 59 A.3d 437, 462–63 (Del. Ch. 2012) (applying affirmative defense despite bylaw violation); *President & Fellows of Harvard Coll. v. Glancy*, 2003 WL 21026784, at *16–17 (Del. Ch.) (same); *Comac Partners, L.P. v. Ghaznavi*, 793 A.2d 372, 377–82, 382 n.18 (Del. Ch. 2001) (rejecting on facts (not in principle) an acquiescence defense to illegal election); *Lofland v. DiSabatino*, 1991 WL 138505, at *1 (Del. Ch.) (defective notice rendered election at annual meeting voidable, not void).

### 3. Klaassen's expansive reading of supposed CEO "super-director" cases is inconsistent with foundational principles of corporate law.

Because they were process challenges and because they were equitable in nature, the claims at issue in *Koch, VGS*, *Adlerstein*, and *Fogel* would have been subject to equitable defenses. *See supra* Arg. § I(C)(1&2). But even assuming otherwise, extrapolating from those cases to the facts here, as Klaassen tries to do, would contradict foundational principles of Delaware corporate law. Those cases do not and cannot mean that Klaassen was entitled to an indeterminate period of notice—not identified in the Bylaws—sufficient to allow him to entrench himself as CEO against the will of the Board.

Delaware corporations are governed by boards of directors. *See* 8 *Del C.* § 141. The DGCL confers upon boards of directors "*full* power to manage and direct the business affairs of a Delaware corporation." *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1292 (Del. 1998) (original emphasis).[15] The corollary of this is the business judgment rule, "a common-law recognition of the statutory authority to manage a corporation that is vested in the board of directors." *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127 (Del. 2003). The Rule prevents courts from acting as "super-directors, measuring matters of degree in business

[15] *See also, e.g.*, *Schoon v. Smith*, 953 A.2d 196, 206 (Del. 2008); *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000); *Paramount Commc'ns v. QVC Network*, 637 A.2d 34, 41-42 (Del. 1994); *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

decisionmaking," *Brehm v. Eisner*, 746 A.2d 244, 266 (Del. 2000), and "imposing [themselves] unreasonably on the business and affairs of a corporation," *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 746 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) (internal quotation marks omitted).

To give effect to these self-governance principles, courts consistently hold that a board's decisions, made with care, loyally and in good faith, will be protected from judicial scrutiny if they comply with the DGCL and corporate charter and bylaws.[16] The DGCL and the corporation's charter and bylaws constitute the only legal requirements to which directors must adhere.

Klaassen asks this Court to reinterpret *Koch*, a vacated Court of Chancery decision with no precedential effect, to impose on Allegro's directors an ill-defined notice requirement not found in the DGCL or the company's bylaws or charter. To the contrary, the Court for decades has refused to impose an equitable notice

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[16] *See, e.g.*, *Brehm*, 746 A.2d at 256 ("Aspirational ideals of good corporate governance practices . . are not required by the corporation law and do not define standards of liability."); *Williams v. Geier*, 671 A.2d 1368, 1385 n.36 (Del. 1996) ("compliance with the applicable corporate governance regime (be it statute or bylaw) will generally shield corporate action from judicial interference"); *Stroud v. Grace*, 606 A.2d 75, 85 (Del. 1992) (rejecting "[t]he trial court's extension of the duty of disclosure beyond that mandated by statute"); *In re Walt Disney Co. Derivative Litig.*, 907 A.2d at 697, 762-63 (business judgment rule protected officer firing decision even though process fell "far short" of corporate "best practices"); *Am. Hardware Corp. v. Savage Arms Corp.*, 136 A.2d 690, 692–93 (Del. 1957); *Hollinger Inc. v. Hollinger Int'l, Inc.*, 858 A.2d 342, 386–87, 392 (Del. Ch. 2004) (rejecting argument that equity demanded a stockholder vote where DGCL did not require it), *appeal ref'd,* 871 A.2d 1128 (Del. 2004) (Table); *Hollinger*, 844 A.2d at 1077–78 (business judgment rule applies to equitable challenges); *Grimes v. Donald*, 1995 WL 54441, at *9 (Del. Ch.) (board has "very broad discretion" over management structure absent "specific restriction in the certificate of incorporation"), *aff'd*, 673 A.2d 1207 (Del. 1996).

requirement not found in the bylaws because doing so "would import serious confusion and uncertainty into corporate procedure." *Am. Hardware Corp. v. Savage Arms Corp.*, 136 A.2d 690, 693 (Del. 1957). That decision accords with the policy underlying the business judgment rule and Delaware law vesting discretion over corporate decision-making in the board of directors. Refusing to engraft extra-bylaw procedures onto corporate actions on a case-by-case basis ensures that directors and investors can "rely on the stability and absence of judicial interference with the State's statutory prescriptions." *Williams v. Geier*, 671 A.2d 1368, 1385 n.36 (Del. 1996); *see also Stroud v. Grace*, 606 A.2d 75, 85 (Del. 1992) (reversing judgment below because "trial court's extension of the duty of disclosure beyond that mandated by statute effectively amends the law" and "[i]t is important that there be certainty in the corporation law").

The board's freedom to act in accordance with its best judgment is especially important in the context of hiring and firing a CEO. *See* SQO 33 n.8 (collecting authorities). For example, the business judgment rule shielded the termination of a president-director, even when this Court viewed the removal process as leaving "much to be desired." *Disney*, 907 A.2d at 762–63; *see also In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 72–73 (Del. 2006); *Brehm*, 746 A.2d at 266. Contrary to Klaassen's arguments, the Board's discretion over the removal process deserves *more* protection when the CEO is a director, due to the

risk that the CEO will use his dual role to entrench himself.[17] Entrenchment is prohibited, even when achieved through legal corporate mechanisms, because it is disloyal. *See, e.g., Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971); *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1080 (Del. Ch. 1985).

Klaassen's argument also clashes with the Board's obligation to put "the best interest of the corporation . . . over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993), *decision modified on reargument*, 636 A.2d 956 (Del. 1994). Boards owe no special duties to CEO-directors, even if they are shareholders, even if they hold a controlling block of shares (which Klaassen does not under the Stockholders Agreement), and even if they control a majority of directors (which Klaassen also does not). *See id.*; SQO 22–25 (collecting and discussing authorities).[18] The duties of the directors run to the corporation as a whole, not individual constituencies. *Id.*

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[17] *See* James A. Brickley, Jeffrey L. Coles & Gregg Jarrell, *Leadership Structure: Separating the CEO and Chairman of the Board*, 3 J. Corp. Fin. 189, 194–95 (1997); Sydney Finkelstein & Richard A. D'Aveni, *CEO Duality as a Double-Edged Sword: How Boards of Directors Balance Entrenchment Avoidance and Unity of Command*, 37 Acad. Mgmt. J. 1079, 1082 (1994); Thuy-Nga T. Vo, *To Be or Not to Be Both CEO and Board Chair*, 76 Brook. L. Rev. 65, 89–91 (2010).

[18] *See also Riblet Prods. Corp. v. Nagy*, 683 A.2d 37, 40 (Del. 1996); *Dweck v. Nassar*, 2005 WL 5756499, at *6 (Del. Ch.); *Berman v. Physical Med. Assocs., Ltd.*, 225 F.3d 429, 433-34 (4th Cir. 2000); *In re U.S. Eagle Corp.*, 484 B.R. 640, 653-54 (Bankr. D.N.J. 2012) (applying Delaware law); *Wall St. Sys., Inc. v. Lemence*, 2005 WL 2143330, at *8 (S.D.N.Y.) (Delaware law).

### 4. The facts underlying *Koch* and cases following it differ significantly from those established in this case.

The cases on which Klaassen relies do not support the expansive reading he would give them. Instead, they are characterized by facts not present here: boards acting in bad faith and relying on deception to effectively restructure the corporation by stripping shareholders of vested ownership rights.[19] That is not the case here, according to the findings of fact that must be credited on this appeal.

The Vice Chancellor found that the Non-Management Directors acted in good faith and did not rely on deception to accomplish the termination because the "November 1 meeting was a regular meeting of the Board that Klaassen would have attended and led regardless." Op. 23-24. Indeed, they had warned Klaassen repeatedly that his job was "in jeopardy." *Id.* at 9, 15-16, 20-21. In choosing not to give Klaassen formal advance notice of his termination, their purpose was not to subvert ownership rights (which were not affected), but as the court found, prudently to secure "control over the Company's bank accounts, intellectual property, and other key assets" before communicating the termination. *Id.* at 23;

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[19] *See Fogel*, 2007 WL 4438978, at *4 (board's intent was to prevent review of CEO-termination decision at special shareholder meeting and its "*deception* renders the [board] meeting and any action taken there void" (emphasis added)); *Adlerstein*, 2002 WL 205684, at *9 & n.28 (citing "unfair" machinations used "for the purpose" of diluting and destroying ownership rights); *VGS*, 2000 WL 1277372, at *1 (reasoning that managers' action was "a clandestine strategic move" under "circumstances where they knew that with notice [the controlling member] could have acted to protect his majority interest" from dilution); *Koch*, 1992 WL 181717, at *75 (reasoning that other directors "tricked" and "intentional[ly]" did not inform CEO of removal resolution to circumvent shareholder rights over board).

*see also id.* at 25-26 (describing Klaassen's subsequent efforts to harm company).

Further, unlike Klaassen, the plaintiffs in the *Koch* cases theoretically could have blocked the board's action by asserting rights of which they were deprived, but Klaassen had no right to remain in the CEO position over the unanimous opinion of the other board members. As CEO, Klaassen was always "subject to the control of the Board of Directors." Bylaws, Art. III § 4. Klaassen's argument that the Stockholders Agreement gave Allegro's CEO power to unilaterally remove Outside Directors without the Series A Investors' agreement is incorrect. *See* Stockholders Agreement ¶¶ 9.2, 9.4. The Stockholders Agreement certainly does not afford the CEO power to entrench himself. Moreover, even if the CEO had unlimited power to remove Outside Directors (which the CEO does not), it is settled that Outside Director vacancies cannot be filled without Series A Investors' agreement. Op. 3, 54-55 (Klaassen "could not unilaterally fill an Outside Director vacancy and bound himself to support only nominees designated by the CEO and approved by the Series A Directors"); Stockholders Agreement ¶ 9.2(d). On a board without Outside Directors, Klaassen still would not have had the votes to defeat his removal; the vote would have been 2-1 in favor of his termination (or 3-1 or 3-2 if the vacant Series A and Common seats were filled). *See id.*

Finally, while *Koch* and the cases following it were concerned with *shareholder* rights, Klaassen's claims are not tied to any rights he had as a

shareholder. Klaassen asserts that the *CEO* position gave him (and by extension, anyone who held that position) the ability to change the board's composition. Nothing in *Koch* or cases relying on it suggest that a corporate officer must be given a chance to entrench himself; that would be absurd. *See, e.g.*, *Schnell*, 285 A.2d at 439. Klaassen also asserts that common stockholders can remove directors "for cause," but nothing about his removal as CEO deprived stockholders of that alleged right. The rights of the common stockholders were not affected by the CEO change. Nor does *Koch* support the radical notion that common stockholders must have notice and an opportunity prior to CEO termination to *search* for cause to remove directors, thereby undermining board autonomy and aiding a CEO's entrenchment effort.

## II. The record amply supports the Court of Chancery's fact-findings, and its application of settled laches and acquiescence law requires affirmance.

### A. Question Presented.

Were the court's findings and application of the laches and acquiescence defenses clearly erroneous?

### B. Standard of Review.

The trial court's findings of fact are reviewed under the "clearly erroneous" standard. *Poliak*, 2013 WL 1897638, at *2. They "will be upheld if they are supported by the record and are the result of an orderly and logical deductive process." *Brody*, 697 A.2d at 753. Whether equitable defenses were correctly applied is a mixed question of law and fact. *Poliak*, 2013 WL 1897638, at *2. Where the Court of Chancery applies settled law governing laches and acquiescence defenses to facts based on a fully developed evidentiary record, the court's conclusion is entitled to deference. *Id.* at *3.

### C. Merits of the Argument.

#### 1. The trial court's laches ruling was factually supported and legally correct.

The trial court found that Defendants met their burden of proof on each element of their laches defense—i.e., that (a) Klaassen had knowledge of his rights, (b) he unreasonably delayed in asserting them, and (c) Klaassen's reinstatement as CEO after such delay would prejudice Allegro. *E.g.*, *Wechsler v.*

*Abramowitz*, 1984 WL 8244, at *1 (Del. Ch.); Op. 41-43. These findings are amply supported by the record, including by exhibits and testimony discussed in the Statement of Facts. *See supra* Facts § E. They are not clearly erroneous and should be sustained. *Poliak*, 2013 WL 1897638, at *2.

Klaassen's appeal of the court's finding of "unreasonable delay" chiefly relies on *Keyser.* In that case, this Court affirmed as not clearly erroneous a Court of Chancery finding that delay in suit was reasonable where ongoing settlement negotiations to resolve the claims later filed helped explain that delay. *See Keyser v. Curtis*, 2012 WL 3115453, at *15 n.141 (Del. Ch.), *aff'd sub. nom., Poliak v. Keyser*, 65 A.3d 617 (Del. 2013). The evidence made clear that the parties were trying to avoid litigation; they had entered a litigation "standstill" agreement. *Keyser,* 2012 WL 3115453, at *4–6. In contrast, Klaassen and the Defendants he sued never engaged in negotiations to settle Klaassen's claim that his removal was invalid.

Klaassen's attempt to buy out the Series A Investors after he was fired was not a "settlement negotiation," and he never communicated in the course of those discussions (or at any other time) that his removal was invalid or that he would sue if his buy-out efforts failed. *See* Op. 25-26, 41-43; A2812-15; A3305-06. Additionally, even after Klaassen's buyout attempt failed in February, he did not sue until June, and he does not explain the delay between when he hired Haynes &

Boone and when he filed suit. A2592. Klaassen misquotes the Vice Chancellor as saying that Klaassen provides "no explanation" for the seven-month delay. Appellant Br. 28. On the contrary, the trial court considered and rejected Klaassen's excuses as not "valid." Op. 41. Regarding the length of delay, shorter delays have supported a finding of unreasonableness and the trial court was well within its discretion to hold that Klaassen's delay was unreasonable here. *See Stengel,* 2001 WL 221512, at *7 (delay of one and a half months unreasonable). *Stengel* illustrates that, in a Section 225 proceeding, there is no tolerance for a slothful plaintiff.[20]

The record also supports the trial court's conclusion that Klaassen's delay prejudiced Allegro. Klaassen argues that the court's conclusion was based on "non-specific hearsay," but he does not identify specific trial objections to the evidence and cannot challenge it for the first time on appeal. Nor does Klaassen otherwise demonstrate why the court's finding was clearly erroneous. Contrary to Klaassen's arguments, the prejudice that would result if Klaassen again became CEO—including chaos on the management team, destruction of new customer relationships, harm from reversal of new corporate policies, and the like—was well

[20] *See also, e.g., Genger v. TR Inves.*, 26 A.3d 180, 199 (Del. 2011) ("The purpose of a Section 225 action is to provide a quick method for review . . ."); *Glancy,* 2003 WL 21026784, at *17 ("Although the plaintiffs protested at some of the actual board meetings, they failed to bring any legal action until April 2001 . . . [while they] could have utilized an expedited summary proceeding under [Section] 225" immediately.)

supported at trial.[21] Klaassen's assertion that the Defendants should have done something pre-suit to protect themselves is belied by the substantial record evidence and the court's finding that his "overall conduct made it reasonable for the defendants to believe that he had accepted the validity of his removal." Op. 43.

**2. The trial court's acquiescence ruling was factually supported and legally correct.**

Even if a plaintiff is openly displeased by his removal, his claim can be barred by acquiescence if his words and conduct communicate a belief that his removal was at least legally effective. *See Nevins*, 885 A.2d at 243, 246-48 (applying acquiescence and laches even though Nevins made clear he was "displeased by the Board's decisions"). The doctrine of acquiescence bars the equitable claims of all those who, with knowledge of their rights and the material facts: "(1) remain inactive for a considerable time; *or* (2) freely do[] what amounts to recognition of the complained of act; *or* (3) act[] in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved." *NTC Gp., Inc. v. West-Point Pepperell, Inc.*, 1990 WL 143842, at *5 (Del. Ch.) (emphasis added). The plaintiff's motive is not relevant, and it does not matter whether the defendant suffers harm. *Frank v. Wilson & Co.*, 32 A.2d 277, 283 (Del. 1943); *Nevins*, 885 A.2d at 254.

[21] *See supra* Facts § E; *see also* B120-31, B156-60; A3104, A3194-96; A3237-38; A3310-11; A3340, A3345-46, A3349, A3360-62.

The trial evidence amply supports that Klaassen acquiesced under the foregoing standard. As detailed in the trial court's opinion, Klaassen "took numerous actions that necessarily conceded the validity of his termination." Op. 42-43; *see also supra* Facts § E (with record citations). Instead of challenging his removal, Klaassen tried to negotiate a stay-on contract in which he would "report" to the CEO who replaced him, insisted that he be appointed to the Compensation and Audit Committees composed of non-management personnel (and expressly not the CEO) under the Bylaws, and insisted that Hood, his replacement, resign from the Audit Committee because Hood was CEO. *Id.* Klaassen's arguments regarding the weight of the evidence do not justify reversal.

**3. The factual record supports affirming the Court of Chancery ruling on the alternative grounds that Klaassen's claims fail on the merits.**

The Court of Chancery correctly concluded that it did not need to decide the merits of Klaassen's claims because the equitable defenses of laches and acquiescence barred them. Op. 30. Apart from these equitable defenses, however, the factual record establishes that the Non-Management Directors did not breach any applicable fiduciary duty, statute, or bylaw. Thus, even if the equitable defenses did not apply, this Court should still affirm the below court's judgment and rule in Appellees' favor based on the merits of Klaassen's claims. *See Windom v. William C. Ungerer, W.C.*, 903 A.2d 276, 281 & n.18 (Del. 2006).

## CONCLUSION

The trial court's Final Judgment should be affirmed. In the alternative, if the Court finds that equitable defenses cannot apply or that the trial court's findings of fact on an essential element of both laches and acquiescence are clearly erroneous, the judgment should be upheld based upon a ruling on the merits of the claims.

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