



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LEVITT CORP., a Florida corporation,)
)
Plaintiff,)
)
v.) Civil Action No. 3622-VCN
)
OFFICE DEPOT, INC., a Delaware)
corporation,)
)
Defendant.)

**OPENING BRIEF IN SUPPORT OF LEVITT CORP.'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

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INTRODUCTION

This action arises out of Office Depot, Inc.'s ("Office Depot" or the "Company") efforts to frustrate Levitt Corporation's ("Levitt") nomination of an alternate slate of two highly successful and experienced retail office supply executives (the "Nominees") to stand for election to the Office Depot Board of Directors (the "Office Depot Board") at Office Depot's 2008 Annual Meeting of Stockholders (the "2008 Annual Meeting"), currently scheduled to be held on April 23, 2008. Instead of allowing its shareholders to determine whether they want to bring new and fresh leadership to the Company, Office Depot's Board and management are attempting to entrench themselves by invoking an inapplicable advance notice provision found in the Company's Bylaws that is silent about director nominations. But this attempt to deny Office Depot's shareholders the right to determine for themselves the future leadership of the Company fails for multiple reasons.

First, it cannot be disputed that Office Depot's advance notification provision, Article II, Section 14 of its Bylaws, says nothing whatsoever about advance notification for the nomination of directors. Office Depot's Bylaws are completely silent in this regard. To exclude Levitt's Nominees, Office Depot must read additional terms into its Bylaws that are not set forth in the plain text. Office Depot may not do this. Black-letter Delaware law recognizes that shareholder franchise, nomination, and election rights are paramount, and cannot be restricted absent clear and unambiguous language, which is simply not present here.

This conclusion is compelled not only by the plain language of the Bylaws, but also by their history. Office Depot's 1996 Bylaws (the "1996 Bylaws") clearly and unambiguously required advance notice for the nomination of directors by shareholders. In August 2000, however, Office Depot's Board, acting without a shareholder vote, *removed* that clear language from its Bylaws. At no time has Office Depot ever publicly stated to its shareholders (or even

suggested) that, notwithstanding the removal of this clear language, shareholders must nonetheless provide advance notice if they intend to nominate directors. In light of this amendment and the clear language of the current Bylaws, Office Depot cannot now credibly claim that it intended to retain an advance notice requirement for the nomination of directors. Office Depot's Bylaws simply do not contain such a restriction, and it is improper under Delaware law to read such a restriction into the Bylaws.

Second, any argument by Office Depot that the term "business" found in Article II, Section 14 of its Bylaws subsumes shareholder nomination of directors must be rejected as unclear and ambiguous. As noted above, because shareholder nomination and franchise rights are paramount under Delaware law, any purported restriction on those rights must be stricken unless it is clear and unambiguous. Office Depot's interpretation of its Bylaws cannot meet this standard. No Delaware court has ever interpreted the word "business" in an advance notice bylaw, standing alone, to include the nomination of directors by shareholders. This Court should not do so now, particularly since the Office Depot Board removed the very language from its Bylaws that would have supported its position. This ambiguity is highlighted by the technical operation of Article II, Section 14, which calculates the advance notice deadline from the mailing of the Company's proxy materials (and not the Annual Meeting), leading to the conclusion that advance notice is only required for shareholder proposals to be included in the Company's proxy materials (but not for shareholder-funded proposals, such as Levitt's). In short, Office Depot's interpretation of its Bylaws is highly ambiguous and irreconcilable with its plain terms, and this ambiguity must be construed against Office Depot (and in favor of Levitt's rights as an Office Depot shareholder). As a result, the advance notice requirement in Article II, Section 14 cannot be applied to Levitt's Nominees.

Third, to the extent the Court concludes that nomination of directors is covered by the term “business,” Office Depot’s advance notice provision, which effectively requires 141 days notice in advance of its 2008 Annual Meeting, is unreasonably restrictive to shareholder nomination rights and is therefore invalid on its face. Although Delaware courts have permitted advance notice provisions under certain circumstances, no court has ever found such an extended notice provision -- almost five months -- to be permissible, and neither should this one. Indeed, over ten years ago, then-Vice Chancellor Jacobs explicitly warned boards that advance notice restrictions of 90 to 100 days push the limits of reasonableness under Delaware law, and Office Depot’s 141-day restriction obliterates that limit. Because this provision is unreasonable on its face, Office Depot cannot preclude Levitt’s Nominees from standing for election for this reason as well.

Fourth, if the Court concludes that Office Depot’s advance notice provision applies and is valid under Delaware law, no advance notice by Levitt is required because Office Depot has already specified in its notice of the 2008 Annual Meeting that the “business” of the meeting includes the election of directors. Office Depot’s proxy, filed March 13, 2008, specifies that the first “item[] of business” is “to elect twelve (12) members of the Board of Directors.” This result is consistent with clear statutory imperatives, as Delaware courts have traditionally and repeatedly found that the purpose of the annual meeting is the election and voting process. Because Office Depot has already announced that directors will be elected, no further notice is required for Levitt’s Nominees to stand for election at the 2008 Annual Meeting.

For each of these reasons, we submit that Levitt’s Nominees are entitled to stand for election at the 2008 Annual Meeting, and respectfully request that this Court so declare so that Levitt, as an Office Depot shareholder, is not improperly denied its right to nominate directors.

Because the issue is straightforward and discrete, and because the parties have agreed not to raise or argue any issue of disputed fact, this matter is appropriate for expedited resolution by motion for judgment on the pleadings. Accordingly, Levitt's motion should be granted, and its Nominees should stand for election at Office Depot's 2008 Annual Meeting, to be held on April 23.

NATURE AND STAGE OF THE PROCEEDINGS

On March 17, 2008, Levitt filed a Verified Complaint (“Complaint” or “Compl.”) seeking a declaration that Article II, Section 14 of Office Depot’s Bylaws does not apply to a shareholder’s nomination of directors. Also on March 17, 2008, because of the time-sensitive nature of this matter, Levitt filed a Motion to Expedite Proceedings (the “Motion”). On March 18, 2008, counsel for Office Depot advised the Court that it did not oppose the Motion. On March 20, 2008, this Court held a scheduling conference and set a hearing on Levitt’s Motion for Judgment on the Pleadings for April 10, 2008 at 10:00 a.m.

On March 24, 2008, Office Depot filed and served an Answer to the Complaint, in which it generally denied Levitt’s claims. That same day, the Court entered an agreed-upon stipulation that governs the briefing on this motion. As part of that stipulation, the parties agreed that, in connection with this motion, (i) they will not claim or argue that there is an issue of disputed fact such that the Court cannot resolve this motion, and (ii) they may refer to any of Office Depot’s Bylaws and any public statement (or the absence of a public statement) by Office Depot concerning (x) its Bylaws or (y) the nomination or election of directors. As a result, this Court is in a position to determine, as a matter of law, whether the Bylaws apply to Levitt’s Nominees.

STATEMENT OF FACTS

The Parties

Plaintiff, Levitt, is a Florida corporation with its corporate headquarters in Fort Lauderdale, Florida. Levitt, directly and through its wholly owned subsidiaries, has historically been a real estate development company. Going forward, Levitt intends to pursue acquisitions and investments opportunistically within and outside the real estate industry. As of the record date of March 3, 2008, Levitt was the beneficial owner of 200 shares of Office Depot common stock. As of the date of the Complaint, Levitt, together with Woodbridge Equity Fund LLLP, an entity wholly owned by Levitt, beneficially own an aggregate of more than 3 million Office Depot shares, which constitutes just over 1% of Office Depot's outstanding common stock. *See* Complaint at ¶ 7.

Defendant, Office Depot, is a Delaware corporation with its corporate headquarters in Delray Beach, Florida. Office Depot is a global supplier of office products and services to consumers and businesses of all sizes. *See* Complaint at ¶ 8.

Although Office Depot Has Exceptional Potential, It Has Struggled Under Its Current Leadership

Notwithstanding Office Depot's position as a leader in the office products and services market, it has had substantial governance problems and operating difficulties over the last two years. As a result, Office Depot's share price has fallen from a high of over \$44 per share in May 2006 to its current trading price of about \$11 per share, a decline of about 75%. During that period, Office Depot has disclosed that it has restated its financial statements and is the subject of a formal investigation by the Securities and Exchange Commission (the "SEC"). As a consequence of its ongoing performance problems, on January 5, 2008, the *Wall Street Journal*

named Office Depot CEO Steve Odland as a candidate for the worst CEO of 2008. *See* Complaint at ¶ 9.

Numerous Wall Street financial analysts at major investment banks have also noticed and written about the ongoing governance and operational problems at Office Depot. For example:

- JP Morgan, in its March 3, 2008 report, titled *Batteries Not Included: Overweight – What We Have Against Current Senior Management*, stated that “**if changes prove necessary, yet are not made, then we expect ODP to be significantly susceptible to shareholder activism over time - by current shareholders, or future ones. Changes would likely be viewed favorably for ODP’s share price**” (emphasis in original);
- Credit Suisse, in its February 26, 2008 report, titled *Free Falling*, stated that Office Depot’s retail performance “ranks right now as the quickest decline in operating results that we have seen from a retailer in our memory”; and
- Bear Stearns, in its February 26, 2008 report, titled *Worse Than Feared; Looking For a 2H08 Recovery*, stated that investors should “wait for some evidence of a turnaround.”

In its report, JP Morgan also went so far as to caution the Office Depot Board “that they have a fiduciary duty to assure that shareholders are fairly represented.” *See* Complaint at ¶ 10.

Levitt’s Nominees are Highly Qualified and Office Depot’s Shareholders Deserve New Leadership on the Board

As the foregoing makes clear, Office Depot’s Board needs an infusion of veteran corporate leadership with experience in the retail sector. Office Depot is a company with the potential to be the preeminent global supplier of office products and services, and Levitt believes, with the experience and leadership provided by Levitt’s Nominees, such a turnaround is possible. The nomination of Levitt’s Nominees is the first step towards this turnaround.

On March 17, 2008, Levitt filed its preliminary proxy statement with the SEC, seeking to solicit proxies in support of its Nominees. *See* Complaint at ¶ 13. Levitt’s two Nominees collectively have decades of experience in retail office supply operations and substantial experience in corporate governance. Mark Begelman has over 35 years of experience in retail

merchandising, and previously served as President and Chief Operating Officer of Office Depot from 1991 to 1995, during which time Office Depot's revenues and store base grew exponentially. Mr. Begelman also served on the Office Depot Board from 1991 to 1996. Martin Hanaka has substantial experience in both retail merchandising and corporate governance, as he previously served as President, Chief Operating Officer and a director of Staples, Inc., and as the CEO and Chairman of the Board of The Sports Authority, Inc. Mr. Hanaka is currently Chairman of the Board of Golfsmith International Holdings, Inc. and a director of Trans World Entertainment Corp. See Complaint at ¶ 12.

Office Depot's Advance Notice Provision
Does Not Apply to Levitt's Nominees

Article II, Section 14 of Office Depot's Bylaws, entitled "Stockholders Proposals," contains an advance notice provision that provides, in pertinent part:

Section 14. Stockholders Proposals. At an annual meeting of the stockholders, *only such business shall be conducted as shall have been properly brought before the meeting. To be properly brought before an annual meeting, business must be (i) specified in the notice of the meeting (or any supplement thereto) given by or at the direction of the Board of Directors, (ii) otherwise properly brought before the meeting by or at the direction of the Board of Directors or (iii) otherwise properly brought before the meeting by a stockholder of the corporation who was a stockholder of record at the time of giving of notice provided for in this Section, who is entitled to vote at the meeting and who complied with the notice procedures set forth in this Section.* For business to be properly brought before an annual meeting by a stockholder, the stockholder must have given timely notice thereof in writing to the Secretary of the corporation at the principal executive office of the corporation.

To be timely, a stockholder's notice shall be received at the company's principal office as set forth in its most recent filings with the SEC, not less than 120 calendar days before the date of Company's proxy statement released to shareholders in connection with the previous year's annual meeting

Notwithstanding anything in these Bylaws to the contrary, no business shall be conducted at any annual meeting except in accordance with this paragraph, and the Chairman of the Board or other person presiding at an

annual meeting of stockholders, may refuse to permit any business to be brought before such meeting without compliance with the foregoing procedures

Declaration of David B. Hennes, dated March 28, 2008 (“Hennes Decl.”), Exh. A (Office Depot Bylaws, dated February 14, 2007) (emphasis added); Complaint at ¶ 16, Exh. A. As is clear from the plain language of Article II, Section 14, there is no mention of the nomination of directors and nothing that specifically applies advance notice requirements to the nomination of directors.

This is in direct contrast to Office Depot’s 1996 Bylaws, which contained a clear and unambiguous advance notice requirement for director nominations. Article II, Section 5 of Office Depot’s 1996 Bylaws stated:

Section 5. Stockholder Proposals. At an annual meeting of stockholders, *only such business shall be conducted, and only such proposals shall be acted upon, as shall have been brought before the annual meeting*, (i) by or at the direction of the Board of Directors or (ii) *by any stockholder of the corporation who complies with the requirements of this Article II, Section 5 and as shall otherwise be proper subjects for stockholder action and shall be properly introduced at the meeting. For a proposal to be properly brought before an annual meeting by a stockholder, the stockholder must have given timely advance notice thereof in writing to the Secretary of the corporation. To be timely in connection with an annual meeting, a stockholder’s notice must be delivered to, or mailed and received at, the principal executive offices of the corporation not less than 90 days prior to the date of the previous year’s annual meeting; provided, however, that if the date of an annual meeting differs from that of the previous year by more than 30 days, notice by the stockholder, to be timely, must be so delivered or received not later than seven days after notice of such meeting has been given (or such greater period of time as is set forth in such notice).... A stockholder’s notice to the Secretary shall set forth, as to each matter the stockholder proposes to bring before the meeting, ... and (v) if such proposal includes the nomination of directors, the information required by Article III, Section 3*

Hennes Decl., Exh. B (Office Depot Bylaws, dated August 13, 1996) (emphasis added); Complaint, Exh. B. Article III, Section 3 of the 1996 Bylaws -- referenced in Article II, Section 5 -- entitled “*Nomination of Directors*,” required that:

Nominations of persons for election to the Board of Directors may be made at a meeting of the stockholders at which directors are to be elected (i) by or at the direction of the Board of Directors or (ii) by any stockholder of the corporation entitled to vote at such meeting in the election of directors who complies with the requirements of this Article III, Section 3. Such nominations, other than those made by or at the direction of the Board of Directors, shall be preceded by timely advance notice in writing to the Secretary of the corporation. To be timely in connection with an annual meeting, a stockholders notice shall be delivered to, or mailed and received at, the principal executive offices of the corporation not less than 90 days prior to the date of the previous year's annual meeting....

Id. (emphasis added). Thus, contrary to Office Depot's current Bylaws, the 1996 Bylaws provided an explicit 90-day advance notice restriction on a shareholder's right to nominate directors.

Office Depot's Board, however, removed this clear and unambiguous language in August 2000. At that time, the Office Depot Board amended its Bylaws and removed Article III, Section 3 and the related nomination language found in Article II, Section 5. *See* Hennes Decl., Exh. C (Office Depot 2000 Bylaws, published November 2, 2001); Compl. at ¶¶ 4, 19, Exh. C. That language has never reappeared in Office Depot's Bylaws. Moreover, Office Depot's Board made this change with no transparency whatsoever to its shareholders, as the Board (i) did not seek or receive shareholder approval for this change; (ii) did not publicly announce the change until November 2, 2001 (over 15 months after the change was made); and (iii) made no public comment about the change or the reasons for the change. *See* Complaint at ¶¶ 4, 19.

Most fundamentally, Office Depot has never advised its shareholders of its belief that, notwithstanding the amendments made in August 2000 -- which removed the explicit language requiring advance notice for director nominations -- advance notification to nominate directors is nonetheless still required under its Bylaws. As a result of Office Depot's silence, shareholders have only two documents upon which to rely when looking to nominate directors: (i) the current

advance notice provision in the Bylaws, which makes no reference to the nomination of directors at all; and (ii) the 1996 Bylaws, which provided a clear and unambiguous advance notice process for the nomination of directors. Given this history, no reasonable shareholder (and no reasonable third party) could conclude that advance notice is still required, nor should this Court.¹

Finally, the changes made by Office Depot in its current Bylaws, adopted on February 14, 2007, highlight the ambiguity in Office Depot's position. At that time, Office Depot amended its Bylaws to calculate the advance notice deadline from the release of the previous year's proxy statement. In contrast, the 2000 Bylaws set the advance notice deadline based on the anniversary of the prior year's annual meeting.² This modification, made without public comment or shareholder approval, is significant for two reasons. *First*, by tying the advance notice deadline to the prior year's proxy, the only reasonable conclusion to be drawn is that this additional time is necessary to enable Office Depot to include shareholder proposals in its own

¹ A review of the history of Office Depot's Bylaws demonstrates that they were also amended in 1997 and 1999. *See* Answer at ¶ 4; Hennes Decl., Exh. D (1997 Bylaws), Exh. E (1999 Bylaws). The 1997 amendments did not make any material changes to the relevant provisions of Article II, Section 5 or Article III, Section 3 of the 1996 Bylaws. *Compare* 1996 Bylaws, Article II, Section 5 and Article III, Section 3, (Hennes Decl., Exh. B) *with* 1997 Bylaws Article II, Section 5 and Article III, Section 3 (Hennes Decl., Exh. D). Although Office Depot claims in its Answer that these two sections of the 1996 and 1997 Bylaws were removed from its Bylaws in 1999 during a "general clean-up of the Bylaws," (Answer at ¶ 4) it never publicly filed or disclosed the 1999 Bylaws to its shareholders. *See* Stipulation and Order, granted on March 24, 2008 ("Stipulation") at ¶ A1. In fact, it is unclear what use even Office Depot made of the 1997 or 1999 Bylaws because Office Depot incorporated by reference its 1996 (and not the 1997 or 1999) Bylaws in all of its public filings through November 2, 2001, when it belatedly disclosed the 2000 Bylaws (enacted in August 2000) for the first time. *See, e.g.*, 1998 Form 10-K at 24-25; 1999 Form 10-K at 23-24; 2000 Form 10-K at 18-19 (excerpts attached at Hennes Decl., Exhs. F-H).

² *Compare* 2000 Bylaws, Art. II, Sec. 14 ("To be timely, a stockholder's notice shall be delivered not less than 120 days prior to the first anniversary of the preceding year's meeting ...") (Hennes Decl., Exh. C) *with* Current Bylaws, Art. II, Sec. 14 ("To be timely, a stockholder's notice shall be received . . . not less than 120 calendar days before the date of Company's proxy statement released to shareholders in connection with the previous year's annual meeting") (Hennes Decl., Exh. A).

proxy statement. It therefore has no application to shareholder-funded proposals or to shareholder nominations (such as Levitt's) which are not included in the Company's proxy statement. *Second*, by calculating the advance notice from the date of the previous year's proxy statement, Office Depot has added 21 more days to the 120 days already required, for a total of 141 days.³ This extended period is plainly and facially impermissible under Delaware law.

³ The period of time between the release of the proxy statement and the annual meeting will vary from year to year. For example, for the 2008 calculation, Office Depot's 2007 proxy statement was released on April 2, 2007, which is 21 days prior to its scheduled April 23, 2008 Annual Meeting, and thus, the required advance notice is 141 days. *See* Hennes Decl., Exh. I (Office Depot Form Def 14-A, filed April 2, 2007). If this calculation were to be applied for 2007, the notice period would have been similarly long. *See* Hennes Decl., Exh. J (Office Depot Form Def 14-A, filed April 10, 2006) (2007 Annual Meeting held on April 25, 2007, resulting in 135 days advance notice required in 2007). Neither of these extended periods are permissible under Delaware law.

ARGUMENT

I. No Advance Notice Restriction On Director Nominations Is Found In Office Depot's Bylaws

Because the advance notice provision found in Office Depot's Bylaws says nothing about director nominations, this provision cannot be used to exclude Levitt's Nominees. This is the only reasonable interpretation of Office Depot's Bylaws, and judgment on the pleadings is appropriate.⁴

A. Shareholder Voting Rights, Including Nominations, Are Paramount Under Delaware Law

It cannot be disputed that the protection of shareholder rights, including the right to nominate directors, is a central tenet of Delaware corporation law. "Delaware courts have long exercised a most sensitive and protective regard for the free and effective exercise of voting rights." *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 n.2 (Del. Ch. 1988). That is because the shareholder franchise forms "the ideological underpinning upon which the legitimacy of directorial power rests." *Id.* at 659. As such, Delaware "courts maintain vigilance to ensure that the voting process, which is largely controlled by the board of directors, allows the

⁴ Under Chancery Court Rule 12(c), the Court may grant judgment on the pleadings where no material facts are in dispute and where the moving party is entitled to judgment as a matter of law. *See Jana Master Fund, Ltd. v. CNET Networks, Inc.*, 2008 WL 660556, at *3 (Del. Ch.). "Because a corporation's bylaws and charter are contracts among its shareholders, and because the construction of a contract is purely a question of law, judgment on the pleadings is an appropriate mechanism" to resolve the present dispute over Office Depot's Bylaws. *Id.* Further, the parties have agreed that the matter is appropriate for judgment on the pleadings, and have stipulated that they will not assert that there is an issue of disputed fact such that the Court cannot resolve the motion. *See Stipulation at ¶ A3; see also Warner Commc'ns, Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 965 (Del. Ch. 1989) ("In this instance [] both parties agree that no material facts are in dispute and that the matter is in a posture for a ruling upon the legal questions presented").

stockholders a full and fair opportunity to vote.” *In re MONY Group Inc. S’holder Litig.*, 853 A.2d 661, 673 (Del. Ch. 2004).

Delaware courts have consistently held that the shareholders’ right to vote includes the right to nominate an opposing slate of directors. *See Linton v. Everett*, 1997 WL 441189, at *9 (Del. Ch.) (“The right of shareholders to participate in the voting process includes the right to nominate an opposing slate”); *Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, at *5 (Del. Ch.) (“The shareholders’ right to vote includes the right to nominate a contesting slate”). As Vice Chancellor Strine has stated, nomination is a fundamental part of the franchise process: “As the nominating process circumscribes the range of choice to be made, it is a fundamental and outcome-determinative step in the election of officeholders. To allow for voting while maintaining a closed selection process thus renders the former an empty exercise.” *Harrah’s Entm’t Inc. v. JCC Holding Co.*, 802 A.2d 294, 311 (Del. Ch. 2002) (internal citation omitted).

Because of the importance of shareholder nomination rights, any restriction of those rights must be clear and unambiguous to be enforceable. *See Harrah’s*, 802 A.2d at 310 (“When a corporate charter is alleged to contain a restriction on the fundamental electoral rights of stockholders under default provisions of law . . . the restriction must be ‘clear and unambiguous’ to be enforceable”) (internal citation omitted); *Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190, at *16 (Del. Ch.) (“[O]ur courts rightly hesitate to construe a contract as disabling a majority of a corporate electorate from changing the board of directors unless that reading of the contract is certain and unambiguous”). No such clear and unambiguous provision exists in Office Depot’s Bylaws.

B. Office Depot’s Bylaws Say Nothing About the Nomination of Directors

The advance notice provision found in Office Depot’s Bylaws, Article II, Section 14, titled “Stockholders Proposals,” is silent on the nomination of directors. This provision states, in pertinent part:

Section 14. Stockholders Proposals. At an annual meeting of the stockholders, *only such business shall be conducted as shall have been properly brought before the meeting. To be properly brought before an annual meeting, business must be (i) specified in the notice of the meeting (or any supplement thereto) given by or at the direction of the Board of Directors, (ii) otherwise properly brought before the meeting by or at the direction of the Board of Directors or (iii) otherwise properly brought before the meeting by a stockholder of the corporation who was a stockholder of record at the time of giving of notice provided for in this Section, who is entitled to vote at the meeting and who complied with the notice procedures set forth in this Section.* For business to be properly brought before an annual meeting by a stockholder, the stockholder must have given timely notice thereof in writing to the Secretary of the corporation at the principal executive office of the corporation.

To be timely, a stockholder’s notice shall be received at the company’s principal office as set forth in its most recent filings with the SEC, not less than 120 calendar days before the date of Company’s proxy statement released to shareholders in connection with the previous year’s annual meeting

Notwithstanding anything in these Bylaws to the contrary, no business shall be conducted at any annual meeting except in accordance with this paragraph, and the Chairman of the Board or other person presiding at an annual meeting of stockholders, may refuse to permit any business to be brought before such meeting without compliance with the foregoing procedures

Hennes Decl., Exh. A (emphasis added). Nothing in the plain text of this Bylaw suggests that a shareholder’s right to nominate directors is covered, and nowhere are nominations even mentioned. Because the Bylaws are silent, no such limitation can now be imposed. For this reason alone, no advance notice for the nomination of directors is required.

Had it intended to impose such a restriction on nominations, Office Depot clearly knew how to do so. In Article III, Section 3 of its 1996 Bylaws, entitled “Nomination of Directors,” Office Depot did exactly that:

Nominations of persons for election to the Board of Directors may be made at a meeting of the stockholders at which directors are to be elected (i) by or at the direction of the Board of Directors or (ii) by any stockholder of the corporation entitled to vote at such meeting in the election of directors who complies with the requirements of this Article III, Section 3. Such nominations, other than those made by or at the direction of the Board of Directors, shall be preceded by timely advance notice in writing to the Secretary of the corporation. To be timely in connection with an annual meeting, a stockholder’s notice shall be delivered to, or mailed and received at, the principal executive offices of the corporation not less than 90 days prior to the date of the previous year’s annual meeting.

Hennes Decl., Exh. B (emphasis added); *see also* Exh. B at Article. II, Section 5 (“(v) if such proposal includes the nomination of directors, the information required by Article III, Section 3”). But the Office Depot Board removed this explicit provision from its 2000 Bylaws, and the language has never reappeared. At no time has Office Depot ever disclosed that it intended its current advance notice provision -- stripped of the specifics found in the 1996 Bylaws -- to apply to director nominations.

As such, the only reasonable conclusion that a shareholder could draw reading these two documents is that Office Depot intended to remove the advance notice requirement it previously imposed on its shareholders’ right to nominate directors, and that no such restriction currently exists. *See Centaur Partners, IV v. Nat’l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990) (“courts must give effect to the intent of the parties as revealed by the language of the certificate and the circumstances surrounding its creation and adoption”) (internal citation omitted); *Waggoner v. Laster*, 581 A.2d 1127, 1135 (Del. 1990) (same).

General principles of contract interpretation support this result. It is black-letter law that a corporation's bylaws are contracts among its shareholders and subject to standard rules of contract interpretation. *See, e.g., Centaur Partners*, 582 A.2d at 928 (“Corporate charters and bylaws are contracts among the shareholders of a corporation and the general rules of contract interpretation are held to apply”); *Jana Master Fund*, 2008 WL 660556, at *3 (“a corporation’s bylaws and charter are contracts among its shareholders”); *Sassano v. CIBC World Markets Corp.*, 2008 WL 152582, at *5 (Del. Ch.) (“corporate charters and by-laws are contracts among the shareholders of a corporation. Therefore, the rules that govern the interpretation of statutes, contracts, and other written instruments apply to the interpretation of corporate charters and bylaws”) (internal citations omitted).

If Office Depot’s current advance notice provision was meant to cover the nomination of directors, then the clear language found in the 1996 Bylaws would not have been removed. *See Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 221 (1979) (“It makes no sense to assume that the parties thought the new language subsumed the deleted provision. Had that been their intention, there would have been no reason to alter the contract”); *Cincinnati SMSA Ltd. P’ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998) (“it is not the proper role of a court to rewrite or supply omitted provisions to a written agreement”); *Wilmington Trust Co. v. Tropicana Entm’t, LLC*, 2008 WL 555914, at *7 (Del. Ch.) (“When the parties omit a provision that seems obvious and could easily have been included, courts are loathe to impose such a provision by implication”).

Because the clear language regarding nominations was removed, the only appropriate reading of Office Depot’s Bylaws is that the Office Depot Board intended to eliminate this requirement. *See Office Structures, Inc. v. Home Ins. Co.*, 503 A.2d 193, 196-97 (Del. 1985)

(“Office Structures and Ci-De specifically deleted the original language in ¶ 14A of their contract requiring Ci-De to indemnify Office Structures for Office Structures’ own negligence. It is quite clear that the parties intended that Ci-De not be liable for such indemnification”). Any other reading of the clear terms of the Bylaws is unwarranted, and Office Depot may not ask this Court to read omitted language back into its Bylaws. This is particularly true where such an interpretation would serve to restrict a fundamental shareholder right. *See Jana Master Fund*, 2008 WL 660556, at *3 (“To the extent there is any ambiguity in interpreting bylaws, ‘doubt is resolved in favor of the stockholders’ electoral rights’”) (internal citation omitted).

Vice Chancellor Lamb’s recent decision in *Openwave Sys., Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228 (Del. Ch. 2007) supports this result. In that case, Openwave’s bylaws contained an explicit provision detailing the requirements for shareholder nominations of directors, which expressly included an advance notice provision. *See id.* at 234-35 (Section 2.5 of Openwave’s bylaws, entitled “Advance Notice of Stockholder Nominees,” required that notice of director nominations by shareholders be received “not less than 60 days” prior to the annual meeting). The stockholders claimed that the bylaws were “confusing,” arguing that it was unclear whether they had to comply with Section 2.5 (pertaining to shareholder nominees) or a separate provision of Openwave’s bylaws, which could arguably have impacted the calculation of the advance notice deadline. *See id.* at 240-41. In rejecting this position, the court upheld the advance notice provision and found the shareholder could have complied with either provision. *See id.* at 239-40 (“the court construes the bylaws in favor of shareholder rights and concludes that compliance with either the November 2, 2006 deadline or the later December 11, 2006 deadline would have been permissible”).

The decision in *Openwave* is instructive here because it involves the type of clear and unambiguous language required to restrict, through an advance notice provision, the right of shareholders to nominate directors. The bylaw upheld in *Openwave* bears a striking resemblance to the requirements previously included in (and since removed from) Office Depot's 1996 Bylaws.⁵ Those requirements, absent from the current Bylaws, may not now be imposed to restrict Levitt's rights.

In sum, because there is no express language pertaining to the nomination of directors in Office Depot's current advance notice provision, no such notice is required, and Levitt is entitled to have its Nominees stand for election at Office Depot's 2008 Annual Meeting. *See, e.g., Cincinnati SMSA Ltd. P'ship*, 708 A.2d at 992 ("it is not the proper role of a court to rewrite or supply omitted provisions to a written agreement") (internal citation omitted); *Ed Fine Oldsmobile, Inc. v. Diamond State Tel. Co.*, 494 A.2d 636, 638 (Del. 1985) (it is "not the function of a court" to "rewrit[e] the plain language of an otherwise valid contractual provision").⁶

⁵ *Compare Openwave*, 924 A.2d at 235 ("Section 2.5, 'Advance Notice of Stockholder Nominees,' provides that '[o]nly persons who are nominated in accordance with the procedures set forth in this Section 2.5 shall be eligible for election as directors' and further specifies that '[t]o be timely' a notice of nomination must be delivered to the corporation 'not less than 60 days . . . prior to the meeting'"); *with* Office Depot's 1996 Bylaws Article III, Section 3, "Nomination of Directors" ("Nominations of persons for election to the Board of Directors may be made . . . by any stockholder of the corporation entitled to vote at such meeting in the election of directors To be timely in connection with an annual meeting, a stockholder's notice shall be delivered to . . . the corporation not less than 90 days prior to the date of the previous year's annual meeting") (Hennes Decl., Exh. B).

⁶ Because Office Depot's Bylaws are silent on nominations, the standard, default rule for nominating directors applies, and nominations for directors should be accepted up to, and including, the date of the Annual Meeting. *See Jana Master Fund*, 2008 WL 660556, at *6 & n.51 (citing 8 Del. C. § 222(a) for default rule under Delaware law that any and all shareholders are free to raise for the first time and present any nominations they desire at the annual meeting and noting that "[a]lthough this may sound daunting, it is the default rule in Delaware"); DAVID A. DREXLER, LEWIS S. BLACK, JR. & A. GILCHRIST SPARKS, III, DELAWARE CORPORATION LAW

II. The Term “Business” in Office Depot’s Advance Notice Provision Does Not Clearly And Unambiguously Include the Nomination of Directors

Any argument by Office Depot that the term “business” in Article II, Section 14 of its Bylaws should be interpreted to subsume the nomination of directors should be rejected. Under Office Depot’s interpretation, the term “business” is unclear and ambiguous (particularly in light of the express provision removed from its 1996 Bylaws) and cannot be employed as a matter of law, because it constitutes an unreasonable restriction on a fundamental shareholder right.

As noted above, advance notice provisions act as a restriction on fundamental shareholder rights and will only be upheld if they are clear and unambiguous. *See Jana Master Fund*, 2008 WL 660556, at *3; *Harrah’s*, 802 A.2d at 310; *Stengel v. Rotman*, 2001 WL 221512, at *6 (Del. Ch.) (“As a general matter [] ambiguities in corporate bylaws will be resolved against the reading that would disenfranchise the stockholders”).

Moreover, as Chancellor Chandler recently held, any bylaw that purports to restrict a shareholder’s right to nominate directors must be interpreted “in the manner most favorable to the free exercise of traditional electoral rights.” *Jana Master Fund*, 2008 WL 660556, at *7; *see also Preston v. Allison*, 650 A.2d 646, 649 (Del. 1994) (“A stockholder’s ability to participate in corporate governance through the election of directors is a fundamental part of our corporate law. Thus, there is a ‘general policy against disenfranchisement’”) (internal citations omitted); *Frankino v. Gleason*, 1999 WL 1032773, at *4 (Del. Ch.) (considering “Delaware’s general policy against disenfranchisement” when construing a company’s bylaws) (internal citations

& PRACTICE, § 24.05 Conducting the Meeting (2007) (“With respect to the conduct of elections of directors, in the absence of an advance notice bylaw, the chair should entertain nominations for directors made from the floor”); 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 7.63 Election of Directors (3d Supp. 2007) (at an annual meeting, “a stockholder will nominate a person not listed in the proxy statement. Unless it is obviously a frivolous nomination, some chairmen will accept the nomination and ask the inspectors to tabulate the shares voting for the nominee”).

omitted). That is why Office Depot is required to provide “clear and convincing” evidence that its advance notice restriction applies to Levitt’s Nominees. *See Chandler v. Ciccoricco*, 2003 WL 21040185, at *13 (Del. Ch.) (party arguing for restriction on voting rights “cannot prevail unless the court finds clear and convincing evidence that the agreement was intended to have that restrictive effect”); *Harrah’s*, 802 A.2d at 312 (“there should be clear and convincing evidence in support of the restriction on electoral rights”). This it cannot do.

In light of fundamental Delaware law, Office Depot cannot credibly claim that the term “business” clearly and unambiguously subsumes director nominations. **First**, Article II, Section 14 makes no mention whatsoever of director nominations. **Second**, Office Depot removed clear and unambiguous language regarding advance notice for director nominations from a prior version of its Bylaws. **Third**, the ambiguity inherent in this provision is exemplified by the fact that the timing of the advance notice provision is tied to the Company’s proxy statement. It follows from that linkage and the express terms of Article II, Section 14 that advance notice is only necessary (if at all) where a shareholder seeks inclusion of a proposal in the Company’s proxy statement (and not where there is a shareholder-funded proposal or nomination). *See Jana Master Fund*, 2008 WL 660556, at *6 (“This Court cannot find a single example of a permissible advance notice bylaw that has set the notice required by reference to the release of the company’s proxy statement”).⁷

Finally, because Office Depot was the sole entity responsible for drafting its Bylaws, any ambiguous terms must be construed against it. *See, e.g., SI Mgmt. L.P. v. Wininger*, 707 A.2d

⁷ As Chancellor Chandler stated: “In other words, this bylaw requires a shareholder bringing a proposal to give advance notice, but ties the deadline for that notice explicitly to the release of CNET’s proxy materials. The most reasonable explanation for so requiring is that the bylaw is designed to allow management time to include the shareholder proposal in its own proxy materials.” *Jana Master Fund*, 2008 WL 660556, at *5.

37, 43 (Del. 1998) (under principle of *contra proferentem* ambiguous terms should be construed against “entity solely responsible for the articulation of those terms”); *Tenneco Auto. Inc. v. El Paso Corp.*, 2004 WL 3217795, at *8 (Del Ch.) (“ambiguous terms will be construed against the drafter who was exclusively responsible for the terms chosen . . . the *contra proferentem* doctrine is typically applied . . . where the non-drafting party had little or no chance to provide input as to the language contained therein”) (internal citations omitted); *Stroud v. Forest Gate Dev. Corp.*, 2004 WL 1087373, at *5, n.27 (Del. Ch.) (noting the “general interpretative guidance that ambiguous language in a contract is construed against the drafting party”).⁸

Because Office Depot’s interpretation of its Bylaws is ambiguous at best, it cannot be found to clearly and convincingly restrict Levitt’s right to put forth its Nominees for election at the 2008 Annual Meeting. *See Lions Gate Entm’t Corp. v. Image Entm’t Inc.*, 2006 WL 1668051, at *6 (Del. Ch.) (“The loss of a final opportunity to elect the whole board has an obvious disenfranchising effect, and any ambiguity in the Classified Board Provision must therefore be construed against the drafter, Image”); *Openwave*, 924 A.2d at 239 (“[i]f the language is found to be ambiguous, doubt is resolved in favor of the stockholders’ electoral rights”); *Harrah’s*, 802 A.2d at 318 (“[b]ecause the Specific Nomination Provision does not clearly limit Harrah’s electoral rights, the residual doubt I harbor must be resolved in favor of permitting Harrah’s to exercise the electoral rights it ordinarily would possess as a JCC stockholder”).

⁸ Authorities on the drafting of Delaware corporate bylaws distinguish between “business” and “nominations.” In fact, the existing model advance notice bylaw set forth in a leading Delaware treatise includes a model provision that explicitly distinguishes “nominations” and “business.” *See* 3 BALOTTI & FINKELSTEIN, Form 1.18 Advanced Notice Bylaw Notice of Stockholder Business and Nominations. (A) Annual Meetings of Stockholders. (1) *Nominations of persons for election to the Board of Directors of the Corporation and the proposal of business to be considered by the stockholders may be made at an annual meeting of stockholders....*) (emphasis added).

III. Office Depot's Advance Notice Provision is Unreasonably Long and Therefore Invalid Under Delaware Law

If the Court concludes that the nomination of directors is covered by the term “business,” Office Depot’s advance notice provision, which effectively requires notice to be given at least 141 days in advance of the Annual Meeting, must nonetheless be struck down because it is unduly long and unreasonably restrictive to shareholder rights. It is clear that Delaware courts will not permit advance notice bylaws, such as Office Depot’s, that unduly restrict the shareholder franchise.

At some point prior to February 14, 2007, and without shareholder approval, Office Depot amended its 2000 Bylaws to change the way the advance notice deadline is calculated. As noted above, this change now requires that the advance notice deadline be calculated from the release of the prior year’s proxy statement, rather than the date of the annual meeting. *Compare* Bylaws, Article II, Section 14 (Hennes Decl., Exh. A) *with* 2000 Bylaws, Article II, Section 14 (Hennes Decl., Exh. C). The result of this modification is that the advance notice deadline will vary year-to-year depending upon the date of the release of the prior year’s proxy statement in relation to the date of the annual meeting. For this year, the impact of this amendment is to increase the advance notice deadline by 21 days, resulting in a 141-day deadline for shareholder proposals. *See* Hennes Decl., Exh. I (Office Depot Form Def 14-A, filed April 2, 2007) (21 days between release of 2007 proxy statement, dated April 2, 2007, and 2008 Annual Meeting, scheduled for April 23, 2008). Such a lengthy advance notice requirement is an impermissible restriction on the shareholder franchise, and is invalid under Delaware law.

Although Delaware courts have upheld advance notice provisions in the past, they have “warned that when advance notice bylaws unduly restrict the stockholder franchise or are applied inequitably, they will be struck down.” *Jana Master Fund*, 2008 WL 660556, at *6 (internal

quotations omitted); *Openwave*, 924 A.2d at 239 (same). No Delaware court has ever upheld an advance notice provision of such length and magnitude, nor should this one. Indeed, as then-Vice Chancellor Jacobs has stated, in a similar context:

A 90 to 100 day delay might not be found reasonable in other circumstances. The legal vulnerability of a mandated delay of the kind presented here tends to increase in proportion to the length of the delay Attorneys who represent corporate boards would best serve their clients well by counseling caution and restraint in this area, rather than seeking continually to push the time-delay envelope outwards to test its fiduciary duty limits.

Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 728 A.2d 25, 43 n.70 (Del. Ch. 1998). Office Depot's 141-day advance notice provision does not simply push the envelope of reasonableness, but shreds it in its entirety, and is invalid as a matter of law. There simply can be no good faith justification for such a lengthy restriction. As such, Levitt's Nominees should be permitted to stand for election for this reason as well.

IV. If the Nomination of Directors is Covered by the Term "Business," No Additional Notice is Required

Similarly, if the Court concludes that the nomination of directors is covered by the term "business" (and Office Depot's advance notice requirement is held not to be impermissibly long), no notice by Levitt is required because Office Depot has already specified in its notice of the 2008 Annual Meeting that the business of the meeting includes the election of directors. Office Depot's Bylaws provide, in part, that "only such business shall be conducted as shall have been properly brought before the meeting . . . business must be (i) specified in the notice of the meeting . . . given by or at the direction of the Board of Directors." Article II, Section 14 (Hennes Decl., Exh. A). In its Definitive Proxy Statement, filed March 13, 2008, Office Depot expressly states that the "items of business" to be conducted at its 2008 Annual Meeting include "to elect twelve (12) members of the Board of Directors." *See* Hennes Decl., Exh. K.

Because Office Depot has already listed the election of members of its Board of Directors as an item of business at its 2008 Annual Meeting, no additional notice was required by Levitt. See 8 Del. C. § 211(b) (“Unless directors are elected by written consent in lieu of an annual meeting as permitted by this subsection, *an annual meeting of stockholders shall be held for the election of directors*”) (emphasis added); *Coaxial Commc’ns, Inc. v. CNA Fin. Corp.*, 367 A.2d 994, 998 (Del. 1976) (“The mandate of 8 Del. C. § 211(b) is that an annual meeting of stockholders ‘shall be held for the election of directors’”); *Clabault v. Caribbean Select, Inc.*, 805 A.2d 913, 917 (Del. Ch. 2002) (“The case law interpreting Section 211(c) strongly favors the convening of an annual meeting for the purpose of electing directors when the factual predicate defined by the statute is shown”), *aff’d*, 846 A.2d 237 (Del. 2003).

That no additional notice is needed is confirmed by the fact that Office Depot removed the specific advance notice requirement for director nominees from its Bylaws. If the Office Depot Board wanted to ensure that advance notice was required for the nomination of directors, it would not have removed this requirement. Because the Office Depot Board removed the specific advance notice requirement, the only conclusion that reasonably can be reached is that restriction does not apply to stockholders who nominate an independent slate of directors.

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2008, a copy of the within document was electronically served on the following attorneys of record in the foregoing action at the addresses indicated:

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