



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.	)	No. 417, 2026
	)	
ATG CAPITAL OPPORTUNITIES	)	Court Below—Court of Chancery
FUND LP,	)	of the State of Delaware
	)	
Plaintiff Below,	)	C.A. No. 2026-0447-LWW
Appellee,	)	
	)	
and	)	
	)	
EMPERY DIGITAL, INC.,	)	
	)	
Nominal Defendant Below.	)	

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NATURE OF PROCEEDINGS

This appeal is Defendants' last-ditch effort to evade accountability and substitute their judgment for that of stockholders, who have already begun voting on whether to replace Defendants at the election in two weeks. This Court should affirm the Court of Chancery's well-reasoned opinion, which vindicates fundamental principles undergirding advance notice bylaws ("ANBs") and preserves the stockholder franchise.

ANBs facilitate orderly elections and inform a board's recommendation to stockholders. But as this Court held in *Kellner*, boards may not wield ANBs as "tripwires" to exclude challengers they deem "unsuitable." The Board did just that. Instead of discharging their duty to oversee a full and fair electoral process, Defendants did everything they could to prevent one. Well before ATG nominated, Empery's Chairman had decided to take the actions "necessary in order for the board to remain in its position." When ATG nominated, the Chairman did not tell the Board for weeks. When he finally did, he stated, "We are going to reject these nominations."

Real-time Board meeting transcripts provide detailed evidence of why Defendants acted. Defendants doubted ATG would spend the resources to challenge their rejection, including because the Board had adopted a poison pill capping ATG's ownership and limiting its potential upside. If ATG sued, the Board planned

to counter-attack with a “devastating” accusation that ATG had joined an undisclosed group.

Defendants rejected ATG’s nomination in a “kitchen sink” letter asserting more than *fifty* purported defects and *dozens* of theories. By trial, Defendants had abandoned all but two: that ATG failed to disclose (a) another stockholder, Tice Brown, as a “participant” under the bylaws, which incorporate the definition in Schedule 14A, and (b) ATG’s Bitcoin ETF hedge. The Court of Chancery correctly rejected both.

Throughout discovery, Defendants represented that the Rejection Letter contained the Board’s reasons for rejecting. Then Defendants pivoted. First, they recast their participant theory as also incorporating Section 13(d). After trial, Defendants pivoted again, advancing a new Section 14(a) theory of a purported “arrangement or understanding” with Brown, “irrespective” of participant status. Defendants’ evolving claims, including their newest assertion of a “voting scheme,” fail on every level: they are untrue, the bylaws required no disclosure, and Defendants waived these arguments. The Court of Chancery correctly held Defendants to the reasons in the Rejection Letter because ANBs “are not moving targets.” Instead, its determination rested on documentary and testimonial evidence, including AI transcripts in which Empery’s Chairman outlined a strategy to ensure ATG’s nominees never reached the electorate.

The Court of Chancery’s judgment rests on two independent grounds. First, ATG’s nomination notice complied with the bylaws, and Defendants breached them by rejecting it. Second, the rejection was inequitable because Defendants misunderstood the role of ANBs, and their rejection was disproportionate, preclusive, foreclosed any stockholder vote, and constituted a breach of Defendants’ fiduciary duties.

Defendants do not challenge the equitable holding. That alone warrants affirmance.

If the Court reaches the merits, the result should be the same. This Board decided to reject first, searched for reasons later, adopted a “kitchen sink” approach, continued searching after-trial, and raised new arguments post-trial. Delaware law does not permit boards to wield ANBs as instruments of entrenchment or to alter the grounds for rejection months into litigation. The Court of Chancery correctly enforced both principles. This Court should affirm.

SUMMARY OF ARGUMENT

1. **Denied.** The Court of Chancery correctly held that Brown was not a “participant” under Instruction 3(a) to Item 4 of Schedule 14A, which the Bylaws incorporate, because “[t]he record contains no evidence whatsoever that Brown participated in ATG’s proxy contest or assisted with financing for ATG’s proxy.” D.I. 11 Ex. A (the “Opinion” or “Op.”). The court construed Instruction 3(a)(v) as limited to financial arrangements and comparable economic inducements, consistent with the regulation’s text, purpose, federal precedent, and drafting history, while also analyzing the applicability of Instruction 3(a)’s remaining subparagraphs.

2. **Denied.** The Court of Chancery correctly held that Defendants waived theories for rejection they failed to assert in the Rejection Letter and first raised in post-trial briefing. The Rejection Letter asserted only that Brown should have been disclosed as a “participant.” After trial, Defendants argued that ATG had to disclose an “arrangement or understanding” with Brown “irrespective” of participant status. The court held that ANBs “are not moving targets,” analyzed the justifications in the Rejection Letter, and independently found that the waiver theory first appeared in post-trial briefing. Op. 34. Regardless, the court never found that ATG and Brown had an “arrangement or understanding.”

3. **Denied.** The Court of Chancery correctly held that neither the Bylaws nor Item 5(b)(1), the sole basis asserted in the Rejection Letter, required disclosure

of the Bitcoin hedge. Because Defendants never relied on Rule 14a-9 in the Rejection Letter and first raised it at the end of litigation, the Court also held that they waived it.

4. Applying the twice-tested framework, the Court of Chancery held that Defendants' rejection of the Nomination Notice was inequitable and breached their fiduciary duties because "the rejection was a disproportionate response to the perceived threat" and "was also preclusive in its practical effect." Op. 43-44. Defendants do not challenge that holding. This independently requires affirmance.

STATEMENT OF FACTS

A. Empery Adopts a Digital Asset Strategy and Falters

In summer 2025, the Company faced financial challenges and irate stockholders. A718:18-A719:4; B311-15. Defendant Ryan Lane and his hedge fund, Empery Asset Management (“EAM”), pitched a solution: raise \$500 million, buy Bitcoin, and become a digital asset treasury (“DAT”). Op. 3; A0718:18-A0719:4.

On July 17, 2025, the Company raised \$500 million through a PIPE at \$10 per share. *Id.* Lane remade the Company in his image, installing himself as Chairman and co-CEO, hiring executives from EAM, and renaming the Company Empery Digital, Inc. B0321; B0330; A0724:16-A0726:12. At Lane’s recommendation, Defendants Read, Homer, and Chauhan secured Board appointments. B1413:3-10; B3282:4-8; B3984:13-B3985:3. Defendants Kim, Foster, Solgaard, and Ólason constituted the balance of the Board. Op. 3-4.

On July 29, 2025, Defendants amended the Company’s bylaws (the “Bylaws”) to reflect its name change. B0330; A1222-49. Defendants made no changes to Empery’s ANBs. B0330; A1222-49.

B. Empery’s Bylaws

Section 2.5 of Empery’s Bylaws contains the ANBs, which require, among other things, extensive disclosures regarding the “Nominating Person,” defined to

include “any other *participant* in such solicitation.” Op. 23 (citing A1230 § 2.5(c)). The parties agree that “participant” in Section 2.5(c) refers to paragraphs (a)(ii)-(vi) of Instruction 3 to Item 4 of Schedule 14A. Op. 24. Empery’s ANBs also require nomination notices to provide all information “required to be disclosed in a proxy statement ... pursuant to Section 14(a) under the Exchange Act.” Op. 29 (citing A1230 § 2.5(c)(iii)(B)).

Empery’s ANBs do not contain “any provision requiring a nominating stockholder to disclose an [agreement, arrangement, or understanding (‘AAU’)] concerning Empery or the nomination.” Op. 22. “Nor does Empery have a [B]ylaw requiring the disclosure of a Section 13(d) group.” *Id.*

Empery’s ANBs require “disclosure of derivatives, synthetic equity, and short positions in *Empery’s own stock*.” Op. 35 (citing A1228 § 2.4(c)(ii)). They do not require disclosure of commodity hedges, cryptocurrency hedges, or positions in unrelated ETFs. Op. 36.

Empery’s Bylaws empower the Board to request supplemental information from nominating stockholders before the annual meeting. Op. 37 n.172; A1231 § 2.5(g).

C. Empery’s Stock Price Plummets

By year-end 2025, Empery’s stock price had fallen from \$10 to \$4.57 per share. Op. 4; B327-28. By early January 2026, Empery’s stock traded at a 27%

discount to net asset value (“NAV”), with the market valuing each dollar of Bitcoin on Empery’s balance sheet at approximately \$0.73. Op. 4. Given this dismal performance, management anticipated activist engagement. *Id.*

D. ATG Acquires Empery Stock

Plaintiff ATG launched in early 2026 as a “patient capital” investment fund. A0426:9-A0427:4; A0430:14-22. Gabi Gliksberg is ATG’s principal. *Id.*

In early January 2026, ATG identified Empery as an attractive investment because it traded at a “very significant discount” to NAV. ATG began acquiring as much stock as possible. Op. 5-6; A1386.

Because Empery’s primary asset was Bitcoin, ATG shorted a Bitcoin ETF to hedge against Bitcoin volatility. A0436:20-A0437:6; A0441:8-12; B1234. Empery had incurred significant debt, and Gliksberg worried a sharp decline in Bitcoin’s price could render Empery insolvent. A0437:11-18; B1234. ATG nevertheless remained net-long Bitcoin and aligned with Empery’s stockholders because ATG’s “profit and loss goes up and down based on how the stock performs” and the Bitcoin short does not hedge the NAV gap. A0441:15-A0443:15.

Shortly after investing, Gliksberg took steps toward a potential nomination. He moved shares into record name and began contacting potential nominees. A1268; A0460:3-A0462:10; A0477:23-A0478:10; A0497:15-A0500:4.

E. Gliksberg Increases His Investment and Meets Brown

On the morning of January 15, 2026, Gliksberg purchased 1.36 million Empery shares, 80% of ATG's total purchases that day. Op. 6-7. Later that day, Gliksberg called Jacob Ma-Weaver, a fund manager Gliksberg knew who was publicly listed as an Empery stockholder, to discuss "why Empery was trading at such a 'steep discount.'" A0447:1-5; A1264. Ma-Weaver introduced Gliksberg to another Empery stockholder, Tice Brown, by email that afternoon. Op. 6; B0357.

Gliksberg and Brown spoke several times that day. Three calls dropped because of poor service, lasting less than a minute each. A0452:4-8; A0587:1-A0588:11; A1260-A1261. They also spoke on January 16 and 19, with four calls dropping in under two minutes. *Id.* On January 20, after another dropped call, Brown moved their calls to Signal, a Wi-Fi calling app. Op. 9; A1260-61.

On January 26, ATG filed a Schedule 13D disclosing beneficial ownership of nearly 2 million shares, approximately 5.6% of Empery's outstanding shares. Op. 10; B0349-50. At a Board meeting that day, Lane acknowledged that Empery's persistent "NAV gap" made the Board vulnerable and warned that activist investors were "coming after us." B0335; B0338-39.

F. Brown's January 28 Meeting at Empery

On January 28, 2026, Brown and his analyst, Joseph Boshans, met with Lane at Empery's headquarters. Op. 10. Brown urged Empery to liquidate its Bitcoin,

claiming that other stockholders shared that view and maintained Bitcoin hedges. Op. 10-11. He disclosed that he had spoken with ATG but stated, “I am not working with ATG.” Op. 11 (citation omitted); A0975; A0688. Lane and Silver concluded the opposite. A0720-22; A0708:8-14; A0713:6-9; Op. 11; B0357.

Brown’s mention of ATG at the January 28 meeting later became the sole basis for the Rejection Letter’s assertion that he participated in ATG’s solicitation. A1372-85.¹

Discovery later revealed that Brown had engaged with Lane long before meeting Gliksberg. In September 2025, Brown appeared unannounced at Empery’s office demanding a meeting. A0699:9-22. Lane met with him by video the next day and over lunch a week later. A0583:9-A0584:9; B0466-68. Brown continued purchasing Empery stock based on its growing NAV discount and advocated for share repurchases to reduce that discount. Op. 5.

G. The Board Adopts a Pill

On January 28, 2026, ATG filed a Schedule 13D/A disclosing beneficial ownership of 10.4%, and Gliksberg requested director nomination materials from the Company by email. B0358-65; B0366-67.

¹ Though the Rejection Letter also asserted that Brown learned the identity of Brandon Gold, EAM’s longtime counsel, from Gliksberg, undisputed evidence established that another McDermott partner directed Brown to Gold. B4438-48.

ATG's request for director nomination materials confirmed Defendants' fears of stockholder activism and a threat to their incumbency. Management responded by preparing a shareholder rights plan (the "Pill"), which the Board discussed on February 2. Op. 12; B0425; B0978-96.² Lane warned that ATG could "put up a slate of directors" and obtain "ultimate control" of Empery, and said the Pill was "necessary in order for the board to remain in its position." Op. 13; B0425. He further explained that capping ATG's ownership at 12.5% limited its upside to render it "not worth it to put up [a] slate to go through the proxy solicitation process." Op. 13. After the thirty-five-minute meeting, the Board approved the Pill. A1343-46.

On February 3, Empery announced the Pill. Op. 12. That day, Brown filed a Schedule 13D and sent the Board a letter recounting the January 28 meeting and demanding "the immediate resignation of Ryan Lane, the immediate replacement of the entirety of the Board of Directors ... and the immediate sale of all Bitcoin[.]" B0437-42; B0443.

H. ATG and Brown Submit Competing Nominations

On February 5, ATG's counsel, Olshan Frome Wolosky ("Olshan"), contacted Empery's counsel to convey ATG's desire for board refreshment. B0485.

² Defendant Homer recorded Board meetings through detailed AI transcripts, which Lane conceded were accurate. *See, e.g.*, A736:16-A737:3; A828:2-A829:12.

On February 12, Empery’s counsel rejected ATG’s overture. A0475:2-18.³ Discovery revealed that Lane never informed the Board of ATG’s outreach. *See, e.g.*, B1960:14-16; B2298:4-11.

In the following weeks, ATG connected potential nominees with Olshan and prepared nomination materials. A0475:13-A0476:7. On February 26, ATG timely nominated a full slate consisting of Gliksberg and eight others (the “Nominees”) for election at the 2026 Annual Meeting. B0494-922 (the “Nomination Notice”). ATG’s Nominees include experienced cryptocurrency professionals, institutional investors, lawyers, and executives. *Id.* The 428-page Nomination Notice provided all disclosures required under the Bylaws and completed questionnaires for all nine nominees. *Id.*

Unbeknownst to ATG, on February 24, Brown had requested nomination materials from the Company. B0491-93. Lane conceded that “competing slates would be odd” if Brown and ATG were coordinating and would divide the stockholder vote. B0488; A0774:4-A0775:4.

³ While not raised on interlocutory appeal, the court’s Supplemental Opinion incorrectly held that ATG “reasonably anticipated litigation by February 12” when “Empery’s counsel rejected ATG’s February 5 demand for ‘board refreshment,’” even though “planning a proxy contest is not equivalent to anticipating litigation.” A0418-19. ATG reserves the right to challenge that ruling on final appeal.

On February 26, Brown nominated himself, which Gliksberg learned in Brown's February 27 Schedule 13D/A. B0953-56; B0309; B0947-52. Gliksberg reacted with concern that it "could be confusing to the marketplace." A0480:18-21.

Defendants argue that a January stockholder list identifying Brown as a potential supporter of ATG's slate undermines their later competition. D.I. 11 ("OB") 14; A1392 ("Shareholders" tab). But the list of "potential good votes?" predated Brown's nomination. A0247. Brown's nomination meant he could not vote for both himself and ATG's entire slate. B0953.

I. Lane Delays Informing the Board of the Nominations

Lane shared ATG's and Brown's nomination notices with only management and counsel. B0978-96; B0997-98. He did not inform the Board until its March 16 meeting, three weeks later, and no director other than Lane *ever* received ATG's Nomination Notice. A0960:10-20. Lane also excluded the Nominating and Governance Committee ("NomGov"). Read, the NomGov chairman, testified that NomGov never met independently with Empery's counsel, and bizarrely added that its "chairman may have." B0164:12-24, B0156:9-19, B0164:19-22.

The March 16 Board minutes span just a page and a half and state only that "a discussion of the activist shareholders took place." B0997-98. The AI transcript tells a different story. B0978-96. Lane complained, "I'm really frustrated [by] the amount of money we're having to spend to defend ourselves from this activist work"

and finally informed the Board that Brown “submitted a nomination to nominate himself[, and] ATG submitted a slate of nine.” He concluded that ATG’s “was somewhat deficient. *We are going to reject those nominations[.]*” B0987 (emphasis added); A0787:18-23.

Lane explained that rejecting the nomination would force ATG to “bring suit to try to move forward[.]” *Id.* He added, “we’re gonna point out the evidence ... that [Brown] and ATG are acting together,” but identified *none*. B0987. Lane sought to signal that the Board could “trigger the pill,” which “*would be devastating for them,*” and “would wipe out ... their holdings.” B0987-88. Threatening a group might make them “*just go away*” because a group allegation is “very expensive” and “painful.” B0987-88 (emphasis added); A0798:3-A0799:22.

Lane told the Board that Empery was conducting background checks on ATG’s nominees and could “add any other deficiencies” they uncovered. B0987. Yet he conceded that rejecting ATG’s nomination “*would be a coin toss.*” *Id.* (emphasis added). Lane assured the Board that he had “*several things up [his] sleeve that will allow us to have more votes and to [] win the situation.*” B0985 (emphasis added); A0785:10-14. Lane touted the Pill as a “*very powerful*” tool because it could leave ATG “*stuck down at 12 and a half*” percent while a favored stockholder “*plus my hedge fund would be a substantial vote and could beat them up.*” B0985 (emphasis added).

J. The Board Issues Stock to a Favored Stockholder

The strategic transaction “up [Lane’s] sleeve” materialized the next day. Empery and an institutional stockholder quickly agreed to preliminary terms for a \$25 million issuance. B1017. The Board approved the transaction on March 22 during a twenty-minute meeting memorialized only in pre-drafted minutes. B0131-33. When asked about a voting agreement, Lane responded, “I have zero concern about how they will vote. I know them well[.]” B1001.⁴

K. The Board Issues a “Kitchen-Sink” Rejection Letter

On March 25, management emailed the Board draft “deficiency letters” to ATG and Tice Brown. B1068.

The March 26 Board meeting lasted about thirty minutes. Although the minutes characterize it as a combined NomGov and Board meeting, NomGov never met or acted separately; Lane directed NomGov to make a recommendation. B1086-88. The AI transcript shows no discussion of the ANBs or protecting any corporate interest. B1081-85. Lane admitted that “we don’t believe the pill is triggered,” conceded that “no single [deficiency] is detrimental” and that, at most, “in the aggregate, they’re sloppy.” Op. 40 n.185 (quoting B1081). But his plan was to “reject them and see what they do.” *Id.* He further explained that rejection could

⁴ The Court of Chancery reserved decision on Plaintiff’s challenges to this issuance. Op. 17-18, 47-48.

end the proxy fight because ATG would have to sue and “*how much money are they gonna spend to go through this battle.*” *Id.* (emphasis added). The Board approved Lane’s “*kitchen sink*” rejection. Op. 40 n.185 (quoting B1081). Empery issued the Rejection Letter that evening. B1085; A1372.

The thirteen-page, single-spaced letter asserted more than *fifty* purported deficiencies across five categories, twenty-seven subcategories, and nineteen nominee-specific allegations. The myriad allegations include claims concerning Brown, the Bitcoin hedge, alleged biographical omissions, and disclosures relating to change of control, call options, margin accounts, and ATG’s proxy solicitor. A1376-79.

L. ATG Sues; Defendants Continuously Shift Theories

On April 2, 2026, ATG sued, alleging that the Board breached the Bylaws and its fiduciary duties by pretextually rejecting the Nomination Notice. The Complaint challenged other entrenchment measures, including the dilutive issuance.

Despite the Rejection Letter’s fifty-plus alleged deficiencies, Defendants ultimately pursued only three: Brown’s purported participation in ATG’s solicitation, ATG’s Bitcoin hedge, and alleged deficiencies in the Nominees’ biographies. Op. 15-16. Empery abandoned the latter before trial. Op. 19.⁵

⁵ During trial, Defendants advanced new theories, including that Brown and ATG formed a Section 13(d) group and that ATG’s January 26 Schedule 13D

As noted, the Rejection Letter asserted that Brown was a “participant” under “Instruction 3 to Item 4 of Schedule 14A” and that ATG was required to disclose its Bitcoin hedge under Item 5(b)(1) of Schedule 14A. A1372. Throughout discovery, Defendants repeatedly represented in interrogatory responses that the Rejection Letter “lists the factual and legal basis” for the supposed deficiencies in Nomination Notice. *See, e.g.*, B1162-63 (Response 11); B1205-07 (Response 11); B1306-11 (Response 11).

Defendants pivoted at trial. For the first time, they argued that “participant” should be defined according to caselaw “applying Section 13(d) of the Exchange Act,” notwithstanding the Rejection Letter’s express reliance on Schedule 14A. A0228. They also advanced a new “Section 14(a)” theory that ATG was required to disclose the Bitcoin hedge because it was “material information necessary to make an informed decision,” a theory also absent from the Rejection Letter. A0223.

M. Empery Changes Its Business, and ATG Supplements Its Complaint

On June 30, 2026, Empery announced a \$65 million investment to acquire a 25% stake in an AI data center (the “AI Transaction”). Op. 16. By July 10, the Company had sold nearly *two-thirds* of its Bitcoin. A0939:16-A0940:14. It was no

violated Rule 14a-9. Neither appeared in the Rejection Letter. Defendants pursue neither on appeal.

longer a DAT company. On July 21, ATG supplemented its complaint to seek reopening of the nomination window. Op. 17.

N. The Court Holds that the Board Improperly Rejected ATG’s Nomination Notice and Breached Its Fiduciary Duties

Trial occurred on August 4 and 5, 2026. The court agreed to resolve ATG’s challenge to the Rejection Letter and request to reopen the nomination window on an expedited basis, with Plaintiff’s remaining claims to be addressed later. Op. 17.

In post-trial briefing, Defendants pivoted again, arguing for the first time that, “irrespective of whether Brown is a ‘participant,’” the Nomination Notice was deficient because it failed to disclose “any arrangement or understanding with Brown[.]” A0360. The court heard post-trial argument on August 19.

On August 28, the Court of Chancery issued its Memorandum Opinion. The court held that Brown was not a “participant” because “[t]he record contains no evidence whatsoever that Brown participated in ATG’s proxy contest or assisted with financing for ATG’s proxy.” Op. 28. It held that Empery’s Bylaws did not require disclosure of ATG’s Bitcoin ETF short position. Op. 37-39. Although the court found some evidence that Gliksberg and Brown discussed “their plans for Empery” and may have been “coordinating,” it found no agreement, arrangement, or understanding between them; no Section 13(d) group; and no evidence supporting Defendants’ alleged “concealed voting scheme.” Op. 21, 28, 34 n.159.

The court further held that rejecting ATG's Nomination Notice was "both contractually improper and inequitable." Op. 2. Emphasizing Defendants' shifting theories, it held that the Board was bound by the "theory of contractual noncompliance" asserted at the time of rejection because "defendants cannot wait until trial to abandon that basis and advance a different theory of contractual noncompliance. Advance [N]otice bylaws are not moving targets." Op. 33. The court rejected Defendants' new AAU theory as "impermissible" because it was not "fairly stated in the Rejection Letter," and separately held it waived because it was first raised in post-trial briefing. Op. 33-34.

The court independently found fiduciary-duty breaches, holding that outright rejection was a preclusive and disproportionate response. As the court explained, "[d]irectors' fiduciary duties do not empower them to interfere with a contest for control merely because they believe that the insurgent's business plan is unwise or destructive," and "[t]he Board's complaints about ATG's plans, suitability, and perceived economic misalignment are arguments for the electorate," making the rejection "inequitable" and a breach of fiduciary duty. Op. 42-44.

The court declined to reopen the nomination window because ATG's nomination was valid and "Empery's stockholders will not be disenfranchised." Op. 45-47.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT BROWN WAS NOT A PARTICIPANT IN ATG’S SOLICITATION

A. Question Presented

Did the Court of Chancery correctly hold that the Board lacked a contractual basis to reject the Nomination Notice based on Plaintiff’s nondisclosure of Brown because Brown was not a participant in ATG’s solicitation?

B. Scope of Review

The Delaware Supreme Court “reviews the Court of Chancery’s legal conclusions *de novo* but defers to the Court of Chancery’s factual findings supported by the record.” *Coster v. UIP Cos.*, 300 A.3d 656, 663 (Del. 2023). The interpretation of corporate bylaws is reviewed *de novo*, as is the interpretation of statutes and regulations. *Kellner v. AIM ImmunoTech Inc.*, 320 A.3d 239, 257 (Del. 2024). The Court of Chancery’s factual findings regarding Brown’s relationship with ATG are entitled to enhanced deference. *See, e.g., Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 491 (Del. 2000).

C. Merits of Argument

The Court of Chancery correctly determined that ATG “carried its burden of demonstrating that its Nomination complied with the Bylaws” because “Brown does not meet the definition of a ‘participant’ incorporated into the Bylaws.” Op. 34. The court broadly analyzed Instruction 3(a)’s definition of “participant” and federal law

interpreting it, applied it to the trial evidence, and found that “[t]he record contains no evidence whatsoever that Brown participated in ATG’s proxy contest or assisted with financing for ATG’s proxy.” Op. 28. That determination should be affirmed.

1. The Plain Language of Instruction 3(a), Incorporated in the Bylaws, and Federal Caselaw Demonstrate Brown Was Not a Participant in ATG’s Solicitation

“The bylaws of a Delaware corporation constitute part of a binding broader contract among directors, officers and stockholders” for which the “rules of contract interpretation apply.” *Hill Int’l, Inc. v. Opportunity Partners L.P.*, 119 A.3d 30, 38 (Del. 2015). “If charter or bylaw provisions are unclear, [the trial court] resolve[s] any doubt in favor of the stockholder’s electoral rights.” *BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.*, 224 A.3d 964, 977 (Del. 2020).

The parties agree Empery’s Bylaws define “participant” by reference to “paragraphs (a)(ii)-(vi) of Instruction 3 to Item 4 of Schedule 14A.” Op. 24. The purpose of Section 14 of the Exchange Act, and Schedule 14A promulgated thereunder, is to regulate the solicitation of proxies. *See* 15 U.S.C.A. § 78n; *see also J. I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964) (Section 14(a) “control[s] the conditions under which proxies may be solicited.”). The five subparagraphs of Instruction 3 to Item 4, entitled “Persons Making the Solicitation,” define “participant” as:

- (ii) In the case of a solicitation ... each of the soliciting person's nominees ... ;
- (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; ... ; and
- (vi) Any person who solicits proxies.

Op. 25; 17 C.F.R. § 240.14a-101, Item 4, Instruction 3(a)(ii)-(vi) (2025).

The plain language of Instruction 3(a)(ii)-(vi), as confirmed by federal caselaw, makes clear that a person is a “participant” only if they are a *nominee* (subparagraph (ii)), *involved in soliciting proxies* (subparagraphs (iii) and (vi)), or *providing financing for the solicitation of proxies* (subparagraphs (iii) and (v)). As the Court of Chancery explained:

Section 14(a) “control[s] the conditions under which proxies may be solicited.” The definition of “participant” reflects that focus by covering a person who “‘solicits,’ ‘takes the initiative,’ and ‘engages in organizing, directing, or arranging’ for financing.” Federal case law

interpreting Item 4, Instruction 3 of Schedule 14A confirms its narrow focus on proxy solicitation and financing. Courts have rejected attempts to classify individuals as “participants” where they *neither financed the proxy contest nor directly participated in the solicitation*.

Op. 26.

Defendants relied exclusively on subparagraph (v) for their contention that Brown was a participant in ATG’s proxy solicitation. *See* Op. 25-26 (citing A0279).⁶ Defendants argue that the words “any other arrangements” together with “for the purpose of financing or otherwise inducing” in subparagraph (a)(v) reflect an intent to “broadly capture” *any* arrangement to induce the purchase, sale, holding or voting of a security in connection with a proxy campaign. OB 25. But the word “any” does not eliminate Instruction 3(a)(v)’s financial nexus; it operates within it. The court thus correctly rejected Defendants’ argument, which “excises the core limiting language of the regulation,” and concluded that subparagraph (a)(v) is “directed at persons providing financial support or other economic inducements for a solicitation.” Op. 26.⁷

⁶ Contrary to Defendants’ assertion (OB 11 n.3), Appellee listed all applicable sections of Item 4, including the language of (a)(v), in its pre-trial brief. A0139.

⁷ *Siegmán v. Columbia Pictures Entertainment, Inc.* (OB 25) interpreted the materially different phrase “any agreement, arrangement or understanding.” 576 A.2d 625, 632 (Del. Ch. 1989). Here, by contrast, “any other arrangements” follows the specific financial terms “lends money” and “furnishes credit” which inform its meaning under *ejusdem generis*. Likewise, *In re GGP Stockholder*

The Court of Chancery’s interpretation accords with federal decisions, which uniformly interpret Instruction 3(a)(v) to require a financial nexus.

IBS Financial Corp. v. Seidman & Associates, L.L.C. is instructive. Op. 26. The *IBS* court entered judgment that “Instruction 3(a)(v) to Item 4 of Schedule 14A includes as participants persons who lend money, furnish credit, or *otherwise contract with a participant to finance* the participant’s purchase, sale, holding or voting of an issuer’s securities.” 954 F. Supp. 980, 990 (D.N.J. 1997) (emphasis added), *aff’d in part, rev’d on other grounds*, 136 F.3d 940 (3d Cir. 1998). The *IBS* court therefore held three individuals who had, “agreed to sell and vote their IBS shares as Seidman directs” did “not fall within the scope of Instruction 3(a)(v)” because they “ha[d] not financed and directed the purchase, sale, holding or voting of Seidman’s shares.” *Id.* Contrary to Defendants’ contention that the *IBS* court “had no occasion to consider the application of Instruction 3(a)(v) to non-financial arrangements,” OB 32, the *IBS* court explicitly rejected that interpretation. 954 F. Supp. at 990.

Other federal authorities are in accord. The Court of Chancery also examined *Lone Star Steakhouse & Saloon, Inc. v. Adams*, 148 F. Supp. 2d 1141 (D. Kan. 2001), *Chris-Craft Industries, Inc. v. Independent Stockholders Committee*, 354 F. Supp.

Litigation (OB 25) interpreted the phrase “any element of value,” without additional contextual words to inform its meaning. 282 A.3d 37, 78 (Del. 2022).

895 (D. Del. 1973), and *Atlantic Coast Airlines Holdings, Inc. v. Mesa Group, Inc.*, 295 F. Supp. 2d 75 (D.D.C. 2003). Op. 26.

In *Lone Star*, the district court declined to issue a preliminary injunction because Instruction 3(a)(v) did not extend to someone “helping [the nominating person] on his own time” who had “not received any compensation.” 148 F. Supp. 2d at 1154. Likewise, in *Chris-Craft*, after a fifteen-day trial, the district court held certain individuals were “participants” based on materially different facts, including recruiting director-nominees and contributing funds to the solicitation. 354 F. Supp. 2d at 907-10. By contrast, the court held that individuals who had lesser involvement, such as notifying stockholders of the proxy contest or providing financing not intended to induce share purchases, were not participants. *Id.*

Tellingly, Defendants cite no cases holding that Instruction 3(a)(v) encompasses non-financial arrangements. In *Lane v. Page*, the only authority they invoke, OB 33, the district court acknowledged that “one can be labeled a participant without being a financier” under subparagraphs (ii), (iii), and (vi) of Instruction 3(a), conspicuously omitting subparagraph (v). 649 F. Supp. 2d 1256, 1287 (D.N.M. 2009); *see also* A1183:2-8 (Defendants’ counsel conceding “*Lane v. Page* doesn’t talk about subsection (v)”).

Faced with this precedent, Defendants contend that the court held “as a matter of first impression”⁸ that participants “must have provided ‘financing’ or other ‘economic inducements.’” OB 22. The Court of Chancery made no such finding and instead expressly held that Instruction 3(a) is *not* limited to financing. “Courts have rejected attempts to classify individuals as ‘participants’ where they neither financed the proxy contest *nor directly participated in the solicitation.*” Op. 26 (emphasis added). However, “[i]n the absence of a financial contribution, courts generally require compelling evidence that a third party plays a fairly active role in the proxy contest in order to be deemed a participant.” *Atlantic Coast*, 295 F. Supp. 2d at 86.

Applying the definition of a participant supported by federal case law to the trial evidence, the Court of Chancery held: “The record contains *no evidence whatsoever* that Brown *participated* in ATG’s proxy contest *or* assisted with financing for ATG’s proxy.” Op. 28. The court correctly held that Brown was “not a participant in ATG’s solicitation.” Op. 28.

⁸ In denying Defendants’ request for interlocutory review, the court held its interpretation of “Participant” was “not an issue of first impression in Delaware.” A0419 & n.22.

2. Instruction 3’s Purpose and History Confine It to Proxy Solicitation and Financing

The Court of Chancery’s interpretation aligns with the purpose of the federal proxy rules, which “control[s] the conditions under which proxies may be solicited.” Op. 26 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964)). Consistent with that purpose, the definition of “participant” focuses narrowly on persons involved in proxy solicitation and its financing. Op. 26.

Defendants assert limiting Instruction 3(a)(v) to economic arrangements would permit concealing non-economic relationships relevant to a proxy contest. OB at 22-24. But subparagraph (v) is only one component of Instruction 3(a). *See Atl. Coast*, 295 F. Supp. 2d at 85; *Lane*, 649 F. Supp. 2d at 1287. Construing subsection (v) to address economic arrangements therefore does not frustrate the objectives of the rule.

Defendants assert the Court of Chancery’s interpretation is inconsistent with the Instruction 3(a)’s drafting history. OB 22-24.⁹ But the regulatory history Defendants rely on confirms the Court of Chancery’s interpretation. As Defendants note, the SEC’s broad draft language that referred to any “party to any joint venture or any other contract, arrangement, or understanding” was *replaced* with the narrower “any person who lends money or furnishes credit or enters into any other

⁹ Defendants cite no cases that use regulatory drafting to interpret ANBs. OB 23 n.3. Defendants’ two authorities construed criminal statutes. *Id.*

arrangements.” OB 23. Rather than retaining language that would have swept in any agreement or understanding, the drafters anchored the definition in lending and credit.

The breadth of the disclosures triggered by participant status further buttresses the Court of Chancery’s narrower interpretation. Schedule 14A (and the Bylaws) requires disclosure of extensive information about any “participant,” including material legal proceedings, relationships with the Company, and relationships with nominees. 17 C.F.R. § 240.14a-101, Item 5(b)(1)(i)-(xii); A1374-75. As the Court of Chancery noted, an expansive definition of “participant” could therefore trigger a “daisy-chain” of invasive disclosures from unaffiliated stockholders who merely communicated with the nominating stockholder. A1131. That would “chill the sort of shareholder interaction upon which sound corporate governance depends and that decades of reform have sought to encourage.” *See Williams Cos. S’holder Litig.*, 2021 WL 754593, at *38 (Del. Ch. Apr. 29, 2021) (citation omitted), *aff’d sub nom*, *Williams Cos., Inc. v. Wolosky*, 264 A.3d 641 (Del. 2021) (ORDER).¹⁰

It would also conflict with longstanding federal policy designed to facilitate rather than inhibit stockholder communication. *See* Regulation of Communications

¹⁰ Chilling stockholder communications would contravene public policy. *Cf. In re AES Corp.*, 362 A.3d 337, 350 (Del. 2026) (whether bylaws have an “unduly chilling effect in operation” should be evaluated “in a concrete nomination setting”).

Among Shareholders, Release No. 34-31326 (Oct. 16, 1992) [57 FR 48276] (Oct. 22, 1992) (proxy rules “are better served by promoting free discussion, debate and learning among shareholders and interested persons.”); Statement of Richard Breeden, Chairman, U.S. Securities and Exchange Commission (Oct. 15, 1992) (proxy rules are “designed to enable shareholders to communicate with each other”).

3. The Court of Chancery Considered “Otherwise Inducing” and Applied Established Interpretive Canons

Although the language of Instruction 3(a)(v) is clear and federal caselaw is consistent and unequivocal, the Court of Chancery also concluded that the canon of *ejusdem generis* reinforced its interpretation.¹¹ The court relied on this Court’s precedent, which explains, when “general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are *not* to be construed in their widest extent.” *Triple C Railcar Serv., Inc. v. City of Wilm.*, 630 A.2d 629, 631 (Del. 1993); Op. 27 n.138. Here, the phrase “any other arrangements” follows two specifically identified forms of financial support: “lend[ing] money” and “furnish[ing] credit.” Therefore, “any other arrangements” only encompasses those of “a similar financial or economic character.” Op. 27.

Defendants’ reliance on *Ali v. Federal Bureau of Prisons* is misplaced. OB 25-26. There, the Supreme Court held that *ejusdem generis* was inapplicable without

¹¹ Defendants contend that the court’s use of *ejusdem generis* was improper. OB 27. But Defendants argued *ejusdem generis* in their post-trial brief. A0282.

a “common attribute” among the specific items. 552 U.S. 214, 225 (2008).¹² Here, by contrast, the phrase “enters into any other arrangements” follows two financial terms that share an “economic” attribute: “lends money” and “furnishes credit.” Op. 27.

Nor does *Harrison v. PPG Indus., Inc.* aid Defendants. There, the Supreme Court found no “uncertainty in the meaning of the [relevant] phrase.” 446 U.S. 578, 588 (1980). By contrast, Defendants urge an interpretation that would extend a provision consistently interpreted to be economically-constrained to encompass any non-economic arrangement.

The Court of Chancery’s finding that Instruction 3(a)(v) is limited to “financing” or “other economic inducements” does not render “otherwise inducing” superfluous. OB 31. The court’s holding recognized instead that Appellants’ interpretation of subparagraph (v) would “render[] it redundant of other provisions of subparagraph (iii), which addresses *coordination in proxies*.” Op. 27 (emphasis added).

The court’s construction is further supported by subparagraph (v)’s use of “otherwise inducing.” During the discussion with Plaintiff’s counsel at post-trial argument, from which Defendants misleadingly quote one sentence (OB 27), the

¹² Defendants’ reliance on *United States v. Buluc*, 930 F.3d 383 (5th Cir. 2019) (OB 28-29), suffers from the same flaw.

Court of Chancery asked “what does ‘inducing’ mean in this sentence, then? ... It’s a causal --”, to which Plaintiff’s counsel responded, “I think that that’s got to be right that that is causal. ... [T]he trial hurt them on this.” A1132:13-33:24. The causal nature of economic inducements comports with Section 14’s focus on the *solicitation* (i.e., inducements) of proxies. *Supra* Part I.C.2. As Plaintiff’s counsel noted, the evidence was clear that Brown was not “soliciting proxies for ATG,” but instead “submitted [a] separate nomination notice.” A1132:13-33:24.

4. The Court of Chancery Properly Held That General Coordination Is Not Participation Under Instruction 3(a)

In their attempt to apply a misreading of Instruction 3(a), Defendants misrepresent the Opinion, asserting that the court “acknowledg[ed]” that the evidence at trial showed there was “an arrangement between ATG and Brown to acquire and vote Empery Digital shares.” OB 22 (citing Op. 20-21, 41).

The Court of Chancery made no such finding. Instead, it found that Defendants had elicited evidence supporting that ATG and Brown had “coordinated” about Empery. Op. 21. As the court made clear, Empery’s Bylaws “did not require the disclosure of general coordination, and coordination alone does not necessarily transform Brown into a ‘participant[.]’” Op. 34, n.159.

Defendants now assert yet another new claim: that Brown “communicat[ed] to shareholders” as part of “solicitation” for ATG. OB 33-34. This is raised for the first time on appeal and waived. Supr. Ct. R. 8; *Protech Mins., Inc. v. Dugout Team*,

LLC, 284 A.3d 369, 378 (Del. 2022). Moreover, Defendants’ summary of evidence supporting this “concealed solicitation” references no communications between Brown and other stockholders soliciting proxies *for ATG*—because there were none. OB 34-35.¹³ Critically, Defendants further omit that Brown “took no further steps in support of his own campaign” because Defendants rejected his nomination notice. B1069; B1079. And Defendants also ignore that Brown had separate counsel and proxy advisors, underscoring their *separate* solicitations. *Compare* B504 (ATG’s Notice), *with* B0932; B0953-54.

Because the Court of Chancery found that Brown was not a nominee, soliciting proxies, or financing ATG’s solicitation, Brown was not a participant about whom disclosure was required. The Court should affirm the Court of Chancery’s determination.

¹³ *Hysong v. Encore Energy Partners LP*, 2011 WL 5509100 (D. Del. Nov. 10, 2011) and *SEC v. Okin*, 132 F.2d 784 (2d Cir. 1943) (OB 34) are inapposite because neither case considered the definition of “participant.” Both concerned whether pre-solicitation communications constituted proxy solicitations. Defendants identify no comparable communications by Brown.

II. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT DEFENDANTS WAIVED REJECTION THEORIES FIRST RAISED POST-TRIAL

A. Question Presented

Whether the Court of Chancery (i) correctly held that Defendants were limited to the grounds stated in the Rejection Letter and (ii) abused its discretion in separately holding that Defendants waived new grounds first raised in post-trial briefing.

B. Scope of Review

Whether the Board may defend its rejection on grounds not asserted in the Rejection Letter presents a question of law subject to *de novo* review. *Hill Int'l*, 119 A.3d at 38.

The Court of Chancery's determination that Defendants waived an argument first raised in post-trial briefing is reviewed for abuse of discretion. *See Bloomingdale v. State*, 842 A.2d 1212, 1216 (Del. 2004).

C. Merits of Argument

The Court of Chancery correctly rejected Defendants' contention that the Bylaws required disclosure of any purported "arrangement or understanding" with Brown. Empery's ANBs do not contain an AAU-disclosure provision; instead, Defendants argued post-trial that the Bylaws' references to Section 14(a) operated as broad "catch-alls that permitted the Board to request any information that, in the Board's estimation, would be material" and that required disclosure of any AAU

with Brown. Op. 29. As the court correctly held, that argument fails because (1) Defendants were limited to the participant-based deficiency asserted in the Rejection Letter, (2) Defendants waived their new Section 14(a)/AAU theory by first raising it post-trial, and (3) the Court never found that ATG and Brown had an AAU requiring disclosure.

1. The Court of Chancery Correctly Rejected Defendants’ New Section 14(a) Theories as Bases for Rejecting ATG’s Nomination

The Bylaws contain two references to Section 14(a) of the Exchange Act: (i) Section 2.5(c)(iii)(B), which requires the nomination notice to disclose certain information regarding nominees, and (ii) Section 2.5(c)(ii), which requires disclosure of any “Disclosable Interests” for each Nominating Person “that [are] required to be disclosed in a proxy statement ... in a contested election pursuant to Section 14(a) under the Exchange Act.” Op. 28-29; A1228; A1230.

As the Court of Chancery noted, Defendants did not assert until post-trial briefing their contention that the Bylaws’ Section 14(a) references required ATG to disclose any AAU with Brown or that any such AAU was material under Rule 14a-9.¹⁴ Op. 29-31. As the court further noted, “[t]he Rejection Letter did not mention

¹⁴ Defendants contend their pre-trial brief (A0227-28) preserved this issue. Not so. Defendants “did not argue that the Nomination Notice violated the Section 14(a) Bylaws by failing to disclose an AAU with Brown irrespective of Brown’s status as a participant” until “post-trial briefing.” Op. 32-33.

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.” Op. 31.

“Because ANBs operate as conditions precedent, a board seeking to reject a nomination must identify a contractual basis for doing so” and provide the stockholder “sufficient notice” of that basis. Op. 33. Defendants’ effort to “decouple the purported disclosure failure from Brown’s participant status” as asserted in the Rejection Letter was an impermissible pivot. *Id.*

Having grounded its rejection in the asserted failure to disclose Brown as a participant, the defendants cannot wait until trial to abandon that basis and advance a different theory of contractual noncompliance. *Advance notice bylaws are not moving targets.*

Op. 33 (emphasis added). The court thus held that Defendants are bound “to the contractual grounds they invoked” and “to the reasons fairly stated in the Rejection Letter.” *Id.*

This holding accords with Delaware precedent, which binds a board to “what it knew and considered at the time” of the rejection, not “*post hoc* justifications that boards or their counsel might construct in litigation.” *Politan Cap. Mgmt. LP v. Masimo Corp.*, C.A. No. 0948-NAC, at 12 (Del. Ch. Dec. 20, 2022) (TRANSCRIPT) (citing *Atl. Rsch. Corp. v. Clabir Corp.*, 1987 WL 758584, at *1 (Del. Ch. Feb. 10, 1987)). This rule ensures that ANBs do not “function[] as a ‘tripwire’ rather than an information-gathering tool.” *Kellner*, 320 A.3d at 265; *see*

Op. 33 (ANBs “are not moving targets.”). The Rejection Letter reflects the grounds on which the Board rejected the Nomination Notice. Deficiencies not identified therein “seem more like litigation constructs than decisions underpinning the Board’s rejection of the Notice.” *Paragon Techs., Inc. v. Cryan*, 2023 WL 8269200, at *7 & n.116 (Del. Ch. Nov. 30, 2023); *see also Strategic Inv. Opportunities LLC v. Lee Enters., Inc.*, 2022 WL 453607, at *13 (Del. Ch. Feb. 14, 2022). Defendants therefore could not invoke their unasserted AAU theory after the fact.

As Defendants acknowledge, “[t]he Board remains bound by ... why it decided to reject ATG’s Nomination Notice.” OB 41. The Board identified that reason in the Rejection Letter: Brown’s alleged status as an undisclosed “participant.” Op. 15-16, 31-33 & n.152. Having rejected the Nomination Notice on that basis, Defendants cannot later defend the decision with a different theory that played no role in the Board’s deliberations.

Defendants’ claim that “ATG knew the factual basis for the Board’s rejection” conflates the subject matter with the alleged deficiency. OB 37. The Rejection Letter asserted that Brown was an undisclosed “participant” as defined in Instruction 3 to Item 4, *not* that ATG was required under Section 14(a) to disclose an AAU with Brown. Op. 31-32. The Board never identified any AAU theory in the Rejection Letter or during its AI-transcribed meetings. Op. 21-22; B0978; B1081. This distinction matters. If Brown were a “participant,” the Bylaws required

extensive disclosures about him as a “Nominating Person.” Op. 23-24; *supra* Part I.C.1. Under Defendants’ later AAU theory, ATG would need to disclose only its alleged “arrangement or understanding” with Brown. OB 36.

During litigation, Defendants were free to argue about the meaning of “participant.” But, as the court noted, “perhaps recognizing the challenge of proving that Brown met the technical regulatory definition of a ‘participant’ under Schedule 14A,” they pivoted in post-trial briefing to a new theory: that ATG had to disclose an alleged “arrangement or understanding” with Brown “*irrespective*” of participant status. Op. 32. The court correctly held that pivot “impermissible.” *Id.* Contrary to Defendants’ claim, the court’s holding did not require the Board to “catalogue every legal theory supporting its conclusion.” OB 37. It required only that Defendants provide “sufficient notice of the contractual basis for rejection.” Op. 33.

Defendants’ citation to ATG’s March 29 response (OB 44) underscores that ATG did *not* have an opportunity to respond to Defendants’ untimely Section 14(a) theory. The cited language appears under the heading “Baseless Allegations of Tice Brown as a *Participant*” and states: “there is no arrangement or understanding with Mr. Brown *regarding soliciting proxies or consents* for the Annual Meeting, nor does he meet any of the other criteria under the Instructions to Item 4.” A1396 (emphasis added). That addresses Defendants’ participant theory, not their post-trial

claim that ATG was required under Section 14(a) to disclose an “arrangement or understanding” with Brown regardless of participant status.

Defendants also argue that the Rejection Letter “specifically stated that ATG failed to disclose ‘arrangements and understandings.’” OB 40. But, as the Court of Chancery explained, the Rejection Letter’s reference to Item 5(b)(1)(viii) was expressly tied to what *Brown* would have had to disclose as a *participant*. Op. 31-32; see Rejection Letter ¶ 4. The court made the same point at post-trial argument, observing that the Rejection Letter “frames this reference to the 14(a) bylaw with a discussion of Mr. Brown as a participant or nominating person,” making Brown’s participant status “the starting premise.” A1177-80.

Defendants concede that not “every AAU [is] sufficient to establish participant status,” OB 31, but identify no standard for determining which AAUs qualify. ATG therefore could not know from the Rejection Letter what it supposedly failed to disclose or whether the Board had correctly identified a deficiency. If a board need not identify the deficiency on which it relies, stockholders would be forced to anticipate and litigate every conceivable theory tied to the same person or transaction. That would eviscerate the notice function of rejection letters and transform ANBs into the sort of “tripwire” this Court cautioned against. *See Kellner*, 320 A.3d at 265. The Court of Chancery properly avoided that result by holding the

Board to the deficiency it identified: Brown’s alleged status as an undisclosed “participant.” Op. 31-32.

That is why this case is fundamentally different from *Vejseli*. There, the board rejected the nomination notice because it failed to disclose the “Third Group Agreement.” *Vejseli v. Duffy*, 2025 WL 1452842, at *14 (Del. Ch. May 21, 2025). During litigation, the defendants pointed to a surviving provision to rebut the plaintiffs’ contention that disclosure was unnecessary because the agreement had terminated. *Id.* at *14-15 & n.126. The alleged deficiency—non-disclosure of a group agreement—never changed. Here, by contrast, Defendants changed the alleged deficiency post-trial, asserting that ATG had to disclose AAUs with Brown even if he was *not* a participant. Op. 32-34. That is not a new argument supporting the same deficiency; it is an entirely new deficiency.

2. The Court of Chancery Did Not Abuse Its Discretion in Determining that Defendants Waived Deficiency Theories First Raised in Post-Trial Briefing

The Court of Chancery’s waiver ruling also rests on independent grounds. As the court observed, Defendants’ pre-trial brief “did not argue that the Nomination Notice violated the Section 14(a) Bylaws by failing to disclose an AAU with Brown

irrespective of Brown’s status as a participant.” Op. 33-34. Rather, “that theory appeared only in post-trial briefing. It is waived.” Op. 34.

This determination was not arbitrary or capricious. Delaware courts have long held that “raising [an] argument in the post-trial briefs is unfair, too late,” and renders the argument “waived.” *Zaman v. Amedeo Hldgs., Inc.*, 2008 WL 2168397, at *16 (Del. Ch. May 23, 2008); *see In re Mindbody, Inc., S’holder Litig.*, 332 A.3d 349, 412 (Del. 2024) (concluding that defendants “waived the right to establish post-trial” that settling defendants were joint tortfeasors through their “pre-trial silence”).

Defendants’ contention (OB 41-42, 44) that ATG had a fair opportunity to respond is incorrect. The Board never exercised its right under Section 2.5(g) of the Bylaws to ask questions. Defendants never identified the Section 14(a) Bylaws or Rule 14a-9 in their supplemental interrogatory responses, so discovery never addressed those theories. *Supra* pp.16-17. ATG therefore had no opportunity to respond to Defendants’ post-trial AAU theory.¹⁵

¹⁵ Defendants’ assertion that ATG’s counsel conceded the Rejection Letter invoked the “Section 14a Bylaws” mischaracterizes the record. OB 45. Counsel explained that Defendants’ theory that Brown had to be disclosed “as some sort of a group” appeared for the first time in post-trial briefing and that, although the Rejection Letter was “truly a kitchen sink,” Defendants had “focused on Brown as a participant.” The court agreed, observing that the Rejection Letter framed its Section 14(a) discussion around Brown “as a participant or nominating person.” A1135-36.

Defendants' claim that the Board lacked time to get the Rejection Letter right (OB 42) is untenable. Lane and management had the Nomination Notice for a *month* and consulted *three* sets of counsel before the Board approved the Rejection Letter on March 26. *See* B1340. The Board must stand on the grounds it chose to include in that letter, not theories developed after trial. The fact that the full Board never reviewed the Nomination Notice and deliberated for only thirty minutes before rejecting is a problem of Defendants' own making.

3. The Court of Chancery Did Not Find an "Arrangement or Understanding"

Even if this Court concludes that Defendants preserved their Section 14(a) theory, affirmance remains warranted because the Court of Chancery never found that ATG and Brown entered into an "arrangement or understanding" requiring disclosure. Defendants assert that the court "acknowledge[d] an arrangement between ATG and Brown" (OB 22), but that is incorrect. Op. 21, 34 n.159. At most, the court found that Brown and Gliksberg "coordinat[ed] regarding Empery securities." Op. 21. But Defendants cite no authority holding that coordination alone establishes an AAU, and the court made no findings regarding the existence, terms, or scope of any agreement concerning the acquisition, voting, or solicitation of proxies. To the contrary, the court expressly found that "[t]he record contains no evidence whatsoever that Brown participated in ATG's proxy contest or assisted with financing for ATG's proxy." Op. 28. Defendants therefore identify no factual

finding supporting their contention that an AAU existed, much less an AAU requiring disclosure under the Bylaws.

Nor does the Opinion resolve whether the trial evidence established such an AAU. As *Kellner* recognizes, that inquiry turns on factual findings regarding the alleged arrangement or understanding. See *Kellner v. AIM ImmunoTech Inc.*, 2024 WL 62666, at *2 (Del. Ch. Jan. 5, 2024) (Letter Op.) (explaining that the claim there “turned on factual findings” regarding arrangements or understandings underlying a nomination). Defendants point only to parallel activist conduct and communications between stockholders. OB 34-35. But “[o]ne of the basic rights of a stockholder is to be able to communicate with his fellow stockholders on matters germane to such stock, and, if necessary, to organize other stockholders for corporate action.” *Williams Cos. S’holder Litig.*, 2021 WL 754593, at *20 (internal quotation marks omitted). Treating the court’s finding of possible “coordination” as sufficient to establish an AAU would substantially impair that right by converting ordinary stockholder communications into disclosure-triggering agreements.

Accordingly, even if this Court holds that Defendants preserved their Section 14(a) theory, it should affirm. Alternatively, at a minimum, this Court should not decide the AAU issue in the first instance and should remand for factual findings regarding whether ATG and Brown had an AAU requiring disclosure and, if so, its nature, scope, and materiality.

III. THE COURT OF CHANCERY CORRECTLY HELD THAT THE BYLAWS DID NOT REQUIRE DISCLOSURE OF ATG’S BITCOIN HEDGE

A. Question Presented

Whether the Court of Chancery erred in holding that the Bylaws did not require disclosure of ATG’s Bitcoin hedge.

B. Scope of Review

The Court of Chancery’s interpretation of the Bylaws is reviewed *de novo*. *Hill Int’l*, 119 A.3d at 38.

C. Merits of Argument

The Court of Chancery correctly held that Defendants failed to preserve a Rule 14a-9 theory as a basis for rejecting the Nomination Notice and that Empery’s Bylaws did not require disclosure of ATG’s Bitcoin hedge.

First, the Rejection Letter identified ATG’s Bitcoin hedge as a purported deficiency under Item 5(b)(1) of Schedule 14A; it did not invoke Rule 14a-9 as an independent basis for rejection. The Court of Chancery correctly held that, as Defendants now concede, Item 5(b)(1) does not require “disclosure of investments in unrelated assets or issuers, much less a nominating stockholder’s purported ‘misalignment’ with other stockholders.” Op. 36. The court also properly held that Defendants’ contention that the hedge was material information required to be disclosed under Rule 14a-9 “was not asserted as a basis for rejection and is waived.” Op. 37-39; *see supra* Part II.C.

Second, the Court of Chancery correctly held that the Bylaws otherwise did not require disclosure of ATG’s Bitcoin hedge. “Section 2.4(c)(ii) requires the disclosure of derivatives, synthetic equity, and short positions in Empery’s own stock.” Op. 35. Unlike some DATs, Empery’s Bylaws and questionnaire do not require disclosure of commodity hedges. Op. 35-36 & n.165. As the Court rightly noted, “[i]f the Board wanted to know about commodity hedges, it could have adopted a bylaw expressly requiring that information, included such a request in its nominee questionnaire, or asked ATG directly.” Op. 37 & n.172. But ATG “could not fairly be expected to guess that the Board would interpret the Bylaws to require the disclosure of a Bitcoin short position.” Op. 37.

Defendants contend that “the rejection should have been upheld” because the Bitcoin hedge was “highly material,” without reference to any Bylaws provision. OB 48. In their view, a nominating stockholder must disclose such information because a board cannot anticipate “every potential material omission” when drafting ANBs. *Id.* That argument defeats itself. If a board cannot identify the information it considers material, a stockholder cannot identify that information any better. ANBs would become “moving targets” (Op. 33) that “function[] as a ‘tripwire’ rather than an information-gathering tool.” *Kellner*, 320 A.3d at 265.

IV. THE COURT OF CHANCERY CORRECTLY HELD THAT THE BOARD INEQUITABLY REJECTED THE NOMINATION NOTICE AND BREACHED ITS FIDUCIARY DUTIES

A. Question Presented

Whether the Court of Chancery correctly held that the Board’s rejection of the Nomination Notice was inequitable and breached its fiduciary duties, independently requiring affirmance.

B. Scope of Review

Defendants do not challenge the Court of Chancery’s independent holding that the Board’s rejection of the Nomination Notice was inequitable and breached its fiduciary duties. “The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.” Supr. Ct. R. 14(b)(vi)(A)(3).

If this Court reaches the issue notwithstanding Defendants’ waiver, it “reviews the Court of Chancery’s legal conclusions *de novo* but defers to the Court of Chancery’s factual findings supported by the record.” *Coster*, 300 A.3d at 663.

C. Merits of Argument

1. Defendants Do Not Challenge the Court of Chancery’s Independent Equitable Ground for Upholding the Nomination Notice

“[W]hen corporate action is challenged, it must be twice-tested—first for legal authorization, and second by equity.” *Kellner*, 320 A.3d at 259. The Court of Chancery held that the Board’s rejection of ATG’s Nomination Notice failed both

tests: no bylaw required the disclosures the Board demanded, and the rejection was a preclusive and disproportionate response that breached the directors' fiduciary duties. Op. 34-46. Defendants challenge only the former holding and do not appeal the latter.

2. Defendants Waived All Equitable Arguments

The Court of Chancery's equitable holding is not merely a variation of the legal issues Defendants address; it rests on a distinct inquiry governed by different principles. *Kellner*, 320 A.3d at 259; *see Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1078-79 (Del. Ch.), *aff'd*, 872 A.2d 559 (Del. 2005). Because the court's judgment rests on an independent ground that Defendants do not challenge, this Court should affirm. *See Isaac v. Politico LLC*, 346 A.3d 103, 121 (Del. 2025) (affirming where "two independent grounds" for dismissal went unchallenged); *Gibson v. State*, 341 A.3d 512 (Del. 2025) (finding waiver where appellant "failed to challenge" the trial court's "alternate grounds" in the opening brief).

3. The Court of Chancery Correctly Determined That the Board's Rejection of the Nomination Notice Was Inequitable

"Advance notice bylaws can be misused to thwart stockholder choice and entrench the existing board of directors." *Kellner*, 320 A.3d at 259. "If a board ... enforces [ANBs] during a proxy contest, *Coster* requires a two-part analysis." *Id.* at 259-60. Under *Coster*, the board must show (i) that it faced a threat that was "real and not pretextual" and acted with motives that were "proper and not selfish or

disloyal,” and (ii) that its response was “reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder franchise.” *Coster*, 300 A.3d at 672-73.

Applying that framework, the Court of Chancery assumed, without deciding, that the Board reasonably perceived a legitimate threat, and held that the Board’s rejection of ATG’s nomination “fails the second *Unocal* prong.” Op. 43. The court found that “[r]ejection was a disproportionate response to the perceived threat” because the Board “could have informed stockholders” of its concerns regarding ATG and Brown and allowed “[t]hose arguments [to] then have been tested through the electoral process.” Op. 43-44. “The rejection was also preclusive in its practical effect” because, “[b]y removing ATG’s nominees from the ballot entirely, the Board effectively foreclosed ATG from presenting its slate to the stockholders and assured the incumbents an uncontested election.” Op. 44. Because “the Board could address its substantive concerns through disclosure, rejecting the nomination was a disproportionate response.” Op. 45.

Given those findings, the court concluded that “the Board’s rejection of the Nomination Notice was inequitable and constituted a breach of the directors’

fiduciary duties.” Op. 45. That unchallenged holding independently requires affirmance.¹⁶

¹⁶ If this Court reverses the court’s order, it should remand the nomination window reopening claim for further analysis, as the resolution of that claim hinged on ATG’s valid nomination notice. Op. 45-47.

CONCLUSION

This Court should affirm.

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