IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

POLITAN CAPITAL MANAGEMENT LP and POLITAN CAPITAL NY LLC, Plaintiffs/ Counterclaim-Defendants, v. MASIMO CORPORATION, Defendant/ Counterclaim-Plaintiff, and JOE E. KIANI, H. MICHAEL COHEN, ADAM P. MIKKELSON, CRAIG B. REYNOLDS, and JULIE A SHIMER, Ph.D., Defendants.	:	C.A. No. 2022-0948-NAC

MOTION OF NON-PARTY MANAGED FUNDS ASSOCIATION FOR LEAVE TO APPEAR AND FILE BRIEF AS *AMICUS CURIAE*

Non-party Managed Funds Association ("MFA"), by and through its undersigned counsel, respectfully moves for leave to appear and file as *amicus curiae* a brief in the above-captioned matter. The proposed brief is attached hereto as Exhibit A. The grounds for this motion are as follows:

BACKGROUND AND INTEREST OF AMICUS CURIAE

1. Plaintiffs, stockholders of Masimo Corporation ("Masimo"), commenced this action on October 21, 2022, challenging the validity of certain amendments to the advance notice provisions in Masimo's bylaws (the "Bylaw Amendments"). Among other things, Plaintiffs allege that the Bylaw Amendments are invalid and unenforceable, and that the members of Masimo's board of directors breached their fiduciary duties by adopting them.

2. MFA is a trade association that represents the hedge fund and global alternative asset management industry and its investors by advocating for industry practices and other public policies that foster efficient, transparent, and fair capital markets. MFA is an advocacy, education, and communications organization established to enable investment advisers in the alternative asset management industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA's more than 150 members collectively manage nearly $2.6 trillion across a diverse group of investment strategies. MFA's members help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. Although

MFA has some members who are engaged investors, it has many other members who are not.[1]

3. MFA believes that the Bylaw Amendments are unprecedented and contain a more extreme combination of provisions requiring more expansive disclosure than any advance notice bylaws previously evaluated by this Court, including, among other things: (i) a broad definition of "covered person" that would require a nominating stockholder that is an investment fund to disclose limited partners holding a 5% or more economic interest in the fund as well as investors in "sidecar vehicles" or special purpose entities, (ii) a requirement to disclose any "plans or proposals" they have to nominate directors at any other public companies in the next twelve months, and (iii) a broad definition of "support" for the nomination.

4. MFA has an interest in the question of whether the Bylaw Amendments are valid. If this Court determines that advance notice bylaws containing similar provisions are enforceable, then there is little doubt that many other companies will move to adopt similar provisions. Widespread implementation of such bylaw provisions could have a direct negative impact on MFA's members, their investors,

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[1] Plaintiffs are not members of MFA and have not contributed any funding toward the preparation of this *amicus curiae*.

and stockholders broadly—specifically, by limiting stockholder engagement and affecting capital allocation decisions in the United States capital markets.

5. Accordingly, MFA respectfully requests leave to submit an *amicus curiae* brief to address the effects that the Bylaw Amendments threaten to have on its members, their investors, and stockholders generally, as well as on stockholder engagement and capital allocation decisions in the United States.

6. MFA contacted the parties on January 31, 2023 and informed them of the intention to seek leave from this Court to appear and submit an *amicus curiae* brief. Plaintiffs do not oppose this motion, but Defendants indicated that they intend to oppose it.

7. This motion has been submitted before the deadline stipulated by the parties and set by the Court in its Order Governing Case Schedule, dated January 19, 2023 [DKT 113].

ARGUMENT

8. Delaware courts have long permitted participation by *amici* in appropriate cases. *See, e.g.*, *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1030 n.2 (Del. Ch. 2004); *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622 (Del. Ch. Nov. 13, 2002); *South Street Corp. Recovery Fund I v. Salovaara*, 1999 WL 504778, at *4 (Del. Ch. July 9, 1999). "Although there is no rule governing the submission of *amicus curiae* briefs in this Court, such briefs are permitted at the Court's

discretion." *Hershey Co*., 2013 WL 1776668, at *1 (Del. Ch. Apr. 16, 2013); *see also Turnbull v. Fink*, 644 A.2d 1322, 1324 (Del. 1994) ("privilege . . . manner and extent of participation" of *amicus curiae* within the discretion of the court).

9. Historically, the purpose of an *amicus curiae* brief is "to ensure 'a full and complete presentation on questions of either general or public interest that were at issue in the proceedings before the court.'" *La. Mun. Police Employees Ret. Sys. v. Hershey Co*., 2013 WL 1776668, at *1 (Del. Ch. Apr. 16, 2013). A non-party may be afforded the opportunity to participate simply "to introduce argument, authority or evidence to protect his interests." *Giammalvo v. Sunshine Mining Co.*, 644 A.2d 407, 410 (Del. 1994). Further, "[w]hen both sides are represented by counsel, the purpose of an *amicus curiae* is to (1) assist the Court by supplementing the efforts of counsel in a case of general public interest; or (2) draw attention to broader legal or policy implications that might otherwise escape its consideration in the narrow context of a specific case." *Hershey Co.,* 2013 WL 1776668, at * 1 (citations and internal quotation marks omitted).

10. The validity of the Bylaw Amendments is a novel issue under Delaware law and is of national importance to the hedge fund and global alternative investment industry and its investors. MFA believes that this Court's ruling on the Bylaw Amendments could have ripple effects that extend far beyond the circumstances of this case and threaten to impact legitimate stockholder engagement and affect capital

allocation decisions at activist and non-activist investment funds alike, and could therefore have negative consequences for MFA's members, their investors, and stockholders generally.

11. Given its membership, MFA is well-positioned to provide input to the Court regarding the broader legal and policy implications relating to the validity of the Bylaw Amendments. MFA is also well-positioned to discuss the likely practical consequences of a determination by this Court to uphold the Bylaw Amendments. MFA seeks to submit an *amicus curiae* brief to provide the Court with the benefit of the industry's perspective on these issues.

12. MFA desires to assist the Court in its resolution of a facial challenge to the Bylaw Amendments, and does not address the merits of Plaintiffs' other arguments directed specifically to the factual circumstances surrounding Masimo's adoption of the Bylaw Amendments. Allowing the filing of an *amicus curiae* brief on this narrow issue will help ensure a full presentation to the Court on this important question of public interest.

CONCLUSION

For the foregoing reasons, MFA respectfully requests that this Court grant its motion for leave to appear as *amicus curiae* in this action and to file the proposed brief attached hereto as Exhibit A.

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Dated: February 2, 2023

CERTIFICATE OF SERVICE

Patricia L. Enerio, Esquire, hereby certifies that on February 2, 2023, a copy of the foregoing Motion of Non-Party Managed Funds Association for Leave to Appear and File Brief as *Amicus Curiae* was served electronically upon the following:

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

POLITAN CAPITAL MANAGEMENT LP and POLITAN CAPITAL NY LLC, Plaintiffs/ Counterclaim-Defendants, v. MASIMO CORPORATION, Defendant/ Counterclaim-Plaintiff, and JOE E. KIANI, H. MICHAEL COHEN, ADAM P. MIKKELSON, CRAIG B. REYNOLDS, and JULIE A SHIMER, Ph.D., Defendants.	:	C.A. No. 2022-0948-NAC

ORDER GRANTING NON-PARTY MANAGED FUNDS ASSOCIATION'S MOTION FOR LEAVE TO APPEAR AND FILE BRIEF AS *AMICUS CURIAE*

IT IS HEREBY ORDERED that Non-Party Managed Funds Association be granted leave to appear and file an *amicus curiae* brief.

SO ORDERED this ____day of __________, 2023.

____
Vice Chancellor Nathan A. Cook

EXHIBIT A

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

POLITAN CAPITAL MANAGEMENT LP and POLITAN CAPITAL NY LLC, Plaintiffs/ Counterclaim-Defendants, v. MASIMO CORPORATION, Defendant/ Counterclaim-Plaintiff, and JOE E. KIANI, H. MICHAEL COHEN, ADAM P. MIKKELSON, CRAIG B. REYNOLDS, and JULIE A SHIMER, Ph.D., Defendants.	:	C.A. No. 2022-0948-NAC

BRIEF AS *AMICUS CURIAE* OF MANAGED FUNDS ASSOCIATION

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Non-party Managed Funds Association ("MFA"), by and through its undersigned counsel, respectfully submits this *amicus curiae* brief in support of Plaintiffs/Counterclaim-Defendants.[1]

I. STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

MFA is a trade association that represents the hedge fund and global alternative asset management industry and its investors by advocating for industry practices and other public policies that foster efficient, transparent, and fair capital markets. MFA is an advocacy, education, and communications organization established to enable investment advisers in the alternative asset management industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA's more than 150 members collectively manage nearly $2.6 trillion across a diverse group of investment strategies.[2] MFA's members help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. Although MFA has some members who are engaged or "activist" investors, it has many other members who are not.

[1] Plaintiffs are not members of MFA and have not contributed any funding toward the preparation of this *amicus curiae*.

[2] A full list of MFA's membership is available on its website, at https://www.managedfunds.org/about-mfa/membership/member-directory/.

MFA has a significant interest in the question of whether the advance notice bylaws at issue in this matter—which contain a combination of provisions that have been described by commentators as "onerous," "aggressive" and "extreme"[3]—are upheld. In particular, MFA has very serious concerns regarding three provisions: (i) the Covered Persons Disclosures provision, which requires investment funds that seek to make a nomination or proposal to disclose the identity of their investors; (ii) the Future Plans Disclosures provision, which requires investment funds that seek to make a nomination or proposal to disclose their highly confidential and commercially sensitive intellectual property; and (iii) the Supporting Stockholder Disclosures provision, which takes a vague and ambiguous interpretation of "support." MFA's decision to focus on these three provisions should not be construed as implicit endorsement of the other bylaw amendments that are being challenged by Politan.

[3] Scott Deveau, *Masimo Investor Politan Sues to Block Activist Rule Changes*, Bloomberg (Oct. 21, 2022), https://www.bloomberg.com/news/articles/2022-10-21/masimo-investor-politan-sues-to-block-rules-hindering-activists; Leonard Wood, Derek Zaba, & Kai H.E. Liekefett, *Bylaw Amendments, Shareholder Activism, and Flying Close to the Sun*, HLS Forum on Corp. Gov. (Nov. 21, 2022), https://corpgov.law.harvard.edu/2022/11/21/bylaw-amendments-shareholder-activism-and-flying-close-to-the-sun/; Lawrence A. Cunningham, *The Hottest Front in the Takeover Battles: Advance Notice Bylaws*, HLS Forum on Corp. Gov. (Oct. 23, 2022), https://corpgov.law.harvard.edu/2022/10/23/the-hottest-front-in-the-takeover-battles-advance-notice-bylaws/.

If this Court determines that advance notice bylaws containing such provisions are enforceable, then there is little doubt that many other companies will move to adopt similar provisions.[4] Widespread implementation of such bylaw provisions would have a direct negative impact on MFA's members, their investors, and stockholders broadly—specifically, by limiting stockholder engagement and affecting capital allocation decisions in the United States capital markets.

MFA therefore submits this *amicus curiae* brief because it believes that the consequences of these bylaw provisions go far beyond impacting only "activist" hedge funds. The bylaw provisions at issue threaten to limit stockholders' incentives and ability to engage with management teams and boards in order to effect beneficial change. That, in turn, will weaken market-based accountability mechanisms that act as important checks and balances in our corporate governance system to the disadvantage of ***all stockholders***. In addition, MFA believes that the advance notice bylaw provisions at issue may well affect capital allocation decisions at activist and non-activist investment funds alike, and could therefore have negative consequences for its members, their investors, and our capital markets generally.

MFA recognizes that advance notice bylaws are "commonplace," and is well aware of this Court's case law upholding the validity of reasonable, unambiguous

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[4] *See* Complaint ¶ 18 (predicting that "[s]cores of other companies can be expected to rush to adopt similar, or identical, advance notice bylaws" if the Bylaw Amendments are upheld).

advance notice bylaws.[5] But the Bylaw Amendments at issue here are a far cry from that. MFA acknowledges and appreciates the value of advance notice bylaws, which "permit orderly meetings and election contests,"[6] provide stockholders with "a reasonable opportunity to thoughtfully consider nominations,"[7] and "serve[] an important disclosure function, allowing boards of directors to knowledgably make recommendations about nominees and ensuring that stockholders cast well-informed votes."[8] However, the Court's jurisprudence has carefully balanced these legitimate objectives against other equally important objectives, such as preventing interference with the stockholder franchise, incentivizing stockholder engagement, promoting the exchange of information, and encouraging efficient capital raising and allocation. As set forth in more detail below, MFA believes that certain of the advanced notice bylaw provisions at issue here—if upheld—would materially upset that balance.

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[5] *E.g.*, *BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.*, 224 A.3d 964 (Del. 2020); *Strategic Inv. Opportunities LLC v. Lee Enters., Inc.*, 2022 WL 453607 (Del. Ch. Feb. 14, 2022).
[6] *Openwave Sys. Inc. v. Harbinger Capital P'ship Master Fund I, Ltd.*, 924 A.2d 228, 239 (Del. Ch. 2007).
[7] *Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, at *13 (Del. Ch. Jan. 14, 1991).
[8] *Jorgl v. AIM ImmunoTech Inc.*, 2022 WL 16543834, at *15 (Del. Ch. Oct. 28, 2022).

II. STATEMENT OF FACTS RELEVANT TO *AMICUS CURIAE*

Masimo Corporation ("Masimo" or the "Corporation") adopted certain amendments to its bylaws on September 9, 2022, and then adopted further amendments to its bylaws on December 1, 2022 (collectively, the "Bylaw Amendments").[9] Plaintiffs ("Politan"), stockholders of Masimo, commenced this action to challenge the validity of the Bylaw Amendments.

In MFA's view, the Bylaw Amendments are unprecedented and contain a more extreme combination of provisions requiring more expansive disclosure than any advance notice bylaws previously evaluated by this Court. As noted above, for the purposes of this *amicus curiae* brief, MFA has focused on the three provisions in the Bylaw Amendments that it considers to be particularly problematic for its members and their investors.[10]

First, the Bylaw Amendments revise the definition of the term "Covered Person" to require any investment fund stockholder who makes a nomination or proposal to disclose the identities of: (i) any person or entity holding a "5% or larger member, limited partner or similar economic interest" in the nominating stockholder and (ii) any person or entity that "has invested or committed to invest" in a "sidecar

[9] Masimo, Form 8-K (Dec. 1, 2022), https://investor.masimo.com/financials/sec-filings/sec-filings-details/default.aspx?FilingId=16238311.

[10] By addressing these three specific provisions of the Bylaw Amendments, MFA does not intend to imply endorsement or approval of Masimo's other bylaw amendments or governance practices.

vehicle" or special purpose entity formed principally for the purpose of investing in securities of the Corporation, regardless of size.[11] In the Complaint, Politan refers to this as the "**Covered Persons Disclosures**" provision.[12] The Covered Persons Disclosures provision also requires disclosure of certain information about those investors' holdings, to the extent that information is within the stockholder's knowledge.

Second, the Bylaw Amendments require any investment fund stockholder who makes a nomination or proposal to "set forth whether or not any Nominating or Proposing Person or any Related Person thereof has any plans or proposals (as those terms are used under Item 4 of Schedule 13D) to nominate directors at any other Public Company within the next 12 months, and, if so, deliver a written representation as to whether or not such plans or proposals involve a director nomination at another Public Company that (A) is a competitor of the Corporation, or (B) is a counterparty to a material litigation involving the Corporation."[13] In the Complaint, Politan refers to this as the "**Future Plans Disclosures**" provision.[14] The Bylaw Amendments also provide that Masimo can request additional information regarding any affirmative responses.[15]

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[11] *See* Bylaws Art. I, §§-1(4)(a)(i)(C), 1(9)(b); *see also* Counterclaim ¶¶ 75-77.
[12] *See* Complaint ¶¶ 81-101.
[13] *See* Bylaws Art. I, § 1(4)(a)(vi); *see also* Counterclaim ¶¶ 95, 101 n.16.
[14] *See* Complaint ¶¶ 106-111.
[15] *See* Bylaws Art. I, § 1(4)(a)(ix).

Third, the Bylaw Amendments require any investment fund stockholder who makes a nomination or proposal to "set forth the names and addresses of other stockholders (including beneficial owners) known by any of the Nominating or Proposing Person **to support such nomination**, and to the extent known the class and number of all shares of the Corporation's capital stock owned beneficially or of record by such other stockholder(s) or other beneficial owners(s)."[16] In the Complaint, Politan refers to this as the "**Supporting Stockholder Disclosures**" provision.[17] The Supporting Stockholder Disclosures provision does not define what constitutes "support," and Masimo has confirmed that it does not contain a materiality qualifier and is not limited to any particular form of support, such as financial contributions, a voting commitment, or a similar arrangement.[18]

III. ARGUMENT

"The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."[19] As such, Delaware courts have repeatedly affirmed that "[a] stockholder's vote is one of the most fundamental rights of owning stock."[20] Furthermore, "Delaware law recognizes that stockholders' fundamental

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[16] *See* Bylaws Art. I, § 1(4)(a)(ii) (emphasis added); *see also* Counterclaim ¶ 90.
[17] *See* Complaint ¶¶ 121-127.
[18] *See* Complaint, Ex. H, at 5 (Letter from Masimo to Politan, dated Oct. 19, 2022).
[19] *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988).
[20] *Perlegos v. Atmel Corp.*, 2007 WL 475453, at *28 (Del. Ch. Feb. 8, 2007); *see also In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 81 (Del. Ch. 1999) (describing voting as a "fundamental shareholder right[]").

right to participate in the voting process includes the right to nominate an opposing slate."[21] Accordingly, board actions that impair or impede that right—such as the Bylaw Amendments—are subject to a more stringent standard of review.[22]

A. The Covered Persons Disclosures Provision

Widespread adoption of the Covered Persons Disclosures provision by public companies threatens to preclude investment funds from making nominations or proposals, which would have significant and profoundly adverse effects on capital allocation decisions and stockholder engagement. Drastically reducing—or potentially eliminating—investment funds' ability to make nominations or proposals will weaken the market-based accountability mechanisms that act as a system of checks and balances on management and boards. That circumstance will, in turn, increase the risks of entrenchment, impair long-term value creation, and harm ***all stockholders***. MFA believes that these substantial costs far outweigh any marginal benefit from the additional transparency that could theoretically be achieved by the Covered Persons Disclosures provision.

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[21] *Strategic Inv. Opportunities LLC v. Lee Enters., Inc.*, 2022 WL 453607, at *8 (Del. Ch. Feb. 14, 2022) (internal quotation omitted) (citing cases); *see also The Williams Cos. S'holder Litig.*, 2021 WL 754593, at *30 (Del. Ch. Feb. 26, 2021) (noting that "stockholder activism is intertwined with the stockholder franchise").

[22] *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988); *see also MM Co. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127 (Del. 2003) ("This Court and the Court of Chancery have remained assiduous in carefully reviewing any board actions designed to interfere with or impede the effective exercise of corporate democracy by shareholders, especially in an election of directors.").

Discussions with MFA's members confirm that many of them have contractual agreements in place with their investors or limited partners that would prevent disclosure of their identities, even in order to comply with an advance notice bylaw like the one at issue.[23] Consequently, if the Covered Persons Disclosures provision is allowed to stand, it may no longer be possible for investment funds with such confidentiality obligations to make nominations or proposals, because they could not disclose the information required without breaching the confidentiality obligations owed to their investors or limited partners.[24]

In other words, if the Covered Persons Disclosures provision is upheld, then the practical effect likely would be dramatically fewer nominations and proposals at public companies, because an investment fund stockholder will understandably have

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[23] This is consistent with reporting from knowledgeable commentators. *See, e.g.*, Ronald Orol, *Masimo Bylaws Pose New Threat to Campaigns*, The Deal (Oct. 5, 2022), https://pipeline.thedeal.com/article/2appi6vgpqbqystvgk1ds/deal-news/features-and-commentary/masimo-bylaws-pose-new-threat-to-campaigns ("Many institutional investors that allocate capital to activist-led funds set up for investments in target companies require that their fund names and investment allocations be kept confidential."); Liz Hoffman, *Inside a new corporate move that turns the tables on activist investors*, Semafor.com (Nov. 3, 2022), https://www.semafor.com/article/11/03/2022/inside-a-new-corporate-move-that-turns-the-tables-on-activist-investors ("Investors in top hedge funds are pension funds, university endowments and insurers. Few will consent to having their names disclosed . . .").

[24] Cunningham, *Advance Notice Bylaws* (explaining that "investment funds and advisors routinely pledge such confidentiality to their investors, often formally expressed in covenants in their investment contracts," so "[c]onditioning a shareholder director nomination on disclosing its investors is therefore tantamount to denying them the opportunity to nominate anyone.").

little incentive to breach its contracts with its investors or limited partners or seek confidentiality waivers which may not be forthcoming (for reasons outlined below). This result, in turn, threatens to entrench incumbent boards of directors by insulating them from proxy campaigns and other legitimate stockholder engagement. This result could further lead to a loss of the substantial value for investors that can be created by engaged investors,[25] and over time, could deprive investors of prudent investment opportunities that would have offered the potential for increased risk-adjusted returns.

The Covered Persons Disclosures provision at issue here and any other advance notice bylaw provisions that force engaged investors—whether traditional "activist" funds or not—to make the difficult choice between (i) disclosing the required information and breaching their confidentiality obligations and (ii) refusing to disclose the required information and thereby walk away from the opportunity to make nominations or proposals are not consistent with the fundamental right of stockholders to nominate directors.[26] It is well settled that "a board of directors may

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[25] This Court has recognized that "[m]any forms of stockholder activism can be beneficial to a corporation." *The Williams Cos. S'holder Litig.*, 2021 WL 754593, at *29 (Del. Ch. Feb. 26, 2021); *see also* Lucian A. Bebchuk, Alon Bray & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1122 (2015) (finding that corporate activist campaigns tend to lead to both short-term gains and sustained, long-term improvements in the operating performance of target companies).

[26] It is also inconsistent with the broader policy of the SEC to encourage and allow more shareholder advocacy, as articulated in the recent universal proxy rules. *See*

not use the corporate machinery for the purpose of obstructing the legitimate efforts of dissident stockholders to undertake a proxy contest against management."[27] MFA therefore believes that the Covered Persons Disclosures provision does not constitute a "reasonable limitation" upon investment funds' right to nominate director candidates, because it would effectively preclude investment funds from having "a fair opportunity to nominate candidates."[28]

The Covered Persons Disclosures provision raises serious concerns not only for engaged investors who may be seeking to make proposals, but also for "passive" investment funds who may have allocated capital to those engaged investors. MFA's members include limited partners who comprise more than 5% of the capital in an investment fund that may consider making nominations or proposals. Other MFA members are investors in sidecar vehicles or special purpose entities in which

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Press Release, SEC Adopts New Rules for Universal Proxy Cards in Contested Director Elections: New Rules Allow Shareholders to Vote for their Preferred Mix of Board Candidates in Contested Elections (Nov. 17, 2021), https://www.sec.gov/news/press-release/2021-235.

[27] *Moran v. Household Int'l Inc.*, 490 A.2d 1059, 1070 (Del. Ch. 1985); *see also AB Value P'rs, LP v. Kreisler Mfg. Corp.*, 2014 WL 7150465, at *3 (Del. Ch. Dec. 16, 2014) ("The clearest set of cases providing support for enjoining an advance notice bylaw involves a scenario where a board . . . imposes or applies an advance notice bylaw so as to make compliance impossible or extremely difficult, thereby thwarting the challenger entirely.").

[28] *Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, at *11 (Del. Ch. Jan. 14, 1991); *see also* Lawrence A. Hamermesh, *Director Nominations*, 39 Del. J. Corp. L. 117, 138-39 (2014) (explaining that "the question becomes whether and when an advance notice bylaw 'unduly restricts' the right to nominate directors").

they are truly passive investors. In many cases, it is critically important for them to keep their identity and investment allocations confidential. The disclosure of their investments could be competitively disadvantageous, which is why they bargained for those contractual confidentiality protections when making the investment in the first place.

There is little need for an issuer faced with a stockholder nomination or proposal to invade those contractual obligations by adopting the Covered Persons Disclosures provision under the guise of "more information is always better." Our federal securities laws have a well-established regime for disclosures by stockholders, and going above and beyond those obligations is not justified where, as here, the consequence could be a material reduction in stockholder engagement.

Furthermore, based on its experience, MFA also believes that the Covered Persons Disclosures provision will likely impact capital allocation decisions. Passive investment funds who may have previously been willing to allocate some capital to engaged investor funds very well may be deterred from doing so by the fact that—for no legitimate reason—their identity would have to be disclosed in connection with any nomination or proposal by the engaged investor. This, in turn, would make it more difficult for engaged investors to raise capital, either through traditional capital raising methods or through sidecar or special purpose entities. In sum, the Covered Persons Disclosures provision threatens to impact ***both*** optimum

capital allocation decisions at non-activist investment funds and capital raising abilities at engaged funds.

These broad, systemic costs associated with the Covered Persons Disclosures provision—costs to MFA's members, their investors, and the market at large—come with little to no discernible benefit. Masimo justifies the Bylaw Amendments primarily by positing speculative scenarios involving Trojan horses, Manchurian candidates, and clandestine strategies to pilfer confidential information.[29] Notably absent is any evidence that these scenarios are present in our capital markets, or, even if they do exist, that they would not be adequately addressed by the current regulatory regime, which already has disclosure requirements in place to protect against undue influence. The limited benefit of the Covered Persons Disclosures provision is emphasized by the fact that information regarding limited partners or other passive investors, such as those in a sidecar vehicle or special purpose entity, is highly unlikely to be material. Such investors generally have no ability or authority to influence the strategy of the investment fund making the nomination or

[29] *See* Counterclaim ¶¶ 79-80.

proposal,[30] and in the limited instances where that is not the case, those matters are covered by the existing regulatory disclosure regime.[31]

The implication of Masimo's arguments in favor of the Covered Persons Disclosures provision is the untenable position that if an investment fund's nominee is actually elected to a board of directors, then it is presumed that such a nominee will share confidential information with, or otherwise do the bidding of, the Covered Persons. In other words, Masimo simply presumes that investment fund director nominees are inherently untrustworthy because someone else will be "pulling their strings" and therefore it is entitled to broad information about the underlying investors or the identity of the supposed "string pullers." That, however, is contrary to a fundamental tenet of Delaware law, which presumes that directors will not breach their fiduciary duties and will act in accordance with them.[32] And, of course,

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[30] *See* Balotti & Finkelstein, DEL. L. OF CORP. AND BUS. ORG. § 21.1 ("[A] limited partner generally does not participate in the control of the business of the partnership."); Investopedia, Sidecar Investment, https://www.investopedia.com/terms/s/sidecar-investment.asp ("A sidecar investment is a strategy in which one investor allows a second investor to control how to invest their capital.").

[31] *See, e.g.*, Section 13(d) of the Securities Exchange Act (requiring non-passive investors to report beneficial ownership of more than 5% of a class of stock by filing a Schedule 13D).

[32] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) ("It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.").

if directors do breach their duties, existing Delaware law already contains mechanisms to hold them accountable.

MFA recognizes that providing stockholders with appropriate information regarding nominees and full disclosure regarding potential conflicts of interest or ulterior motives is a salutary goal. However, the Covered Persons Disclosures provision goes well beyond that and does not appropriately balance the incremental benefits of this increased transparency against the onerous, unnecessary and unjustified burdens that it would cause to investment funds, their investors and the market. Instead, the Covered Persons Disclosures provision reflects only a generic desire for more information, without consideration of the materiality or usefulness of that information. As this Court has recognized in other contexts, there needs to be a limiting principle.[33]

MFA respectfully submits that this case presents the Court with an opportunity to establish such a limiting principle with respect to the appropriate information that can be sought under advance notice bylaws. Otherwise, the continued metastasis of the requests for information included in advance notice bylaws could prevent investment funds from making nominations or proposals,

[33] *See, e.g.*, *Galindo v. Stover*, 2022 WL 226848, at *7 (Del. Ch. Jan. 26, 2022) (holding that "directors need not provide exhaustive information in seeking a stockholder vote; caselaw requires accurate and complete disclosure of material information").

cause serious damage to stockholder engagement, impede the stockholder franchise, and negatively impact the functioning of our capital markets. MFA therefore believes that the Covered Persons Disclosures provision should not be upheld.

B. The Future Plans Disclosures Provision

The Future Plans Disclosures provision also threatens to create significant burdens for investment funds. Far from an "abstract" or "wildly speculative concern,"[34] it would be extremely onerous for investment funds to comply with this provision. The information sought by the Future Plans Disclosures provision—future investment plans in public companies ***other than the issuer***—is the intellectual property of the investment fund, and it is usually proprietary, highly confidential, and commercially sensitive.[35] Some have argued that an investment fund's strategies and holdings should be considered trade secrets.[36] Many activist engagements and proxy campaigns take well over a year to reach fruition, and investors expend considerable time, effort and resources on in-depth research to

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[34] Counterclaims ¶¶ 100-101.

[35] Wood, Zaba, & Liekefett, *Flying Close to the Sun* ("Plans to nominate directors at other companies in the future (as opposed to in the past) are among an activist fund's most highly confidential and valuable information.").

[36] *See, e.g.*, Jay Khurana, *Mandatory Financial Disclosures as Total Regulatory Takings*, 1 U. Chi. Bus. L. Rev. 519, 539 (2022); James B. Robertson, *Hedge Funds and Public Disclosure Requirements: Is the SEC Telling Secrets?*, 8 Nev. L. J. 787, 794 (2008); Erin E. Martin, *The Intersection Between Finance and Intellectual Property: Trade Secrets, Hedge Funds, and Section 13(f) of the Exchange Act*, 53 N.Y.L. Sch. L. Rev. 575, 584 (2008).

develop their investment theses and identify potential investment targets. The Future Plans Disclosures provision would deprive those investors of the benefit from this research and analysis.[37]

The Future Plans Disclosures provision also would hinder an investor's ability to build investment stakes and diminish the economic incentive to commence proxy campaigns.[38] Before collaborating with management, an engaged investor often accumulates a substantial position in an issuer in order to justify the financial commitment it is making. Requiring such disclosures reduces the value of the intellectual property of engaged investors by shrinking the profits to be generated from their own ideas. Once again, this would cause a decline in stockholder engagement that would, in turn, increase the risk of entrenchment and diminish management accountability, which would be detrimental for all stockholders and our capital markets.

These burdens come with little to no discernible benefit. Indeed, it is not immediately clear why the information sought by the Future Plans Disclosures

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[37] Cunningham, *Advance Notice Bylaws* ("Equally prohibitive is conditioning such nominations on the disclosure of planned director nominations at other companies. That calls for revealing investment plans and strategies that are invariably the product of substantial, costly research and analysis.").

[38] *Id*. (noting that "[m]aintaining the confidentiality of such efforts is essential to the successful deployment of capital" and "[c]ompelling its disclosure undermines the business model, providing a Draconian deterrent to nominate a director.").

provision would even be relevant, let alone material.[39] The Future Plans Disclosures provision goes well beyond simply asking whether a director nominee serves as a director on any company that is an actual competitor with or litigant against Masimo. The scenarios posited by Masimo, regarding "potential conflicts of interest that may arise if a nominating stockholder has already placed or imminently intends to place directors on the boards of companies that compete with Masimo,"[40] are highly speculative. Like the Covered Persons Disclosures provision, the Future Plans Disclosures provisions are premised on the baseless notion that nominating stockholders somehow control nominees and will force them to breach their fiduciary duties to the company. However, in the event that a nominee is actually elected as a director, Delaware law presumes that they will act in accordance with their fiduciary duties to all stockholders and would subject them to liability for any breach.[41]

As such, there is simply no justification for forcing engaged investors in public Company A to disclose future plans at public Company B so that ***the***

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[39] *Id*. (noting that "it is not obvious why such other investments would generally be important to a company's other shareholders"); *see also* Wood, Zaba, & Liekefett, *Flying Close to the Sun* ("It is also more challenging to argue the relevance of an activist's future plans at other companies with no relationship to the company or its industry.").

[40] Counterclaims ¶ 96.

[41] Additionally, federal antitrust laws, *i.e.* the Clayton Act, already address liability for directors sitting on the boards of competing companies.

incumbents at Company A can decide whether there is a conflict or more information that is needed. The "tell me more" philosophy that permeates the Bylaw Amendments is contrary to the legitimate balance that Delaware courts traditionally have struck between providing an issuer with material information needed to make informed decisions and not imposing a burden on stockholders.[42]

In addition, Masimo's reliance on this Court's ruling in *Cytodyn* is inapposite—in that case, the "future plans" in question dealt specifically with a potential transaction that would affect the Company itself, which is a far cry from a future plan to ***potentially*** nominate directors to an unrelated third-party company board.[43] Rather, the information sought by the Future Plans Disclosures provision is more akin to that which would be covered by the business strategy privilege, and this Court has long recognized the need to protect information about "decisions that are tentative, subject to ongoing consideration, and which have not yet been (and perhaps may never be) made."[44]

As noted above, MFA recognizes the importance of providing stockholders with appropriate information regarding the nominating investment fund, and MFA

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[42] *See* Lawrence A. Hamermesh, *Director Nominations*, 39 DEL. J. CORP. L. 117, 139 (noting that "courts explicitly or implicitly balance the negative impact of the limitation on the right to nominate against the positive impact on the interests of the corporation and its stockholders").
[43] *See Rosenbaum v. CytoDyn, Inc.*, 2021 WL 4775140 (Del. Ch. Oct. 13, 2021).
[44] *Plaza Sec. Co. v. Office*, 1986 WL 14417, at *3 (Del. Ch. Dec. 15, 1986).

is not opposed to some disclosure of information regarding holdings and strategies.[45] However, the Future Plans Disclosures provision appear to be designed to punish engaged investors who make nominations or proposals with the potential loss of economic benefit from any other planned investments. Even Professor Coffee acknowledges that "courts can reject bylaws that seem intent only on imposing an undue burden,"[46] and MFA respectfully submits that the Court should do so here. The Future Plans Disclosures provision would disincentivize value-creating stockholder engagement, which would create a chilling effect on such activity. MFA therefore believes that the Future Plans Disclosures provision should not be upheld.

C. The Supporting Stockholder Disclosures Provision

MFA recognizes that "provisions asking stockholders to disclose supporters are . . . ubiquitous."[47] However, the broad interpretation that Masimo has given to the Supporting Stockholder Disclosures provision is not. When Politan wrote to

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[45] For example, when the SEC proposed raising the threshold for reporting Form 13F information from $100 million to $3.5 billion, MFA encouraged the SEC to reconsider in light of the material reduction in market data that would result from the change and the usefulness of that market data to investors and public companies. *See* MFA Comment Letter re: Reporting Threshold for Institutional Investment Managers (Sept. 29, 2020), https://www.managedfunds.org/letter/mfa-letter-on-proposed-changes-to-sec-form-13f/.

[46] John C. Coffee, Jr., *Proxy Tactics Are Changing: Can Advance Notice Bylaws Do What Poison Pills Cannot?*, CLS Blue Sky Blog (Oct. 19, 2022), https://clsbluesky.law.columbia.edu/2022/10/19/proxy-tactics-are-changing-can-advance-notice-bylaws-do-what-poison-pills-cannot/.

[47] *Rosenbaum v. CytoDyn, Inc.*, 2021 WL 4775140, *19 (Del. Ch. Oct 13, 2021).

clarify what types of support were required to be disclosed under the provision, Masimo replied that it did not contain a materiality qualifier and was not limited to any particular form of support, such as financial contributions, a voting commitment, or a similar arrangement.[48] This is far more expansive than previous understandings regarding that provision, and should be rejected as vague and unworkable.

Masimo again cites *Cytodyn* to support its position,[49] but again such reliance is inapt. In *Cytodyn*, the Court found that a company was entitled to reject a nomination notice where, among other things, there was an advance notice bylaw requiring disclosure of all supporters, and the nominating stockholder failed to disclose any, including its financial backers.[50] There was no question that financial contributors were considered "supporters" for the purpose of disclosure, and the briefing shows that there was no argument that the advance notice bylaw was ambiguous or that the nominating stockholder asked the company how to comply.[51] That is the inverse of the situation here, where the nominating stockholder believes the advance notice bylaw is ambiguous and requested guidance about the scope of what constituted "support," and the company took the broadest possible reading.

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[48] *See* Complaint, Exhibit H, at 5 (Letter from Masimo to Politan, dated Oct. 19, 2022).
[49] Counterclaims ¶ 91.
[50] *Rosenbaum v. CytoDyn, Inc.*, 2021 WL 4775140 (Del. Ch. Oct 13, 2021).
[51] *See* Defendants' Pre-Trial Answering Brief, *Rosenbaum v. CytoDyn*, 2021 WL 4813133 (Del. Ch. Oct. 4, 2021).

Thus, although the language of the bylaw in *Cytodyn* may have been similar to the Supporting Stockholder Disclosures provision, the interpretation of it plainly is not.

Widespread adoption of Masimo's broad reading of "support" would create an imprecise and sweeping standard that could sweep in a variety of ordinary, market-efficient communications between stockholders. Such communications are not just limited to communications between and among activist investors. Engaged investors often reach out to other institutional investors regarding their views on specific companies before launching a proxy campaign that may involve a significant investment of resources and considerable risk. Institutional and/or passive stockholders would likely be wary of engaging in such communications with activist investors if there is an appreciable risk that those stockholders—with the benefit of hindsight—will be held to be "supporting" an activist campaign just by dint of communicating with an activist about a common goal or objective. Where, as here, the word "support" remains untethered to any metric or limiting principle, those communications will unquestionably be chilled.

What is more, it would be virtually impossible for engaged investors to know what types of conduct or communications would need to be disclosed—or what a board of directors would later determine to constitute support—sufficient to justify rejection of a nomination or proposal. Although this ambiguity in the Supporting Stockholder Disclosures provision likely would be resolved in favor of a

stockholder's electoral rights eventually,[52] we believe that the uncertainty will have a significant chilling effect on the free flow of communications between investors and discourage them from communicating about key issues related to an issuer. In fact, as part of a recent decision to enjoin a poison pill, the Court described a broad reading of an "acting-in-concert" provision as the "primary offender," because the language swept up "potentially benign stockholder communications."[53] The same is true here.

MFA respectfully submits that this case presents the Court with an opportunity to clarify that "support" in the Supporting Stockholder Disclosures provision should be read with a materiality qualifier, such that it is limited to financial contributions, a voting commitment or a similar arrangement.

IV. CONCLUSION

For all the foregoing reasons, *amicus curiae* MFA believes that the three provisions of the Bylaw Amendments highlighted above should not be upheld.

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[52] *See BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.*, 224 A.3d 964 (Del. 2020).

[53] *The Williams Cos. S'holder Litig.*, 2021 WL 754593, at *37; *see also Jorgl v. AIM ImmunoTech Inc.*, 2022 WL 16543834, at *16 (Del. Ch. Oct. 28, 2022) (noting that "[o]ne can envision an advance notice bylaw with so broad a reach that it mandated the disclosure of mere discussions among stockholders" but finding that the bylaw at issue was not so broad").

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CERTIFICATE OF SERVICE

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