



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

**VERIFIED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff, Levitt Corporation, a Florida corporation (“Levitt Corp.”), by and through its undersigned counsel, hereby pleads as and for its Verified Complaint for Declaratory and Injunctive Relief against Defendant, Office Depot, Inc. (“Office Depot”), a Delaware corporation, as follows:

NATURE OF THE ACTION

1. This action presents a straightforward and basic issue: can the 120-day advance notice provision in Office Depot’s current corporate bylaws (“Bylaws”) (attached as Exhibit A), which makes no reference to the nomination of directors, impose an advance notice restriction on the fundamental right of stockholders to exercise their franchise rights and nominate directors for election at Office Depot’s upcoming annual meeting, thereby denying Levitt Corp. the right to nominate two candidates for election to the Office Depot Board of Directors (the “Office Depot Board”). Under the plain language of Office Depot’s Bylaws and fundamental principles of Delaware law, the answer is no.

2. This action arises out of Office Depot's expected efforts to impede Levitt Corp.'s nomination of an alternate slate of two highly successful and experienced executives (the "Nominees") to stand for election to 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, by invoking an inapplicable advance notice provision in its Bylaws.

3. Office Depot cannot invoke its expected interpretation of its Bylaws because it would require additional terms not set forth in the plain text of the Bylaws to be read into the Bylaws. It is also completely at odds with fundamental and well-recognized principles of Delaware law that shareholder franchise, nomination, and election rights are paramount.

4. In addition, such an interpretation is undermined by the existence of express provisions in Office Depot's 1996 Bylaws (attached as Exhibit B) that clearly and plainly applied an advance notice requirement to the nomination of directors. In August 2000, Office Depot's Board, acting without a shareholder vote, removed that express language from its Bylaws (attached as Exhibit C). Office Depot, however, did not disclose that amendment until November 2001 and has never publicly commented on the amendment. Nor has Office Depot ever publicly suggested that the advance notice provision applies to the nomination of directors. In light of this amendment and the clear language of the current Bylaws, Office Depot cannot now claim that it intended to retain an advance notice requirement for the nomination of directors.

5. Because the advance notice provision in the Bylaws makes no reference to the nomination of directors, and because Office Depot clearly could have included language requiring such a restriction (as it did in 1996, but later removed), Levitt Corp. seeks a

declaration that its Nominees are entitled to stand for election to the Office Depot Board at the 2008 Annual Meeting.

6. Prompt resolution of this action is necessary to ensure that the Nominees' entitlement to stand for election at the 2008 Annual Meeting is not jeopardized. Any other result would cause shareholder disenfranchisement and solidify the entrenchment of a number of the current, ineffective directors.

THE PARTIES

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

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

FACTUAL BACKGROUND

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

9. 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 ("SEC"). As a consequence of the ongoing performance issues at Office Depot, on January 5, 2008, the *Wall Street Journal* named Office Depot CEO Steve Odland as a candidate for the worst CEO of 2008.

10. Numerous Wall Street financial analysts at major investment banks have 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."

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

11. As the foregoing makes clear, Office Depot lacks strong corporate governance and effective operational management. Although Office Depot is a company with the potential to be the pre-eminent global supplier of office products and services, its Board needs an infusion of veteran corporate leadership.

12. Levitt Corp.'s Nominees collectively have decades of experience in retail office supply operations and substantial experience in corporate governance: (i) Mark Begelman has over 30 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, and also served as a director of Office Depot from 1991 to 1996; and (ii) Martin E. 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., as the CEO and Chairman of the Board of The Sports Authority, Inc., and is currently Chairman of the Board of Golfsmith International Holdings, Inc., and a director of Trans World Entertainment Corp.

13. On March 17, 2008, promptly after Office Depot filed its Proxy Statement (which occurred on March 13, 2008) revealing that there would be no change to the slate of candidates that collectively comprise Office Depot's Board, Levitt Corp. took matters into its own hands and filed a proxy statement with the SEC, seeking to solicit proxies in support of its Nominees.

14. Rather than embrace this opportunity to bring about a change in its Board and support its shareholders' ability to consider an alternative to the present path, Levitt Corp. believes that Office Depot's Board will instead challenge this call for change and seek to entrench the current, ineffective directors. But Office Depot's expected interpretation of its Bylaws, as it relates to the nomination of directors, is wrong as a matter of Delaware law.

15. Accordingly, Levitt Corp. filed this complaint seeking a declaration that Office Depot's Bylaws contain no advance notice requirement as to the nomination of directors

and, therefore, Levitt Corp.'s Nominees are entitled to stand for election at Office Depot's 2008 Annual Meeting.

Office Depot's Bylaws Do Not Apply to Levitt Corp.'s Nominees

16. Article II, Section 14 of the Bylaws provides, in 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

(emphasis added) (Exhibit A).

17. In order to keep their directorships, Levitt Corp. believes that the Office Depot Board will take the position that Article II, Section 14 of its Bylaws applies to the nomination of directors and that Levitt Corp.'s nomination is improper because notice was not given prior to the deadline fixed in those Bylaws. Office Depot's expected interpretation of

this provision, as it relates to the nomination of directors, is wrong as a matter of Delaware law.

18. The advance notice provision does not clearly and unambiguously include the nomination of directors. Indeed, it does not even mention the nomination of directors. Article III, Section 3 of Office Depot's 1996 Bylaws had previously included a clear and unambiguous advance notice provision covering the nomination of directors, which stated, in pertinent part:

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[.]

(emphasis added) (Exhibit B).

19. In August 2000, Office Depot's Board removed that clear language from its Bylaws. Since that time, Office Depot has never publicly taken the position that shareholders must provide advance notice to nominate directors (and, in fact, Office Depot has never publicly addressed the change to its Bylaws). Accordingly, because the Bylaws do not clearly and unambiguously cover director nominations, and because this advance notice provision restricts important shareholder nomination rights, any use of the Bylaws to restrict Levitt Corp.'s ability to nominate directors is wrong as a matter of Delaware law.

20. To the extent that director nominations are arguably covered by the term "business," as Office Depot may argue, such a Bylaw provision is ambiguous. Under

Delaware law, any ambiguity in the Bylaws must be construed against Office Depot as the drafting and approving party of those Bylaws, and in favor of Office Depot's shareholders. As such, to the extent the Bylaw is ambiguous, it is inapplicable to Levitt Corp.'s nominations for this reason as well.

21. In the alternative, to the extent nomination of directors is arguably covered by the term "business," no notice by the shareholders 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. *See* Definitive Proxy Statement, filed March 13, 2008 (excerpts attached as Exhibit D) (listing first among "items of business," "to elect twelve (12) members of the Board of Director").

22. Because Office Depot's expected interpretation of its Bylaw is incorrect under Delaware law, Levitt Corp.'s Nominees must be permitted to stand for election at the 2008 Annual Meeting.

COUNT I

Article II, Section 14 of the Office Depot Bylaws Is Inapplicable to the Nomination of Directors

23. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 22 as if fully set forth herein.

24. Office Depot's expected interpretation of Article II, Section 14 of its Bylaws requires that any stockholder wishing to nominate a candidate or candidates for directors must have made such request in writing by the notice date contained therein.

25. Office Depot's expected interpretation of Article II, Section 14, as it applies to the nomination of directors, is incorrect on its face because, unlike the prior version of its Bylaws, this provision contains no language concerning the nomination of directors.

26. To the extent that Office Depot's Bylaws on this topic are ambiguous, they must be construed against Office Depot, as the drafter, and in favor of Levitt Corp., as the shareholder.

27. Office Depot's expected interpretation of Article II, Section 14 is unreasonable and unduly restricts the exercise of the fundamental shareholder right to attempt to unseat the current, ineffective directors.

28. Adoption of this expansive interpretation, which has not previously been communicated to shareholders, would unduly restrict the fundamental shareholder right to nominate directors for election to the Office Depot Board and will immediately cause Levitt Corp. harm.

29. In the alternative, to the extent nomination of directors is arguably covered by the term "business," no notice by the shareholders 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.

30. Levitt Corp. has no adequate remedy at law.

WHEREFORE, Plaintiff demands that the Court enter an Order:

- A. Declaring and decreeing that Office Depot's expected interpretation of Article II, Section 14 of the Bylaws, as it relates to the nomination of directors, is incorrect as a matter of law;
- B. Preliminarily and permanently enjoining the application of Article II, Section 14 of the Bylaws to Levitt Corp.'s Nominees as candidates for director at the 2008 Annual Meeting;

- C. Preliminarily enjoining the 2008 Annual Meeting, if necessary, in order to ensure that Levitt Corp.'s Nominees stand for election at a rescheduled 2008 Annual Meeting;
- D. Awarding Plaintiff its costs and expenses incurred in bringing and prosecuting this action, including the attorneys' fees based on, *inter alia*, the corporate benefit conferred by this litigation; and
- E. Awarding such other and further relief as may be just and equitable in the circumstances.

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