IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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| Jerald Hammann,<br><br>Plaintiff,<br>v.<br><br>Adamis Pharmaceuticals Corporation,<br>a Delaware Corporation, et. al.<br><br>Defendant. | C.A. No. 2021-0506-PAF |

**PLAINTIFF'S REPLY BRIEF IN SUPPORT OF**
**<u>HIS MOTION FOR A TEMPORARY RESTRAINING ORDER</u>**

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Plaintiff Jerald Hammann ("Hammann") herein replies to Defendants Adamis Pharmaceuticals Corporation ("Adamis" or the "Company"), Dennis J. Carlo ("Carlo"), Richard C. Williams ("Williams"), Howard C. Birndorf ("Birndorf"), Roshawn A. Blunt ("Blunt"), and David J. Marguglio's ("Marguglio") (collectively, "Defendants") June 15, 2021, Response to his motions for a Temporary Restraining Order and to Expedite proceedings.

## PRELIMINARY STATEMENT

It is difficult to relate the complex range of emotions I felt while reading the Defendants response. The response reminded me of a recent press release the Company made in the which it felt it important to share with the public the FDA's "acknowledging that the country is in an opioid crisis." There, the CEO was also quoted stating: "the availability of our higher dose naloxone product could potentially save thousands of lives."[1] The Company already received two Complete Response Letters from the SEC relating to the product, which is SEC-speak for "either try again or quit." In this shareholder communication, the CEO appears to be indirectly blaming the FDA for these past delays. The response also reminded

[1] See April 12, 2021, press release re: Zimhi at https://www.globenewswire.com/en/news-release/2021/04/12/2208084/32832/en/Adamis-Pharmaceuticals-Provides-an-Update-on-ZIMHI.html

me of a Civil Contempt Order affirmed against the Company.[2] There, the Company complained that it could not have known that the Consent Preliminary Injunction it entered into related to the conduct of both of two employees it has hired away from a competitor, instead of just one of the two employees. Defendants appear to regularly cast themselves as the beleaguered heroes in their own narrative. Everyone who disagrees with them is the bad guy. To some extent, many of us do this same thing. The difference lies in how many misstatements and omissions each might make to conform to the narrative.

Take for instance the Defendants' claim that it held a telephonic Board meeting for approximately 10 minutes on April 14, 2021, on the day before the Form 10-K filing, in the telephonic presence of an attorney,[3] which the Chairman of the Board convened to discuss the only item on the agenda, a pre-formulated Board resolution to advance the shareholder meeting date for the first time in the most recent 11 years and to also trigger the alternate proxy notice calculation for the first time in the most recent 11 years by advancing it more than 30 days. At least according to the minutes, no mention was made of the March 18, 2021, Purpose Declaration contained in Hammann's Section 220 Records Request

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[2] *Nephron Pharmaceuticals Corp. et al. v. Hulsey et al.*, case number 6:18-cv-01573, in the U.S. District Court for the Middle District of Florida, March 1, 2021 Order (Defendants in civil contempt for violating the Consent Preliminary Injunction).

[3] C. Kevin Kelso is an attorney with Weintraub Tobin, a Sacramento, CA law firm.

disclosing the planned proxy contest. HammannDecl Ex. 2. If Hammann wanted to depose any member of the Board regarding what specifically was discussed in this meeting, he suspects they might invoke attorney-client privilege. And, absent these depositions, the only given reason in the minutes for this significant decision was to behave in a manner "more customary for public companies." YochDecl Ex. 4; MarguglioDecl ¶10. Even though that particular objective could have been more easily achieved with a 30-day move up of the meeting rather than the 35 days included in the pre-formulated Board resolution. This, apparently, is the level of misstatement and omission necessary – the level of the suspension of disbelief required – for Defendants to appear as the beleaguered heroes in this narrative.

And it doesn't stop there. Defendants' paint a disparaging picture of Hammann as well. Taking one example, Mr. Marguglio claims that "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—CytRx Corp." MarguglioDecl ¶6. While we can't validate Mr. Marguglio's recollection of what Hammann stated, or what Hammann actually stated, we can validate the actual facts. As disclosed by CytRx Corporation:

> "On July 13, 2020, attorneys of Vinson & Elkins held a telephone call with Mr. Hammann to explore a potential settlement between him and the Company. On July 14, 2020, Mr. Hammann

> emailed attorneys of Vinson & Elkins his proposals for settlement. The proposals were designated as confidential between the parties."[4]

More than a month after Vinson & Elkins made this initial overture, the parties did reach a cooperation agreement and, as Hammann already disclosed, that cooperation agreement did result in substantial benefits for shareholders.[5] In Mr. Marguglio's narrative as the beleaguered hero, however, wherein management is the stalwart protector of the Company's shareholders, Hammann's efforts to help pull Adamis out of its value-destructive groove are nefarious and to be looked down upon by the Court and the shareholders. This representation therefore includes some material mischaracterization.

But how about any outright false statements amongst Mr. Marguglio's representations? Well, here's one, spread over MarguglioDecl ¶5-¶8:

> "At a meeting I attended with Hammann and another representative of Adamis on March 9, 2021 . . . [A]ccordingly, Adamis rejected Hammann's proposal for the proposed consulting agreement. On March 12, 2021, at a meeting with the Company's representatives, Hammann informed the Company that he had purchased 1,000 shares of Adamis Common Stock on March 11, 2021, and confirmed that he had done so for the express purpose of initiating a books-and-records demand pursuant to Section 220 of the Delaware General Corporation Law, 8 Del. C. § 220, in apparent retaliation for the fact that the Company had not agreed to the Hammann's demand to pay him fees in exchange for a consulting agreement."

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4 https://www.sec.gov/Archives/edgar/data/799698/000149315220014999/defc14a.htm at 9.

5 https://noticepapers.com/cytrx.

If, as Mr. Marguglio represents, Adamis "rejected Hammann's proposal for the proposed consulting agreement on March 9, 2021," what was the purpose of the meeting on March 12, 2021? If one reviews the CytRx chronology, for example, the only time a telephone call is used is for settlement discussions. Otherwise, everything is emails and letters. See fn. 4. And it seems reasonably likely by this time that the Company was being advised by Vinson & Elkins, the same attorneys in the CytRx chronology. If one takes a rational approach to evaluating Mr. Marguglio's representations described immediately above, while this approach does not preclude Mr. Marguglio's representations from being truthful, it does elicit a conclusion that it is highly likely that they are not.

The false narrative that Defendants are the beleaguered heroes serving to protect the shareholders and that Hammann is some villain seeking to harm them has permeated much of the representations regarding Hammann made by the Company. See e.g., YochDecl Ex. 9 (wherein Hammann dispels this narrative). Hammann requests that the Court recognize that a narrative is being created by the Defendants and that the representations made in the April 14, 2021 Board of Director Meeting Minutes and in Mr. Marguglio's Declaration are designed more to focus on supporting this narrative than they are on providing an unbiased account of the facts. Indeed, it will be shown that many of the additional "facts" contained in the Defendants' Response Brief suffer from this same deficiency.

## ARGUMENT

### I. Plaintiff Seeks a TRO, Not a Mandatory Injunction.

Defendants' Response at 18-19 begins its first argument against Hammann's motion for a TRO by first placing Hammann's request "in other words," then conflating these "other words" into a "that is," and then transforming the "that is" into a "thus." Defendant's argument is a mess by the "other words" and falls apart at the "that is." Hammann's director nominations and shareholder proposals have already been submitted. Defendants have already acknowledged receiving them. Therefore, Hammann is not seeking "a time at which Hammann will be able to submit timely nominations." But for the conduct alleged by Hammann in his Complaint, there is no dispute between the parties that Hammann's Solicitation Notice is otherwise timely. It is only Defendants who claim that Hammann's Solicitation Notice was untimely.

It is highly unlikely that Hammann will receive "virtually all the relief he seeks" in being granted the TRO. In seeking his TRO, Hammann has not asked the Court to declare that his Solicitation Notice is timely. He has only asked the court to find that his claims are colorable. If the Court ultimately determines this issue as a result of the TRO hearing, it will not have been because Hammann specifically requested it in his motion. Therefore, this argument fails.

## II. Plaintiff Asserts Colorable Claims that Defendants have Violated the Law and Their Fiduciary Duties.

### A. Plaintiff Alleges a Colorable Claim for the Violation of Securities Exchange Act Rule 14a-5(f) and 14a-9(a).

Defendants' Response at 20-21 begins its non-colorable claims arguments by attacking Counts I and II as not subject to the jurisdiction of this court. However, the test for granting or denying a TRO is not whether a party has colorable claims in the forum where they are seeking the TRO, but instead whether the party has colorable claims in whatever appropriate forum the claims may be brought. See e.g., *Sherwood v. Ngon*, 2011 WL 6355209, at *6 (Del. Ch.) (no mention of limiting colorable analysis strictly to the forum of the TRO request).

Defendants' Response at 21, fn. 5, citing *Accipiter Life Sciences Fund, LP v. Helfer*, 905 A.2d 115, 127 (Del. Ch. 2006), next argues that these claims are also not colorable under federal law. However, there are numerous material factual differences between *Accipiter* and the present case.

First, in *Accipiter*, the shareholder meeting date notice was contained at the bottom of the first page of a press release. Id. at 119. Here, the shareholder meeting date notice was contained at page 67 of Adamis' Form 10-K under a nondescript heading normally reserved for events occurring at a completely different time period from the event being announced. Thus, the notice was buried to a substantially greater degree. Indeed, notably, YochDecl Ex. 1, containing excerpts from Adamis' Form 10-K, is the only Exhibit for which Defendants provided an

excerpt instead of the entire document, demonstrating that Defendants themselves were afraid of impairing  their argument to the court on this issue were they to include the entire 10-K.

Second, in *Accipiter*, it was determined that, had the plaintiff personnel seen the notice, the plaintiff could have complied with the deadline. Here that is not the case. Adamis' Bylaws are loaded with land mines for the unwary shareholder, restricting the submission of Solicitation Notices only to a "stockholder of the corporation who was a stockholder of record at the time of giving the stockholder's notice." YochDecl Ex. 5, Sect. 5(a). Like most publicly-traded corporations, the stockholders of record are persons or entities who obtained their shares as a result of some direct relationship with the Company. For Adamis, it is a miniscule sub-set, both in number and in voting power, of the persons entitled to vote, comprising only 0.003% of the total shares outstanding. Moreover these shares cannot be bought directly from Adamis' transfer agent. Hammann tried. HammannDecl ¶6. To comply with Adamis' Bylaws, a beneficial shareholder must first convert some of their shares into "shareholder of record" status to submit any Solicitation Notice at all. This process is incredibly arduous. Id. Hammann began the process on April 20, 2021. He received notice that his transfer of 100 common shares was complete on May 5, 2021. In between and on average, he called either E*Trade (his broker) or AST (Adamis' stock transfer agent) more than once a day, including occasionally on weekends. Many person-hours went into accelerating Hammann's

transfer request, likely more than 50 hours. Therefore, unlike the Plaintiffs in *Accipiter*, Hammann could not have complied with the deadline even had he known about it. Nor could any other beneficial shareholder within a 10-day time period.

Third, in *Accipiter*, "defendants emphasize that no one at LifePoint had so much as heard of Accipiter, or knew of any potential proxy contest, before Accipiter's April announcement." Defendants here cannot make that claim as their attorney proxy contest consultants were actively responding to Hammann's Records Requests that contained a sworn Purpose Declaration disclosing his sworn and express intent to engage in a Proxy Contest. HammannDecl Ex. C; YochDecl Ex. 8-10. Therefore, here, the court is confronted with a direct intent to harm Hammann's shareholder rights, not merely a nebulous intent to harm shareholder rights in general.

Fourth, in *Accipiter*, plaintiff's request for preliminary injunctive relief was denied with the court "noting the availability of speedy equitable relief." Ultimately, however, this basis for the initial denial was in err because the speedy equitable relief was later denied and therefore was not actually available.

Fifth, *Accipiter* was heavily decided on an "on these facts" basis:

> "[T]here is no evidence in the record to support the further inference that the actual language used to disclose the meeting date, the placement of that disclosure in the earnings release, or the absence of headings or captions was part of a plan to make the announcement

> so obscure as to escape all attention. On the contrary, the disclosure conveys the required information in plain English, in simple declarative sentences, and in a separate paragraph on the first page of an important press release. Similarly, there is no evidence that either Carpenter or anyone else actively chose to omit mention of the meeting date from the caption of either the press release or the Form 8-K."

This fifth difference creates two separate problems for Defendants argument. The first problem is that the facts of this case are materially different. The second problem is that at this TRO stage, the Court is merely evaluating whether Hammann's claims are colorable, not whether Hammann will ultimately prevail on the merits of his claims.

One additional differentiating factor not identified in *Accipiter*, but present in this case is the requirement that Hammann's nominees, as a collective group, comply with the diversity requirements of California Corporations Code Sections 301.3 and 301.4 for the 2021 calendar year. The director nominee search, interview, and selection process Hammann engaged in was therefore substantially more complex than anything hypothetically contemplated by *Accipiter*. Hammann would even note, on information and belief, that Adamis' current slate of director nominees does not comply with the diversity requirements, lending credence to the difficulty of the effort. Presumably, Defendants intend to either create a new sixth director position or to replace one of its nominee directors after the shareholder meeting in order to comply with the diversity laws by December 31, 2021.

In sum, *Accipiter* contains so much factual variation from the present circumstances that, rather than standing against Hammann's own claims, its analysis somewhat plainly lays out the merits to Hammann's claims. Indeed, Defendants not only inequitably turned its own corporate machinery against Hammann, it also inequitably turned the Delaware Corporate Code against Hammann, taking unfair advantage of the knowledge it obtained from the sworn purpose declaration required by a Section 220 Demand to intentionally obstruct that very purpose.

### B. Plaintiff Alleges a Colorable Claim for the Violation of 8 Del. C. § 220.

Addressing next Hammann's claims relating to the Defendants' violation of 8 Section 220 of the Delaware Code, Defendants' Response at 22-23 claims that "an imminent proxy contest" "is the only purported purpose for obtaining documents not already produced to him." However, Hammann's sworn Purpose Declaration contains seven (7) separate identified proper purposes. Therefore, this argument neglects the facts of the case.

As to these same claims, Defendants' Response at 23 claims that relief in the form of a TRO is "outside the scope of Section 220" and "thus cannot be ordered for a purported violation of that statute." This claim is untrue as the Section expressly permits "such other or further relief as the Court may deem just and proper." See 8 Del. C. § 220(c)(3). Moreover, this argument does not reach to the

question of whether these claims are colorable or not, which is the object of the TRO inquiry.

Finally, Defendants claim Hammann "unreasonably delay[ed]" bringing his claims, thereby precluding a request for injunctive relief. Defendants recitation of the history of the records dispute ends at April 5, 2021, thereby ignoring that Defendants were producing information subject to Hammann's requests as late as May 4, 2021 (see HammannDecl. Ex. F), and only informed Hammann that it considered the Section 220 matter closed in a letter dated May 31, 2021. HammannDecl. Ex. H at 2 ("In addition, our client has responded fully to your books-and-records demand under 8 Del. C. § 220 demand, including, where appropriate, producing responsive documents."). Contrary to Defendants claim that Hammann unreasonably delayed, in the time between May 31 and June 9, Hammann familiarized himself with the information necessary to: (a) write a complaint; (b) prepare all of the TRO materials; (c) prepare all of the Expedited Proceedings materials; and (d) otherwise comply with Delaware Chancery Procedures. He then went on to prepare all of these documents (mostly) in compliance with what he had learned. There therefore was no unreasonable delay. Hammann has instead been moving at an incredibly rapid pace, often working deep into the night or even through the night to timely assert and protect his rights.

### C. <u>Plaintiff Alleges Colorable Claims for the Breaches of the Duty of Disclosure.</u>

Defendants' Response at 24-25 next claims that neither of Hammann's two claims for the breach of the duty of disclosure is colorable.

As to the first of these two claims (Count IV), Defendants either misunderstand the claim or are being intentionally obtuse. The duty of disclosure requires that a Board "disclose its motivations candidly." *Sherwood v. Ngon*, 2011 WL 6355209, at *6 (Del. Ch.). The page 67 disclosure presents its disclosures in a matter-of-fact manner without ever disclosing the Board's true motivation for advancing the meeting date by 35 days for the purpose of triggering the alternate timeliness calculation for the ultimate purpose of declaring untimely Hammann's Solicitation Notice. As informed by *Sherwood* and as Hammann demonstrated through HammannDecl. <u>Ex. H</u>, this information is material to shareholder decision-making.

The citations referenced at Defendants' Response at 26 to a host of transaction-related jurisprudence is wholly off-point. The present dispute does not involve a business transaction. It instead involves a proxy contest. SEC guidance to Rule 14a-9(a) provides that: "The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this section. . . . b. Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning

improper, illegal or immoral conduct or associations, without factual foundation." See Note to Rule 14a-9(a) of the Securities Exchange Act of 1934. Count IV in part represents a state-law form of Rule 14a-9(a) as the duty of disclosure encompasses observing both statutory and common law duties. As Hammann alleged in his complaint and argued in his Brief, the misleading statements impugned Hammann's personal reputation without having any basis in fact and concealed from shareholders information beneficial to accurately assess the character, integrity, and personal reputation of Carlo, Williams, Birndorf, Blunt, and Marguglio. The duty of disclosure requires that a Board "disclose its motivations candidly." *Sherwood*. When this information concealed by Defendants was revealed by Hammann, four separate shareholders aptly demonstrated the material nature of the Defendants' concealment. See HammannDecl. Ex. H. Contrary to being ""precisely the sort of 'tell me more' disclosures routinely characterized by Delaware courts as immaterial and unnecessary," the alleged failures to disclose claimed by Hammann are precisely of the sort characterized as material. Moreover, Hammann also submitted evidence proving that they were material.

As to the second of Hammann's two breach of the duty of disclosure claims, Defendants' Response at 27 claims that by disclosing the shareholder meeting information on page 67 of its 10-K under a nondescript heading normally reserved for events occurring at a completely different time period from the event being

disclosed, it is not possible for a breach of the duty of disclosure to exist. They claim that SEC guidance expressly approves the use of Item 9B to hide meeting advancement notices. Not true. The SEC guidance cited is to a "triggering event," not specifically to an advancement in the date of a shareholder meeting triggering modified timeliness provisions. And as to this guidance, the SEC permissibly accommodates this "triggering event" placement. It does not "approve" it.

Defendants' Response at 27, fn. 11 that Hammann's disclosure claim is now "moot" because Hammann wrote a blog post about this issue and filed a copy of the blog post with the SEC. Not true. Defendants have not offered to mail Hammann's blog post to all of the shareholders to whom it will deliver its Proxy Statement. In relation to the total number of Adamis shareholder, only a relatively small portion will ever see Hammann's post. Therefore, Hammann's conduct has done nothing to change the "mix" of information Defendants have a duty to provide shareholders.

More troubling than these contentions is the contention at Defendants' Response at 29, fn. 13 that the "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" does not represent a "request [for] shareholder action" and "does not concern the Company's proxy statement." Not true. The updated deadlines represent notice of a required period

for action and, if a shareholder acts, this action directly concerns the Company's proxy statement."

In sum as to Hammann's Count V breach of duty of disclosure claim, Defendants' Response essentially asserts that such a claim doesn't exist under the circumstances of Hammann's claims. And yet, *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437 (Del. 1971) and all of the other supportive cases identified in *Accipiter Life Sciences Fund, LP v. Helfer*, 905 A.2d 115, 127 (Del. Ch. 2006) shows that it does exist under the exact circumstances of Hammann's claims.

**D. Plaintiff Alleges Colorable Claims for the Breach of the Duty of Loyalty.**

As to Hammann's Count VI claims for breach of the duty of loyalty, Defendants' Response at 29-30 begins by claiming that the validity of the Advance Notice Bylaw could not be challenged because the Bylaws were adopted on a "clear day." Hammann would like to thank Defendants for making this argument because it raises the question, a "clear day" for whom. The Bylaws were initially adopted by Adamis' Board of Directors. They are occasionally amended with shareholder approval, but the document is created and exists in place before outside shareholders ever play a substantial role in a Company. Therefore, Bylaws are generally tools created and used by management and the Board of a Company to oppress the rights of the shareholders to determine the affairs of the Company. Consider:

1. **Plurality Voting**: If a shareholder does not desire to submit a Solicitation Notice relating a director nominee, no shareholder vote will ever directly result in a director being removed from office because a management-nominated director will at least receive votes from management-nominated shares. See Bylaws 8 (plurality voting). See also HammannDecl Ex. B, Proposal #1 ("That the board make appropriate changes to the company's governing documents and policies so that directors who fail to obtain majority votes in favor of their re-election (retaining a plurality vote standard for contested elections) may only serve as a holdover director until the earliest of 90 days after the voting results are determined, the date on which the board fills the seat as a vacancy, or the date of the director's resignation.").

2. **Shareholder of Record**: In order to submit a Solicitation Notice, one must first be "a stockholder of record at the time of giving the stockholder's notice." See Bylaws 5(a). Only 0.003% of the Company's shares are held in "of record" status. These shares cannot be directly purchased in the stock market. The process of converting shares purchased in the stock market (i.e., beneficial status) to "of record" status is cumbersome, sometimes expensive, and takes weeks. Apparently the industry standard length of time is 4-6 weeks. Also, E*TRADE initially requested to charge Hammann $500

to convert the 100 shares he converted. Ultimately, it elected not to charge Hammann this fee.

3. **Director Nomination**: If an "of record" shareholder desires to make a director nomination, they must provide "all information relating to such person that is required to be disclosed in solicitations of proxies for election of directors in an election contest, or is otherwise required, in each case pursuant to Regulation 14A under the Securities Exchange Act of 1934, as amended (the "1934 Act") and Rule 14a-4(d) thereunder (including such person's written consent to being named in the proxy statement as a nominee and to serving as a director if elected)." See Bylaws 5(b). Based on Hammann's submissions, a "compliant" nomination entails a 27-page supporting document, with even one deviation from the Bylaws potentially triggering a rejection of the nomination as non-compliant.

4. **Meeting Advancement**: If the Company gets wind of a shareholder's intended efforts, like for example, because that shareholder had to make to purpose declaration disclosing their intent to exercise their Section 220 record demand rights, the Company can advance the date of the shareholder meeting by more than 30 days to trigger a change from the previously-disclosed Solicitation Notice submission deadline to as little notice as "the 10th day following the day on which public announcement of the date of

such meeting is first made". See Bylaws 5(b). According to Defendants contentions, they are free to try to bury this disclosure as much as they want. If the stockholder was not already "of record" status or had not started the process weeks earlier, this trigger would result in a rejection of the Solicitation Notice as untimely.

5. **Vote Rigging**: If the Company can't stop the proxy contest as a result of the steps immediately above, it can always simply rig the vote by issuing more shares to dilute the anticipated voting power of the group making the Director Nominations. Especially effective for this vote rigging are preferred shares because the Board can assign each preferred share as many votes as desired. See HammannDecl Ex. B, Proposal #2 ("That the board make appropriate changes to the company's governing documents and policies so that the company may not establish voting rights for preferred stock in an amount greater than one vote per share.").

As evident, Hammann fully agrees with Defendants' contention that the Bylaws were written on a clear day. A clear day behind closed doors, windows drawn, when only management was present in the smoke-filled room. Two of the three shareholder proposals Hammann proposes are intended to reverse some of the obstructive rules created by management to prevent shareholders from exerting meaningful influence over the Company they collectively own. Now that

Hammann has observed Defendants conduct in action, they have revealed additional aspects of the Bylaws meriting shareholder-led change.

Hammann's Count VI, however, addresses Defendants duty of loyalty to him and other shareholders. The construction of the Bylaws reflects Defendants' disloyalty to shareholders' rights and should be construed in this light.

Defendants' Response at 30-34 next moves to a discussion of *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437 (Del. 1971) and *Accipiter Life Sciences Fund, LP v. Helfer*, 905 A.2d 115, 127 (Del. Ch. 2006). By *Schnell* supports Hammann's claims and Hammann has already addressed above the many differences between the *Accipiter* case and the present one. However, a key point Defendants' Response at 34 attempts to make is  that ""[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."" However, as Hammann has already shown, this contention is untrue. Even had he seen the buried notice, it would have been impossible for Hammann or any of the other beneficial shareholders collectively controlling 99.997% of the voting common shares to become a shareholder of record within the notice window, a necessary prerequisite under the Bylaws to submit a valid Solicitation Notice. The industry average time necessary to convert beneficial shares to record shares is 4-6 weeks

and the Defendants' notice only provided 10 days. Even with Hammann employing truly excessive pressure on the agents and mechanisms of transfer, it still took him 15 days. That Defendants now make this argument before the court is exceedingly puzzling given that Defendants know the argument is untrue. In their May 18, 2021, letter to Hammann, they disclose: "In fact, you were not a stockholder of record at any time during the nomination window and, therefore, could not have submitted timely nominations or proposals for the Annual Meeting." YochDecl Ex. 12 at 2. When Defendants advanced the meeting date, they were quite aware of all of the obstructive provisions they had placed in the Bylaws to deny shareholder rights to effectively participate in the governance of the company of which the meeting date advancement would permit them to benefit.

As evident, Defendants have intentionally constructed and maintained Bylaws that strive to make it impossible for shareholders to successfully submit shareholder proposals and director nominees. These Bylaws and this conduct violates the Defendants' duty of loyalty to Hammann and other shareholders. Advancing the shareholder meeting date to trigger an accelerated 10-day Solicitation Notice deadline when only 0.003% of the shares could meet the new deadline represents a breach of the duty of loyalty the director Defendants owe to Hammann and other shareholders.

Rather than being loyal to the Company's shareholders, the Defendants are instead self-dealing in an attempt to remain entrenched in the Company. The breach relating to inequitably advancing the date of the shareholder meeting, by itself, was sufficient for the plaintiff in *Schnell* to prevail. Therefore, Hammann's claim that Defendants breached their duty of loyalty is colorable.

## III. Defendant's Conduct will Irreparably Harm Plaintiff

Moving next from colorable claims to irreparable harm, Hammann identified multiple sources of irreparable harm, including: (a) the threat of an uniformed shareholder vote; (b) the dissemination of materially false or misleading information and the subsequent timely communication of corrective disclosures; (c) his own potential inability to distribute his proxy statement and participate in the proxy contest; and, (d) the prospective waste of the better part of four months of his life.

Defendants' Response at 34-36 contends that Hammann will not suffer irreparable harm if denied a TRO. Their first argument, that Hammann has not proven colorable claims, has already been addressed. Next, they contend that Hammann's potential harm is not "irreparable" because the Court can always subsequently void the election through its equitable powers and also that Hammann has plenty of time to seek a preliminary injunction before the election.

Interestingly, Defendants Response at 37 next raises their concerns of waste, confusion, chaos and costliness if they are permitted to continue on their path to

holding the meeting. These arguments mirror the very arguments Hamman made. While these seem like good reasons to temporarily restrain these things from occurring, Defendants nonetheless somehow disagree. Indeed, it seems that both sides would suffer similar harms in certain respects, Defendants merely assert their own harms and deny that Hammann would suffer these same harms. Moreover, neither Defendants nor Hammann would suffer confusion and chaos. Instead, the shareholders would suffer these conditions, which would contribute to their inability to cast an informed vote, a harm for which Hammann argued.

Defendants' Response also seems based on the false presumption that it is only possible that their own Proxy Statement will be disseminated to shareholders. The SEC provided Hammann with sufficient guidance to seek to have this matter resolved as quickly as possible through the courts. However, now that Hammann has demonstrated to the SEC that he is "seriously prepared to use all legal avenues to have a proxy contest," it may very well permit him to file and distribute his own Proxy Statement. The Defendants therefore understate that "waste, confusion, chaos and costliness" that will be incurred by all sides if this matter is not resolved before the proxy contest begins.

Without a TRO, it is quite possible that both Defendants and Hammann would be running their respective proxy contests until a preliminary injunction issued. This is the type of irreparable harm Hammann seeks to avoid suffering.

Defendants contention that no irreparable harm will be suffered be Hammann or Adamis shareholders until the date of the shareholder meeting is simply false.

## IV. The Balance of Hardships Favors Plaintiff

As to the balance of hardships, Adamis claims that it will suffer hardship if the annual shareholder meeting is not held on its advanced date.

To be clear, the 2021 Annual Meeting is scheduled to be entirely virtual, held at www.virtualshareholdermeeting.com/ADMP2021. Moreover, according to the Proxy Statement, "[o]nly holders of record of our common stock, . . . at the close of business on May 24, 2021 (the "Record Date"), will be entitled to notice of the virtual Meeting or any adjournments or postponements thereof." Defendants are already committing to only sending notice to the 0.003% of shareholders "of record" and not to the beneficial shareholders. Therefore, there is very little incremental cost with moving the meeting and with providing notice of the change in date. Further, as the Company filed its Definitive Proxy Statement with the SEC just yesterday, any waste, confusion, chaos, or costliness between that filing and the scheduled hearing in this matter would be entirely of their own making. The Court should not rule in a manner that encourages parties to intentionally commit waste in an effort to claim greater hardship.

## V. The Doctrine of Laches Does Not Bar Injunctive Relief

Defendants close their arguments by claiming that the doctrine of laches bars Hammann from obtaining injunctive relief. Much like their arguments relating to

the Records Request dispute, Defendants' Response at 38-39 only discloses a partial record of the facts. While the Response at 38 claims that "Hammann knew of his purported claims by May 18, 2021, when he received the Company's response to his Solicitation Notice," a complete record shows that this isn't exactly true. First, the May 18, 2021, letter was sent to Hammann by a Vinson & Elkins attorney on May 19, 2021 at 11:25 a.m. Second, this timeline also implies that Defendants waited 13 days before even hinting to Hammann their contention that his Solicitation Notice was untimely. Third, on May 20, 2021 Hammann wrote to Defendants: "Respectfully, I am a little confused about the assertion in the May 18 Letter that the Solicitation Notice is untimely." This is because the May 18, 2021, letter did not disclose details sufficient to inform Hammann regarding the nature of Defendant's misconduct. As part of his prompt investigation, he asked Defendants for clarification. During the whole time prior to filing this action, Hammann moved at full speed, obtaining the necessary clarifications, performing the necessary research, discussing the matter with the SEC and establishing its preferred path forward, and researching the content of and how to prepare the complaint and each of the other necessary documents to properly seek the present motion.

In addition, while Defendants incorrectly assert that Hammann unreasonably delayed in bringing his suit, they make no claim that they have suffered any prejudice from this unreasonable delay. Moreover, to the extent that any alleged

suffering is the result of the Defendants' inequitable advancement of the date of the Annual Meeting, they come to the present action with unclean hands, and therefore should not gain through equity from circumstances they created by their own inequity.

## VI. Expedited Proceedings

Plaintiff's motion for a TRO to prevent Defendants from printing and disseminating a misleading Proxy Statement and from convening the annual Shareholder Meeting on July 16, 2021, should be granted.

## CONCLUSION

Plaintiff's motion for a TRO to prevent Defendants from printing and disseminating a misleading Proxy Statement and from convening the annual Shareholder Meeting on July 16, 2021, or until a preliminary injunction may be obtained, should be granted.

Dated: June 15, 2021

Signed: _/s/ Jerald Hammann___________

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