

1 APPEARANCES:

2 JERALD HAMMANN, pro se
3 for Plaintiff

4 JAMES M. YOCH, JR., ESQ.
5 Young Conaway Stargatt & Taylor, LLP
6 -and-

7 ROBERT P. RITCHIE, ESQ.
8 of the Texas Bar
9 Vinson & Elkins LLP
10 for Defendants

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1 THE COURT: Good morning. Vice
2 Chancellor joining. Can we have a roll call, starting
3 with the plaintiff?

4 MR. HAMMANN: Your Honor, this is
5 Jerald Hammann for the plaintiff.

6 THE COURT: Good morning.
7 And for the defendants?

8 MR. YOCH: Good morning, Your Honor.
9 James Yoch from Young Conaway. With me on the line is
10 Robert Ritchie from Vinson & Elkins on behalf of
11 defendants.

12 THE COURT: Good morning. Thank you
13 for getting on the line with me this morning. I'm
14 going to give you my ruling on the pending motions for
15 a temporary restraining order and to expedite in this
16 matter.

17 On June 9, 2021, plaintiff Jerald
18 Hammann filed a complaint in this Court alleging
19 several claims against defendant Adamis
20 Pharmaceuticals Corporation and members of its board
21 of directors. The complaint largely focuses on the
22 Company's selection of July 16, 2021, as the date for
23 the Company's 2021 annual meeting of stockholders,
24 which triggered the Company's advance notice bylaw,

1 and the Company's subsequent rejection of
2 Mr. Hammann's director nominations and stockholder
3 proposals as being untimely.

4 The salient facts are as follows: The
5 Company's bylaws require, among other things, that any
6 stockholder proposals or director nominations must be
7 made by a record holder. The bylaws also have an
8 advance notice provision which generally provides in
9 pertinent part that in the event the date of the
10 annual meeting of stockholders is changed by more than
11 30 days before the date on which it was held in the
12 prior year, to be timely, any stockholder proposals
13 must be received not later than the 90th day prior to
14 the date of such annual meeting or the 10th day
15 following the day on which public announcement of the
16 date of such meeting is first made.

17 On or about February 2021, plaintiff
18 contacted the Company about enacting changes within
19 the Company that he believed would benefit
20 stockholders. At that time, the plaintiff was not a
21 stockholder of the Company. The Company declined the
22 plaintiff's offer. On March of 2021, the plaintiff
23 purchased stock of the Company, and on March 18, 2021,
24 sent a demand to inspect books and records of the

1 Company.

2 The demand specifically stated: "My
3 investigation is directed ultimately to the waging of
4 a proxy contest, to the formulation of a stockholder
5 proposal or proposals for consideration at the next
6 annual meeting, and/or to the preparation of a lawsuit
7 against corporate leadership."

8 The Company's version of events is a
9 bit different and, if believed, strongly suggests that
10 the plaintiff engaged in what might be called an
11 old-fashioned shakedown.

12 The Company contends that plaintiff
13 sought a consulting agreement, accompanied by a large
14 fee, and if the Company refused, the plaintiff would
15 buy shares and distract the Company with a costly
16 proxy contest. According to the defendants, this
17 action is plaintiff's followthrough on his threat.

18 The Company responded to the books and
19 records demand on March 25, 2021. Thereafter, the
20 Company provided some documents to the plaintiff,
21 including some stockholder list materials.

22 On April 15, 2021, the Company filed
23 with the SEC the Company's annual report on Form 10-K
24 for the year ending December 31, 2020. In the 10-K,

1 Adamis disclosed that the board had determined that
2 the 2021 annual meeting of stockholders would be held
3 on July 16, 2021.

4 The July 16, 2021, meeting date was
5 more than 30 days prior to the 2020 annual meeting
6 date, thus triggering the Company's advance notice
7 bylaw. Under the Company's advance notice bylaw,
8 stockholder proposals and director nominations would
9 be due no later than 10 days after the April 15, 2021,
10 announcement of the meeting date. The 10-K expressly
11 stated that any stockholder proposals or director
12 nominations must be received at the Company's offices
13 by April 25, 2021.

14 In letters to the Company dated May 6
15 and 7, plaintiff notified the Company of his intention
16 to nominate four individuals, including himself, for
17 election to the Adamis board. Plaintiff submitted a
18 solicitation notice, stockholder proposals, and
19 completed director questionnaires for his nominees.

20 On May 18, 2021, the Company advised
21 plaintiff that his solicitation notice, stockholder
22 proposals, and director nominations were untimely and
23 would not be accepted.

24 The Company filed with the SEC a

1 preliminary proxy statement for the July 16, 2021,
2 annual meeting on June 1, 2021. Plaintiff filed
3 definitive additional materials on Schedule 14A on
4 June 2nd, 2021. He filed his complaint in this action
5 on June 9, 2021, and a motion for a temporary
6 restraining order and for expedited proceedings on
7 June 11.

8 The defendants oppose both motions. I
9 heard argument yesterday, June 16th.

10 Plaintiff's motion for a temporary
11 restraining order seeks an order as to three things:
12 One, enjoining the Company from printing its proxy
13 statement; two, enjoining the Company from
14 disseminating the proxy statement; and, three,
15 enjoining the Company from convening the annual
16 meeting on July 16.

17 A temporary restraining order is an
18 extraordinary remedy. It is a specialized remedy of
19 short duration designed primarily to prevent imminent
20 irreparable injury.

21 A party seeking a TRO must establish a
22 colorable claim, a threat of imminent irreparable
23 harm, and a balancing of hardships favoring the moving
24 party. This Court has routinely refrained from

1 granting interim injunctive relief that amounts to
2 final relief.

3 Similarly, to obtain expedited
4 proceedings, the plaintiff must establish a
5 sufficiently colorable claim and a sufficient
6 possibility of threatened irreparable injury that
7 would justify the extra costs of an expedited
8 injunction proceeding.

9 I now turn to the claims in the
10 complaint. Counts I and II are similar. Count I
11 alleges violation of Rule 14a-5(f) of the Securities
12 Exchange Act of 1934. Count II alleges violation of
13 Rule 14a-9(a) of the Securities Exchange Act.

14 This Court does not have jurisdiction
15 to consider these claims. Under 15 USC Section 78aa,
16 "The district courts of the United States ... shall
17 have exclusive jurisdiction of violations of [the
18 Exchange Act] or the rules and regulations thereunder,
19 and of all suits in equity and actions at law brought
20 to enforce any liability or duty created by [the
21 Exchange Act] or the rules and regulations
22 thereunder."

23 Vice Chancellor Lamb also acknowledged
24 in the *Accipiter* case that this Court lacks

1 jurisdiction to hear claims under the Exchange Act.
2 Therefore, Counts I and II are not colorable.

3 Count III alleges violation of Section
4 220 of the Delaware General Corporation Law. The
5 plaintiff's TRO brief does not seek relief in the form
6 of immediate production of books and records. Books
7 and records actions are summary proceedings in this
8 Court. Because they are summary proceedings, the
9 general rule is that they should be litigated in
10 distinct proceedings. That's from *MHS Capital LLC v.*
11 *Goggin*, 2018 WL 2149718 at *15 from this Court on
12 May 20, 2018, and *Travel Centers of America v. Brog*,
13 2008 WL 868107 at *1 from this Court on March 31,
14 2008.

15 If the plaintiff wishes to pursue a
16 books and records action, he may do so in a separate
17 proceeding. For purposes of the pending motions
18 today, the motion to expedite the books and records
19 claim asserted in this complaint is denied.

20 Count VI alleges claims for breach of
21 the duty of disclosure against the individual
22 defendants based on representations and omissions in
23 the proxy statement. The gravamen of the claim is
24 that the proxy's disclosure that the plaintiff's

1 director nominations were untimely, without further
2 disclosure that the board authorized an advancement of
3 the annual meeting date, misled stockholders that
4 plaintiff and his slate were inept, and impugned the
5 plaintiff's reputation.

6 The plaintiff also claims that the
7 failure to disclose the board's motivation in setting
8 a meeting date that triggered the advance notice bylaw
9 is a material omission that bears on the character of
10 the Company's slate of directors.

11 I do not find these claims to be
12 colorable. The proxy disclosure merely states that
13 plaintiff's nominations and stockholder proposals were
14 untimely. They do not say anything along the lines
15 that plaintiff is inept, and even if it did, that is
16 not, at least in my view, a claim for a breach of the
17 duty of disclosure that would support enjoining the
18 meeting.

19 The plaintiff also alleges the proxy
20 does not disclose the motivation for setting the
21 annual meeting which triggered the advance notice
22 bylaw, which plaintiff alleges would allow
23 stockholders to assess the integrity of the current
24 board.

1 I do not find this claim to be
2 colorable. This is the type of "tell me more" that
3 does not require additional disclosure. Delaware law
4 does not require that a fiduciary disclose its
5 underlying reasons for acting. That's from the *Sauer*
6 *Danfoss* case.

7 Furthermore, the fact that the board
8 set the annual meeting date that triggered the advance
9 notice provision did not prevent the plaintiff from
10 making stockholder proposals and director nominations.
11 The plaintiff could have read the disclosure in the
12 10-K and submitted his materials in compliance with
13 the bylaw if he had become a record holder.

14 To the extent that the plaintiff seeks
15 disclosure that the directors breached their fiduciary
16 duties, this Court has clearly held that directors are
17 not required to disclose the plaintiff's
18 characterization of the facts or engage in "self --
19 flagellation."

20 The plaintiff's reliance on *Sherwood*
21 *v. Ngon* for the proposition that the board's motives
22 must be disclosed is misplaced. In that case, the
23 proxy statement gave reasons for the Company's removal
24 of a director from its slate after having previously

1 nominated him. The proxy statement gave several
2 reasons for the removal, but the removed director
3 argued that the real reason was a self-interested one
4 and that the plaintiff had stated a colorable claim
5 that the proxy may be materially misleading in
6 describing its motivations for its decision.

7 Here, however, there is no
8 representation in the proxy about the defendants'
9 motivations for selecting July 16, 2021, as the annual
10 meeting date, nor is there any such representation in
11 the 10-K that is being mailed with the proxy
12 statement. Therefore, this is not like *Sherwood* where
13 the proxy described the board's motivations and the
14 plaintiff alleged the disclosure was misleading and
15 incomplete.

16 Count V is a claim for a breach of the
17 fiduciary duty of disclosure for burying the
18 announcement of the 2021 annual meeting date in the
19 Company's SEC Form 10-K under a nondescript heading,
20 which the plaintiff asserts prevented him from
21 presenting and the stockholders from voting on the
22 plaintiff's stockholder proposals and director
23 nominees.

24 This is not a claim for breach of

1 fiduciary duty of disclosure with respect to the proxy
2 statement and the annual meeting. This claim, as I
3 understand it, focuses on the way in which the annual
4 meeting date was disclosed in the 10-K. It is not a
5 claim alleging false or misleading disclosure in the
6 proxy statement in connection with the request for
7 stockholder action, and it is not a colorable
8 disclosure claim with respect to the proxy statement.
9 Therefore, it is not colorable.

10 Count VI is a claim for breach of
11 fiduciary duty. Fairly read, this claim alleges the
12 Board breached its fiduciary duties by taking action
13 that was intended to prevent the plaintiff from
14 running a proxy contest. This falls within the
15 *Schnell v. Chris-Craft* line of cases which holds that
16 inequitable conduct does not become permissible merely
17 because it is legally possible.

18 Based on the facts alleged in the
19 complaint and the low threshold of colorability, I
20 conclude at this very preliminary stage that the
21 plaintiff has alleged a *Schnell* claim based on the
22 board's selecting an annual meeting date that
23 triggered the advance notice bylaw after the plaintiff
24 had made the Company aware in his March 18, 2021,

1 books and records demand that his investigation was
2 "directed ultimately to the waging of a proxy contest"
3 and "formulation of a stockholder proposal or
4 proposals for consideration at the next annual
5 meeting."

6 Those facts distinguish this case from
7 the *Accipiter* case, which both parties cited in their
8 papers and addressed at argument yesterday. In
9 *Accipiter*, the company not aware of any threatened
10 proxy contest at the time it scheduled the annual
11 meeting in a way that triggered the advance notice
12 bylaw. In addition, *Accipiter* was decided on summary
13 judgment following discovery. The applicable standard
14 on the motions before me today is colorability, a much
15 lower standard than what is needed to prevail on
16 summary judgment.

17 I now turn to irreparable harm.

18 To obtain a TRO, a party must allege
19 an imminent threat of irreparable harm. The plaintiff
20 seeks relief in the form of an order preventing the
21 Company from printing and disseminating the annual
22 meeting proxy statement and from holding the annual
23 meeting on July 16, 2021.

24 First, the requested relief in the

1 form of preventing the printing and dissemination of a
2 proxy statement may very well be moot because the
3 definitive proxy statement has already been filed and,
4 according to counsel for defendants, mailing is
5 occurring this week. Second, preventing the
6 dissemination of the Company's proxy statement would
7 effectively provide the plaintiff with final relief in
8 delaying the annual meeting.

9 In my view, a TRO is not the
10 appropriate vehicle here. Perhaps a preliminary
11 injunction hearing could be scheduled in advance of
12 the meeting to allow for discovery and an expedited
13 hearing. But after careful consideration of the
14 issues, there are several reasons for denial of the
15 motion.

16 The first reason concerns the
17 plaintiff's unreasonable delay in seeking interim
18 relief. The plaintiff was on notice of his *Schnell*
19 claim no later than May 18, 2021, which is when he
20 received the Company's response to his solicitation
21 notice. He waited to file his complaint on June 9,
22 2021, more than three weeks later, and he did not file
23 a brief in support of a motion for a temporary
24 restraining order and expedited proceedings until

1 early in the morning of June 11.

2 The meeting is scheduled for July 16.
3 The plaintiff's delay wasted over one-third of the
4 time available to prepare, hear, and adjudicate an
5 injunction motion before the meeting. I am not
6 denying the motions solely on the basis of
7 unreasonable delay, but it is a factor in my decision.

8 Second, it is not apparent to me that
9 the plaintiff is unable to solicit proxies or run a
10 proxy contest. In his complaint, the plaintiff
11 alleges that he spoke with the SEC on June 2nd and
12 3rd, 2021, and on June 3rd the plaintiff says the SEC
13 told him that "The SEC staff determined their
14 preference that Hammann demonstrate that he was
15 seriously prepared to use all legal avenues to have a
16 proxy contest for them to approve for dissemination to
17 stockholders his proxy statement."

18 Third, in his TRO motion papers, the
19 plaintiff is not seeking an order compelling the
20 Company to waive the advance notice bylaw.

21 Fourth, under the circumstances here,
22 an adequate remedy can be fashioned after trial if the
23 plaintiff ultimately prevails. The Court could order
24 a new meeting for the election of directors or could

1 order the Company to allow plaintiff to run an
2 opposing slate at next year's annual meeting.

3 That type of remedy was endorsed in
4 *Oliver Press*. That case involved a challenge to
5 triggering of an advance notice bylaw in a company
6 with a classified board. The Court denied a motion to
7 expedite both as to a trial and a preliminary
8 injunction hearing prior to the meeting. The Court
9 observed that it could fashion an equitable remedy
10 after the fact by requiring after trial that two
11 classes of directors stand for election at the next
12 annual meeting.

13 Similarly, in *Millenco v. meVC Draper*
14 from 2002, the Court ordered that a class of directors
15 elected to three-year terms should stand for
16 reelection at the next annual meeting due to a false
17 and misleading proxy statement. More recently, Chief
18 Judge Stark from our federal district court in
19 Delaware concluded in *Immunomedics v. Venbio Select*
20 that the plaintiff had not met its burden of
21 irreparable harm sufficient to enjoin an annual
22 meeting, noting that the Court could exercise its
23 equitable power to void the results of the annual
24 meeting should it be warranted based on a full record.

1 Finally, there is *Accipiter*, which is
2 a case that was ultimately decided on summary judgment
3 after the annual meeting. In that case, the Court had
4 previously denied a preliminary injunction motion
5 seeking to enjoin the annual meeting over a challenge
6 to the triggering of an advance notice bylaw.

7 In denying the motion for a
8 preliminary injunction, the Court reasoned that the
9 plaintiff had not established irreparable harm because
10 if the Court were to agree with the plaintiff after an
11 expedited trial, the Court could order a new election
12 or order two classes of directors to stand for
13 election the following year.

14 At argument, the plaintiff here
15 speculated that if he must wait until after a
16 post-meeting trial for a new election, there is a risk
17 that the Company could issue additional shares to
18 management-friendly stockholders. That risk is
19 entirely speculative, and if it were to occur, the
20 plaintiff could raise it at an appropriate time.

21 Though not necessary for my ruling,
22 the balance of harms tips in favor the Company, at
23 least at this stage. Granting a TRO as requested
24 would effectively grant final relief because the

1 Company would not have been able to hold a meeting on
2 July 16 if it prevails in defeating the plaintiff's
3 preliminary injunction motion.

4 The Company has expended resources on
5 meeting preparation, and enjoining the meeting would
6 not provide any immediate benefit to the plaintiff.
7 The plaintiff would still have to await the results of
8 a vote to seat its directors until a new meeting is
9 held.

10 In contrast, granting relief after
11 trial saves both on election-related expenses and
12 judicial resources if the defendants prevail. If not,
13 then a second election can be held.

14 For these reasons, I am denying the
15 motion for a temporary restraining order. On the
16 other hand, I am granting the motion to expedite in
17 part. The parties should confer on a schedule for a
18 prompt trial on the *Schnell* claim, perhaps with an eye
19 to a September trial date.

20 Although I am denying the motion for a
21 TRO, I am also ordering that the Company preserve any
22 ballots, proxies, or voting records for the July 16
23 annual meeting, and that includes any ballots,
24 proxies, or voting records pertaining to votes in

1 favor of the plaintiff's nominees or the plaintiff's
2 stockholder proposals.

3 Mr. Hammann, Counsel, that is my
4 ruling on the pending motions. I am not asking for a
5 reargument, but are there any questions as to my
6 ruling?

7 And let me first turn to counsel for
8 the defendants.

9 MR. YOCH: No, Your Honor. Thank you.

10 THE COURT: Mr. Hammann?

11 MR. HAMMANN: Just one quick question.
12 When I communicate with the Securities Exchange
13 Commission, is there ever going to be -- other than my
14 personal notes here of what I took down relating to
15 this oral ruling, is there ever going to be any sort
16 of documentation that I can send them a copy of?

17 THE COURT: There is a transcript that
18 was made of this bench ruling, and it will be
19 available on the docket in relatively short order. I
20 don't know whether it will be today. But there will
21 be a transcript that will be placed on the docket.

22 MR. HAMMANN: All right.

23 No further questions. Thank you.

24 THE COURT: Thank you, Mr. Hammann.

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Thank you, Counsel.

That is my ruling, and the Court stands in recess. Have a good day.

MR. YOCH: Thank you, Your Honor.

MR. HAMMANN: Thank you, Your Honor.

(Proceedings concluded at 11:50 a.m.)

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CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery for the State of Delaware, Registered Diplomate Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 21 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except as revised by the Vice Chancellor.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington, this 17th day of June, 2021.

/s/ Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter