



IN THE SUPREME COURT OF THE STATE OF DELAWARE

RYAN LANE, JOHN KIM, JONATHAN
P. FOSTER, ADRIAN SOLGAARD,
ÖRN ÓLASON, ROHAN CHAUHAN,
MATTHEW HOMER, and IAN READ,

Defendants-
Below/Appellants,

v.

ATG CAPITAL OPPORTUNITIES
FUND LP,

Plaintiff-Below/Appellee,

and

EMPERY DIGITAL, INC.,

Nominal Defendant.

No. 417, 2026

Court Below: Court of Chancery of
the State of Delaware

C.A. No. 2026-0447-LWW

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal arises out of a concealed voting scheme between two activist investors seeking to seize control of Empery Digital, Inc. (“Empery Digital”). The Court of Chancery held that the Board was reasonable to suspect that ATG Capital Opportunities Fund LP’s (“ATG”) Gabriel Gliksberg and Woodmont Investing, LLC’s (“Woodmont”) Tice Brown secretly coordinated to liquidate Empery Digital’s Bitcoin assets. The evidence corroborated these suspicions. Within minutes of being introduced by a fellow activist to discuss an Empery Digital activist campaign, Gliksberg and Brown began an explosion of phone calls, trading, and other coordination that led to their collective acquisition of 25% of the Company within days. Gliksberg then destroyed virtually all his communications with Brown and his nominees, leading the Court of Chancery to impose sanctions. Notwithstanding these findings, the Court of Chancery held that Empery Digital’s advance notice bylaws did not provide a contractual basis for the Board to reject ATG’s Nomination Notice.

The arrangement between ATG and Brown lies at the core of the disclosure regime set forth in Section 14(a) of the Securities Exchange Act and the rules promulgated thereunder. Empery Digital’s advance notice bylaws incorporate Section 14(a)’s disclosure requirements, including the disclosure of “participants” in a solicitation (Schedule 14A, Item 4, Instruction 3), and the disclosure of any

“arrangements or understandings with any person with respect to any securities of the registrant” (Schedule 14A Item 5(b)(1)(viii)). Thus, to the extent Brown was a participant in ATG’s campaign or shared an arrangement or understanding with ATG with respect to Empery Digital securities, ATG was obligated to disclose that information in its Nomination Notice.

In concluding otherwise, the Court of Chancery erroneously applied a novel interpretation of “participant” that improperly narrows its scope. The SEC defines “participant” to include any person who “lends money or furnishes credit or enters into *any other arrangements*, pursuant to any contract or understanding with a participant, for the purpose of financing or otherwise inducing the purchase, sale, holding or voting of securities....” Rather than apply the plain meaning of that phrase, the Court of Chancery redefined it to mean “any other *similar* arrangements.” Under this narrow reading, the Court of Chancery reasoned that Brown could not be a “participant” unless he provided ATG with “financial support or other economic inducements.”

The Court of Chancery erred. *First*, under basic principles of contract interpretation, the phrase “any other arrangements” does not mean “any other similar arrangements.” *Second*, the grammatical structure of the definition of “participant” repels the Court of Chancery’s interpretation. So does the SEC’s commentary.

The Court of Chancery also refused to address the Schedule 14A requirements under the Bylaws, pursuant to which any arrangement or understanding with respect to Empery Digital securities must be disclosed. According to the Court of Chancery, because the Rejection Letter focused on Brown's status as a "participant," Appellants could not contend at trial that the same arrangement was disclosable under the Bylaws, notwithstanding that: (i) ATG has always contended that it did not coordinate with Brown—a position the Court of Chancery found to lack credibility; and (ii) the factual predicate underlying Appellants' argument that Brown is a participant is exactly the same.

Lastly, ATG's undisclosed "dollar-for-dollar" hedge of its Empery Digital shares rendered ATG without a material economic interest in the Company's primary asset. The divergence of interests created by ATG's Bitcoin ETF short positions was information material to Empery Digital's stockholders. The Court of Chancery ruled that Empery Digital's Bylaws did not contain a requirement to disclose "commodity hedges," and that Appellants could not rely on Rule 14a-9. In so doing, the Court of Chancery rendered Rule 14a-9 meaningless as a "catch-all" provision.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in holding that Brown could not be a “participant” in ATG’s solicitation unless he provided “financing” or “comparable economic inducements.” The SEC defines “participant” to include “[a]ny person who lends money or furnishes credit or enters into any other arrangements” to induce the purchase or voting of a security in connection with a proxy campaign. The plain language of the definition, its surrounding context, and controlling precedent all contradict the Court of Chancery’s holding.

2. The Court of Chancery also erred by refusing to consider Appellants’ argument that ATG’s coordination with Brown constituted an undisclosed “arrangement or understanding” under Schedule 14A, incorporated into the Section 14(a) Bylaws. The Court of Chancery improperly conflated the facts known to the Board at the time of rejection with the legal basis establishing why those facts violated the Bylaws. The Rejection Letter was not required to identify every legal provision supporting rejection. Nor was there any unfairness: ATG’s coordination with Brown was central in the Rejection Letter, litigated throughout the case, and tying those same facts to Section 14(a) at trial introduced no new factual theory or prejudice.

3. Finally, the Court of Chancery erred in refusing to consider Appellants’ argument that ATG was required to disclose its short position in Bitcoin

ETFs. Those short positions rendered ATG without any material economic interest in the Company's primary asset. In finding the argument waived because the Rejection Letter did not specifically identify Rule 14a-9, the Court of Chancery again improperly shifted ATG's burden to the Board.

STATEMENT OF FACTS

A. Empery Digital Becomes an Attractive Target for Activists.

Empery Digital is a Delaware corporation whose stock trades under the ticker EMPD. Op. 3.¹

In July 2025, Empery Digital adopted a digital asset treasury (“DAT”) strategy. *Id.* A DAT is a publicly traded company that holds cryptocurrency as a primary asset—in Empery Digital’s case, Bitcoin. *Id.* At the time, DATs “were generally trading at a premium to the net asset value (‘NAV’) of their underlying cryptocurrency.” *Id.*

In fall 2025, “[c]ryptocurrency prices began to sharply decline,” and “many DATs began to trade at a discount,” including Empery Digital. *Id.* 4. By January 2026, Empery Digital stock was trading at 73% of the value of its Bitcoin. *Id.* The discount created an arbitrage opportunity: “to the extent a stockholder could acquire control of Empery Digital for 73% of the value of its Bitcoin and force a sale of that Bitcoin at market price, the stockholder could capture the spread.” *Id.* 4–5.

¹ Citations to “Op. ___” are to the Memorandum Opinion dated August 28, 2026, attached as Exhibit A (the “Opinion”).

B. Tice Brown Develops a Plan to Exploit Empery Digital's Discount.

Tice Brown, Woodmont's principal, participated in the PIPE alongside his friend, Jacob Ma-Weaver. *Id.* 5. When it began trading at a discount, Brown approached Ma-Weaver about targeting Empery Digital for liquidation. *Id.* 6. Ma-Weaver rejected Brown's overtures over concerns about "inadvertently trigger[ing] a [Schedule]13D." *Id.* 6.

Brown continued to accumulate Empery Digital stock to "capitalize on [Empery Digital's] growing NAV gap." *Id.* 5. By December 2025, Brown was contemplating how "to get to 9.99[%] in a week and file [a Schedule] 13[D]." A1250. On December 26, Brown described Empery Digital as "a DAT I am going to make dissolve." A1251.

On January 10, 2026, Brown instructed his analyst to investigate "[t]he proxy contest process for [Empery Digital]." A1255. On January 12, his analyst supplied Brown with the requested summary. *Id.*

One day later, on January 13, Brown took another pass at Ma-Weaver, asking him: "Come do empd." Op. 6. Ma-Weaver—"who had previously faced group allegations," *id.*—replied, "Not a group!" and refused, once again, to join Brown in his plans for Empery Digital. A1262.

C. ATG Pursues Empery Digital and Markets Itself as an Activist Willing to Force Liquidations.

Gliksberg launched Appellee ATG in January 2026. Op. 5–6. ATG’s “marketing materials touted [its] willingness to use litigation and pursue ‘liquidations’ to force value realization.” *Id.* 6. Like Brown, Gliksberg “had also noticed Empery Digital’s ‘very significant discount’ to NAV.” *Id.* 5.

D. Ma-Weaver Introduces Brown and Gliksberg—and They Immediately Jump into Action.

As of January 15, Brown had contemplated an activist campaign for months but had taken no concrete steps to effectuate it. That changed once Brown met Gliksberg.²

Ma-Weaver, uninterested in Brown’s activist campaign, instead introduced him to someone who was. On January 15, just after speaking with Brown and Gliksberg (A1265–67), Ma-Weaver emailed both Brown and Gliksberg: “You both called me on the same topic today[,]” Op. 6. Three minutes later, “Brown called Gliksberg—the first of several phone calls that afternoon that totaled over an hour.” *Id.* 7.

Gliksberg and Brown’s January 15 calls kicked off a flurry of activity. *Id.* 21. Among other things, at 2:17 p.m., ten minutes after their fourth call ended,

² A more comprehensive timeline of events is set forth in Appellants’ Post-Trial Brief, at A384–93.

Gliksberg placed a single trade for 400,000 Empery Digital shares, which was rejected by his broker's electronic order system for being too large. A1387; A1261.

At 4:12 p.m., between calls with Brown, Gliksberg called his longtime activist counsel and future nominee, Aaron Morris. *Id.* 7. At 4:27 p.m., Gliksberg called Irv Schlussel, an investment manager with whom he had previously discussed Empery Digital, for advice on how to best hedge his investment. A1256–58. At 4:49 p.m., Schlussel sent Gliksberg models detailing two Bitcoin hedging scenarios. A1256.

At 4:53 p.m., Brown's broker responded to his request that "margin and risk teams" look into the "margin reqt/margin release [] if [he] went up to a 9.9% holder." A1269–70. At 4:58 p.m., ATG's broker submitted a request from Gliksberg to transfer 1,000 Empery Digital shares into record name. Op. 7–8. At 5:02 p.m., Gliksberg called Brown. A1261. At 5:22 p.m., Morris called Gliksberg. A1264.

At 5:52 p.m., Brown asked his analyst if he had the funds to "buy up to 9.9%" of Empery Digital. Op. 8. At 6:03 p.m., three minutes after ATG's broker responded to the transfer request, Gliksberg called Brown again. A1261; A1388–1391. By the end of the day, ATG had purchased 1,686,245 shares, increasing its shareholding from 0.4% to 5.4%—or over 1,000%. A1386.

E. Brown and Gliksberg Continue Communicating and Take Steps Consistent with an Imminent Proxy Contest.

At 8:40 a.m. the following day, Gliksberg messaged Ronald Davies, one of ATG’s future nominees: “[M]ight have a proxy fight coming up that I’ll need to nominate directors for.” Op. 8; A1268. At 8:51 a.m., “Brown and Gliksberg’s calls resumed.” Op. 8; A1261. Brown and Gliksberg had two more calls that afternoon. Op. 8. That evening, Brown “pressed his broker and analyst on freeing up cash to make a large purchase of Empery shares” to get to 9.9%. *Id.*; A1269–70. Brown, like Gliksberg, also requested the transfer of 1,000 Empery Digital shares to record name. Op. 8.

“On January 19, Gliksberg and Brown spoke on the phone twice” with “[o]ne of their calls last[ing] 34 minutes.” *Id.* On January 20, “Brown wired \$2 million to his broker to purchase Empery shares,” and ultimately “purchased a total of 813,779 shares.” *Id.* Gliksberg unsuccessfully attempted to call Brown one hour after Brown’s first purchase of the day. *Id.* “Gliksberg’s attempted call to Brown on January 20 is the last in the record.” *Id.*

F. Brown and Gliksberg Switch to Auto-Deleting Communications.

After January 20, “Gliksberg and Brown communicated solely by Signal.” *Id.* “Both testified that they did so due to poor cellular reception” at their homes, despite living in major cities—Brown in Manhattan and Gliksberg in Miami.

Id. “The auto-delete feature was enabled on both of their Signal accounts, ensuring that their subsequent communications were destroyed.” *Id.* 9–10.

G. Brown and ATG Both Purchase Additional Shares and Prepare for a Proxy Campaign.

Notwithstanding his stated activist intentions for Empery Digital, “[o]n January 23, Brown filed a Schedule 13G”—disclosing a passive ownership stake of 9.7%. *Id.* 10. That evening, Brown requested a meeting with Empery Digital’s management, scheduled for January 28. *Id.*

Meanwhile, ATG continued purchasing shares, and had acquired another 934,822 by January 26. *Id.* “On January 26, ATG filed a Schedule 13D disclosing [] a 5.6% ownership stake in Empery.” *Id.* Its Schedule 13D stated ATG “may in the future” engage “in short selling” or “hedging,” despite ATG having “already hedged over 80% of its Empery position by shorting Bitcoin exchange-traded funds.” *Id.*

H. Brown Demands Empery Digital Liquidate and Volunteers that He Is “Not Working with ATG”; ATG Requests Nomination Materials.

Brown met with Empery Digital management on January 28 at 3:00 p.m. and demanded the Company “immediately liquidate its Bitcoin to maximize returns.” *Id.* 10–11. Brown asserted “other stockholders shared his views and maintained similar hedges.” *Id.* 11. “The only stockholder Brown named was ATG, referring to Gliksberg informally as ‘Gabi.’” *Id.* Unprompted, Brown then

volunteered, “I am not working with ATG.” *Id.* “To Lane and Silver, this unsolicited denial—coupled with Brown’s shifting stories about how he met Gliksberg—suggested the opposite.” *Id.*

At 5:33 p.m., shortly after Brown refused to leave and was escorted out of Empery Digital’s offices by security, ATG requested nomination materials. *Id.*; A1279–80. Lane promptly responded, mentioning his earlier meeting with Brown and his understanding that ATG and Brown were working together. *Id.* Gliksberg did not respond. *See id.* However, a discussion with Empery Digital’s counsel later that day demonstrated that Gliksberg knew what happened at the meeting. A982:8–20.

I. Brown Takes the Liquidation Campaign Public.

On February 3, Brown sent a letter to the Board demanding Lane’s resignation, the Board’s replacement, and the liquidation of Empery Digital’s Bitcoin. Op. 11. The letter was attached to a Schedule 13D Brown filed that day. *Id.*

Brown then contacted Bloomberg columnist Matt Levine, stating: “I’d like to liquidate a bitcoin treasury company. I’d like to speak publicly about it[.]” *Id.* 11–12. Levine published “Cracking Open the DATs” the next day. *Id.* 12. The article named both Brown and ATG and “described an arbitrage and liquidation strategy whereby an investor buys a stake in a DAT company that is trading at a

discount to its NAV,” like Empery Digital, “and agitates for the company to liquidate its cryptocurrency,” like Brown had just done. *Id.*

Shortly after it was published, Gliksberg sent the article to one of ATG’s nominees, telling him to “Read it now! And then don’t text me about it.” *Id.* Gliksberg testified that he was concerned that the recipient might respond with an inappropriate joke. A561–62.

J. ATG Assembles Its Slate While Using Ephemeral Messaging to Discuss the Proxy Contest.

Throughout February, Gliksberg solidified ATG’s slate of nominees. Op. 13. During this time, notwithstanding that he should have reasonably anticipated litigation as of February 12, (A419), Gliksberg affirmatively enabled auto-delete for communications with nominees Kirshenbaum, Novak, and Ratner. *Id.* 7 n.29; A211. Notably, Gliksberg *turned on auto-deleting messages* with Kirshenbaum and Novak only after they agreed to be nominees. A211.

K. ATG Nominates Directors and Brown Submits a Supposedly Competing Nomination—But ATG Identifies Him as a Likely Supporter.

Just days before the nomination window closed, on February 26, 2026, ATG nominated nine nominees for election to the Board (the “Nomination Notice”). *Id.* 13. Later that day, Brown submitted a partially handwritten notice, nominating only himself (after requesting the nomination materials just two days earlier). *Id.*

13–14. Gliksberg and Brown testified that Brown’s nomination demonstrated that they were competitors and could not have been acting together. A480:12–14; A593:12–16.

Evidence presented at trial—including a spreadsheet created by Gliksberg—showed, *inter alia*, that Brown was among the stockholders ATG expected to support its slate, notwithstanding Brown’s “competing” nomination. A1392.

L. The Board Rejects ATG’s Deficient Nomination Notice.

The Board met on March 16 to discuss the nomination notices—the third time that the Board met to discuss ATG and Brown. Op. 14.; *see* A1277–78; A1341–49. The Board’s discussion focused on two main suspicions: (1) that Gliksberg and Brown were “acting together” and “hid[ing] it,” and (2) “that ATG had a short position on Bitcoin.” Op. 14.

Section 2.4(c) of the “Bylaws” defines “participant” by reference to “paragraphs (a)(ii)-(vi) of Instruction 3 to Item 4 of Schedule 14A.” *Id.* 24. Section 2.5 of the Bylaws defines “Nominating Person” to include “the stockholder providing the notice...and any other *participant* in such solicitation.” *Id.* 23. “[T]he parties agree that the Section 2.4(c) definition applies equally to Section 2.5.” *Id.* 24. Thus, “[i]f Brown were a participant, the Bylaws would have required ATG to

disclose details about Brown as a Nominating Person.” *Id.* 23–24. Sections 2.5(c)(ii), 2.4(c)(ii)(G), and 2.5(c)(iii)(B) of the Bylaws (the “Section 14(a) Bylaws”) call for all “information...required to be disclosed in a proxy statement...pursuant to Section 14(a) under the Exchange Act.” A1227–30 § 2.5(c)(iii)(B), § 2.5(c)(ii), § 2.4(c)(ii)(G).

The Board and the Nominating and Corporate Governance Committee convened on March 26. Op. 14. They discussed concerns regarding ATG’s and Brown’s nominations, specifically focusing “on what they perceived as an undisclosed relationship between Brown and ATG, as well as ATG’s failure to disclose its Bitcoin short.” *Id.* “The Nominating and Corporate Governance Committee recommended that the Board reject the nominations.” *Id.* 15. “The Board unanimously agreed” and Empery Digital issued rejection letters to ATG (the “Rejection Letter”) and Brown. *Id.*

M. The Rejection Letter Identifies Numerous Deficiencies, Including the Failure to Disclose ATG’s Coordination with Brown and its Bitcoin Hedge.

The Rejection Letter catalogued the Nomination Notice’s deficiencies. A1372–85. Chief among them were the: (1) failure to disclose ATG’s coordination with Brown that rendered Brown a “participant” in ATG’s proxy campaign (Op. 15); and (2) failure to disclose “all information...required to be disclosed...pursuant to

Section 14(a) under the Exchange Act[,]” particularly the existence of ATG’s Bitcoin hedge and all “arrangements or understandings” related to Empery Digital securities, (*Id.*; A1376–80 ¶¶ 3(a), 3(h), 4(i)).

With respect to ATG’s undisclosed arrangement with Brown, the Rejection Letter outlined the Board’s concern that ATG and Brown had taken actions “that strongly indicate coordination.” A1374 ¶ 1. Specifically, the Rejection Letter stated:

Based on statements made by Tice Brown [] to members of the Company’s management (including at the Company’s New York office on January 28, 2026), the Company understands that Mr. Brown and ATG Capital have had specific discussions regarding the acquisition of the Company’s securities, as well as the timing of such acquisitions...While it is impossible for the Company to know the extent of the coordination between Mr. Brown and ATG Capital—particularly because Mr. Brown and ATG Capital are strongly inclined to conceal their teamwork—the Company has concerns that Mr. Brown is participating in ATG Capital’s solicitation....

Id. The Rejection Letter also stated that ATG’s “significant undisclosed short position in iShares Bitcoin Trust ETF” should have been disclosed under the Section 14(a) Bylaws. *Id.* ¶ 3(a). The Rejection Letter expressed concern that “ATG Capital’s position in the Company is not aligned with shareholders” because the Company’s “primary purpose is long exposure to Bitcoin” and “ATG Capital has virtually no long economic exposure in the Company’s only material asset” and is

therefore “incentivized to push the Company to liquidate its Bitcoin *as quickly as possible*.” *Id.* ATG’s failure to disclose its Bitcoin short thus concealed ATG’s “actual interests in the election of the Nominees.” *Id.*

Among the other Section 14(a)-related deficiencies was ATG’s failure to disclose all “arrangements or understandings” related to Empery Digital securities. *Id.* ¶ 3(h). The Rejection Letter specifically identified ATG’s failure to disclose details related to certain “call option contracts” as required by Schedule 14A, Item 5(b)(1)(viii), but did not indicate that the Item 5(b)(1)(viii) deficiencies were limited to only those call options. *Id.* Moreover, the Rejection Letter also identified the Nomination Notice’s failure to disclose any of Brown’s “arrangements or understandings” with respect to Empery Digital, which was rooted in his being a participant in ATG’s solicitation. *Id.* ¶ 4(i).

N. Trial Confirms the Board’s Factual Suspicions.

The Court of Chancery found that “the Board had reason to be suspicious” and that “[a]t trial, the defendants elicited evidence supporting the Board’s suspicion that Brown and Gliksberg were coordinating regarding Empery securities—even without the evidence lost to Brown and Gliksberg’s use of Signal with auto-delete enabled.” *Id.* 20–21.

Indeed, the Court of Chancery found that ATG was “furtive in its coordination with...Brown,” (A415–16), and held that “[i]t is more likely than not

that Brown and Gliksberg’s multiple communications in mid-January went beyond sharing pleasantries and focused on their plans for Empery.” Op. 21. After January 15, “Brown and Gliksberg’s activity—phone calls, stock purchases, and outreach to prospective nominees by Gliksberg—rapidly intensified.” *Id.* The Court of Chancery held that, though “Brown and Gliksberg testified that their discussion of Empery was minimal and did not include their respective investment theses, positions, or hedges” the “weight of the evidence suggests otherwise.” *Id.* 7.

The evidence likewise confirmed that “[a]t the time ATG submitted the Nomination Notice, it had hedged its Empery equity position ‘dollar for dollar’ to isolate and eliminate the risk of Bitcoin price movement.” Op. 35.

O. Despite Its Findings, the Court of Chancery Finds the Bylaws Did Not Require Disclosure of ATG and Brown’s Coordination.

The Bylaws incorporate five subparagraphs of the definition of “participant” from Instruction 3 to Item 4 of Schedule 14A (“Instruction 3”):

- (ii) In the case of a solicitation...each of the soliciting person’s nominees for election as a director;
- (iii) Any committee or group which solicits proxies, any member of such committee or group, and any person whether or not named as a member who, acting alone or with one or more other persons, directly or indirectly takes the initiative, or engages, in organizing, directing, or arranging for the financing of any such committee or group;

(iv) Any person who finances or joins with another to finance the solicitation of proxies...;

(v) Any person who lends money or furnishes credit or ***enters into any other arrangements***, pursuant to any contract or understanding with a participant, for the purpose of financing ***or otherwise inducing*** the purchase, sale, holding or voting of securities of the registrant by any participant or other persons, in support of or in opposition to a participant...;

(vi) Any person who solicits proxies.

Id. 24–25 (emphasis added); *see also* 17 C.F.R. § 240.14a-10, Item 4, Instruction 3(a)(ii)–(vi).

Holding that Instruction 3 has a “narrow focus on proxy solicitation and financing,” the Court of Chancery opined that subparagraph (a)(v) of Instruction 3 (“Instruction 3(a)(v)”) is “directed at persons providing financial support or other economic inducements for a solicitation.” *Id.* 26. It construed Instruction 3(a)(v)’s “any other arrangements” clause as limited to arrangements “similar in nature to those specifically enumerated” such as lending money and furnishing credit. *Id.* 27.

Applying this narrow construction, the Court of Chancery held that “Brown is not a participant in ATG’s solicitation” because (i) “ATG did not nominate Brown,” (ii) “Brown did not ‘finance’ ATG’s nomination, nor did he ‘lend money or furnish credit’ to ATG to induce its ‘purchase, sale, holding or voting of securities,’” and (iii) the “record contain[ed] no evidence whatsoever that Brown

participated in ATG’s proxy contest or assisted with financing for ATG’s proxy.” *Id.* 28.

Finally, the Court of Chancery declined to consider whether the Section 14(a) Bylaws required disclosure of ATG and Brown’s coordination because “[t]he Rejection Letter did not mention the Section 14(a) Bylaws as requiring disclosure of any agreement or understanding with Brown, or reference Rule 14a-9 as an independent basis for rejection” and the “theory appeared only in post-trial briefing” and is therefore “waived.” *Id.* 31–34.

P. The Court of Chancery Similarly Did Not Entertain Appellants’ Bitcoin Hedge Argument.

In finding that “the Bylaws did not require the disclosure of commodity hedges” so “ATG could not have breached the Bylaws by failing to disclose its Bitcoin hedge in its Nomination Notice,” the Court noted that “neither Empery’s Bylaws nor its questionnaire for director candidates require the disclosure of commodity hedges, cryptocurrency hedges, or positions in unrelated ETFs.” *Id.* 36, 39. The Chancery Court then declined to consider Appellants’ argument “that ATG’s Bitcoin hedge was material information that Empery ‘[s]tockholders were entitled to know under Rule 14a-9” because “this theory was not asserted as a basis for rejection and is waived.” *Id.* 37.

ARGUMENT

I. INSTRUCTION 3(a)(v)’s DEFINITION OF “PARTICIPANT” INCLUDES NON-ECONOMIC ARRANGEMENTS.

A. Question Presented

Did the Court of Chancery err by holding that the definition of “participant” as set forth in Instruction 3(a)(v) applies only to “persons who provide financing, credit, or comparable economic inducements for the solicitation”? Appellants raised this issue below (A227–30; A360–64; A1183:24–85:4) and the Court of Chancery considered it (Op. 23–28).

B. Scope of Review

This Court reviews questions of law, including the interpretation of statutes, regulations, and bylaws, *de novo*. See *Stanford v. State Merit Employee Relations Bd.*, 2012 WL 1549811, at *3 (Del. May 1, 2012); *Airgas, Inc. v. Air Prod. & Chemicals, Inc.*, 8 A.3d 1182, 1188 (Del. 2010).

C. Merits of Argument

From the outset, ATG has consistently denied that it shared an arrangement or understanding with Brown concerning the acquisition of Empery Digital shares. It was only in ATG’s Post-Trial Brief, following Gliksberg’s and Brown’s discredited testimony, that ATG even mentioned Instruction 3(a)(v), having left that subparagraph of the definition out of its Pre-Trial Brief. A1039.

While acknowledging that the evidence adduced at trial pointed to an arrangement between ATG and Brown to acquire and vote Empery Digital shares (Op. 20–21, 41), the Court of Chancery held—on a question of first impression—that Brown must have provided “financing” or other “economic inducements” to be a “participant” within the meaning of Instruction 3(a)(v), (Op. 26, 28). That holding cannot be reconciled with the plain language of Instruction 3(a)(v), its legislative history, or the context in which it was adopted.

1. The SEC Defines “Participant.”

The definition of “participant” was adopted in 1956 to “aid and protect public investors in the exercise of their voting rights,” including by making available information for “all persons who may represent the real interests behind the formal nominees.” *Stock Market Study (Corporate Proxy Contests): Hearing before the Committee on Banking and Currency, Subcommittee on Securities*, 84th Cong. 1693 (July 6, 1956) (excerpted) (statement of J. Sinclair Armstrong, Chairman of Sec. & Exch. Comm’n) (Tab 1).

As originally proposed, the definition extended to not only those who financed a proxy solicitation, but also:

[A]ny person who is a party to any joint venture or any other contract, arrangement or understanding with a participant, for the purpose of buying, selling, holding or voting securities, or of making a profit or preventing a loss in such securities, during or in connection with the

activities of the person or persons on whose behalf proxies are solicited.

Id. 1680 (quoting Exchange Act Release No. 5,212 (Aug. 23, 1955)).³

Before its adoption in 1956, the definition was reorganized and refined but retained the concept of non-economic arrangements. Specifically, “any person who is a party to...any other contract, arrangement or understanding” became “[a]ny person who lends money or furnishes credit or *enters into any other arrangements.*” The definition also retained the nexus between the arrangement, financial or otherwise, and the purchase, sale, holding, or voting of a security in connection with a proxy contest. Amendments to Proxy Rules, 21 Fed. Reg. 579 (Jan. 26, 1956) (Tab 2).

SEC Director Byron Woodside expressed that “too much could be done by persons...either directly or indirectly, to have a very significant and persuasive effect upon security holders generally if they were engaged in an attempt to persuade other people to support them.” *SEC Enforcement Problems: Hearing Before the*

³ Defendants refer to the history and commentary because it “reinforce[s] the conclusion” that Instruction 3(a)(v) “is...unambiguous.” *Rembert v. State*, 2025 WL 1805214, at *2 n.13 (Del. July 1, 2025) (“Notwithstanding a determination that statutory language is clear on its face, courts may look to legislative history to reinforce the conclusion.”); *see also Hoover v. State*, 958 A.2d 816, 820 (Del. 2008) (“[T]his Court may refer to parts of the legislative record to establish the purpose of legislation where the record reveals more information about the enactments.”).

Committee on Banking and Currency, Subcommittee on Securities, 85th Cong. (Mar. 6, 1957) (Tab 3).

Thus, the rule was drafted to extend to “the various arrangements you have with other people for either acquiring securities, financing securities, borrowing securities, joint venture arrangements or whatever”:

Now, the obvious purpose of all of this is to get out into the public atmosphere arrangements and understandings that are so easily devised by which one group of people could stay here, not reveal their names and connections, and operate through another group over here, and accomplish through the front indirectly that which they might have difficulty doing directly.

Id. 12–13. The drafters consistently expressed that “participant” was meant to be construed broadly. *See SEC Enforcement Problems: Hearing Before the Committee on Banking and Currency, Subcommittee on Securities, 85th Cong. (Mar. 6, 1957) (statement of J. Sinclair Armstrong, Chairman of Sec. & Exch. Comm’n), in STOCK MARKET STUDY, 23–24 (Tab 3).*

2. Instruction 3(a)(v) Unambiguously Extends to the Arrangement Between ATG and Brown.

“The ‘most important consideration for a court in interpreting a statute is the words...used in writing it.’” *Salzberg v. Sciabacucchi*, 227 A.3d 102, 113 (Del. 2020). Instruction 3(a)(v) defines “participant” as:

Any person who lends money or furnishes credit or *enters into any other arrangements*, pursuant to any contract or understanding with a participant, for the purpose of financing or otherwise inducing the purchase, sale, holding or voting of securities by any participant...in support or in opposition to a participant....

17 C.F.R. § 240.14a-10, Schedule 14A, Item 4, Instruction 3(a)(v) (emphasis added).

The SEC’s use of “any other arrangements,” together with “for the purpose of financing or otherwise inducing,” reflects its unambiguous intent to capture any arrangements that induce the purchase, sale, holding or voting of a security in connection with a proxy campaign. *See, e.g., Siegman v. Columbia Pictures Ent., Inc.*, 576 A.2d 625, 632 (Del. Ch. 1989) (holding “any agreement, arrangement or understanding” is “broad language” that “applies to all arrangements, whether formal or informal, written or unwritten”) (citing *SEC v. Savoy Indus.*, 587 F.2d 1149, 1163 (D.C. Cir.1978)); *In re GGP, Inc. S’holder Litig.*, 282 A.3d 37, 78 (Del. 2022) (“[T]he use of the word ‘any’. . . means ‘each’ or ‘every.’”) (J. Montgomery-Reeves, concurring); *N.L.R.B. v. Scrivener*, 405 U.S. 117, 122 (1972) (using “otherwise” in a statute conveys “an intent on the part of Congress to afford broad rather than narrow” meaning).

Two U.S. Supreme Court cases are further instructive. In *Ali v. Federal Bureau of Prisons*, the Supreme Court analyzed statutory language covering “any officer of customs or excise or any other law enforcement officer.” 552 U.S. 214,

218–19 (2008). In rejecting the contention that “any other law enforcement officer” meant only officers resembling customs or excise officers, the Supreme Court reasoned that the provision was “disjunctive with one specific and one general category not...a list of specific items separated by commas and followed by a general or collective term.” *Id.* 225. Similarly, here, the “expansive language” of the definition “‘offer[s] no indication whatever that [the SEC] intended’ to limit the phrase to [arrangements] similar to those in the specifically enumerated sections.” *Id.* 219–20.

In *Harrison v. PPG Industries, Inc.*, the Supreme Court analyzed a provision of the Clean Air Act that provided for administrative review of “both (1) actions of the Administrator under another specifically enumerated provision of the Act, and (2) ‘any other final action of the Administrator under [the] Act which is locally or regionally applicable.’” 446 U.S. 578, 584–85 (1980) (emphasis added). Because Congress’s amendment included “not simply ‘other final action,’ but rather ‘any other final action,’” the Supreme Court found the provision was meant to be “construed to mean exactly what it says, namely, *any other* final action.” *Id.* 588–89.

Delaware law is in accord. *See, e.g., ARC Global Invs. II, LLC v. Digital World Acquisition Corp.*, 2024 WL 4212709, at *8–*9 (Del. Ch. Sept. 16, 2024) (applying “ordinary meaning” of “otherwise,” *i.e.*, “in a different way,” to “give[] effect to th[e] language and intent” of a company’s charter); *Manche v.*

MVMT Labs, Inc., 2026 WL 631291, at *10 n.101 (Del. Ch. Mar. 6, 2026) (finding the use of “or otherwise” intentionally broad).

Notably, *ATG’s own counsel conceded this point* in questioning about the reach of Instruction 3(a)(v):

THE COURT: Would an agreement to pool voting power for purposes of the proxy contest satisfy the definition in subsection (v)?

...

ATTORNEY BAYLISS: [T]he answer is yes, because it picks up voting....

A1132:13–33:5.

The Court of Chancery contends that extending Instruction 3(a)(v) beyond a financial context “renders it redundant to subparagraph (iii).” Op. 27. That is incorrect. Interpreting Instruction 3(a)(v) to extend to non-economic arrangements that induce the purchase and voting of shares does not touch upon the same subject matter as 3(a)(iii). Moreover, the Court of Chancery’s interpretation would render large portions of the text of Instructions 3(a)(iii) and (iv) meaningless, since both provisions more broadly cover financing initiatives.

3. The Court of Chancery’s Use of *Ejusdem Generis* to Limit the Scope of the Definition Was Improper.

The Court of Chancery also applied *ejusdem generis* to rewrite the SEC’s definition from “[a]ny person who lends money or furnishes credit *or enters*

into any other arrangements,” to “any person who lends money or furnishes credit or enters into any other similar arrangements.” Op. 27. “[T]he rule of *ejusdem generis*...is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty.” *United States v. Powell*, 423 U.S. 87, 91 (1975); *see also ARC Global Invs. II, LLC v. Digital World Acquisition Corp.*, 2024 WL 4212709, at *9 (Del. Ch. Sept. 16, 2024), *aff’d*, 2026 WL 1068102 (Del. Apr. 20, 2026) (“The object of construction is to ascertain the true intent from the words used, not how meaningless the words can be made by the application of any given rule.”).

Here, if the drafters wanted to limit arrangements to the financial nature of the preceding categories, they could have easily done so. Beyond that, however, the grammatical composition of the relevant language “repels application of *ejusdem generis*.” *United States v. Buluc*, 930 F.3d 383, 389 (5th Cir. 2019). The phrase “lends money or furnishes credit or enters into any other arrangements” has two distinct characteristics: (i) each verb is paired with its own noun—*i.e.*, “lends” with “money,” “furnishes” with “credit,” and “enters into” with “any other arrangements,” and (ii) there are no commas separating each of the clauses within the purported “list”:

[E]jusdem generis...has no application [to a] catchall...[that] is *not* a general or collective term following a list of specific items to which a particular statutory command is applicable (*e.g.*, ‘fishing rods, nets, hooks, bobbers, sinkers, and other equipment’).

United States v. Aguilar, 515 U.S. 593, 615 (1995) (Scalia, J., concurring).

Here, as in *Buluc*, Instruction 3(a)(v) “disjunctively places one category of verbs (‘[lends or furnishes]’) alongside a second category (‘[enters into]’)[,]” and “the verbs’ grouping as distinct categories signals contextually that they have independent meaning.” 930 F.3d at 390; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 197 (2012) (excerpted) (Tab 4) (explaining that a list is “usually a parallel series of nouns and noun phrases, or verbs and verb phrases”).

In *Ali*, the Supreme Court refused to apply *ejusdem generis* to the phrase “any officer of customs or excise or any other law enforcement officer,” noting:

The phrase is disjunctive, with one specific and one general category, not...a list of specific items separated by commas and followed by a general or collective term.⁴

Ali, 552 U.S. at 225. Like the clause in *Ali*, here, Instruction 3(a)(v) contains no preceding “list of specific items separated by commas.” *Id.*

⁴ See *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 383–84 (2003) (applying doctrine to “execution, levy, attachment, garnishment, or other legal process”); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 487–88 (2006) (limiting “negligent transmission” in “loss, miscarriage, or negligent transmission of letters or postal matter” because “loss” and “miscarriage” both “refer to failings in the postal obligation to deliver mail in a timely manner to the right address”).

Additionally, the Court of Chancery's application of *ejusdem generis* created an untenable loophole in the Bylaws. The Court of Chancery attempted to reinforce its narrow construction of "participant" by observing that § 2.5 of the Bylaws does not contain a freestanding "agreements, arrangements, and understandings" ("AAU") disclosure requirement like § 2.4(c)(iii). Op. 22. But that reasoning conflates two distinct provisions serving different functions. Section 2.4(c)(iii) imposes an affirmative obligation to disclose certain AAUs in the context of stockholder proposals generally. By contrast, the meaning of "participant" is supplied by separate provisions that expressly incorporate the SEC's proxy rules. The absence of an explicit AAU requirement from § 2.5 therefore cannot narrow a definition that § 2.5 incorporates independently. To hold otherwise would allow the omission of one disclosure obligation to rewrite the separate definition of the persons to whom the nomination disclosure requirements apply. Such an outcome "defeat[s] the obvious purpose of legislation." *Gooch v. United States*, 297 U.S. 124, 128 (1936).

Nor is the absence of an express AAU disclosure requirement meaningful in the way the Court of Chancery suggested. Section 2.5(c)(iii)(B) independently incorporates Schedule 14A, which requires the disclosure of each participant's "contract[s], arrangements or understandings" with respect to Empery Digital's securities. Item 5(b)(1)(viii). Thus, the nomination provisions contemplate

disclosure of securities-related AAUs through a mechanism distinct from § 2.4(c)(iii). That does not make every AAU sufficient to establish participant status; it does, however, refute any inference that the omission of a provision identical to § 2.4(c)(iii) in § 2.5 was intended to narrow the separately incorporated “participant” definition.

4. The Court of Chancery’s Reading Renders “Otherwise Inducing” Superfluous.

The Court of Chancery’s limitation of Instruction 3(a)(v) to “financing” or “other economic inducements,” Op. 26, also renders the phrase “otherwise inducing” superfluous. A proper reading must “giv[e] independent meaning to each term.” *Cornette v. State*, 361 A.3d 19, 28 (Del. 2026).

The Court of Chancery’s interpretation of this clause “resists the disjunctive nature of the word ‘or’” and leaves “no meaningful distinction” between the disjunctive “purpose of financing” and “purpose of...otherwise inducing.” *Id.* If the only purposes for which a participant can enter into an arrangement are financial in nature, the phrase “or otherwise inducing” is meaningless. *See Chase Alexa, LLC v. Kent Cnty. Levy Ct.*, 991 A.2d 1148, 1152 (Del. 2010) (“Words in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning[.]”).

5. The Limited Case Law Does Not Support the Court of Chancery's Novel Reading.

The cases the Court of Chancery cites do not support its conclusion that “Instruction 3(a)(v) is...directed at persons providing financial support or other economic inducements for a solicitation.” Op. 26.

First, while *IBS* did hold that “defendants were not ‘participants’ because they neither financed nor arranged financing for the proxy contest,” *id.* n.136, the *IBS* court was adjudicating an allegation that parties “engaged in arranging for the Committee’s financing.” *IBS Fin. Corp. v. Seidman & Assocs., L.L.C.*, 954 F. Supp. 980, 989 (D.N.J. 1997). The court thus had no occasion to consider the application of Instruction 3(a)(v) to non-financial arrangements. It is therefore unsurprising that the court’s holding was specific to the issue of financing. *Id.*

Second, the Court of Chancery’s assertion that “[c]ourts have rejected attempts to classify individuals as ‘participants’ where they neither financed the proxy contest nor directly participated in the solicitation,” Op. 26, is unsupported by the holdings in the cases it cites. *Atlantic Coast Airlines Holdings v. Mesa Air Group* stands for the proposition that, “in the absence of financial contribution,” courts require “compelling evidence” of proxy contest participation. 295 F.Supp.2d 75, 85 (D.D.C. 2003). The court’s holding in *Lone Star Steakhouse & Saloon v. Adams* was similar. 148 F.Supp.2d 1141, 1153–54 (D. Kan. 2001) (demonstrating

“participant” status requires “‘heavily and compellingly’ prov[ing] that others are supporting plaintiff or...directly participating in the [] proxy contest”). Both cases explicitly contemplate non-economic arrangements, in certain circumstances, rendering a person a “participant,” contrary to the Court of Chancery’s conclusion.

Indeed, *Lane v. Page* specifically noted that “[p]articipation in solicitation and financing solicitation are [] distinct concepts” and “one can be labeled a participant without being a financier.” 649 F.Supp.2d 1256, 1287 (D.N.M. 2009). The Court of Chancery dismissed this observation because “*Lane* interpreted paragraph (a)(iii)” as opposed to Instruction 3(a)(v).⁵ Op. n. 137. But nothing in *Lane* suggests that its observation was limited to 3(a)(iii), and the court itself noted that it was interpreting the definition of “[p]articipation...*in the regulations*.” *Lane*, 649 F.Supp.2d at 1287.

6. The Evidence Proved an Arrangement Tied to ATG’s Solicitation.

Framed in its proper context, the evidence reflected that Brown acted as a textbook “participant” in ATG’s anticipated solicitation and engaged in

⁵ Even if *Lane* were limited to Instruction 3(a)(iii), Appellants have never waived any argument that Brown was a “participant” under 3(a)(iii), which was included in Appellants’ Rejection Letter. A1374 fn 1. Appellants contend that Instruction 3(a)(v) is closer to the facts suspected and proven at trial, but the point, as Appellants have argued all along, is that Brown was a “participant.”

concealed solicitation for ATG directly. “[C]ommunication[s] to shareholders” that are “part of a continuous plan intended to end in solicitation and to prepare the way for success” are part of a proxy solicitation. *Hysong v. Encore Energy Partners LP*, 2011 WL 5509100, at *4 n.3 (D. Del. Nov. 10, 2011); *see also SEC v. Okin*, 132 F.2d 784, 786 (2d Cir. 1943) (proxy rules apply to pre-solicitation communications because “were it not so, an easy way would be open to circumvent the statute; one need only spread the misinformation adequately before beginning to solicit”).

For example:

- Brown talked about taking an active position in Empery Digital for months, but waited until the day he met Gliksberg. A1256; A1386; A1388–91.
- Immediately after their introduction, Brown took steps to, coincidentally, cover his short position and increase his net exposure to Empery Digital by more than 500%, even though he believed the price of Bitcoin was going to fall. A591:12–14.
- Gliksberg and Brown immediately transferred shares into record name, and, after nearly a dozen phone calls over a span of just days, made Schedule 13 filings within one day of each other.
- Brown concealed his active position by filing a Schedule 13G instead of a 13D, (A1271–76), then requested a meeting with Empery Digital where he demanded liquidation, while ATG remained quiet. Brown contacted Gliksberg, likely immediately after his removal from Empery Digital’s offices.
- With their liquidation pressure unsuccessful, Brown planted a story with Bloomberg reporter Matt Levine detailing his and ATG’s plan to liquidate the Company. A1359–60; A1350–57. Gliksberg, meanwhile, texted a link of the story to a nominee,

declaring, “Read it now! And then don’t text me about it.” A1358.

- Brown issued more press releases demanding the Board’s resignation and immediate liquidation of the Company, which allowed ATG to remain silent while concealing its joint liquidation plans with Brown. A1369–71.
- Brown then filed his own purported nomination on the same day as ATG but took no further steps in support of his own campaign. It was revealed on the eve of trial, after ATG fought its disclosure, that Brown was on ATG’s stockholder support list all along.

Because Empery Digital adopted a stockholder rights plan in response to ATG’s rapid acquisition of shares (Op. 12), ATG and Brown’s scheme depended on concealing their coordination. Indeed, by secretly working with Brown, ATG sought to “accomplish through the front indirectly that which [it] might have difficulty doing directly,” *SEC Enforcement Problems: Hearing Before the Subcomm. on Securities of the S. Comm. on Banking & Currency*, 85th Cong. 12 (1957) at 12–13—just as the drafters of the definition of participant feared. This explains not only the coordination, but also Brown’s “competing” nomination, as well as Brown’s presence on ATG’s stockholder support list.

II. APPELLANTS' SCHEDULE 14A ARGUMENT WAS FAIRLY NOTICED AND SEPARATELY WARRANTS UPHOLDING THE BOARD'S REJECTION.

A. Question Presented

Did the Court of Chancery err in refusing to consider Appellants' argument that ATG was required to disclose its coordination with Brown as an "arrangement or understanding" under Empery Digital's Section 14(a) Bylaws and Schedule 14A, Item 5(b)(1)(viii), incorporated therein? Appellants raised this issue below (A227–28; A357–60; A1175:12–78:14) and the Court of Chancery considered it (Op. 28–34).

B. Scope of Review

This Court reviews questions of law, including the interpretation of statutes, regulations, and bylaws, *de novo*. See *Stanford*, 2012 WL 1549811, at *3; *Airgas, Inc.*, 8 A.3d at 1188.

C. Merits of Argument

Appellants argued that the Court of Chancery should uphold rejection of ATG's Nomination Notice because ATG's arrangement with Brown required disclosure under Schedule 14A, Item 5(b)(1)(viii), as an "arrangement or

understanding” concerning Empery Digital securities. A358. Schedule 14A is incorporated into Empery Digital’s Section 14(a) Bylaws.⁶

The Bylaws place the burden of compliance on the nominating stockholder and specify the information ATG was required to disclose. *Kellner v. AIM ImmunoTech Inc.*, 307 A.3d 998, 1037–38 (Del. Ch. 2023). ATG did not comply. The Rejection Letter’s role was to identify the facts supporting the Board’s rejection, which it did. Nothing in the Bylaws required the Board to catalogue every legal theory supporting its conclusion. Appellants’ subsequent reliance on the Schedule 14A requirements incorporated into the Bylaws identified no new deficiency or facts. The argument addressed the legal consequences of the same omission the Board identified from the outset. Developing that argument more fully in post-trial briefing did not change the factual basis for the Board’s decision or relieve ATG of its obligation to comply with the Bylaws.

Nor was there trial-level unfairness warranting waiver. Although the Court of Chancery characterized the standalone Schedule 14A theory as first appearing in post-trial briefing, ATG knew the factual basis for the Board’s rejection

⁶ Appellants also argued that “[t]o the extent the Court determines the undisclosed arrangement or understanding was material, it also should have been disclosed under Rule 14a-9.” A360. Rule 14a-9 is also incorporated by the Section 14(a) Bylaws. The Court of Chancery similarly declined to consider this argument. Op. 34.

and had full opportunity to contest both its relationship with Brown and its legal significance. ATG addressed the Schedule 14A argument in its Post-Trial Brief and at oral argument. Developing a legal argument from the same facts and omissions in the Rejection Letter is not a post-hoc factual justification for the Board’s decision. The Court of Chancery erred.

1. The Bylaws Require Compliance with Section 14(a); They Did Not Require the Board to Catalogue the Legal Grounds for Noncompliance.

Empery Digital’s Bylaws unambiguously obligated ATG to comply with the requirements of Section 14(a). Indeed, reference to the federal securities laws in a company’s bylaws “reminds shareholders” that the securities laws “set[] requirements in addition to those laid out in the bylaw itself.” *Jana Master Fund, Ltd. v. CNet Networks, Inc.*, 954 A.2d 335, 345 (Del. Ch. 2008), *aff’d*, *CNet Networks, Inc. v. Jana Master Fund, Ltd.*, 947 A.2d 1120 (Del. 2008); *see also Barnwell Indus., Inc. v. Sherwood*, C.A. No. 2025-0320-PAF, at 29 (Del. Ch. May 21, 2025) (TRANSCRIPT) (finding advance notice bylaw “requir[ing] a nominating stockholder to provide information in accordance with Section 14(a) of the Exchange Act” to be “customary”). Thus, compliance with Section 14(a) was a specific condition precedent to allowing ATG’s Nomination Notice to stand. *See Kellner*, 307 A.3d 998 at 1037–38. And the burden for satisfying that condition was

solely on ATG, not the Board. *Id.*; *see also Blackrock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.*, 224 A.3d 964, 978 (Del. 2020) (bylaws place “an obligation” on the stockholder to comply). Thus, the question of the Nomination Notice’s validity should have been determined based on whether ATG provided the information the Bylaws required.

The Court of Chancery instead focused on the Rejection Letter. Although the Board identified the factual deficiency, the Court of Chancery declined to consider whether it independently violated the Section 14(a) Bylaws because the Rejection Letter did not articulate that legal basis with sufficient specificity. That holding adds a condition the Bylaws do not contain. Nothing in the Bylaws makes ATG’s disclosure obligation contingent on the Board identifying every Section 14(a) disclosure basis. Nor does anything provide that an otherwise material omission becomes compliant because the Board identified the omitted facts but incompletely explained the law requiring their disclosure.

Stated differently, a condition precedent imposed on ATG does not become satisfied because the Board imperfectly explained why it was unsatisfied. The Court of Chancery’s contrary rule transforms ATG’s duty to comply with the Bylaws into a duty on the Board to diagnose and preserve the legal grounds for ATG’s noncompliance. The Bylaws impose no such duty and the Court of Chancery erred by concluding otherwise.

2. The Rejection Letter Provided ATG with Notice of the Factual Grounds Underlying the Board’s Decision.

A board cannot reject a nomination and then search for new facts to justify its decision or substitute an unrelated deficiency for the one on which it acted. Requiring contemporaneous identification of the substantive basis for rejection prevents such post-hoc rationalization. But those concerns are absent here. The Rejection Letter specifically stated that ATG failed to disclose “arrangements or understandings” under Item 5(b)(1)(viii), noting that the Nomination Notice “fail[ed] to do so with respect to Mr. Brown.” A1372 ¶¶ 3(h), 4(i). That Brown’s undisclosed “arrangements or understandings” arose from his being a “participant” in ATG’s proxy contest does not change the fact that ATG had fair notice that it failed to disclose their coordinated scheme. Thus, the Rejection Letter gave ATG full and fair notice of the grounds for rejection, and holding ATG to its Bylaws compliance burden is not unfair.

3. The Contemporaneous-Record Doctrine—Not the Parties’ Subsequent Legal Analysis—Fixes the Factual Basis for the Board’s Decision.

In holding that “[t]he plaintiff’s burden is bounded by the deficiencies the Board fairly identified in its Rejection Letter,” the Court of Chancery relied on *Rosenbaum v. CytoDyn Inc.* and *Paragon Technologies, Inc. v. Cryan*. Op. 33. Those cases establish that a board cannot reconstruct its reasons after the fact. 2021

WL 4775140, at *21 (Del. Ch. Oct. 13, 2021); 2023 WL 8269200, at *7 n.116 (Del. Ch. Nov. 30, 2023). But an after-discovered fact differs from a later-developed legal argument, and a new substantive ground differs from additional legal analysis of an already-identified factual deficiency. This distinction—absent from the Court of Chancery’s analysis—preserves the contemporaneous-record doctrine in full. The Board remains bound by what it knew and why it decided to reject ATG’s Nomination Notice. What is not frozen in time, however, is the court’s interpretation of the Bylaws and whether facts identified by the Board satisfy them.

Appellants’ Schedule 14A argument did not rely on newly discovered facts, transactions, relationships, or omissions. Thus, considering Appellants’ Schedule 14A argument would not have supplied an improper post-hoc justification for the Board’s rejection. It would have answered the legal question the Bylaws presented, *i.e.*, whether ATG provided the information Section 14(a) required.

Vejseli v. Duffy illustrates the same distinction. There, the board resolved to reduce the seats for election at the annual meeting but did not disclose the reduction until after receiving the plaintiff’s nomination notice. 2025 WL 1452842, at *6–*7 (Del. Ch. May 21, 2025). The court found the board breached its fiduciary duties in adopting the resolution, citing the lack of an evidentiary record and justifications that “seem[ed] to have been created for purposes of th[e] litigation.” *Id.* *13. Yet *Vejseli* upheld the board’s rejection of the nomination

notice, even though “the Board’s inequitable adoption of the Board Reduction Resolution colors its rejection of the Nomination Notice.” *Id.* The court found the record showed the rejection was not unreasonable or preclusive.

Vejseli makes clear that a belated argument implicates the contemporaneous record concern only if it depends on different facts or alleged omissions. If it addresses the legal consequence of the same facts and omission identified in the rejection letter, it is legal argument—not a new reason for rejection. That distinction reconciles *Vejseli* with *Rosenbaum* and *Paragon* and supplies an administrable rule: factual grounds for rejection are fixed; legal arguments concerning them are not.

Under the Court of Chancery’s reasoning, ATG’s disclosure obligation varies with how precisely the Board explains Section 14(a) in its rejection. Two stockholders subject to the same bylaw and making the same omission could face different results if, despite identifying the same conduct, one board described the governing law more fully. That cannot properly measure contractual compliance.

The contrary rule effectively turns a rejection letter into a pleading, requiring directors—often on a compressed proxy-contest timetable—not only to identify the omission underlying rejection but also to anticipate and preserve every legal argument establishing why it violated incorporated law—a problem that was

particularly exacerbated in this case given that ATG waited until the very end of the nomination window to submit the Nomination Notice.

Nothing in the Bylaws requires this. Requiring notice of the deficiency—not every legal theory—protects the stockholder franchise and integrity of advance-notice bylaws. It prevents sandbagging without shifting the stockholder’s compliance burden to directors, ensuring the Board cannot hide the factual basis for rejection while preserving the court’s role in determining what the governing contract requires.

4. ATG Had a Full Opportunity to Respond.

ATG had full notice of the factual deficiencies in its Nomination Notice and opportunity to respond to Appellants’ arguments and allegations. The Court of Chancery thus went too far in finding waiver of Appellants’ Schedule 14A argument. “Waiver is fundamentally an issue of fairness: the belated presentation of an argument can deprive the opposing party of notice and the opportunity to respond.” *In re Mindbody, Inc. S’holder Litig.*, 2023 WL 7704774, at *4 (Del. Ch. Nov. 15, 2023). Courts may, however, consider late-filed arguments where the opposing party “suffered no prejudice.” *S’holder Representative Servs., LLC v. Alexion Pharms., Inc.*, 2025 WL 2993473, at *2 n.15 (Del. Ch. Oct. 23, 2025). Thus, where “the opposing party had the opportunity to respond,” Delaware courts have declined to find a waiver. *Kakar v. Octo Consulting Grp., LLC*, 2026 WL 2497322, at *3–*4

(Del. Super. Ct. Aug. 25, 2026); *see also Annestella v. GEICO Gen. Ins. Co.*, 2014 WL 4229999, at *4 (Del. Super. Aug. 18, 2014) (same); *Rostowsky v. Hirsch*, 2024 WL 4491902, at *7 n.111 (Del. Ch. Oct. 15, 2024) (“[N]o prejudice where promissory estoppel was raised in post-trial briefing prior to the post-trial oral argument.”).

ATG suffered no prejudice. Since receiving the Rejection Letter, ATG has known that its undisclosed scheme with Brown was a principal basis for rejection. *Supra* II.C.2. Appellants have maintained that factual basis throughout. For example, Appellants argued in their Pre-Trial Brief that ATG’s relationship with Brown should have been disclosed because, as in *Kellner* and *Jorgl*, their “arrangement or understanding” was information stockholders would want to know in deciding how to vote. A227–28 (citing *Kellner*, 307 A.3d at 1038; *Jorgl v. AIM ImmunoTech Inc.*, 2022 WL 16543834, at *12 (Del. Ch. Oct. 28, 2022)).

ATG had ample opportunity to respond to Appellants’ argument that ATG and Brown had an “arrangement or understanding” requiring disclosure. ATG did so. Its March 29 response to the March 26 Rejection Letter explicitly stated that ATG had “no arrangement or understanding with Mr. Brown.” A1396. In its Pre-Trial Brief, ATG argued that “the record establishes that Brown was neither part of a Section 13(d) group with ATG nor a participant in ATG’s solicitation,” citing Brown’s testimony that “[w]e have not coordinated, we are not operating together,

we are not deciding anything together” and “never had any agreement of any sort for pooling, voting or otherwise.” A142. In its Post-Trial Brief, ATG criticized Appellants for “conflat[ing]” the disclosure requirements for “participants” and “agreements, arrangements, and understandings,” concluding that “Section 2.5 [of the Bylaws] contains no AAU requirement” and “[r]egardless, there is no evidence of any AAU or group activity between Brown and ATG.” A299 n.166. ATG also responded at oral argument. When asked whether Appellants’ Post-Trial Brief was “the first time [ATG] had seen the argument that the Section 14a Bylaws required disclosure of Mr. Brown,” counsel candidly admitted that “to be fair” the idea had been established in the Rejection Letter. A1135:17–24.

III. APPELLANTS' RULE 14A-9 ARGUMENT WAS FAIRLY NOTICED AND ATG'S HEDGE WAS MATERIAL INFORMATION THAT SHOULD HAVE BEEN DISCLOSED.

A. Question Presented

Did the Court of Chancery err by refusing to consider whether ATG's Bitcoin hedge was material and should have been disclosed pursuant to the Section 14(a) Bylaws and Rule 14a-9 incorporated thereby? Appellants raised this issue below (A222–23; A356–57; A1163:13–68:7) and the Court of Chancery considered it (Op. 35–39).

B. Scope of Review

This Court reviews questions of law, including the interpretation of statutes, regulations, and bylaws, *de novo*. See *Stanford*, 2012 WL 1549811, at *3; *Airgas, Inc.*, 8 A.3d at 1188.

C. Merits of Argument

The Rejection Letter articulated the Board's concern that ATG maintained a substantial undisclosed hedge of its Empery Digital position in Bitcoin ETFs. By purchasing discounted Empery Digital shares long and selling shares of Bitcoin ETFs short, ATG could accumulate nearly risk-free exposure to Empery Digital stock and then capture the spread between the market value and share price by liquidating the Company to the detriment of long stockholders. This divergent economic interest between itself and other long Empery Digital stockholders is

exactly the type of information the Board knew other stockholders would want to know.

The Court of Chancery's error was two-fold. *First*, holding that Appellants' Rule 14a-9 argument was waived because it was not specified in the Rejection Letter impermissibly shifted ATG's burden to the Board, for the reasons discussed *supra* II.C.1. There is no dispute that the Rejection Letter raised as a factual matter and as a basis for rejection the Board's (correct) suspicions that ATG had concealed its "dollar-for-dollar" hedge. *Second*, the Court of Chancery's treatment of Rule 14a-9 renders it meaningless as a catch-all provision.

**1. The Rejection Letter Fairly Noticed
ATG's Bitcoin Short as a Basis for
Rejection.**

Empery Digital's Bylaws, like many others, require nominating stockholders to provide information required by Section 14(a) of the Exchange Act. This includes Rule 14a-9, promulgated thereunder by the SEC, which prohibits the omission of "any material fact necessary in order to make the statements therein not false or misleading." 17 C.F.R. § 240.14a-9(a); A1023:24–24:5 (describing 14a-9 "as a catch-all provision that...prohibits half-truths").

The Court of Chancery refused to consider whether ATG was required to disclose its hedge under Rule 14a-9 because the Rejection Letter mentioned only

the fact of ATG's hedge and not Rule 14a-9 itself. For the reasons explained above, *supra* II.C.1, that reasoning impermissibly shifts ATG's burden onto the Board.

Moreover, the rejection should have been upheld on the merits. In the context of a Bitcoin treasury company, a "dollar-for-dollar" short position against Bitcoin ETFs is highly material. *See, e.g., In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 434 (Del. Ch. 2012) ("financial motives adverse to the best interests of [the] stockholders" must be disclosed); *Bertoglio v. Tex. Int'l Co.*, 488 F. Supp. 630, 655–59 (D. Del. 1980).

Forcing corporations to anticipate every potential material omission by persons unknown at the time the advance notice bylaw is drafted, as the rule espoused by the Court of Chancery does, creates a profound inefficiency in Delaware law and opens a giant loophole in the proxy process. This should be avoided.

CONCLUSION

For the foregoing reasons, this Court should reverse.

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CERTIFICATE OF SERVICE

I hereby certify that, on September 22, 2026, a copy of the foregoing *Appellants' Opening Brief* was served by File & ServeXpress on the following attorneys of record:

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