



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

DEFENDANT / COUNTERCLAIM-PLAINTIFF MASIMO CORPORATION'S VERIFIED COUNTERCLAIMS, ANSWER, AND DEFENSES TO PLAINTIFFS / COUNTERCLAIM-DEFENDANTS POLITAN CAPITAL MANAGEMENT LP AND POLITAN CAPITAL NY LLC'S VERIFIED COMPLAINT

Defendant / Counterclaim-Plaintiff Masimo Corporation ("Masimo" or the "Company"), by its undersigned attorneys, files its Verified Counterclaims, Answer, and Defenses to the Verified Complaint filed by Plaintiffs / Counterclaim-Defendants Politan Capital Management LP and Politan Capital NY LLC ("Politan").

VERIFIED COUNTERCLAIMS

NATURE OF THE ACTION

1. Politan initiated this lawsuit after Masimo’s board of directors refused to cave in to Politan’s demand that unless Politan received board representation, it would attack the Company. Politan’s demands included a board seat for its founder, Quentin Koffey, who has an alarming activism track record, has *never* served on a corporate board, and has *no* relevant experience in Masimo’s industry. The demand was pure hubris, and Politan did not explain how it would be in the best interest of the Company or its stockholders. Politan is a serial activist investor whose principal motivations are to promote itself and advance the interests of its cabal of undisclosed financial backers. After accumulating an 8.4% financial stake in Masimo, without any prior dialogue with the Company, Politan immediately displayed a pattern of dishonesty and evasiveness in discussions with Masimo, while refusing to be transparent with the Company’s stockholders.

2. Politan claims this case is about actions that Masimo took to purportedly “entrench its incumbent directors in office.” It is not. Rather, this case is about a company’s ability to ensure that its stockholders are fully informed when making one of the most important decisions that they are asked to make—electing directors to sit on the board. In doing so, a company has every right to: (i) ensure its stockholders have comprehensive disclosure about stockholders waging proxy

contests with undisclosed interests that may be antithetical to stockholders' best interests, and (ii) preserve the long-term value of its business.

3. The board of directors of Masimo, an innovative, publicly traded medical technology company, sought to accomplish these important corporate objectives by amending Masimo's bylaws on September 9, 2022. These amendments were a reaction to recent changes to the SEC's proxy rules that are expected to increase the incidence of director contests, in combination with troubling and dishonest behavior by Politan and Koffey.

4. Politan and Koffey are well known for seeking corporate shake-ups at companies in which they invest, often at the expense of long-term stockholder value. For instance, Politan made headlines in late 2021 when its campaign for board seats at Centene Corporation, a publicly traded managed care company, resulted in the appointment of five new directors and resignation of the company's CEO and founder. Politan's activism at Centene did not translate into success for the business. In fact, Centene recently announced that it incurred a \$172 million loss in the second quarter of 2022 and that it would be forced to divest certain international business units. Centene's revenue had grown from approximately \$75 billion in 2019 to approximately \$126 billion in 2021 *before* Politan intervened at the end of 2021. Koffey likewise caused a stir at Bunge Ltd., an agribusiness company, when he and his activist team at his former firm pressured Bunge into adding Koffey's choice of

directors to its board and replacing its CEO. Bunge's stock price dropped substantially in the eighteen months that followed Koffey's investment. Tellingly, while the Verified Complaint takes great pains to tout Koffey's purported investing success, it says nothing of these two massive failures and obscures Politan's and Koffey's true agenda.

5. Politan and Koffey pursue these activist strategies under the guise of maximizing value to stockholders. In reality, their aim is to benefit Politan, Koffey, and Politan's investors—including the perceived reputational benefits Politan and Koffey receive by causing dramatic corporate shake-ups—to the detriment of their targets' long-term stockholders.

6. In August 2022, Politan disclosed its new position as the beneficial owner of 8.4% of Masimo's common stock.

7. Soon after, Masimo and Politan had an important meeting that Politan blatantly mischaracterizes in the Verified Complaint. On September 2, 2022, Koffey and other principals of Politan met with members of Masimo's management team, including Masimo's founder, CEO, and board chairman, Joe Kiani. Contrary to the allegations in the Verified Complaint, Politan was highly complimentary of Masimo's management at the meeting. Koffey praised Kiani's vision and leadership, told Masimo he saw value in Masimo's recent strategies, and stated that

Politan would publicly endorse Masimo's business strategies and management if, and only if, Masimo capitulated to its demand for board seats.

8. Specifically, at the meeting, Koffey demanded that he and another nominee of Politan's choosing be installed as members of Masimo's board of directors. If Masimo acceded to Koffey's demand, then Koffey promised he would be Kiani's "biggest cheerleader." If it did not, then Koffey threatened to wage war against Masimo, disparage Kiani's reputation, and win the board seats anyway.

9. Koffey's position was both unprincipled and dishonest. His public stance towards Masimo's leadership would be cheerleading or war based solely on how much control Koffey would be given—regardless of the business strategies management pursued. Indeed, although Masimo management invited Koffey to seek additional information about Masimo and management's business strategies (by accepting a non-disclosure agreement), Koffey had no questions about Masimo's business or plans and no recommendations for improvement.

10. Politan's attempt to coerce Masimo into supporting its bid for board representation was problematic on multiple levels. *First*, Koffey has no relevant experience to sit on Masimo's board. Koffey demonstrated a disturbing lack of knowledge regarding Masimo's technology, and he did not identify a single business strategy that he would want Masimo to pursue if elected to Masimo's board. Indeed, Koffey acknowledged that his only purported qualification for sitting on the board

is that Politan is a “major shareholder.” Koffey has no relevant experience in Masimo’s field, has never sat on a board of directors of any public company in any industry ever, and his newfound interest in doing so at Masimo suggests that he is more interested in padding his resume than enhancing the long-term value of the Company or its stockholders.

11. *Second*, Masimo had no visibility into who is backing Politan. Although Politan told Masimo that its investment was backed by Politan’s own capital, the Wall Street Journal reported on August 15, 2022 that “[a] portion of Politan’s Masimo capital comes from EnTrust Global,” an activist investment firm. Politan also told Masimo that its investors “are reputable family offices, pension funds, endowments and sovereign entities,” but EnTrust Global does not fit any of those categories. On this point, Politan was not only dishonest with the Company, but with its stockholders and the public securities market at large. Under Item 3 of its Schedule 13D, which federal securities laws required Politan to complete upon acquiring 5% of the Company’s voting shares, Politan disclosed that “the source of the funds” for its investment in Masimo was derived from Politan’s capital, failing to mention any funding from EnTrust Global or other significant investors. Because of Politan’s lack of transparency, Masimo had no way of knowing whether: (i) the funders backing Politan had Masimo’s best interests in mind; (ii) were Masimo’s business competitors or adverse litigants; (iii) were investors in Masimo’s business

competitors or adverse litigants; or (iv) were shorting Masimo stock. Indeed, the fact that Politan has “sovereign entities” as investors is particularly concerning, given that there are a number of sovereign entities that do not respect—and have attempted to steal—intellectual property belonging to U.S. companies. Politan’s deficient disclosures gave Masimo no reason to believe that a director nominated by Politan would be faithful to the Company.

12. *Third*, even before Politan filed its Verified Complaint containing misleading statements, Koffey had shown himself to be untruthful and untrustworthy. For instance, during the September 2, 2022 meeting, Koffey assured Masimo that he did not contact other Masimo stockholders to discuss Masimo. But Masimo has since learned that before September 2, 2022, Koffey had, in fact, solicited Masimo stockholders. Weeks later, Koffey disingenuously changed his tune; at the meeting, Koffey claimed that Masimo’s stockholders wanted him on the board and that he that he would win a proxy contest if Masimo did not relent, but after being pressed for detail, in correspondence dated October 9, 2022, Politan suddenly claimed to be “unaware of any other stockholders that support” its nomination proposal. These are not the actions or statements of an investor who has the best interests of Masimo’s stockholders at heart.

13. Following the Politan meeting, Masimo took action to protect its stockholders. *First*, Masimo’s board, four-fifths of which is comprised of

independent directors (a fact not in dispute), caused Masimo to enter into a Shareholder Rights Plan (the “Plan”) that would protect the remaining stockholders in the event a single stockholder amassed an outsized share of the common stock of the Company.¹ *Second*, in response to Politan’s insincerity and new SEC proxy rules that were expected to increase the frequency of director contests, and as many public companies have done in the wake of those new rules, Masimo’s board amended the Company’s bylaws. The new bylaw provisions were designed to (i) protect Masimo from having directors with potential undisclosed conflicts of interests or ties to conflicted parties nominated or appointed to its board; (ii) enhance the procedural mechanics and disclosure requirements in connection with stockholder nominations of directors to increase transparency and ensure that stockholders are sufficiently informed regarding who is being nominated to the Masimo board and who is backing the nomination so that they may have a reasonable opportunity to thoughtfully consider the nominations; (iii) protect the long-term stockholder value of Masimo; and (iv) update the bylaws in light of recently revised SEC regulations.

¹ Although Politan’s Verified Complaint references Masimo’s entrance into the Plan, neither its well-pleaded factual allegations nor its enumerated causes of action challenge the propriety of that action. Nevertheless, in the Prayer for Relief, Politan sneaks in a request for a declaration that Masimo’s directors breached their fiduciary duties by adopting the Plan. There is no basis for that requested relief.

14. The bylaw amendments are designed to uncover conflicts of interests, ensure transparency in the director nomination process, and preserve the value of Masimo's business by making sure that voters are properly informed if a nominating stockholder (or its backers) has incentives that are misaligned with Masimo's other stockholders. By ensuring that nominating stockholders make disclosures not only on their own behalf, but also on behalf of their significant funders and co-investors, the bylaws protect against a "Trojan Horse" situation where a nominating stockholder and its director nominee are acting on behalf of—and potentially sharing confidential information with—undisclosed actors who do not have Masimo's best interests in mind.

15. In Politan's Verified Complaint, it declares that the bylaw amendments are "unprecedented," "unlawful," and "improper." Politan's position is without basis. Stripped of the rhetoric, the Verified Complaint, itself, reflects an unprecedented effort to have this Court strike down advance notice bylaws long before an annual meeting will even be scheduled for the simple reason that the activist stockholder would prefer not to disclose who is backing it. Politan wants the amended bylaws stricken because it knows the information it will be required to disclose will expose its incomplete and false statements in its mandatory 13D filings, will reveal who is really behind Politan, will shed light on its hidden agenda, and

will ultimately allow Masimo's other stockholders to learn who Politan and Koffey really are.

16. But this Court has long afforded broad deference to Delaware corporations in their adoption and enforcement of advance notice bylaws, recognizing that they serve fundamental and important corporate purposes, such as facilitating orderly election processes and ensuring stockholders are fully informed when casting their votes. Indeed, Masimo is aware of no case in Delaware that has struck down advance notice bylaws as facially invalid under similar circumstances, particularly where, as here, the plaintiff stockholder has failed even to try to comply with the bylaws and ample time exists before the annual meeting to gather the information needed to comply.

17. Politan's abstract concerns about the potential difficulty of complying with the amended bylaws cannot override Masimo's interests in protecting itself and its stockholders from undisclosed conflicts of interests, implementing a fair and transparent director nomination process, and preserving the value of its business. That Politan has refused to engage with Masimo in any meaningful way about the amended bylaws, including to explain with any specificity why it cannot comply with them—indeed, Politan has not even said that it cannot—only confirms the need to protect Masimo's stockholders from unscrupulous self-interested investors like Politan.

18. Politan also challenges the propriety of certain change of control provisions in Kiani’s employment agreement—even though those provisions were entered into in 2015 and were clearly and repeatedly disclosed in Masimo’s SEC filings for almost *seven years* before Politan decided to make its investment in Masimo. Those provisions were adopted after extensive arms’ length negotiations between Masimo, its independent directors, and Kiani, each of whom was represented by independent counsel. The provisions were necessary to persuade Kiani—Masimo’s visionary founder and key man—to stay on as Masimo’s Chief Executive Officer. Under Kiani’s leadership, Masimo’s stock price has grown over 650% since the Company’s initial public offering (including after the Sound United acquisition), which is more than double the growth of the Nasdaq composite index during the same time period and far surpasses the industry average. Not surprisingly, when Politan met with Company management on September 2, 2022, Politan had no complaints about the change of control provisions, and instead acknowledged that the Company’s stockholders have benefited by the “Joe Kiani multiple”—which only confirms that Masimo’s board had compelling reasons to adopt the change of control provisions seven years ago to incentivize Kiani to remain at Masimo. Moreover, in exchange for the Company’s agreement to the change of control provisions, Kiani agreed to forego certain guaranteed stock option grants, tax gross-ups, and other compensation and benefits that were available to him in his prior

employment agreement. Politan's assertion that the change of control provisions were put in place to serve anything other than the best interests of Masimo and its stockholders is thus baseless and misleading.

19. Politan has outright refused to comply with Masimo's amended bylaws and has stated its intention to nominate directors for Masimo's next board election. Masimo accordingly seeks declaratory relief that the amended bylaws are enforceable.

PARTIES

20. Defendant / Counterclaim-Plaintiff Masimo Corporation is a Delaware corporation with its principal place of business in Irvine, California. Masimo's common stock trades on Nasdaq under the symbol "MASI."

21. Plaintiff / Counterclaim-Defendant Politan Capital Management LP is a Delaware limited partnership founded in 2021.

22. Plaintiff / Counterclaim-Defendant Politan Capital NY LLC is a New York limited liability company founded in 2021.

JURISDICTION AND VENUE

23. This Court has jurisdiction over these counterclaims because Masimo seeks a declaratory judgment as alleged herein. 10 *Del. C.* § 341; 10 *Del. C.* § 6501. This Court also has jurisdiction because Masimo seeks enforcement of its bylaws. 8 *Del. C.* § 111(a)(1).

24. Politan has submitted to this Court’s jurisdiction by filing the Verified Complaint, and is subject to this Court’s jurisdiction pursuant to Article XI of Masimo’s Third Amended and Restated Bylaws, dated as of September 9, 2022 (the “Amended Bylaws”), which provides in relevant part that:

Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for ... any action asserting a claim arising pursuant to any provision of the General Corporation Law of the State of Delaware, the Amended and Restated Certificate of Incorporation of the Corporation or these Bylaws or as to which the General Corporation Law of the State of Delaware confers jurisdiction on the Court of Chancery of the State of Delaware ... shall be a state or federal court located within the State of Delaware.... Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this Bylaw.

Amended Bylaws § XI.

25. Politan Capital Management LP is further subject to this Court’s jurisdiction because it is an entity that is organized under the laws of Delaware.

26. Venue is proper in this Court pursuant to the above forum selection clause, 8 *Del. C.* §§ 111(a)(1), 115, and 6 *Del. C.* § 2708.

FACTUAL BACKGROUND

I. Masimo Corporation

27. Masimo is a global medical technology company that develops, manufactures, and markets a variety of life-saving noninvasive patient monitoring technologies, hospital automation solutions, home monitoring devices, ventilation solutions, and consumer products. Masimo is best known today for its proprietary

pulse oximetry technology, which provides the safest, most reliable noninvasive method for monitoring a person's blood oxygen levels with a high degree of accuracy. Masimo's pulse oximetry technology is currently used to monitor over 200 million patients per year, and it is the primary pulse oximetry technology used in many of the top hospitals in the United States. Masimo's is the only pulse oximetry technology proven to result in positive clinical outcomes for patients.

28. Despite its current stature in the medical technology industry, Masimo grew from humble beginnings. Joe Kiani, an inventor and engineer, founded Masimo in 1989 in classic "garage start up" fashion. Kiani believed that the problems plaguing then-existing pulse oximeters could be solved by improvements in sensor and signal processing technologies. The industry had concluded that the problems were unsolvable. Kiani co-invented the Masimo Signal Extraction Technology, and it has since been integrated into hospital patient monitors made by Masimo, GE, Philips, and dozens of other companies and has reached a place of near ubiquity in the medical field. Over 100 peer reviewed publications have concluded that Masimo's pulse oximetry technology outperforms other technologies.

29. Since Masimo's founding, its pulse oximetry technology has helped reduce the risk of eye damage and blindness in infants, helped identify critical congenital heart disease in millions of newborns, and has saved the lives of countless

other patients who otherwise would have been sent home with undetected heart defects or circulatory system issues.

30. Masimo has continued to innovate, developing the first commercially available technology for noninvasively monitoring important blood parameters such as carboxyhemoglobin, methemoglobin, and total hemoglobin. Masimo's total hemoglobin monitoring technology has been shown to help reduce unnecessary blood transfusions and save lives.

31. In recent years, Masimo's pulse oximetry technology has played a significant role in assisting medical professionals in monitoring patients with COVID-19. The technology has allowed hospitals to detect silent or "happy" hypoxia, a pneumonia condition associated with COVID-19 in which the patient feels and outwardly appears to be breathing normally, but in fact has dangerously low blood oxygen levels. In addition, Masimo's technology and products have permitted the remote monitoring of COVID-19 patients within their own homes, which freed up scarce hospital beds for those that were more acutely ill.

32. Masimo has also further developed additional technologies that assist in brain function monitoring, acoustic respiration monitoring, and even neuromodulation—an innovative non-narcotic technology used to fight the opioid epidemic by virtually eliminating the symptoms of opioid withdrawal in 80% of patients within 30 minutes.

33. Masimo has substantially outperformed the market since its initial public offering in 2007, and Masimo’s revenues, operating profit, and earnings per share have all increased year-over-year from 2017 through 2021. The below chart reflects Masimo’s strong track record of performance over the last five years:



34. Masimo is a platinum brand medical technology company, and its current board of directors has the same pedigree. Masimo has a five-member board, consisting of Joe E. Kiani, H. Michael Cohen, Adam P. Mikkelson, Craig B. Reynolds, and Julie A. Shimer, Ph.D.

35. Kiani, described above, is the Company’s founder and a prolific inventor, listed as the named inventor on hundreds of patents and patent applications for a variety of technologies, including advanced signal processing, optical sensors, and wearable technologies. Kiani’s leadership of the Company has been widely praised, as shown by his receipt of the Ernst & Young National Entrepreneur of the Year award for the Life Sciences industry, among other awards.

36. Indeed, year after year, Kiani has been the subject of industry accolades. In 2014, Kiani was named by Becker's Hospital Review as one of "50 Experts Leading the Field of Patient Safety." Kiani was the only patient safety expert named who was also CEO of a medical technology company. In 2015, Kiani was featured on the cover of SafeCare Magazine, in a feature entitled, "Can This Man Save American Healthcare? Our Interview with Masimo CEO, Joe Kiani." In 2016, Kiani was asked by then-Vice President Joe Biden to put together a team of cancer researchers and experts to assist in President Obama's "Cancer Moonshot" initiative, with the goal of speeding cancer treatments and ultimately eradicating cancer. In 2017, Kiani was named "Innovator of the Year" by the Orange County Business Journal. Just last year, in 2021, Kiani received a #2 ranking for CEOs in a poll conducted by Institutional Investor Magazine of individuals on the "sell side." Under Kiani's leadership, Masimo received a #1 ranking in that same poll for "Best Investor Relations Team."

37. Kiani is also known for his extensive philanthropic efforts, including helping to build schools in Uganda and homes for refugees. Kiani is the founder of the Masimo Foundation for Ethics, Innovation, and Competition in Healthcare, a private charitable foundation that has worked closely with organizations like the Carter Center, Smile Train and United4Oxygen to expand access to quality healthcare and improve lives around the world. Kiani also founded the Patient

Safety Movement Foundation in 2012, which is credited with saving over 250,000 lives from medical errors. He also serves on the board of directors of the Children's Hospital of Orange County, CalTech, and the President's Council of Advisors on Science and Technology.

38. Besides Kiani, the remaining four members of Masimo's board of directors are independent, non-employee directors with decades of experience in the healthcare industry and serving as directors on other public company boards.

- a. H. Michael Cohen is the former Vice Chairman of Healthcare Investment Banking at Deutsche Bank Securities and has over thirty years of experience in the healthcare industry.
- b. Adam Mikkelson is a partner at a healthcare-focused investment fund with over twenty years of experience in healthcare investments.
- c. Craig Reynolds is the former CEO of Cereve, Inc., a medical company engaged in resolving insomnia issues. Prior to Cereve, Reynolds was a senior executive for thirty years with various medical device and medical technology companies.
- d. Dr. Julie Shimer is the former CEO of Welch Allyn, a medical equipment company, and Vocera Communications, Inc., and has over thirty years' experience in product development and launch.

39. In contrast to the directors described above, Koffey has never served on any public company board of directors; has never worked for any medical devices company; has no prior track record as a successful investor in the medical devices industry, on information and belief; and lacks any other relevant experience that would qualify him to serve on the Masimo board of directors.

II. Politan

40. Politan is an activist hedge fund with over \$1 billion in assets under management, of which \$750 million was purportedly invested in Masimo after the announcement of the Sound United acquisition. Politan was founded last year by Koffey, Politan's Managing Partner and Chief Investment Officer, who previously spearheaded the activist investing practices of other hedge funds, including Senator Investment Group and Elliott Management Corp.

41. Politan and Koffey have a history of causing major disruption within their target companies, including by initiating media campaigns to intimidate management, engaging in proxy fights to acquire board seats, using leverage to oust senior management, and pressuring companies to split apart or spin-off certain of their businesses. These results are largely the product of Koffey's reported "behind the scenes" tactics that he employs to apply pressure to the target company's management.

42. For instance, Koffey and his activist team at his former firm previously pressured Bunge Ltd., an agribusiness company, to add Koffey's choice of directors to the board, and they later pressured the company to replace its CEO. Koffey's activism had negative consequences for Bunge's stockholders. Between October 8, 2018, the date Koffey's former firm's investment in Bunge was announced by the Wall Street Journal, and May 23, 2019, the date Reuters reported Koffey departed his former firm, Bunge's stock price had dropped by more than 20%.

43. Koffey's most recent activist investment in Centene Corporation, a managed care company, fared no better. At Centene, Koffey and his team at Politan led a campaign that caused six directors to resign, included naming two new directors, and resulted in the retirement of Centene's CEO. These shake-ups did not improve Centene's business. To the contrary, Centene recently announced that it incurred a \$172 million loss in the second quarter of 2022, and that it would be forced to divest certain international business units.

44. Politan and Koffey make these dramatic changes within a company under the guise of maximizing long-term benefits to all of a target company's stockholders. But, in reality, the aim of these activist strategies is to enrich Politan, Koffey, and Politan's investors, including through the perceived reputational benefits Politan and Koffey receive by achieving press coverage on their corporate

shake-ups. And the service of their self-interest comes at the expense of the target company's other long-term stockholders and long-term business value.

III. Politan's Investment In Masimo

45. On February 15, 2022, Masimo announced that it entered into an agreement to acquire Sound United, a leading consumer technology company, for approximately \$1 billion. The deal closed in April 2022.

46. Masimo's strategic acquisition of Sound United provides Masimo with access to Sound United's 20,000 points of distribution, more than 350 engineers, and rich history and brands of high fidelity audio technology, which can accelerate the design, manufacture, and distribution of Masimo's pipeline of revolutionary consumer and consumer health products into the home.

47. The day after the announcement of the acquisition, Masimo's stock value declined by 37%. Masimo's price-to-earnings ratio, reduced from over 70 at the time of the acquisition—a substantial multiple—to a still healthy 44.

48. Believing that there was a “massive overreaction” by the market to the acquisition of Sound United, Politan saw Masimo as a good investment opportunity and began to accumulate an economic interest in Masimo. Politan did so largely through the purchase of derivative instruments that enabled it to avoid the reporting requirements of the Hart-Scott-Rodino Act of 1976 and shield its accumulating position from antitrust scrutiny and public disclosure.

49. Politan finally disclosed its investment in Masimo on August 16, 2022, in a Schedule 13D filed with the SEC. In its Schedule 13D disclosure, Politan stated that it beneficially owned approximately 4.4 million shares (or 8.4%) of Masimo’s outstanding common stock, including approximately 4.1 million shares to be acquired through swap transactions that would be executed on an unspecified future date. On September 27, 2022, Politan filed an amended disclosure announcing that it had exercised all of its stock swaps and owned approximately 8.8% of Masimo’s outstanding common stock.

50. When Politan disclosed its position in Masimo, it stated that the “source of funding” for its investment was “derived from the capital of the Politan Funds.” Politan repeated this statement in its September 27, 2022 amended disclosure.

51. Press reports have indicated that these disclosures were misleading. The Wall Street Journal has reported that EnTrust Global, an activist investment firm, “represents a significant portion of Politan’s capital,”² and that “[a] portion of Politan’s Masimo capital comes from EnTrust Global.”³ These reports contradict Politan’s earlier statements to Masimo and its written representation to Masimo in an October 9, 2022 letter that its investors “are reputable family offices, pension

² See The Wall Street Journal, “Politan Management Has Roughly \$900 Million Stake In Centene,” Nov. 3, 2021 (attached hereto as Exhibit A).

³ See The Wall Street Journal, “Activist Politan Capital Has 9% Stake In Masimo,” Aug. 15, 2022 (attached hereto as Exhibit B).

funds, endowments and sovereign entities.” EnTrust Global does not fit those categories.

52. Likewise, in its Schedule 13D disclosures, Politan represented that, besides the stock swaps, it had no “no contracts, arrangements, understandings or relationships (legal or otherwise) with respect to any securities of” Masimo. This, too, appeared to be false. The Wall Street Journal reported that EnTrust Global had specifically contributed towards Politan’s “*Masimo* capital.” It defies logic to imagine that EnTrust Global, an experienced funder of activist investors, would provide “significant” funding to Politan—a fledgling activist investor fund—without knowing how that capital would be deployed. At a minimum, contrary to its Schedule 13D disclosures, it is clear that Politan has a “contract[], arrangement[], understanding[] or relationship[] (legal or otherwise)” with EnTrust Global regarding the Masimo investment.⁴

53. Masimo has no knowledge whether EnTrust Global or Politan’s other unidentified backers are aligned with Masimo’s goal of preserving the long-term value of its business. Masimo does not know, for example, whether EnTrust Global

⁴ Politan’s Schedule 13D also failed to disclose whether the purpose of its investment included seeking “any change in the present board of directors or management of the issuer,” as plainly required under Item 4 of Schedule 13D, even though Politan explicitly informed Masimo management on September 2, 2022 that its agenda was to take two board seats, be Masimo’s cheerleader, and get the “Joe Kiani multiple.”

or other funders of Politan—which include unidentified “sovereign entities”—are invested in Masimo’s competitors in the medical technology space or companies that are litigating against Masimo,⁵ are shorting Masimo’s stock, or have other ulterior motives beyond enhancing the long-term value of Masimo for the benefit of its stockholders.⁶ Politan’s activist stance towards Masimo, including its dishonest statements and omissions, raises many questions that must be answered, and which the Amended Bylaws address.

IV. Politan’s September 2, 2022 Meeting With Masimo

54. On August 15, 2022, Politan requested a meeting with Masimo. Masimo offered an immediate meeting with its Chief Financial Officer and Vice

⁵ For example, Masimo has a pending lawsuit against Apple Inc. in the United States District Court for the Central District of California regarding Apple’s theft of trade secrets and infringement of certain Masimo patents. *Masimo Corp., et al. v. Apple Inc.*, No. 8:20-cv-00048 (C.D. Cal.). Apple also filed two new lawsuits against Masimo in the United States District Court for the District of Delaware just one day before Politan filed this action. *Apple Inc. v. Masimo Corp., et al.*, Nos. 1:22-cv-01377 & 1:22-cv-01378 (D. Del.). Apple’s new lawsuits cite the same August 20, 2022 CNBC article as Politan’s Verified Complaint, which, on information and belief, Politan or its agents caused to be published in order to build support for its activist campaign.

⁶ Politan represented to Masimo in correspondence dated October 9, 2022 that it was “unaware” that any of its backers held interests in or had agreements with Masimo’s competitors or adverse litigants. These statements provide no assurance to Masimo, as Politan admitted it had no information regarding “the actions, holdings or operations” of its limited partners. Politan made no apparent effort to obtain that information or otherwise confirm that Politan’s backers do not suffer from the types of conflicts of interest that the Amended Bylaws would uncover and that Masimo stockholders undoubtedly would find useful before casting their votes.

President of Investor Relations, but Politan said that it would only speak to Kiani. Kiani agreed and invited Politan to Masimo's headquarters for an in-person meeting, rather than a remote videoconference, as Politan had requested.

55. On September 2, 2022, Koffey and two other principals of Politan met with Kiani and other members of Masimo's senior management at Masimo's headquarters. The meeting was conducted in Masimo's Discovery Lab, a showroom for Masimo's products and technologies. For years, the Discovery Lab has been a useful tool for helping customers and investors who visit the lab to understand Masimo's vision. Unlike the investors and customers who previously visited the lab, however, Koffey and his colleagues at Politan made no remarks, had no questions, and did not appear to care about anything in the lab.

56. During the meeting, Koffey requested Kiani's support to appoint two Politan nominees to Masimo's board of directors, with one of the nominees being Koffey himself.

57. Masimo management asked Koffey and the other representatives from Politan multiple times about their strategy and vision for Masimo, and about any complaints they had regarding the direction of the Company. Far from proposing any new ideas, Koffey confirmed that he saw value in the Sound United acquisition, and stated that, if installed as a board member, he would endorse existing management and its strategy so that Masimo could get back to the "Joe Kiani

multiple.” In short, Politan offered no new strategic vision for Masimo or unique perspectives with regard to its management or operations.

58. Nor did Politan inquire about Masimo’s business or strategy during the meeting. Indeed, Politan rejected Masimo’s offer to provide Politan with additional, confidential information about the Company under a non-disclosure agreement. Politan wanted only one thing: board seats, including one for Koffey, personally.

59. When asked whether it solicited any of Masimo’s stockholders, Politan denied having done so. When asked if he intended to increase Politan’s equity stake in Masimo, Koffey responded that he “might.”

60. Koffey raved about how great he believed the Masimo technology and business model was, and reported that he began buying Masimo shares after he perceived a “massive overreaction” by investors to the Sound United acquisition.

61. During the meeting, Koffey made his intentions clear and delivered his ultimatum: If Kiani supported Koffey’s nomination to serve as a director, then Koffey promised he would be Kiani’s “biggest cheerleader.” If Kiani did not, then Koffey indicated he would wage war against Masimo and win the board seats anyway.

62. This was problematic for several reasons. *First*, Koffey had no relevant experience to sit on the board. Koffey had no prior background investing in or managing medical technology companies, and failed to demonstrate any interest in

anything Masimo was doing; nor did Koffey ask a single question about Masimo's business. Indeed, Koffey acknowledged that his only purported qualification for the board was that Politan was a "major shareholder." Equally concerning, Koffey's prior activist campaigns at Centene and Bunge had been highly disruptive and ended negatively for both companies. Masimo was thus understandably concerned that adding a director with zero board experience, zero experience in the medical technology sector, zero demonstrated knowledge of or interest in Masimo's business or core products, and a spotty (at best) activism track record would not be in the best interests of Masimo's stockholders.

63. *Second*, Masimo had no visibility into who was behind Politan's investment. As mentioned above, although Politan reported to the SEC that its investment was backed by Politan's own capital and that it had no agreements with respect to Masimo other than the swaps, it appeared that, in reality, Politan's Masimo investment was being funded by others, including EnTrust Global. Politan's lack of transparency and apparent dishonesty meant that Masimo had no way of knowing whether the funders backing Politan had conflicts of interest that could prevent Politan-appointed directors from serving as faithful fiduciaries to Masimo or might risk the Company's highly-sensitive, confidential information falling into the wrong hands.

64. *Third*, Koffey had lied during the meeting. Despite Koffey's assurances that he had not solicited other investors of Masimo, Masimo was later shown an email in which a third party had reached out to a major stockholder on Koffey's behalf, evidencing that Koffey's assurances were false. This made clear to Masimo that neither Koffey nor Politan can be taken at their word.

65. Because of the serious red flags raised by Politan's behavior, Masimo had no choice but to take action in the form of the Plan, entered into on September 9, 2022. The Plan provides, among other things, that if an investor acquires beneficial ownership of at least 10% of Masimo common stock (20% for certain passive institutional investors), then all other stockholders will have the right to purchase shares of common stock at a 50% discount. The Plan ensures that Masimo and its stockholders are protected from efforts to obtain control of the Company that are inconsistent with the best interests of Masimo and its stockholders.

66. Politan has not challenged the validity of the Plan in any of its correspondence with the Company and does not assert any cause of action challenging the Plan.

V. Masimo's Bylaw Amendments

67. On September 9, 2022, at the same time that it adopted the Plan, Masimo also adopted the Amended Bylaws.

68. The Amended Bylaws were catalyzed by both Politan’s troubling behavior and recent amendments to the SEC proxy rules that became effective September 1, 2022. *See* SEC Rule 14a-19.

69. The new SEC rules require, among other things, that contested director elections utilize a “universal” proxy card that includes the names of all duly-nominated director candidates for election at an upcoming stockholder meeting, regardless of whether the candidates were nominated by management or stockholders. Under the new rules, voting stockholders can “mix and match” nominees from a public company’s and its dissident’s slates.

70. Historically, an insurgent would have to run its candidate on a separate proxy card. The cost of doing so would present an implicit screening mechanism against unqualified or frivolous candidates. Under the new SEC rules, there is no such screening mechanism.

71. The proxy rule amendments are therefore widely expected to increase the incidence of director contests, including contests by well-funded activist hedge funds like Politan, and contests by social activists.

72. In recent months, numerous public companies have responded to the new SEC rules by amending the advance notice provisions of their bylaws to ensure an orderly and transparent process in the event of a proxy contest. Masimo is no exception.

73. In response to the new SEC rules and Politan’s behavior, Masimo amended its bylaws to accomplish four corporate objectives: (i) protect Masimo from having directors with potential undisclosed conflicts of interests or ties to conflicted parties nominated or appointed to its board; (ii) enhance the procedural mechanics and disclosure requirements in connection with stockholder nominations of directors to increase transparency and ensure that stockholders are sufficiently informed regarding who is being nominated to the Masimo board and who is backing the nomination so that they may have a reasonable opportunity to thoughtfully consider the nominations; (iii) protect the long-term stockholder value of Masimo; and (iv) update the bylaws in light of the recently revised SEC regulations. The Amended Bylaws were the product of thoughtful deliberation and were adopted well in advance of Masimo’s next annual meeting (which has not yet been scheduled), allowing stockholders ample time to comply with the amendments should they wish to present matters for consideration by Masimo stockholders at the annual meeting.

74. There are five categories of bylaw amendments that are at issue here because they have been challenged by Politan: (i) disclosures relating to “Covered Persons”; (ii) disclosures regarding stockholders supporting a nomination; (iii) disclosures regarding agreements or understandings; (iv) disclosures regarding past and future plans or proposals concerning director nominations at other public

companies; and (v) “Family Member” disclosures. Each of these amendments is properly tailored to the legitimate corporate objectives identified above.

A. Disclosures Relating to “Covered Persons”

75. The Amended Bylaws require nominating stockholders to disclose the identities of their large investors (together with the nominating stockholders, “Covered Persons”), and all Covered Persons to disclose, *inter alia*, (i) any short positions they are taking with respect to Masimo’s debt or equity, including through repurchase agreements or other similar arrangements; (ii) any material equity or other interests they hold in Masimo’s competitors and litigation counterparties; and (iii) any material contracts they have with Masimo’s competitors and litigation counterparties. Amended Bylaws Art. I, §§ 1(4)(a)(i)(C), 1(4)(c)(ii)(E), 1(4)(c)(ii)(I)-(J), 1(9)(b).

76. If a nominating stockholder is an investment fund, “Covered Persons” is defined in the Amended Bylaws to include investors who hold at least 5% of the economic interests in that fund. Amended Bylaws Art. I, § 1(9)(b). That 5% amount was not chosen at random, but reflects a threshold frequently employed by the SEC to ascertain investors with a substantial interest.⁷

⁷ For example, the Investment Company Act of 1940 defines “Affiliated person” to include any person who owns more than 5% of voting stock in an entity. 15 U.S.C. § 80a-2(a)(3). Likewise, the SEC requires a Schedule 13D to be filed by any person owning “more than five percent” of “any equity security of a class.” 17
(footnote continued)

77. “Covered Persons” also includes investors in “sidecar vehicle[s]” or special purpose entities formed by an investment manager or adviser for the purpose of co-investing with the nominating stockholder specifically in Masimo. Amended Bylaws Art. I, § 1(9)(b). Disclosures of investors in those vehicles must be made, regardless of size, to ensure Masimo stockholders are made aware of all the actors who funded a nominating stockholder for the specific purpose of its investment in Masimo.

78. “Covered Persons” also includes persons who knowingly acted in concert with a nominating stockholder during the preceding two years “in relation to matters ... that will be material” to the nominating stockholder’s solicitation of stockholders. Amended Bylaws Art. I, §§ 1(9)(b), (g). This ensures that disclosures are made regarding the agents and entities that act in lockstep with the nominating stockholder on matters that are material to the director nomination. The definition also includes a carveout that makes clear that any “Holding Fund” or “Person whose primary business is to serve as investment manager or adviser with respect to investing and trading in securities for a client or its own account” “shall not be deemed to be acting in concert” with a nominating stockholder. Amended Bylaws

C.F.R. § 240.13d-1. 5% is also the threshold that is frequently used “[a]s a rule of thumb” or “rough gage” to establish materiality. *Goldstein v. Denner*, 2022 WL 1797224, at *11 & n.7 (Del. Ch. June 2, 2022).

Art. I, §§ 1(9)(b), (g). According to law professor John C. Coffee, Jr., this carveout effectively ensures that “hedge funds and other professional investors could seldom, if ever, be deemed to be ‘Acting in Concert’ with the nominating person.”⁸ As a result, the “Acting in Concert” disclosures impose little or no burden on Politan—a fact that Masimo explained to Politan in a letter dated just two days before Politan filed this lawsuit.

79. These bylaws are designed to uncover conflicts of interests, ensure transparency in the director nomination process, and preserve the value of Masimo’s business by making sure that voters are properly informed if a nominating stockholder (or its backers) has incentives that are misaligned with Masimo’s other stockholders. By ensuring that these disclosures cover not only the nominating stockholders themselves, but also their significant funders and co-investors, the bylaws protect against a “Trojan Horse” situation where a nominating stockholder and its director nominee are acting on behalf of—and potentially sharing confidential information with—undisclosed actors who do not have Masimo’s best interests in mind. Indeed, Masimo’s current situation with Politan—an activist fund

⁸ “Proxy Tactics Are Changing: Can Advance Notice Bylaws Do What Poison Pills Cannot?”, John C. Coffee, Jr., 2022 WLNR 33331575 (October 19, 2022). Politan quotes this article, incompletely and carelessly, in Footnote 7 of the Verified Complaint.

that suspiciously refuses to identify any of its significant backers—demonstrates precisely why these bylaws are important to protect stockholder interests.

80. These bylaws also assist voting stockholders by ensuring that they are given other material information about a nominating stockholder. For example, these bylaws assist voting stockholders in ascertaining whether a nominating stockholder is affiliated with a foreign government. They likewise assist the voting stockholders by rooting out whether a nominating stockholder merely has “synthetic equity” in Masimo—*i.e.*, whether its long position in Masimo is actually hedged by substantial short positions taken by its backers—such that its economic interests are not aligned with those of the voting stockholders. There can be no real dispute that disclosing information regarding Politan’s financial backers would advance stockholders’ ability to cast well-informed votes.

81. Politan instead asserts, in classic conclusory pleading, that compliance with these bylaws is “impossible.” The lack of factual support is glaring. Indeed, Politan’s outside counsel previously advocated in another context that a nominating investment fund should be required to disclose *all* of its limited partners, not just significant investors. *See Ashford Hospitality Trust, Inc. v. Cygnus Capital, Inc., et al.*, No. 21-cv-00125 (Dkt. 1, ¶¶ 94-97) (N.D. Tex.). Politan’s assertion that its funders’ identities must remain “confidential” at all costs is further belied by the fact that The Wall Street Journal publicly reported that EnTrust Global had provided “a

significant portion of Politan’s capital,” citing “people familiar with the matter.”⁹ Confidentiality provisions in investment fund limited partnership agreements typically include carveouts that would permit disclosure of the identity of a fund’s limited partners, including, *e.g.*, to comply with regulatory and legal requirements associated with the fund’s investments.

82. Tellingly, Politan alleges only in the abstract that the Covered Persons definition raises “confidentiality” concerns or requires the disclosure of information that would be “impossible” to obtain. But Politan does not identify any specific contractual provisions, laws, or other barriers that would preclude Politan from disclosing the information sought by the amended bylaws. Nor does Politan allege, for instance, that it has so many investors with a greater than 5% interest that it would render compliance overly burdensome.

83. Discussing these bylaws, Professor Coffee explains: “[H]edge funds’ apparent claim that” the disclosure requirements in those bylaws “represent[] an ‘existential threat’ to them sounds as if Chicken Little has entered the debate. Such claims are easily asserted but less easily proven, and they tend to be self-serving.... Chicken Little-like predictions that the sky will fall in on proxy contests if limited partners must be disclosed needs to be viewed skeptically.”¹⁰

⁹ See Exh. A.

¹⁰ Coffee, *supra* n.8.

84. As Professor Coffee further recognizes, “the argument that limited partners and other persons with some relationship to the nominating person have some right of privacy that entitles them to escape disclosure is overbroad. Even when they hold only 5%, limited partners are not the weak, passive creatures of traditional limited partnership law. Rather, they may have a fat pocketbook that the nominating person is relying upon to finance its proxy contest. The Company’s shareholders are entitled to know of any such arrangements, including what has happened in the recent past.”

85. Masimo asked Politan on multiple occasions to identify any specific barriers that prevented Politan from complying with these disclosure requirements, so that the parties could work collaboratively to address Politan’s purported concerns. Politan refused to engage, instead filing this lawsuit.

86. Politan similarly provides no support for its contention that the requested information could not be compiled in a “timely manner.” Politan’s purported timing concerns are particularly unavailing here; the Company has yet to even schedule its annual meeting, which will not take place before the late spring or early summer of 2023.

87. Finally, Politan’s contention that Masimo’s rationale for adopting the Covered Persons bylaw amendment “is a mere pretext”¹¹ is speculative and conclusory. To prove inequitable or manipulative conduct, a plaintiff needs to do “more than merely laying out the timeline of Defendants’ conduct and speculating about bad intent or purpose.” *Blackrock Credit Allocation Income Trust v. Saba Capital Master Fund, Ltd.*, 224 A.3d 964, 981 (Del. 2020). But that is all Politan has pled here. Masimo’s purpose in adopting the amended bylaws was to enhance an orderly process and facilitate the flow of important information to stockholders.

88. Contrary to Politan’s conjecture, as detailed above, the bylaw amendments advance legitimate corporate interests, most notably protecting Masimo and its stockholders from having elected representatives who may be influenced by undisclosed conflicts of interest or objectives antithetical to those of Masimo’s stockholders. They inure to the “benefit of shareholders by providing a reasonable opportunity to thoughtfully consider nominations and allow for full information to be distributed to stockholders,” *Sherwood v. Chan Tze Ngon*, 2011 WL 6355209, at *14 n. 95 (Del. Ch. Dec. 20, 2011), and facilitate a “vitally important” interest “that stockholders be fully informed when voting for directors,”

¹¹ Compl. ¶ 96.

Aprahamian v. HBO & Co., 531 A.2d 1204, 1207 (Del. Ch. 1987). There is no pretext.

89. At bottom, Politan’s self-serving desire to maintain the secrecy of its significant financial backers and co-investors and its self-imposed purported confidentiality agreements with those backers and co-investors cannot trump Masimo’s legitimate interest in protecting its stockholders.

B. Disclosures Regarding Stockholders Supporting a Nomination

90. The Amended Bylaws require a nominating stockholder to disclose other stockholders that it knows “support [its] nomination.” Amended Bylaws Art. I, § 1(4)(a)(ii).

91. This provision, adopted by numerous public companies, is designed to increase transparency in director elections. The amendment mitigates the risk of a false appearance of consensus regarding a director candidate by ensuring that voting stockholders are aware of whether a nomination is being advanced by a single stockholder or a bloc of stockholders, and if the latter, how broad the support is for that nomination. Indeed, addressing a similar bylaw, this Court recognized that the disclosure of a nominating stockholder’s “supporters” would secure “vital information” for stockholders. *Rosenbaum v. CytoDyn*, 2021 WL 4775140, at *19 (Del. Ch. Oct. 13, 2021).

92. Politan’s only challenge to this bylaw is that it is purportedly “so broad as to be virtually unbounded.”¹² Politan’s feigned ignorance at what the word “support” means strains credulity. Indeed, Koffey himself stated during the September 2, 2022 meeting that he was confident Masimo stockholders would “support” Politan’s nomination proposal. Politan knows full well what this bylaw seeks and how to respond to it.

C. Disclosures Regarding Agreements or Understandings

93. The Amended Bylaws require a nominating stockholder to identify certain “agreements, arrangements or understandings” that are material to the nomination, such as, *inter alia*, agreements “relating to any compensation or payments to be paid” to a nominee, or agreements with a nominee concerning “matters of social, labor, environmental and governance policy.” Amended Bylaws Art. I, §§ 1.4(a)(iii)-(v).

94. These amendments facilitate transparency to voting stockholders regarding the directors they are electing and the stockholders that nominated them, including any financial incentives a nominee may have for agreeing to serve as a nominee. For example, these provisions assist voting stockholders in determining whether a director candidate has been nominated to implement environmental,

¹² Compl. ¶ 124.

social, and corporate governance initiatives at the Company or has other motivations for seeking to join the board.

D. Disclosures Regarding Past and Future Plans or Proposals

95. The Amended Bylaws require nominating stockholders to disclose any “proposals or nominations” that they or those acting in concert with them submitted to nominate directors “at any other Public Company within the past 36 months,” and any “plans or proposals” they have “to nominate directors at any other Public Company within the next 12 months.” Amended Bylaws Art. I, §§ 1(4)(a)(vi)-(vii).

96. This bylaw alerts voting stockholders to 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. This information is crucially important. If a nominating stockholder plans to nominate a representative to sit on Masimo’s board, and also plans to nominate that representative to sit on the board of a company that competes with Masimo, then that information could have consequences under Section 8 of the Clayton Act. This is particularly important in light of the U.S. Department of Justice’s recent announcement that it intends to bring more cases against “interlocking directorates” that violate Section 8 of the Clayton Act.

97. The bylaw also increases the information available to the voting stockholders about the nature of the nominating stockholder. For example, it would

be material to voters to know whether the nominating stockholder has already ran or intends to run activist campaigns across a myriad of public companies in the next year, or whether the nominating stockholder is focused exclusively on Masimo.

98. It would likewise be material to voters to know about past proposals that Politan has made at other companies to better understand the volume of companies Politan has targeted, whether and to what extent Politan has had prior non-public engagements with Masimo competitors, Politan’s general approach to activism, and the impact its campaigns have had on companies it targeted.

99. Contrary to Politan’s assertions, such information clearly bears on “the fitness of a stockholder’s director nominees” and would provide “stockholders with material information.”¹³ Indeed, although under a different factual backdrop, this Court previously has recognized that past proposals and future intentions of a nominee may be material to stockholders to the extent they are indicative of a potential conflict of interest. *See CytoDyn*, 2021 WL 4775140, at *20.

100. Politan does not contend that it would be difficult or overly burdensome to comply with these bylaws. Instead, it claims that the information requested may be confidential. Here, again, Politan speaks only in abstract terms. For example, as to past proposals, Politan alleges that “settlement agreements sometimes contain

¹³ Compl. ¶ 111.

strict confidentiality provisions which may prevent a nominating stockholder from being able to comply with the Past Proposals Disclosure requirement.”¹⁴ Yet, despite Masimo’s persistent invitations to engage, Politan has never identified any such settlement agreement or other confidentiality restriction that would preclude its compliance here.

101. Similarly, Politan’s only defense to disclosing any planned proposals at other companies is that doing so may prevent Politan from seizing on a potential stock price bump.¹⁵ That wildly speculative concern cannot override the interests of Masimo and its stockholders in ensuring that their director nominees are not, and will not be in the near future, subject to conflicts of interest that may inhibit their ability to faithfully discharge their fiduciary duties.¹⁶

E. “Family Member” Disclosures

102. The Amended Bylaws expand requirements that were in Masimo’s previous bylaws with respect to disclosures that nominating stockholders must make

¹⁴ Compl. ¶ 110.

¹⁵ Compl. ¶¶ 107-08.

¹⁶ Moreover, and as Masimo informed Politan in an October 19, 2022 letter, the bylaw only requires disclosure of proposals that Politan *currently* has planned as of the time of the notice, not preliminary investment ideas. Politan is not obligated to update its disclosure going forward each time it plans to make a proposal at another company, and Masimo told Politan in its October 19, 2022 letter that Masimo did not expect to “seek to disqualify a nomination on the basis of a future nomination that results from a plan or proposal that is formed after the notice is delivered.”

regarding certain holdings of their “immediate family” to include “mothers- and fathers-in law” and “brothers- and sisters-in-law” that do not share the same household. Art. I, §§ 1(4)(c)(ii), 1(9)(c).

103. These provisions, again, increase transparency to voting stockholders regarding the nominating stockholder and help root out potential conflicts of interest. Family member disclosures are particularly relevant when considering director nominations made by Politan, whose personnel have several family ties to other relevant institutions.

104. The Amended Bylaws’ definition of “Family Member,” including its reference to in-laws, is identical to the definition approved by the SEC for use by Nasdaq to ascertain the independence of directors.¹⁷

* * *

105. Masimo also adopted several other amendments that, while not challenged by Politan in the Verified Complaint, further demonstrate that the Amended Bylaws as a whole were driven by the legitimate corporate objectives described above.

106. For example, Masimo amended its bylaws to make clear that “[a]ny stockholder ... soliciting proxies from other stockholders must use a proxy card

¹⁷ See Securities and Exchange Commission, Release No. 34-88210, Feb. 13, 2020, <https://www.sec.gov/rules/sro/nasdaq/2020/34-88210.pdf>.

color other than white, which shall be reserved for the exclusive use by the Board of Directors.” Amended Bylaws Art. I, § 7(6). This bylaw protects against voter confusion by ensuring that a dissident cannot claim the “white” proxy card—which is historically, across public companies, used by company management—and confuse voting stockholders into using the dissident’s proxy card by mistake. This bylaw has been adopted by numerous other public companies, particularly in the wake of the new SEC proxy rules.

107. As another example, the Amended Bylaws require all nominating stockholders to make an undertaking to solicit proxies from holders of at least 67% of the voting power of all of the shares of capital stock of Masimo entitled to vote generally in the election of directors. Amended Bylaws Art. I, § (1)(4)(e). This amendment increases transparency in director elections, directly tracks a new requirement in the recently-adopted SEC proxy rules,¹⁸ and has been commonly adopted in other public company bylaws.

108. In short, each of the Amended Bylaws was adopted for legitimate purposes and serves the best interests of Masimo’s stockholders.

¹⁸ Politan admits in the Verified Complaint that this provision “address[es] the SEC’s recent amendments to the proxy rules.” Compl. ¶ 131 n.10 (stating the same regarding Amended Bylaws Art. I, §§ 1(3)(d), 1(4)(d)).

VI. The Parties' Correspondence

109. On September 20, 2022, Politan sent Masimo a letter claiming (without any support) that the Amended Bylaws were “unlawful” and asserting specific challenges to the five categories of amendments described above.

110. On September 28, 2022, Masimo responded to Politan’s letter, explaining that the Amended Bylaws are legitimate, adopted in good faith, supported by precedent, and advance the best interests of Masimo’s stockholders.

111. On October 9, 2022, Politan sent Masimo another letter claiming that it would be “practically impossible” to comply with the Amended Bylaws that required disclosure of the identities of its large funders, even though EnTrust Global had already been publicly reported to be funding a “portion of Politan’s Masimo Capital.”¹⁹ Politan also represented in this correspondence that its investors “are reputable family offices, pension funds, endowments and sovereign entities,” but EnTrust Global does not fit any of those categories, leading Masimo to believe this representation was false or misleading. Far from providing answers, Politan’s correspondence only prompted more questions.

112. On October 17, 2022, Politan wrote again, requesting for the first time that Politan’s board of directors amend Kiani’s employment agreement to eliminate the change of control provisions. Politan demanded a response within two days.

¹⁹ See Exh. B.

113. On October 19, 2022, Masimo responded, reiterating its request that Politan disclose the identity of its significant (*i.e.*, 5%+) financial backers, and asking Politan to, at minimum, provide the **number** of limited partners that own a stake of 5% or more in Politan, and confirm that no “sidecars” had been created by Politan principally to invest in Masimo. Masimo also noted that Politan’s outside counsel had previously advocated for an even broader nominee questionnaire than the one utilized by Masimo, which required disclosure of **all** limited partners of an investment fund, not just significant investors, *see Ashford*, No. 21-cv-00125 (Dkt. 1, ¶¶ 94-97), and explained that this was inconsistent with Politan’s assertion in its October 9, 2022 letter that it was “practically impossible” for an investment fund to disclose the identity of its limited partners (as the activist hedge fund in that situation in fact did). Masimo also explained that the change of control provisions in Kiani’s employment agreement were the product of extensive arms’ length negotiations between Masimo’s independent directors and Kiani and had been publicly disclosed for **seven years** without objection, and that the independent directors were without power to unilaterally eliminate those provisions.

114. Politan did not provide a substantive response. Instead, on October 21, 2022, it sent Masimo a one-page letter summarily stating that it “do[es] not accept the validity of Masimo’s positions or arguments” and filed this litigation.

115. Although Politan stated its intention to nominate directors for Masimo's next board election, it has expressly refused to comply with the Amended Bylaws' requirements for director nominations and has asserted that the Amended Bylaws are unenforceable.

116. Masimo accordingly seeks a declaratory judgment that the Amended Bylaws are enforceable.

STANDARD OF REVIEW

117. Politan asserts that the standard of review applicable to this dispute is the "compelling justification" standard described in *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988). This is incorrect.

118. The *Blasius* standard of review applies only to actions that were adopted "for the primary purpose of disenfranchisement." *Strategic Inv. Opportunities LLC v. Lee Enterprises, Inc.*, 2022 WL 453607, at *14 (Del. Ch. Feb. 14, 2022); see *Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140, at *12 (Del. Ch. Oct. 13, 2021) (concluding that "enhanced scrutiny under *Blasius* is not justified" in assessing the propriety of a company's advance notice bylaws).

119. The Amended Bylaws were not adopted for such a purpose. To the contrary, the Amended Bylaws were adopted for legitimate corporate purposes, including: (i) to protect Masimo from having directors with potential undisclosed conflicts of interests or ties to conflicted parties nominated or appointed to its board;

(ii) to enhance the procedural mechanics and disclosure requirements in connection with stockholder nominations of directors to increase transparency and ensure that stockholders are sufficiently informed regarding who is being nominated to the Masimo board and who is backing the nomination so that they may have a reasonable opportunity to thoughtfully consider the nominations; (iii) to protect the long-term stockholder value of Masimo; and (iv) to update the bylaws in light of recently revised SEC regulations.

120. The Amended Bylaws are accordingly subject to the business judgment rule, under which they must be upheld so long as they “can be attributed to a rational business purpose.” *Williams v. Geier*, 671 A.2d 1368, 1377 (Del. 1996).

121. At most, the Amended Bylaws are subject to an “intermediate standard of review,” that “requires a context-specific application of the directors’ duties of loyalty, good faith and care.” *Strategic Inv. Opportunities*, 2022 WL 453607, at *16. “[T]he standard to be applied is one of reasonableness,” and so long as “the incumbent directors[’] actions[] operated as a reasonable limitation upon the shareholders’ right to nominate candidates for director, they will generally be validated.” *Id.* (quotation marks and citation omitted); *see id.* at *9 (upholding advance notice bylaws, noting that “informational requirement[s] ... serve[] an important disclosure function, allowing boards of directors to knowledgably make recommendations about nominees and ensuring that stockholders cast well-informed

votes”). In assessing whether the Amended Bylaws were reasonable, the Court should consider the relevant context, including that the Amended Bylaws were adopted in the wake of sweeping new SEC proxy rules that have upended the traditional regime for director contexts and caused swaths of public companies to amend their bylaws in response.

FIRST CAUSE OF ACTION

(Declaratory Judgment – Bylaws) Against All Counterclaim-Defendants

122. Masimo repeats and realleges each and every allegation above as if fully set forth herein.

123. The Amended Bylaws were unanimously adopted by Masimo’s board and validly executed on or around September 9, 2022.

124. Masimo’s board of directors adopted the Amended Bylaws in good faith after thoughtful consideration of the circumstances facing the Company—including the SEC’s recent amendments to its proxy rules and Politan’s recent behavior—and after a full and candid evaluation regarding their scope and effect.

125. Masimo’s board of directors adopted the Amended Bylaws for legitimate corporate purposes in the best interest of Masimo stockholders, including (i) to protect Masimo from having directors with potential undisclosed conflicts of interests or ties to conflicted parties nominated or appointed to its board; (ii) to enhance the procedural mechanics and disclosure requirements in connection with

stockholder nominations of directors to increase transparency and ensure that stockholders are sufficiently informed regarding who is being nominated to the Masimo board and who is backing the nomination so that they may have a reasonable opportunity to thoughtfully consider the nominations; (iii) to protect the long-term stockholder value of Masimo; and (iv) to update the bylaws in light of recently revised SEC regulations.

126. Counterclaim-Defendants, as stockholders of Masimo, are bound by the Amended Bylaws.

127. Counterclaim-Defendants have stated their intention to nominate directors for Masimo's next board election and have expressly refused to comply with the Amended Bylaws' requirements for director nominations.

128. Counterclaim-Defendants have asserted that the Amended Bylaws are "unlawful" and unenforceable and have asserted specific challenges relating to five categories of the amendments: (i) disclosures relating to "Covered Persons"; (ii) disclosures regarding stockholders supporting a nomination; (iii) disclosures regarding agreements or understandings; (iv) disclosures regarding past and future plans or proposals concerning director nominations at other public companies; and (v) "Family Member" disclosures .

129. A valid and justiciable controversy exists between Masimo and Counterclaim-Defendants as to whether the Amended Bylaws are valid and may be enforced.

130. Pursuant to 10 *Del. C.* § 6501, *et seq.*, Masimo seeks a declaration that the Amended Bylaws are valid and enforceable and that Masimo is permitted to invalidate any director nominations by Counterclaim-Defendants that are not made in accordance with the Amended Bylaws.

PRAYER FOR RELIEF

WHEREFORE, Masimo prays for relief and judgment as follows:

A. That the Court declare that the Amended Bylaws are valid and enforceable and that Masimo is permitted to invalidate any director nominations by Politan that are not made in accordance with the Amended Bylaws;

B. That the Court award Masimo reasonable costs, including attorneys' fees and expenses; and

C. That the Court award such other relief as is just and proper under the circumstances.

ANSWER

Masimo denies every allegation in the Verified Complaint except as hereinafter specifically admitted, qualified, or otherwise explained. The Verified Complaint contains section titles and other organizational headings to which no

response is required. To the extent any such section titles or other organizational headings in the Verified Complaint are construed to contain substantive allegations to which a response is required, they are hereby denied. To the extent the Prayer for Relief in the Verified Complaint is construed to contain substantive allegations to which a response is required, they are hereby denied, and Masimo denies that Plaintiffs are entitled to any relief. To the extent Masimo uses terms defined in the Verified Complaint in this Answer, such use is not an acknowledgement or admission of any characterization Plaintiffs seek to associate with any such defined term.

1. This action challenges the validity of Masimo's newly amended advance notice bylaws (the "Bylaw Amendments") and the refusal by Masimo's Board of Directors (the "Board") to disable onerous change of control provisions that Masimo adopted to entrench its incumbent directors in office.

RESPONSE TO NO. 1: Paragraph 1 purports to characterize the nature of the action and purports to state a legal conclusion and therefore no response is required. To the extent a response is required, Masimo denies the allegations in Paragraph 1.

2. During the summer of 2022, Politan, an investment fund with a focus on driving long-term positive change through constructive engagement, acquired an 8.8% ownership stake in Masimo and requested a meeting with Masimo's Chairman and Chief Executive Officer ("CEO") Joe Kiani. At a private meeting between Mr. Kiani and Quentin Koffey, Politan's founder, in early September 2022, Mr. Koffey expressed Politan's interest in obtaining representation on Masimo's Board. Just one week later, in an effort to prevent that from happening, the Board brazenly adopted the Bylaw Amendments, which are perhaps the most preclusive advance notice

bylaws in Delaware history.²⁰ Indeed, Masimo has *admitted* that it did so based on its “concerns that Politan might attempt to present matters for stockholder consideration at Masimo’s next annual meeting”

RESPONSE TO NO. 2: Masimo denies the allegations in Paragraph 2, except that Masimo admits that Kiani is the Chairman and CEO of Masimo, that Koffey requested a meeting with Kiani in or around the summer of 2022, that a meeting between the two occurred on September 2, 2022, immediately after a broader meeting between principals of Politan and Masimo management, and that Masimo adopted certain Bylaw Amendments on September 9, 2022. Plaintiffs purport to characterize the Bylaw Amendments and selectively quote from correspondence from Masimo to Politan dated October 19, 2022. Masimo respectfully refers the Court to the Bylaw Amendments and the October 19, 2022 correspondence, which speak for themselves, and denies any allegations or characterizations inconsistent therewith.

3. The Bylaw Amendments are inequitable and invalid and cannot stand. Among other things, they purport to require nominating stockholders to provide highly confidential and proprietary information, including the identity of certain investors, that they likely would be unwilling, unable and contractually prohibited from disclosing. As such, they preemptively block any investment fund stockholder from nominating candidates for election to the Board, thereby impeding the stockholder franchise and entrenching the incumbent Board in office.

²⁰ A redline comparing the newly enacted Third Amended and Restated Bylaws (the “Bylaws”), which incorporate the Bylaw Amendments, with Masimo’s Second Amended and Restated Bylaws (the “Prior Bylaws”) is attached hereto [to the Complaint] as Exhibit A. Copies of the Bylaws and the Prior Bylaws are attached hereto as Exhibits B and C, respectively.

RESPONSE TO NO. 3: Paragraph 3 states a legal argument or legal conclusion and therefore no response is required. Masimo lacks sufficient information relating to what nominating stockholders would “likely” “be unwilling, unable [or] contractually prohibited” to do to form a belief as to the truth of the allegations in Paragraph 3 and denies them on that basis. To the extent a response is required, Masimo denies the allegations in Paragraph 3.

4. Masimo’s Bylaw Amendments are so draconian that, as The Deal recently reported, activists and activist defense attorneys alike have expressed the view that they “represent an existential threat for activist campaigns.” Tellingly, an “unaffiliated activist defense adviser told The Deal he looked at the idea [of a provision requiring insurgent funds to identify underlying investors] previously but decided against implementing it over concerns about a Delaware court striking it down and worries about drawing ‘scathing reprimands’ from proxy advisers in a subsequent proxy contest.”

RESPONSE TO NO. 4: Masimo denies the allegations in Paragraph 4, and Masimo denies knowledge or information sufficient to form a belief as to the truth of the statements reportedly made by an unidentified “activist defense adviser” to The Deal, which speak for themselves.

5. The Bylaw Amendments are only the latest in Masimo’s long history of corporate governance failures which rank it among the worst, if not the worst, of the companies making up the Russell 3000 Index (“Russell 3000”), a benchmark index of the entire U.S. stock market which represents approximately 96% of the American public equity market, as demonstrated by the following:

- **Say-on-Pay:** Since 2011, when Masimo was first required to include Say on Pay in its proxy, **Masimo has failed the vote six times.** Only two other companies in the entire Russell 3000 have as bad a record. Even in those years when Masimo did not fail its

vote, its vote results still ranked in the bottom 14th percentile of all companies in the Russell 3000.

- **Director Withholds:** At Masimo’s 2022 Annual Meeting, its directors ranked in the **bottom 3rd and 6th percentiles** of the entire Russell 3000. During the past ten years, Masimo directors have been, on average, in the bottom 21st percentile and only two times in the past decade has even a single Masimo independent director done better than the bottom 33rd percentile. Additionally, Mr. Kiani, the Chairman of the Board, has, on average during the last decade, been in the bottom 25th percentile.
- **Board Composition:** Masimo has a **staggered Board**, with the same individual serving as CEO and Chairman of the Board (“Chairman”), with no **Lead Independent Director** (“LID”)—94% of Russell 3000 companies have a LID or independent chair and 97% of Russell 3000 companies have either a non-staggered board or LID/independent chair.

RESPONSE TO NO. 5: Masimo lacks sufficient information relating to the stockholder voting and board composition of each Russell 3000 company to form a belief as to the truth of the allegations in Paragraph 5 and denies them on that basis, except that Masimo admits that Masimo has a staggered board, that it does not have a Lead Independent Director, and that Masimo’s say-on-pay vote failed six times between 2011 and 2022, facts that were all publicly disclosed and known and knowable to Politan at the time it chose to invest in Masimo in 2022.

6. Masimo’s director withhold rates and Say-on-Pay failures are stunning not only for the degree of stockholder frustration they evidence, but also for their duration—continuing year after year without any appropriate response by the Board.

RESPONSE TO NO. 6: Masimo denies the allegations in Paragraph 6.

7. To make matters worse, the Board agreed to an acceleration provision in the employment agreement of Chairman and CEO Joe Kiani that would allow Mr.

Kiani to receive hundreds of millions of dollars in severance payments (including a stock grant equal to approximately 5% of the Company) if only *two* of Masimo's five Board members are voted out of office. That acceleration provision impedes the stockholder franchise by coercing Masimo's stockholders into opposing any change to the composition of the Board.

RESPONSE TO NO. 7: Masimo denies the allegations in Paragraph 7, except that Masimo admits that Kiani's Employment Agreement contains change of control provisions that were negotiated at arms' length between and among the Company, Kiani, and the independent members of the board seven years ago, have been publicly disclosed ever since, and have never been challenged by Masimo's stockholders until Politan, which was not an investor until 2022—seven years after the Employment Agreement was agreed to—belatedly raised questions for the first time in correspondence dated October 17, 2022, to which Masimo responded on October 19, 2022. Masimo respectfully refers the Court to those provisions of Kiani's Employment Agreement and the October 17 and October 19 letters, which speak for themselves, and denies any allegations of characterizations inconsistent therewith.

8. Against this backdrop of unchecked governance failures, Masimo's stock price collapsed when stockholders learned of Masimo's acquisition of Sound United LLC ("Sound United"). On February 15, 2022, Masimo (a nearly \$14 billion market cap company at the time) announced the acquisition for \$1.025 billion of Sound United, a consumer audio company that primarily sells speakers. The acquisition marked a detour from Masimo's medical device business of selling pulse oximeters and accompanying sensors to hospitals (which constituted in excess of 90% of Masimo's revenues at the time). Mr. Kiani stated the rationale for the deal was to gain distribution into Best Buy and Euronics for Masimo's new smartwatch that would compete directly with Apple.

RESPONSE TO NO. 8: Masimo denies the allegations in Paragraph 8, except that Masimo admits that Masimo acquired Sound United for \$1.025 billion and announced the acquisition on February 15, 2022. Masimo further admits that certain of Masimo’s revenues were derived selling pulse oximeters and sensors before the acquisition. Masimo respectfully refers the Court to Kiani’s entire remarks following the acquisition of Sound United, which speak for themselves, and denies any allegations or characterizations inconsistent therewith.

9. The market responded to that deal by erasing *five times* the acquisition price—approximately *\$5.1 billion*—from Masimo’s market capitalization the day after the acquisition was announced, which amounted to approximately 70% of Masimo’s current market capitalization. As far as Politan is aware, based on extensive research, never before in the history of United States publicly traded companies has an acquiring company’s market cap declined by more than twice, let alone five times, the purchase price of a material acquisition (*i.e.*, an acquisition that represents 5% or more of the acquiring company’s market cap).

RESPONSE TO NO. 9: Politan has not provided Masimo or this Court with its purported “extensive research,” and Masimo lacks sufficient information relating to the stock price history of all United States publicly traded companies to form a belief as to the truth of the allegations in Paragraph 9 and denies them on that basis, except that Masimo admits that the price of Masimo’s stock declined on February 16, 2022.

10. The stunning decrease in value reflects much more than mere market skepticism of the acquisition. A decrease of more than five times the purchase price demonstrates that the market fears that a complete breakdown in accountability and oversight by Masimo’s Board will lead to a destruction of value far in excess of the purchase price.

RESPONSE TO NO. 10: Masimo denies the allegations in Paragraph 10.

11. Over the years, Delaware courts consistently have emphasized the critical importance of ensuring that stockholders have a say in the management of the companies they own through the free and fair exercise of the stockholder franchise. Indeed, as the Delaware Supreme Court has explained, the stockholder franchise “has been characterized as the ‘ideological underpinning’ upon which the legitimacy of the directors’ managerial power rests.” *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1126 (Del. 2003). A stockholder’s fundamental right to participate in the voting process includes the right to nominate individuals for election to a company’s board of directors.

RESPONSE TO NO. 11: The allegations in Paragraph 11 are legal arguments or conclusions to which no response is required. To the extent that any response is required, Masimo denies the allegations, except that Masimo admits that Paragraph 11 contains a partial quotation of a sentence from *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1126 (Del. 2003). Masimo respectfully refers this Court to the full opinion, which speaks for itself, and denies any allegations or characterizations inconsistent therewith. Masimo avers that the stockholder franchise is important, and that the Amended Bylaws seek to promote the franchise by increasing transparency and enhancing the information available to voting stockholders regarding director nominations.

12. Masimo’s Board has all but abrogated that right by adopting amendments to its advance notice bylaws that effectively preclude any investment fund stockholder, such as Politan, from nominating candidates for election to the Board.

RESPONSE TO NO. 12: Masimo denies the allegations in Paragraph 12.

13. While all of the Bylaw Amendments identified herein are improper and should be invalidated, two of them stand out as particularly egregious. *First*, by amending the definition of “Covered Person” in the Bylaws, the Bylaw Amendments

require nominating stockholders that are investment funds to disclose highly confidential information concerning the identities and investment holdings of their own limited partners as well as any *family members* of those limited partners. As explained herein, that provision improperly conditions an investment fund stockholder's right to nominate candidates for election to the Board on the disclosure of information concerning its *passive* limited partners that the stockholder is unlikely to have, has no right to obtain, and otherwise is obligated to keep confidential.

RESPONSE TO NO. 13: Masimo denies the allegations in Paragraph 13, except that Masimo admits that Masimo adopted Bylaw Amendments on September 9, 2022. Masimo respectfully directs this Court to the Bylaw Amendments, which speak for themselves, and denies any allegations or characterizations inconsistent therewith.

14. This expanded disclosure requirement serves no legitimate purpose. Indeed, while the Bylaw Amendments mandate that a nominating stockholder disclose this information to Masimo, the Questionnaire for Director Nominees (the "D&O Questionnaire") does not require any such expanded disclosure. Thus, incumbent Board members are not subject to the same disclosure requirement as are stockholder nominees.

RESPONSE TO NO. 14: Masimo denies the allegations in Paragraph 14, except that Masimo admits that Masimo adopted Bylaw Amendments on September 9, 2022 and that Masimo will provide a Questionnaire for incumbent Director Nominees before Masimo's next annual meeting in 2023. Masimo respectfully directs this Court to the Bylaw Amendments and current D&O Questionnaire, which speak for themselves, and denies any allegations or characterizations inconsistent therewith.

15. This discrepancy is particularly notable given that one of the Director Defendants, Adam Mikkelson, manages an investment fund that, earlier *this year*, held a substantial investment in Masimo's primary competitor (and *no* investment

in Masimo).²¹ That investment was not disclosed in Masimo’s public filings, including its proxy statement, which underscores that the Board does not believe such information is relevant or material to Masimo’s stockholders. Rather, it is intended to discourage investment fund stockholders from nominating candidates for election to the Board.

RESPONSE TO NO. 15: Masimo denies the allegations in Paragraph 15, except that Masimo admits that Adam Mikkelson is a director of Masimo in his personal capacity, that Mikkelson is a Partner at Camber Capital Management (“Camber”), and that Camber disclosed in its Form 13-F, dated May 16, 2022, that it held \$55 million in Medtronic plc shares. Masimo avers that \$55 million is a small percentage of Camber’s overall holdings and an even smaller percentage of Medtronic’s overall market capitalization. Masimo avers, on information and belief, that Camber did not possess any shares of Medtronic plc as of December 31, 2021 and no longer held any shares of Medtronic plc as of June 30, 2022, based upon Camber’s Form 13-F filings with the SEC dated February 14, 2022 and August 15, 2022, respectively. Masimo also avers that Mikkelson was not required to disclose Camber’s holding of Medtronic plc stock on or around March 31, 2022, and that this information was publicly available in Camber’s May 16, 2022 Form 13-F filing. Masimo further admits that Masimo competes with Medtronic in patient monitoring, but avers that the vast majority of Medtronic’s products and sales are outside of Masimo’s markets.

²¹ See Camber Capital Management, LLC, Institutional Investment Manager Holdings Report, Information Table (Form 13F-HR) (May 16, 2022).

Masimo further avers that Mikkelson was not nominated by Camber as a director in Masimo, which was not a stockholder in Masimo at the time of Mikkelson's nomination.

16. *Second*, the Bylaw Amendments require nominating stockholders to disclose (i) *future* plans to nominate directors at *other* public companies in the next 12 months and (ii) past proposals or nominations at *other* public companies within the last 36 months, *whether or not those proposals or nominations were ever publicly disclosed*. As with the expanded "Covered Person" disclosures, this serves no legitimate purpose beyond forcing investment fund stockholders to either disclose information that is highly confidential and proprietary or forfeit their right to nominate.

RESPONSE TO NO. 16: Masimo denies the allegations in Paragraph 16, except that Masimo admits that Masimo adopted certain Bylaw Amendments on September 9, 2022. Masimo respectfully directs this Court to the Bylaw Amendments, which speak for themselves, and denies any allegations or characterizations inconsistent therewith.

17. To make matters worse, on the same day the Board adopted the Bylaw Amendments, it also adopted a shareholder rights agreement (a "poison pill"). In so doing, the Board chilled stockholder communication and effectively cut off both of the traditional means of holding a board accountable: the poison pill prevents stockholders from pursuing tender offers to change control of the Company, and the Bylaw Amendments make it impossible as a practical matter for a stockholder to launch a proxy contest, replace the Board, and redeem the pill. Thus, the Board's adoption of the poison pill along with the Bylaw Amendments was unreasonably preclusive.

RESPONSE TO NO. 17: Masimo denies the allegations in Paragraph 17 except that Masimo admits that Masimo adopted a Shareholder Rights Plan on September 9, 2022. Masimo respectfully directs this Court to the Shareholder Rights Plan,

which speaks for itself, and denies any allegations or characterizations inconsistent therewith.

18. If the unprecedented Bylaw Amendments are allowed to stand, the adverse effects on the stockholder franchise will be felt far beyond Masimo. Scores of other companies can be expected to rush to adopt similar, or identical, advance notice bylaws, imposing a significant drag on the stockholder franchise as many activist and other investment fund stockholders will be precluded or deterred from nominating candidates for election to the boards at those companies.

RESPONSE TO NO. 18: Paragraph 18 purports to state a legal argument or conclusion to which no response is required. To the extent a response is required, Masimo denies the allegations in Paragraph 18.

19. A substantial decrease in activist campaigns would do significant harm to the stockholder franchise, given the critical role that activist and other investment fund stockholders play in pushing for change at underperforming companies and holding boards accountable.

RESPONSE TO NO. 19: Paragraph 19 purports to state a legal argument or conclusion to which no response is required. To the extent a response is required, Masimo denies the allegations in Paragraph 19.

20. Accordingly, Plaintiffs request that the Court: (i) declare that the Bylaw Amendments are unenforceable; (ii) find that the Director Defendants breached their fiduciary duties by approving and implementing the Bylaw Amendments; (iii) invalidate the Director Change of Control Provision (as defined below); and (iv) enjoin Masimo and the Board from taking any actions to prevent Politan from exercising its rights to nominate candidates for election to the Board in accordance with the Prior Bylaws.

RESPONSE TO NO. 20: Paragraph 20 purports to state a legal argument or conclusion to which no response is required. To the extent a response is required, Masimo denies the allegations in Paragraph 20.

21. This Court has jurisdiction over this action pursuant to 8 *Del. C.* § 111 and 10 *Del. C.* § 341.

RESPONSE TO NO. 21: Masimo admits the allegations in Paragraph 21.

22. As directors of a Delaware corporation, the Director Defendants have consented to the jurisdiction of this Court pursuant to 10 *Del. C.* § 3114.

RESPONSE TO NO. 22: Paragraph 22 purports to state a legal argument or conclusion to which no response is required. The allegations in Paragraph 22 are also not directed at Masimo and therefore no response is required. To the extent a response is required, Masimo denies the allegations in Paragraph 22.

23. Plaintiff Politan Capital Management LP is a Delaware limited partnership and an investment advisor to the funds it manages. Politan, together with certain affiliates, beneficially owns 4,648,869 shares of Masimo common stock, representing approximately 8.8% of Masimo's outstanding common shares.²² Politan does not use any financial leverage and therefore owns its Masimo stock outright with no encumbrances.

RESPONSE TO NO. 23: Masimo lacks sufficient information relating to Politan to form a belief as to the truth of the allegations in Paragraph 23 and denies them on that basis, except that Masimo admits that Politan Capital Management LP is a Delaware limited partnership, and that Politan filed a Schedule 13D on August 16, 2022 in which it purported to beneficially own 4,431,284 shares of Masimo common

²² Politan filed a Schedule 13D on August 16, 2022 disclosing that it beneficially owned 4,431,284 shares of Masimo common stock. It subsequently filed an Amended Schedule 13D on September 27, 2022 disclosing its current holdings.

stock and that it subsequently filed an Amended Schedule 13D on September 27, 2022.

24. Plaintiff Politan Capital NY LLC is a New York limited liability company and the record owner of 1,000 shares of Masimo common stock.

RESPONSE TO NO. 24: Masimo admits the allegations in Paragraph 24.

25. Politan was founded in 2021 by Quentin Koffey, a “veteran activist” who has a reputation for “creating significant value for shareholders” by engaging in constructive private dialogue and, when necessary, nominating candidates for election to a company’s board: “Politan’s style is to amicably and quietly work with management to achieve its objectives. They do not send angry public letters, and they do not seek proxy fights. However, they will also not back down from a proxy fight if their hand is forced.”

RESPONSE TO NO. 25: Masimo denies the allegations in Paragraph 25, except that Masimo admits that Politan was founded last year by Koffey.

26. Mr. Koffey’s constructive approach has benefitted stockholders. According to CNBC, “Koffey has created significant value for shareholders at companies like Lowe’s and has orchestrated some very positive transformations at companies like EQT.”

RESPONSE TO NO. 26: Masimo denies the allegations in Paragraph 26, except that to the extent the allegations purport to quote a CNBC article written by a portfolio manager for a mutual fund specializing in stockholder activist investments, available at <https://www.cnbc.com/2020/08/01/activist-teams-up-with-potential-acquirer-to-pressure-real-estate-data-company-corelogic.html>, Masimo respectfully refers the Court to that article, which speaks for itself, and denies any allegations or characterizations inconsistent therewith.

27. Once it has secured board representation, Politan does not push an agenda aimed at generating short-term gains. Rather, it considers management's strategic initiatives and proposed projects with an open mind, supporting those that it believes will create value for stockholders over the long term and opposing those that are likely to generate poor (or no) returns. Politan can employ such an approach because it has long-term capital to invest—the majority of its investors are locked-up for three to four years.

RESPONSE TO NO. 27: Masimo denies the allegations in Paragraph 27.

28. Politan has relayed to Masimo, both in a meeting and in correspondence, that Politan is “focused on long-term value creation and open-minded to the strategic initiatives [Masimo] announced.” But Politan also made clear that it is focused on the appropriate functioning of a board of directors to provide oversight and accountability. This accountability is exactly what the market has shown it believes is lacking at Masimo—and exactly what the Board seeks to entrench itself against by adopting the Bylaw Amendments and maintaining other preclusive barriers to the unencumbered exercise of the stockholder franchise.

RESPONSE TO NO. 28: Masimo denies the allegations in Paragraph 28, except that Masimo admits that Politan has engaged in correspondence and meetings with Masimo. Masimo respectfully refers the Court to the correspondence between Politan and Masimo, which speaks for itself, and denies the characterizations inconsistent therewith.

29. Founded in 1989, Defendant Masimo Corporation is a Delaware corporation with its headquarters in Irvine, California. Masimo is a supplier of pulse-oximetry monitoring technologies to hospitals—accounting for more than 90% of its revenues prior to the acquisition of Sound United.

RESPONSE TO NO. 29: Masimo denies the allegations in Paragraph 29, except that Masimo admits that Masimo is a Delaware corporation, that its headquarters is in Irvine, California, that Masimo supplies pulse-oximetry monitoring technologies to hospitals, and that those technologies accounted for certain of Masimo's revenues

prior to the acquisition of Sound United. Masimo avers that Politan's list is incomplete, as, among other things, Masimo has also further developed additional technologies that assist in brain function monitoring, acoustic respiration monitoring, neuromodulation, noninvasive hemoglobin, capnography, nasal high flow, and hospital automation.

30. Defendant Joe E. Kiani is Masimo's Founder, CEO and Chairman. Mr. Kiani has served as a director of Masimo and as Masimo's CEO and Chairman of the Board since the Company's formation in 1989.

RESPONSE TO NO. 30: Masimo admits the allegations in Paragraph 30, and avers that Kiani is a prolific inventor, listed as the named inventor on over 100 patents and patent applications for a variety of technologies, including advanced signal processing, optical sensors, and wearable technologies.

31. Defendant H. Michael Cohen has served as a director of Masimo since 2018.

RESPONSE TO NO. 31: Masimo admits the allegations in Paragraph 31, and avers that Cohen is the former Vice Chairman of Healthcare Investment Banking at Deutsche Bank Securities and has over thirty years of experience in the healthcare industry.

32. Defendant Adam P. Mikkelson has served as a director of Masimo since 2016. Mr. Mikkelson is an investment manager at Camber Capital Management, LLC ("Camber"), a healthcare-focused investment fund.

RESPONSE TO NO. 32: Masimo admits that Mikkelson has served as a director of Masimo since 2016. Masimo further admits that Mikkelson is a partner at a

healthcare-focused investment fund, Camber, with over twenty years of experience in healthcare investments. Masimo lacks sufficient information relating to whether Mr. Mikkelson is an “investment manager” to form a belief as to the truth of that allegation of Paragraph 32 and denies it on that basis.

33. Defendant Craig B. Reynolds has served as a director of Masimo since 2014.

RESPONSE TO NO. 33: Masimo admits the allegations in Paragraph 33, and avers that Reynolds is the former CEO of Cereve, Inc., a medical company engaged in resolving insomnia issues, and that before Cereve, Reynolds was a senior executive for thirty years with various medical device and medical technology companies.

34. Defendant Julie A. Shimer, Ph.D. has served as a director of Masimo since 2019.

RESPONSE TO NO. 34: Masimo admits the allegations in Paragraph 34, and avers that Shimer is the former CEO of Welch Allyn, a medical equipment company, and Vocera Communications, Inc., and has over thirty years’ experience in product development and launch.

35. Since its founding in 1989, Masimo has carved out a dominant position in a niche industry. Masimo produces and supplies monitoring technologies and automation solutions to hospitals and other healthcare organizations. Masimo’s core business, which accounted for more than 90% of Masimo’s sales prior to the Sound United acquisition, is pulse oximeter devices and accompanying sensors for patient monitoring. Masimo’s pulse oximetry devices are best-in-class; they have been

shown to perform better and reduce adverse events, length of hospital stays, and medical costs.

RESPONSE TO NO. 35: Masimo denies the allegations in Paragraph 35, except that Masimo admits that Masimo produces and supplies monitoring technologies and automation solutions to hospitals and other healthcare organizations, that certain of Masimo’s sales prior to the Sound United acquisition were derived from pulse oximeter devices and accompanying sensors for patient monitoring, and that Masimo’s pulse oximetry devices have been shown to perform better and reduce adverse events, length of hospital stays, and medical costs.

36. The combination of its best-in-class pulse oximetry products and the general structure of the pulse oximetry industry, which has high barriers to entry and is not tied to economic cycles, provides Masimo with a stable revenue base from its core business. Indeed, because the technology used in pulse oximetry is highly specialized and critical to patient health, companies hoping to break into the market would need to demonstrate the safety and soundness of their devices through years of approved medical studies before they could effectively compete with Masimo.

RESPONSE TO NO. 36: Masimo admits that Masimo’s best-in-class pulse oximetry products provide Masimo with a stable revenue base from its core business, and denies the remaining allegations in Paragraph 36.

37. Masimo also generates recurring revenue by employing a “razor-razorblade” style business model, whereby Masimo sells hospitals both measuring devices and the disposable replacement sensors used with the devices. Masimo and customers generally enter into five-year contracts, resulting in 80% annual recurring revenue.

RESPONSE TO NO. 37: Masimo admits that Masimo sells hospitals both measuring devices and the disposable replacement sensors used with the devices,

and that Masimo and customers generally enter into five-year contracts. Masimo lacks sufficient information relating to the meaning of “80% annual recurring revenue” to form a belief as to the truth of that allegation of Paragraph 37 and denies it on that basis. Except as otherwise admitted, Masimo denies the allegations in Paragraph 37.

38. The strength of Masimo’s pulse oximetry technology, together with the high costs for hospitals considering switching to an alternative provider, drive a contract renewal rate of greater than 98%.

RESPONSE TO NO. 38: Masimo admits that Masimo has a contract renewal rate of greater than 98%. Masimo lacks sufficient information relating to the first clause of Paragraph 38 and denies it on that basis.

39. Masimo’s pulse oximetry business has performed well this year, with EBITDA generation year-to-date in-line with the Company’s guidance, excluding foreign exchange impact. This performance is notable given the difficult business environment, which has led the majority of Masimo’s medical device peers to reduce their expectations for earnings during the year.

RESPONSE TO NO. 39: Masimo lacks sufficient information to form a belief as to the truth of the allegations in the second sentence of Paragraph 39 and denies them on that basis. Masimo admits that Masimo’s pulse oximetry business has produced EBITDA generation year-to-date in-line with the Company’s guidance.

40. Notwithstanding the strength of its pulse oximetry business, Masimo’s total stockholder return has significantly underperformed both its peers and the S&P 500 on a trailing one-, three-, and five-year basis, which is the standard time frames and metric used by Institutional Shareholder Services Inc. (“ISS”), a leading proxy advisory firm, to evaluate a company’s (and therefore its board’s) performance. The following chart reflects Masimo’s historical stock price performance as of the date

of Politan’s Schedule 13D filing on August 16, 2022 compared to its peer companies and relevant indices.²³

		1 Year	3 Years	5 Years
Masimo stock performance vs:	US Medical Device ETF	(27%)	(32%)	(19%)
	NASDAQ	(29%)	(66%)	(30%)
	S&P 500 INDEX	(37%)	(51%)	(3%)
	Proxy Peers	(21%)	(19%)	(19%)
	Proxy Peers with Same Growth Profile	(26%)	(41%)	(69%)
	Bloomberg Peers	(66%)	(123%)	(14%)

RESPONSE TO NO. 40: Masimo denies the allegations in Paragraph 40.

41. Masimo’s stock price underperformance is attributable, in large part, to stockholders’ growing dissatisfaction with Masimo’s long history of corporate governance failures and increasing fears that the Board had abdicated its responsibility to conduct oversight of the Company and its management, which culminated in the market’s stunningly negative reaction to the Sound United acquisition (discussed in further detail below).

RESPONSE TO NO. 41: Masimo denies the allegations in Paragraph 41.

42. For instance, a significant contingent of Masimo’s stockholders have refused to support the re-election of incumbent Board members, even when those Board members were unopposed. At Masimo’s 2022 Annual Meeting, the two Board members up for re-election ranked in the bottom 3% and 6% of the entire Russell 3000 in terms of withhold votes. Over the past ten years, Masimo directors, on average, were in the bottom 21st percentile in terms of withhold votes. Only twice in the past decade has even a single Masimo independent director done better than the bottom 33rd percentile. Mr. Kiani has, on average, been in the bottom 25th percentile during the last decade.

RESPONSE TO NO. 42: Masimo denies the allegations in Paragraph 42.

²³ Peer companies are those selected by Masimo in its proxy statement for this year’s annual meeting, as well as those selected as peers by Bloomberg. “Proxy Peers with Same Growth Profile” are those proxy peers with a three-year forward revenue compound annual growth rate (CAGR) greater than 10%.

43. At the most basic level, the structure of Masimo’s Board is problematic. Masimo has a staggered Board, lacks a lead independent director, and does not separate the Chairman and CEO positions. Indeed, despite Masimo touting its “corporate governance guidelines,” which are ostensibly intended to ensure that the Board can “make decisions that are independent of our management,” one of the guidelines is that “except in unusual circumstances, the positions of Chairman of our Board and CEO will be held by the same person.”²⁴ By contrast, 94% of Russell 3000 companies have a lead independent director or independent chairperson.

RESPONSE TO NO. 43: Masimo denies the allegations in Paragraph 43, except that Masimo admits that Masimo has a staggered board, that Kiani holds the position of Chairman and CEO, that Masimo does not have a “Lead Independent Director,” and that the third sentence of Paragraph 43 selectively quotes from Masimo’s Proxy Statement (Form 14A) dated April 4, 2022. Masimo respectfully refers the Court to the entire Proxy Statement, which speaks for itself, and denies any characterizations or allegations inconsistent therewith.

44. One of a board’s most fundamental and critically important functions is to select a company’s CEO, monitor that individual’s performance, and hold them accountable for underperformance or poor strategic decision-making. To be clear, Politan is not advocating through this action for Mr. Kiani’s removal as Masimo’s CEO, but regardless, as a matter of corporate governance, it would be exceedingly difficult for the Board to remove him from office. Under Mr. Kiani’s employment agreement, even a termination of his employment for cause must be approved by at least 75% of the Board, meaning that all four other Board members would need to unanimously support his removal.

RESPONSE TO NO. 44: The first sentence of Paragraph 44 contains a legal argument or conclusion to which no response is required. Masimo denies the

²⁴ Masimo, Proxy Statement (Form 14A) (Apr. 4, 2022), at 26.

remainder of the allegations in Paragraph 44, except that Masimo admits that Kiani entered an Employment Agreement with Masimo in 2015 through arms' length negotiations between and among Kiani, the Company, and the independent directors, and that the Employment Agreement contains provisions relating to the post-termination rights. Masimo respectfully refers the Court to the Employment Agreement, which has been publicly disclosed as enacted and amended since 2015, which speaks for itself, and denies any allegations or characterizations inconsistent therewith.

45. Since 2011, Masimo has been required to hold advisory, non-binding votes at its annual meetings to approve the compensation of its named executive officers, which are commonly known as "Say-on-Pay" votes. In *six of the last twelve years*, Masimo failed this vote with as many as *70%* of shares voting against in some years. Only two other companies in the entire Russell 3000 have a record that poor. Even in the years in which Masimo did not outright fail its Say-on-Pay vote, Masimo still ranked in the bottom 14th percentile of the entire Russell 3000.

RESPONSE TO NO. 45: Masimo lacks sufficient information to form a belief as to the truth of the allegations in Paragraph 45 and denies them on that basis, except that Masimo admits that Masimo's stockholders have voted against the "Say-on-Pay" votes six times between 2011 and 2022.

46. Part of the reason Masimo's stockholders have expressed such strong disapproval of its executive compensation is the sheer excess of the compensation Masimo pays to its executives like Mr. Kiani. For example, in 2020 and 2021 Mr. Kiani's total compensation was approximately *three to nearly four times* median Russell 3000 CEO compensation, as calculated by ISS. Mr. Kiani's total

compensation as a percentage of Masimo's sales was approximately *four times* the median for Russell 3000 companies during that same time period.

RESPONSE TO NO. 46: Masimo denies the first sentence of Paragraph 46.

Masimo lacks sufficient information to form a belief as to the truth of the remaining allegations in Paragraph 46 and denies them on that basis.

47. Over the years, the Board also has approved excessive perks for Mr. Kiani, including nearly a million dollars for private security services for Mr. Kiani and his family at his personal residence or other non-Masimo facilities that were unrelated to Masimo's business. Those payments drew scrutiny by ISS, which noted: "The company provided a large security-related perquisite to CEO Kiani. The amount of compensation related to this perquisite, which in 2021 was provided by only 2 percent of companies in the Russell 3000 Index, significantly exceeded the index median."

RESPONSE TO NO. 47: Masimo denies the allegations in Paragraph 47, except that Masimo admits that Masimo has publicly disclosed in its filings with the Securities and Exchange Commission that Kiani has received private security services in connection with his role as CEO and Chairman, and that the ISS document partially quoted in Paragraph 47 contains the quoted language. Masimo respectfully refers the Court to the ISS document, which speaks for itself, and denies any allegations or characterizations inconsistent therewith.

48. In addition, the Company pays millions of dollars to other entities associated with Mr. Kiani, but those payments serve no legitimate corporate purpose. For example, Masimo makes cash contributions to the Masimo Foundation for Ethics, Innovation and Competition in Healthcare (the "Masimo Foundation"), a non-profit organization for which Mr. Kiani is the Chairman, his wife is a director,

and his sister was formerly a director (for at least five years). Masimo has contributed over \$30 million to the Masimo Foundation since its inception in 2010.

RESPONSE TO NO. 48: Masimo denies the allegations in Paragraph 48, except that Masimo admits that Masimo has publicly disclosed in its filings with the Securities and Exchange Commission that it has made over \$1 million in cash contributions to the Masimo Foundation for Ethics, Innovation and Competition in Healthcare; that Kiani is the Chairman of that organization; that Kiani's wife is a director of that organization; and that Kiani's sister was formerly a director of that organization.

49. The Masimo Foundation's admirable mission is "to encourage and promote activities, programs, and research opportunities that improve patient safety and deliver advanced healthcare to people worldwide who may not otherwise have access to lifesaving technologies." Yet despite its mission to focus on patient safety and healthcare, the Masimo Foundation regularly uses a substantial portion of the funds it receives from Masimo to make contributions to politicians and their foundations at the direction of Mr. Kiani and his family members, which, upon information and belief, provides personal benefits to Mr. Kiani to present himself as a benefactor for causes he personally believes in but are unrelated to Masimo. For instance, in its last four annual public tax returns, the Masimo Foundation reported making nearly \$6.4 million in contributions to organizations associated with Presidents Carter, Clinton, Obama, and Biden for "general support"—approximately 50% of the grants and contributions the Masimo Foundation made during that period. The Masimo Foundation has donated nearly \$8.5 million to those organizations since its founding.

RESPONSE TO NO. 49: Masimo denies the allegations in Paragraph 49, except that Masimo admits that the Masimo Foundation's mission statement contains the quoted language and that the Masimo Foundation has made charitable donations referenced in its publicly filed annual tax returns. Masimo refers the Court to the

Masimo Foundation's publicly filed annual tax returns, which speak for themselves, and denies any allegations or characterizations inconsistent therewith.

50. Masimo also makes payments to Cercacor Laboratories, Inc. ("Cercacor"), an independent entity spun off from Masimo in 1998. Mr. Kiani is the Chairman and CEO of Cercacor and receives a salary and equity compensation in connection with those roles.

RESPONSE TO NO. 50: Masimo denies the allegations in Paragraph 50, except that Masimo admits that Kiani is the Chairman and CEO of Cercacor and receives salary and equity compensation from Cercacor, that Cercacor is an independent entity spun off from Masimo in 1998, and that Cercacor receives payments from Masimo pursuant to a cross-licensing agreement between Cercacor and Masimo that was entered into at arms' length 15 years ago and has been publicly disclosed ever since. Masimo respectfully refers the Court to the cross-licensing agreement between Masimo and Cercacor, which speaks for itself, and denies any allegations or characterizations inconsistent therewith.

51. Pursuant to a cross-licensing agreement between Masimo and Cercacor related to certain intellectual property (the "CLA" (Exhibit D)), Masimo is obligated to make minimum royalty payments of \$5 million per year to Cercacor. Masimo's aggregate royalty payment liabilities to Cercacor were approximately \$13.5 million, \$13.3 million, and \$12.1 million, for the years ended January 1, 2022, January 2, 2021 and December 28, 2019, respectively. In addition, as discussed below, Masimo must make additional minimum royalty payments to Cercacor under the CLA in the event Mr. Kiani ceases to be Masimo's CEO.

RESPONSE TO NO. 51: Masimo denies the allegations in Paragraph 51, except that Masimo admits that Cercacor has received, and has a right to receive payments

from Masimo, and has received approximately \$13.5 million, \$13.3 million, and \$12.1 million, for the years ended January 1, 2022, January 2, 2021 and December 28, 2019, respectively, pursuant to a cross-licensing agreement between Cercacor and Masimo that was entered into at arms' length 15 years ago and publicly disclosed ever since. Masimo respectfully refers the Court to the cross-licensing agreement between Masimo and Cercacor, which speaks for itself, and denies any allegations or characterizations inconsistent therewith.

52. Similarly, Masimo makes payments to a company founded by Mr. Kiani called Like Minded Media Ventures (“LMMV”), at which Mr. Kiani continues to serve as a director. Masimo describes LMMV in SEC filings as a “team of storytellers that create content focused in the areas of true stories, social causes and science.” Masimo pays LMMV and certain of its subsidiaries hundreds of thousands of dollars for “audiovisual production services promoting brand awareness,” software development, and certain patents.

RESPONSE TO NO. 52: Masimo denies the allegations in Paragraph 52, except that Masimo admits that Kiani is the founder and a director of Like Minded Ventures, that Masimo has made payments to Like Minded Ventures pursuant to service agreements, and that Masimo filed a statement with the SEC containing the quoted language in Paragraph 52. Masimo respectfully refers the Court to the SEC filings referenced in Paragraph 52, which speaks for themselves, and denies any allegations or characterizations that are inconsistent therewith.

53. In yet another example of the Board's efforts to shield itself from accountability for Masimo's poor corporate governance, the Board embedded acceleration provisions in Mr. Kiani's Amended and Restated Employment Agreement (as amended, the “Employment Agreement” (Exhibit E)) that are

triggered if there is a “Change of Control,” which is defined in the Employment Agreement to include, among other things, a change in the composition of more than one third of the Board during a rolling 24-month period, *i.e.*, if only two of Masimo’s five Board members are voted out of office (the “Director Change of Control Provision”). (Employment Agreement § 9(iii).)

RESPONSE TO NO. 53: Masimo denies the allegations in Paragraph 53, except that Masimo admits that Kiani entered an Amended and Restated Employment Agreement with Masimo in 2015. Masimo respectfully refers the Court to the Employment Agreement, which speaks for itself, and denies any allegations or characterizations inconsistent therewith. Masimo further avers that the Employment Agreement was entered into in 2015, was the product of extensive arms’ length negotiations between and among Masimo, Masimo’s independent directors, and Kiani, that Masimo, Kiani, and the independent directors were represented by independent counsel during those negotiations, and that, other than Craig Reynolds, none of the independent directors who negotiated the Employment Agreement remain on the board. Masimo further avers that the contents of the Employment Agreement were repeatedly disclosed in Masimo’s SEC filings for the past seven years.

54. Specifically, Section 9(iii) of the Employment Agreement states, in relevant part, that a Change of Control takes place if:

there shall occur a change in the Board in which the individuals who constituted the Board at the beginning of the twenty-four (24) month period immediately preceding such change *cease for any reason to constitute two-thirds or more of the directors then in office*. For purposes of this

Section 9(iii), a director (other than a director whose initial assumption of office is in connection with an actual or threatened election contest, including but not limited to, a consent solicitation, relating to the election of directors of the Company) whose election by the Board or whose nomination for election by the stockholders of the Company was approved by a vote of at least a majority of the directors then in office either who were directors at the beginning of such period or whose election or nomination for election was previously so approved will be treated as a member of the Board at the beginning of the twenty-four (24) month period.

RESPONSE TO NO. 54: Masimo denies the allegations in Paragraph 54, except that Masimo admits that Kiani entered an Amended and Restated Employment Agreement with Masimo. Masimo respectfully refers the Court to the Employment Agreement, which speaks for itself, and denies any allegations or characterizations inconsistent therewith.

55. Thus, under the terms of the Employment Agreement, a Change of Control triggered by reason of the Director Change of Control Provision constitutes “Good Reason” for Mr. Kiani to terminate his employment—*i.e.*, it gives rise to entitlements on an essentially “single-trigger” basis even if there is no change in Mr. Kiani’s pay or authority, simply because the Company’s stockholders determined to elect directors different than those pre-approved by the Board. (*Id.* § 7.4.) Upon a termination for Good Reason, Masimo is obligated under the Employment Agreement to: (i) pay Mr. Kiani a severance benefit equal to two times his base salary and average annual bonus; (ii) vest all of Mr. Kiani’s stock options and other equity awards; (iii) issue shares to Mr. Kiani in respect of 2.7 million restricted share units (“RSUs”) (equivalent to a stunning 5% of the Company); and (iv) make a single lump-sum cash payment of \$35 million to Mr. Kiani (collectively, the “Good Reason Termination Payments”). (*Id.* § 8.4.)

RESPONSE TO NO. 55: Masimo denies the allegations in Paragraph 55, except that Masimo admits that Kiani entered an Amended and Restated Employment

Agreement with Masimo in 2015, which was publicly disclosed in Masimo’s Form 8-K filed on November 4, 2015. Masimo respectfully refers the Court to the Employment Agreement, which speaks for itself, and denies any allegations or characterizations inconsistent therewith.

56. Notably, even if Mr. Kiani *does not* terminate his employment after a Change of Control, he is still entitled to receive his stock options and equity awards, the 2.7 million RSUs (5% of the Company) and the \$35 million cash payment, all of which vest in equal installments over a two-year period (the “Continuous Service Payments”). (*Id.* § 8.4(iii)(3).)

RESPONSE TO NO. 56: Masimo denies the allegations in Paragraph 56, except that Masimo admits that Kiani entered an Amended and Restated Employment Agreement with Masimo in 2015 (together with all amendments, the “Employment Agreement”), which was publicly disclosed in Masimo’s Form 8-K filed on November 4, 2015. Masimo respectfully refers the Court to the Employment Agreement, which speaks for itself, and denies any allegations or characterizations inconsistent therewith.

57. The payments Masimo must make to Mr. Kiani after a Change of Control are astronomical. For instance, if a Change of Control had occurred on December 31, 2021, Mr. Kiani would have been entitled to Good Reason Termination Payments worth nearly *\$913 million* or Continuous Service Payments worth more than *\$825 million*.

RESPONSE TO NO. 57: Masimo denies the allegations in Paragraph 57, except that Masimo admits that Kiani entered an Amended and Restated Employment Agreement with Masimo in 2015, which was publicly disclosed in Masimo’s Form

8-K filed on November 4, 2015. Masimo respectfully refers the Court to the Employment Agreement, which speaks for itself, and denies any allegations or characterizations inconsistent therewith. Masimo avers that Paragraph 57 is materially false and misleading, because if a change of control occurred today, the amounts due to Kiani would be magnitudes lower than the amounts alleged in Paragraph 57, given Masimo's most recent stock price.

58. The Director Change of Control Provision serves no legitimate corporate purpose. Rather, it is intended to coerce stockholders into supporting the incumbent Board in a contested election in order to avoid triggering the Director Change of Control Provision and requiring Masimo to pay out hundreds of millions of dollars.

RESPONSE TO NO. 58: Masimo denies the allegations in Paragraph 58.

59. Likewise, the CLA includes change of control provisions that are triggered if Mr. Kiani ceases to be the CEO of Masimo or if non-affiliates directly or indirectly gain 50% or more of Masimo's voting shares. (CLA § 1.4.)

RESPONSE TO NO. 59: Masimo denies the allegations in Paragraph 59, except that Masimo admits that Cercacor entered a Cross-Licensing Agreement with Masimo in 2007, which has been publicly disclosed ever since. Masimo respectfully refers the Court to the Cross-Licensing Agreement, which speaks for itself, and denies any allegations or characterizations inconsistent therewith.

60. Upon such a change in control of Masimo, Masimo is obligated to, among other things, pay Cercacor substantially increased aggregate minimum royalties and also specified minimum royalty fees per product. (*Id.* §§ 5.4(g), 5.6.) Instead of the current \$5 million minimum, Masimo would be obligated to pay an aggregate minimum royalty of *\$15-17 million per year*, amounts that are several

million dollars more than what Masimo actually paid per year during the past three fiscal years. (*See id.*)

RESPONSE TO NO. 60: Masimo denies the allegations in Paragraph 60, except that Masimo admits that Cercacor entered a Cross-Licensing Agreement with Masimo in 2007, which has been publicly disclosed ever since. Masimo respectfully refers the Court to the Cross-Licensing Agreement, which speaks for itself, and denies any allegations or characterizations inconsistent therewith.

61. Like the change of control provision in Mr. Kiani's Employment Agreement, the change of control provision in the CLA serves no legitimate corporate purpose and is solely intended to entrench Mr. Kiani in office.

RESPONSE TO NO. 61: Masimo denies the allegations in Paragraph 61.

62. Long-simmering stockholder discontent with the Board's inaction in the face of serious corporate governance failures finally boiled over when Masimo announced that it was acquiring Sound United—a consumer technology company that sells speakers and headphones under brands such as Bowers & Wilkins, Denon, and Polk Audio—for approximately \$1.025 billion. The Sound United acquisition, which represented a departure by Masimo from its core pulse oximetry business into unrelated consumer audio products, was the final straw for many of Masimo's stockholders.

RESPONSE TO NO. 62: Masimo denies the allegations in Paragraph 62, except that Masimo admits that Masimo acquired Sound United for approximately \$1.025 billion on February 15, 2022.

63. On February 15, 2022, the day on which Masimo announced the Sound United acquisition, the Company's stock closed at \$228 per share. The following day, the stock fell 37%, to \$144 per share. Thus, the market responded to news of a \$1.025 billion acquisition by erasing *five times* that amount—approximately \$5.1

billion—from Masimo’s market cap. Masimo’s stock price remains around that same depressed level to this day.



RESPONSE TO NO. 63: Masimo denies the allegations in Paragraph 63 except that Masimo admits that Masimo’s stock traded at approximately \$228 per share on February 15, 2022, traded at approximately \$144 per share on February 16, 2022, and has traded between \$169.38 per share and \$112.07 per share between February 17, 2022 and October 20, 2022.

64. Such a drop in value is extremely rare, if not unprecedented. To Politan’s knowledge, based on extensive research, never before in the history of United States publicly traded companies has an acquiring company’s market cap declined by more than *two* times, let alone *five* times, the purchase price of the acquisition where the acquisition was material (*i.e.*, 5% or more of the acquiring company’s market cap).

RESPONSE TO NO. 64: Masimo lacks sufficient information to form a belief as to the allegations in Paragraph 64, including with respect to the frequency of stock price declines, the comparators employed by Politan, and the nature of Politan’s

purported “extensive research,” and accordingly denies the allegations in Paragraph 64 on that basis.

65. The market’s reaction to the Sound United acquisition is a clear signal that the market has lost confidence in the Board’s ability to exercise oversight over Masimo’s management. Indeed, a CNBC commentator reported that Masimo “has become a public company run like a private company” with “a founder/CEO making a great product and using the cash flow to fund pet projects.” That commentator further noted “now the milk is starting to spoil as [Mr.] Kiani pursues pet/science projects” such that “it has become obvious that the company needs a more objective board to oversee the discipline of R&D spending.”

RESPONSE TO NO. 65: Masimo denies the allegations in Paragraph 65, except that Masimo admits that the quoted language in the second and third sentence of Paragraph 65 appears in an article on CNBC.com, available at <https://www.cnbc.com/2022/08/20/how-activist-politan-capital-may-find-an-opportunity-to-trim-costs-build-value-at-masimo.html>, which article, on information and belief, Politan or its agents caused to be published months after the Sound United acquisition in order to build support for its activist campaign. Masimo respectfully refers the Court to that article, which speaks for itself, and denies any allegations or characterizations inconsistent therewith.

66. During the summer of 2022, Politan concluded that Masimo presented an attractive buying opportunity because the price of its common stock significantly undervalued its core pulse oximetry business, in substantial part because the market had lost confidence in the Board’s stewardship. Politan had not, and still has not, formed a firm opinion on the merits of Masimo’s smartwatch or other strategic

initiatives, but Politan recognizes the clear substantial value in fixing the oversight and governance of the Company.

RESPONSE TO NO. 66: Masimo lacks sufficient information to form a belief as to the allegations in Paragraph 66, and accordingly denies the allegations in Paragraph 66 on that basis, except that Masimo admits that in the summer of 2022, the price of Masimo’s common stock was significantly undervalued.

67. On August 16, 2022, Politan filed a Schedule 13D with the SEC disclosing that it owned an 8.4% position in Masimo’s common stock.²⁵ Politan stated that it intended to engage in conversations, meetings and other communications with, among others, certain members of the Board and the management team. Politan further disclosed that it intended to discuss Masimo’s “business, operations, financial condition, strategic plans, governance, the composition of the executive suite and board and possibilities for changes thereto, as well as other matters related to [Masimo.]” Upon the filing of Politan’s Schedule 13D, Masimo’s stock price rose by 6%.

RESPONSE TO NO. 67: Masimo denies the allegations in Paragraph 67, except that Masimo admits Politan filed a Schedule 13D with the SEC on August 16, 2022 and an Amended Schedule 13D on September 27, 2022. Masimo respectfully refers the Court to Politan’s Schedule 13D and Amended Schedule 13D, which speak for themselves, and denies any allegations or characterizations inconsistent therewith. Masimo further avers that Politan’s Schedule 13D and Amended Schedule 13D filings are materially incomplete and inaccurate, because, *inter alia*, Politan

²⁵ Politan subsequently filed an Amended Schedule 13D on September 27, 2022, disclosing that it had increased its holdings to 8.8% of Masimo’s common stock.

disclosed that “the source of the funds” for its investment in Masimo was derived from Politan’s capital, failing to mention any funding from EnTrust Global or other significant investors, and Politan represented that, besides its stock swaps, it had no “no contracts, arrangements, understandings or relationships (legal or otherwise) with respect to any securities of” Masimo, even though The Wall Street Journal reported that EnTrust Global had specifically contributed towards Politan’s “*Masimo* capital.” Masimo further avers that, after Politan’s disclosure on August 16, 2022, Masimo’s stock price fell from \$169.38 per share at close of markets on August 16, 2022 to \$149.67 at close of markets on August 23, 2022.

68. Immediately before, and again shortly after, filing the Schedule 13D, Mr. Koffey requested a meeting with Mr. Kiani to begin the process of constructive engagement. Initially, Masimo ignored that request and instead offered to set up a telephone call between Mr. Koffey and Masimo’s Chief Financial Officer and head of Investor Relations.

RESPONSE TO NO. 68: Masimo denies the allegations in Paragraph 68, except that Masimo admits that on August 15, 2022, Koffey requested a meeting with Kiani. Masimo avers that Masimo offered an immediate meeting with its Chief Financial Officer and Vice President of Investor Relations, but Koffey said he would only speak to Kiani. Masimo further avers that Kiani agreed and invited Politan to Masimo’s headquarters for an in-person meeting, rather than a remote videoconference, as Koffey had requested.

69. After repeated requests, Mr. Kiani finally agreed to a meeting with Mr. Koffey on September 2, 2022. In that meeting, the parties discussed Masimo’s

corporate governance, strategic initiatives, and financial performance. In addition, Mr. Koffey expressed his interest in obtaining representation on Masimo's Board, and made clear that Politan was approaching the situation with an open mind, would reserve judgment on any of Masimo's strategic initiatives, and had a strong focus on return on invested capital in order to be a good steward of stockholder resources.

RESPONSE TO NO. 69: Masimo denies the allegations in Paragraph 69, except that Masimo admits that Kiani and Koffey met on September 2, 2022, immediately following a broader meeting between principals of Politan and Masimo management, and that during that meeting, Koffey requested Kiani's support to appoint two Politan nominees to Masimo's board of directors, with one of the nominees being Koffey himself.

Masimo avers that, during the meeting, Masimo management asked Koffey and the other representatives from Politan multiple times about their strategy and vision for Masimo, and about any complaints they had regarding the direction of the Company, and that Koffey confirmed that he saw value in the Sound United acquisition. Koffey stated that, if installed as a board member, he would endorse existing management and its strategy so that Masimo could get back to the "Joe Kiani multiple." Politan did not inquire about Masimo's business or strategy during the meeting. In fact, Politan rejected Masimo's offer to provide Politan with additional, confidential information about the Company under a non-disclosure agreement.

Masimo further avers that, when asked whether it had solicited any of Masimo's stockholders, Politan denied having done so, and that when asked if he intended to increase Politan's equity stake in Masimo, Koffey responded that he "might."

Masimo further avers that, at the meeting, Koffey raved about how great he believed the Masimo technology and business model was, and reported that he began buying Masimo shares after he perceived a "massive overreaction" by investors to the Sound United acquisition.

Masimo further avers that Koffey delivered an ultimatum during the meeting, and told Kiani that if Kiani supported Koffey's nomination to serve as a director, then Koffey would be Kiani's "biggest cheerleader." If Kiani did not, then Koffey indicated he would wage war against Masimo and win the board seats anyway.

70. At the conclusion of the meeting, Mr. Koffey requested that Mr. Kiani arrange for a follow-up meeting with Masimo's entire Board (consisting of the four other directors), which he reiterated by email on September 6, 2022. Mr. Kiani declined to do so.

RESPONSE TO NO. 70: Masimo denies the allegations in Paragraph 70, except that Masimo admits that Koffey sent Kiani an email on September 6, 2022, which speaks for itself. Masimo respectfully refers the Court to that email for its contents and denies any allegations or characterizations that are inconsistent therewith.

71. Instead, Mr. Kiani replied on September 8, 2022 to inform Mr. Koffey that "members of our Board and management team are planning to meet this fall

with many of our large shareholders to get their views and input. They would welcome meeting with you as well as part of that process.”

RESPONSE TO NO. 71: Masimo admits that Kiani sent an email to Koffey on September 8, 2022 containing, in part, the language quoted in Paragraph 71. Masimo respectfully refers the Court to that email for the entirety of its contents and denies any allegations or characterizations that are inconsistent therewith.

72. Mr. Koffey followed up by email on September 16, 2022, asking Mr. Kiani to reconsider his apparent rejection of Politan’s request for a meeting with the whole Board. Mr. Koffey noted that while Politan encourages and is supportive of the Board’s general stockholder outreach efforts, Politan believes it is incumbent upon the Board to promptly arrange a meeting between the Board and Masimo’s largest stockholders (including Politan) when the stockholder specifically requests such a meeting.

RESPONSE TO NO. 72: Paragraph 72 purports to characterize an email from Koffey to Kiani dated September 16, 2022. Masimo admits that Koffey sent Kiani an email on or around September 16, 2022, and respectfully refers the Court to that email for the entirety of its contents and denies any allegations or characterizations that are inconsistent therewith. Masimo avers that also on September 16, 2022, Politan sent a letter to counsel to Masimo requesting a copy of the Questionnaire, to which Masimo responded on September 28, 2022. Masimo respectfully refers the Court to that correspondence for the entirety of its contents and denies any allegations or characterizations that are inconsistent therewith.

73. Mr. Kiani has yet to respond to Mr. Koffey's September 16, 2022 email, nor has Masimo scheduled any meeting with Politan as part of its stockholder outreach efforts.

RESPONSE TO NO. 73: Masimo admits the allegations in Paragraph 73.

74. Instead of engaging with Politan in a constructive manner, the Board sought to entrench itself in office by making it all but impossible for Politan to nominate candidates for election to the Board.

RESPONSE TO NO. 74: Masimo denies the allegations in Paragraph 74.

75. As is the case for many public companies, Masimo's bylaws have long contained advance notice provisions, which require stockholders seeking to nominate candidates for Masimo's Board to make voluminous disclosures concerning the stockholder and its nominee(s). However, on September 9, 2022—less than a month after Politan filed its Schedule 13D and only *five business days* after the meeting between Mr. Koffey and Mr. Kiani—the Board adopted and approved, effective immediately, certain amendments to the advance notice provisions in Masimo's bylaws.

RESPONSE TO NO. 75: Masimo denies the allegations in Paragraph 75, except that Masimo admits that Masimo adopted and approved the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to Masimo's bylaws and Amended Bylaws for their full and complete contents, which speaks for themselves, and denies any allegation or characterization inconsistent therewith.

76. Notably, that same day, the Board also adopted a poison pill. By doing so, the Board effectively cut off both of the traditional means available to a stockholder to hold a board accountable: the poison pill prevents a tender offer to gain control of the Company, and the Bylaw Amendments make it impossible as a practical matter for the stockholder to launch a proxy contest, replace the Board, and redeem the pill.

RESPONSE TO NO. 76: Masimo denies the allegations in Paragraph 76, except that Masimo admits that on September 9, 2022, Masimo entered a Shareholder

Rights Plan. Masimo respectfully refers the Court to Masimo’s Shareholder Rights Plan for its full and complete contents, which speaks for itself, and denies any allegation or characterization inconsistent therewith.

77. The timing and content of the Board’s adoption of the Bylaw Amendments makes clear that they were adopted for the express purpose of preventing Politan, or any other investment fund stockholder, from nominating a dissident slate of directors for election to the Board.

RESPONSE TO NO. 77: Masimo denies the allegations in Paragraph 77.

78. Indeed, Masimo has admitted that the Bylaw Amendments were aimed squarely at Politan—in a letter dated October 19, 2022, Masimo stated that the Board adopted the Bylaw Amendments “to address well-founded concerns that Politan might attempt to present matters for stockholder consideration at Masimo’s next annual meeting without providing the accurate and complete information stockholders would need to cast an informed vote.” Masimo has never articulated its purported basis for any such “well-founded” concerns, as plainly there are none.

RESPONSE TO NO. 78: Masimo denies the allegations in Paragraph 78, except that Masimo admits that Masimo sent Politan a letter dated October 19, 2022 that contains, in part, the quoted language. Masimo respectfully refers the Court to the letter dated October 19, 2022 for the entirety of its contents, and denies any allegations or characterizations inconsistent therewith.

79. In practice, the Bylaw Amendments impose such onerous requirements that, if allowed to stand, they would significantly chill stockholders’ ability to nominate candidates for election to Masimo’s Board. Now, to exercise the right to nominate candidates for the Board, the Bylaw Amendments require stockholders to disclose highly sensitive and confidential information while also creating burdensome obligations to collect vast quantities of information from far-flung

sources, including information that the Board knows activist and other investment fund stockholders will not be able to obtain.

RESPONSE TO NO. 79: Masimo denies the allegations in Paragraph 79, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

80. In many instances, the Bylaw Amendments are so vague that they leave a nominating stockholder without any objective basis by which to evaluate whether it has complied with them. As a result, the Bylaw Amendments vest the Board with virtually unfettered discretion to accept or reject nominations for any reason or no reason at all. In sum, the new disclosures required by the Bylaw Amendments serve no purpose other than to entrench Masimo's incumbent directors and impede the stockholder franchise.

RESPONSE TO NO. 80: Masimo denies the allegations in Paragraph 80, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

81. Perhaps the most troubling aspect of the Bylaw Amendments arises from a modification to the term "Covered Person," which has the effect of imposing new and unprecedented disclosure requirements on nominating stockholders that are investment funds.

RESPONSE TO NO. 81: Masimo denies the allegations in Paragraph 81, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak

for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

82. Specifically, the term “Covered Person” includes, in addition to the nominating stockholder: (i) any person or entity holding a “5% or larger member, limited partner or similar economic interest” in the nominating stockholder and (ii) “Related Persons,” which is vaguely defined to include persons who have acted in concert with the nominating stockholder within the last two years, whether or not regarding Masimo. (Bylaws Art. I, § 1(9)(b).)

RESPONSE TO NO. 82: Masimo denies the allegations in Paragraph 82, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

83. For each such Covered Person—i.e., for each limited partner— the Bylaw Amendments require the nominating stockholder to disclose both the name and address of the Covered Person and granular information about the Covered Person’s investment holdings, including “any significant equity or other interest held by the Covered Person in any principal competitor of the Company or any counterparty to any litigation in which the Company is involved,” (the “Covered Persons Disclosures”). (Bylaws Art. I, §§ 1(4)(a)(i)(C), (4)(c)(i)-(iii).)

RESPONSE TO NO. 83: Masimo denies the allegations in Paragraph 83, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

84. Accordingly, by their plain terms, the Covered Persons Disclosures require investment fund nominating stockholders to (i) disclose both the names and addresses of their own limited partners to Masimo, and (ii) determine whether any of those limited partners in turn hold investments in any key competitor to, or litigation adversary with, Masimo, and disclose any such responsive information to Masimo.

RESPONSE TO NO. 84: Masimo denies the allegations in Paragraph 84, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

85. Thus, for example, if one of a nominating stockholder's 5% or greater limited partners held an equity interest in Apple, a company with which Masimo is currently engaged in litigation, the nominating stockholder would need to identify that limited partner and disclose information about the limited partner's interest in Apple.

RESPONSE TO NO. 85: Masimo denies the allegations in Paragraph 85, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022, and Masimo admits that Masimo is currently engaged in litigation with Apple. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

86. The Covered Persons Disclosures are egregious for numerous reasons. *First*, at the most basic level, the Covered Persons Disclosures contravene well-established norms of confidentiality in the investment fund industry by requiring investment fund stockholders to disclose the names of their limited partners to

Masimo. The identities of an investment fund’s outside investors are among its most valuable trade secrets and proprietary information.

RESPONSE TO NO. 86: Masimo denies the allegations in Paragraph 86.

87. *Second*, many institutional investors that allocate capital to investment funds (including but not limited to activist funds) require that their names and investment allocations be kept confidential unless disclosure is required by law, rule, or regulation. In such a case, the nominating stockholder would be in a Catch-22—either it could comply with the Covered Persons Disclosures and breach its confidentiality obligations to its own limited partners, or it could abide by its obligations to its limited partners and have its nomination rejected.

RESPONSE TO NO. 87: Masimo denies the allegations in Paragraph 87.

88. Institutional investors’ desire to keep their names and investment allocations confidential is eminently reasonable. For example, a sovereign wealth fund or pension fund may be reluctant to be publicly associated with efforts to influence strategy and corporate governance at United States public companies. That reticence is understandable, both from a public relations standpoint and, more so, when considering that these are *passive* investors with no influence on the activist fund’s strategy. Indeed, Politan’s limited partners have no discretionary authority whatsoever over Politan’s investments or investment strategy.

RESPONSE TO NO. 88: Masimo denies the allegations in Paragraph 88.

89. *Third*, because institutional investors do not want their names and allocations disclosed—even privately to Masimo—the Covered Persons Disclosures, which one would reasonably expect to be broadly adopted by public companies, will make it exponentially harder for investment funds to raise capital from such investors. The end result would be significantly less stockholder activism across all public companies.

RESPONSE TO NO. 89: Masimo denies the allegations in Paragraph 89.

90. *Fourth*, investment fund stockholders would reasonably be concerned about the manner in which Masimo would use information about their limited partners. Disclosing the identities of those limited partners could expose them to

harassment or other pressure tactics by Masimo in an effort to inflict damage on the nominating stockholder's business relationships.

RESPONSE TO NO. 90: Masimo denies the allegations in Paragraph 90.

91. *Fifth*, it would be impossible, as a practical matter, for an investment fund stockholder to comply with the Covered Persons Disclosures requirement. Investment funds generally do not have access to information concerning the other investments of their limited partners. As noted, in many cases those limited partners include entities like sovereign wealth funds or pension funds, which themselves manage vast amounts of money. Even if those entities were willing to disclose their investment holdings, which is highly unlikely, the odds that the nominating stockholder would be able to collect such information in a timely manner are exceedingly low.

RESPONSE TO NO. 91: Masimo denies the allegations in Paragraph 91.

92. *Sixth*, not all litigation is discoverable, much less easily. Litigation may be filed internationally or in federal or state court in any of the 50 states. The dockets of many of those courts are not readily accessible. Moreover, to the extent "litigation" includes private arbitration, there may be no way to determine if an investor is a party to any such dispute.

RESPONSE TO NO. 92: Masimo denies the allegations in Paragraph 92, except that Masimo admits that the dockets for certain litigations or arbitrations may not be publicly accessible.

93. The Board, advised by sophisticated activist defense counsel,²⁶ is fully aware that there is no way an investment fund stockholder could comply with the Covered Persons Disclosures. Indeed, that is precisely the point.

RESPONSE TO NO. 93: Masimo denies the allegations in Paragraph 93, except that Masimo admits that the partial quotation in Footnote 7 appears in “Proxy Tactics Are Changing: Can Advance Notice Bylaws Do What Poison Pills Cannot?”, John C. Coffee, Jr., 2022 WLNR 33331575 (October 19, 2022). Masimo avers that the same article discusses Masimo’s Amended Bylaws and, with respect to Politan’s assertions, states: “[H]edge funds’ apparent claim that” the disclosure requirements in those bylaws “represent[] an ‘existential threat’ to them sounds as if Chicken Little has entered the debate. Such claims are easily asserted but less easily proven, and they tend to be self-serving.... Chicken Little-like predictions that the sky will fall in on proxy contests if limited partners must be disclosed needs to be viewed skeptically.” Masimo further avers that the article states: “[T]he argument that limited partners and other persons with some relationship to the nominating person have some right of privacy that entitles them to escape disclosure is overbroad. Even

²⁶ There can be no doubt that Masimo adopted the Bylaw Amendments to improperly act as a surrogate poison pill aimed at stockholders who dare to run a proxy contest for even a minority of Board seats. *See* “Proxy Tactics Are Changing: Can Advance Notice Bylaws Do What Poison Pills Cannot?”, John C. Coffee, Jr., 2022 WLNR 33331575 (October 19, 2022) (“in the takeover war, the poison pill is no longer the absolute showstopper it once was and can be outflanked by activist hedge funds seeking to run a proxy contest—even if only for a minority of the board. . . .”).

when they hold only 5%, limited partners are not the weak, passive creatures of traditional limited partnership law. Rather, they may have a fat pocketbook that the nominating person is relying upon to finance its proxy contest. The Company’s shareholders are entitled to know of any such arrangements, including what has happened in the recent past.” Masimo respectfully refers the Court to the full contents of the article, which speak for itself, and Masimo denies any allegations or characterizations inconsistent therewith.

94. Masimo has no legitimate need for the information required by the Covered Persons Disclosures. That information—which concerns the identities and investments of passive investors in an investment fund—has no bearing whatsoever on the fitness of a proposed candidate for election to the Board.

RESPONSE TO NO. 94: Masimo denies the allegations in Paragraph 94.

95. Masimo claims that the Bylaw Amendments, and the Covered Persons Disclosures in particular, are necessary to “protect against undisclosed conflicts of interest adverse to Masimo and its stockholders, including conflicts resulting from short positions, derivatives, and relationships with current and prospective Masimo competitors or adverse litigants.” (Exhibit F.)

RESPONSE TO NO. 95: Masimo denies the allegations in Paragraph 95, except that Masimo admits that Masimo sent a letter on September 28, 2022 containing a sentence partially quoted in Paragraph 95. The full sentence states: “Among other things, the Bylaw amendments protect against undisclosed conflicts of interest adverse to Masimo and its stockholders, including conflicts resulting from short positions, derivatives, and relationships with current and prospective Masimo competitors or adverse litigants—an objective clearly relevant to the Board

nomination process.” Masimo respectfully refers the Court to the September 28, 2022 letter, which speaks for itself, and Masimo denies any allegations or characterizations inconsistent therewith.

96. That purported rationale is a mere pretext, as is illustrated by the fact that neither the Bylaw Amendments nor the D&O Questionnaire require incumbent Board members to disclose whether passive investors in their own businesses hold equity interests in “any principal competitor of the Company or any counterparty to any litigation in which the Company is involved.” (Bylaws Art. I, §§ 1(4)(a)(i)(C), (4)(c)(i)-(iii).)

RESPONSE TO NO. 96: Masimo denies the allegations in Paragraph 96.

97. Notably, Director Defendant Mikkelson is an investment manager at Camber, a healthcare-focused investment fund. As Camber itself disclosed in its Form 13-F filed with the SEC, Camber held an investment of more than \$55 million in Medtronic plc (“Medtronic”)—and *no* investment in Masimo— as of March 31, 2022.²⁷ Masimo’s own annual report describes Medtronic as its “primary competitor.” Yet Mr. Mikkelson was not required to, and did not, disclose this investment to Masimo’s stockholders. Nor, for that matter, did he disclose the names or investment holdings of any of Camber’s limited partners.

RESPONSE TO NO. 97: Masimo denies the allegations in Paragraph 97, except that Masimo admits that Mikkelson is a director of Masimo in his personal capacity, that Mikkelson is a Partner at Camber, and that Camber disclosed in its Form 13-F, dated May 16, 2022, that it held \$55 million in Medtronic plc shares. Masimo avers that \$55 million is a small percentage of Camber’s overall holdings and an even smaller percentage of Medtronic’s overall market capitalization. Masimo avers, on

²⁷ Camber, Institutional Investment Manager Holdings Report, Information Table (Form 13F-HR) (May 16, 2022).

information and belief, that Camber did not possess any shares of Medtronic plc as of December 31, 2021 and no longer held any shares of Medtronic plc as of June 30, 2022, based upon Camber's Form 13-F filings with the SEC dated February 14, 2022 and August 15, 2022, respectively. Masimo also avers that Mikkelson was not required to disclose Camber's holding of Medtronic plc stock on or around March 31, 2022, and that this information was publicly available in Camber's May 16, 2022 Form 13-F filing. Masimo further admits that Masimo competes with Medtronic in patient monitoring, but avers that the vast majority of Medtronic's products and sales are outside of Masimo's markets. Masimo further avers that Mikkelson was not nominated by Camber as a director in Masimo, which was not a stockholder in Masimo at the time of Mikkelson's nomination.

98. The Covered Persons Disclosures are plainly unnecessary, especially considering that the Prior Bylaws already included robust disclosure requirements concerning the nominating stockholder, its holdings, and the proposed nominee(s).

RESPONSE TO NO. 98: Masimo denies the allegations in Paragraph 98.

99. Under Masimo's Prior Bylaws, a nominating stockholder was required to disclose record and beneficial ownership information for itself and the underlying beneficial owner of its shares (if any). (Prior Bylaws Art. I, § 1(4)(c).) It also was required to disclose "all information relating to [the proposed nominee(s)] as would be required to be disclosed in solicitations of proxies for the election of such nominees as directors pursuant to Regulation 14A under the Exchange Act." (Prior Bylaws Art. I, § 1(4)(a).) Such information extended to disclosure of "any material interest, direct or indirect, of any director or nominee for election as director who is not or would not be an 'interested person,' . . . or Immediate Family Member of the

director or nominee, in any transaction, or series of similar transactions” 17 C.F.R. § 240.14a-101.

RESPONSE TO NO. 99: Masimo denies the allegations of Paragraph 99, except that Masimo admits that, before September 9, 2022, Masimo last adopted bylaws on October 24, 2019. Masimo respectfully refers the Court to the Bylaws adopted on October 24, 2019, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

100. In addition, a nominating stockholder was required to disclose “any other information relating to [itself and any underlying beneficial owner of its shares] that would be required to be disclosed in a proxy statement or other filings required to be made in connection with solicitations of proxies for, as applicable, the proposal and/or for the election of directors in a contested election pursuant to Section 14 of the Exchange Act.” (Prior Bylaws Art. I, § 4(c)(iii).) Those required disclosures were more than adequate to serve the Board’s legitimate purpose in vetting director nominees for office.

RESPONSE TO NO. 100: Masimo denies the allegations of Paragraph 100, except that Masimo admits that, before September 9, 2022, Masimo last adopted bylaws on October 24, 2019. Masimo respectfully refers the Court to the Bylaws adopted on October 24, 2019, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

101. The Board’s attempt to add additional disclosure requirements that serve no legitimate corporate purpose, on top of what already was a robust advance notice bylaw regime, must be seen for what it is: an intentional and bad faith attempt to deter, chill and/or prevent investment fund stockholders generally, and Politan in particular, from nominating candidates for election to the Board.

RESPONSE TO NO. 101: Masimo denies the allegations in Paragraph 101.

102. The Bylaw Amendments also provide that a nominating stockholder must disclose to Masimo information concerning the investment holdings of “any Family Member of each Covered Person” in an extreme departure from both SEC requirements and established norms. (Bylaws Art. I, § 4(c)(ii).)

RESPONSE TO NO. 102: Masimo denies the allegations in Paragraph 102, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

103. The Bylaws define “Family Member” 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 (other than domestic employees) who shares the person’s home,” which could include roommates and other individuals who are not actually family members of that person. (Bylaws Art. § 1(4)(ii).)

RESPONSE TO NO. 103: Masimo denies the allegations in Paragraph 103, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

104. Therefore, under the plain language of the Bylaws, if a stockholder like Politan wished to nominate a candidate for election to the Board, it would need to survey the Family Members of both (i) its own limited partners and (ii) any Related Persons (*i.e.*, any person who has acted in concert with the nominating stockholder within the last two years, whether or not regarding Masimo) and disclose any such Family Member’s investment holdings in a principal competitor or litigation counterparty of the Company.

RESPONSE TO NO. 104: Masimo denies the allegations in Paragraph 104, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

105. Not only is this information practically impossible for a nominating stockholder to collect; it also has no bearing on a nominee's fitness to serve as a director. The Prior Bylaws were more than sufficient in requiring disclosure of information regarding interests "held by members of each such party's immediate family sharing the same household." (Prior Bylaws Art. I, § 1(4)(c)(ii).)

RESPONSE TO NO. 105: Masimo denies the allegations of Paragraph 105, except that Masimo admits that, before September 9, 2022, Masimo last adopted bylaws on October 24, 2019. Masimo respectfully refers the Court to the Bylaws adopted on October 24, 2019, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

106. In another attempt to block investment fund stockholders from nominating candidates for election to the Board, the Bylaw Amendments require a nominating stockholder to disclose any "plans or proposals" for the nominating stockholder or any Related Person to nominate directors at other public companies "within the next 12 months," (the "Future Plans Disclosures"). (Bylaws Art. I, § 1(4)(a)(vi).)

RESPONSE TO NO. 106: Masimo denies the allegations in Paragraph 106, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak

for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

107. Typically, investment funds do not publicly disclose their plans and strategies as such information is highly confidential and proprietary. Indeed, many activist funds create value by identifying investment opportunities and strategies for enhancing stockholder value, including by nominating and electing candidates to companies' boards of directors. Those funds would not be able to successfully implement such a strategy if they were required to telegraph their intention as a pre-condition to nominate candidates for election at a company as much as a year prior to an election.

RESPONSE TO NO. 107: Masimo denies the allegations in Paragraph 107.

108. The disclosure of an activist's investment in a company can, and often does, in and of itself, create significant value. For example, over five previous activist situations, public disclosure of an investment by Mr. Koffey has spurred an average increase of 12.4% in the target company's stock price and added more than \$2 billion on average to the market capitalizations of those companies. That is precisely why investment funds treat their future plans as highly confidential. The Future Plans Disclosures would require investment funds to forego that value in exchange for the right to nominate candidates for election to Masimo's Board. As such, the Bylaw Amendments chill activists from nominating candidates for election to Masimo's Board by forcing them to choose between making a nomination and risking returns on future investment opportunities.

RESPONSE TO NO. 108: Masimo denies the allegations in Paragraph 108.

Masimo avers that Koffey's activism has caused negative consequences at several companies, including Centene Corporation and Bunge Ltd. For example, Politan's late-2021 campaign for board seats at Centene, a publicly traded managed care company, resulted in the appointment of five new directors and resignation of the company's CEO and founder. Since then, Centene recently announced that it incurred a \$172 million loss in the second quarter of 2022 and that it would be forced

to divest certain international business units. Centene's revenue had grown from approximately \$75 billion in 2019 to approximately \$126 billion in 2021 before Politan intervened at the end of 2021. Likewise, Koffey and his activist team at his former firm pressured Bunge into adding Koffey's choice of directors to its board and replacing its CEO. Bunge's stock price dropped substantially in the eighteen months that followed Koffey's investment.

109. Relatedly, the Bylaw Amendments require a nominating stockholder to disclose any proposals or nominations by the nominating stockholder or any Related Person at other public companies in the last 36 months, "whether or not such . . . nomination was publicly disclosed," (the "Past Proposals Disclosures"). (Bylaws Art. I, § 1(4)(a)(vii).) That disclosure requirement, too, is aimed directly at the investment fund business model and intended to discourage investment fund stockholders from nominating candidates.

RESPONSE TO NO. 109: Masimo denies the allegations in Paragraph 109, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

110. As the Past Proposals Disclosures recognize, situations may arise in which a stockholder's prior proposal or nomination was never publicly disclosed. In those situations, the stockholder and the company may enter into settlement agreements that address issues like board representation, corporate governance changes and other initiatives to enhance stockholder value, and that impose restrictions on the investor. Such settlement agreements sometimes contain strict

confidentiality provisions which may prevent a nominating stockholder from being able to comply with the Past Proposals Disclosures requirement.

RESPONSE TO NO. 110: Masimo denies the allegations of Paragraph 110, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

111. The Board has no legitimate need for the information that a nominating stockholder must disclose under the Future Plans Disclosures or the Past Proposals Disclosures. That information has no bearing whatsoever on the fitness of a stockholder's director nominees and provides neither the Board nor stockholders with material information regarding a nominating stockholder or its investment in Masimo.

RESPONSE TO NO. 111: Masimo denies the allegations in Paragraph 111.

112. The Bylaw Amendments also operate to chill the stockholder franchise by mandating extensive disclosures about "agreements" or "understandings" with and among "Covered Persons," "Related Persons," and unascertainable others (the "Agreements or Understandings Disclosures"). (Bylaws Art. I, § 1(4)(a)(iii), (v).)

RESPONSE TO NO. 112: Masimo denies the allegations in Paragraph 112, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

113. The scope of the Agreements or Understandings Disclosures goes far beyond what is required under the federal securities laws, covering any agreement or understanding regarding, vaguely, "any subject matter that could reasonably be determined to be material in the Nominating Person's solicitation of stockholders

(including, without limitation, matters of social, labor, environmental, and governance policy), regardless of whether such agreement, arrangement or understanding relates specifically to [Masimo].” (Bylaws Art. I, § 1(4)(a)(iv), (v).)

RESPONSE TO NO. 113: The allegations in Paragraph 113 contain legal arguments or conclusions regarding the scope and content of federal securities law to which no response is required. To the extent that any response is required, Masimo denies the allegations of Paragraph 113, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

114. Equally troubling is the wide-ranging yet vaguely defined group of individuals or entities whose agreements and understandings must be disclosed. As noted, the term “Related Persons” includes persons with whom the nominating stockholder has acted “in concert” “during the prior two years” with respect to matters, “whether or not specific to [Masimo],” that would be material to the solicitation of stockholders. (Bylaws Art. I, § 1(9)(g).) It is anybody’s guess how the Company might interpret such a vague provision.

RESPONSE TO NO. 114: Masimo denies the allegations in Paragraph 114, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

115. In short, a nominating stockholder is left to speculate which “agreements” or “undertakings,” with which counterparties, must be disclosed. It is impossible for a nominating stockholder to ascertain whether it has complied with the Agreements or Understandings Disclosures requirements, and the Board has

unfettered (and arbitrary) discretion to determine whether the disclosures tendered are acceptable.

RESPONSE TO NO. 115: Masimo denies the allegations in Paragraph 115.

116. Indeed, because the Agreements or Understandings Disclosures require such a broad range of information concerning (i) potential agreements (*i.e.*, agreements or understandings regarding “any subject matter that could reasonably be determined to be material in the Nominating Person’s solicitation of stockholders . . . regardless of whether such agreement, arrangement or understanding relates specifically to [Masimo]”) and (ii) the counterparties thereto (*i.e.*, anyone with whom the nominating stockholder acted “in concert” during the previous two years regardless of whether such coordination involved Masimo), a nominating stockholder can never be sure that it has satisfied those disclosure requirements.

RESPONSE TO NO. 116: Masimo denies the allegations in Paragraph 116, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

117. In addition, the Agreements or Understandings Disclosures give Masimo *carte blanche* to conduct a fishing expedition under the guise of determining whether the information it desires “could reasonably be determined to be material” to stockholders.

RESPONSE TO NO. 117: Masimo denies the allegations in Paragraph 117.

118. Finally, because the Agreements or Understandings Disclosures have no boundaries, the Board is free to apply different standards—or no standards at all—to different nominating stockholders when determining whether a stockholder has complied with the disclosure requirements.

RESPONSE TO NO. 118: Masimo denies the allegations in Paragraph 118.

119. Like the Covered Persons Disclosures, the Agreements or Understandings Disclosures serve no legitimate purpose because the Prior Bylaws

already had ample disclosures in place to allow Masimo to obtain necessary information in this regard.

RESPONSE TO NO. 119: Masimo denies the allegations in Paragraph 119.

120. For instance, the Prior Bylaws (Prior Bylaws Art. I, § 1(4)) included disclosure requirements concerning transactions with related persons, specifically requesting “any other information regarding the transaction or the related person in the context of the transaction that is material to investors in light of the circumstances of the particular transaction.” 17 C.F.R. § 229.404.

RESPONSE TO NO. 120: Masimo denies the allegations of Paragraph 120, except that Masimo admits that, before September 9, 2022, Masimo last adopted bylaws on October 24, 2019. Masimo respectfully refers the Court to the Bylaws adopted on October 24, 2019, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

121. The Bylaw Amendments also unreasonably require a nominating stockholder to disclose the identities of any other stockholder known to support the nomination. Specifically, the Bylaw Amendments require the disclosure of the names, addresses, and shares held by any stockholder “known . . . to support such nomination” (the “Supporting Stockholder Disclosures”). (Bylaws Art. I, § 1(4)(a)(ii).)

RESPONSE TO NO. 121: Masimo denies the allegations in Paragraph 121, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

122. Like the Agreements or Understandings Disclosures, the Supporting Stockholder Disclosures are ill-defined and unduly vague. By their terms, the Supporting Stockholder Disclosures require a nominating stockholder to disclose not

just any other stockholders that have provided *financial* support for a nomination but also those that have expressed support in *any* form. There is a marked difference between financial support and supporting a position in a proxy contest.

RESPONSE TO NO. 122: Masimo denies the allegations in Paragraph 122, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

123. Indeed, on October 17, 2022, Politan asked Masimo to confirm that “Politan would only be required to disclose instances where a stockholder has given material support in the form of financial support, a voting commitment or similar arrangement.”²⁸ (Exhibit G.) By letter dated October 19, 2022, Masimo expressly rejected any such limitation, stating that the Supporting Stockholder Disclosures requirement “is not so limited” and “plainly requires the disclosure of any stockholders known to ‘support such nomination,’ and *does not contain a materiality qualifier or limit the required disclosure to any particular “forms” of support.*” (Exhibit H, at 5) (emphasis added).

RESPONSE TO NO. 123: Masimo denies the allegations of Paragraph 123, except that Masimo admits that Politan sent a letter to Masimo dated October 17, 2022, and that Masimo sent a letter in response dated October 19, 2022. Masimo respectfully refers the Court to the October 17, 2022 letter and October 19, 2022 letter, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

²⁸ Politan does not challenge the Supporting Stockholder Disclosures to the extent they require disclosure of material support in the form of financial support, a voting commitment or similar arrangement.

124. As drafted, the Supporting Stockholder Disclosures are so broad as to be virtually unbounded. It is impossible for a nominating stockholder to determine whether, for instance, a casual comment by a stockholder that she hopes the nominating stockholder's candidate wins or wishing the stockholder "good luck" would trigger the disclosure requirement.

RESPONSE TO NO. 124: Masimo denies the allegations in Paragraph 124.

125. Moreover, requiring early disclosure of stockholder support for a nomination would significantly chill stockholder communications. When determining whether to commence a proxy contest, it is not uncommon for a nominating stockholder to gauge support by communicating with other stockholders to determine whether other stockholders share their views. In connection with those preliminary discussions, other stockholders sometimes express "support" for the nominating stockholder but do not commit to voting for the stockholder's nominee or proposal, as often such support is tentative, subject to change and requires internal approval. In addition, certain stockholders fear retribution by the company if they are seen to be in league with a nominating stockholder. For those reasons, among others, if such preliminary and tentative discussions of support would be subject to disclosure, many stockholders would be expected to refrain from having such discussions out of concern for internal or external repercussions.

RESPONSE TO NO. 125: Masimo denies the allegations in Paragraph 125.

126. Thus, the Supporting Stockholder Disclosures would chill important and permitted communications among stockholders—communications that the SEC has expressly encouraged—and facilitate the harassment of any potential supporters of a stockholder's efforts to nominate new directors.

RESPONSE TO NO. 126: Masimo denies the allegations in Paragraph 126.

127. Given the existing requirement under the federal securities laws to disclose the source of recommendations for a nominee, *see* 17 C.F.R. § 229.407(c), the Supporting Stockholder Disclosures are unnecessary and plainly are designed to serve as an impediment to nominations.

RESPONSE TO NO. 127: Masimo denies the allegations in Paragraph 127.

128. It would be particularly inequitable to apply the Bylaw Amendments in the upcoming proxy season given the SEC's recent adoption of rules implementing the use of "universal proxy cards." The new universal proxy rules apply to all

stockholder meetings involving contested director elections held after August 31, 2022.

RESPONSE TO NO. 128: Masimo denies the allegations in Paragraph 128, except that Masimo admits that the SEC recently adopted Rule 14a-19. Masimo respectfully refers the Court to Rule 14a-19 and its legislative history, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

129. Under new SEC Rule 14a-19, the universal proxy card must include all candidates nominated by management and stockholders for election at the upcoming annual meeting. If the Board is permitted to enforce the disclosures required by the Bylaw Amendments, Politan would be forced to solicit proxies on cards that include all of Masimo's candidates, while Masimo could refuse to include any of Politan's candidates on its cards. Such a circumstance would both tilt the playing field in favor of the incumbent directors and lead to stockholder confusion.

RESPONSE TO NO. 129: Masimo denies the allegations in Paragraph 129, except that Masimo admits that the SEC recently adopted Rule 14a-19. Masimo respectfully refers the Court to Rule 14a-19 and its legislative history, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

130. On September 20, 2022, Politan sent Masimo a letter requesting that the Board either amend Masimo's Bylaws to eliminate the onerous requirements or revert back to the Prior Bylaws in effect prior to the Bylaw Amendments. (Exhibit I.)

RESPONSE TO NO. 130: Masimo denies the allegations in Paragraph 130, except that Masimo admits that Politan sent a letter to Masimo on September 20, 2022. Masimo respectfully refers the Court to the letter dated September 20, 2022 for the

entirety of its contents, and denies any allegations or characterizations inconsistent therewith.

131. Masimo responded to Politan on September 28, 2022, declining to do either. (Exhibit F.) Despite adopting the Bylaw Amendments and the poison pill *just a week* after Politan expressed interest in Board representation, Masimo now claims that the Bylaw Amendments were adopted after “good faith and thoughtful consideration in response to the SEC’s recent amendments to the proxy rules, including Rule 14a-19 . . .”²⁹ But the timing of the adoption of the Bylaw Amendments and the poison pill belies Masimo’s self-serving claim.

RESPONSE TO NO. 131: Masimo denies the allegations in Paragraph 131, except that Masimo admits that Masimo sent a letter to Politan on September 28, 2022.

Masimo respectfully refers the Court to the letter dated September 28, 2022 for the entirety of its contents, and denies any allegations or characterizations inconsistent therewith.

132. Notably, Masimo has failed to provide any justification for the far-reaching provisions in the Bylaw Amendments that would force Politan to disclose, among other things, proprietary and confidential information concerning (i) the identities and investments of its own limited partners and (ii) its plans or proposals relating to nominations at other public companies.

RESPONSE TO NO. 132: Masimo denies the allegations in Paragraph 132.

133. The Board’s refusal to amend the facially invalid Bylaws serves no legitimate corporate interest and has no purpose other than to maintain the Director Defendants in office, irrespective of the will of stockholders.

RESPONSE TO NO. 133: Masimo denies the allegations in Paragraph 133.

²⁹ To be clear, amendments to the following Bylaw provisions address the SEC’s recent amendments to the proxy rules: Bylaws §§ 1(3)(d), 1(4)(d), 1(4)(e). Politan does not challenge those Bylaw Amendments in this action.

134. Masimo held its 2022 Annual Meeting on May 26, 2022 and historically holds its Annual Meetings in that timeframe. Also, under Masimo's Bylaws, stockholders wishing to nominate candidates for election to Masimo's Board at the 2023 Annual Meeting likely must do so between January 28, 2023 and February 27, 2023.

RESPONSE TO NO. 134: Masimo admits that Masimo held its 2022 Annual Meeting on May 26, 2022 and that it has in prior years held its Annual Meeting in or around that time of year. Masimo denies the remainder of the allegations in Paragraph 134, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022, which give rise to obligations relating to the nomination of directors. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

135. In an effort to determine whether the Board would accept a nomination, on October 9, 2022, Politan submitted a form of nomination notice, a completed questionnaire and related materials (collectively, the "Politan Form of Notice") which presented Mr. Koffey as a nominee for election to the Board at the 2023 Annual Meeting. (Exhibit J.) The Politan Form of Notice contained extensive information about Politan, Mr. Koffey, and Politan's investment in Masimo.

RESPONSE TO NO. 135: Masimo denies the allegations in Paragraph 135, except that Masimo admits that on October 9, 2022, Politan sent Masimo a letter attaching a form of nomination notice and other materials. Masimo respectfully refers the Court to the October 9, 2022 correspondence and attachments thereto, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

136. While Politan declined to disclose the identities of its limited partners, it provided substantial information in an effort to assuage any concerns that Masimo might have. Among other things, it advised that the Covered Persons are all passive investors in Politan’s fund and Politan does not coordinate its activities with them.

RESPONSE TO NO. 136: Masimo denies the allegations in Paragraph 136, except that Masimo admits that on October 9, 2022, Politan sent Masimo a letter attaching a form of nomination notice and other materials. Masimo respectfully refers the Court to the October 9, 2022 correspondence and attachments thereto, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

137. Further, Politan disclosed that the Covered Persons are reputable family offices, pension funds, endowments and sovereign entities, many of which control tens, if not hundreds, of billions of dollars of capital and their investments in Politan represent a relatively small portion of their investment portfolios. Politan also represented that there are no secret plans or agendas—Politan’s goal is to increase the value of its investment in Masimo for the benefit of itself, its investors and other stakeholders of Masimo.

RESPONSE TO NO. 137: Masimo denies the allegations in Paragraph 137, except that Masimo admits that on October 9, 2022, Politan sent Masimo a letter attaching a form of nomination notice and other materials. Masimo respectfully refers the Court to the October 9, 2022 correspondence and attachments thereto, as well as Masimo’s October 19, 2022 letter identifying deficiencies in the materials Politan provided on October 9, 2022, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

138. Finally, Politan asked, if it were to deliver an actual notice of nomination in the same form as the Politan Form of Notice during Masimo's nomination window under its Bylaws, with signatures affixed, whether (i) Masimo would accept such notice as valid and permit Politan to nominate Mr. Koffey as a candidate for election to the Board at the 2023 Annual Meeting, (ii) the Board would not find any deficiency in such form of notice, and (iii) the Board is aware of any other reason that would provide it with a basis to reject such nomination.

RESPONSE TO NO. 138: Masimo denies the allegations in Paragraph 138, except that Masimo admits that on October 9, 2022, Politan sent Masimo a letter attaching a form of nomination notice and other materials. Masimo respectfully refers the Court to the October 9, 2022 correspondence and attachments thereto, as well as Masimo's October 19, 2022 letter identifying deficiencies in the materials Politan provided on October 9, 2022, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

139. On October 19, 2022, Masimo refused to confirm that it would not reject Politan's nomination, citing alleged "concerns about the material accuracy and completeness of certain of the information contained in the [Politan Form of Notice], as well as with [its] clear omissions." (Exhibit H.) In particular, Masimo faulted Politan for failing to comply with the inequitable Bylaw Amendments that Politan challenges in this action—i.e., (i) not disclosing "the identity of its significant (i.e., 5%+) limited partners," (ii) limiting its disclosure of proposals or nominations by Politan at other public companies in the last 36 months to those that had been publicly disclosed, (iii) not disclosing any plans or proposals to nominate directors at other public companies in the next 12 months, and (iv) limiting its disclosure of other stockholders that support Politan's nomination to stockholders providing financial support, a voting commitment or similar arrangement.

RESPONSE TO NO. 139: Masimo denies the allegations in Paragraph 139, except that Masimo admits that Masimo submitted a letter to Politan on October 19, 2022. Masimo avers that there was no "refusal" to confirm, since the October 19, 2022

letter specifically asks Politan to provide additional relevant information and to correct its materially incomplete and misleading disclosures, and instead Politan elected to file this litigation. Masimo respectfully refers the Court to Masimo’s letter dated October 19, 2022, which speaks for itself, and Masimo denies any allegations or characterizations inconsistent therewith.

140. Furthermore, on October 17, 2022, Politan requested that the Board agree to disable the Director Change of Control Provision to permit Masimo’s stockholders to elect Politan’s nominees without triggering massive payments to Mr. Kiani. (Exhibit G.) The Board refused to do so, claiming that the Employment Agreement was the product of “extensive arms-length negotiations between representatives of Masimo’s independent directors and Mr. Kiani” and that the Board lacked the authority to unilaterally waive the Director Change of Control Provision. (Exhibit H.)

RESPONSE TO NO. 140: Masimo denies the allegations in Paragraph 140, except that Masimo admits that Politan sent a letter to Masimo on October 17, 2022, and Masimo sent a letter to Politan on October 19, 2022. Masimo respectfully refers the Court to Politan’s letter dated October 17, 2022, and Masimo’s letter dated October 19, 2022, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

141. As set forth above, the Board adopted the Bylaw Amendments and the poison pill only days after Mr. Koffey expressed his interest in obtaining representation on Masimo’s Board.

RESPONSE TO NO. 141: Masimo denies the allegations in Paragraph 141, except that Masimo admits that Masimo’s board adopted the Amended Bylaws and Shareholder Rights Plan on September 9, 2022.

142. The Bylaw Amendments serve no legitimate corporate purpose. Instead, the Board adopted the Bylaw Amendments for the sole or primary purpose of precluding investment fund stockholders, particularly Politan, from exercising their fundamental right to nominate individuals for election to Masimo's Board, thereby entrenching the Board in office. Indeed, Masimo has expressly admitted that the Board adopted the Bylaw Amendments in direct response to Politan's expression of interest in obtaining Board representation.

RESPONSE TO NO. 142: Masimo denies the allegations in Paragraph 142.

143. Accordingly, the Board's adoption of the Bylaw Amendments is "presumptively inequitable and will be invalidated, unless the directors are able to rebut that presumption by showing a compelling justification for their actions." *Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, at *8 (Del. Ch. Jan. 14, 1991) (citing *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988)).

RESPONSE TO NO. 143: Masimo denies the allegations in Paragraph 143, and denies that the standard articulated in *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988) is applicable to the instant dispute.

144. The Board cannot make any such showing. The Bylaw Amendments all but abrogate an investment fund stockholder's right to nominate candidates for election to the Board. They require nominating stockholders to disclose, among other things, both the identities and investments of their own passive outside investors and the nominating stockholder's future strategic plans to nominate candidates at other public companies, which are closely guarded proprietary information tantamount to trade secrets. That information is wholly divorced from the proper purpose of advance notice bylaws, which is to permit orderly election contests by giving companies fair warning so they have time to respond to stockholder nominations.

RESPONSE TO NO. 144: Masimo denies the allegations in Paragraph 144, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak

for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

145. Nor does the Board need any such information to determine whether a nominee is subject to “undisclosed conflicts of interest adverse to Masimo and its stockholders,” as is illustrated by the fact that the current Board members are not subject to the broad disclosure requirements set forth in the Bylaw Amendments.

RESPONSE TO NO. 145: Masimo denies the allegations in Paragraph 145.

146. Moreover, even if the *Blasius* standard does not apply here, the Board’s actions are nevertheless invalid under *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971). *Schnell* recognizes that any attempt to “utilize the corporate machinery and the Delaware Law for the purpose of perpetuating [oneself] in office” by “obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest” must be denied because those are “inequitable purposes, contrary to established principles of corporate democracy.” *Id.*

RESPONSE TO NO. 146: Masimo denies the allegations in Paragraph 146, except that Masimo admits that the quoted language appears, in part, in *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971), and respectfully refers the Court to the full opinion for its contents and denies any allegations or characterizations inconsistent therewith.

147. Plaintiffs repeat and reallege the preceding paragraphs as if fully set forth herein.

RESPONSE TO NO. 147: Masimo repeats, realleges, and incorporates by reference all preceding responses as if fully set forth herein.

148. The Covered Persons Disclosures, the Family Member Disclosures, the Future Plans Disclosures, the Past Proposals Disclosures, the Agreements or Understandings Disclosures, and the Supporting Stockholder Disclosures (collectively, the “Invalid Bylaw Amendments”) are invalid because they improperly restrict stockholder rights, impose unreasonable conditions on the ability

of stockholders to nominate candidates for election to the Board, and violate public policy. As written, the Invalid Bylaw Amendments permit Masimo to manipulate the electoral process to subvert stockholder rights and serve only to entrench the incumbent Board.

RESPONSE TO NO. 148: Masimo denies the allegations in Paragraph 148.

149. In particular, among other things:

- The Covered Persons Disclosures require an investment fund nominating stockholder to disclose highly sensitive, and often impossible to obtain, information concerning the identities and investments of its own limited partners;
- The Family Member Disclosures extend the Bylaw Amendments' broad disclosure provisions to a wide-range of individuals, including the mothers-in-law, fathers-in-law, brothers-in-law, sisters-in-law, and perhaps even roommates, of any Covered Person (which, in the case of investment fund nominating stockholders, includes the stockholder's investors);
- The Future Plans Disclosures require a nominating stockholder to disclose highly confidential and proprietary information concerning future plans and strategies to nominate directors for election at other public companies;
- The Past Proposals Disclosures may require a nominating stockholder to disclose non-public settlements and other agreements with other public companies in violation of confidentiality obligations;
- The Agreements or Understandings Disclosures require nominating stockholders to disclose vaguely-defined "agreements" or "understandings" with a wide-ranging, amorphous group of individuals or entities; and
- The Supporting Stockholder Disclosures require the nominating stockholder to identify any other stockholder that supports the nomination, which would chill important and permitted communications among stockholders and facilitate the

harassment of any potential supporters of a stockholder's efforts to nominate new directors.

RESPONSE TO NO. 149: Masimo denies the allegations in Paragraph 149, except that Masimo admits that Masimo adopted the Amended Bylaws on September 9, 2022. Masimo respectfully refers the Court to the Amended Bylaws, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

150. The Director Defendants' primary purpose in adopting the Invalid Bylaw Amendments was to preclude Plaintiffs from nominating candidates for election to the Board and to interfere with the ability of stockholders to nominate and vote for directors other than the incumbents. Indeed, Masimo has admitted as much.

RESPONSE TO NO. 150: Masimo denies the allegations in Paragraph 150.

151. Plaintiffs have no adequate remedy at law.

RESPONSE TO NO. 151: The allegations in Paragraph 151 are legal arguments or conclusions to which no response is required. To the extent that any response is required, Masimo denies the allegations in Paragraph 151.

152. Plaintiffs are entitled to a declaration that the Invalid Bylaw Amendments are unlawful and Politan need not comply with such disclosure requirements to nominate candidates to stand for election at Masimo's next annual meeting of stockholders.

RESPONSE TO NO. 152: The allegations in Paragraph 152 are legal arguments or conclusions to which no response is required. To the extent that any response is required, Masimo denies the allegations in Paragraph 152.

153. Plaintiffs repeat and reallege the preceding paragraphs as if fully set forth herein.

RESPONSE TO NO. 153: To the extent that Plaintiffs' Second Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 153. To the extent a response is required, Masimo repeats, realleges, and incorporates by reference all preceding responses as if fully set forth herein.

154. The Director Defendants owe Masimo's stockholders—including Politan—the uncompromising fiduciary duties of care and loyalty. Those fiduciary duties preclude the Director Defendants from taking any action to favor their own interests ahead of the interests of Masimo and its stockholders.

RESPONSE TO NO. 154: The allegations in Paragraph 154 are legal arguments or conclusions to which no response is required. Moreover, to the extent that Plaintiffs' Second Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 154. To the extent that any response is required, Masimo denies the allegations in Paragraph 154.

155. The Director Defendants have abused their positions and misused the corporate machinery to impede the exercise of the stockholder franchise and to entrench themselves in office.

RESPONSE TO NO. 155: To the extent that Plaintiffs' Second Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 155. To the extent that any response is required, Masimo denies the allegations in Paragraph 155.

156. In breach of their fiduciary duties, the Director Defendants approved the Invalid Bylaw Amendments, which place inequitable and unreasonable burdens upon stockholders seeking to nominate director candidates. The Invalid Bylaw

Amendments have no legitimate corporate purpose and are instead designed to thwart nominations to replace incumbent directors and stymie stockholders from exercising their franchise.

RESPONSE TO NO. 156: The allegations in Paragraph 156 are legal arguments or conclusions to which no response is required. Moreover, to the extent that Plaintiffs' Second Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 156. To the extent that any response is required, Masimo denies the allegations in Paragraph 156.

157. The Director Defendants had no justification, much less a reasonable or compelling justification, to adopt the Invalid Bylaw Amendments mere days after the meeting between Mr. Koffey and Mr. Kiani in which Politan expressed an interest in obtaining representation on Masimo's Board.

RESPONSE TO NO. 157: To the extent that Plaintiffs' Second Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 157. To the extent that any response is required, Masimo denies the allegations in Paragraph 157.

158. The Director Defendants' primary purpose in adopting the Invalid Bylaw Amendments was to preclude Plaintiffs from nominating candidates for election to the Board and to interfere with the ability of stockholders to nominate and vote for directors other than the incumbents. Masimo has admitted as much.

RESPONSE TO NO. 158: To the extent that Plaintiffs' Second Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 158. To the extent that any response is required, Masimo denies the allegations in Paragraph 158.

159. The Director Defendants are acting unlawfully and in bad faith to entrench themselves by blocking Politan from presenting alternative candidates to stockholders, consistent with Plaintiffs' franchise rights.

RESPONSE TO NO. 159: To the extent that Plaintiffs' Second Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 159. To the extent that any response is required, Masimo denies the allegations in Paragraph 159.

160. Defendants' misuse of the corporate machinery to impede the exercise of the shareholders' franchise and entrench themselves in office constitutes a clear violation of their fiduciary duties under Delaware law.

RESPONSE TO NO. 160: To the extent that Plaintiffs' Second Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 160. To the extent that any response is required, Masimo denies the allegations in Paragraph 160.

161. Plaintiffs have no adequate remedy at law.

RESPONSE TO NO. 161: The allegations in Paragraph 161 are legal arguments or conclusions to which no response is required. Moreover, to the extent that Plaintiffs' Second Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 161. To the extent that any response is required, Masimo denies the allegations in Paragraph 161.

162. Plaintiffs repeat and reallege the preceding paragraphs as if fully set forth herein.

RESPONSE TO NO. 162: To the extent that Plaintiffs' Third Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 162. To the extent a response is required, Masimo repeats, realleges, and incorporates by reference all preceding responses as if fully set forth herein.

163. The Director Defendants owe Masimo's stockholders—including Politan—the uncompromising fiduciary duties of care and loyalty. Those fiduciary duties preclude the Director Defendants from taking any action to favor their own interests ahead of the interests of Masimo and its stockholders.

RESPONSE TO NO. 163: The allegations in Paragraph 163 are legal arguments or conclusions to which no response is required. Moreover, to the extent that Plaintiffs' Third Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 163. To the extent that any response is required, Masimo denies the allegations in Paragraph 163.

164. The Director Defendants have refused to disable the Director Change of Control Provision in the Employment Agreement to prevent Masimo from becoming obligated to make massive severance payments to Mr. Kiani in the event that two Politan nominees are elected to the Board. The Board has done so for the primary purpose of obstructing the ability of Masimo stockholders to remove the Director Defendants from office.

RESPONSE TO NO. 164: To the extent that Plaintiffs' Third Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 164. To the extent a response is required, Masimo denies the allegations in Paragraph 164, except that Masimo admits that Politan sent a letter to Masimo dated October 17, 2022 in which it, for the first time, requested that Masimo's board unilaterally waive

the change of control provisions in Kiani's Employment Agreement, and that Masimo responded by letter dated October 19, 2022. Masimo respectfully refers the Court to Politan's letter dated October 17, 2022 and Masimo's letter dated October 19, 2022, which speak for themselves, and Masimo denies any allegations or characterizations inconsistent therewith.

165. To the extent that the Employment Agreement does not provide the Director Defendants with the ability to disable the Director Change of Control Provision, the Director Change of Control Provision is invalid and unenforceable under Delaware law.

RESPONSE TO NO. 165: The allegations in Paragraph 165 are legal arguments or conclusions to which no response is required. Moreover, to the extent that Plaintiffs' Third Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 165. To the extent that any response is required, Masimo denies the allegations in Paragraph 165.

166. As a result of the Director Defendants' foregoing breaches, Masimo stockholders will be deprived of their opportunity to decide whether to support Politan's nominees free from the coercive effects of hundreds of millions of dollars in severance payments to Mr. Kiani. *See Marcato International Master Fund, Ltd. v. John M. Gibbons, et al. [Deckers]*, C.A. No. 2017-0751-JTL, transcript at 46-47, 57-58 (Del. Ch. May 25, 2018; filed June 22, 2018) (awarding corporate benefit fees to plaintiffs who successfully challenged directors' attempt to stand on similar "continuing directors" provision of compensation agreement in order to accelerate executive compensation upon election of director nominated by plaintiff).

RESPONSE TO NO. 166: To the extent that Plaintiffs' Third Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 166. To the extent a response is required, Masimo denies the allegations in Paragraph 166.

167. Plaintiffs are entitled to a declaration that the Director Defendants breached their fiduciary duties.

RESPONSE TO NO. 167: To the extent that Plaintiffs' Third Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 167. To the extent a response is required, Masimo denies the allegations in Paragraph 167.

168. Plaintiffs are entitled to an injunction requiring the Board to disable the Director Change of Control Provision.

RESPONSE TO NO. 168: To the extent that Plaintiffs' Third Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 168. To the extent a response is required, Masimo denies the allegations in Paragraph 168.

169. To the extent that the Board lacks the ability to disable the Director Change of Control Provision, the Court should declare the Director Change of Control Provision void and unenforceable.

RESPONSE TO NO. 169: To the extent that Plaintiffs' Third Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 169. To the extent a response is required, Masimo denies the allegations in Paragraph 169.

170. Plaintiffs have no adequate remedy at law.

RESPONSE TO NO. 170: The allegations in Paragraph 170 are legal arguments or conclusions to which no response is required. Moreover, to the extent that Plaintiffs' Third Cause of Action is not directed to Masimo, no response is required by Masimo to Paragraph 170. To the extent that any response is required, Masimo denies the allegations in Paragraph 170.

DEFENSES

Masimo asserts the following defenses, reserving the right to modify, amend, and/or expand upon these defenses and assert further defenses as the case proceeds. The inclusion of such defenses below is not an admission that Masimo bears the burden on these defenses.

FIRST DEFENSE

The Verified Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Plaintiffs' claims are barred, in whole or in part, by Plaintiffs' inequitable conduct and unclean hands, including by making materially false and misleading disclosures in their Schedule 13D filings and in correspondence with Masimo.

THIRD DEFENSE

Plaintiffs' claims are barred, in whole or in part, because the Bylaw Amendments are valid and enforceable.

FOURTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, because Plaintiffs violated Section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d).

FIFTH DEFENSE

Plaintiffs are not entitled to the recovery of fees, costs, and expenses.

SIXTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, because they are not ripe.

SEVENTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, because the first cause of action does not specify which Defendants, if any, it is brought against.

EIGHTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, to the extent Plaintiffs seek a mandatory injunction but cannot establish irreparable harm.

NINTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, because Masimo at all times acted in good faith and did not directly or indirectly induce any act constituting a cause of action arising under any law.

TENTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, because Masimo's conduct was justified.

ELEVENTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, because Masimo's conduct can be attributable to a rational business purpose and is accordingly subject to the business judgment rule.

TWELFTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, because the transactions at issue were entirely fair.

WHEREFORE, Masimo respectfully requests that this Court:

- a) enter an order, judgment and decree dismissing the Verified Complaint with prejudice;
- b) enter a judgment in favor of Masimo in all respects;
- c) award Masimo reasonable costs, including attorneys' fees and expenses; and
- d) grant such other relief as is just and proper under the circumstances.

DATED: October 24, 2022

OF COUNSEL:

Michael B. Carlinsky
Sarah Heaton Concannon
R. Corey Worcester
Ryan A. Rakower
Eric J. White
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000

Avi Weitzman
PAUL HASTINGS LLP
200 Park Avenue
New York, New York 10166
(212) 381-6000

/s/ Michael A. Barlow
Michael A. Barlow (#3928)
Anthony R. Sarna (#7012)
ABRAMS & BAYLISS LLP
20 Montchanin Drive, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

*Attorneys for Defendant /
Counterclaim-Plaintiff Masimo
Corporation*