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Advance Notice Bylaws After Kellner: Still Advisable and Require Not Flying Too Close to the Sun

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There has never been a more important time for public companies traded on U.S. stock exchanges to have appropriate, robust advance notice bylaws. These provisions protect the interests of all shareholders by ensuring a fair process in relation to the conduct of corporate director elections and shareholder nominations of director candidates. Companies and shareholders benefit from robust advance notice bylaws because shareholder activists annually knock on the doors of a staggering number of U.S. public companies each year bearing dissident director nominations and other business proposals, with unpredictable and, in some cases, harmful consequences. Since January 2022, activists initiated over 900 public campaigns at corporations traded in the U.S., based only on publicly available data.[1] At the same time, over the past two years, a spate of high-profile lawsuits in Delaware challenging the validity of advance notice bylaws created uncertainty, for Delaware corporations as well as corporations of other states, about the legality and advisability of adopting new advance notice bylaws or modifying those that companies already had in place.

The recent decision of the Delaware Supreme Court in *Kellner v. AIM ImmunoTech, Inc.*,[2] the most significant of the recent cases addressing advance notice bylaws, confirmed that adopting and maintaining robust and appropriate advance notice bylaws is advisable for Delaware corporations provided the bylaws fall within certain well-known limits of law and, if adopted in the face of a potential or actual proxy contest, can satisfy enhanced scrutiny. The court's ruling indicates that decades-old fundamentals of Delaware corporation law, highly supportive of robust advance notice bylaws, remain intact. *Kellner* added clarity to the law but did so without materially changing the well-established framework and spirit of Delaware case law.

Potentially the most welcome aspect of the ruling for companies is the Delaware Supreme Court's confirmation of an old principle of Delaware law: a plaintiff shareholder who wishes to establish that a given advance notice bylaw is facially invalid, without reference to facts involving a potential or actual proxy contest, faces a high burden of proof, and it is not the defendant company that carries this burden. In keeping with historical Delaware law, advance notice bylaw amendments that reach too far because they are unintelligible on their face or used to make a stockholder's campaign

impossible will still risk being struck down, as has long been the case in Delaware. Like Icarus, they may "fly too close to the sun."[3]

Delaware Has Long Permitted Advance Notice Bylaws, Subject to Limits

Advance notice bylaws serve a critical function. Among other things, they provide requirements that shareholders must satisfy in order to submit valid director nominations and other business proposals for shareholder meetings, outside of the processes associated with Rule 14a-8 and "proxy access" bylaws. Advance notice bylaws require a nominating shareholder to provide certain information about itself, certain associated parties, and its director nominees and any proposals of business within a specified period of time prior to a shareholder meeting. Without these provisions in a corporation's bylaws, any shareholder could nominate its own "dissident" director candidates to serve on the board of a corporation while providing the company and its other shareholders little to no advance warning or information about the candidates ahead of a shareholder meeting. Receiving information under advance notice bylaws helps boards make informed decisions about how best to respond to shareholder nominations and ensure that shareholders can make informed voting decisions.

Given the constructive role of advance notice bylaws, Delaware courts have long upheld advance notice bylaws, both consistently and strictly.[4] This is true in particular where the provisions were adopted in the absence of an impending threat of a proxy contest.[5] For decades, Delaware courts have recognized that advance notice provisions generally serve "the proper purpose of assuring that stockholders and directors will have a reasonable opportunity to thoughtfully consider nominations . . . and to allow for full information to be distributed to stockholders."[6] The courts' support of advance notice provisions has also gone beyond generalities, as chancellors and vice chancellors have had many occasions to uphold specific types of advance notice bylaws at issue in given disputes. For example, multiple decisions, including those of the Delaware Supreme Court, have specifically upheld advance notice bylaws that require dissident director nominees to submit director questionnaires as part of the dissident shareholders' advance notice package, including questionnaires that seek detailed and accurate answers from nominees.[7]

However, Delaware courts have long invalidated advance notice bylaw provisions that "unduly restrict the stockholder franchise or are applied inequitably."[8] For years, Delaware courts have unambiguously held that advance notice bylaws adopted in the face of a shareholder activist campaign — known to lawyers as "rainy day" and "cloudy day" adoptions, depending on the imminence of the threat — will likely be subject to greater judicial scrutiny, out of a concern that a board may be changing the rules of an election after the process has begun.

To illustrate, in *In re Ebix, Inc. Stockholder Litigation*, at the motion to dismiss phase, the Delaware Chancery Court ruled in 2016 that bylaw amendments adopted on a "rainy day" might be deemed

defensive measures in the face of a perceived threat and, accordingly, would be subject to heightened scrutiny under *Unocal Corporation v. Mesa Petroleum Co.* rather than receive business judgment rule deference in the first instance.[9] Although the court ultimately determined at trial that the particular amendments were adopted on a "clear day," the court confirmed that enhanced scrutiny under *Unocal* applied "whenever the record reflects that a board of directors took defensive measures in response to a perceived threat to corporate policy and effectiveness which touches on issues of control."[10] Under the *Unocal* standard, directors bear the burden of proving they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed and that the bylaw amendments were reasonable in relation to the threat posed. Thus, certain bylaw amendments having "defensive value" could, in certain situations, be subject to enhanced scrutiny.[11] The court in *Ebix* paid particular attention to bylaws that "prevent elections from occurring."[12]

Accordingly, well before *Kellner*, it was established in Delaware that in order to be upheld, an advance notice provision "must, on its face and in the particular circumstances, afford the shareholders a fair opportunity to nominate candidates."[13] Advance notice bylaws must be used for proper purposes consistent with directors' fiduciary duty of loyalty.[14] In 2014, the Court of Chancery observed that the "clearest set of cases providing support for enjoining an advance notice bylaw involves a scenario where a board, aware of an imminent proxy contest, imposes or applies an advance notice bylaw so as to make compliance impossible or extremely difficult, thereby thwarting the challenger entirely."[15]

The Recent Controversies: *Kellner* Upholds and Elaborates on Established Principles

After *Kellner*, the fundamental principles are still that advance notice bylaws can be robust but generally should not be designed to make compliance impossible, and that companies should be additionally cautious about adopting, strengthening, and enforcing advance notice provisions on a rainy or cloudy day.

Politan v. Masimo

In October 2022, activist fund Politan Capital Management LP sued a corporation for having adopted advance notice bylaw provisions that allegedly made it impossible for the activist to nominate directors and wage a proxy campaign.[16] Facing a potential proxy battle with the activist fund, the corporation's board adopted several advance notice bylaw provisions that went far beyond typical advance notice bylaws with regard to the type and extent of information sought. These bylaws required that for any shareholder's nomination notice to be valid, the notice needed to identify, among other things, the shareholder's limited partners, all understandings between such shareholder's limited partners and any of their respective family members and cohabitants, and

any plans such shareholder had to nominate directors at other public companies in the next 12 months.[17]

Two key questions presented in *Politan* were: when is it legal to adopt advance notice bylaw amendments, and what kinds of advance notice bylaw amendments are over the line from a legal perspective? The bylaws at issue were alleged to have been adopted on a "rainy day" — a case that was not hard to make. (In August 2022, the activist disclosed its stake and on September 2 told the company that the activist might launch a proxy contest; on September 9, the company amended its advance notice bylaws.) As to the content of the amendments, Politan alleged that they went too far, effectively precluding shareholders from exercising their "fundamental right to nominate individuals for election" to the company's board of directors.

On this basis, the plaintiff called for the application of the demanding *Blasius* standard to the adoption of the amendments, under which the adoption is "presumptively inequitable and will be invalidated" unless the directors can rebut this presumption by showing a "compelling justification" for the adoption.[18] The company initially argued that the amendments were not, in fact, adopted for the purpose of interfering with the shareholder franchise but rather to protect the company from having directors with potential undisclosed conflicts of interest, increase transparency in the director election process, and protect long-term shareholder value. Subsequently, in February 2023, the company unwound all of the bylaw amendments it had adopted in September 2022, before losing its proxy contest against the activist in a landslide. The Delaware Chancery Court ultimately awarded Politan a nearly $18 million mootness fee as reimbursement for Politan's legal expenses, reflecting how the court viewed the merits of the lawsuit. While the public does not have the benefit of a final trial ruling, ample takeaways can be mined from the briefings and transcript records.

Kellner v. AIM

In December 2023, activist shareholder Ted D. Kellner sued AIM ImmunoTech Inc. and its directors for having adopted advance notice bylaw provisions that Kellner alleged made it impossible to nominate directors. In early 2023, AIM had faced a potential activism campaign from shareholders who had previously targeted the company in 2022. The board adopted several new advance notice bylaws. When the dissident shareholders submitted their nomination notice, the company identified deficiencies in the notice and rejected the notice. The alleged deficiencies included undisclosed "agreements, arrangements, and understandings" among the plaintiff, his affiliates, and his nominees; a failure to disclose the "known supporters" of the nominations; a failure to disclose information about initial contacts among those involved in the campaign; and a failure to provide "other undisclosed information" pursuant to the company's form of D&O questionnaire.[19]

Kellner argued that certain of AIM's advance notice bylaw provisions were invalid and that even if the provisions were valid, they had been applied inequitably to his nomination notice. The Delaware

Court of Chancery upheld the board's overall rejection of the nomination notice on the basis that the nomination notice did not comply with certain valid portions of the advance notice bylaws. In this regard, the defendant corporation won the case. However, the Chancery Court found that certain elements of the advance notice bylaw provisions were invalid because they "inequitably imperil the stockholder franchise to no legitimate end."[20]

In the Chancery Court's consideration of the validity of the AIM bylaws, the court applied "enhanced scrutiny," Delaware's intermediate standard of review. The Chancery Court's reasoning for this was familiar: the bylaws were adopted on a cloudy day, "overcast . . . with storm clouds of a proxy contest gathering on the horizon."[21] In so doing, the Chancery Court invoked the recent Delaware Supreme Court decision of *Coster v. UIP Cos.*, under which the court applied *Unocal* "with sensitivity to the stockholder franchise that integrates the spirit of *Blasius* and *Schnell*."[22] Enhanced scrutiny requires a "context-specific" review of a board's conduct and most fundamentally focuses on "reasonableness."[23] Ultimately, the Chancery Court held that although the board had identified a "threat to proper corporate objectives," the board had not shown the court that certain of the advance notice bylaw amendments were "proportionate in relation to those objectives." Consequently, the Chancery Court found that four of AIM's advance notice bylaw provisions were invalid and unenforceable.

Had AIM adopted the bylaw amendments on a clear day, it is conceivable that the outcome could have been different. At the same time, the nature of AIM's bylaw amendments, the concerns that the Chancery Court expressed about them, and the manner in which the court applied enhanced scrutiny to the terms suggested that certain advance notice bylaws, even if adopted on a clear day and not yet invoked or enforced by a company, could become vulnerable to a plaintiff's action challenging their facial validity. In such a case, the adopting company would need to shoulder the initial burden of proving the validity of such provisions under the standard of enhanced scrutiny.

On July 11, 2024, the Delaware Supreme Court upheld the Chancery Court's decision in certain respects and overruled it in others.[24] The Supreme Court held that only one of the challenged advance notice bylaw provisions was invalid on its face, because it was "indecipherable," and that the other challenged advance notice bylaw provisions were valid on their face. Furthermore, the Supreme Court held that the AIM board had "acted inequitably when it adopted the amended bylaws for the primary purpose of interfering with, and ultimately rejecting," the activist's nomination. Additionally, the Supreme Court determined that the nomination notice was invalid because, as the Chancery Court had found, Kellner had submitted "false and misleading responses" to certain informational requests of the advance notice bylaws. The Supreme Court's ruling in this regard was a reminder of Delaware's doctrine that a plaintiff who seeks equity must do so with "clean hands." The court therefore determined that the case was properly dismissed and that no further action was warranted regarding Kellner's nomination notice.

The highest-level takeaways from *Kellner* with specific respect to advance notice bylaws include the following:

- Bylaws are "presumed to be valid." Advance notice bylaws are generally facially valid if they are "consistent with the certificate of incorporation" and are "not prohibited by law, and they address a proper subject matter."
- An advance notice bylaw provision is facially invalid if it is "indecipherable."
- A board can be found to have acted inequitably if it adopts or enforces bylaws for the "primary purpose" of interfering with or rejecting a shareholder's nomination. In keeping with well-established law, "[i]f a board adopts, amends, or enforces advance notice bylaws during a proxy contest," the courts will review the action under the enhanced scrutiny standard.
- Even if a board has acted inequitably in its adoption or enforcement of certain advance notice bylaws, the court could still permit the company to reject a shareholder nomination or proposal pursuant to the bylaws if the nominating or proposing shareholder has failed to satisfy one or more valid advance notice bylaws or otherwise has unclean hands in the process.

Kellner confirmed that *Coster*, which "folded *Schnell* and *Blasius* review into *Unocal*,"[25] is the current standard of enhanced scrutiny for reviewing the propriety of board action when the board is accused of interfering with a corporate election or a stockholder's voting rights in election contests.[26] In the first step, the court reviews "whether the board faced a threat to an important corporate interest or to the achievement of a significant corporate benefit. The threat must be real and not pretextual, and the board's motivations must be proper and not selfish or disloyal." If the board's actions "pass muster" under the first step, then the court considers "whether the board's response to the threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder franchise."[27]

Critically for the many companies that already have adopted sophisticated advance notice bylaws, the Delaware Supreme Court effectively reversed the Chancery Court's ruling as it related to the standard of proof for establishing that a bylaw is invalid on its face. The court affirmed that if a plaintiff seeks to establish that a given bylaw is facially invalid — that is, asserting that a bylaw is void in all cases as opposed to challenging the adoption or enforcement of a bylaw in view of particular circumstances — a specific and high burden of proof falls on the plaintiff, and it is not the defendant company that bears the burden subject to enhanced scrutiny. The Supreme Court held that in a challenge to the adoption, amendment, or enforcement of a Delaware corporation's advance notice bylaws that is ripe for judicial review, the court should first consider "whether the advance notice bylaws are valid as consistent with the certificate of incorporation, not prohibited by law, and address a proper subject matter."[28] For a bylaw to be held facially invalid, the burden is

on the plaintiff to demonstrate that the bylaw "cannot operate lawfully or equitably under any circumstances."[29] In other words, if there is a reasonable hypothetical scenario in which the bylaw could operate lawfully and equitably, it probably would not be found facially invalid.

Kellner's affirmation of the high standard for establishing facial invalidity of bylaws is perhaps the most notable — and novel — holding from *Kellner* insofar as it offers comfort to public companies with robust advance notice bylaws adopted on a clear day. As a matter of public policy, *Kellner* should result in fewer facial challenges to advance notice bylaws than would have resulted from the Chancery Court's decision. This is a positive result for companies, as only the coffers of plaintiffs' firms benefit from clogging the courts with bylaw challenges outside of potential or actual proxy contests.

Navigating the Post-*Kellner* Landscape

The decision in *Kellner* implies several takeaways for public Delaware corporations, along with corporations of other states that look to Delaware law. The following discussion reflects our own impressions that are subject to change, and this discussion does not intend to be comprehensive.

There may be defenses to rainy- or cloudy-day adoption, but the courts will hold these adoptions to a higher standard. *Politan* and *Kellner* provide more than a mere reminder of the already-well-established cautions of Delaware law with respect to rainy- and cloudy-day adoptions of advance notice bylaws. *Kellner* showed that the courts still have limited tolerance for the adoption of certain bylaw amendments on rainy or cloudy days. In both cases, the defendant companies and boards bore the burden of justifying the adoption of advance notice bylaw amendments in the face of a potential proxy contest. If a board considers rainy- or cloudy-day adoption to be necessary, the board should ideally be able to articulate the nature of the threat and why the board believed in good faith that the threat existed, and the advance notice bylaw amendments should be "reasonable in relation to the threat posed and not preclusive or coercive to the stockholder franchise." For the *Kellner* Supreme Court, Kellner's questionable actions in the past as found at trial were enough to uphold his disqualification under the bylaws, but the court still held that the board had acted inequitably in other respects related to its adoption and enforcement of advance notice bylaws.

Consider whether an informational requirement may be construed as indecipherable or as designed to inevitably frustrate the shareholder franchise. AIM's bylaws sought information about the nominating shareholder's direct ownership of stock as well as interests in the stock indirectly held through synthetic, derivative, and short positions. The Chancery Court observed that provisions seeking "to close loopholes in Section 13(d) involving synthetic equity" are generally legitimate in advance notice bylaws.[30] But the court held that AIM's provision, "with its 1,099

words and 13 subparts," was unduly lengthy and "indecipherable."[31] The Supreme Court agreed in upholding the invalidation of the provision.[32]

Generally, Delaware case law points to a distinction between, on the one hand, advance notice bylaws that are searching and, on the other hand, those that are so ill-defined that they are impossible to comply with. If a provision arguably "cannot operate lawfully or equitably under any circumstances," then it could be subject and vulnerable to a claim of facial invalidity even if adopted on a "clear day."[33] To the extent the provision is adopted and applied in a defensive context and is not reasonable in relation to the threat, the provision will not be upheld.

Care is warranted when defining the scope of people and entities about whom information is sought. Different types of definitions and terms can create concern under this principle. For example, in *Politan*, the company's bylaw amendments required a nominating shareholder to disclose to the company information concerning the investment holdings of "Family Members" of "Covered Persons." "Covered Persons" was defined broadly to include far-flung limited partners. "Family Member" was defined to include not only immediate family members living in a person's household but also mothers-in-law, fathers-in-law, brothers-in-law, and sisters-in-law living outside the person's household as well as "anyone . . . who shares the person's home." The plaintiff contended that this provision could be read to require detailed information about the interests, objectives, and agreements of and between even the roommates of limited partners of a fund who live anywhere in the world and that this information would be "practically impossible for a nominating stockholder to collect."[34]

Avoid seeking information about a nominating party's passive investors (i.e., limited partners). In *Politan*, the defendant company's bylaw amendments required any investment fund wishing to nominate director candidates to identify the names and addresses of its limited partners and to describe whether any of those limited partners in turn hold investments in any key competitor to, or litigation adversary with, the company. More specifically, the amendments required the nominating shareholder to disclose the identity of any limited partner or other investor who owned 5% or more of the investment fund as well as all investors in any sidecar vehicle. The plaintiff argued that this requirement created a severe and purposeful obstacle to activism because it is axiomatic in the investment fund industry to keep the identities of limited partners confidential, and identities of an investment fund's outside investors are valuable trade secrets. The plaintiff argued it would be impossible, as a practical matter, for an investment fund to comply with these disclosure requirements.

Avoid seeking information about planned nominations at other companies. In *Politan*, the defendant company's bylaw amendments required a nominating shareholder to disclose any "plans or proposals" for that shareholder, or any person with whom it is acting in concert, to nominate directors at other public companies within the next 12 months. The plaintiff asserted that such plans

and strategies of funds are highly confidential and proprietary and represent a fund's confidential thesis for growth. The plaintiff regarded the requirement as an "attempt to block investment fund shareholders from nominating candidates for election to the Board."

In Conclusion

As lawyers dedicated to shareholder activism defense, we routinely advise companies in adopting advance notice bylaws. We view robust advance notice bylaws as essential for protecting the interests of corporations and all of their shareholders. It is crucial for companies to evaluate and understand which advance notice requirements best protect corporate interests and to appreciate that the circumstances surrounding their adoption matter. *Kellner* is yet another reminder of the benefits of adopting advance notice bylaw amendments on a clear day — and of not flying too close to the sun.

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[1]DealPoint data. Excludes activism at closed-end funds and Rule 14a-8 proposals.(go back)

[2]C.A. No. 2023-0879 (Del. Jul. 11, 2024) ("Kellner"); see also Kellner v. AIM ImmunoTech Inc., 307 A.3d 998 (Del. Ch. 2023) ("Kellner (Chancery)").(go back)

[3]See Kai Liekefett, Derek Zaba & Leonard Wood, Bylaw Amendments, Shareholder Activism, and Flying Close to the Sun, Harvard Law School Forum on Corporate Governance Nov. 21, 2022,

https://corpgov.law.harvard.edu/2022/11/21/bylaw-amendments-shareholder-activism-and-flying-close-to-the-sun/.(go back)

[4]In re Damon Corp. S'holders Litig., C.A. No. 10173, at *8 (Del. Ch. Sept. 16, 1988); see also Hubbard v. Hollywood Park Realty Enters., Inc., 1991 WL 3151, at *11 (Del. Ch. Jan. 14, 1991).(go back)

[5]BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd., 224 A.3d 964, 980 (Del. 2020); AB Value Partners, LP v. Kreisler Mfg. Corp., 2014 WL 7150465, at *3 (Del. Ch. Dec. 16, 2014); Strategic Inv. Opportunities LLC v. Lee Enters., Inc., 2022 WL 453607, at *18 (Del. Ch. Feb. 14, 2022).(go back)

[6]R. Franklin Balotti & Jesse A. Finkelstein, The Delaware Law of Corporations and Business Organizations § 7.7. The summary of law in this section follows the summary of Balotti & Finkelstein.(go back)

[7]Rosenbaum v. CytoDyn Inc., 2021 WL 4775140, at *9, *18–19 (Del. Ch. Oct. 13, 2021). See also Lee Enters., 2022 WL 453607, at *13, *18; BlackRock Credit Allocation Income Tr., 224 A.3d at 977–82.(go back)

[8]Goggin v. Vermillion, Inc., 2011 WL 2347704, at *4 (Del. Ch. June 3, 2011).(go back)

[9]In re Ebix, Inc. S'holder Litig., 2016 WL 208402 (Del. Ch. Jan. 15, 2016); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985). See also Kai Liekefett & Leonard Wood, In re Ebix: Corporate Defenses and Activist Engagement, Harvard Law School Forum on Corporate Governance, Apr. 13, 2016, https://corpgov.law.harvard.edu/2016/04/13/in-re-ebix-corporate-defenses-and-activist-engagement/.(go back)

[10]In re Ebix, Inc. S'holder Litig., 2018 WL 3545046, at *7 (Del. Ch. July 17, 2018).(go back)

[11]In re Ebix, 2016 WL 208402, at *19; Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 728 A.2d 25, 38–43 (Del. Ch. 1998); Kidsco Inc. v. Dinsmore, 674 A.2d 483, 487–89, 494–97 (Del. Ch. 1995).(go back)

[12]In re Ebix, 2016 WL 208402, at *19.(go back)

[13]Hubbard, 1991 WL 3151, at *11.(go back)

[14]Healthcor Mgmt., L.P. v. Allscripts Healthcare Sols., Inc., C.A. No. 7557-CS, at 3–4 (Del. Ch. May 25, 2012) (transcript).(go back)

[15]AB Value, 2014 WL 7150465, at *3.(go back)

[16]Politan Capital Mgmt. LP v. Masimo Corp., 2022 WL 14813970 (Del. Ch. Oct. 24, 2022) (trial pleading).(go back)

[17]See note 3.(go back)

[18]Politan, 2022 WL 14813970 (quoting Hubbard, 1991 WL 3151, at *8). In Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988), the court held that even if a board is acting in good faith, if it acts with the primary purpose of interfering with the fundamental right to elect directors, the board must show it had compelling justification for doing so.(go back)

[19]Kellner (Chancery), 1019.(go back)

[20]Id. at 1006.(go back)

[21]Id. at 1024.(go back)

[22]Id. at 1025 (citing Coster v. UIP Cos., Inc., 300 A.3d 656, 673 (Del. 2023) ("Experience has shown that Schnell and Blasius review, as a matter of precedent and practice, have been and can be

folded into Unocal review to accomplish the same ends — enhanced judicial scrutiny of board action that interferes with a corporate election or a stockholder's voting rights in contests for control.")).(go back)

[23]Id.(go back)

[24]Kellner, 5.(go back)

[25]Id. at 36 (citing Coster, 300 A.3d. at 672).(go back)

[26]Id.(go back)

[27]Id. at 37.(go back)

[28]Id. at 5.(go back)

[29]Id. at 30, 34.(go back)

[30]Kellner (Chancery), 1034.(go back)

[31]Id.(go back)

[32]Kellner, 5, 50.(go back)

[33]Id. at 30, 34.(go back)

[34]Politan, 2022 WL 14813970 (trial pleading).(go back)