IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

POLITAN CAPITAL MANAGEMENT LP and POLITAN CAPITAL NY LLC,	:	
Plaintiffs/ Counterclaim-Defendants,	:	
v	:	C. A. No. 2022-0948-NAC
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.	:	

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, December 20, 2022
1:30 p.m.

- - -

BEFORE: HON. NATHAN A. COOK, Vice Chancellor

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TELEPHONIC BENCH RULING ON PLAINTIFFS' MOTION TO COMPEL, PLAINTIFFS' MOTION FOR PROTECTIVE ORDER AND TO QUASH SUBPOENA, AND DEFENDANT MASIMO'S MOTION TO COMPEL

CHANCERY COURT REPORTERS
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ALSO PRESENT:

CATHERINE A. GAUL, ESQ.
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THE COURT: Good afternoon. This is Vice Chancellor Cook. Can I get appearances for the record, please.

ATTORNEY DiTOMO: Good afternoon, Your Honor. This is John DiTomo of Morris, Nichols, Arsht & Tunnell on behalf of plaintiffs.

I have with me on the call a host of people. I'll try to name them all. From my office I have Ali Cumings; my co-counsel Michael Swartz and Frank Olander from the Schulte firm; and Richard Brand from Cadwalader.

THE COURT: Good afternoon to you all.

ATTORNEY LESSNER: Good afternoon, Your Honor. Also for plaintiffs, Your Honor, you have Marty Lessner and Alberto Chavez from Young Conaway.

THE COURT: Good afternoon.

ATTORNEY SARNA: Good afternoon, Your Honor. This is Anthony Sarna from Abrams & Bayliss LLP on behalf of defendants.

I'm joined by co-counsel from Quinn Emanuel, specifically Mike Carlinsky, Sarah Concannon, Elli Merkel, and Ryan Rakower.

Mike Barlow, unfortunately, can't make it today because of a hearing in Georgetown this

afternoon. Thank you, Your Honor.

THE COURT: Thank you. Good afternoon to you all.

I want to thank everyone for hopping on the line for me to provide my ruling on the discovery motions. I'll ask that folks please place their phones on mute while I am delivering my ruling.

For the reasons I'll explain in a moment, I am going to deny defendant's motion to compel, grant plaintiffs' motion for a protective order and to quash a subpoena, and grant plaintiffs' motion to compel in part.

Plaintiffs Politan Capital Management and Politan Capital NY, which I will refer to collectively as "Politan," are stockholders of defendant Masimo Corporation, which I will refer to as "Masimo" or the "Company." Politan brought this action to invalidate certain governance measures, which I will refer to as the "Challenged Measures," which Masimo adopted ahead of its upcoming board elections.

The Challenged Measures are the subjects of vigorous debate in this case as well as in the business and legal communities. This is

particularly true with respect to the advance notice bylaw when viewed by itself and together with the other measures at play here. I want to be clear that, at this stage, I am not evaluating the merits of Politan's claims. Those are matters for another day. Today, I am tasked only with resolving narrow issues raised by the parties' pending discovery motions and with applying well-settled Delaware precedent to them.

The parties' discovery dispute involves the Challenged Measures. By way of high-level overview, the Challenged Measures comprise a stockholder rights plan, a change of control provision, and amendments to Masimo's advance notice bylaw. I note that Masimo also has a staggered board.

The stockholder rights plan, which I will refer to as the "Rights Plan," is alleged to prevent Masimo stockholders, including of course Politan, from obtaining a controlling stake in the Company via a tender offer. The mechanics of rights plans and their operation in theory and in fact have been the subject of Delaware case law for decades since their invention in the 1980s. Masimo allegedly put the Rights Plan in place soon after Politan surfaced as a significant stockholder of the Company

and reached out to the Company.

The "Change of Control Provision" appears in the employment agreement of Masimo's current chairman and CEO, Defendant Joe Kiani? The Change of Control Provision is alleged to be essentially a single-trigger acceleration provision that would require the Company to pay Mr. Kiani a large sum of equity and cash if two or more of Masimo's five incumbent board members are unseated within a 24-month period.

A distinction from the Rights Plan and from the Bylaw Amendments that I will address next is that the Company agreed to the Change of Control Provision several years before Politan announced its presence as a significant Company stockholder. For now, I note only that the parties dispute the extent to which this timing distinction matters for purposes of my merits analysis, but that is an issue for another day.

Turning, then, to the Bylaw Amendments. The amendments refer to certain significant modifications that Masimo's board made to the Company's advance notice bylaw shortly after Politan surfaced and reached out to the Company. The

Bylaw Amendments allegedly apply only to the Company's investment fund stockholders and require them, in connection with a proxy campaign, to make extensive disclosures, including about their limited partners' identities, portfolios, and investment strategies. The Bylaw Amendments also allegedly require investment fund stockholders that seek to nominate a director to Masimo's board to divulge past and future plans for running Masimo or companies related to or competitive with it. In its papers, Politan described the advance notice bylaw as "perhaps the most preclusive advance notice bylaws in Delaware history ...."

Politan alleges that Masimo adopted the Rights Plan and Bylaw Amendments shortly after Politan expressed interest in nominating two directors to Masimo's board. Politan alleges that the Challenged Measures, whether viewed individually or together, are improper measures intended to entrench the incumbent directors and to interfere with stockholder voting rights.

The parties seek to compel each other to produce various documents and information concerning the Challenged Measures and Politan's proxy campaign. Politan also seeks a protective order and

to quash a third-party subpoena. I will discuss the motion details during my analysis, which I will begin now.

I'll start with the standard of review. Rule 26 governs discovery motions. Under Rule 26(b)(1), a party may obtain discovery "regarding any non-privileged matter that is relevant to [the] party's claim or defense and proportional to the needs of the case[.]" "Information sought in discovery is considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action." That's a quote from this Court's 2014 *Dole Food* decision.

So "discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of the action." That's a quote from this Court's 1981 *Husky v. Boxer Oil* decision.

After all "[d]iscovery is called that for a reason. It is not called 'hide the ball.'" That's a quote from this Court's 2010 *Klig v. Deloitte* decision.

Still, Rule 26 does not provide "an

unlimited right to discovery." That's a quote from then-Vice Chancellor Strine's 2007 *Diedenhofer* decision.

"[T]he scope of discovery is broad, but not limitless, and this Court may exercise its ... discretion in delineating the appropriate scope of discovery." That's a quote from this Court's 2007 *Tyson Foods* decision.

"That discretion must be exercised in a sensible way to fairly accommodate all of the interests involved ... to confine the scope of discovery to those matters that are truly relevant[,] and to prevent discovery from evolving into a fishing expedition or from furthering purposes ulterior to the litigation." That's a quote from then-Vice Chancellor Jacobs's 1986 *Plaza Securities* decision.

These principles apply equally to motions for protective orders and to squash subpoenas. I take that observation from this Court's 2008 *Countrywide* decision and from its 2021 *Department of Finance v. AT&T* decision.

Discovery should be used "to advance issue formulation, to assist in fact revelation, and to reduce ... surprise at trial." That's a quote from

our Supreme Court's 1986 *Levy v. Stern* decision.

Discovery should not be used as a "strategic weapon[.]" That's a quote from this Court's 2017 *Oxbow Carbon* decision.

Nor should discovery be used to "harass ... [an] opponent[.]" That's a quote from this Court's 1980 *Loretto Literary* decision.

Accordingly, I may deny discovery if the information sought goes "beyond the allegations," even where it "may cover some of the same subject matter[,]" in order to prevent a party from obtaining irrelevant information or from overburdening or prejudicing another party or a nonparty. Those are quotes from Chancellor Seitz's 1960 *Dann v. Chrysler* decision.

I'll turn now to Masimo's motion to compel. Masimo moves to compel Politan to answer 20 requests for production and 17 interrogatories. Masimo's demands are articulated in Exhibit 3 to Politan's opposition, which I incorporate by reference in the interest of time. Broadly speaking, defendants seek to obtain through Rule 26 discovery the following types of information: Identification of Politan's limited partners with over a 5 percent stake in

Politan and their various limited partnership agreements, co-investment agreements, confidentiality agreements, subscription agreements, and funding agreements with Politan; Politan's internal governance documents; all communications between Politan and EnTrust Global, which defendants claim is a significant limited partner of Politan that they have identified; all communications between Politan and its limited partners concerning Masimo or "Politan's intention to engage in director campaigns at public companies, including Masimo," for the past two years; and the list goes on.

Masimo also asks for all documents and communications between Politan and any journalists "academic[s,]" "blogger[s,]" "online ... commentators," investors or prospective investors concerning Masimo or "Politan's intention to engage in director campaigns at public companies, including Masimo"; all documents and communications concerning various allegations in Politan's complaint, Mr. Quentin Koffey's "qualifications to serve on the Masimo Board" and his separation from prior employers; the potential creation of a "Sidecar Vehicle" for investing in Masimo, and Politan's "consideration" of

every "potential" board candidate that Politan "might" support for election to the board. Again, this is just a summary of some of the requests. The interrogatories are drafted in the same vein.

Politan opposes these demands on a number of grounds, including that they seek to discover irrelevant information. Masimo counters that its demands "are tailored to obtain facts and information directly relevant to the claims and defenses at issue in this action." That's a quote from page 4 of Masimo's motion.

Masimo's position runs contrary to an unbroken line of precedent dating back to then-Vice Chancellor Jacobs's 1987 *Atlantic Research v. Clabir* decision. There, the target's board adopted a rights plan to combat a hostile takeover threat. The target and bidder litigated the validity of the board's response.

In this setting, "the board has made a decision. That decision is historical. That decision is past. There was a body of knowledge that the board had when it made its decision. That body of knowledge is what is being tested. The board's motives when making that decision are what's being tested ...."

That's a quote from Vice Chancellor Laster's 2017 *Marcato v. Gibbons* transcript.

Consistent with this paradigm, this Court in *Atlantic Research* held that in a takeover response case, discovery is not relevant under Rule 26 unless it is focused on "what the directors knew and considered at the time" they responded to the threat.

Stated conversely, the board cannot seek discovery into what it "did not know and did not consider" at the time it responded to the threat. That's a quote from Chancellor Chandler's 1998 *Circon* decision, which applied *Atlantic Research* to deny a target board's motion to compel information from a hostile bidder about what the bidder was planning at the time it made a tender offer to the target's stockholders.

Atlantic Research embodies an approach in our law that focuses on what the board knew and considered at the time it adopted the governance measures. This approach is uninterested in *post hoc* justifications that boards or their counsel might construct in litigation with the aid of discovery.

As Vice Chancellor Laster has explained, "when [courts] deal[] with one of these

situations [allegedly involving] entrenchment and interference with [a stockholder] vote ... it's the [directors'] knowledge and beliefs and thinking that [are] at issue. So if [the board] make[s] a decision, [the directors] are in the positive situation of getting to create the record on which [they] made that decision. That's a very powerful place to be. But it also means that [the directors] created [their] record, and [they] don't later get broad-ranging discovery into things that [they] didn't even know about. What *Atlantic Research* [held], ... and the vast majority of the cases have followed, is that this is a relevance point, and so broad discovery into other things about the bidder — or ... the insurgent — isn't relevant to the types of claims that are being made [in the case]." And that's a quote from Vice Chancellor Laster's 2017 *venBio* transcript.

Atlantic Research has been on the books for three and a half decades, and neither party has cited a case questioning it. Under *Atlantic Research*, this Court has rejected the "recurring argument" that the target directors "should be able to take discovery into the [plaintiff]" to confirm or reinforce their response because "[t]he target

directors don't get to attempt to justify their decision by obtaining through discovery [from the plaintiff] materials that they didn't consider" when they responded. Those are quotes from Vice Chancellor Laster's 2014 *Men's Warehouse* transcript.

Masimo has made this "recurring argument" here and I, too, reject it.

Masimo seeks information from Politan about its investors and potential proxy plans. But the board did not know that information at the time the board adopted the Challenged Measures. And the question here is what the board did know and consider at the time. So the discovery Masimo seeks is irrelevant.

Nor do Masimo's counterclaims and defenses change this result. In the ordinary case, access to discovery generally should be symmetrical, and each party should be entitled to information about the other to support its claims and defenses. But the practical realities and special policy considerations involved in takeover response cases or proxy contest cases make them different. In responding to a perceived takeover threat, the board controls the resources and universe of information needed to form

its response.

As the Court put in *venBio*, that's a "very powerful" position to be in. The stockholder or outsider, by contrast, has very little, if any, access to or, say in, that process.

In the context of cases like this one, then, the Court has declined to treat incantations of equitable defenses or the usual goose/gander arguments as a basis for avoiding *Atlantic Research*, explaining: "There's a lot in the [directors'] brief[s] about ... 'level playing field'; 'they've asked us for this stuff'; 'we ought to get that stuff from them.' Those are all very powerful arguments when parties are similarly situated or when you are talking about issues [on which] both parties are engaging. But when you are talking about a scenario in which the question is: Did the incumbents act for entrenchment or did they act for some other reason? and the question is what the incumbents knew or thought and did at the time, you're not dealing with parties that are similarly situated. You are not dealing with people ... in similar positions or engaging on similar issues." That's a quote from the *venBio* transcript.

Accordingly, under settled precedent,

mere recitation of a counterclaim or defense is not a "free pass" to conduct otherwise irrelevant discovery into the plaintiff's files. That's a quote from this Court's 2009 *Kurz v. Holbrook* decision.

For these reasons, Masimo's complaints about one-sided discovery are inapt. This is a matter involving a challenge to certain governance measures by stockholders seeking to run proxy campaign, and the board had exclusive power to create the record on the Challenged Measures. Consistent with decades of Delaware precedent on this issue, the board's decision will rise or fall with that record. Consequently, the board cannot use discovery to bolster or reshape evidence grounding a decision that the directors already made.

Under *Atlantic Research* and its, at this point, quite considerable progeny, Rule 26's broad concept of relevancy narrows in the proxy campaign defense context to preclude directors from casting Rule 26's normally wide net in order to expand the record surrounding the adoption of governance measures beyond the information that was available to the directors at the time of the measures' adoption. I will look to the past to review the board's reasons

and motivations for adopting the Challenged Measures. What defendants might theoretically discover about Politan now by turning over the proverbial rocks is, at least based on the arguments and record presently before me, irrelevant to my analysis. Accordingly, I deny Masimo's motion.

As a last resort, Masimo invokes what it calls the "objectively incorrect exception" to the *Atlantic Research* rule. This "exception" purportedly comes from the *Atlantic Research* decision itself, which, as I have emphasized, announced a relevancy rule that has been faithfully applied ever since.

In the paragraph following the pronouncement of that rule, the *Atlantic Research* decision stated, "If Clabir were to attack the reasonableness of the board's decision at the trial on the basis that the directors' perceptions of Clabir's intentions were objectively incorrect, then [the board] would be entitled to test what Clabir's true intentions were; that is to say [the board] would be entitled to test the validity or the truth of what Clabir claimed that its intentions were by way of rebuttal."

Based on this passage, Masimo argues

that because, in Masimo's view, Politan seeks to prove that the board's perception of Politan's intentions was objectively incorrect, Masimo is entitled to dragnet discovery into Politan investors and past and future proxy proposals to rebut Politan's case.

It is true that *Atlantic Research* states an exception to the general rule I've been describing. As I discussed with the parties at oral argument, however, it was unclear to me the extent to which this so-called "objectively incorrect exception" gained material traction in our law following *Atlantic Research*.

The Company pointed me to an October 2009 decision of this Court in *eBay v. Newmark*, which alluded to application of the exception via a citation to a transcript ruling the Court had issued earlier in that action. Given this arguably scant case law support, at least in what had been submitted to me, I requested the submission of any additional authority concerning the extent to which the purported exception has been applied.

Following oral argument, the Company submitted a letter with the March 6, 2009, transcript ruling referenced in the *eBay* decision. The Company's

letter also cited as additional authority an April 8, 2014, transcript ruling in *Third Point LLC v. Ruprecht* and this Court's 2010 post-trial decision in *Yucaipa American Alliance Fund II v. Riggio*.

I have reviewed this additional authority, and I come away with at least a couple of reactions.

First, the fact that the "objectively incorrect exception" has apparently been applied so infrequently over the three and a half decades since *Atlantic Research* seems indicative of something.

Second, I note that the *eBay* litigation seems to have involved arguably broader and different issues than what's at play here. It's true that the case involved challenges concerning a staggered board, rights plan, and right of first refusal over outstanding shares. However, it also appears, for example, that *eBay* already had a director on the craigslist board for years before the director was removed in connection with allegations of eBay using craigslist's nonpublic information to compete with craigslist. Indeed, it appears that the matter also involved arguments over whether various documents could even be deemed privileged due to years of

"mutuality of interests" in connection with eBay's investment in craigslist and director designee rights. In any event, the Court permitted discovery of the sort challenged here because the Court concluded that it was "possible[,] even likely" that eBay "will introduce evidence that its conduct was proper and did not pose a threat to craigslist sufficient to warrant adoption of the governance measures."

For the reasons I will explain in a moment, that is ultimately a key difference from this case.

My review of the April 8, 2014, transcript ruling in *Third Point v. Ruprecht* also seems less supportive of defendants' arguments than they contend. First, I note in passing that the ruling seems to have been issued on a highly truncated time frame, with the motion for a protective order being filed on April 7th, an opposition and then reply being filed on April 8th, and then the ruling coming that same day. That being said, the parties did engage at length on the issue in their papers and during oral argument in *Third Point*.

In any event, I have reviewed the transcript, and what jumps out at me is the language

that Plaintiffs pointed out in their December 14, 2022, letter to the Court in this matter. Specifically, the Court in *Third Point* explains that Third Point had "made various allegations in its complaint as to ... the kind of investor that it is" and, importantly, "I don't hear Third Point representing that it's not going to make any of those allegations when we get to the [injunction] hearing." Again, and for the reasons I will explain in a moment, that is a key distinction.

Defendants' third and final example in support of application for the "objectively incorrect exception" is, as I noted earlier, the post-trial decision in *Yucaipa*. It is somewhat difficult to follow defendants' reasoning for including the citation beyond perhaps for the proposition that the parties to litigation may, as a matter of trial strategy, voluntarily engage on issues at trial concerning information that was not available to the board at the time it made its decisions. Beyond that basic proposition, it is not entirely clear how defendants' citation to the *Yucaipa* decision is relevant to the matter at hand. Specifically, it is not clear whether defendants would like me to conclude

that the *Yucaipa* court must have allowed discovery under the "objectively incorrect exception." But that conclusion does not necessarily follow.

Yucaipa is not a discovery decision, and it did not cite *Atlantic Research*. The parties could have introduced evidence in *Yucaipa* concerning information that was not available to the board at the time it made its decisions for many reasons, including that the parties did not make *Atlantic Research* arguments or otherwise object to this sort of discovery. Indeed, my review of the *Yucaipa* action docket seems to indicate that the only motions to compel filed in that action were filed by the plaintiffs, not the directors, and that none raised *Atlantic Research*. *Yucaipa*, then, is no help.

As I noted earlier, given the scant authority applying the Company's exception to *Atlantic Research* after decades of litigation on this topic, I have to wonder whether the exception arguably might exist more in name than in actual practice. And that is particularly true in the context of advance notice bylaws, where the information itself is the whole ballgame.

Given the real world context in which

this sort of litigation arises, it would seem to be the rare plaintiff who participates in a board election process but does not address the larger context of the elections in its complaint, rhetorically or otherwise. But if, as Masimo maintains, the correctness of the board's perception is put in issue every time the board's decision is attacked in a complaint, then the board always could obtain information it did not know to prove the correctness of what it did know. In other words, Masimo's formulation of the "exception" to *Atlantic Research* would swallow its rule. Perhaps that is why the *Marcato* transcript, when presented with an identical "objectively incorrect" argument, declined to even address it, referring the parties instead to the arguments made against it in the plaintiff's reply brief.

But even if I were to assume that the Company's exception exists, I conclude that it would not apply here. The most obvious reason why the exception would not apply here is that Politan has represented to me that it does not intend to challenge the objective correctness of the board's perceptions. Politan confirmed this in its briefing and doubled

down on it at the hearing.

To be clear, I understand defendants' point that Politan's initial complaint, and then its proposed amended complaint, could relatively easily be read to suggest that Politan had intended to argue matters of objective correctness and that, as a result, the *Atlantic Research* exception might be deemed to be triggered. But Politan has made its representations to me -- quite forcefully, I might add -- and Politan will be held to them. This, then, is the key distinction from the limited set of case law that defendants cited to me in their post-argument correspondence.

I believe that my approach here is consistent with *Atlantic Research*. The decision, which is a transcript ruling, contains a colloquy between the court and bidder counsel. Bidder counsel asked whether the court would impose a protective order on information about the bidder if the bidder determined not to challenge the objective correctness of the target board's perception of the threat. As I read the transcript, the court indicated that it would.

Even so, there is a separate reason

why the Company's exception would not apply here, I believe. This case is unlike any other of the cases Masimo cites in subtle but important ways. Unlike those cases, the information the board seeks in this case is not just central to a discovery dispute. It is central to the case.

This case is largely about an advance notice bylaw that allegedly requires investment fund stockholders, like Politan, to reveal voluminous details about their proxy campaign as well as their limited partners' identities, portfolios, and investment strategies. Disclosure of this information allegedly is a precondition to Politan's participation in Masimo's board election process. So understood, the Bylaw Amendments are allegedly structured to extract information that the board did not know when it took the Challenged Measures. The information that Masimo seeks to compel from Politan in discovery is the very information that the Bylaw Amendments allegedly would compel from Politan in connection with a proxy campaign.

In other words, the information sought in discovery is the very information being sought via the challenged advance notice bylaw. Masimo asks that

I order Politan to give Masimo information now that, three months from now, I may well conclude Masimo is not entitled to after trial.

Seen this way, this case does not implicate *Atlantic Research* in the abstract. It implicates the core of what *Atlantic Research* was designed to address and the undue prejudice to a party participating in an active deal process or proxy campaign that *Atlantic Research* was, I believe, designed to prevent.

I understand the argument that a confidentiality agreement is in place. But saying that is enough here would require me to ignore decades of precedent as to how discovery in these unique types of cases does or does not proceed.

Under these circumstances, there's a strong argument that Masimo impermissibly seeks to achieve through discovery a victory on the ultimate issue raised by the Bylaw Amendments. Our books and records jurisprudence teaches that discovery should be denied if it is calibrated to secure the very information that is being sought as ultimate relief in the proceeding. I take that proposition from Section 220 decisions like then-Vice Chancellor

Steele's 1995 *U.S. Die Casting* decision.

The parties have debated whether the ultimate issue doctrine should be exported from the books and records context. But I need not resolve that debate, or the ultimate issue question more broadly, today. Politan has conceded that it will not seek to prove that the board's perceptions were objectively incorrect. That is sufficient to reject an exception to *Atlantic Research* here.

"Relevancy is one thing, the scope of discovery allowed under a particular theory of relevancy is quite another." That's a quote from *Plaza Securities*.

Under settled precedent, Masimo's discovery demands seek information that is irrelevant to the issues in this case. Accordingly, Masimo's motion to compel is denied.

As a final note, I want to make clear that my ruling should not be read as a suggestion that the company-defendants are entitled to no discovery in this type of litigation. My ruling is limited only to the specific discovery requests that are the subject of the Company's motion to compel, which I have considered in the specific circumstances of this case.

It should be understood that there's a great deal of self-selection bias at work in the disputes that end up appearing in the Court's rulings, in that the Court is necessarily not asked to rule or even speak about the numerous discovery requests that the parties are able to work out. And this case is no exception. My review of Politan's responses to defendants' document requests and interrogatories indicates that there are quite a number of requests and interrogatories that Politan has substantively responded to. In any event, I leave to another matter and another day the question of what the ultimate contours of plaintiff discovery should and should not look like in this type of litigation.

I'll turn next to Politan's combined motion for a protective order and to quash a subpoena. This motion mirrors the arguments Politan made in opposition to Masimo's motion to compel. As a result, my ruling on this motion will follow logically my ruling on Masimo's motion.

Politan seeks a protective order to shield from discovery the information Masimo sought through its motion to compel. I have held that, under settled law, Masimo's discovery demands are

irrelevant. So I grant the protective order.

Politan also seeks to quash a subpoena that Masimo served on nonparty EnTrust Global, who Masimo believes to be a Politan limited partner. Politan contends that the subpoena was issued as part of a larger harassment spree. For example, Politan observes that the subpoena was served on EnTrust at the eleventh hour on the day before Thanksgiving. Although harassment is a basis for denying discovery, I need not rule on that issue here. At bottom, the subpoena is engineered to obtain from EnTrust the same or similar type of information that Masimo had sought from Politan. Accordingly, based on my relevancy rulings, and now the protective order, the subpoena must be quashed.

Lastly, I turn to Politan's motion to compel. Politan moves to compel defendants to produce certain documents and answer certain interrogatories related to the following three topics: the Rights Plan, defendants' attempts to identify and contact Politan's limited partners, and the adoption of the Change of Control Provision found in Mr. Kiani's employment agreement.

Turning first to the Rights Plan

aspect of the motion to compel. As I understood it from oral argument, defendants have withdrawn their objection to this aspect of the motion to compel now that Politan seeks to bring a cause of action specifically directed to the Rights Plan.

I therefore turn next to Politan's request that defendants provide certain discovery concerning persons or entities that Masimo suspects may be an investor/limited partner of Politan. Defendants took the position in their papers that they would be glad to respond to the discovery — delighted even — if Politan would just reveal, via a list of search terms, who Politan's limited partners are. I'm quite loath to say that an argument is silly, but that one gets pretty close in these circumstances. In any event, the argument seemed to move toward a more reasonable one at the hearing.

Where we left things at oral argument was that defendants are concerned about a "needle in a haystack" problem in that they have a lot of communications files and can't be sure that Politan won't come back to them later and say they violated their discovery obligations because defendants missed an entity that defendants didn't know about in the

first place. According to defendants, the information needed to respond to the request is in Politan's hands, not defendants'.

But who defendants believe is a Politan investor is information in defendants' hands. Defendants do not need Politan to give them a list. And that list of names and entities is going to be what it's going to be. As Politan's counsel stated at the very conclusion of the hearing before I cut him off for time, "if they couldn't tell it was an LP or they didn't know it was an LP," Politan is not going to accuse defendants of violating their discovery obligations. Ultimately, given where the parties' positions landed at the end of the hearing, this seems like a fairly common sense thing that the very sophisticated lawyers involved in this matter can now resolve.

That being said, there was a suggestion at the hearing that this particular request seeks documents over a very broad time period. As I noted at the hearing, it strikes me that this particular request for documents can and should be limited to the time frame around which, and after, Politan surfaced as a significant investor in Masimo.

Finally, concerning Politan's motion to compel discovery around the Change of Control Provision, defendants have argued that such requests are irrelevant and would be unduly burdensome. Defendants have produced certain responsive documents for the handful of days in mid-October 2022 covering the time when Politan first demanded repudiation of the Change of Control Provision and when Politan filed its action in this Court. Defendants argue that they should not be required to produce documents outside of this period, and particularly not back to the 2013 time frame that Politan seeks.

According to Politan, Masimo's board originally considered the Change of Control Provision in the 2013 and 2014 time period and rejected it. Politan appears to assert that when the 2013/2014 board rejected the provision, Mr. Kiani engineered their replacement and that the new board then approved an employment agreement containing the Change of Control provision in 2015.

Again, according to Politan, the provision is essentially a single-trigger acceleration provision that is triggered if two members of Masimo's five-member board are voted out of office during a

rolling 24-month period. Triggering the provision is alleged to result in the payment of a quite substantial amount of cash and stock to Mr. Kiani. Specifically, Politan has alleged that, at least as calculated as of December 31, 2021, the value of such payments would be between $800 and $900 million.

For its part, defendants contend that the information relating to the adoption of the Change of Control Provision in 2015 is not relevant because the matters go beyond the narrow issue for trial, any claim concerning those events would be time-barred, and Politan would lack standing to bring any such claim in any event since it was not a stockholder at that time.

Defendants also asserted during argument that granting Politan's motion on this point would "introduce 100,000 documents into this proceeding."

First, as highlighted in this Court's decision in *Deloitte v. Flanagan*, a discovery motion is generally not the proper procedural posture for merits-based conclusions on claims and defenses. Accordingly, I am not going to resolve defendants' limitations period and standing arguments in the

context of this discovery motion. In addition, I expect that Politan will make arguments in response, but, again, I need not address those now.

Had the Change of Control Provision been adopted contemporaneously with the Rights Plan and Bylaw Amendment, the question of whether the adoption of this provision is sufficiently relevant to consideration of these various measures, whether viewed singly or together, and the board's decision-making process in adopting them — that would be an easy question. The only thing that makes this somewhat difficult is the number of years that have lapsed.

But I also must consider that the Change of Control Provision is not what I would, at least at this very preliminary stage, consider a run-of-the-mill employment agreement provision. If different terms were at issue, defendants' time-based arguments would likely have more force. To be clear, there has not been a trial yet, and I'm making no judgments about the Change of Control Provision. But, based on the allegations and arguments before me today, I find that Politan has sufficiently supported its request to take discovery into the circumstances

surrounding the alleged initial proposal and rejection of the provision in the 2013 and 2014 time frame and into the circumstances surrounding its eventual adoption in 2015.

I don't think it takes any great stretch of mind to believe that the adoption of a change of control provision, in which there may be a nearly billion-dollar payment upon the change in two directors of the board, could well be something that a current board member, being a reasonably social and curious human being, would have learned about at some point in the director's service and that those facts might have played some role in the director's thought process in adopting the challenged provisions. Again, I'm not making any conclusions one way or another on this, but the seemingly unique terms of the provision make some degree of discovery on this matter appropriate.

The next question, then, is what degree of discovery is appropriate. Defendants have suggested that this would inject 100,000 documents into this matter. We are obviously not doing that. I believe that targeted discovery around the periods in which the provision was initially proposed and

rejected, and then again proposed and adopted, would be appropriate. Politan's proposed amended complaint also refers to certain amendments or renewals of the provision in more recent years, including as recently as January 2022. To the extent that occurred, targeted discovery around those periods seems appropriate as well. And then Politan is entitled to discovery concerning the provision since Politan surfaced, as there is a reasonable likelihood that the provision will, at a minimum, go to what may well end up being the total mix of information considered by the board.

Those are my rulings on the motions. To recap, I've denied Masimo's motion to compel, granted Politan's motion for a protective order and to quash a subpoena, and granted Politan's motion to compel in part.

I'm not looking for reargument at this time, but I'm happy to take any questions.

Any questions from the plaintiffs?

ATTORNEY DiTOMO: Your Honor, no questions from me. But given that we are on the phone, I'll defer to my colleagues at Schulte to see if they had any questions.

ATTORNEY SWARTZ: It's Michael Swartz. No questions, Your Honor.

THE COURT: Any questions from the defendants?

ATTORNEY CONCANNON: Good afternoon, Your Honor. This is Sarah Concannon from Quinn Emanuel. No questions from the defendants either. Thank you for your thorough recitation and the Court's order.

THE COURT: Thank you all for bearing with me for that fairly long ruling. And again, I very much appreciated the arguments on the motions. I thought the arguments were excellent. And to the extent that I can be of any further assistance to the parties during the course of discovery or otherwise, please don't hesitate to reach out to my assistant.

With that we are adjourned. Thank you.

(Proceedings concluded at 2:13 p.m.)

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CERTIFICATE

I, DENNEL NIEZGODA, Official Court Reporter for the Court of Chancery for the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 38 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 21st day of December, 2022.

/s/ Dennel Niezgoda

Dennel Niezgoda
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter