



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

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ARGUMENT¹

The SEC requires disclosure of “participants in a solicitation” to ensure stockholders have the information necessary to make a fully informed decision. Here, the Court of Chancery found that ATG likely plotted with Tice Brown to liquidate Empery Digital’s assets, that Gabi Gliksberg intentionally destroyed evidence of ATG’s campaign, and that Gliksberg’s and Brown’s testimony was unworthy of crediting. To read ATG’s brief is to be unaware of any of this. Rather than argue the novel legal issues presented in this appeal, ATG uses its brief to re-litigate the facts that the Court of Chancery resolved. But the dispute before this Court is not one of facts, it is one of law, and on this ATG has no credible response. Reversal is respectfully warranted.

I. INSTRUCTION 3(A)(V) EXTENDS TO ARRANGEMENTS TO PURCHASE AND VOTE SHARES IN A PROXY CAMPAIGN.

ATG argues that the plain language of Instruction “3(a)(ii)–(vi)...makes clear that a person is a ‘participant’ only if they are a nominee,” “involved in soliciting proxies,” or in “providing financing for the solicitation of proxies[.]” AB 22. This reading of Instruction 3(a) is foreclosed by

¹ All terms not otherwise defined herein shall have the meanings ascribed to them in Appellants’ Opening Brief, dated September 22, 2026 (“OB”). D.I. 11. Citations to “AB __” refer to Appellee’s Answering Brief, dated September 29, 2026. D.I. 26. All emphasis has been added; unless otherwise noted internal citations have been omitted.

its plain language, purpose, and regulatory history. OB 22–27. Unable to respond to Appellants’ arguments, ATG wraps itself in the mantle of protecting the stockholder franchise, claiming that finding Brown a “participant” would lead to a calamity of disclosure problems that would chill stockholder engagement. ATG’s arguments are meritless.

From the outset, it bears noting that neither ATG’s nor the Court of Chancery’s interpretation of Instruction 3(a)(v) can be reconciled with the SEC’s own commentary. Chairman J. Sinclair Armstrong explained just after its adoption:

The term “*participant*” is broadly defined in the rule to cover persons and groups who solicit proxies, and persons who finance or otherwise enter into arrangements with such groups to induce the purchase or voting of securities in support of, or in opposition to, a participant. In order to obtain for investors the disclosures required by these provisions it is often necessary to ascertain the amount of securities held beneficially, directly or indirectly, by specified persons, or to ascertain the identity of persons engaged in purchasing or acquiring securities which will be voted....in a proxy contest.

Subcomm. to Investigate the Admin. of the Internal Sec. Act & Other Internal Sec. Laws of the S. Comm. on the Judiciary, 85th Cong., Section VIII, Money and Soviet Influence 114 (Dec. 31, 1957) (Tab 6).

Consistent with these principles, SEC Director Byron Woodside described the definition’s “obvious purpose” as getting “into the public atmosphere arrangements and understandings that are so easily devised by which one group” that

could “not reveal their names and connections,” and “operate through another group....” *SEC Enforcement Problems: Hearing Before the Committee on Banking and Currency, Subcommittee on Securities*, 85th Cong. 12–13 (Mar. 6, 1957) (OB Tab 3).

It is inconceivable that the SEC intended a construction of Instruction 3(a)(v), as the Court of Chancery held and ATG suggests, under which a person could make substantive arrangements around the acquisition and voting of shares in support of a proxy contest, take affirmative steps to advance those arrangements, and nevertheless fall outside of the rule merely because no one wrote a check. To the contrary, the SEC defined Instruction 3(a)(v) in a way that recognizes that participation in a solicitation varies. While that includes financing arrangements, it also includes understandings to acquire joint beneficial ownership sufficient to win a stockholder election, as is the case here. *Id.* 23–24.

A. The Plain Meaning and Context of the Definition of Participant Support Reversal.

The phrase “lends money or furnishes credit or enters into any other arrangements” is intended to capture not only financial arrangements, but also *any other* arrangements that induce the buying, selling, voting, or holding of securities in support of a proxy campaign. OB 25. Had the SEC intended to limit Instruction 3(a)(v) to economic arrangements, the general clause would have read “any similar arrangements” or “other financial arrangements,” *not* “any other arrangements.”

This is language the SEC knows how to use. *See, e.g.*, 17 C.F.R. § 270.18f-4 (“Derivatives transaction” includes “Any swap, security-based swap,...*or any similar instrument*”); 17 C.F.R. § 230.501(f) (“officer” includes “*any other* person who performs *similar* policy-making functions”). Yet, the SEC elected not to use that language here.

ATG’s entire response is a single sentence:

[T]he word ‘any’ does not eliminate Instruction 3(a)(v)’s financial nexus; it operates within it.

AB 23. ATG offers no explanation to support this *ipse dixit* assertion. It points to nothing in Instruction 3(a)(v)’s text suggesting that “any” should “operate within” a “financial nexus.” *Id.* This is notable, as the word “any” is broad and is interpreted as such by the courts. *See, e.g., 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.’”) (Montgomery-Reeves, J., concurring).

ATG also does not explain why “otherwise inducing” would be necessary if its interpretation of Instruction 3(a)(v) were correct. Taken to its conclusion, that would mean the SEC was ensuring disclosure of financing arrangements only to “hold” shares. That is illogical. Stockholders do not finance the “holding” of their shares. Rather, it was “other arrangements” that “otherwise induce” the “holding” (or voting) of shares, like the arrangement between ATG and Brown, that the SEC sought to capture in Instruction 3(a)(v).

Nor can ATG distinguish dispositive holdings of the United States Supreme Court. *Ali v. Fed. Bureau of Prisons* involved the interpretation of the statutory phrase: “any officer of customs or excise or *any other* law enforcement officer.” 552 U.S. 214, 215–216 (2008). Like ATG, the petitioner argued that the phrase “any other” was limited by the preceding subject matter of “customs or excise.” *Id.* 218.

At oral argument, Justice Scalia noted that the drafters did not need the phrase “any other” if the petitioner’s argument was correct: “It seems to me that [the phrase ‘any other’] envisions seizure under laws *other than* tax and customs.” Tr. of Oral Arg. at 10, 18–19, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008) (No. 06-9130). The Court concluded the phrase was intentionally broad and not limited to the examples preceding it. *Ali*, 552 U.S. at 225–26.

ATG suggests the clause in *Ali* lacked a “common attribute,” like the “economic attribute[s]” here. AB 29–30. In fact, the petitioner argued a “common attribute” between “customs and excise,” and the Court observed “no reason why that should be the relevant characteristic as opposed to, for example, that officers of that type are commonly involved in the activities enumerated in the statute.” *Ali*,

552 U.S. at 218, 226. There was also no grammatical evidence supporting the application of *ejusdem generis*. *Id.* 225.

The same is true here. Those who provide “financing” or “credit” to a proxy campaign are “commonly involved” in activities relevant to a proxy campaign. *Id.* 225–26. They are not the *only* such participants, however. *See id.* 218–19, 227–28 (limiting “any other” would be “inconsistent with the statute’s language” and holding “any other law enforcement officer” to mean all law enforcement officers).²

ATG’s attempt to distinguish *Harrison v. PPG Industries, Inc.*—which involved the phrase “any other final action”—also fails. It claims that there was “no ‘uncertainty in the meaning of the [relevant] phrase’” in *Harrison*. AB 30. Notably, ATG does not identify the text of that phrase. AB 30. It was the phrase at issue here: “*any other* final action.” *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980). The Court opined that “any other” left “no indication whatever that Congress intended the limiting construction.” *Id.* The same is true here.

² ATG dismisses *United States v. Buluc* as inapplicable because it cannot respond to the holding. AB 30 n.12. The text at issue included the same grammatical structure as Instruction 3(a)(v), which therefore similarly “repels” the application of *ejusdem generis*. *Id.* 389.

B. The Regulatory History Refutes the Contention That Instruction 3(a)(v) Is Limited to Economic Arrangements.

ATG claims that the regulatory history supports its reading of Instruction 3(a)(v) because the SEC purportedly removed non-economic arrangements from the final version. AB 27–28. ATG is incorrect.³

If the SEC intended to remove an entire category of arrangements originally contemplated for Instruction 3(a)(v), one would expect the SEC to note that somewhere. Yet, there is nothing in the corresponding releases, SEC commentary, the text of the definition itself, or elsewhere suggesting that the SEC intended to do so.

Moreover, the revision ATG points to—changing “any joint venture or any other contract, arrangement, or understanding” to “any other arrangements”—does not reflect an intent to *remove* non-economic arrangements from the definition. “[A]ny other arrangements” logically subsumes “any joint venture or any other contract, arrangement, or understanding.” What’s more, the financial arrangements that ATG claims replaced the original text *were already included* in the proposed

³ ATG observes Appellants’ cases “construed criminal statutes” instead of “us[ing] regulatory drafting to interpret ANBs.” AB 27 n.9. But there is no dispute that the Bylaws incorporate the definition of “participant” from Instruction 3(a)—Appellants are using regulatory history to interpret a *rule*, not the Bylaws.

definition. Combining two different forms of arrangements—one based in economic support and the other based in influential support—into a single provision shows no intent to eliminate either category of arrangement from the scope of Instruction 3(a)(v).

C. The “Participant” Cases on Which ATG Relies Do Not Support Its Argument.

Seeking to prop up the Court of Chancery’s first-of-a-kind ruling limiting Instruction 3(a)(v) to economic arrangements, ATG points to three cases which it falsely asserts “uniformly interpret Instruction 3(a)(v) to require a financial nexus.” AB 24. Not one of these cases holds that the arrangements contemplated by Instruction 3(a)(v) require a “financial nexus.” One says the exact opposite.

Lone Star Steakhouse & Saloon, Inc. v. Adams held that Instruction 3(a)(v) did not “extend to someone ‘helping [the nominating person] on his own time’ who had ‘not received any compensation.’” AB 25 (quoting 148 F. Supp. 2d 1141, 1154 (D. Kan. 2001)). The issue was not the scope of Instruction 3(a)(v), but whether the employer of an individual engaged in solicitation was a participant in that solicitation. *Lone Star*, 148 F. Supp. 2d at 1147–48. The court characterized the allegations as an “interesting factual collage” that could not withstand the burden of a preliminary injunction motion. *Id.* 1153–54. Here, by contrast, the question is legal not factual as the Court of Chancery found “Gliksberg

and Brown were coordinating regarding Empery Securities” surrounding ATG’s proxy campaign while “attempting to conceal [their] coordination.” Op. 20–21, 42.

Chris-Craft Industries, Inc. v. Independent Stockholders Committee likewise did not consider the scope of Instruction 3(a)(v). 354 F. Supp. 895 (D. Del. 1973). The court rejected a claim that a loan to a nominee for use in a proxy campaign was unrelated to a “contribution...to the proxy contest,” since it could be “reasonably inferred that a substantial portion of [the lender’s] motivation was directed toward influencing the battle for control of Chris-Craft[.]” *Id.* 908. *Chris-Craft* therefore lends no support to a financial nexus requirement in 3(a)(v).

ATG relies heaviest on *IBS Financial Corp.*, but stretches that case beyond the breaking point. ATG claims the *IBS* court “explicitly reject[ed]” Instruction 3(a)(v)’s application to non-financial agreements. AB 24; *see IBS Financial Corp. v. Seidman & Assocs. LLC*, 954 F. Supp. 980 (D.N.J. 1997), *aff’d in part, rev’d in part*, 136 F.3d 940 (3d Cir. 1998). That is inaccurate.

The court held that the participation claim failed “for lack of evidence.” *IBS Financial Corp.*, 954 F. Supp. at 990. In so doing, the court implicitly acknowledged that an arrangement to induce the purchasing or voting of shares could establish participant status. *Id.* An investment manager having general discretion over his clients’ stock was, however, insufficient. *Id.*

Here, in contrast, ATG's campaign was *borne* out of its secret arrangement with Brown to acquire and vote shares necessary to ensure control and liquidation. Op. 41 (record supports "that ATG and Brown were hatching a plan to take control of Empery and liquidate its Bitcoin").

D. Requiring Disclosure of Participants Like Brown Has No Chilling Effect.

ATG asserts that "an expansive definition of 'participant' could [] trigger a 'daisy-chain' of invasive disclosures from unaffiliated stockholders who merely communicated with the nominating stockholder." AB 28. ATG protests too much. "Brown and Gliksberg's activity—phone calls, stock purchases, and outreach to prospective nominees by Gliksberg—rapidly intensified" within moments of their introduction. Op. 21. Brown was the vocal "front man" for ATG, both in demanding liquidation at a meeting with Empery Digital and later planting a story with Matt Levine about his and Gliksberg's liquidation plans, while Gliksberg used the article for nominee recruitment. A661:3–62:19, A469:10–70:5. Brown and Gliksberg worked through ephemeral messaging that erased any trace of their coordination. *See* A420. Now, ATG suggests the markets will grind to a halt if stockholders are unable to execute such clandestine schemes to liquidate public companies. That cannot be.

Williams Companies Stockholder Litigation also does not help ATG. There, the court evaluated a board's adoption of a stockholder rights plan that (i) was

not adopted in response to a specific threat; (ii) had a rare 5% trigger threshold; and (iii) contained an acting in concert provision that would capture “potentially benign stockholder communications.” *Williams Cos. S’holder Litig.*, 2021 WL 754593, *37 (Del. Ch. Feb. 26, 2021). This case does not raise similar concerns. Holding a nominating stockholder to their SEC-required disclosure obligations is exactly “the sort of shareholder interaction upon which sound corporate governance depends and that decades of reform have sought to encourage.” AB 28.

Indeed, stockholders have been required to make these kinds of disclosures for decades without a chilling effect. *See, e.g.*, 17 C.F.R. § 240.13d-101, Items 4, 6. There is no reason clarifying that the meaning of “participant” is what it was always intended to be should change that.

E. Brown Was a Participant Under the Proper Interpretation of Instruction 3(a)(v).

ATG mischaracterizes the Court of Chancery’s holding to suggest an affirmative finding that there was “no evidence” Brown participated in ATG’s campaign. AB 26. ATG omits that this conclusion was premised on the Court of Chancery’s “[a]ppl[ication]” of “the proper definition”—*i.e.*, the view that a “participant” is limited to one who is a “nominee,” who “solicits proxies,” or “finances” such solicitation. *Id.* The Court of Chancery did not suggest an absence of proof under the definition advanced by Appellants. It said the opposite.

ATG also argues that Brown did not participate “in a solicitation.” But the SEC defined Instruction 3(a) as “[t]he terms ‘participant’ and ‘participant in a solicitation.’” The subparts of the definition effectuate the SEC’s intention that a “participant in a solicitation” includes not only those who solicit or finance a solicitation, but also those who have other arrangements that induce the purchase and voting of shares in support. That Brown largely concealed his coordination with ATG until discovery does not exonerate him as a participant, it is further evidence of his participation.⁴

Indeed, the factual record warrants reversal and affirmance of the rejection under the proper interpretation of Instruction 3(a)(v). The evidence of ATG and Brown’s “furtive” plan to acquire and vote shares for ATG to secure the Company’s liquidation is overwhelming:

- Within hours of meeting and nearly one dozen calls in the first three days, Gliksberg and Brown significantly altered their trading patterns, and purchased millions of shares. Op. 7–8. Gliksberg placed a 400,000-share order minutes after speaking with Brown the day they were introduced. It was so large it was rejected by his broker. A1387, A507:12–09:19.

⁴ ATG asserts Appellants’ argument that “Brown ‘communicat[ed]’ to shareholders’ as part of ‘solicitation’ for ATG” is waived for being “raised for the first time on appeal.” AB 31. Not so. Appellants presented it before the Court of Chancery on multiple occasions. *See* A393; AR21.

- After speaking with Gliksberg, Brown suddenly accessed retirement funds and other liquidity to buy as many shares as possible. Op. 8.
- Both transferred exactly 1,000 shares into record ownership within a day of their initial conversations. *Id.* 7–8.
- Both made Section 13 filings within one business day. *Id.* 10
- Brown immediately requested a meeting with management and demanded liquidation. AR1–2. Hours after management refused Brown’s demands, Gliksberg requested a nomination package. A280.
- Brown then approached Bloomberg’s Matt Levine to publish “Cracking Open the DATs”—an article about his and ATG’s efforts to liquidate Empery Digital—while trying (unsuccessfully) to conceal his relationship with ATG. Op. 11–12.
- Once the article was published, Gliksberg texted a nominee, “Read it now! And then don’t text me about it.” *Id.* 12.
- Both Gliksberg and Brown then submitted nomination notices on the same day, purporting to be in competition (while simultaneously remaining in contact on Signal). *Id.* 13–14.

As just the sliver of evidence uncovered above reflects, Brown was not just an influential force behind ATG’s campaign, he acted as Gliksberg’s functional

partner in the election.⁵ Their combined investment and voting power would ensure the success of their liquidation scheme and their short-term profit.

Finally, ATG's spoliation campaign, for which the Court of Chancery awarded sanctions (A419–21), warrants an adverse inference further supporting reversal. The Court of Chancery found that Appellants' request was moot because, in effect, nothing spoken between Gliksberg and Brown would change that Brown had not provided Gliksberg financing, and would therefore not "cure the contractual invalidity of the Board's rejection." Op. 34 n.159. That analysis depends on whether the Court of Chancery's narrow reading of Instruction 3(a)(v) was correct.

The only inference that logically flows from Gliksberg's destruction of evidence is that he used ephemeral messaging to conceal his arrangement with Brown. Should this Court determine the Court of Chancery erred, it should also conclude based on the Court of Chancery's spoliation findings that any adverse inference would render Brown a "participant" in ATG's campaign.

⁵ ATG critiques Appellants for "ignor[ing]" that Brown had a "separate solicitation[]." AB 32. But evidence at trial reflected Brown's "separate" solicitation was a sham designed to portray the illusion of separateness from ATG. In reality, Brown submitted his "partially handwritten" notice nominating only "himself" on "the exact same day" as ATG and "just two days" after requesting nomination materials. OB 13. He then took no further steps in support of that campaign. OB 14.

II. APPELLANTS PRESERVED THEIR SCHEDULE 14A ARGUMENT AND THE COURT ERRED BY TREATING A LESS ONEROUS LEGAL BASIS AS A NEW FACTUAL GROUND FOR REJECTION.

ATG defends the Court of Chancery’s refusal to consider whether ATG was required to disclose its AAU with Brown under the Section 14(a) Bylaws on two grounds: that Appellants (i) “were limited to the participant-based deficiency asserted in the Rejection Letter,” and (ii) “waived their new Section 14(a)/AAU theory by first raising it post-trial.” AB 34. Both turn on a single question—was the deficiency fairly presented?⁶ The answer is yes and reversal is thus warranted.

A. ATG’s “Tripwire” Argument Cannot Excuse Its Obligation To Comply with the Bylaws.

ATG concedes it must demonstrate compliance with the Company’s Bylaws. AB 20; Op. 19. Yet it argues the Board had to provide “sufficient notice” of every precise contractual basis for its rejection, lest the Rejection Letter become a moving target and the Bylaws operate as a forbidden “tripwire.” AB 37–38. ATG’s reliance on *Kellner* is misplaced. The “tripwire” concern in *Kellner* arose from an amorphous bylaw, not—as here—a deliberately concealed relationship with the nominating stockholder, governed by clear federal law and concepts this Court routinely applies. *Kellner v. AIM ImmunoTech Inc.*, 320 A.3d 239, 265 (Del. 2024);

⁶ Embedded legal conclusions in a decision that is generally reviewed for abuse of discretion are reviewed *de novo*. See *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 380–81 (Del. 2014).

Jorgl v. AIM ImmunoTech Inc., 2022 WL 16543834, *11 (Del. Ch. Oct. 28, 2022).⁷

The Rejection Letter identified the relevant facts: ATG’s undisclosed arrangement with Brown. A1374. ATG understood the point: its March 29 response, though styled as addressing Brown’s “participant” status, engaged the same facts underlying the Board’s concern—undercutting its claim of inadequate notice. A1396–97. ATG also denied broadly that it was “secretly coordinating with a rival nominator advancing a competing slate” (A1397)—the very premise of the Board’s concern—and defended that position vigorously throughout the litigation.⁸

Advance notice bylaws serve the Board’s “information-gathering and disclosure functions.” *Kellner*, 320 A.3d at 258. They do not require a board anticipate every legal theory bearing on whether an undisclosed arrangement must be disclosed. Requiring that here—particularly where ATG toiled to conceal its relationship with Brown, including by spoliating documents—would improperly shift ATG’s compliance burden to the Board. OB 39. The Board acted as required:

⁷ ATG’s invocation of *Williams* to argue treating “possible ‘coordination’” as an AAU would have a chilling effect (AB 42) is misplaced. *Williams* condemned aggregating *unknowing* parallel conduct—not disclosure of a knowing, intentionally concealed arrangement.

⁸ *See, e.g.*, A1141:10–13 (ATG’s counsel addressing evidence of a group at post-trial argument stating, “I think they fail on the evidence there, because they’ve got to prove the existence of this agreement. And I just don’t think they can”).

it identified the factual deficiency—nondisclosure of ATG’s arrangement with Brown. A1374. ATG cannot transform its obligation to comply into a Board obligation to supply a complete legal roadmap for why ATG’s concealed relationship required disclosure or forfeit those positions in litigation.

B. ATG’s Rejection Letter-Based Claims of Prejudice Are Belied by the Record.

The Rejection Letter expressly identified the deficiency: ATG and Brown had specific discussions concerning the acquisition and timing of Empery Digital’s securities, raising concerns about coordination. A1374. ATG nevertheless contends that, once Brown’s status as a “participant” is removed, the AAU theory presents an entirely new deficiency. AB 39. It does not.

The AAU analysis added no new person, transaction, or category of concealed conduct. The operative omission remained: the Board identified ATG’s coordination with Brown and invoked Item 5(b)(1)(viii) of Schedule 14A as the basis for ATG’s disclosure obligation. A1376. Appellants acknowledge a board cannot rely on litigation to add after-discovered facts or a wholly different omission as post hoc justification for rejection. *Rosenbaum v. CytoDyn*, 2021 WL 4775140 (Del. Ch. Oct. 13, 2021); *Paragon Tech., Inc. v. Cryan*, 2023 WL 8269200 (Del. Ch. Nov. 30, 2023). Developing an additional legal consequence of the same contemporaneously identified facts is different. *Vejseli v. Duffy* confirms this. 2025 WL 1452842, *14–*15 & n.126 (Del. Ch. May 21, 2025).

ATG's attempt to distinguish *Vejseli* fails. It argues the board there consistently identified the nondisclosure of the group agreement, whereas Appellants supposedly shifted from a "participant" theory to an AAU theory regardless of Brown's status. AB 39. That confuses the factual deficiency with the legal theory supporting it. *Vejseli* held there was no waiver because the underlying deficiency never changed; only the legal argument evolved. *Vejseli*, 2025 WL 1452842, *15 n.126; OB 41. The same is true here: the omission concerning Brown remained unchanged before, during, and after trial.

The Court of Chancery therefore misapplied *Rosenbaum* and *Paragon*, which prohibit reliance on after-discovered facts or a new omission, not development of the legal consequences of a deficiency already identified. *Rosenbaum*, 2021 WL 4775140, *21; *Paragon*, 2023 WL 8269200, *13. Treating the two as equivalent transforms a rule against post hoc factual supplementation into one that impermissibly shifts the burden to the Board.

C. ATG's Waiver Argument Should Not Foreclose a Theory Turning on ATG and Brown's Relationship Litigated at Trial.

Whether or not "an argument is waived is highly contextual and ultimately a matter within [the] Court's discretion." *REJV5 AWH Orlando, LLC v. AWH Orlando Member, LLC*, 2018 WL 1109650, *4 (Del. Ch. Feb. 28, 2018). The focus is whether the opposing party received fair notice. *See Zaman v. Amedeo*

Holdings, Inc., 2008 WL 2168397, *15 (Del. Ch. May 23, 2008). And this Court “indulge[s] every reasonable presumption against waiver.” *Suber v. State*, 360 A.3d 203, 210 (Del. 2026). There is no waiver here for three independent reasons.

First, the Court of Chancery addressed the issues. Op. 29–31. “Where...the trial court has addressed in its decision the issues raised on appeal, the arguments on appeal are not waived.” *In re Tesla, Inc. Derivative Litig.*, 351 A.3d 1005, *10 (Del. 2025) (TABLE) (citing *Origis USA LLC v. Great Am. Ins. Co.*, 345 A.3d 936, 954 (Del. 2025)).⁹

Second, ATG suffered no prejudice. It briefed the AAU theory, and its counsel conceded at post-trial argument the concept was established in the Rejection Letter. OB 44–45 (citing A142, A299 n.166, and A1135:17–24).¹⁰ Indeed, ATG’s focus throughout trial was proving the absence of coordination or agreement

⁹ Additionally, Court of Chancery Rule 15(b) treats issues tried with the parties’ express or implied consent as if raised in the pleadings, *i.e.*, a party need not spell out every theory pretrial. Ct. Ch. R. 15(b); *In re Sears Hometown & Outlet Stores, Inc. S’holder Litig.*, 332 A.3d 1088, 1108 (Del. Ch. 2025) (parties do not “have to identify everything they intend to prove in a pre-trial brief”).

¹⁰ ATG tries to walk back this concession, claiming Appellants have “mischaracterize[d] the record.” AB 40, n.15. There was no mischaracterization. The Court asked whether the first time ATG had seen the Section 14(a) Bylaw argument was in Appellants’ Post-Trial Brief. A1135:17–20. ATG’s counsel responded: “Yes. Yes. Now,...to be fair, the Sidley rejection letter on March 26 is truly a kitchen sink, and it lists almost everything possible under the sun.” *Id.* A1135:21–24.

between ATG and Brown *whatsoever*, not just as a matter of degree.¹¹ Delaware courts decline to find waiver where “the opposing party had the opportunity to respond.” *Kakar v. Octo Consulting Grp., LLC*, 2026 WL 2497322, *3–4 (Del. Super. Ct. Aug. 25, 2026).

ATG’s authorities are distinguishable. *Zaman* turned on the absence of fair notice. *Zaman v. Amedeo Holdings, Inc.*, 2008 WL 2168397, *15. And *In re Mindbody, Inc., Stockholder Litigation* involved an argument raised for the first time in the final footnote of the final post-trial brief. 332 A.3d 349, 412 (Del. 2024). Here, ATG and Brown’s coordination was disclosed in the Rejection Letter and thoroughly litigated. *See supra* Section II.B.

ATG’s assertion that “discovery never addressed” the Section 14(a) Bylaws or Rule 14a-9 is hard to take seriously. AB 40. The fact is both the “participant” and “group” arguments turn on the question of whether Gliksberg and Brown entered into a furtive arrangement to take control of Empery Digital. There is no credible dispute they did, as the Court of Chancery found. Moreover, ATG identifies no material discovery it would have needed, but did not get, to test the AAU theory, because the legal characterization of facts identified in the Rejection

¹¹ *See, e.g.*, A764:20–65:11 (ATG’s counsel questioning Brown concerning the nature of his relationship with ATG); A602:17–03:15 (same); *see also, e.g.*, A450:10–51:8; A479:22–80:3; A484:16–23; A485:19–21; A593:2–20; A596:3–7; A598:17–24.

Letter does not change the nature of the omission. In fact, ATG's own expert witness testified about the Rule 14a-9 argument. A1073:5–74:19. ATG cannot claim surprise about facts it vigorously litigated for months.

Finally, Supreme Court Rule 8's interests-of-justice exception independently warrants review given the ubiquity of Section 14(a) bylaws and the consequences of requiring boards to catalogue every legal ground for rejection in the initial notice.

III. ATG’S UNDISCLOSED HEDGE WAS MATERIAL AND SHOULD HAVE BEEN DISCLOSED.

ATG does not dispute concealing its “dollar-for-dollar” short position against Bitcoin notwithstanding that Empery Digital is a Bitcoin treasury company. It argues instead it was not required to disclose this because the Rejection Letter identified the deficiency under Item 5(b)(1) of Schedule 14A and “did not invoke Rule 14a-9” (AB 43), and because Empery Digital lacked a specific bylaw requiring ATG to disclose commodities short positions. *Id.* 44.

Appellants advanced two primary reasons why the Court of Chancery erred in holding that ATG’s Bitcoin hedge need not be disclosed. *First*, Appellants argued the Board was not required to identify every specific legal theory underlying its rejection and ATG was on notice that its Nomination Notice was deficient for failing to disclose its substantial Bitcoin hedge. *Second*, Appellants asserted the Court of Chancery’s treatment of Rule 14a.9 defeats its purpose as a “catch-all provision.” OB 47. ATG’s Answering Brief confirms the Court of Chancery erred.

First, the Rejection Letter was not required to disclose every legal argument underlying the Board’s rejection. *Supra* Section II.B. The Rejection Letter gave ATG the required notice that the Bylaws required disclosure of its Bitcoin short. Nothing more was required to preserve Appellants’ Rule 14a-9 argument.

Second, whether under Schedule 14A or Rule 14a-9, both incorporated by the Section 14(a) Bylaws, ATG’s only response is that there was no such disclosure obligation because the Bylaws lack a specific provision requiring “disclosure of commodity hedges.” AB 44. ATG’s duty to comply with Rule 14a-9 applies regardless of what Item 5(b)(1) requires. The contractual holding therefore does not dispose of Appellants’ Rule 14a-9 theory.

Third, ATG’s theory renders the inclusion of Rule 14a-9 disclosures in advance notice bylaws meaningless. It argues that “[i]f a board cannot identify the information it considers material, a stockholder cannot identify that information any better.” AB 44. That flips the nature of Rule 14a-9 on its head. Rule 14a-9 is premised on the reality that it is the person issuing a proxy—in this case, ATG—who possesses information that might be material to stockholders in connection with a vote.

ATG’s *only* diligence into Empery Digital was how to hedge its position by shorting Bitcoin ETFs. Yet, it claims its short position would have been meaningless to stockholders, and that its interests were aligned. At a minimum, ATG found the hedge material to its ownership of Empery Digital stock. How can it now claim that same hedge would not be material to other stockholders? ATG cannot credibly assert that it did not know the short position should have been disclosed. Rule 14a-9 is meant to prevent precisely this type of willful ignorance, a

pattern that ATG has suffered from repeatedly in this case and for which ATG has been sanctioned.

IV. THE COURT OF CHANCERY’S FIDUCIARY-DUTY HOLDING DOES NOT REQUIRE AFFIRMANCE.

ATG contends the Court of Chancery’s equitable holding is an unchallenged independent ground for affirmance. AB 45–48. Not so. That holding is entirely based on the Board’s purportedly “erroneous interpretation of [the] Bylaws.” Op. 45. The Court of Chancery assumed “a legitimate threat” and found the Board’s rejection disproportionate under *Unocal*’s second prong because “the Board lacked valid contractual grounds” for the rejection “and had available means to communicate its concerns to the stockholders.” *Id.* 44–45. It distinguished *Kellner* on precisely that basis: “the Board was not enforcing a valid disclosure requirement.” *Id.* 43.

It follows that if the Board had a valid contractual basis to reject the Nomination Notice, it “acted reasonably and equitably” under the twice-tested framework. *Kellner*, 307 A.3d at 1044. Thus, if the Bylaws required ATG to disclose its arrangement with Brown or its Bitcoin hedge (which they did), the Board enforced a valid requirement, eliminating the premise for the court’s disproportionality finding. The Board’s rejection was also not “preclusive”: ATG could have complied and the Board “did nothing to prevent [compliance].” *Id.* 1043. Moreover, the evidence showed no pretext or flawed process; the Court of Chancery found the Board had “reason to be suspicious.” Op. 20–21; *see also Id.* 41–42.

Neither *Isaac v. Politico LLC*¹² nor *Gibson v. State*¹³ alters this analysis. Those cases involved genuinely independent grounds that were unchallenged by the appellants—independent grounds for admissibility and failure to state a claim. Here, the Court of Chancery’s equitable holding is inseparable from the compliance holding Appellants challenge. Reversal of the compliance predicate necessarily vacates the equitable holding. Accordingly, there is no waiver. If this Court reverses on any of Appellants’ three arguments, it should vacate the fiduciary-duty holding.

¹² Appellant in *Isaac* challenged the dismissal of a defamation claim as time barred, not that it separately failed to state a cognizable claim. 346 A.3d 103, 121 (Del. 2025).

¹³ In *Gibson*, appellant challenged the admissibility of evidence under D.R.E. 803(15), but not the finding that it was also independently admissible under D.R.E. 807. 341 A.3d 512 (Del. 2025) (TABLE).

CONCLUSION

For these reasons and those set forth in Appellants' Opening Brief, this Court should reverse.

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CERTIFICATE OF SERVICE

I hereby certify that, on October 2, 2026, a copy of the foregoing *Appellants' Reply Brief* was served by File & ServeXpress on the following attorneys of record:

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