IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JERALD HAMMANN, Plaintiff, v. ADAMIS PHARMACEUTICALS CORPORATION, DENNIS J. CARLO, RICHARD C. WILLIAMS, HOWARD C. BIRNDORF, ROSHAWN A. BLUNT, and DAVID J. MARGUGLIO, Defendants.	)	C.A. No. 2021-0506-PAF

DEFENDANTS' ANSWERING BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION TO EXPEDITE PROCEEDINGS

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Rolin P. Bissell (#4478)
James M. Yoch, Jr. (#5251)
Alberto E. Chávez (#6395)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
(302) 571-6600

Attorneys for Defendants

OF COUNSEL:

Michael C. Holmes
Robert P. Ritchie
Allison L. Fuller
VINSON & ELKINS, L.L.P.
2001 Ross Avenue
Suite 3900
Dallas, Texas 75201
(214) 220-7700

Dated: June 14, 2021

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

PRELIMINARY STATEMENT

This case arises from Plaintiff Jerald Hammann's ("Plaintiff" or "Hammann") frustrated efforts to extort payment from Defendant Adamis Pharmaceuticals Corporation ("Adamis" or the "Company"). Specifically, in February 2021, Hammann contacted the Company seeking a meeting with management. In early March, the Company agreed to arrange a conference between Hammann and Defendant David J. Marguglio, Adamis' Chief Business Officer. At that meeting, Hammann demanded that the Company agree to pay him a large fee—purportedly in exchange for "consulting services." Hammann was not, however, able to provide any legitimate justification for this demand. To the contrary, Hammann was not even a stockholder of the Company at the time, and his self-described experience—involving purported work with hospital systems to improve their medical education programs—had no relevance to the Company's operations.

Nonetheless, Hammann argued that the Company should provide him with a lucrative consulting contract because, if they did not, he would purchase stock of the Company for the sole purpose of plaguing the Company with substantial expense and distraction by launching a proxy campaign (and accompanying books-and-records demand) in connection with elections to be held at the Company's 2021 Annual Meeting of Stockholders (the "Annual Meeting"). The Company promptly

informed Hammann that they found such a demand to be improper and not in the best interests of the Company's common stockholders.

Since then, Hammann has sought to follow through on his threat to punish the Company for not acceding to his extortionate demands. After buying a nominal stake of the Company's stock, he first sent a books-and-records demand under 8 *Del. C.* § 220. The Company cooperated with this demand, providing Hammann with the stockholder list materials he requested and providing a detailed explanation (under established Delaware law) for its rejection of the remainder of his requests, for which he had failed to establish a proper purpose.

Next, on May 6–7, 2021, Hammann purported to submit four director nominations and three stockholder proposals for inclusion in the Company's proxy statement for the Annual Meeting (together, the "Solicitation Notice"). On May 18, 2021, the Company responded to these purported submissions, notifying Hammann that his submissions were untimely under Adamis' Advance Notice Bylaw and would thus not be accepted. *See* Ex. 12, May 18, 2021 Letter to J. Hammann.

Specifically, Adamis' bylaws, enacted long before the Company had any knowledge of Hammann, contain an Advance Notice provision, provide that "in the event that the date of the [Company's] annual meeting is changed by more than 30 days before [the date on which it was held the prior year] . . . to be timely [any

director nominations or stockholder proposals] must be [] received . . . not later than the later of the close of business on the later of the 90th day prior to the date of such annual meeting or the 10th day following the day on which public announcement of the date of such meeting is first made."[1] On April 15, 2021, Adamis filed its Form 10-K for the fiscal year ended December 31, 2020 (the "2020 10-K"). In the 2020 10-K, Adamis announced that "the Company has determined that the Company's 2021 annual meeting of stockholders will be held July 16, 2021 (the '2021 Annual Meeting')." *See* Ex. 1, 2020 10-K, Item 9B at 67. Adamis' 2020 "annual meeting of stockholders was held on August 20, 2020, which was later in the year than the dates on which the Company has scheduled its annual meeting of stockholders in recent years." Ex. 4, April 14, 2021 Minutes of the Meeting of the Adamis Board; Declaration of David J. Marguglio ("Marguglio Decl.") ¶ 10. For the 2021 Annual Meeting, the Board chose an earlier date to more closely align with the date of the Company's annual meeting in prior years and what the Board understood to be the customary practice of similar public companies. *Id.*

Adamis also included a disclosure in the 2020 10-K which explained to investors that:

> Because the expected date of the 2021 Annual Meeting represents a change of more than 30 calendar days from

[1] Ex. 5, Amended and Restated Bylaws of Adamis Pharmaceuticals Corporation (the "Bylaws"), art. III, § 5(b).

> the date of the anniversary of the Company's 2020 annual meeting of stockholders, the Company is informing stockholders of this change and the updated deadlines for stockholders to submit proposals intended for inclusion in our proxy statement or nominations for director or proposals for consideration at the 2021 Annual Meeting in accordance with the rules and regulations of the SEC and the Company's Bylaws. Accordingly, to be timely, stockholders wishing to submit proposals intended to be considered for inclusion in our proxy statement relating to the 2021 Annual Meeting, must ensure that proper notice is received by the Company at its offices no later than the close of business on April 20, 2021, which we consider a reasonable time before we will begin printing and mailing proxy materials. . . . ***In addition, to be timely, stockholders wishing to nominate a candidate for director or to propose other business at the 2021 Annual Meeting, must ensure that proper notice is received by the Company at its offices no later than the close of business on April 25, 2021, which is the 10th day following the day on which public announcement of the date of the 2021 Annual Meeting is first made by us***. The Company's bylaws specify requirements relating to the content of the notice that stockholders must provide, and any such notices must be received in writing at the following address: Adamis Pharmaceuticals Corporation, 11682 El Camino Real, Suite 300, San Diego, CA 92130, Attention: Corporate Secretary. The notice must comply with the procedures and include the information required by the Company's Bylaws.

See Ex. 1, 2020 10-K, Item 9B at 67 (emphasis added).

Despite this notice, Hammann failed to submit any proposals or nominations by April 25, 2021—rendering any subsequent proposals or nominations invalid and untimely. Then, after being expressly informed that his proposals were untimely

and would not be accepted, Hammann ***did nothing for over three weeks*** while the Company prepared its own proxy solicitation materials. Now, however, he brings this action seeking "emergency" injunctive relief forbidding the Company from soliciting proxies under its own proxy statement or holding an annual meeting. This request should be denied, under each of the required elements for a Temporary Restraining Order.

First, Hammann has not stated a colorable claim. The first two counts of the Complaint can be quickly dispatched, as they seek relief under federal securities laws that this Court lacks jurisdiction to give. Hammann's third count seeks books and records under 8 *Del. C.* § 220. But the Company has already complied with its obligations under the statute, and Hammann has no right to further documents under settled law. Next are two duty of disclosure counts, both of which contend that the Company failed to "inform[] stockholders that the Board authorized advancement of the date of the next annual meeting." But, of course, the 2020 10-K (which was incorporated by reference and will be mailed with the Company's proxy statement for the Annual Meeting) *did* disclose just that.

Finally, Hammann contends that the Board violated their duty of loyalty by enforcing the Company's Advance Notice Bylaw. Remarkably, nowhere does Hammann suggest that the Advance Notice Bylaw is itself invalid, nor does he assert that the deadline established by the Bylaws for the submission of nominations is

inherently inadequate. Nor does Hammann contend that a material change of circumstances has occurred since the deadline expired that renders the bylaw's enforcement inequitable. Instead, Hammann's argument is based on his unsupported contention that the announcement of the annual meeting in the Company's publicly-filed 2020 10-K was impermissibly "buried" because he was expecting the announcement to appear as a separate press release.

The record establishes, however, that the information in question was plainly set forth in a public announcement that was much anticipated, and that Hammann purportedly overlooked it—not because it was concealed—but because he apparently chose not to read the 2020 10-K. In other words, as the Court of Chancery previously held in rejecting similar claims, all Hammann "needed to do to preserve [his] rights was read the company's [2020 10-K] carefully and in full." *Accipiter Life Sciences Fund, LP v. Helfer*, 905 A.2d 115, 127 (Del. Ch. 2006). Thus, "[t]o rule in the plaintiff's favor here . . . would extend [Delaware law] well beyond [its prior] limits and would threaten to involve the court in matters better understood as regulatory in nature." *Id.* In short, there is no basis to enjoin the Company from enforcing its unambiguous and valid Advance Notice Bylaw—which was enacted on a proverbial "clear day" and unambiguously invoked here.

Second, Hammann has not shown that irreparable harm would occur absent injunctive relief. Nor could he. "Should the Annual Meeting go forward . . . and

should Plaintiff subsequently prove the election results were tainted, the Court can exercise its equitable power to void the results of the Annual Meeting (should such action be warranted based on a full record)." *Immunomedics, Inc. v. Venbio Select Advisor LLC*, 2017 WL 822800, at *3 (D. Del. Mar. 2, 2017) (denying motion to enjoin annual meeting). Accordingly, there is no threatened irreparable harm and Hammann's motion should be denied. Indeed, "[g]ranting an injunction here, simply because the Court ***can*** prevent the vote from taking place, would risk transforming the extraordinary relief of a preliminary injunction and temporary restraining order into something easily and regularly obtained." *Id.*

Finally, the balance of the equities weighs strongly against granting injunctive relief here. The relief Hammann seeks is extraordinary—enjoining the Company from soliciting any proxies or holding its upcoming Annual Meeting. Such relief would be particularly damaging to the Company now the Annual Meeting is little more than a month away and the Company has taken substantial steps to prepare for it. Hammann should not be allowed to impose such harm on the Company after he failed to take any action for over three weeks after he received notice that his Solicitation Notice would not be accepted by the Company. *See, e.g.*, *Roseton OL, LLC v. Dynegy Holdings Inc.*, 2011 WL 3275965, at *7 (Del. Ch. July 29, 2011) (injunctive relief "may be denied where the moving party has not proceeded as

promptly as it might and, by virtue of its languor, has contributed to the emergency nature of its application for preliminary relief").

Accordingly, Hammann has satisfied none of the elements of his burden in seeking injunctive relief and his Motion for Temporary Restraining Order should be denied. Hammann's motion for expedited proceedings should be denied for the same reasons.

NATURE AND STAGE OF PROCEEDINGS

On June 9, 2021, Hammann filed his Verified Complaint for Injunctive and Declaratory Relief (the "Complaint"), and subsequently on June 10, 2021, a Motion for Temporary Restraining Order (the "Motion") with an accompanying brief and Motion to Expedite Proceedings. Therein, Hammann asserts that Defendants Adamis and the Board breached their fiduciary duties by triggering the deadline set forth in the Company's Advance Notice Bylaw and by declining to waive it upon Hammann's belated submission of four nominees for election and three stockholder proposals for the Company's upcoming annual meeting of stockholders.

Hammann requests, *inter alia*, that the Court enjoin the holding of the 2021 Annual Meeting to allow Hammann to proceed with his solicitation efforts and proxy contest. This is Defendants' Answering Brief in Opposition to the Motion.

STATEMENT OF FACTS

A. The Parties.

Plaintiff Hammann is a self-described provider of "investor advocacy services," who targets publicly-traded companies based on their stock value and then initiates proxy contests in order to secure lucrative consulting agreements and/or positions for himself. Hammann purports to be sufficiently sophisticated to warrant votes of the Company's stockholders sufficient to provide him control of the Company.

Defendant Adamis Pharmaceuticals Corporation is a specialty biopharmaceutical company focused on developing and commercializing products in various therapeutic areas, including allergy, opioid overdose, respiratory and inflammatory disease. Ex. 1, 2020 10-K, Item 1 at 1.

B. Hammann attempts to extort the Company prior to becoming a stockholder.

Beginning in February 2020, in conversations with and correspondence to representatives of the Company, Hammann—who was not at that time a stockholder of the Company—made demands upon the Company that the Company pay Hammann a substantial fee, purportedly in exchange for Hammann performing unsolicited "consulting services." Marguglio Decl. ¶ 5. Hammann informed the Company representatives that even though he had only recently become aware of Adamis, he believed that he was in a position to offer the Company advice, and

proposed that Adamis pay him to look into the Company's "corporate strategy" over the next six to twelve months to see if Hammann could find a way to "create retail stockholder value." *Id.* Hammann threatened that if the Company did not accede to his demand, he would seek to purchase stock in the Company in order to initiate a books-and-records demand and launch an expensive proxy campaign in connection with elections to be held at the 2021 Annual Meeting. *See id*. ¶ 6. Hammann informed the Company representatives that he had been successful using such tactics in the past to secure a favorable "cooperation deal" with another company. *Id.* Hammann made clear that the Company's only choices were to hire him or be drawn into a proxy contest against him, and recommended that his proposed "consulting agreement" was likely to be less intrusive to Adamis' business. *Id.* He also informed Company representatives that he had recently learned that he could make a career out of running proxy contests and that he intended to make a business of effecting similar shakedowns in the future. *Id.*

Hammann provided no legitimate justification for the proposed consulting agreement, and was thus informed by the Company that his self-described experience and credentials were of no relevance or value to Adamis. *See id.* ¶ 7. Because Hammann's proposal was deemed by the Company to be a waste of the Company's resources and not in the best interest of the Company's stockholders,

Adamis rejected Hammann's proposal for the proposed consulting agreement. *See id*.; *see also* Ex. 6, March 17, 2021 Letter to J. Hammann.

C. Hammann serves the Company with a Books-and-Records Demand.

Following the initial contact with the Company, on or around March 11, 2021, Hammann purported to purchase of 1,000 shares of Adamis Common Stock. Marguglio Decl. ¶ 8. At a meeting with the Company's representatives on March 12, 2021, Hammann confirmed that he had purchased Adamis shares for the purpose of initiating a books-and-records demand pursuant to Section 220 of the Delaware General Corporation Law, 8 *Del. C.* § 220. *Id.*

On March 18, 2021, Hammann sent correspondence to the Company "withdraw[ing] any and all offers to collaborate with the Company" and served the Company with a books-and-records demand (the "Books-and-Record Demand") seeking a broad and far-ranging collection of information and documents, including among other things, a list of the stockholders of record of the Company, information regarding historical stockholder voting results and stockholder proposals from prior annual meetings, the Company's operative strategic plan, compensation and financial information, regulatory information, and information relating to bench and clinical programs. Ex. 7, March 18, 2021 Letter from J. Hammann; *see also* Ex. C to Hammann TRO Brief, March 18, 2021 Letter.

The Company responded to Hammann's Books-and-Records Demand on March 25, 2021. Ex. 8, March 25, 2021 Letter to J. Hammann. There, the Company informed Hammann that to the extent he sought the specified records for the purpose of extorting the Company and threatening punitive legal action, such requests were demonstrably improper. *See id.* After subsequent correspondence, the Company agreed to provide Hammann with certain stockholder information on the condition that Hammann execute a confidentiality agreement. Ex. 10, April 5, 2021 Letter to J. Hammann. The Company has since produced the stockholder list materials it agreed to provide. Marguglio Decl. ¶ 9; Plf's Br. at 16 (conceding that "Requests #1-#3 and #24-#25 have been responded to and #4 was withdrawn").

D. The Board sets the date for the 2021 Annual Meeting and Hammann misses the deadline for submitting director nominations or stockholder proposals.

On April 15, 2021, the Company announced in its 2020 10-K that its Annual Meeting of stockholders will be held on July 16, 2021. Compl. ¶ 31.

As described in the 2020 10-K, the Company's Bylaws require that any stockholder seeking to nominate a slate of directors or submit business proposals at the annual stockholder meeting must provide the Company with timely, advance notice of such nominations. Specifically, Article III, Section 5(b) of the Company's Bylaws, states, in pertinent part:

> To be timely, a stockholder's notice must be received by the Secretary at the principal executive offices of the corporation not later than the close of business on the 90th day nor earlier than the close of business on the 120th day prior to the first anniversary of the date of the preceding year's annual meeting; ***provided, however***, that subject to the next sentence of this Section 5(b), ***in the event that the date of the annual meeting is changed by more than 30 days before or after such anniversary date*** (or if no annual meeting was held in the preceding year), ***notice by the stockholder to be timely must be so received not earlier than the close of business on the 120th day prior to the date of such annual meeting and not later than the later of the close of business on the later of the 90th day prior to the date of such annual meeting or the 10th day following the day on which public announcement of the date of such meeting is first made***.

Bylaws, art. III, § 5(b) (emphases added). The Advance Notice Bylaw has been in place and has remained unchanged since at least 2009. Marguglio Decl. ¶ 11; *see also* Ex. 5, Amended and Restated Bylaws of Adamis.

On April 14, 2021, the Adamis Board held a meeting, at which time the Board came to a decision regarding the timing for the upcoming annual meeting of stockholders. Marguglio Decl. ¶ 10; Ex. 4, April 14, 2021 Minutes of the Meeting of the Adamis Board. The Board noted that the prior year's annual meeting of stockholders was held on August 20, 2020, which was later in the year than the dates on which the Company had scheduled its annual meeting of stockholders in recent

years. *See id.*[2] In discussing whether the date of the annual meeting for 2021 should be advanced, the Board noted that the August 20th date for the prior year was not only later than usual for Adamis' annual meetings, but also later than what he believed was customary for other public companies. *Id.* It was thus proposed that the date of the 2021 Annual Meeting be held earlier in the 2021 year, to a date closer to the dates of annual meetings of stockholders in recent prior years. *Id.* Thereafter, the Board unanimously agreed that the 2021 Annual Meeting should be conducted on July 16, 2021. *Id.*

Because Adamis' prior annual meeting was held on August 20, 2020—a difference of more than 30 days from the upcoming meeting—the second provision of the Advance Notice Bylaw was triggered. The result of this change is that the deadline for a stockholder to submit a proposal for consideration at the 2021 Annual Meeting was April 25, 2021.

The Company clearly addressed the fact that this contingency was triggered in the 2020 10-K:

> Because the expected date of the 2021 Annual Meeting represents a change of more than 30 calendar days from the date of the anniversary of the Company's 2020 annual meeting of stockholders, the Company is informing stockholders of this change and the updated deadlines for stockholders to submit proposals intended for inclusion in

[2] For reference, for the annual meetings conducted in 2017 through 2019, the dates were as follows: June 7, 2017; July 6, 2018; and July 24, 2019.

> our proxy statement or nominations for director or proposals for consideration at the 2021 Annual Meeting in accordance with the rules and regulations of the SEC and the Company's Bylaws. . . . In addition, ***to be timely, stockholders wishing to nominate a candidate for director or to propose other business at the 2021 Annual Meeting, must ensure that proper notice is received by the Company at its offices no later than the close of business on April 25, 2021***, which is the 10th day following the day on which public announcement of the date of the 2021 Annual Meeting is first made by us.

Ex. 1, 2020 10-K, Item 9B at 67 (emphasis added). Notwithstanding the clear disclosure of the deadline, Hammann failed to submit the forms for his director nominees or stockholder proposals by April 25, 2021. Marguglio Decl. ¶ 12.

E. Hammann fails to comply with the Company's Advance Notice Bylaw and submits a Solicitation Notice.

In letters to the Company dated May 6, 2021, and May 7, 2021 (collectively, the "Solicitation Notice"), Hammann notified the Company of his intention to nominate four individuals for election to the Adamis Board, including himself, as well as to set forth certain Shareholder Proposals for consideration by Adamis' stockholders. *See* Ex. 11, May 6–7, 2021 Emails from J. Hammann, with accompanying attachments.

On May 18, 2021, the Company responded to the Hammann's Solicitation Notice, advising Hammann that, pursuant to the Company's public announcement of the 2021 Annual Meeting in the 2020 10-K, the window for stockholders to submit director nominations and business proposals closed on April 25, 2021. Ex. 12, May

18, 2021 Letter to J. Hammann. The Company informed Hammann that the Solicitation Notice was untimely and thus would not be accepted. *See id.*[3] The Company's response also provided Hammann with detailed instructions as to how he could properly and validly submit director nominations and business proposals at the Company's next Annual Meeting, should he choose to do so. *See id.*

F. Hammann files purported Definitive Additional Materials on Schedule 14A.

On June 1, 2021, the Company filed its Preliminary Proxy Statement on Schedule 14A regarding notice of the 2021 Annual Meeting on July 16, 2021. Ex. 2, Adamis Preliminary Proxy Statement. In the Preliminary Proxy Statement, the Company informed stockholders that they may receive purported solicitation materials, including proxy statements and proxy cards, from Hammann and that pursuant to the Company's Bylaws, any such solicitation materials were invalid. *See id.*

Nevertheless, on June 2, 2021, Hammann filed purported Definitive Additional Materials on Schedule 14A (the "Additional Materials"), in which he

[3] The Company also informed Hammann that not only was the Solicitation Notice untimely, but it suffered from additional material deficiencies that resulted in the Solicitation Notice failing to comply with Section 5(b) of the Bylaws. In particular, the Solicitation Notice lacked information otherwise required to be disclosed pursuant to Section 12(a) of the Exchange Act, including Item 5(b) of Schedule 14A. Ex. 12, May 18, 2021 Letter to J. Hammann.

contests "Adamis' allegation of an untimely proxy solicitation" and questions whether the Board has violated its fiduciary duties to its stockholders. Ex. 3, Definitive Additional Materials filed by J. Hammann.

G. Hammann files his Complaint and Motion for Temporary Restraining Order and Motion to Expedite Proceedings.

On June 9, 2021, Hammann filed his Complaint in this Court, and subsequently on June 10, 2021, he filed his Motion for Temporary Restraining Order and Motion to Expedite Proceedings. In his Complaint, Hammann brings six alleged claims against Adamis and the Board, specifically: Counts I and II against all Defendants, which allege that Defendants violated Rules 14a-5(f) and 14a-9(a) of the Securities Exchange Act of 1934 by disclosing the date of the 2021 Annual Meeting in the 2020 10-K (rather than on a Form 8-K) and purportedly failing to disclose that the Board had authorized the advancement of the 2021 annual meeting, thereby triggering the April 25, 2021 deadline for submitting director nominations and business proposals pursuant to the Advance Notice Bylaw; Count III against Adamis, which alleges that the Company violated 8 *Del. C.* § 220 by refusing to produce all of the documents described in Hammann's books-and-records request; and Counts IV through VI against the Individual Defendants, which allege that the Board violated its fiduciary duties of disclosure and loyalty by disclosing the date of the 2021 Annual Meeting in the 2020 10-K and purportedly failing to disclose that

the Board had authorized the advancement of the 2021 annual meeting, thereby triggering the April 25, 2021 deadline for submitting director nominations and business proposals, and by purportedly interfering with the effectiveness of the upcoming stockholder vote.

Pursuant to the claims outlined in his Complaint, Hamman requests via his Motion for Temporary Restraining Order and Motion to Expedite Proceedings that the Court issue a temporary restraining order to prevent Adamis from printing and disseminating any Proxy Statement and from convening its annual Shareholder Meeting on July 16, 2021.

ARGUMENT

A. Hammann's requested relief is in the nature of a mandatory injunction, and he has failed to satisfy even the standard for obtaining a temporary restraining order.

Through his Motion, Hammann seeks an order "to prevent Defendants from printing and disseminating" its proxy statement for its upcoming Annual Meeting and "from convening the annual Shareholder Meeting on July 16, 2021." Pl.'s Br. at 32. In other words, Hammann asks that the Company be ordered to cancel its upcoming Annual Meeting and reschedule it to a time at which Hammann will be able to submit timely nominations. That is, Hammann seeks an order that would allow him "to run [his] dissident slate of directors and thereby receive virtually all

the relief [he] seeks." *AB Value Partners, LP v. Kreisler Mfg. Corp.*, 2014 WL 7150465, at *3 (Del. Ch. Dec. 16, 2014).

"Thus, Plaintiff effectively seeks a mandatory injunction," not a mere temporary restraining order. *Id.* (so finding where plaintiff sought "a TRO enjoining [the company] from enforcing [its] advance notice requirement at the upcoming annual stockholder meeting").[4] In order to obtain a mandatory injunction, Hammann must establish that he is "entitl[ed] to judgment as a matter of law." *Id.* (citing *Alpha Builders, Inc. v. Sullivan,* 2004 WL 2694917, at *3 (Del. Ch. Nov. 5, 2004) ("This Court has utilized the higher mandatory injunction standard where, instead of seeking to preserve the status quo as interim relief, Petitioners, as a practical matter, seek the very relief that they would hope to receive in a final decision on the merits.")).

As explained below, Hammann has not come close to meeting this extraordinary burden. In fact, he has not even satisfied the burden for obtaining a temporary restraining order: "(i) the existence of a colorable claim, (ii) the

[4] *See also Saba Cap. Master Fund, Ltd. v. Blackrock Credit Allocation Income Tr.*, 2019 WL 2711281, at *4 (Del. Ch. June 27, 2019) ("Under the status quo, Defendants have asserted their Bylaws and concluded that Saba's nominees are ineligible for election. The relief Saba seeks would upend, not preserve, that status quo, by requiring Defendants to permit and count votes they otherwise would not have. 'Thus, [Saba] effectively seeks a mandatory injunction.'"), *aff'd in part, rev'd in part on other grounds*, 224 A.3d 964 (Del. 2020).

irreparable harm that will be suffered if relief is not granted, and (iii) a balancing of hardships favoring the moving party." *CBOT Hldgs., Inc. v. Chi. Bd. Options Exch., Inc.*, 2007 WL 2296356, at *3 (Del. Ch. Aug. 3, 2007). Accordingly, his request for injunctive relief should be denied.

a. Hammann has failed to establish the existence of a colorable claim.

In the Complaint, Hammann advances six claims: Count I for purported violation of Rule 14a-5(f) of the Securities Exchange Act of 1934, Compl. ¶¶ 89–95; Count II for purported violation of Rule 14a-9(a) of the Exchange Act, Compl. ¶¶ 96–105; Count III for purported violation of 8 *Del. C.* § 220, Compl. ¶¶ 106–09; Counts IV and V for purported breach of the fiduciary duty of disclosure, Compl. ¶¶ 110–21; and Count VI for purported breach of the fiduciary duty of loyalty, Compl. ¶¶ 131–39. As explained below, however, Hammann has failed to establish that any of these claims are colorable.

i. Counts I and II fail as a matter of law for lack of subject matter jurisdiction.

With Counts I and II, Hammann contends that Defendants allegedly violated Rules 14a-5(f) and 14a-9(a) of the Securities Exchange Act of 1934 by disclosing the advancement of the 2021 Annual Meeting in the Company's 2020 10-K and thereby "triggering [] the alternate timeliness calculation" as set forth in the Advance Notice Bylaw. *See* Compl. ¶¶ 89–105. However, as this Court has held, "the Board's complying with SEC rules and regulations when filing information with the

SEC . . . is governed by the federal securities laws, over which this Court does not have subject matter jurisdiction." *In re Ebix, Inc. Stockholder Litig.*, 2014 WL 3696655, at *17 (Del. Ch. July 24, 2014) (dismissing claim that the company had made false or misleading SEC filings pursuant to Court of Chancery Rule 12(h)(3)); *see also* 15 U.S.C. § 78aa ("The district courts of the United States . . . shall have exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or the rules and regulations thereunder."). Thus, "[w]hether or not [the company] violated SEC Rule 14a-5(f) [or 14a-9(a)] in the way that it announced its annual meeting, this court lacks jurisdiction to enforce that rule." *Accipiter*, 905 A.2d at 123.

As a result, Hammann cannot make any colorable claim in this Court on the basis of any alleged violations of the federal securities laws by Defendants. Rather, because this Court does not have subject matter jurisdiction over Hammann's claims in Counts I and II of the Complaint, they fail as a matter of law.[5]

[5] In any event, though it is outside the proper scope of Hammann's suit in this Court, the Counts are also not colorable under federal law. *See, e.g.*, *Accipiter,* 905 A.2d at 123 ("[T]o the extent that Rule 14a-5(f) would apply to these facts in a securities law case, that provision contains no bright line rule like the one the plaintiff favors, but rather sets out an undefined standard of disclosure by 'any means reasonably calculated' to inform stockholders."); *cf. Heinze v. Tesco Corp.*, 971 F.3d 475, 483 (5th Cir. 2020) ("The texts of Section 14(a) and SEC Rule 14a-9 do not provide a freestanding cause of action to challenge any and all material omissions from proxy

ii. Count III fails because Hammann is not entitled to additional books and records from the Company, and cannot obtain such relief via a motion for a temporary restraining order.

In Count III, Hammann seeks "an immediate inspection of all the books and records" requested in his Books-and-Records Demand and not yet produced,[6] because, according to Hammann, the "outstanding Section 220 Records Requests are necessary and essential to conducting and winning [his] proxy contest." *See* Compl. ¶¶67–71, 106–09.

However, the Company has already provided Hammann with the stockholder list materials he has requested. Marguglio Decl. ¶ 9; *see also* Pl.'s Br. at 16 (conceding that such requests have been resolved). And as the Company explained to Hammann in letters dated March 25, 2021,[7] and April 5, 2021,[8] "pleading an imminent proxy contest"—while in some cases is enough to gain access to the logistical stockholder list materials the Company has already provided—"is ***not*** enough to earn access to broad sets of books and records relating to the details of questionable transactions." *See High River Ltd. P'ship v. Occidental Petroleum Corp.*, 2019 WL 6040285, at *7 (Del. Ch. Nov. 14, 2019); *Polygon Glob.*

---

statements.").

[6] *See* discussion of Plaintiff's Books-and-Records Demand and the Company's prior responses thereto at *supra* 10–12.

[7] Ex. 8, March 25, 2021 Letter to J. Hammann.

[8] Ex. 10, April 5, 2021 Letter to J. Hammann.

Opportunities Master Fund v. W. Corp., 2006 WL 2947486, at *6 (Del. Ch. Oct. 12, 2006) ("[W]hile Polygon is free to communicate with other stockholders in compliance with the federal securities laws, that purpose does not, itself, support any inspection of West Corp.'s books and records."). Because this is Hammann's only purported purpose for obtaining documents not already produced to him,[9] Count III is not colorable. *See High River*, 2019 WL 6040285, at *7.[10]

Moreover, under Section 220, a plaintiff can at most obtain corporate ***books and records***. *See* 8 *Del. C.* § 220. In his Motion for a Temporary Restraining Order, however, Hammann does not seek books and records at all. Instead, he seeks "a TRO to prevent Defendants from printing and disseminating a misleading Proxy Statement and from convening the annual Shareholder Meeting on July 16, 2021." Pl.'s Br. at 32. Such requested relief is outside the scope of Section 220, and thus cannot be ordered for a purported violation of that statute.

In addition, any need for emergency relief here is of Hammann's own making. His Section 220 claim could have been brought ***more than two months ago***, when

[9] *See* Mot at 17 ("The outstanding Section 220 Records Requests are necessary and essential to conducting and winning the proxy contest.").

[10] Moreover, as the Company's response letters explain, in addition to Hammann's failure to provide a proper purpose for these claims, his document requests are not sufficiently tailored to even his (improper) stated purpose. Ex. 8, March 25, 2021 Letter to J. Hammann; Ex. 10, April 5, 2021 Letter to J. Hammann.

the Company rejected the demand. *See* Ex. 8, March 25, 2021 Letter to J. Hammann (rejecting demand); Ex. 10, April 5, 2021 Letter to J. Hammann (reiterating rejection). In light of this unreasonable delay, Hammann cannot claim that injunctive relief is warranted on his books-and-records claim. *See Union Pac. Corp. v. Santa Fe Pac. Corp.*, 1995 WL 54428, at *3 (Del. Ch. Jan. 30, 1995) (finding an unreasonable delay where plaintiff was in a position to request injunctive relief on January 18, 1995, possibly as early as December 23, 1994, and did not do so until January 26, 1995); *Roseton OL, LLC v. Dynegy Holdings Inc.*, 2011 WL 3275965, at *7 (Del. Ch. July 29, 2011) (a preliminary injunction "may be denied where the moving party has not proceeded as promptly as it might and, by virtue of its languor, has contributed to the emergency nature of its application for preliminary relief").

iii. Counts IV and V fail because the purportedly undisclosed information was plainly disclosed.

Next, Hammann asserts "two separate accounts alleging Defendants' [purported] breach of the duty of disclosure." Pl.'s Br. at 27. Neither is colorable.

First, Hamman argues that "Defendants fail[ed] to inform stockholders that the Board authorized an advancement of the date of the next annual meeting which triggered an alternate timeliness calculation." *Id.* This contention is demonstrably false. As discussed above, the Company's 2020 10-K provides a very explicit disclosure of these precise facts. *See supra* 3–4, 14.

The Company's proxy statement incorporates the 2020 10-K by reference and the 2020 10-K will be sent to investors with the Definitive Proxy. *See* Ex. 2, Preliminary Proxy at 33–34 ("A copy of our Annual Report on Form 10-K for the year ended December 31, 2020, is enclosed with these materials. Upon written request, we will provide each stockholder being solicited by this Proxy Statement with a copy, free of charge, of any of the documents referred to in this Proxy Statement."). Delaware law is clear that there is no disclosure violation in these circumstances: "Under no reasonable interpretation of the facts plead could the placement of the disclosure . . . in the 10-K accompanying the proxy statement rather than in the statement itself serve as the basis for a disclosure violation." *Wolf v. Assaf*, 1998 WL 326662, at *3 (Del. Ch. June 16, 1998) ("Including the description . . . in the 10-K and attaching it to the proxy statement creates a substantial likelihood that the reasonable shareholder would have been on notice to review and would have been likely to review its contents. . . . [This] precludes any possibility of prevailing on the omission element of this claim."); *see also Orman v. Cullman*, 794 A.2d 5, 35 (Del. Ch. 2002) ("General Cigar's Form 10-K and 10-K/A are incorporated into the Proxy Statement by reference and do disclose [the purportedly undisclosed fact]. . . . Therefore, [the issues] are sufficiently disclosed by the Proxy Statement and Orman's disclosure allegations with regard to director Bernbach are dismissed."). After all, the duty of disclosure "does not require . . . that all material information

that was previously disclosed be disclosed again with the specific correspondence requesting action." *Zalmanoff v. Hardy*, 2018 WL 5994762, at *6 (Del. Ch. Nov. 13, 2018) (citation omitted), *aff'd*, 211 A.3d 137 (Del. 2019).

Hammann's further suggestion that Defendants' disclosures "omit the[ir] motivations" in setting the Annual Meeting and applying the Advance Notice Bylaw, *see* Pl.'s Br. at 26, likewise fails under settled Delaware law. *See In re GGP, Inc. S'holder Litig.*, 2021 WL 2102326, at *33 (Del. Ch. May 25, 2021) ("Board explanations of its motives when making transaction-related decisions, are precisely the sort of 'tell me more' disclosures routinely characterized by Delaware courts as immaterial and unnecessary."); *In re Solera Holdings, Inc. S'holder Litig.*, 2017 WL 57839, at *12 (Del. Ch. Jan. 5, 2017) ("Asking why does not state a meritorious disclosure claim under Delaware law."); *In re Sauer–Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1131 (Del. Ch. 2011) (same); *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *14 (Del. Ch. June 30, 2014) (same); *Brinckerhoff v. Tex. E. Products Pipeline Co.*, 2008 WL 4991281, at *7 (Del. Ch. Nov. 25, 2008) (dismissing disclosure claims that complained that "[t]he proxy materials . . . failed to provide complete disclosure of [the chairman's] intentions and business plan with regard to [the company]"). Hammann's first disclosure claim is thus not colorable.[11]

[11] Moreover, in any event, on June 2, 2021, Hammann filed a Form DFAN14A (Additional definitive proxy soliciting materials filed by non-management) with

Second, Hammann argues that "Defendants fail[ed] to meaningfully disclose the advancement in the shareholder meeting date in a manner calculated to actually and timely inform shareholders." Pl.'s Br. at 28. This claim fails for the same reason. The disclosure was made in clear language in the Company's most important SEC filing of the year, its 10-K. And Delaware courts recognize that making a disclosure in a 10-K "creates a substantial likelihood that the reasonable shareholder would have been on notice to review and would have been likely to review its contents." *Wolf*, 1998 WL 326662, at *3. There can be no disclosure violation in these circumstances. *See id.*

Indeed, SEC guidance expressly ***approves*** of disclosure of an Annual Meeting date in Item 9B of a 10-K in these circumstances:

> Question 101.01
>
> **Question:** If a triggering event specified in one of the items of Form 8-K occurs within four business days before

---

respect to the Company with the SEC. *See* Ex. 3, Definitive Additional Materials filed by J. Hammann (publicly available at: https://sec.report/Document/0001816079-21-000001/). In his SEC filing, Hammann purports to "describe the machinations of the Board of Directors of Adamis" in response to his attempted proxy campaign. Plf's Br. at 15 (characterizing this SEC filing). Thus any disclosure claim Hammann may have had with respect to this information—and he did not have a colorable one, as described above—is now moot. *See Brinckerhoff*, 2008 WL 4991281, at *1 (dismissing disclosure claims because "the complaint fails to point to any material information that was not already in the total mix or cured by the publication of subsequent proxy materials").

> a registrant's filing of a periodic report, may the registrant disclose the event in its periodic report rather than a separate Form 8-K? If so, under what item of the periodic report should the event be disclosed? . . . .
>
> **Answer:** Yes, a triggering event occurring within four business days before the registrant's filing of a periodic report may be disclosed in that periodic report. . . . ***The registrant may disclose triggering events,*** other than Items 4.01 and 4.02 events, **on** ***the periodic report under*** Item 5 of Part II of Form 10-Q or ***Item 9B of Form 10-K***, as applicable . . . .[12]

Here, the triggering event for the disclosure—the Board's decision to schedule the Annual Meeting for July 16, 2021—occurred at the Company's Board meeting on April 14, 2021, one day before the 2020 10-K was filed. *See* Ex. 4, April 14, 2021 Minutes of the Meeting of the Adamis Board. As a result, the above SEC guidance expressly permits disclosure of the new date in "Item 9B of Form 10-K." And, as a survey of recent SEC filings show, public companies regularly follow this guidance and announce new annual meeting dates that trigger advance notice bylaws ***in Item 9B disclosures substantively identical to the one the Company made here***. *See, e.g.,* Appendix A (collecting five recent examples of substantively identical disclosures of annual meeting dates triggering an advance notice bylaw in Item 9B

[12] Securities and Exchange Commission, Questions and Answers of General Applicability: Exchange Act Form 8-K, at Question 101.01 (emphasis added). Available at: https://www.sec.gov/divisions/corpfin/guidance/8-kinterp.htm.

of a 10-K, each of which constituted the company's only disclosure of the new annual meeting date prior to the expiration of the advance notice deadline).

Thus, there was nothing unlawful or even unusual about the Company's disclosure of its Annual Meeting date in the 2020 10-K. Rather, the Company's announcement of its annual meeting date in Item 9B of its 2020 10-K followed express SEC guidance and common practice among public companies. Thus, no disclosure violation occurred.[13]

iv. Count VI fails because Defendants merely applied a clear and unambiguous bylaw adopted on a clear day.

Finally, in Count VI, Hammann alleges that the Defendants breached their fiduciary duties by purportedly triggering the Advance Notice Bylaw and by allegedly failing to make a sufficient public announcement of the change in the submission deadline. *See* Pl.'s Br. at 29.

As an initial matter, Hammann does not challenge the validity of the Advance Notice Bylaw itself. Nor could he. The Advance Notice Bylaw was adopted on a

[13] There is also another, legal reason Hammann's second disclosure claim fails: the duty of disclosure does not apply to disclosures—like the disclosure of the date of the Annual Meeting—that do not request stockholder action. *See Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 388–89 (Del. Ch. 1999) ("The duty of disclosure . . . applies *only* in the setting of a transaction or other corporate event that is being presented to the stockholders for action." (emphasis added)). Hammann's second disclosure claim, which does not concern the Company's proxy statement, thus fails because such a disclosure does not trigger the duty of disclosure under Delaware law.

"clear day," long before Hammann became or even conceived of becoming an Adamis stockholder. *See BlackRock Credit Allocation Income Tr. v. Saba Capital Master Fund Ltd.*, 224 A.3d 964, 980 (Del. 2020) ("[W]e are reluctant to hold that it is acceptable to simply let pass a clear and unambiguous deadline contained in an advance-notice bylaw, particularly one that had been adopted on a 'clear day.'").[14] Hammann does not anywhere contest that the Advance Notice Bylaw is itself invalid or that it is any way confusing. On the contrary, Hammann apparently concedes that the Bylaw is clear and unambiguous, but that he simply failed to comply with it.

Hammann is thus left to argue that, under the doctrine of *Schnell v. Chris-Craft*, the Company's actions in full compliance with the Bylaws should be judicially invalidated. *See* Pl.'s Br. at 29. But since deciding *Schnell*, the Delaware

[14] The fact that the Advance Notice Bylaw was enacted on a "clear day," also distinguishes this case from *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437 (Del. 1971). In *Schnell*, before the activism campaign began, the defendant-company had a bylaw that designated the date for its annual meeting. The court noted that, in such a situation, where "the by-laws of a corporation designate the date of the annual meeting of stockholders, it is to be expected that those who intend to contest the reelection of incumbent management will gear their campaign to the by-law date." *Schnell*, 285 A.2d at 439. The court thus found it inequitable when the Board amended the bylaw in response to an activism campaign to change the annual meeting date to a date in which the activists were "given little chance . . . to wage a successful proxy fight." *Id*. Here, the situation is very different because (1) Adamis stockholders have long been on notice that the Board will make a decision each year as to the Company's annual meeting date, potentially triggering the pre-existing Advance Notice Bylaw and (2) there has been no argument that Hammann could not have conducted his proxy campaign in light of the date set for the 2021 Annual Meeting had he exercised reasonable diligence to read the 2020 10-K.

Supreme Court the Delaware Supreme Court has clarified that its doctrine applies only in extraordinary circumstances, which Hammann has not—and could not—allege here:

> The invocation of equitable principles to override established precepts of Delaware corporate law must be exercised with caution and restraint. Otherwise the stability of Delaware law is imperiled. While the doctrine *of Schnell v. Chris-Craft Industries, Inc.*, is an important part of our jurisprudence, its application, or that of similar concepts, should be reserved for those instances that threaten the fabric of the law, or which by an improper manipulation of the law, would deprive a person of a clear right.

Alabama By-Products Corp. v. Neal, 588 A.2d 255, 258 n.l (Del. 1991) (citation omitted); *see also Staar Surgical Co. v. Waggoner*, 588 A.2d 1130, 1137 n.2 (Del. 1991) ("Again we emphasize that our courts must act with caution and restraint when granting equitable relief in derogation of established principles of corporate law.") (citation omitted). Hammann cannot meet this high standard here. In fact, the Court of Chancery previously rejected a nearly-identical attempt to use *Schnell* to override enforcement of an advance notice bylaw in *Accipiter Life Sciences*, in which Vice Chancellor Lamb upheld and enforced a similar advance notice bylaw provision in nearly identical circumstances to those alleged here. 905 A.2d at 115.

Like here, the stockholder in *Accipiter* claimed to have missed the public announcement of the company's annual meeting, which, under the company's

advance notice bylaw, triggered a ten-day deadline to nominate a slate of directors to the board. *Id*. After discovering that it had missed the deadline under the company's bylaws, Accipiter belatedly attempted to nominate candidates and brought an action in this Court seeking to have the election results set aside. Accipiter claimed that it could not comply with the company's advance notice bylaw because the company "chose to 'bury' the announcement in the seventh paragraph of a purportedly 34-page (when viewed on a Bloomberg screen) press release, strategically placing this crucial information in the midst of boilerplate legal text, and in any case just before vital financial results on which [the company] knew stockholders would concentrate their efforts." *Id.* at 121. Accipter argued that the Company "intentionally obscured its announcement, and that its efforts succeeded when Accipter failed to notice the ten-day window for stockholder proposals and nominations." *Id.* at 122.

In other words, the "gravamen of Accipiter's case [wa]s that the form of [the] annual meeting announcement violated Delaware law by making important corporate information more difficult to discover than was necessary." *Id.* at 127. The Court, however, held that while the disclosure could have been "considerably improved," this "does not reach the standard required for equitable relief" Under *Schnell*. *Id.* "Importantly, unlike the cases [in which such relief has been granted], all Accipiter needed to do to preserve its rights was read the company's press release

carefully and in full." *Id.* Thus, the court granted summary judgment dismissing Accipiter's claims:

> The reason this court grants the defendants' motion for summary judgment, therefore, is not that the court views [the company's] method of disclosure with approbation, but that its equitable powers can only be roused under *Schnell* where compelling circumstances suggest that the company unfairly manipulated the voting process in such a serious way as to constitute an evident or grave incursion into the fabric of the corporate law. ***To rule in the plaintiff's favor here, where the record shows that Accipiter could easily have preserved its rights with reasonable diligence, would extend*** **Schnell** ***well beyond those limits*** and would threaten to involve the court in matters better understood as regulatory in nature.

Id. (emphasis added).

The same result should be reached here. In fact, here, the facts are worse for Hammann than they were for the plaintiff in *Accipiter*. For one, the announcement of Adamis' 2021 Annual Meeting was included not in an unrelated press release, but in the Company's most important annual SEC filing—its 10-K. As any reasonable stockholder would understand, public companies are permitted by SEC regulation—and often do—announce the date of their upcoming annual meetings in their 10-K. *See* Appendix A.

Moreover, unlike the press release in Accipiter, Adamis' 2020 10-K unambiguously explained that the announcement of the 2021 meeting triggered its Advance Notice Bylaw, and the deadlines by which nominations and proposals

would be due. "[A]ll [Hammann] needed to do to," consistent with the Company's Bylaws, "was read the company's [2020 10-K]," which any person intending to launch a proxy contest to seek control of the Company would be expected to do. *Accipiter*, 905 A.2d at 127.[15] Having failed to do so, there is no basis to grant Hammann relief from the plain and unambiguous terms of the Advance Notice Bylaw. *See id.*[16]

b. Hammann will not suffer irreparable harm absent injunctive relief.

Hammann's request for injunctive relief should also be denied because he has not established that he would suffer irreparable harm absent injunctive relief.

In an attempt to satisfy his burden on this element, Hammann argues that, absent injunctive relief "an uninformed stockholder vote" would occur. Pl.'s Br. at 29. This is incorrect. As explained above, Hammann has not identified any

[15] *Cf. Wolf*, 1998 WL 326662, at *3 ("Including the description . . . in the 10-K . . . creates a substantial likelihood that the reasonable shareholder would have been on notice to review and would have been likely to review its contents.").

[16] Hammann cites *Sherwood v. Ngon*, 2011 WL 6355209 (Del. Ch. Dec. 20, 2011) in an attempt to urge a different result. But *Sherwood* involved an entirely different factual setting. There, after "initially nominating" a director to its own slate, the company "remov[ed] him only days before the Annual Meeting, and argu[ed] . . . that the Company's advance notice bylaw prevent[ed] him from nominating an opposing slate." *Id.* at *8. This maneuver, which effectively made it impossible for the plaintiff director to be elected, bears no resemblance to this case, where Hammann "could easily have preserved [his] rights with reasonable diligence." *Accipiter*, 905 A.2d at 122. The Motion should, accordingly, be denied.

disclosure deficiency that is material to the elections that will be held at the Annual Meeting. *See supra* 25–27.

Nor does the fact that Hammann's proposed slate of nominees and proposals will not be voted upon at the Annual Meeting raise the specter of any damages that would be irreparable. After all, "[s]hould the Annual Meeting go forward . . . , and should Plaintiff subsequently prove the election results were tainted, the Court can exercise its equitable power to void the results of the Annual Meeting (should such action be warranted based on a full record)." *Immunomedics*, 2017 WL 822800, at *3 (citing *Bertoglio v. Texas Intern. Co.*, 472 F. Supp. 1017, 1021 (D. Del. 1979) ("[I]t is well within the equitable power of the Court to void the results of a shareholders' vote and require both a new solicitation of proxies and a second shareholder vote.")). Hammann has failed to show that he would be damaged at all—let alone *irreparably* in that scenario.[17] Accordingly, he is not entitled to injunctive relief. Indeed, "[g]ranting an injunction here, simply because the Court ***can*** prevent the vote from taking place, would risk transforming the extraordinary relief of a preliminary injunction and temporary restraining order into something easily and regularly obtained." *Immunomedics*, 2017 WL 822800, at *3 (emphasis added).

[17] As *Immunomedics* holds, this conclusion would apply even if there were material disclosure violation, as an order to vacate the results of the meeting would cure any "tainted" results of the prior meeting. *Immunomedics*, 2017 WL 822800, at *3.

Moreover, a temporary restraining order "will issue only to prevent irreparable injury that is occurring or is threatened to occur ***before the court may hear an application for a preliminary injunction***." *McCann Surveyors, Inc. v. Evans*, 611 A.2d 1, 1–2 (Del. Ch. 1987) (emphasis added). Here, Hammann has not identified any evidence that he purports to need to obtain before the Court can hear an application for a preliminary injunction.[18] And he certainly has not shown that such an application could not be held before the Annual Meeting on July 16, 2021. The only irreparable harm Hammann argues exists would not occur until the Annual Meeting. *See* Pl.'s Br. at 29 ("Hammann . . . will suffer irreparable harm ***if the annual shareholder meeting is held prior to the resolution of Hammann's claims***." (emphasis added)). Accordingly, while Hammann has not identified any irreparable harm that would occur at any point, he has certainly not identified any "irreparable injury that is occurring or is threatened to occur before the court may hear an application for a preliminary injunction." *McCann*, 611 A.2d at 1–2. Accordingly, the Motion should be denied.

[18] In light of this failing, there is no reason to hold a preliminary injunction hearing, as the Court can and should determine on the record presented here that no preliminary injunction should issue.

c. The balance of equities favors the denial of injunctive relief.

Finally, in order to obtain injunctive relief, Hammann must also show that the balance of equities tips in his favor. *Cantor*, 724 A.2d at 587. That is, to warrant injunctive relief, a plaintiff must show that the "threatened irreparable harm outweighs the harm that may result if the restraining order is improvidently granted." *Keenwick W. Prop. Owners Ass'n v. Matheos*, 2015 WL 3609518, at *1 (Del. Ch. June 9, 2015) (denying TRO based on the balance of equities).

Here, not issuing an injunction would cause ***no*** irreparable harm to Hammann, as discussed above. *See supra* 34–35. By contrast, an order issuing the injunction he seeks would cause the Company substantial harm by disrupting the elections at the annual stockholder meetings. For example, the Company has already incurred substantial expense, with the help of outside advisors, to draft, gain approval of, and mail to stockholders its proxy statement. Ordering the Company to cancel the 2021 Annual Meeting at this point would render that expense a waste, confuse investors, and be chaotic and costly for the Company. Hammann has not offered to post a bond to protect against such waste.

Accordingly, the harm that would result to Adamis if a TRO is granted greatly outweighs the (nonexistent) "threatened irreparable harm" to Hammann of not granting such relief. *Matheos*, 2015 WL 3609518, at *1. Accordingly, the balance of the equities strongly weighs against granting the Motion.

d. The doctrine of laches bars injunctive relief because Hammann failed to act promptly to preserve his rights and avoid injuring Defendants.

These hardships of granting injunctive relief here are all the more prescient here because they could easily have been avoided had Hamman sought injunctive relief promptly rather than sit on his hands for three weeks after receiving notice that the Company would not accept his Solicitation Notice. A party seeking injunctive relief must "move as promptly as possible to prevent the passage of time from increasing the risk of injury to the opposing party and from depriving the court of an opportunity to make a more informed judgment." *Kahn v. MSB Bancorp, Inc.*, 1995 WL 1791092, at *1 (Del. Ch. Dec. 6, 1995); *see also Moor Disposal Serv., Inc. v. Kent Cty. Levy Court*, 2007 WL 2351070, at *1 (Del. Ch. Aug. 10, 2007) (noting that a motion for a TRO "may be denied where that plaintiff has not proceeded as promptly as it might, has therefore contributed to the emergency nature of the application and is guilty of laches") (internal quotation marks omitted). Indeed, Delaware law, under the doctrine of laches, bars relief where: (i) the plaintiff knew or should have known of its claim; (ii) the plaintiff unreasonably delayed in bringing suit; and (iii) the delay has prejudiced the defendant. *See Khanna v. McMinn*, 2006 WL 1388744, at *30 (Del. Ch. May 9, 2006).

Here, Hammann knew of his purported claims by May 18, 2021, when he received the Company's response to his Solicitation Notice. Nevertheless,

Hammann waited ***22 days***—until June 9—to commence this action, in which he seeks expedited relief. Hammann has not offered any reason, let alone a valid and convincing one, why the Court should excuse his failure to move with alacrity. Accordingly, the Court should deny Hammann's request for injunctive relief. *See Moor Disposal*, 2007 WL 2351070, at *1 (denying the plaintiff's request for a TRO where the plaintiff waited over two weeks to seek emergency relief and holding that "the emergency nature of plaintiff's complaint is a self-inflicted wound that does not justify the commencement of the heavy machinery of expedited injunctive proceedings"); *see also Union Pac. Corp. v. Santa Fe Pac. Corp.,* 1995 WL 54428, at *3 (Del. Ch. Jan. 30, 1995) (finding an unreasonable delay where plaintiff was in a position to request injunctive relief on January 18, 1995 and did not do so until January 26, 1995); *see McAllen v. Reybold Venture Grp.*, 2008 WL 4152680, at *1 (Del. Ch. Aug. 28, 2008) (finding that plaintiff had unreasonably delayed seeking a TRO where he waited until 24 hours before the sale even though he had 30 days' notice).

In sum, given Hammann's inexcusable failure to comply with the Bylaws, and his dilatory approach to seeking judicial relief here, denying Hammann's Motion and requiring him to wait until the next annual meeting to run his slate of trustees for election would be the equitable result here.

B. Hammann's Motion to Expedite Proceedings fails for the same reasons.

"This Court does not set matters for an expedited hearing unless there is a showing of good cause why that is necessary." *Lawrence v. Forster*, 2017 WL 3499922, at *1 (Del. Ch. Aug. 3, 2017). "To make the necessary showing, a plaintiff must articulate a sufficiently colorable claim and show a sufficient possibility of a threatened irreparable injury to justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited proceeding." *Id.*

Here, as explained above, Hammann has shown neither a sufficiently colorable claim nor a sufficient threat of irreparable injury to warrant expedited proceedings. Accordingly, the Motion to Expedite Proceedings should be denied.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully requests that this Court deny Plaintiff's Motion for Temporary Restraining Order and Motion to Expedite.

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ James M. Yoch, Jr.
Rolin P. Bissell (#4478)
James M. Yoch, Jr. (#5251)
Alberto E. Chávez (#6395)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
(302) 571-6600

Attorneys for Defendants

Words: 9,960

OF COUNSEL:

Michael C. Holmes
Robert P. Ritchie
Allison L. Fuller
VINSON & ELKINS, L.L.P.
2001 Ross Avenue
Suite 3900
Dallas, Texas 75201
(214) 220-7700

Date: June 14, 2021

APPENDIX A

Company	**Date of 10-K**	**Item 9-B Disclosure in 10-K**
Epizyme, Inc. [1]	March 13, 2018	"The Company intends to hold its annual meeting of stockholders on Friday, May 18, 2018 (the "2018 Annual Meeting"). Because the expected date of the 2018 Annual Meeting represents a change of more than 30 calendar days from the date of the anniversary of the Company's 2017 annual meeting of stockholders, the Company is providing revised deadlines for receipt of stockholder proposals and nominations with respect to the 2018 Annual Meeting. . . . Under the Company's bylaws, stockholders may also propose a director nomination or present a proposal at the 2018 Annual Meeting if advance written notice is timely given to the Secretary of the Company, at the Company's principal executive offices, in accordance with the Company's bylaws. To be timely, notice by a stockholder of any proposal or nomination must be provided not later than the close of business on or prior to March 24, 2018. The Company's bylaws specify requirements relating to the content of the notice that stockholders much provide, and any such notices should be received in writing at the following address: Epizyme, Inc., 400 Technology Square, Cambridge, Massachusetts 02139, Attention: Corporate Secretary."
Symantec, Inc.[2]	May 24, 2019	"Our Board of Directors has scheduled our 2019 Annual Meeting of Stockholders, or the 2019 Annual Meeting, to be held on September 10, 2019. The record date, time and location of the 2019 Annual Meeting will be as set forth in our proxy statement for the 2019 Annual Meeting. . . . [I]n accordance with our Bylaws, because the scheduled date of the 2019 Annual Meeting is more than 30 calendar days before the one-year anniversary of the previous year's Annual Meeting of Stockholders, if a stockholder desires to make a proposal from the floor during the 2019 Annual Meeting, or if an eligible stockholder or group of stockholders wants to submit nominees for inclusion in

[1] Full text of 10-K available at: https://www.sec.gov/Archives/edgar/data/1571498/000156459018005397/epzm-10k_20171231.htm

[2] Full text of 10-K available at: https://www.sec.gov/Archives/edgar/data/849399/000084939919000005/symc32919-10k.htm

		our proxy materials for the 2019 Annual Meeting pursuant to the proxy access provisions of our Bylaws, our Bylaws provide that the stockholder or group of stockholders must provide timely written notice to our Corporate Secretary no later than the close of business on June 3, 2019."
Anixa Biosciences Inc.[3]	January 7, 2021	"On January 7, 2021, the Board of Directors of the Company confirmed its intention to hold the Company's 2021 Annual Meeting of Shareholders (the '2021 Annual Meeting') on Friday, May 21, 2021. The time and location of the 2021 Annual Meeting, and the matters to be considered, will be as set forth in the Company's definitive proxy statement for the 2021 Annual Meeting to be filed in due course with the SEC. Since the date of the 2021 Annual Meeting has been changed by more than 30 days from the anniversary date of the Company's last annual meeting of shareholders, the Company is informing shareholders of this change and the updated deadline for shareholders to submit nominations for director or proposals for consideration at the 2021 Annual Meeting in accordance with the rules and regulations of the SEC and the Company's By-laws. Accordingly, shareholders wishing to nominate a candidate for director or to propose other business at the 2021 Annual Meeting must ensure proper notice is received by the Company at its offices no later than March 17, 2021. The notice must include all of the information required by the Company's By-laws."
Enzon Pharmaceuticals, Inc.[4]	February 23, 2021	"On February 22, 2021, the Board of Directors of the Company determined that the 2021 annual meeting of stockholders (the '2021 Annual Meeting') will be held on June 2, 2021. . . . Stockholders wishing to submit proposals for the 2021 Annual Meeting outside the process of Rule 14a-8 or nominate individuals to the Company's Board of Directors must comply with the advance notice and other provisions of Article II, Section 2.15 of the Company's Second Amended and Restated Bylaws. Since the date of the 2021 Annual Meeting has moved more than 25 days from the anniversary date of the 2020 Annual Meeting, to be timely, a notice by the stockholder must be delivered to the

[3] Full text of 10-K available at: https://www.sec.gov/ix?doc=/Archives/edgar/data/0000715446/000149315221000456/form10-k.htm

[4] Full text of 10-K available at: https://www.sec.gov/ix?doc=/Archives/edgar/data/727510/000110465921026712/tm214060d1_10k.htm

		Corporate Secretary of the Company at the address set forth below not later than Friday, March 5, 2021."
Ocugen, Inc.[5]	March 19, 2021	"Our Board of Directors has established Friday, June 11, 2021 as the date of our 2021 Annual Meeting of Stockholders (the '2021 Annual Meeting') . . . . According to our bylaws, a stockholder must provide notice to the our corporate secretary of proposals intended to be presented at, but not included in the proxy materials for, the 2021 Annual Meeting, including director nominations for election to our Board of Directors, in a timely manner. Under our bylaws, in order to be timely, in the event that the date of the annual meeting is advanced more than 30 days prior to or delayed more than 30 days after the anniversary of the preceding year's annual meeting, notice by the stockholder must be delivered to us by the close of business on the later of (x) the 90th day prior to such annual meeting or (y) the 10th day following the day on which public announcement of the date of such meeting is first made. As such, the new deadline for submission of proposals to be included in the proxy materials or otherwise to be considered at the 2021 Annual Meeting is the close of business on Monday, March 29, 2021, which we consider a reasonable time before we will begin printing and mailing proxy materials and is the 10th day following the date of filing of this Annual Report."

[5] Full text of 10-K available at: https://www.sec.gov/ix?doc=/Archives/edgar/data/1372299/000162828021005124/ocgn-20201231.htm

CERTIFICATE OF SERVICE

I, Alberto E. Chávez, Esquire, do hereby certify that on June 14, 2021, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below.

By File & ServeXpress and E-mail

Jerald Hammann
1566 Sumter Avenue N.
Minneapolis, MN 55427
jerrympls@gmail.com

/s/ Alberto E. Chávez
Alberto E. Chávez (No. 6395)